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Unframing Legal Reasoning: A Cyclical Theory of Legal Evolution

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UNFRAMING LEGAL REASONING: A CYCLICAL THEORY OF LEGAL EVOLUTION

LARRY A. DIMATTEO*

Ode to Maine and Isaacs

This is a story of two men from Cambridge
One in the old world, the other in the new;
One's story flows like a river
the other caught in a whirlpool;
One was a father who did not know his prodigal son
The son, on the other hand, knew of his erring father;
In the end, their protagonism was made more of straw
than of concrete;
Nonetheless, legal scholarship is the beneficiary
of their unknowing intellectual tussle.¹

I. INTRODUCTION

This article draws from legal history to inform a part of legal theory. The legal history examination focuses on two theories of legal development—

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¹ The author wrote this “ode.” Sir Henry Sumner Maine (1822–1888) graduated from Pembroke College, Cambridge University in 1944 and went on to become the Whewell Professor of International Law. His most famous work, Ancient Law, was published in 1864. Nathan Isaacs (1886–1941) earned his law degree and a Ph.D. in economics from the University of Cincinnati, before obtaining his doctorate in the law at Harvard under the tutelage of Dean Roscoe Pound. He was denied a teaching position at Harvard Law School, likely due to anti-Semitism within the University. He ended up being one of the first, openly Jewish professors at Harvard University with his appointment as a Professor of Business Law at the Harvard Business School in 1924 where he remained for the rest of his life. He was a legal realist who wrote seminal articles in such diverse areas as arbitration, contracts, constitutional, securities regulation, torts, and trust law. For a discussion of the life of Nathan Isaacs, see Samuel Flaks, Law, Religion, and Pluralism: The Thoughts and Experiences of Nathan Isaacs, 39 TOURO L. REV. 307 (2013) [hereinafter Flaks, Law, Religion, and Pluralism].
Henry Sumner Maine's "progression thesis" and Nathan Isaacs's "cycle theory." After examining these two theories of legal development, the analysis shifts to how legal history informs theories of legal reasoning. There are numerous long-standing debates on how "law" should be interpreted. These debates are replicated in the question of how "contracts" should be interpreted. Contract law and contract interpretation will be the focus in examining how history informs legal theory, and more specifically, legal reasoning.

In the end, as is the case with all contract theories, no monist view of legal development possesses the explanatory power needed to understand how law has come to be and where it may take us in the future. However, whether progressive, cyclical, or progressive-cyclical in nature, theories of legal development lend insight to current debates on legal reasoning. At the same time, views of legal development challenge the notion of eras of legal reasoning as distinctive demarcations between formalism and realism; literalism and contextualism; and the appropriateness of rules versus standards, as well as contract law's role as facilitator versus regulator.

In the end, this Article concludes that history shows how styles of legal reasoning evolve along a pattern of constant recurrence. Legal history and the cycle theory of legal development suggest that all forms of legal reasoning are present in all eras of legal thought. It will be argued that cycle theory falsifies the great debates and dichotomies in legal scholarship, such as formalism versus contextualism, the importance of the public-private law distinction, and to a lesser extent the proper role of rules versus standards in law's conceptual structure. On the latter point, cycle theory also provides insight on how rules and standards evolve and interact with each other.

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The word Status may be usefully employed to construct a formula expressing the law of progress . . . . All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status . . . . to signify these personal conditions only . . . . we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.

Id. at 164–65 (emphasis original).


4. See infra Part V.E.


The idea that law evolves progressively recognizes that there are relatively stable dichotomies whose opposing poles fluctuate over time. Moreover, even when a given end of the poles becomes dominant in a given era of legal development, its dominance is never absolute. Every era possesses both sides of the above noted dichotomies. In the case of contract law, the status-contract dichotomy possesses descriptive power in explaining different eras of contracts. The dichotomy is a powerful tool to analyze the surface of contract law—its principles, standards, and rules. However, the scholar needs to dig below the surface to better understand the underlying tensions.

The intellectual starting point for this undertaking is Nathan Isaacs’s cycle theory of legal development. His view of legal development takes issue with Henry Sumner Maine’s thesis (Maine’s Thesis) that development in advanced legal systems is progressive in nature. With a long historical lens, Isaacs sees the common law—as well as civil and Jewish law—as cyclical in nature. This article will examine Isaacs’s cycle theory and its implications for legal theory and legal reasoning. It will be argued that the theory suggests that all forms of legal reasoning are present in all eras of legal thought.

Before beginning the analysis of Maine and Isaacs’s theories of legal evolution, it may be best to ask the question: what is meant by legal evolution? Legal evolution may be studied at numerous levels—of which, three levels can be easily discerned—such as the level of doctrine (expansion of duress to include economic duress), paradigm shifts within an area of law (the “replacement” of products liability based on negligence to one based on strict liability), and broad changes across the law (movement of legal reasoning from a stage of formalism to one of realism or contextualism). Professor Stephen Waddams recently offered an example of doctrinal change by reviewing English case law relating to the evolution of unjust enrichment (second level change in an area of law) and the doctrine of frustration (first level or specific doctrinal change).

7. Roscoe Pound noted that the transition of America from a largely agrarian society to an industrial one required the law to adjust from free contracting to a greater regulation of contracting (status):

[I]n rural, pioneer, agricultural America there was no call to limit the contracts a laborer might make as to taking his pay in goods. To have imposed a limitation would have interfered with individual freedom of industry and contract without corresponding gain in securing some other interest. On the other hand, in industrial America of the end of the nineteenth century, a regime of unlimited free contract between employer and employee in certain enterprises led not to conservation but to destruction of values. ... Hence we began to put limits to liberty of contract between employer and employee ....


8. Isaacs’s cycle theory of legal evolution is explored in his two-part article. Isaacs, Law of Change, supra note 3.

Waddams provides a localized view of what he phrases as legal evolution. He looks at the mid-nineteenth century view that obligations fell into only two categories—contract and tort, leaving causes or actions based upon unjust enrichment to flounder. This simplification of obligations resulted in the insertion of unjust enrichment—or to make the incorporation more palatable, the use of the label quasi-contract—into the domain of contract. In order to accomplish this feat, the law had to imply a promise by seeing the unjust enrichment as creating a debt, which then implies a promise to repay. This maneuver impacted the functionality of the excuse doctrines. Despite the longstanding precedent in *Taylor v. Caldwell* recognizing the doctrine of impossibility, as well as in the previous frustration cases, the court in *Chandler v. Webster* held that the payment on a room overseeing a much anticipated procession was not refundable because it was a payment in advance and the excuse doctrines only applied to relieving a party from future performance and not that part of the contract already performed. The court's reasoning was based upon implied contractual intent.

However, the jurisprudence on *Krell v. Henry* (frustration of purpose), which was decided a year before *Chandler*, under the implied promise theory of unjust enrichment in which one rationale for granting an excuse due to frustration was to prevent unjust enrichment. *Krell* was based upon the same fact pattern, the renting of a room in order to view a coronation procession, as was the case in *Chandler*. The crucial difference, under the reasoning of *Chandler*, was that in *Krell* the room owner sued for full payment, while in *Chandler* the renter sued for a refund. But, under the logic subsequently associated with *Krell*, the reasoning in *Chandler* was faulty given that the result was the unjust enrichment of the room owner.

*Chandler*, long discredited, was officially overturned forty years later by *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* Waddams summarizes the holding as follows: “A claim lay for recovery of advance payments in cases of frustration, not on the basis of the intention of the parties, but on the extracontractual principle of ‘total failure of consideration.’ This was the ground of restitution for avoidance of unjust enrichment.” The lesson learned is that formalism often ties itself into knots of inconsistency, or what Waddams calls, “the dangers of adopting too rigid a scheme of classification,” instead of achieving its goals of bringing consistency and predictability to the law. In thinking of common law as a slow process of incremental change, in Waddams view, *Fibrosa* overturning of the *Chandler* ruling was nothing less than a “revolution” in judicial thinking. I would submit that the overturning of *Chandler*, after forty years, is better classified as incremental in nature, especially given the context of the parallel development of the doctrine of frustration of purpose. However,

10. *Id.*
11. *Id.* (citing STEPHEN LEAKE, ELEMENTS OF THE LAW OF CONTRACTS (1971)).
13. Chandler v. Webster (1904) 1 KB 493, 501 (Eng.).
14. Krell v. Henry (1903) 2 KB 740 (Eng.)
16. Waddams, supra note 9, at 12.
Waddams hits on the key force or element that underlies incremental and epochal change: “Revolutions in legal thinking have often been prompted by the need to avoid practical consequences considered to be absurd, or for other reasons intolerable.” This “need” may produce change at any of the different levels of legal evolution.

Another crucial lesson to be learned from Waddam’s example is that if incremental change stayed abreast with real world developments and actively removed inconsistencies in the law brought about by legal formalism, then the need for epochal change in the law may be avoided. Of course, epochal change in the law may still be needed to respond to sudden, radical changes in society, such as was seen during the Great Depression. Alternatively, if the law becomes drastically out of sync with societal developments, then the epochal change needed in the law is due to its becoming obsolete through failure to make necessary incremental changes, such was the case when the Uniform Sales Act of 1906 and other obsolete model commercial laws, such as the Uniform Negotiable Instrument Act of 1896, Warehouse Receipt Act of 1909, Uniform Bills of Lading Act of 1919, and so forth) was drafted in the area of legal formalism and was replaced by an expansive Uniform Commercial Code (UCC). In sum, epochal change in law or legal reasoning may be brought about by the law’s

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17. Id. at 9.
18. The Uniform Sales Act of 1906 was written by Samuel Williston and was enacted into law by thirty-four states between 1906 and 1947. It can be considered a precursor to Article 2 of the Uniform Commercial Code (UCC) since it was the first widely adopted uniform sales law even though it was based upon the obsolete common law of sales of the nineteenth century. See Kevin M. Teeven, A History of Legislative Reform of the Common Law of Contract, 26 U. TOL. L. REV. 35 (1994).
19. See Grant Gilmore, Formalism and the Law of Negotiable Instruments, 13 CREIGHTON L. REV. 441 (1979). Gilmore is fully supportive on the notion of cyclical change: “Perhaps we are doomed to live through alternating half centuries of activism and formalism.” Id. at 441. He than analyzes Negotiable Instruments Law and asserts that even in such an area of law where formalism is a necessity, lack of law reform results in irrelevancy. After destroying the credibility of the Negotiable Instrument Law of 1896 as a pro-bank creation, Gilmore then criticizes Article 3 of the UCC, which by 1979 he argues had become: “a museum of antiquities—a treasure house crammed full of ancient artifacts whose use and function have long been forgotten.” Id. at 461.
20. Isaacs was a staunch supporter for the revision of commercial law. Isaacs described the 1906 Uniform Sales Act as a standardized contract, which had the unfortunate draw back “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.” Nathan Isaacs, Address Before the Rochester Association of Purchasing Agents: Some Legal Aspects of Purchasing 3 (Nov. 16, 1932) (on file with Baker Library Historical Collections, Harvard Business School, Box 3, File: Speeches, 1934); see also Nathan Isaacs, The Dealer-Purchaser, 1 U. CIN. L. REV. 373 (1927). In short, the Sales Act was hopelessly obsolete and needed to be replaced by a modern law. We see here the notion of what is now called the “hypothetical bargain.” See David Charny, Hypothetical Bargains The Normative Structure of Contract Interpretation, 89 MICH. L. REV. 1815 (1991) [hereinafter Charny, Hypothetical Bargains] (hypothetical bargain formulation conceals a complex set of issues). One can also argue that it is at this point we see the beginning of a paradigm shift between classical to neo-classical contract law. Llewellyn’s subsequent incorporation of a contextual interpretive methodology into the UCC was an attempt to continually refresh default rules. In this way, contract law’s default rules would continue to mimic the hypothetical bargain. Llewellyn and Isaacs believed that classical interpretive methodology, such as the plain meaning and four-corners interpretive techniques, often failed to get to the true meaning of the contract.
obsolescence or by a sudden dramatic change in society. This Article analyzes legal change from the broadest possible context—the evolution of common law and common law reasoning over time.

Another “micro” example involves the parol evidence rule. Professors Robert Childres and Stephen Spitz stated that despite its formal, fixed-rule nature, the doctrine is partially status-based when applied by the courts. That is, even though the formal rule is status neutral, courts depend on the characteristics of the parties, and apply the rule differently based on status. They noted the persistence of the importance of status through an analysis of the parol evidence rule, by showing that the exclusion or admission of parol evidence was dependent on the status of the parties. The rule states that parol evidence is admissible in cases where the issue is whether a contract has or has not been concluded or is voidable; to show the parties intended their written instrument to be only a partial integration of their agreement; and as an aid to the interpretation of the contract.

Childress and Spitz show that parol evidence was more likely to be admitted in cases of abuse of bargaining power and excluded in commercial contracts. This is an example where a formal rule (law in the books) may be different than the rule (law as applied or in action). The formal rule may seem to be a bright line—a fixed rule in which one size fits all—but the operative rule is based on a factors analysis not expressly provided for in the formal rule. The lesson to be learned here is that free contract and status may play roles in the formation and application of same rule—the contract norm is expressed in the formalization of the rule and the status norm works covertly in the application of the rule.

It is this divergence between formal and operative rules that Isaacs’s cycle theory is based. For example, contract law only remains useful when it is updated to remain relevant to changes in society. If this revision of law is not properly maintained then the rules and principles that embody the law become anachronistic. The divergence of law and real world practice widens to a degree where the law no longer reflects contemporary business and life. The rules and principles are no longer predictive of decisions in cases.

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22. Katharina Schmidt creates a general typology of modern transactional versus standardization-relational contracting into of contract-status and status-contract categories. Consumer standardized contracts would be of the genus of status-contracts where consumer choice is limited and may require additional status-based protections. Other types of contracts, sometimes, but not always between parties of relatively equal bargaining power, are based only formal (often highly detailed) contracts, but subsequently [are] governed by 'status'-like or relational elements,” such as long-term supply or licensing and franchise contracts. Katharina Isabel Schmidt, Henry Maine’s “Modern Law”: From Status to Contract and Back Again?, 65 AM. J. COMP. L. 145, 179 (2017). I would add that the very meaning of status, and inescapably contract, change over time in response to societal needs, so the pendulum may swing back and forth and at the same time move progressively due to the changing meanings of status-contract.

rules or principles are ignored, subject to creative interpretation or fictions, subject to equitable modification, or are covertly replaced by operative rules. Eventually, the divergence is narrowed through legislative fiat or by judicial destruction and creation (overturning of precedent or the creation of new principles and rules).

A. OF MAINE AND ISAACS

One important distinction needs to be made before the analysis begins. The distinction is between what Maine’s works—including his famous aphorism in *Ancient Law*—mean (or what he intended them to mean) when taken as a whole and not just through the lens of *Ancient Law*, and what his “status-to-contract” assertion came to personify in legal scholarship. The iconic statement by Maine that movement from “status to contract” characterizes legal development in progressive societies is simply a caricature of the generality and nuance of Maine’s thesis. First, his starting point for analyzing a status relationship were ancient, patriarchal societies where a person’s rights were totally dependent on his or her position in the societal hierarchy. Any reasonable analysis of such societies that existed centuries and millennia before his writing and the mid-nineteenth century would support the status-to-contract description of legal development. Thus, the long historical sweep of Maine’s study of ancient societies does not preclude the continued importance of status in progressive or modern societies, and for that matter, nothing precludes the remixing of status and contract during different eras of the law. Status in Maine’s *Ancient Law* refers to the most extreme of status-based societies where women were treated as property and a person’s status was set at birth with little subsequent opportunity for upward mobility.

Second, the nuance of *Ancient Law* is that it clearly does not equate regulation of contracts with status. The notion of contract in *Ancient Law* must be viewed in relationship to the extreme and restrictive nature of status in ancient societies. Contract represented the rise of individualism where people could determine their own destinies outside of the crushing


25. Professor VerSteeg rightly notes that Maine’s status-to-contract adage was taken out of context of his analysis found in *Ancient Law* and has been hijacked to mean that law is constantly evolving from status to contract. It was Maine’s intent to show that in ancient societies persons were limited by their status in the collective, while in modern societies people are freer to change their status through contracts. Maine did not mean that contract meant absolute freedom of contract. J. Russell VerSteeg, *From Status to Contract: A Contextual Analysis of Maine’s Famous Dictum*, 10 WHITTIER L. REV. 669, 679 (1989) (the fact that contract rules change in order to protect the vulnerable does not necessarily show that from the broad sweep of history that societies have moved to a contract-based system of relationships; status in ancient times generally precluded free contracting to large segments of the population, such as women and slaves).

restrictions of familial-controlled societies. Thus, status and contract for Maine were viewed in the context of the anti-individualism of patriarchal power structures of ancient societies in which an individual's status was predetermined by her placement within that structure, and contract as a power structure in which individuals create their own obligations and reality. The idea that Maine somehow was advocating for a regime of unlimited freedom of contract, free of any sort of government regulation, is a historical fabrication. This Article is about the fabrication—the Maine Thesis, as used here, refers to the caricature that law moves progressively from status to contract. However, one bit of equivocation is in order before moving on. Even though the assertion of a progressive movement from status to contract, upon which this Article is partially based, is not sustainable, the "status-to-contract" adage still retains normative power. Maine was undertaking an exercise in legal history, but the "truth" of status to contract may be found in its normative dimension. That is, his aphorism is commonly construed as descriptively wrong, but if viewed from a normative perspective then its purpose gains salience—namely, that at best, society is one in which there is free contracting available to all people, independent of status considerations. This is not antithetical to the continued role that status should continue to provide certain protections from abuse of freedom of contract. But, status concerns aside, the core paradigm of legal evolution remains the advancement of private autonomy through the free creation of contractual rights.

The legal evolution that Maine describes in *Ancient Law* is not directly challenged in this Article. Whether legal development is generally progressive begs the question of what is the nature of that progression? The nature of that progression as a movement from status to contract is what Isaacs’s cycle theory rejects. Maine’s thesis is that progressive societies eventually strip away status-based relationships and replace status with a generic freedom of contract where the characteristics of the contracting parties become irrelevant. Isaacs argues that, taken from a broad historical context, legal development is best characterized as cyclical in nature. In sum, legal development is in perpetual motion moving between status- and contract-based relationships, generally reflected in relationships that blend contract and status elements. It is interesting to note that both Maine and Isaacs's works were undertakings in legal history and both took broad historical perspectives to their subject. The difference is that Maine compared two distinct eras of time—ancient societies with modern societies (the nineteenth century). In contrast, Isaacs studied the development of law

27. "What Maine really intended with his juxtaposition of status and contract had been to draw attention to the contrast between 'primitive' collectivism and progressive individualism." Schmidt, *supra* note 22, at 155.


29. Another example of a cycle theory or the evolution as a pendulum swinging between two poles is Herbert Spencer's notion of evolution as cycles of "Integration and Disintegration." HERBERT SPENCER, *FIRST PRINCIPLES* § 95 at 258–59 (6th ed. 1901) [hereinafter SPENCER, *FIRST PRINCIPLES*] (Herbert Spencer applied Darwinian thought to social change).

30. The importance of *Ancient Law* is that it was a path breaking work of comparative law and not a detailed history of the evolution of a single legal system; Frederick Pollock noted that the
over time through various legal traditions—common, civil, and most importantly, the longer duration of the Jewish legal tradition. It is through the study of the development of these traditions that he finds the commonality of cyclical change between status and contract.

This Article will focus mostly on the legal development of contract law. Roger Cotterrell notes that, "at the most basic level contract is the legal concept which most directly links law and economy because of the significance of the numerous forms of exchange transactions for economic development." Based upon this assessment, the development of contract law in the nineteenth to the twenty-first centuries will act as a surrogate of legal development in general and will be used to understand the ebbs and flows of different modes of legal reasoning.

Part II will review theories of development inside and outside the legal academy. This review is premised on two core issues. First, is legal development best characterized by a linear progression (status to contract) or by a cyclical process (status to contract to status)? Second, is this progression gradual due to the nature of the common law or is it subject to periods of rapid change or jumps? Part III provides the framework for Isaacs’s cycle theory through the review and recognition of evolutionary patterns in Jewish law. Isaacs’s knowledge of Jewish law influenced his view of secular law. Part IV explores the relationship between status and contract law. Part V argues that cycle theory’s implications for legal theory is that it falsifies the dichotomies of contract law and many of the pseudo-debates found throughout twentieth century legal scholarship. This approach is based upon three core tenets: (1) contract law is dynamic in nature; (2) contract law’s complexity provides ample space for different theories, models, and norms; and (3) because of the first two tenets, the dichotomies debated in legal scholarship are false. In the end, these tenets demonstrate that law is not a pure creation of induction, but takes inductive input and uses historical principles to guide legal change. It concludes with the proposition that legal development can best be understood as progressive-cyclical in nature; that is, despite the cyclical nature of legal change, law remains progressive as its cyclical movements act like a bicycle’s wheel moving the rider forward.

B. IMPORTANCE OF ISAACS

Isaacs’s work is valuable because, with the aid of a long comparative law perspective encompassing thousands of years and different legal systems, he detected the cyclical nature of legal change. Isaacs’s argument is that law cycles between eras of status and contract and between periods in which strict law predominates and then melds into periods of equity, which

"Ancient Law is of permanent importance as a leading type of the comparative method which has in the present generation become familiar." SIR FREDERICK POLLOCK, OXFORD LECTURES AND OTHER DISCOURSES 152 (1890).

31. ROGER COTTERRELL, LIVING LAW: STUDIES IN LEGAL AND SOCIAL THEORY 171 (2008) [hereinafter COTTERRELL, LIVING LAW].
in turn evolves back to an age of strict law—a "self-repeating" cycle. The swinging back and forth between strict law and equity appears within the context of a larger cycle of "codification, fictions, equity, legislation, [return to] codification ... and so on." In Isaacs's nomenclature, legislation does not refer to the statutory enactment of laws, but more generally to the enactment of law whose "obligatory force is independent of general principles." When Isaacs used the term codification he did not mean solely the enactment of legislation on a broad scale, but the "crystallization of law into hard and fast rules definitely stated," whether by judicial- or legislative-made law.

In an age of strict law, Isaacs argues that the methodological methods of a writer of glosses on an authoritative text would predominate. These methods primarily focus on the "true" or literal meaning of the words of the authoritative texts and the use of legal fictions to stretch the meanings of those words to address contemporary problems. A period of equitable relief ensues when legal fictions are no longer able to bridge the gap between law and reality. The unraveling of a formal rule begins when jurists take the "point of view that is concerned with the subject matter rather than words, with the purposes of law rather than its method, its spirit rather than its letter, ..."
its principles rather than its rules." The phase of commentary by glossators is one of obsession with "text" and "technical rules," while the equitable phase of law uses "common sense" and "fundamental principles" to prevent the persistence of unjust outcomes caused by the formal application of technical rules. The problem with Isaacs's writing style was that his script provided straightforward meaning by the recitation of "facts," but masked more esoteric meanings. An assistant of Isaacs acknowledged that Isaacs's writing utilized "successive layers of meaning" in which "[t]he ostensible meaning will always make sense" but that ostensible meaning is "often almost contradictory to the ultimate or real meaning." In viewing his body of work as a whole, elements of Isaacs's academic and intellectual agenda become more apparent. For example his cycle theory of legal development in Jewish law is supported by the work of Isadore Twersky some fifty years after Isaacs advanced his undeveloped thesis. Twersky asserted that a careful study of Jewish law reveals its "see-saw tendency" through an ongoing process of "formal codification," with "alternate counter-attempts to preserve the method and fullness of the [Law] by engaging in interpretation, analogy, logical inference, and only then formulating the resultant normative conclusion. A code would provide 'guidance and certitude for a while but not finality.'" However, Twersky's study focused on the cycles found in post-Talmudic history, while Isaacs presented a historical account of the history of Jewish Law before and after Biblical times. Twersky's analysis of Jewish law treats Biblical law as a separate and independent subject, while Isaacs's cycle theory shows that much of Jewish law developed prior to the Biblical era.

Isaacs's view on the work of Maine is generally positive. Isaacs's contributions include: (1) Maine's stages of legal development continuously reoccur; (2) law cycles apply to all legal systems; and (3) each cycle is generally progressive in nature, but not every part of a cycle is necessarily progressive. Isaacs argued that the stages of legislation, codification, and

37. By equity, Isaacs means the period in which the words or fixed rules can no longer be stretched to real world developments through word study or fictions. The phase of equity introduces discretion into the legal system through the study of the principles that underlie the rules and the quest to respond to real world developments through the spirit and not the letter of the law. Id. at 668-69.

38. Id.


40. Flaks, Law, Religion, and Pluralism, supra note 1, at 308 (citing Albert M. Freiberg, Nathan Isaacs in Cambridge 6 (July 15, 1952), in ISAACS COLLECTED PAPERS VOL. 1, JEWISH SUBJECTS (on file at Nathan Isaacs Papers, Hebrew College, Newton Centre, MA)). I would like to thank Samuel Flaks for pointing out this source.


42. Id. at 138.

43. See generally The History of Jewish Law, in THE PRINCIPLES OF JEWISH LAW (Menachem Elon trans., 1975) (outlining a periodization of Jewish Law very similar to Isaacs) (thanks to Samuel Flaks for this reference).

hermeneutical study of texts do not occur in a single order, but instead in a repeating cycle. Although others have recognized the different eras of legal history, Isaacs’s precise formulation of the process as one of repeating cycles is distinctive. The distinctiveness of his work and its applicability to most legal systems is seen in his comparative study of legal scholarship published in a 1918 issue of the Harvard Law Review. In that article he traces schools of jurisprudence. Most notably, he summarizes that the Historical School of nineteenth-century Germany “sought to locate the sources of law in historical practice and precedent, in the character of the native Volkgeist and the language in which it expressed itself.” The most prominent leaders of the Historical School were Friedrich Karl von Savigny in Germany and Sir Henry Maine in England. Savigny claimed that there is an “organic connection between law and the nature and character of a people.” According to von Savigny, sources of law are found in the historical roots of a culture or what is known as customary law.

The Historical School believed that there was change in the law, but that it was a gradual change and could not be forced. Moreover, the Historical School believed that law progressed from the primitive to the more sophisticated. Hegel too believed in progressive legal evolution, but he also argued that earlier stages of society reflected the universal spirit of right, even if not in an ultimately perfected form. Isaacs adopted the contributions of the Historical School inasmuch as he recognized that change in the law was deeply attached to the fate of peoples; but he took a Neo-Hegelian approach in that he believed that there was such a thing as universal principles of justice and that justice did not merely mirror the existing laws of a people, but rather the laws of people were constantly being adjusted to better reflect those universal principles given changing societal developments. Thus, a change in society with a resulting change in the law, but away from the universal principles of justice, meant that legal evolution,

"Law of Change," supra note 3). Referencing Isaacs, Oko states his own view that: "The recurrent cycles do present an upward development: recurrent, they start from the comparatively higher order which has previously been attained." This does not mean that a given cycle or part of a cycle could be regressive in nature. Further referencing Isaacs, Oko states that Isaacs "does not think of the cycles as stratified layers, nor of their recurrence as a kind of Pythagorean Apokatastasis." Id. Nathan Isaacs, The Schools of Jurisprudence: Their Places in History and Their Present Alignment, 31 HARV. L. REV. 373 (1918).


48. Id. at 139 (citing FRIEDRICH KARL VON SAVIGNY, GESCHICHTE DES ROMISCHEN RECHTS IM MITTELALTER “Forward” (6 vol. 1815-31)).

49. Von Savigny viewed that true law was found in the slow growth of customary law: “[A]ll law is originally formed in the manner, in which, in ordinary but not quite correct language, customary law is said to have been formed: i.e. that it is first developed by custom and popular faith, next by jurisprudence,—everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver." FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 30 (Abraham Hayward trans., 1831).

at least at a given point of time, could be regressive. Unlike the Historical School, he did not believe that historical development would reach an endpoint. Isaacs’s idea of cycles is much more akin to that of Hegel’s unending cycles of law, history, and reason.

C. BRIEF SUMMARY OF CYCLE THEORY

Isaacs, in his 1917 two-part article ‘The Law’ and the Law of Change,\(^{51}\) accepts Maine’s general notion that law evolves in order to be in harmony with society through movement from legal fictions, equity, and legislation. The movement occurs when law diverges over time with societal practices, but is then made to work through the use of legal fictions, when the fictions run out, then equity is used to prevent injustice;\(^{52}\) eventually the chaos of ad hoc justice requires legislative action, either by statute or through judge-made law. Isaacs added a fourth stage by labeling the “given law” as codification, meaning “a crystallization of law into hard and fast rules definitely stated.”\(^{53}\) Maine’s Thesis asserts that the movement or cycle is more of a single occurrence, as he compared single points of time (ancient law versus modern law). Isaacs saw law as a continuous series of cycles that occur throughout time (cycles during the period of ancient law and cycles in modern law). Isaacs is valuable because his analysis, initially based on his study of the evolution of Jewish law and then applied to the common law, was from a much broader, continuous perspective than that of Maine.

Cycle theory provides a perspective in assessing other theories and debates in the contract law literature. Isaacs saw his theory equally applicable to the common, civil, and Jewish legal traditions. It is from Isaacs’s historical knowledge of Jewish legal development that he saw the idea of a linear progression from status to contract as an illusion. The shift from equitable contract law of the eighteenth century (requirement of relative equality of the exchange), to the rise of individualism (even a peppercorn is legally sufficient consideration) at the end of the century, was clearly a shift from status to contract.\(^{54}\) But, viewed historically it is but one of many such shifts.

In broad strokes, in the last few centuries, status was represented by the fact that consideration prior to the nineteenth century needed to be of relative equality (from a societal point of view) in order to be legally sufficient. By the end of the century, laissez-faire economics focused on the individual’s value of consideration leading to the expunging of adequacy of consideration.

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\(^{51}\) Isaacs, Law of Change, supra note 3.

\(^{52}\) Isaacs states that when strict application of law begins to produce injustice there is a “desire to breathe the freer air of general principles comes to all peoples who have suffered from the choking atmosphere of too many particular rules.” Id. at 668.

\(^{53}\) Id. at 666.

\(^{54}\) Professor James Gordley states: “Pre-nineteenth-century jurists and philosophers developed the doctrine of equality in exchange by drawing upon two different authorities. One was a theory of exchange proposed by Aristotle in his Nichomachean Ethics; the other was a Roman text in the Corpus iuris civilis of Justinian, which provided a legal remedy for those who sold land at less than half its just price.” James Gordley, Equality in Exchange, 69 CAL. L. REV. 1587, 1588 (1981).
and the need for fairness of exchange from the consideration doctrine.55 Thus, as Lon Fuller asserted in 1941, the requirement of consideration was no longer one of substance, but had been reduced to mere formality.56 The twentieth century has seen a partial return to status with the consumer replacing the farmer or serf as a focus of paternalism. This shift in American law is seen in Karl Llewellyn's adoption of the merchant-consumer distinction in the UCC; the evolution of unconscionability, originally found in equity, to being recognized in law; proliferation of consumer protection laws; and the adoption of the duty of good faith as an implied term in all contracts.

In contract law, without attempting to attribute an idea to one tradition over the other, or to provide evidence of transplantation or borrowing, the Jewish responsa57 (case law) literature shows a great deal of commonality with the common law, and also offers insight into how the common law developed. One explanation for the commonality is that the case-based process of Jewish and common law inherently evolved in an efficient or, in the alternative, fairness-centered way. The connection between the Jewish responsa and English common law is only relevant here for purposes of explaining Isaacs's notion of legal cycles.

If one accepts the idea of legal cycles, then contract law's great dichotomies dissolve into continuums. At any given time, a legal shift may favor contract over status, formalism over realism, literalism over contextualism, facilitation over regulation, and rules over standards, followed by a subsequent shift in the other direction. Any such shift is only a partial movement. Contract law will always remain a mixture of rules and standards, status and contract, formal and contextual interpretation, and so forth. These shifts may occur gradually as the traditional view of the case-based system depicts or quickly in response to external shocks, such as the industrial revolution, financial crises, and the advent of the Internet.

Any theory of legal evolution must be broad in scope in which, in the present case, nuance is dissolved in the sweep of Jewish and common law history; but through a sampling of the historical record, the battle between status and contract becomes apparent, and the seemingly endless thrusts to and fro from the different sides of competing contract law theories and debates can be distilled. A look at the contract law literature from the beginning of the twentieth century to the present reflects the legal cycles that Isaacs saw unfolding over the course of millennia. In the end, this Article abandons all tethering to theory, as such, in favor of an "all of the above" model of legal development characterized by cyclical and mostly, progressive developments in law. The only support to be offered here for the

55. "In the nineteenth century, jurists confidently abandoned this principle [equality of exchange]. Some argued that equality in the values exchanged was a meaningless concept; others claimed that judicial remedies were an unwarranted interference with the judgment of the parties." Id. at 1587.

56. Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 800-04 (1941) [hereinafter Fuller, Consideration and Form] (consideration as form serves three important functions—evidentiary, cautionary, and channeling).

57. The responsa tradition in Jewish or Talmudic law is the counterpart of the common law's precedent and case-based system of reasoning.
D. CYCLES AND CHANGE

To fully understand cycle theory, especially in the context of the common law, the meaning of change that marks the process of recognizing a cycle must be discerned. Isaacs's cycle theory is at its most plausible form when two types of change are recognized: recurrent and epochal change, in which both types of change are occurring at the same time or alternatively—one can be seen as a process leading to the other. Recurrent meaning intermittent, persistent, repeated change or the Latin recurrere meaning "to run back." Epochal change, which I believe comes closer to Isaacs's view of legal cycles, meaning the beginning of a distinctive period in legal history. In its standard meaning, epoch has a beginning and end; a time when a thing existed, such as the age of reason or the era of laissez-faire. In law, the "thing" existed in some degree before and after the time that it had become seen as epochal. Cycle theory plays a role in the effectuation of both types of change. These types of change will be explored later in this Article.

II. LEGAL THEORIES OF DEVELOPMENT

Roger Cotterrell sees legal development as a battle between different ideologies. This is so because law both legitimates and channels power structures in society: "Analysis of the historical patterns of the development of legal doctrine is thus part of the field of study of the formation, modification and disintegration of ideologies." An example is the perceived paradigm shifts from classical, to neoclassical, to modern eras of contracts. It can be seen in methods of legal reasoning—from legal formalism to realism-contextualism, and potentially in a return to formalism (neo-formalism). This Part will review three approaches to legal development—Henry Sumner Maine's progression thesis, Nathan Isaacs's cycle theory, and law and economics' evolutionary efficiency model.

A. MAINE'S PROGRESSION

In relation to the evolution of the common law, two seemingly dyadic views can be presented. The Mainesian view sees law as a gradual,

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59. See supra note 5. See also Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940, 3 Res. L. & Soc. 3 (1980) (eras of American legal thought); DUNCAN KENNEDY, THE RISE & FALL OF CLASSICAL LEGAL THOUGHT (1998) (Kennedy states: "The periodization I adopted was the conventional one for describing three overlapping 'Ages American Law:' the period from the Revolution to the civil war (pre-Classical legal thought); the late nineteenth century to early twentieth century (Classical Legal Thought or CLT); and the 'modern' period beginning before WWI and lasting to the present of 1975." Id. at x.
progressive development. This development results from a gradual evolution of the common law. An alternative view of legal development focuses on the contingent nature of the law. The gradual evolution of the common law is premised on its ability to develop in an internally logical manner. The alternative view sees not only gradual evolutionary change, but also revolutionary change through "legal jumps" in response to seismic events, such as the industrial revolution, the Great Depression, and the creation of the Internet. The idea of legal jumps will be discussed later in this Part. For now, the mainstream common law model is that of gradualism—law changing in response to societal change, but only at an incremental rate. Steven Morrison argues that legal systems are not inherently coherent, therefore, incremental change is a poorer description of legal change than more dramatic types of change caused by social and political conflicts:

One cannot find in legal systems an internal consistency, because legal systems are determined by externalities, namely historical, social, and political conflicts. [This realization results in the rejection of] the Hartian notion, [...] that "[t]o the extent that lawyers think historically about the law, they tend to think in terms of the slow evolution of legal forms from the crude to the sophisticated, and not in terms of the particular connections between different legal forms and different kinds of society."62

Whether by gradual means, jumps, or a combination of both, the core part of Maine’s Thesis remains that legal development is a linear progression. The issue that remains is whether gradual progression from lesser degrees of status protections to greater degrees of freedom of contract is a plausible explanation of legal change.

Sociologists like Max Weber and Emile Durkheim lend support to the important role of contract in modern societies, but both assert that increased regulation of contracts will be needed. The importance of contract in creating a modern marketplace was a common theme in the works of Max Weber. Weber is in agreement with Maine that freedom of contract is a recent

61. Another example of a theory of evolutionary progression can be seen in the work of some law and economics scholars that argue that the common law evolves to create more efficient rules in order to reduce the costs or waste in transactions. Compare Paul H. Rubin, Why Is the Common Law Efficient?, 6 J. LEGAL STUD. 51 (1977) (stating more efficient rules are more likely to survive the making of precedent), George L. Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. LEGAL STUD. 65 (1977) (contending that litigation is more likely to contest and change inefficient rules), and John C. Goodman, An Economic Theory of the Evolution of Common Law, 7 J. LEGAL STUD. 393 (1978) (same), with Mark J. Roe, Chaos and Evolution in Law and Economics, 109 HARV. L. REV. 641 (1996) (arguing other factors weigh in the evolution of the common law, such as path dependence and random shocks), and Oona A. Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 IOWA L. REV. 601 (2001) (path dependence).


63. See MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Edward Shils & Max Rheinstein trans., Harvard University Press: Cambridge 1954) [hereinafter WEBER ON LAW IN ECONOMY].
development. In fact, Weber refers to earlier relations as "status contracts" and those that relate to a market economy as "purposive contracts." Additionally, Weber recognized the facilitative and regulatory nature of contract law. With the expansion of types of contractual transactions came a need for more and more rules. The facilitative rules—the rules of *ius dispositivum*—are known as default rules in modern nomenclature. The primary function of contract law is to provide known rules that automatically apply unless the contracting parties agree otherwise. However, certain issues could not be left to contractual freedom. Therefore, a body of mandatory rules—*ius cogens*—was needed to prevent harm produced by unlimited freedom of contract.

Emile Durkheim asserted that the expansion of the realm of contracts was a necessary consequence of the specialization of labor as a society moves from agrarian-based to industrial-based economies. But, Durkheim also saw the potential for abuse in an unregulated contract regime. The expansion of the reach and importance of free contracts necessitated an increase in "regulative action." He argues that the more economically advanced a society becomes, the greater the importance of contracts and the greater the need for regulation: "[T]he division of labor produces solidarity . . . not only because it makes each individual an exchangist . . . it is because it creates among men an entire system of rights and duties which link them together in a durable way." In sum, Durkheim does not see contracts and status as adversarial, but as the necessary products of the specialization of labor. The popular notion of Maine's Thesis that status to contract was a zero sum game—that as contract increased, status decreased—is not entirely correct since Maine's "movement" was a more nuanced and more in line with Durkheim's analysis. Maine's adage correctly stated that contract relationships grow in importance relative to status with the creation of a market economy. This is partially due to the fact that contract law is a tool for creation; as a market economy develops, contract law is used in many more types of transactions than existed in earlier times. But, nothing in Maine's overall theory indicates that status will ever be totally expunged from the law.

In sum, Maine's status-to-contract adage was likely meant to be a generality and not advocacy for the extinguishment of all status-based

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64. Weber states "[t]hat extensive contractual freedom which generally obtains today has . . . not always existed." *Id.* at 100 (alteration in original).
65. *Id.* at 105.
66. *Id.* at 126 & 126 n.67.
68. *Id.* at 101.
69. *Id.* at 143 (alteration in original) (emphasis omitted).
70. Sir Frederick Pollock in eulogizing Maine and his work notes that Maine believed that the law never stood still and that the movement forward was not a smooth transition: "As Maine himself said, the principle of progress, which is the same thing as the law of healthy life, is a principle of 'destruction tending to construction.'" *POLLOCK, supra* note 30, at 166-67.
71. *WEBER, ON LAW IN ECONOMY, supra* note 63, at 100 ("[w]ith every extension of the market . . . legal transactions become more numerous and more complex").
relationships, such as the special protections provided to minors in the common law. In Frederick Pollock’s “notes” to the 1963 Beacon edition of *Ancient Law*, he surmises that “[s]tatus may yield ground to Contract, but cannot itself be reduced to Contract.”72 Pollock gives as an example, the evolution of the personality of the corporation.73 The corporation as a legal person is a status-based entity created by the State through incorporation statutes and regulated by the status-based concept of fiduciary duties. In his discussion of the continuing importance of status, Pollock intimates that the status-to-contract notion was more rhetorical than literal.74 Pollock concludes that Maine’s historically overgeneralized “dictum” should be read narrowly. He asserts that it is best left to the area of property law, such as the move from the feudal system of fiefdoms to individual fee tail ownership.75

**B. ISAACS’S CYCLE THEORY**

Before proceeding, a brief introduction to Nathan Isaacs and his scholarship is needed. Isaacs was a prolific writer from 1914 to 1940.76 He held a doctorate in economics and received his S.J.D. at Harvard Law School under the tutelage of Dean Roscoe Pound.77 Isaacs was a scholar of powerful intellect with broad-based knowledge of the Jewish, civil, and common law traditions. His intellect produced a deep opus both in secular common law and in Jewish literature.78 For contract law aficionados, he is remembered as the person who introduced the nomenclature of standard form contracting in his 1917 article, *The Standardizing of Contracts* in the *Yale Law Journal*.79 For tort buffs, he advocated early in the twentieth century, the need to recognize strict liability in certain areas of an industrialized economy.80 Those that work in arbitration law will be familiar with Isaacs’s description

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73. *Id.* at 423–24.

74. In fact, Maine’s status-to-contract progression thesis appears as the last sentence of Chapter 5, and is never fully elaborated upon. *Id.* at 165. The importance of *Ancient Law* lies in its connection of legal history to legal theory, as opposed to the ahistorical stance of much of legal theory. The work had also had substantial impact on the disciplines of sociology and law, and law and anthropology. See Stephen G. Utz, *Maine’s Ancient Law and Legal Theory*, 16 CONN. L. REV. 821 (1984).

75. Pollock’s commentary on *Ancient Law* states that: “Maine’s now celebrated dictum as to the movement from Status to Contract in progressive societies is perhaps to be understood as limited to the law of Property ....” *Maine, Ancient Law*, supra note 2, at 422. He further states that: “it does not seem that a movement from Status to Contract can be asserted with any generality.” *Id.* at 423. Pollock gives examples marriage and the mortgage (with the mortgagor’s right of redemption) as status based relationships. *Id.* at 423–25.


of alternative models of the role of the arbitrator—the agency model and the judicial model. He argued for the agency model, believing that the model of arbitrator as judge would make arbitration litigation-like. He also argued for limited judicial review of arbitration awards. The agency model would become the standard interpretation of the 1926 American Federal Arbitration Act.\(^8\)

In constitutional law he argued for a principles-based interpretive methodology and against literal interpretation. He asserted that after 150 years of existence, constitutional interpretation involved “trying to get at the spirit of the thing, rather frankly confessing that the letter is not the whole thing.”\(^8\)

This aligns with the now mainstream view that the Constitution should be seen as a living document.

As the above paragraph notes, Isaacs wrote on numerous areas of law. In at least four of those areas his works remain standard citations in American law review articles to the present. However, few people make the connection to his total body of work because of the specialization of legal research. Why is Isaacs so unknown? Why isn’t he recognized in the legal history canon for the breadth and insightfulness of his work? Why isn’t he recognized as an important legal realist as is clearly shown in his writings? These are hard questions to answer. Maybe the answer was that he was a professor at the Harvard Business School and not at a law school. Maybe it was because his articles were not very theoretical in nature.\(^8\)

But, here is where I venture a supposition that rests upon the difference between theory and insight. Even though Isaacs’s writings were filled with insights—many prophetic in nature—on the surface they were relatively atheoretical in nature. This may be the reason that he was not recognized, as he should have been, by his contemporaries, while his insights remain important today and are evident in the historical record.

Many of Isaacs’s insights were based upon deep historical knowledge and not concocted theory. Isaacs’s cycle theory evolved through his in-depth study of Jewish and secular legal systems; it suggests the commonality of Jewish law or legal tradition and the common law.\(^8\)

The Jewish “common law” or responsa\(^8\) and other sources of Jewish law often dealt with issues of


\(^8\)2. Nathan Isaacs, Lecture on Legal History (Jan. 8, 1922) (transcript on file with Baker Library Historical Collections, Harvard Business School, Box 1, File). See also Nathan Isaacs, The Securities Act and the Constitution, 43 YALE L.J. 218 (1933) (criticizing the Supreme Court for using fictions and stretching the words of the Constitution beyond their normal meanings); Beyond Rules, supra note 76, at 353–56 (arguing for a principled approach to Constitutional interpretation).

\(^8\)3. Beyond Rules, supra note 76, at 302 (“he often disguised his theoretical insights under the garb of doctrine”). The same was also said of the great contract scholar E. Allan Farnsworth. See Larry Garvin et al., Theory and Anti-Theory in the Work of Allan Farnsworth, 1 TEX. WESLEYAN L. REV. 1 (2006).


\(^8\)5. Responsa translates into “answers.” Jewish scholars provided these answers when an answer was not readily apparent in the text of the Talmud. Isaacs “had what was probably the greatest existing
commercial and contract law that predated the common law. Isaacs explained the commonality of legal systems, especially in areas of commercial law, as the product of the commonality of basic, universal principles that underlie most developed legal systems. His contributions to Jewish law were also contributions to common law; his Jewish scholarship clearly informed his legal scholarship.86 He believed that cycle theory could be applied to most legal systems. However, the primary focus of his analysis was the cyclical nature of the Jewish and common law traditions.

The seeds of cycle theory are seen in Max Weber's insight that the greater the contractual freedom the greater the level of coercion. In order to prevent freedom of contract from being the singular domain of the powerful, mandatory rules were needed: "A legal order which contains ever so few mandatory and prohibitory norms and ever so many 'freedoms' and 'empowerments' can nonetheless in its practical effects facilitate a quantitative and qualitative increase not only of coercion in general but quite specifically of authoritarian coercion."87 A status relationship is a bundle of mandatory norms or rules—at least in modern times—needed to protect the weaker parties to contracts. Another rationale for cycle theory is the importance of authoritative sources in legal decisions. The law or at least those who apply it are in a constant search for authority. This search is required by the internal component of law. The conceptual nature of law requires any change in the law to be supported by and within that conceptual system. Because of this, "law is typically backward-looking."88 In essence, what is old is made new. This assures that the law—if not substantively, then at least superficially—looks cyclical in nature.

Professor Weisbrod succinctly summarizes cycle theory as the view that "one should get away from an idea of legal history progresses 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.'"89 Indeed, Isaacs did not see the stages of cycle theory as strict demarcations, but as overlapping through much of legal evolution.90 Cycle theory of legal development seeks to discover universal principles of law while allowing for constant change in the content of the law. Isaacs


86. For a review of Isaacs's Jewish scholarship, see Flaks, Law, Religion, and Pluralism, supra note 1.
87. WEBER ON LAW IN ECONOMY, supra note 63, at 191.
90. Isaacs saw the movement of law as swings between strict law and equity, with the swing always being in a state of transition, meaning the law consists of various degrees of formalism and equity: "It is submitted ... that the periods of strict law and equity are composite and that the same component parts are discernible in each recurrence, that a self-repeating cycle is the result, ... " Isaacs, Law of Change, supra note 3, at 666.
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. Since the law always returns to general principles during a given cycle, it is the principles that need to be studied and that act as guides in the formulation of new rules as law progresses through the different phrases of each cycle. In comparison, since the progressive theory of legal development has been accepted as canonical, legal scholars’ views of legal history are structured by this foundational premise. In sum, the progressive theory of legal development biases the historical record to support such a view. The danger of such bias is the diminishment of the need to uncover underlying principles to guide legal change.

Instead of Maine’s progression of status to contract, Isaacs’s historical research in Jewish and common law led him to believe that law developed in cycles from status to contract and contract to status. He believed that the history of the common, civil, and Jewish law is characterized by many such cycles. Isaacs referred to status-based legal regimes as ones that encompass standardized relationships and those that were primarily based on free contract as characterized by individualized relationships.

Wilson Huhn’s scheme, in which legal reasoning progresses through three stages, provides an example of cycle theory in a microcosm. He uses the Dworkinian notion of “hard cases” as the impetus for change: “examination of judicial opinions in hard cases reveals that courts progress from formalism, to analogy, to realism, in resolving difficult questions of law.” However, Huhn’s progression is ahistorical in that he asserts that judges’ progress through the three types of legal reasoning in singular cases.

From a historical vantage point all three types of reasoning play a role in the evolution of law. Formalism recognizes the internal component of law as a conceptual system based upon deductive reasoning. The major premise being the law, the facts of the case being the minor premise, and the rule application is the conclusion. The judicial decision is the application of an existing rule of law by its terms to a set of facts. This approach views the text—contract law rules and private contracts—as providing an internal means of interpretation. Pure formalism is the direct application of rule to

91. Different schools of thought, such as strict law versus equity or formalism versus contextualism, compete against one another at any one time. In the end the schools are bridged by focusing not on the words of law but on the purpose of law: “It is a point of view that is concerned with the subject matter rather than the words, with the purposes of the law rather than its method, its spirit rather than its letter, its principles rather than its rules. It is an appeal from the text to common sense, from technical rules to fundamental principles.” Id. at 667.

92. Isaacs states that: “After all, the question is not so much one of status and contract as it is of a broader classification that embraces these concepts: standardized relations and individualized relations.” Isaacs, The Standardizing of Contracts, supra note 32, at 39. Under Isaacs’s terminology standardized contracts were status-based and individualized contracts were products of free contracting.


94. Id. at 305; see Ronald Dworkin, Hard Cases, 88 HARV. L. REV. 1057 (1975).

95. Huhn, Stages of Legal Reasoning, supra note 93, at 305.

96. Id. at 309 (citing Frederick Schauer, Formalism, 97 YALE L.J. 509, 510 (1988)).
case in which the reasoning is purely conceptual and deductive. The civil law system with its direct appeal to a civil code, as the singular source of law, is an example of such rule-to-case reasoning. The next step in the evolutionary process is the use of analogical reasoning. Analogical reasoning allows for a broader view of the law and the case facts. On the conceptual side, the judge may look to different rules and apply them analogically to a novel case. But, it is on the factual side where analogical reasoning is most used in the common law. The judge searches previous case law to determine the proper precedent to apply to the case at hand.97

The final stage of legal reasoning is based upon the need for the court to look into the consequences of its rule applications. The need to apply a policy analysis to weigh the benefits and costs of a ruling "emerged from the British school of utilitarianism and the American philosophy of pragmatism."98 However, Huhn’s analysis of legal reasoning is not diachronic in nature. His is a synchronic analysis of the judicial reasoning process in particular cases, and not by implication a testament to the legal evolution from formalism to realism. His judicial reasoning references the types of reasoning employed in hard cases:

When faced with new fact situations, the reasoning of the courts frequently follows a typical sequence. First, courts attempt to formalistically apply existing rules of law according to their terms to new facts. If the courts are unable to define the terms of existing rules so that they apply to the new case, then the courts draw analogies between the new situations and familiar ones, applying the existing rules by analogy. If these analogies break down, courts fashion new rules by means of a realistic balancing of policies and interests.99

This summation of Huhn’s three stages of legal reasoning makes a number of things clear. First, even though it is not a theory of legal development, it implicitly supports cycle theory. In different eras of legal development these three types of reasoning change in importance or in the degree in which they are “formally” utilized.

Grant Gilmore’s 1979 tome, Ages of American Law,100 divides American legal evolution into different eras, provide moderate support for cycle theory. Gilmore traces the shifting of American legal reasoning from the late nineteenth century.101 The later part of the nineteenth century saw a shift to greater freedom of contract and less judicial interventionism into private contracts. This legal regime was characterized by the formalistic application

97.  Id. at 312 (citing Emily Sherwin, A Defense of Analogical Reasoning in Law, 66 U. CHI. L. REV. 1179, 1179 (1999)).
98.  Id. at 316.
99.  Id. at 379.
100. See GILMORE, AGES, supra note 5.
101. Gilmore divides American law into three distinct eras—the Age of Discovery (early nineteenth century to the Civil War) involved the creation of the American legal system, the Age of Faith (later part of the nineteenth century to the early twentieth century) involved the development of the view of law as science and the ascendance of legal formalism, and the Age of Anxiety (post World War I) involved the rise of legal realism and the drafting of the UCC. GILMORE, AGES, supra note 5, at 40–87.
of the rules of contract law. Beginning with the proto-Realists\textsuperscript{102} in the early twentieth century, and the advent of standard-form contracting, the reality of bargaining disparities was recognized.\textsuperscript{103} The history of the twentieth century shows a continuous movement away from pure laissez-faire formalism to greater protection of weaker parties. The history at the turn of the twenty-first century has seen increased scholarship advocating for a greater amount of formalism in contract law application.\textsuperscript{104} Thus, the general scheme of cycles in the common law of contracts shifts between ages of formalism and realism, law and equity, and status and contract.

C. EVOLUTIONARY EFFICIENCY

Judge Posner, among others, has argued that the common law is generally made up of efficient rules: "The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities."\textsuperscript{105} The argument is that common law judges, in applying rules, intuitively use an economic analysis. Thus, theoretically, the common law should become more efficient over time. One argument is, that through a process of natural selection, inefficient rules are adjusted or replaced by more efficient rules.\textsuperscript{106} Professors Priest and Rubin have argued in favor of this evolutionary efficiency theory of legal development.\textsuperscript{107} Rubin asserts that efficiency gains are mainly due to the types of cases that parties decide to litigate. Cases where both contesting

\textsuperscript{102} The proto-realists questioned the internal coherency of the law and its ability to find determinate answers through pure deductive reasoning. They were the predecessors to the Legal Realists of the late 1920s and 1930s, and included Robert Hale, Morris and Felix Cohen, Wesley Hohfield, Nathan Isaacs, and Roscoe Pound, whose major works are found in the first two decades of the twentieth century, as well as the early 1920s.

\textsuperscript{103} See Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470 (1923) (arguing courts enforcement of contract rights is inherently coercive; over interpreting freedom of contract masks the coercive power of the state).

\textsuperscript{104} The advocacy of a less contextual, more formal interpretation of contracts has been labeled "neo-formalism." See Frederick Schauer, Formalism, 97 YALE L.J. 509, 510 (1988) ("[T]he word 'formalism,' in many of its numerous uses, lies the concept of decisionmaking according to rule. Formalism is the way in which rules achieve their 'ruleness' precisely by doing what is supposed to be the failing of formalism . . . .").

\textsuperscript{105} RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 98 (7th ed. 2007). This book is considered the seminal text of the law and economics movement.

\textsuperscript{106} See Goodman, supra note 61 (arguing that common law efficiency is dependent on the probability of particular litigants winning favorable decisions); Cf. Nuno Garoupa & Carlos Gómez Liguerre, The Evolution of the Common Law and Efficiency, 40 GA. J. INT'L & COMP. L. 307 (2012) (discussing the efficiency hypothesis of the common law from the perspective of comparative law and concluding that the efficiency hypothesis of common law evolution lacks explanatory power).

parties seek to establish a precedent result in inefficient rules being worked out of the common law. In short, “efficient rules will be maintained, and inefficient rules litigated until overturned.”

Priest argues that even when parties decide not to seek or change a precedent, the common law still evolves toward efficiency.

Professor Rubin conditions his thesis by acknowledging that evolutionary efficiency is not uniform throughout the common law because it is party-dependent. This insight implies that evolutionary efficiency is not necessarily congruent with a gradual, steady evolution of the common law. Archaic or inefficient rules that are not worked out of the law in a timely fashion invite legislative or regulatory action. America’s best private law example is the enactment of the UCC as a reaction to the worn out Uniform Sales Act of 1906.

Viewed through a comparativist perspective, the similarities in commercial and contract law across legal traditions, specifically the common and civil law, support the view that legal systems evolve in efficient ways. High degrees of similarity between the systems likely reflect the fact that the ways of doing business are similar in most legal systems so the variation in rules should be relatively minor if law in general evolves efficiently to reflect real world transactions. Professor Baird has offered an excellent description of the explanatory power of an evolutionary efficiency theory of legal development:

In addition, if evolutionary economics is correct, the law would operate best by allowing experimentation with respect to means, even if the law sets the ends desired and imposes certain constraints. But the law also requires a modesty to acknowledge its own limitations and a realization that the law is an imperfect expression that requires careful and constant reconsideration.

However, divergences in rules across advanced legal traditions weigh against the evolutionary efficiency theory. If contract rules found in the common and civil laws are opposed, then they cannot both be equally efficient. The emergence of different rules or divergences in the application of similar rules may still be efficient within the context of their given legal systems, although, efficiency theory would warrant otherwise.

From a contextual approach, it may be that different rules are efficient in different contexts. An example would be the diametrically opposed rules, found in the American UCC and the United Nations Convention on Contract

108. Rubin, supra note 61, at 53.
109. Id. at 51.
for the International Sale of Goods (CISG)\textsuperscript{112} on the right of buyers to reject defective goods. Section 2-601 of the UCC states that the buyer has a right to reject goods if they “fail in any respect to conform to the contract.” This almost absolute right of a buyer to reject, even for minor defects, is appropriately called the perfect tender rule. In contrast, the CISG incorporates a pro-seller rule in which the buyer may only reject delivery of goods that meet the threshold of fundamental breach.\textsuperscript{113}

Diametrically opposed rules are subject to a comparative efficiency analysis. However, when placed in the context of domestic and international sales, both rules can be seen as efficient. On the surface, the perfect tender rule arms the buyer with a weapon to reject goods that closely conform to contract requirements. This presents a moral hazard problem. Assuming the market price for the goods declines from the time of contract execution to the time of delivery, a buyer could use the rule as a “loophole” to get out of the contract in order to buy lower priced goods on the market. But, in the domestic context, such a rule is more efficient than the fundamental breach rule. First, the duty of good faith can be used to police such bad faith acts. Second, the disincentive of negative reputational effects dissuades merchants from such opportunistic behavior. Third, the efficiency of domestic shipment capabilities and the existence of secondary markets make rejection more of an inconvenience for the seller than a major financial setback.

In contrast, the fundamental breach rule is the more efficient rule for international sales transactions. The sending of goods to a stranger in a distant country greatly increases the risk to the seller. The risks of theft, the inability to find a secondary buyer, the costs of transshipping the goods, as well as the lack of marketability of customized goods, and goods that are subject to deterioration, make the pro-seller rule of fundamental breach the efficient choice. The buyer is in the best position to maximize the value of the defective goods and to prevent waste.

The next section explores non-legal theories of development to address the nature of legal change. A model of gradual change interspersed with radical change—legal jumps or paradigm shifts—challenges the gradualism of change most often associated with common law development. This modified model recognizes that gradual change is inherent in the case method approach, while also recognizing that external shocks can result in rapid changes in the law.


\textsuperscript{113} Id. at 8, 14–16, 19, 22.
D. Non-Legal Theories of Development

Evolutionary biology's theory of "jumps" and Thomas Kuhn's concept of paradigm shifts offer an alternative view of common law development. The rationale for the gradualism of common law change is that such change provides a level of continuity, certainty, and predictability needed for commercial transactions. Jay Gould's evolutionary jumps and Kuhn's paradigm shifts assert that the gradualism of evolutionary change and the incremental development of scientific theory are not true depictions of change. In reality, gradualism is interrupted at times by dramatic change. Gradual evolution, whether it is biological, scientific, or legal, is intermittently shocked by profound extrinsic change. In legal development, the impetus for radical change is an external shock to the relevancy of existing law. The Industrial Revolution provided such a shock. New types of contractual relations—distance selling, mass production, standard contracting—required dramatic changes in the law. In the United States, the evolutionary jump or paradigm shift is best represented by the enactment of the UCC. The paradigm shift also resulted in new theories and frameworks for looking at contract law, such as neo-classicism and relational contract theory.

1. Evolutionary Biology

It is important to note that Ancient Law was published a year after the publication of Darwin's The Origin of Species. Maine saw law as evolutionary, but not always necessarily progressive. But, what Maine's Thesis clearly had in common with Darwin's theory is that predecessor versions of species, in the case law, remained embedded in the newer versions. As a legal historian, Maine also believed that to understand modern law it was vital to understand its predecessors beginning with ancient law. Maine uses geology as an analogy: "These rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist." Thus, for Maine, the core theme in studying ancient law was a better understanding of the law of his time and not the nature of legal evolution. Essentially, Maine's Ancient Law was a work of comparative law and not a work on the evolution of law.

Herbert Hovenkamp has rightly noted that jurisprudence was "evolutionary long before Darwin, and it continues to be evolutionary." He asserts that this is so because "[I]ike most other intellectual disciplines, jurisprudence needs a theory of change." Hovenkamp divides evolutionary theories into two camps: Social Darwinists and Reform Darwinists. The former group is made up of firm believers in natural selection and survival
of the fittest as applied to social evolution, where different social practices compete against one another. Under this view, status protections interfere with the natural selection process and, thus, Social Darwinists advocated laissez-faire economics.\textsuperscript{119} In contrast, the Reform Darwinists—including Dean Roscoe Pound of Harvard Law School—believed that people and practices evolved from the overall cultural environment, but also believed the environment could be created and changed.\textsuperscript{120} Thus, the Reformist Darwinists saw a greater role of government associated with social engineering.\textsuperscript{121} Roscoe Pound’s version of the evolutionary development of law was called “Sociological Jurisprudence.”\textsuperscript{122} Sociological Jurisprudence rejects the conceptualism of law as based upon unverifiable universal principles and asserts that law is constructed through its interaction with society, and is best grounded in verifiable public policy. Poundism sees law through “a truly scientific jurisprudence [that] requires the abandonment of individual rights claims based on natural law in favor of scientifically determined public policy claims.”\textsuperscript{122} Pound’s analysis was an attack on the rigidity and irrationality of the legal formalism of the time—use of deduction from general principles, such as ‘liberty of contract,’ which were often obsolete, empty vessels that failed to respond to changing times and the nuance of social reality.\textsuperscript{124} The failure of Pound’s theory of legal development was its inability to determine the public policies that best served the different social classes found in society.\textsuperscript{125} While Pound’s view of

\begin{itemize}
\item \textsuperscript{119} Id. at 648.
\item \textsuperscript{120} Id. at 654.
\item \textsuperscript{121} Id. at 656.
\item \textsuperscript{122} Pound coined the term “sociological jurisprudence” for his philosophy of law that focused on the interrelationship in law and society—social activities’ impact on substantive law and law’s ability of law to effect change in society (social engineering). See Roscoe Pound, \textit{The Need of a Sociological Jurisprudence}, 19 GREEN BAG 607 (1907); Roscoe Pound, \textit{The Scope and Purpose of Sociological Jurisprudence}, 24 HARV. L. REV. 591 (1911) & 25 HARV. L. REV. 140 (1912); see also James A. Gardner, \textit{The Sociological Jurisprudence of Roscoe Pound}, 7 VILL. L. REV. 1 (1961) (explaining Pound’s sociological jurisprudence as a positive theory of the sociology of law based on twin premises—application of social sciences to understand the role of law in society and the use of law as an instrument of social control). Pound’s philosophy of law can be seen as a precursor to legal realism because he recognized that the law had become out of sync with social developments. See Karl N. Llewellyn, \textit{Some Realism About Realism: Responding to Dean Pound}, 44 HARV. L. REV. 1222, 1235 (1931) (describing both the similarities and differences among social jurispudne); G. Edward White, \textit{From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America}, 58 VA. L. REV. 999 (1972) (describing the displacement of sociological jurisprudence by Realism).
\item \textsuperscript{123} Hovenkamp, \textit{ supra} note 117, at 678 (citing Roscoe Pound, \textit{The Scope and Purpose of Sociological Jurisprudence}, 24 HARV. L. REV. 591, 694–11 (1911); Roscoe Pound, \textit{Do We Need a Philosophy of Law?}, 5 COLUM. L. REV. 339, 346 (1905); Roscoe Pound, \textit{The Need of a Sociological Jurisprudence}, 19 GREEN BAG 607 (1907)).
\item \textsuperscript{124} Pound was one of the first to attack the legal formalism, which Pound pejoratively called “mechanical jurisprudence,” that existed at the turn of the twentieth century. He asserted numerous principles of law had become empty vessels that courts applied to cases often blind to the facts: “Manifestations of mechanical jurisprudence are conspicuous in the decisions as to liberty of contract. A characteristic one is the rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of the actual facts . . . .” Roscoe Pound, \textit{Liberty of Contract}, 18 YALE L.J. 454, 462 (1908–1909).
\item \textsuperscript{125} Hovenkamp, \textit{ supra} note 117, at 679.
\end{itemize}
law as a tool for social engineering proved implausible, he was able to open legal formalism to the critique subsequently advanced by the legal realists.

The traditional historiography of common law development is one marked by a law that took centuries to mature through gradual change.\textsuperscript{126} This may have been true during the Middle Ages and through to the eighteenth century, but it has not been true of the modern era of legal development. Alternatively stated, in a relatively static period of social change, the change in law is also relatively static. However, dynamic or epochal change in society requires major changes in the law. The debate of whether the law is always in the lag position or whether law can initiate dramatic social-economic change is a sociological-legal question not a part of the current undertaking. The issue being explored here is the rate of legal change. The most rational model would combine the case-by-case gradualism of common law with intermittent paradigm shifts or legal “jumps.” The evolutionary theory associated with Stephen Jay Gould provides an appropriate analogy.\textsuperscript{127} Under the concept of “punctuated equilibrium,” evolution is characterized by long periods of little change, where a species is gradually transformed into another, with relatively short periods punctuated by rapid, cladogenesis or species-splitting change.\textsuperscript{128} Richard Dawkins labeled Gould’s work with Niles Eldredge as “discrete variable speedism” in which gradual change is interspersed with evolutionary jumps.\textsuperscript{129}

The application of punctuated equilibrium to legal development has recently been provided in the area of administrative law development. Professor Niles references Eldredge-Gould in stating that: “evolution is much more often the product of dramatic quantum shifts over relatively short periods of time, than the kind of gradualism envisioned by Darwin.”\textsuperscript{130} Niles asserts that the evolution of regulations follows a similar path. Examples include: the Sarbanes-Oxley Act\textsuperscript{131} in response to a series of corporate

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  \item \textsuperscript{126} See Sir Matthew Hale, The History of the Common Law of England (6th ed. 1820). The nature of the common law is to accommodate “the Conditions, Exigencies, and Conveniences of the People . . . as those Exigencies and Conveniences do insensibly grow upon the People, so many Times there grows insensibly a Variation of Laws, especially in a long Tract of Time.” Id. at 39 (emphasis added).
  \item \textsuperscript{127} Stephen Jay Gould, The Structure of Evolutionary Theory 775 (2002).
  \item \textsuperscript{128} Niles Eldredge & Stephen Jay Gould, Punctuated Equilibria: An Alternative to Phyletic Gradualism, in Models in Paleobiology 82 (1992) (critiquing Darwinian theory that evolution is characterized by slow and steady transformations of new species; instead, breaks in the fossil records indicate that new species arise through rapid and sudden changes). Eldredge and Gould assert: “The history of evolution is not one of stately unfolding, but a story of homeostatic equilibria, disturbed only ‘rarely’ (i.e., rather often in the fullness of time) by rapid and episodic events of speciation.” Id. at 84; see also Niles Eldredge, Time Frames, at 193-223 (1985); Stephen Jay Gould, Punctuated Equilibrium 26 (2007); Gould, supra note 114 (“sudden jumps”); Ernst Mayr, Change of Genetic Environment and Evolution, in J. Huxley, A. C. Hardy & E. B. Ford, Evolution as a Process 157-180 (1954).
  \item \textsuperscript{129} Richard Dawkins, The Blind Watchmaker 227, 245 (1996).
  \item \textsuperscript{130} Mark C. Niles, Punctuated Equilibrium: A Model for Administrative Evolution, 44 J. Marshall L. Rev. 353, 353 (2011) [hereinafter Niles, Punctuated Equilibrium].
  \item \textsuperscript{131} The Sarbanes-Oxley Act, Pub. L. 107-204, 116 Stat. 745 (July 20, 2002) (set new or expanded requirements for all U.S. public company boards of directors, management, and public accounting firms).
\end{itemize}
scandals, including the collapse of Enron, and the Dodd-Frank Act following the 2008 financial crisis. These dramatic regulatory responses were premised by the view that the existing legal structures were incapable of preventing a reoccurrence. These regulatory jumps are rare in a political process where political interest groups are generally successful in preventing rapid regulatory changes. Thus, a dramatic social-economic event is the means by which agency capture by interest groups are evaded to effectuate a substantial change in law. While economic crises and business cycles have long focused on regulatory jumps, Niles notes that this view of change is even more relevant in the information age, where even less dramatic events can have powerful societal impacts and resulting regulatory shifts. In this environment, the occurrences of rapid regulatory change become much less rare.

Another example of a legal jump occurred in the area of contract interpretation with the movement from formalist to contextualist methodologies. The legal formalist believes in an internally logical, enclosed body of law, that can be directly applied in each case. This conceptual utopia is founded on another belief that every issue presented in real world cases has a pre-existing, ready-made solution in the law. This may be true in “easy cases,” but it is not true in novel or “hard cases.” The idea that courts should refrain from using extrinsic evidence in the interpretation of a contract or in the application of contract law is, at best, in American common law, superficially acknowledged. In fact, some form of contextual evidence is used even in the so-called easy cases as well. Karl Llewellyn was a strong believer in the dynamic nature of commercial law. This dynamism is due to the grassroots—nature of commercial and contract law creation. In this way, the conceptual edifice of commercial law could be constantly refreshed by real world developments. The template for a law that is in a constant state of recreating itself was the courts willingness to consider contextual evidence. Thus, the law of practice—trade usage, commercial practice, and business custom—would enter and change the law through case decisions. This constant renewal of law prevents the anachronism of non-changing or slowly changing law that characterized the abstract conceptualism associated with the legal formalism that existed in the early twentieth century.

Llewellyn, in writing Articles 1 and 2 of the UCC, rejected the status-quo contextualism that sociologist William Graham Sumner and attorney

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133. Niles, Punctuated Equilibrium, supra note 130, at 421.

134. Id.

135. Llewellyn argued that since society and commerce where changing rapidly so too must the law: “The conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of the law needs reexamination to determine how far it fits the society it purports to serve.” KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 55 (1962) [hereinafter LLEWELLYN, JURISPRUDENCE].

James Coolidge Carter advanced in the early part of the twentieth century. The Sumner-Carter model of legal change was simply the recognition and continuation of ancient customs. Under this model of change, context-driven change is slowed by the need to tie all legal change to evolving, but historically ancient, customs. Sumner-Carter's theory of change was not the dynamic change that Llewellyn attempted to incorporate into the UCC through his repeated use of the reasonableness standard. Reasonableness determinations are inherently contextual endeavors. In contrast, Sumner-Carter contextualism was diachronic in nature, in that a rule adjustment had to fit within a historical context of customary common law. It is an evolutionary gradualism more akin to Darwinian-Spencerian theory of evolutionary change.

For Llewellyn, Isaacs, and the other Realists, legal development or change—especially in commercial law—was an inductive process with a forward-looking perspective. Where Sumner-Carter looked backward to ancient customs anchored by relatively static societal norms; the realist looked to existing commercial practice to constantly adjust rules to fit the present and looked to the consequences of such rule adjustments for future cases. While Sumner-Carter's view of change was reconcilable to the deductive reasoning of legal formalism; the realists argued that the deductive process had to be complimented with inductive reasoning from facts and practice to prevent rules from becoming anachronistic.

2. Paradigm Shifts: Kuhnian Theory

American legal historian Alan Watson recognized the notion of a paradigm shift in his concept of "legal revolution." Unlike a social revolution, the legal tradition remains, but the basis of the law changes. The idea of "paradigm shifts" is most popularly associated with the work of Thomas Kuhn. Kuhn, in his influential book, *The Structure of Scientific Revolutions*, argues that a paradigm shift is when the basic assumptions within mainstream scientific theory are replaced. From an evolutionary perspective, paradigm shifts in scientific thinking are similar to evolutionary jumps in evolutionary biology, in which scientific advancement is not

137. See generally JAMES COOLIDGE CARTER, LAW, ITS ORIGIN, GROWTH AND FUNCTION (1907).
139. See SPENCER, FIRST PRINCIPLES, supra note 29; see also HERBERT SPENCER, SOCIAL STATICS, OR THE CONDITIONS ESSENTIAL TO HAPPINESS SPECIFIED (1851) (although a work of political philosophy advocating libertarianism; often associated with Social Darwinian; Spencer coined the term survival of the fittest often associated with Darwin). Spencer concludes that:

[We are to search out with a genuine humility the rules ordained for us—are to do unfalteringly, without speculating as to consequences, whatsoever these require; and we are to do this in the belief that then, when there is perfect sincerity—when each man is true to himself—when every one strives to realize what he thinks the highest rectitude—then must all things prosper.

*Id.* at 518.
140. WATSON, supra note 88, at 118.
141. KUHN, supra note 115.
characterized by a slow moving linear progression, but is accelerated by paradigm shifts that lead to new ways of scientific thinking.

Just as Patrick Glenn noted the incommensurability in comparing legal traditions, Kuhn argues that competing scientific paradigms are also incommensurable. As a result, the competing views of contract law cannot be reconciled, and our view of contract law can never be a purely objective one. In fact, the incommensurability issues of law are much greater than those in scientific evolution. Science is a pure fact-based undertaking. Once a new theory is scientifically proven there is no avenue to go back and argue the truth of the older, disproved theory. Law, as a value-laden creation, is able to re-cycle theories of law, legal development, and legal reasoning. It is this distinction between science and law that lends credence to a cycle theory of legal development.

In Kuhnian terms, divergences between reality and law or legal theory lead to the development of a new paradigm. In contract, rules are changed and new standards asserted to close the gap. The paradox is that the revolution is not based on a sudden dramatic insight or event, but is based upon a steady build-up of changes in reality, and law’s response or lack of response to those changes. As Llewellyn and Isaacs recognized in the 1920s, piecemeal changes in the commercial law of the time was no longer a rational course of action. The gap between business reality and existing rules necessitated a more sweeping change in commercial law. This recognition led to a change in Llewellyn’s mandate from revising the Uniform Sales Act of 1906 to the drafting of a broad commercial code.\[142\]

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142. William A. Schnader, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 U. MIAMI L. REV. 1, 2 (1967) (the various uniform acts prepared, and subsequently adopted by various states by the National Conference of Commissioners of Uniform State Laws (NCCUSL), beginning with the Uniform Negotiable Instrument Act of 1896, had been independent efforts drafted by different parties resulting in inconsistencies between the different acts; also certain provisions in the acts were “no longer suitable to govern the business practices of the day”). By 1940 the Revised Sales Act had been drafted. At the same time the NCCUSL approached the American Law Institute to act as a co-sponsor of the Sales Act, but by 1944 the two organization agreed to move forward to drafting a general commercial code. William Schnader, the then-President of NCCUSL, explained why Karl Llewellyn was chosen as the Chief Reporter for the UCC Project:

There was no difficulty in finding a "Chief Reporter." The outstanding man in the United States to undertake this task was Professor Karl N. Llewellyn . . . . Not only was Professor Llewellyn a student of commercial law as it appeared in the law books, but he was the type of law professor who was never satisfied unless he knew exactly how commercial transactions were carried on in the market place. He insisted that the provisions of the Code should be drafted from the standpoint of what actually takes place from day to day in the commercial world rather than from the standpoint of what appeared in statutes and decisions.

Id. at 4. Llewellyn represented to the legal academy and practitioners a unique blend of theory and praxis. See also Karl N. Llewellyn, The Needed Federal Sales Act, 26 VA. L. REV. 558 (1940); Karl N. Llewellyn, Why We Need the Uniform Commercial Code, 10 U. FLA. L. REV. 367 (1957); Homer Kripke, The Principles Underlying the Drafting of the Uniform Commercial Code, 1962 U. ILL. L. F. 321 (1962).
III. CASE STUDY: JEWISH LEGAL EVOLUTION

Isaacs, in studying the tension between tradition and innovation in Jewish Law, saw legal change as anchored in basic principles. Therefore, the cyclical nature of legal development is a reflection of this tension. Isaacs was both "fascinated by universal legal ideals" and his belief that Jewish law was a living, growing law. The cyclical nature of legal development was not a chaotic one because it was guided by the application of basic principles to novel developments in society. Furthermore, Isaacs did not see the Jewish people or their law as sui generis. Jewish scholar Norman Solomon notes that Jewish law was practiced within different societies, cultures, and religions or secular legal systems:

Talmud is very much a product of the interaction between biblical tradition and the Mediterranean and Near-Eastern cultures of late antiquity. The extent to which Jewish law was influenced by Roman, Greek or Near Eastern legal systems and social mores is much debated. Some concepts, such as guardianship, have no biblical precedent, leading the rabbis to use Greek terms. In general, talmudic halakham in matters of civil and criminal law must be read in the context of other legal systems of late antiquity. It has its distinctive features, deriving mainly from the attempt to harmonize the biblical text with actual practice, but at the same time [it] shares much with the surrounding societies.

Isaacs's knowledge of the Jewish and civil law legal systems enabled him to place Anglo-American law in a broader context. Isaacs believed that the indexing of the responsa and the legal experience in the Jewish settlement in Palestine could add "a new chapter to the influence of Judaism on Western Law." Isaacs accepted that there were rigid periods in Jewish law, but he asserted that these periods were followed by flexible periods of equity. Crucially, he argued that these cycles occurred in all legal systems.

H. Patrick Glenn has noted that the impact of sources outside of the common law are often forgotten or ignored: "More distant traditions have

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143. See Adolph S. Oko and Nathan Isaacs, Correspondence Between A Jurist and a Bookman, IV MENORAH J. 73, 73–85 (1918) (calling for the writing of a history of Jewish Law).
146. See Weisbrod, Way We Live, supra note 89, at 786–87 nn.40-44 (analysis of the general character of Nathan Isaacs's writings and career).
also contributed greatly to one another, as with the Talmudic and Islamic contributions to the common law.

The responsa tradition is the counterpart of the common law's precedent and case-based system of reasoning. Largely based on analogical reasoning, a new case is processed through a search for applicable law. This search involves the analysis of previously decided, similarly situated cases. Analogical reasoning may be both deductive and inductive in nature. The search for similarly situated cases or fact patterns is inductive in nature (search for similar fact scenarios), while the recognition and application of the relevant law or rule is deductive (application of law's conceptualization—principles, standards, rules) in nature. The reasoning process entails the extension of existing case law or the analysis when applied to the case at hand may suggest a rule adjustment or the creation of a new rule, such as an exception. As in the common law, Jewish responsa exhibits both dimensions of analogical reasoning.

A. THE PREMISE AND ITS EXPLANATORY POWER

Isaacs's cycle theory as applied to Jewish law was premised on the idea of the existence of cycles between tradition and innovation. An alternative way of viewing cycle theory in Jewish law is his belief in universal principles while also recognizing the changing content of law. The cycle approach may be seen as the way the bet din restores harmony between contesting parties, which at times involve novel fact situations not expressly dealt with by the Talmud. The degree of influence of Jewish law on the development of the common law can be debated. But, thousands of years of the Jewish legal tradition predate the common law and likely had some influence on common law development. Some argue that Jewish law remains a source of common law development: "American courts and legal scholars have increasingly turned to Jewish legal tradition for insights into various issues confronting the American legal system." This should not come as a

151. "[C]ase-based reasoning and explicit, principle-based conceptualization are closely, even inextricably, intertwined in rabbinic literature . . . ." LEIB MOSCOVITZ, TALMUDIC REASONING: FROM CASUISTICS TO CONCEPTUALIZATION 272 (Mohr Siebeck: Tübingen 2002).
152. Bet din or bet din is a Rabbinic Court, which built up the Jewish legal system during Biblical times and to the present acts as a court for litigation between Jews, most importantly in the area of divorce, and to provide instruction as to the meaning of Jewish law (halakhah).
153. The Talmud is an enormous compilation of teachings consisting of sixty-three tractates totally 523 chapters. It was compiled over a period of about eight hundred years. Talmud means study and refers to the massive collection of law produced by rabbinic Judaism from the oral traditions.
surprise, since Jewish law (halakhah) is not only a spiritual conduit to the Jewish faith, it touches upon all aspects of life, including everyday activities. Alternatively stated, there are a surprising amount of similarities between Talmudic law and modern secular law.

**B. JEWISH LEGAL INNOVATIONS**

This analysis does not significantly take into account the pluralism of the Jewish legal tradition. Like the history of all legal traditions, the historical record is never monochromatic: “Today there is a growing recognition of the variety in Jewish belief and practice, together with a deeper appreciation of the contributions that the different schools have made to the content of Jewish life and thought.”

Isaacs saw Jewish law as dynamic in nature and not ending with the passing of the law to Moses at Mount Sinai. Alternatively stated, he did not believe the literal revelation of the five books of the Torah was in complete form at Mount Sinai. While applying cycle theory to secular legal systems, Isaacs also used it as a response to the Jewish Reform movement at the turn of the twentieth century. He believed in the importance of authority and fixed basic principles espoused in Orthodoxy. But, he also saw Jewish law as dynamic in responding to real world developments and in the application of those basic principles. Even though he was strict in his practice of the rituals of the Jewish faith, he did not approve of the unbending, static nature of some views of Orthodoxy. At the same time, despite his view of the flexibility of Jewish law, he rejected the Reform style’s complete rejection of the authority of the rabbinic tradition.

Thus, the development of Jewish law, like any other legal system, was heavily influenced by customs external to the literal text of the Torah: “The power of the popular will, as distinct from the official Halakhah, is exemplified in the famous dictum ‘Custom sets the law aside.’” Custom was resorted to when there were competing interpretations among scholars of the meaning of the law and “when a set of exceptional circumstances prevailed.” The binary relationship between a given society and law is made obvious from the variations of Jewish law after the Diaspora resulted in the emigration of Jews throughout Europe and Northern Africa: “The many differences in local background and experiences, coupled with the beliefs and desires of the common people, produced the phenomenon of minhag, ‘custom,’ as distinct from din, ‘law.’” These minhagim reflected

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157. Halakhah refers to the entire corpus of Jewish law.
160. Conversation with Samuel Flaks (July 12, 2011).
162. Id.
every conceivable level of content and outlook and were marked by considerable power and persistence. Even though much of the minhagim disappeared, mainly because they were out of touch with the times, between the Medieval and Modern Age, the importance of evolving custom and its influence on Jewish law has persisted:

The emergence of new practices and institutions embodying the operation of ethical principles under changing conditions was not an unbroken linear process. . . . [However,] the general direction was unmistakable. A new position once achieved was rarely abandoned; on the contrary, it proved the point of departure for another step forward toward the realization of the ideal.

Another example of the dynamic nature of Jewish law is seen in the recognition of prenuptial contracts. In this recognition, we see the dynamic nature of the Halakhah. Because of the rarity of divorce in ancient times the issue of providing support for an ex-wife was not one of urgency. In the case of divorce, tradition required the divorcing husband to provide a sum of money or a "get." As the incidents of divorce increased, and the injustice of divorcing husbands not providing a get, the prenuptial agreement providing for the wife in case of divorce came to be recognized as an enforceable obligation.

C. JEWISH COMMON LAW

Isaacs's major insight was to recognize that Jewish law is a dynamic, living law, responsive to moral and ethical concerns, much as he stressed the same attributes in American law. He argued that Jewish life "was developing the Halakah by applying it." An example was the development of the practice known as hazakah, which developed in response to the scarcity of housing due to anti-Semitism and, at times, the segregation of the Jewish population. In order to prohibit Jews from competing for the same rental units Rabbis, sometimes, but not always, with reference to the Talmud, recognized the tenant-right or hazakah. This tenant-right prohibited one Jew from attempting to rent a unit currently occupied by another Jew. The result was an early form of rent control. Isaacs's research on rent control in Jewish law was cited as precedent for the constitutionality of rent control in

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163. Id. at 106.
164. Id. at 121.
165. "[New] agreements, including the Agreement for Mutual Respect, have been built and developed on the foundations laid by the rabbis of Morocco in the 1950's." Rachel Levmore, Rabbinic Responses in Favor of Prenuptial Agreements, 42 TRADITION 29, 44 (2009). Such agreements have been approved "by various rabbinical authorities, including . . . the Supreme Rabbinical Court of Jerusalem." Id. at 42.
oral arguments before Judge Cardozo's New York Court of Appeals and the U.S. Supreme Court, where both courts upheld New York's groundbreaking rent control law.  

D. JEWISH LAW OF CONTRACTS

One scholar asserts "that many of our common law principles and many of the legal forms and customs which we find difficult to explain, trace their origin more or less directly to sources in the Written and Oral Law of the Jewish people." One example is found in the law of contracts. The evolution of form (formalities, such as offer-acceptance, seal, and the Statute of Frauds) and the doctrine of consideration are found in Jewish law: the "Jewish counterpart of the fixed form in Anglo-American law is Kinyan." "The delivery by A to B of the article of use creates an obligation [(Mahaeb)] in B to deliver the money to A. This is the identical concept of contracts which prevailed in England in Glanville's time."  

The creation of an executory obligation, or current promise for a future transfer or payment, is an example of the creativity and innovation of Jewish law. Multiple types of obligations (debt, barter, obtaining ownership by form) were combined to create the modern day law of contract "in the creation of the concept of Hiyub. This was accomplished by combining parts of the applicable and functional principles of the doctrines of Areb [(surety)], Uditha [debt], Kinyan [(form)] and Deikni [(lien)]." Jewish law also requires consideration to bind most contracts. However, unlike modern common law, Jewish law concerned itself with the adequacy of the consideration. Thus, if something was sold or bought for an amount higher or lower than one-sixth of its market value, then the agreement was void. Jewish law is similar to the common law on the rule that a detriment can be consideration and that past consideration could not bind a contract. The common law rule against penalties was predated by the Jewish principle of Asmakhta. "[It] is a rule which declares to be invalid an assurance made by one that he will pay or forfeit something in the event of his non-fulfillment of a certain condition, which, however, he is confident that he will carry out."  

The conceptualistic nature of rabbinic legal opinions in the area of contract allows for a comparative analysis with the common law of contracts. This comparison, not surprisingly, shows a great amount of similarity. In early Jewish law, as in the early common law, formality was of great importance. However, the key roles of intent or consent, alongside the

170. *Id.* at 10.  
171. *Id.* at 11.  
172. *Id.* at 13 (emphasis added).  
173. *Id.* at 19.  
174. MOSCOVITZ, *supra* note 151, at 27.
required formalities, are fully actualized from the early stages of Jewish legal development:

No matter how perfectly formalized a transaction may be, it will not be valid unless that form is supported by knowledge, intention, and consent—by Da’at. Conversely, Da’at without form cannot normally have any legal effect. 175

The act of a person who does not know what he is doing has no legal validity. 176

[In mercantile law, the rule is . . . [that] [a]ll formal acts of acquisition require the intention of the acquirer to acquire and the disposer to dispose . . . . An act without intention is worthless . . . . 177

The second major element of common law contracts is the requirement of consideration. The same concept is found in Jewish law as a requirement for a binding contract. However, today, consideration in the common law is viewed primarily as a formality. 178 In contrast, relative equality of the consideration is required in Talmudic law. Despite these seemingly different approaches to consideration, a broader view allows for an understanding of the difference. First, Ona’ah (inequality of consideration or inequity in the exchange) was an early regulatory device in Jewish law to police fraud and overreaching. Profiting from a transaction is assumed under Jewish law, but something that rises to the level of unconscionability would be invalidated. Viewed as such, the Ona’ah can be seen as an early version of unconscionability that was first found in common law equity and later adopted in American law through Section 2-302 of the UCC, and by analogy to the general law of contracts. Historically, the focus on the fairness of the exchange was a core concept in the common law as late as the nineteenth century. 179

175. ARNOLD COHEN, JEWISH CIVIL LAW 228 (Feldheim Publishers: Jerusalem 1991).
176. Id. at 229. Examples of this include Jewish law’s adoption of the three major areas of incapacity which are also found in the common law: (1) intoxication, but only extreme intoxication (a contract with “someone who is drunk would be valid unless he had reached the stage of Lot’s drunkenness,” (2) mental incapacity, and (3) infancy law doctrine (“Neither a madman nor a minor is deemed to know what he is doing and is therefore deprived of legal capacity . . . .”). Id. (citations omitted).
177. Id. at 233 (citations omitted).
179. See Gordley, supra note 54; see also LARRY A. DI MATTEO, EQUITABLE LAW OF CONTRACTS (2001) (tracing the equitable side of contract law from the twelfth century forward).
IV. STATUS AND CONTRACT

Patrick Atiyah made the case for the need for status-based protections in contract law. He lays the rationale on the tenuous nature of free choice. Those that are the beneficiaries of good fortune, such as intellect, wealth, and the best available education, are better equipped to take advantage of free contracting: "[T]he greater is the scope for the exercise of free choice, the stronger is the tendency for these original inequalities to perpetuate themselves by maintaining or even increasing economic inequalities." The Coase Theorem’s argument that such inequities do not prevent entitlements arriving in the hands of those who can maximize its value rings hollow in the face of reality. In reality, the disparity between the wealthy and the poor continues to grow at an alarming rate. The assumption of no or low transaction costs that allow entitlements to flow to the most efficient user bears little relationship to reality. In fact, the inequality of transactional costs also continues to grow between the haves and have not’s. Often times contracting parties do not play on a level playing field. Transactional costs asymmetries flow from the baseline inequities alluded to by Atiyah. Status-based protections will grow in importance as the protector of last resort against these growing inequities. This Part will examine in more detail the relationship between status and contract.

A. STATUS-BASED RELATIONSHIPS

A good example of the oscillation between status and contract is the employment contract. A look back at the last 500 years in Anglo-American law shows that the employment relationship has largely been recycling between the status and contract poles of Maine’s dichotomy. The 1562 English Statute of Laborers created a status-based relationship that provided protections to apprentices. It required advanced notice and a reasonable cause for a legal termination. A further protection provided by the Statute was the presumption that a hiring with no fixed term was an employment contract of one-year. In nineteenth century America, there was a paradigm shift that resulted in the recognition of the employment-at-will doctrine. The watershed event being the publication of Horace Wood’s 1887 treatise on the Law of Master and Servant, in which Wood states:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day

181. Ronald H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960) (assuming no transaction costs, the initial allocation of property is immaterial because the property will eventually end up in the hands of the most efficient user).
182. Statute of Labourers, 1562 5 Eliz. 1, c.4 (Eng.).
even, but only at the rate fixed for whatever time the party may serve. 184

The importance of Wood’s Treatise is reflected in the fact that there were only a handful of cases that recognized employment-at-will at the time. 185 The real source of Wood’s declaration was not found in the law, but was a response to the Industrial Revolution and its need for a flexible, fungible workforce. The rejection of the special status of employees was evident in the United States Supreme Court decisions in the early twentieth century, holding that even minimal employee protections were unconstitutional under the Constitution’s Contract Clause. 186 In the 1915 case of Coppage v. Kansas, the Court declared that “the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify.” 187 In that case, the Court upheld an employer right to prohibit its employees from joining a union as a condition of employment. Even though the Supreme Court’s position changed in the mid-1930s to allow workplace protections, such as maximum hour and child labor laws, the employment-at-will doctrine remained the default rule for the employment relationship.

Toward the end of the twentieth century, the pendulum began to swing back toward status-based protections. First, all of the American states adopted a public policy exception to at-will termination. This exception holds that an employer may not discharge an employee, without liability, if the discharge was due to an employee act that was in furtherance of a public policy. Thus, discharging an employee who is absent from work in order to serve on a jury would be illegal under the public policy exception. Broader

186. U.S. Const. art. I, § 10, cl. 1: “No State shall... pass any... Law impairing the Obligation of Contracts....” During the Lochner Era, 1897 to 1937, the Supreme Court used the Contract Clause to invalidate numerous state laws regulating the work place. The era is named after the case of Lochner v. New York, 198 U.S. 45 (1905), in which the Supreme Court held that a New York labor law that limited the work day in bakeries to ten hours was an unconstitutional violation of the freedom of contract embedded in the Contract Clause and applicable to the states under the Fourteenth Amendment (substantive) due process provision. This is seen as an example of legal formalism and the core belief in laissez-faire economics:

According to progressive scholars, American judges steeped in laissez-faire economic theory, who identified with the nation’s capitalist class and harbored contempt for any effort to redistribute wealth or otherwise meddle with the private marketplace, acted on their own economic and political biases to strike down legislation that threatened to burden corporations or disturb the existing economic hierarchy. In order to mask this fit of legally unjustified, intellectually dishonest judicial activism, the progressive interpretation runs, judges invented novel economic “rights”—most notably “substantive due process” and “liberty of contract”—that they engrained upon the Due Process Clause of the Fourteenth Amendment.

187. Coppage v. Kansas, 236 U.S. 1, 11 (1915) (upholding “yellow dog contracts,” which allowed employers to prohibit employees from joining unions).
exceptions—implied-in-fact contract and breach of the duty of good faith—began to be recognized in some states. Even though at the present these exceptions have not been uniformly adopted, their existence in some states potentially changes the at-will default to a just cause legal regime.

The implied-in-fact exception liberally construes employment-related materials (company policies, employee handbooks) and employer representations—even when the employer expressly states it is an at-will relationship—to find an implied-in-fact contract for just cause termination. The good faith exception is potentially the most expansive of the exceptions since it applies to all employment relationships. The basis of this exception is Section 205 of the Restatement (Second) of Contracts, which states: “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” Under this exception, the motivation for discharging the employee becomes tantamount in determining the legality of the discharge. Thus, in an otherwise at-will relationship, if an employer discharges an employee to prevent full vesting of the employee in the company’s pension plan, then that would constitute bad faith termination.

B. STANDARD FORM CONTRACTING

It was in Isaacs’s Standardizing of Contracts article that the term “standard” was first applied to contracts. He saw the rise of standard form contracting as challenging classical contract law’s unitary consent-based view of contract law. 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


189. It should be noted that the Restatement drew from the provisions of the UCC relating to the duty of good faith and fair dealing (citing UCC §§ 1-202(19) (meaning of good faith); 2-103(1)(b) (for merchants, good faith means “honesty in fact” and “observance of reasonable commercial standards of fair dealing”); 2-306(3) (duty of best efforts)).


191. Professor Snell 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, n.109 (1996) (citing Isaacs, The Standardizing of Contracts, supra note 32, at 47).

the refusal of an association."

Instead of simply creating fictitious models of consent to justify standard contracting as within the unitary theory, Isaacs saw the need for the development of specialized rules to regulate such contracts. The will theory's view of contract, as a pure exercise of freedom, did not fit the imposition of standard terms by the stronger contracting party on a take it or leave it basis.

Isaacs charged that because of a lack of true consent by the form-receiving party, especially when that party is a consumer, required a new categorization of those types of contracts with their own status-oriented set of contract rules (consumer contract law). He believed, like any principle or right, the exercise of such principles and rights could not be unfettered. There would always be a need for limitations, regulations, and exceptions. For Isaacs, the standard form contract was the line in the sand in need of a separate categorization, with applicable restrictions and regulatory limits on enforceability. Standard form contract terms represented a "practical check on the individuality of contracts, if not a theoretical limitation on the freedom of contract."

Despite the obvious diminishment of the quality of consent in standard form contracts, judges and scholars largely folded these types of contracts into the classical framework. Contract theory has failed to properly adjust by continuing to rationalize the enforcement of such contracts through the rubric of unitary contract principles of consent. Nonetheless, Isaacs's prophecy that status would make a major comeback in order to regulate such contracts was realized. Instead of adjusting contract law internally, except for the expansion of the doctrine of unconscionability in American law, the protections came from external sources through the enactment of consumer protection laws. It should be noted that Llewellyn was able to create status-oriented rules through the use of the merchant-consumer distinction and the adoption of the doctrine of unconscionability in the UCC.

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193. Weisbrod, Way We Live, supra note 89, at 807 (citation omitted).
194. In a section entitled, "Social Enfranchisement Through Status Law," Isaacs asserts that the law was moving from the era of laissez-faire toward status to provide protections to consumers and workers: "Yet, freedom in the positive sense of presence of opportunity is being served by social interference with contract." Isaacs, The Standardizing of Contracts, supra note 32, at 47.
195. Id. at 39.
196. Id. at 40.
197. Llewellyn at first wanted to have separate merchant rules in Article 32 of the UCC and the creation of specialized merchant courts. Both proposals were rejected, but he was able to incorporate the merchant-consumer distinction in some of the rules in Article 2. See Zipporah Batshaw Wiseman, The Limits of Vision: Karl Llewellyn and the Merchant Rules, 100 HARV. L. REV. 465 (1987) (analyzing Llewellyn's view of merchant rules as expressed in the early 1940s drafts of Article 2). Some of the merchant rules found in Article 2 provided additional protections to consumers, such as Section 2-207, but mostly the merchant rules, such as the written confirmation rule, were installed to facilitate commercial transaction. See R.B. Herrington & H.M. Durham, Merchant Provisions in the Uniform Commercial Code—Sales, 39 GEO. L.J. 130 (1950) ("distinction drawn between merchant and non-merchant or more broadly speaking between the skilled and unskilled").
Isaacs recognized that the concept of freedom was a multi-dimensional concept that included positive and negative freedom. Superior bargaining power can lead to a form of negative freedom where the weaker party’s manifestation of consent is really an exercise of negative freedom. The negative nature of the consent is a creature of the weaker party’s belief that there is a lack of an alternative. The one-sidedness created by the use of superior bargaining power dictates judicial or regulatory intervention to reorder relationships initially created by contract in order to protect the weaker party against overreaching. Again, cycle theory can be brought to bear to expunge the concept that contract law is purely private law. Instead, cycle theory shows that contract law cycles between its private autonomy (private law) and regulatory (public law) functions.

C. PROBLEM OF ANACHRONISTIC RULES

The cyclical progression of legal development is implied in Cotterrell’s “battle of ideologies.” Competing ideologies (such as freedom of contract versus justice in the exchange) seek to determine the rules and doctrines that reflect the given ideology. But, this is a perpetual battle in which winners and losers constantly change positions. Cotterrell notes that “[l]egal history shows the discovery, loss and rediscovery of specific ideas and techniques over time.” This implies circularity of legal techniques and styles of legal reasoning. Part of this is due to societal developments that at times suggest the utility of a given type of legal thought and doctrine. A simple notion of progression asserts that the law changes in response to changes in economic and social change. Cotterrell again notes that the interrelationship between society and law is not perfectly correlated. He states that “[i]t is extremely difficult to pick out clear lineal patterns of development of legal techniques so as to be able to relate them confidently and exactly to the existence or non-existence of particular forms of economic or social relationships... and kinds of transactions at specific moments in history.” Thus, different schools of thought or ideologies will always exist at a given time and to a certain degree.

V. FALSE DICHOTOMIES OF LEGAL REASONING

The voluminous literature espousing different unitary theories of contract law—such as promise, reliance, consent and efficiency—has only

199. Isaacs gave the example of the insurance contract in which overreaching by the insurance industry lead to government intervention. NATHAN ISAACS, THE LAW IN BUSINESS PROBLEMS 217 (The Macmillan Company rev. ed. 1934); see also Carol Weisbrod, War, Insurance and Some Problems of Community, 10 CONN. INS. L.J. 103, 111-13 (2003-2004).
200. COTTERRELL, LIVING LAW, supra note 31, at 170.
201. Id.
202. Id.
proven the nonsensical nature of such a quest.\textsuperscript{203} A cyclical theory of legal development recognizes that law has always and will always oscillate between different poles of a multi-dimensional matrix. This oscillation in contract law is due to the dynamic and complex nature of real world transactions. Contract law is dynamic and complex because of “the rich complexity of actual situations that involve full-dimensional people.”\textsuperscript{204} Thus, contract law’s theories and dichotomies possess explanatory power when taken as a whole. In the end, unitary theories fail to fully explain the is or ought of contract law. Dichotomies are inherently false due to the dynamic-complex range of contract transactions. The explanatory power of dichotomies, however, can be harnessed through the recognition that they form a continuum in which the law gravitates, over time, toward one pole or the other. This recognition is the essence of cycle theory.

A. DYNAMIC NATURE OF LAW

The richness of the law and oral traditions of Jewish law can be attributed to the nature of the Torah: “Because the laws of the Torah were enunciatory in nature and required a great deal of interpretation by the rabbis, a large body of oral interpretive teachings developed.”\textsuperscript{205} J. David Bleich rejects the abstract conceptualism of legal formalism and the idea of an absolute and static Jewish law: “Law is not metaphysics; nor is the Halakhah”\textsuperscript{206} The Jewish responsa, or Jewish common law, supports the premise that Jewish law is a dynamic, living law. The comparison of Jewish law and the common law is not a novel idea. The idea that both laws are dynamic in nature is commonsensical. Steven Nadel states that the “[c]omparison of the talmudic law’s regulation of the market place with that of the Anglo-American legal system can enhance our understanding of law as a dynamic system of thought.”\textsuperscript{207} One commentator, in reviewing \textit{Palsgraf v. Long Island R.R. Co.},\textsuperscript{208} traces the foreseeability standard needed to prove proximate cause in tort to Jewish law.\textsuperscript{209} He notes that throughout the commentary on the Talmud a person could not be held liable in negligence for an unforeseeable occurrence. The Talmud recognizes Gerama, which holds that a tortfeasor is not liable for remote, unforeseeable damages.\textsuperscript{210} Nadel states that this use of

\begin{footnotesize}
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  \item \textsuperscript{204} WILLIAM M. SULLIVAN ET AL., \textit{EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW} 6 (2007).
  \item \textsuperscript{205} Jurkowitz, supra note 158, at 473.
  \item \textsuperscript{206} J. David Bleich, \textit{The Metaphysics of Property Interests in Jewish Law}, 43 Tradition 49, 67 (2010).
  \item \textsuperscript{207} Schaefer, \textit{Differing Concepts}, supra note 178, at 80.
  \item \textsuperscript{208} Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928).
  \item \textsuperscript{209} Steven B. Nadel, Palsgraf Revisited: A Comparative Analysis of the Unforeseeable Damages Exception to Liability Under American and Jewish Tort Law, 5 Nat’l Jewish L. Rev. 145 (1990).
  \item \textsuperscript{210} Id. at 151.
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Gerama is an example of Jewish judicial courts “expanding the application of the Torah-based principles” to novel cases.211

Sociology of law and legal history have demonstrated that the dynamism of societal development requires a dynamic, albeit lagging, development in law. But, the changes in the law are not always knee-jerk responses to socio-economic change. For example, contract law is ever changing to meet the needs of changes in society, but it also helps guide real world transactions. The law not only responds to new categories of novel fact-situations, but it also helps anchor transactions with certainty and predictability. Roger Cotterrell notes, “if we are to treat seriously the hypothesis that law has an independent effectivity, the coercive power of the law must be treated primarily as the power of a political authority guaranteeing the law and, at the same time, directing and channeling its power through legal doctrine.”212 At the same time, it is clear to see in legal history, especially in the past two centuries, contract law responding and changing to real world developments, such as distance selling, form contracting, inequality of bargaining power, evolution of the leasing and licensing of products and intellectual property, Internet contracting, creation of franchising, and the liberalization of international trade.

B. COMPLEXITY OF CONTRACT LAW

The reason for the oscillation between status and contract and between the dominance of certain types of legal reasoning during different eras of legal development is that contract law is responsive to different values. The list of contract values includes private autonomy, certainty, fairness, and justice, among others. A more static, less dynamic, contract law would need to evaluate and reconcile these competing values into a normative composite. This is impossible due to the incommensurability of values. Patrick Glenn in comparing legal traditions notes that “[m]onistic theories are those which presuppose a single, ultimate value in the world against which all must be measured.”213 No single value, whether autonomy or fairness, can fully capture contract law. This ensures that even in freedom of contract and legal formalist eras, there remains a good measure of contract law whose primary normative base is fairness concerns and some level of contextualism within the legal-formalistic infrastructure. Glenn notes, however, that within a given legal tradition the incommensurability of values is contained within a socio-political framework. This framework allows the legal system to function despite the incommensurability problem. The possible outcomes of the competing values “would all nest within the range of permissible choices which western life offers to us.”214

The complexity of contract law can be simplified by viewing the norms that underlie its principles and rules as a tree with a number of sturdy branches. Or, in the alternative, the American notion of the “spoke and

211. Id. at 145.
213. Glenn, Incommensurable?, supra note 150, at 137.
214. Id. at 138.
"wheel" approach to commercial law in which common law contracts make up the core or center and the spokes represent different sets of specialized bodies of rules for specific transaction types; such as sales of goods, leasing of goods, licensing of goods, and so forth.\textsuperscript{215} This approach to revising Article 2 of the UCC was rejected, but its general theme remains—that the complexity of contract law requires categorization and attendant specialized rules. The tree analogy would have the trunk of contract law being the core norms of freedom of contract, certainty, and predictability. These norms attach to all forms of contract. Ancillary norms such as fairness, justice, trust, expediency, and security, apply to varying degrees depending on the transaction or contract-types, such as promissory notes, consumer sales, letters of credit, licensing of intellectual property, and so forth.

A close look at different areas of contract law shows different ancillary principles at work besides the core norms. In sales law, an expediency principle underlies most of the law. The focus is not so much on performance or breach; the focus is on quick contracting and delivery of goods. The rules focus not so much on the parties, but on the goods themselves. More specifically, sales law’s ancillary goal, beyond facilitating private autonomy, is the prevention of waste and the quick acquisition of substituted goods if needed. This is why we see the perfect tender rule in the American UCC and the fundamental breach rule in the CISG. Perfect tender allows for an expedient rejection of goods by the buyer. Due to market fungibility and an efficient domestic transport system, the buyer can quickly cover and the seller can quickly find a secondary buyer to transship the goods. In this way, the buyer’s harm is partially mitigated, the cost to the seller is diminished, and the value of the defective goods is not lost. The CISG, with its pro-seller rule, accomplishes the same objective due to the different context of the international sale of goods transaction. Market fungibility and the low costs of transshipment are greatly diminished. The party that is best positioned to minimize the waste and harm caused by the delivery of defective goods is the buyer. Thus, the fundamental breach rule places the onus on the buyer to use or resell the defective goods. Both sales laws minimize waste by placing duties on the buyer to protect and preserve the defective goods.

In the area of government contracts, the ancillary principles of transparency and opportunity of access are what makes this body of law different than the general common law of contracts. With the common law of contracts as a backdrop, government bid regulations aim to provide access to government procurement contracts to a broader range of private contractors. The principle of transparency allows for greater access to procurement information for interested parties. Secondly, at the same time, government contract law’s intended goal is to increase the opportunity of access to smaller and medium-sized firms. This goal is rationalized under the

\textsuperscript{215} See Marion W. Benfield, Jr. & Peter A. Alces, Reinventing the Wheel, 35 WM. & MARY L. REV. 1405 (1994) (explaining the hub and spoke concept of contract law or commercial law as a hub of general principles that apply to all contracts and spokes of specialized rules for specific types of contracts or contract types).
principle of equality. Sometimes this goal is made explicit with policies that
give minority group companies preferential treatment. Other times, the goal
of equality is implicit in the bidding process, such as when larger
procurements are broken into numerous, smaller invitations to bid, to allow
smaller and minority-owned firms the opportunity to bid.

In the area of letters of credit, bank guarantees, suretyship, and
performance bonds, the core certainty principle is the dominant contract
norm. There is no ancillary principle per se, but there is the presence of
ancillary parties. The assurance of payment or performance is external to the
primary contract. In a sense, the uncertainty of payment or performance by
a contracting party is resolved through the enlistment of a trusted third party.
Because of this external source of certainty, a principle of integrity underlies
the transaction. This principle relates to the integrity of the guaranteeing
institution in honoring its obligations and the integrity of the contracting
party, which is signaled by its ability to obtain such a guarantee.

In the area of employment law and the limited liability company, the core
principle of freedom of contract is almost uncontested. However, agency,
fiduciary, and good faith principles place a check on that freedom. The
American employment-at-will model holds that, outside of a written
employment contract or a collective bargaining agreement, an employer may
discharge an employee without notice for any or no reason. Even in this
bastion of American liberalism, ancillary principles have begun to impact the
law. As noted above, some states have carved out exceptions to the at-will
rule. The implied-in-fact exception holds that, even though an employment
relationship begins at-will, the employee may obtain just cause termination
rights. The case of a loyal, long-term worker with firm specific skills is one
where the principles of loyalty and heightened duties seem more
pronounced. A second exception—implied-in-law or good faith exception—
protects at-will employees from bad faith termination. The rationale here is
quite simple—the duty of good faith is or should be implied in all contracts.
This is an example where the UCC has transformed the general law of
contracts by analogical applications. The duty of good faith and fair dealing
found in the UCC is now implied in non-UCC cases including: termination
of franchises, employment, mortgage loan and foreclosures, landlord-tenant
contracts, and so forth.

A long-term or relational contract’s primary norm is the preservation of
the contract and the contractual relationship.216 Given the sunk costs and
specialization of goods or services linked to such contracts, the need for
flexibility becomes paramount in obtaining a return on investment, and the
harm caused by the premature ending of a contract by a technical breach
enforced by the terminating party. Additionally, in most such contracts, due
to their long-term and often personal nature, the formal, written contract will
fade or get lost in the context of the relationship. Within this relational-

216. See IAN R. MACNEIL, THE NEW SOCIAL CONTRACT (1980); Ian R. Macneil, Contracts:
Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract
Law, 72 NW U. L. REV. 854 (1978); Ian R. Macneil, The Many Futures of Contracts, 47 S. CAL. L.
preserving context the ancillary principles of good faith, trust, and loyalty play important secondary influences on how the law is applied.

It is the complexity of contracts that lays the basis for a number of widely discussed dichotomies that will be discussed in the next Section. Due to the variety of transaction-types, there is no general, overarching structure or meaning. It would seem that such complexity would argue for a contextual-interpretive methodology. Contextual evidence is needed to appropriate meaning from the matrix of particular parties, particular industries, and particular transaction-types. Others have offered a diametrically opposed proposition: due to contract law’s complexity, legal formalism is the means to bring order to the chaos by processing such complexity through a unitary premise that contracts are consent-based. Under such an approach, the parties have the responsibility to negotiate out of formalism, which involves the recognition of standardized terms and the formal application of contract rules. The next Section reviews some of contract law’s theoretical dichotomies—formalism-realism, textualism-contextualism, and standards-rules.

C. DEBATES AND DICHOTOMIES

Numerous dichotomies have been used to characterize law and legal reasoning. These dichotomies include the appropriateness of rules versus standards and the relative qualities of legal formalism versus contextualism. In the end, cycle theory shows that these are pseudo-dichotomies. It provides an explanation that scholars have always known, that the eras of legal development all incorporated relative amounts of both ends of the dichotomies. During the high-water mark of laissez-faire economics of nineteenth century America, there, was an extraordinary amount of state and local government regulation of private transactions. The move from legal formalism, beginning in the 1920s to the present, to a more realistic, contextual jurisprudence, was far from a total success. Formality remains, and should remain, a part of our contract law system. On the other hand, contract law is not a formalistic machine whose formal rules provide single right answers. But, formal rules do provide a certain level of certainty and predictability.

1. Formalism-Realism

The debate between formalism and realism is actually two debates. At the risk of confusion, this Article deals with these separately. The first debate

217. See Chamy, Hypothetical Bargains, supra note 20, at 1849.

218. WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (arguing that the characterization of nineteenth-century America is a myth; showing the existence of the pervasive use of government regulation; documenting nineteenth century ordinances, statutes, and common law restrictions that regulated every aspect of the marketplace).

219. See Fuller, Consideration and Form, supra note 56 (arguing that formalities, such as the Statute of Frauds and, in Lon Fuller’s view, the consideration requirement, serve to caution contracting parties that they were incurring binding obligations; in areas such as negotiable instruments, formalities provide the trust and security required for that area of law).
is whether it is possible to have a closed, internally logical system that provides answers to all cases through deduction from law to case (formalism). Realism represents a number of tenets in legal thought. First, rule skepticism holds that rules really don’t decide cases; other factors decide cases, such as a judge’s predisposition and the operative facts of the case. Second, because rules cannot resolve hard cases, contract law is largely indeterminate. This skeptical view argues that a judge usually reaches a decision first and then looks to the law to rationalize the decision. In sum, the meaning of formalism here is the formalistic application of rules, and realism, its radical tenets aside, is the recognition that other elements influence the judicial decision whether economic, policy considerations, or the creative nature of a given judge in crafting new law.

The second debate, reviewed in the next section, involves the methods of interpreting contracts and contract law. The question here is what sources of evidence are permitted in the interpretation of a contract and the application of contract rules to that contract? Formalists hold to classical contract law’s premise that places the written contract intended as a final integration of the parties’ agreement, as the only relevant source of evidence. The exceptions are cases of contractual incompleteness and contractual ambiguity. If there is a gap in the contract, then the court may apply a default rule. In the case of ambiguity, extrinsic evidence is used to determine the most plausible meaning—party intent or trade usage. Contextualists argue that meaning can never be completely found within the four-corners of the written contract. The premise here is that words may mean different things in different contexts. Therefore, the written contract is just one piece of probative evidence, along with evidence extrinsic to the formal contract. In the next section I refer to the second aspect of formalism as textualism, and will more fully explore its counterpoise of contextualism.

Hanoch Dagan provides a succinct description of the formalist-realistic divide: “Formalists . . . describe ‘the standard judicial function as the impartial application of determinate existing rules of law in the settlement of disputes.’” While realists “reject the idea that law is or can be ‘a self-regulating system of concepts and rules, a machine that, in run-of-the-mill cases, simply runs itself.’” The realists reject the thesis that law can be made determinate by simply equating law with doctrine. Instead they see law “as ‘a going institution,’ and thus focus their attention on the dynamics of legal evolution, notably adjudication.”

220. See Justice Traynor’s analysis in the Pacific Gas case, infra notes 235–36 and accompanying text.


224. Dagan, Rationality, supra note 221, at 196.
A more interesting issue is whether parties can contract into formalism by setting the rules of interpretation in their contract. Professors Schwartz and Scott have answered the question in the affirmative, at least, when it comes to business-to-business transactions. They argue that businesspersons primarily want certainty and that certainty requires the use of formalism in the interpretation of such contracts. They posit that firm-to-firm contracting is “conditioned on few states of the world, and maximizes joint gains in a wide variety of contexts.” They argue the power of contextual evidence to uncover meaning is unnecessary in business contracts since the bargaining parties are willing to trade off a rare misinterpretation for the certainty of formalistic interpretation. There is no evidence that suggests that business contracts should be treated as a separate species in need of different rules of interpretation. First, not all businesspersons are as sophisticated or possess equality of bargaining power that the Schwartz-Scott thesis assumes. Second, their model assumes, wrongfully I suggest, that business contracts and their meaning are immune from contextual influences. Another commentator rightfully suggests, even if business parties intend to adopt a formalistic interpretation, that it would still “take a contextual . . . approach to determining whether formalist principles apply.”

The better theory to explain the relationships between businesspersons is relational contract theory, which is contextual in nature. Another commentator, instead of using relational contract theory to critique formalism, argues in the alternative that many business transactions are short-term in nature and that the argument for formalism in interpretation of those contracts is most inappropriate:

This is because the usual arguments for formalist interpretation struggle to explain why formalism complements parties’ choice . . . . In their traditional formulations, the standard arguments for formalism—that formalism creates incentives for parties to draft clearer agreements (standardization theory) and that formalism allows informal governance to flourish (self-enforcement theory)—appear insufficient. Standardization theory fails because the endemic uncertainty that attends innovative activity precludes parties from creating standardized contractual terms that a court can readily recognize. Traditional self-enforcement theory fails because . . . . interfirm collaborations are often neither lengthy nor repeated . . . .

226. Id. at 618.
It is in the fact patterns of real world cases—whether in Jewish responsa or in the common law, in which the limits of formalism are exposed. Plausible arguments can be made that a strictly formalist argument is unsound in both discrete and long-term business contracts. There is no empirical evidence to support the Schwartz-Scott’s assumption that businesspersons prefer formalistic interpretation of their contracts instead of interpretations based on their true intentions through the use of contextual evidence.

2. Textualism-Contextualism

The first dimension of formalism discussed above relates to the formalistic (purely deductive) application of existing law under the premise that existing doctrine provides answers to all issues brought before the courts. Furthermore, the application process is a mechanical one that leaves little room for judicial discretion. In contrast legal realism asserts that material external to the law—novel fact patterns, public policy considerations, distributive justice concerns—also have a strong impact on judicial decision-making. These materials are used in the application of legal rules through the process of induction. This section analyzes the impact of these views on the process of interpretation of contracts.

At the core of the debate between the textual (literal) and contextual interpretive methodologies, is the recognition of evidentiary rules. Formalism’s mechanical-deductive model suggests that the interpretation process should be limited to the written contract. The parol evidence rule bars the introduction of extrinsic evidence that contradicts the written form, but allows extrinsic evidence in cases of gaps and ambiguity. Contextualism recognizes that only through the admission of extrinsic evidence can the true intentions of the contracting parties be uncovered. The formal-literal interpretive approach that characterized American law in the late nineteenth and early twentieth centuries also appeared in eras of Jewish law: “Rabbinic explanations of legal rulings . . . are frequently formalistic and conceptualistic in nature. Such explanations often focus on the formal legal status of particular actions or objects . . . rather than on the assumed goals of the law (e.g., promoting equity).” At other times, Jewish law continues to absorb external customary practices. These intermittent eras of formalism and equity in Jewish law are what inspired Isaacs’s fabrication of cycle theory.

Cycle theory explains the swing between textualism versus contextualism over time with the contract pole aligning with formalism and status related to contextualism, which allows for the characteristics of the parties to be considered in the interpretation and enforcement of contracts. That said, these general doctrinal trends are partially created not only by societal forces, but also in the competing styles of legal reasoning or techniques of legal interpretation.

230. MOSCOVITZ, supra note 151, at 27.
According to contextualists, the court itself, using informal business norms as a guide, should proactively fill the agreement's gap on behalf of the parties. On the other hand, modern formalists argue that a court asked to enforce an incomplete contract should follow a minimalist understanding of its role and refuse to extrapolate the contract's indefinite language to reach the unforeseen situation. Such an approach addresses incompleteness by creating incentives for parties to draft clearer agreements and/or because informal governance will compensate for the courts' minimized role.231

As noted previously, cycle theory falsifies contract law's dichotomies in that at all times contract interpretation is a blend of formalist and contextualist approaches. Alternatively stated, there are different shades of contextualism, just as there are less strict forms of formalism. In order to flesh out what contextualism means in the actual interpretation of cases, I will review three iconic cases—two American cases and one English case—that demonstrate the implications of contextualism. The cases are in chronological order Pacific Gas v. G.W. Thomas Drayage Co. (Pacific Gas),232 Nanakuli Paving & Rock Co. v. Shell Oil Co. (Nanakuli),233 and Investors Compensation Scheme (ICS) Ltd. v. West Bromwich Building Society (ICS v. Bromwich).234 All three cases illustrate the late twentieth century's trend towards contextual interpretation of contracts.

In Pacific Gas, California Supreme Court Chief Justice Richard Traynor rejected a plain meaning approach dictated by legal formalism. The relevant clause in the case was an indemnity clause in which one party agreed to indemnify the other for "all" damages to property "arising out or in any way connected" to the performance of the contract. The indemnifying party argued that the words "all" and "any way" related only to damages to property of third parties. A plain meaning approach would hold that "any" meant "any" and that "any way" meant damages caused to anyone's property. The lower court held that since the indemnity clause had a plain meaning it could not admit any extrinsic evidence that would contradict its interpretation.

Traynor famously rejected the lower court's argument by asserting that such a rule "would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained."235 Traynor's assertion pretends that the plain meaning rule was a novel creation by the lower court judge instead of a longstanding common law rule. Knowing this, Traynor acknowledges the parol evidence
rule, which prohibits the use of extrinsic evidence to contradict a written, integrated contract. He then empties the rule of its prohibitory authority by stating: “Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose.”

In essence, it is rarely the case where a word or phrase has a plain meaning. Therefore, even when the language is seemingly clear, extrinsic evidence should be considered to determine whether the language is susceptible to an alternative interpretation to the plain meaning interpretation.

The Nanakuli case demonstrates how far contextualism can reach. In that case, the court surmises that: “courts should not stand in the way of new commercial practices and usages by insisting on maintaining the narrow and inflexible old rules of interpretation.” Unlike Pacific Gas, where there was at least a plausible argument for ambiguity, the issue in Nanakuli is a step into the abyss of linguistic nihilism. The case involved a long-term supply contract for the supply of asphalt paving materials. The contract expressly provided the supplier could unilaterally change the price without notice. The clause stated that the price shall be the supplier’s “posted price at [the time of] delivery.” Despite the clarity of the meaning, admitted to by the court, the court allowed the jury to consider extrinsic evidence. However, instead of overtly doing away with the ordering of evidence (parol evidence rule) as Justice Traynor did, the court went on a quixotic journey to work within the formal rules of contract interpretation. The extrinsic evidence of note was general business customs to price protect buyers in long-term supply contracts. Price protection would require some advance notice or maintaining the price for jobs already contracted or bid on by the buyer using the price at the time of contracting. However, the court did not instruct the jury that the custom could trump the clear language of the contract but, instead allowed it to construe the custom or trade usage as being consistent with the contradictory plain meaning of the express term!

Finally, the House of Lords, more recently, made the case for contextualism in ICS v. Bromwich. The comparison of the majority and dissenting opinions provides a stark example of formalistic and contextual methods of interpretation. The dissent provides the case for a legal formalistic interpretation. The interpretive issue in the case was the meaning of a reservation of rights phrase in an assignment clause. The reservation stated that the assigning party reserved “any claim (whether sounding in rescission for undue influence or otherwise).” Lord Lloyd makes the distinction between language that is “tolerably clear” and language that is a product of poor drafting. In the event that the language is tolerably clear the problem of poor drafting is not the subject for which a court is to use extrinsic evidence to uncover the parties’ true intent. He rejects the importance of the

236. Id. at 645.
237. Nanakuli, 664 F.2d at 790 (emphasis added).
238. Id.
239. Investors Compensation Scheme, 1 WLR 896.
240. Id.
oddity of specifying undue influence and not the other common grounds for rescission. Lord Lloyd acknowledges the use of purposive interpretation methodology, but rejects its use here since the plain meaning of the clause can be ascertained. He disregards the phrase, "or otherwise," and asserts that the placement of the phrase in question in parentheses can only be construed as a narrowing of the external phrase, "any claim."\textsuperscript{241}

Lord Hoffman, writing for the majority, works within the same rules of interpretation advanced by Lord Lloyd and, at the same time, breaks out of the structure of the formal rules of interpretation. First, he argues that Lord Lloyd’s interpretation of the parentheses is a misreading. The key phrase is "any claim," while the parenthetical phrase serves only an illustrative purpose and is not a limitation of the types of claims permitted under the reservation of rights. Second, assuming that Lord Lloyd’s interpretation is a reasonable one does not mean that there are no other reasonable interpretations that would be uncovered through a closer contextual analysis. In contrast, Lord Hoffman provocatively states that: "The meaning which a document... would convey to a reasonable man is not the same thing as the meaning of its words."\textsuperscript{242} This is a clear rejection of legal formalism and the

\textsuperscript{241} Id.

\textsuperscript{242} Lord Hoffman sketches five principles of contract interpretation:

1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

2. The background [has been] ... referred ... as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

3. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. ...

4. The meaning which a document ... would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even ... to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

5. The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention, which they plainly could not have had.

Id. (citations omitted).
interpretive rules of classical contract law—four-corner analysis, plain meaning rule, and a hard parol evidence rule.

Lord Hoffman’s conviction that reasonable meaning is or should not be the determinate of actual meaning, although Hoffman's approach is not a complete rejection of the objective theory of contract, it is a partial rejection of the reasonable person analysis when it is confined to the words of the text. The fact that a plain meaning interpretation is possible is important probative evidence, but should not shunt the judicial inquiry of whether there is an alternative reasonable meaning through the consideration of the contextual evidence. The alternative objective meaning places inter-subjective meaning in the trump position over the plain meaning interpretation since it shows that the other party knew or should have been aware of the first party’s alternative meaning or intent. Meaning is an inter-subjective enterprise. An example of this model or ordering of intent is found in Article 8 of the United Nations Convention on Contracts for the International Sale of Goods (CISG). It states that the first order rule is the subjective meeting of one party “where the other party knew or could not have been unaware” of what that party’s “intent was.” This assessment cannot be determined without an analysis of all relevant contextual evidence. The second order rule is the reasonable person or objective theory of interpretation. If the search of the evidence fails to uncover the inter-subjective meaning, then the meaning attributed by the reasonable person prevails.

Lord Hoffman’s rejection of plain meaning interpretation, and embrace of inter-subjectivism, is made clear when he quotes Lord Diplock in Antaios Compania Naviera SA v. Salen Rederierna AB: that “if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.” In essence, even in cases of ambiguity, the meaning given by a reasonable person ought not to automatically prevail. This does not seem at all controversial since formalism allows for the use of extrinsic evidence in cases of ambiguity. However, Lord Hoffman goes on to say that a reasonable person determination (plain meaning plus extrinsic evidence) should not necessarily prevail when the extrinsic evidence fails to remove the ambiguity. In fact, the court is required to choose “between competing unnatural meanings” when the evidence shows that the parties did not intend to use the words in an ordinary manner.

Justice Traynor and Lord Hoffman’s rejection of literalism were not some Cardozo-like leap of faith. Instead, they were openly recognizing what had previously been a covert operation. The ambiguity determination is a

243. CISG, supra note 112, at 3.
244. Contextualism is fully embraced in CISG Article 8 (3): “due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.” This rejection of interpretive formalism is re-enforced in Article 11’s provision that a contract “may be proved by any means, including witnesses.” Id. at 4.
245. Id. at 3.
247. Id. at 201.
decision of law and, as was seen in *Nanakuli*, where even the clearest of language can be dubbed an ambiguity when the true meaning is likely to be found in the arena of contextual evidence. In the end, contextualism in some degree has been a part of contract interpretation from the very beginning. Without it, laws dynamic nature would be greatly diminished and the divergence of law and commercial practice would soon render contract rules obsolete.\(^\text{248}\) It is the recognition of context—from large socio-economic change to the creation of new transaction types—that law progresses.

As noted earlier, both sides of contract law’s dichotomies, as discussed in the scholarly literature, appear throughout the recent history of the common law in some degree. Such balancing or blending that a continuum approach represents is demonstrated by the notion of “relational formalism.” Relational contract theory sees many business contracts embedded in a relational framework, which requires the recognition of other than the purely freedom of contract norms of certainty and predictability and include trust, loyalty, solidarity, and the duty to renegotiate.\(^\text{249}\) This expansion of contract norms suggests that, even in long-term contracts, formalism continues to play a role, but that the relational context is important in determining the nature and intended meanings of the parties to such contracts. Formalism suggests that parties, especially business parties, should have the onus to craft contracts that can be applied strictly under legal formalism. Relational formalism suggests that, even in highly formalized contracts, such as financial instruments, context still plays an important role. It holds that strict formalism may have a pragmatic use in some types of contracts, but it can never be completely detached from the context of relationships.\(^\text{250}\)

3. Rules-Standards Debate

Cycle theory lends insight to the rules-standards debate.\(^\text{251}\) The debate discusses the differences between rules and standards, as well as what each

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\(^{248}\) Max Radin noted that in 1920 the California sales law was still based upon a 1848 codification (Field Code) and was hopelessly out of touch with commercial reality: “Now 1848 is a long time ago, and in industrial and commercial communities the needs of business [persons] have demanded a very thorough revision of the common law of sales—a law, which we may remember, grew up in an atmosphere of fairs and markets, quite uncomplicated by the elaborate machinery of modern credit and finance.” Max Radin, *The Law of Sales in California and the Uniform Sales Act*, 9 CALIF. L. REV. 27, 27 (1920).

\(^{249}\) See Jonathan Yovel, *Relational Formalism and the Construction of Financial Instruments*, 48 AM. BUS. L.J. 371 (2011). Yovel explains the concept of relational formalism as follows:

[A]lthough maintaining the precedence of formalist construction over functional analysis and policy considerations—does so while responding to practical concerns and interests entailed by the relations between the relevant parties and, in particular, reliance relations. Legal formalism thus needs not be a manifestation of positivistic commitments, but can be justified in some areas on relational and functional grounds.

is best suited. Should standards remain the key component of tort law? Are rules best utilized in areas such as contract law and government regulation? Cycle theory suggests that areas of law cycle between rules-based and standards-based legal regimes. Of course, most areas of law possess both standards and rules. However, over time, standards through application to various categories of cases are recast into rules-based regimes. At times, a chaotic rules-based jurisprudence leads to a more simplified regime with the adoption of standards to compliment the codification of new rules. One commentator provides an example relating to the statute of limitations. At the turn of the twentieth century, the standard of laches provided an equity-based approach that granted courts discretion in determining whether a cause of action had become stale. Laches was marginalized as States adopted fixed periods to bring timely claims under limitation statutes. As in all fixed-rule systems, the bright line periods caused injustices in certain categories of cases. The courts and legislatures responded by extending limitation periods through the principle of tolling. However, tolling resulted in the extension of limitation periods well past a reasonable time. This resulted in the passage of statutes of repose to fix the length of time that tolling can extend the right to sue.

The defining characteristic of a rule is that it can be applied by making a simple factual determination. However, Russell Korobkin notes that a hard and fast rule can lose its clarity by its hardness being diluted through the recognition of exceptions and ultimately lead to the adoption of a standard to remove the jurisprudential chaos of rules, exceptions to rules, and exceptions to exceptions. In time, in order to prevent injustice in certain categories of cases, exceptions are crafted onto standards. As the number of exceptions increase, the original standard is contorted into a series of precise rules. The process continues as rules become more standard-like through the creation of exceptions. This cyclical process of rules-standards-rules is explained by cycle theory. When standards become too obtuse, courts see the need for more formalism and break the standard into fixed rules. When rules lag behind societal developments and become anachronistic, courts look to the development of a flexible standard in order to better cohere the law with real world practice.

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254. See Huhn, Stages of Legal Reasoning, supra note 93, at 380:
   [A]s rules evolve into standards, and as standards evolve into rules, a critical stage in the process is judicial experience in applying the law. For standards to become rules, the courts must draw formalist analogies between cases interpreting the standards, and for rules to become standards, the courts must draw realist analogies among the cases interpreting the rules. This pattern in the evolution of rules and standards supports the concept that formalism, analogy and realism are the stages of legal reasoning, and that analogy serves as the bridge between formalism and realism.
Another discernible characterization of the cyclical nature of common law reasoning is the role of equity within contract law. Judicial discretion is expanded during eras of equity. Isaacs asserted that during periods of growth by equity, there is a great deal of discretion by judges. Equity is almost entirely made up of standards and principles, such as estoppel, waiver, unclean hands, and so forth. From his perspective, this was a good thing. In the end, Isaacs was a true believer in judge-made common law and in the common law process.

4. Facilitation-Regulation

Contract law serves two functions—the facilitation of private ordering and the regulation of the abuses of private ordering. The long-standing debates (freedom-fairness, formalism-realism, textualism-contextualism, standards-rules) are a result of contract theories that favor one or the other of contract law’s functions. It is imperative to keep in mind that both functions are present in all eras of contract law development. An example, as previously noted, is the characterization of the late-nineteenth century as an era of pure freedom of contract, legal formalism, and laissez-faire economics. In fact, private transactions were heavily regulated and government intervention in the marketplace was widespread.

Different eras, at least on the surface, call for less or more regulation of private ordering. The facilitation function focuses on freedom of contract’s role in fostering private initiative; the regulatory function focuses on the need to provide status-based restrictions to prevent the abuse of freedom of contract. This is almost always the case following financial and economic crises. But, this variation in degrees of regulation is both external and internal to contract law. Government regulation aims at correcting market failures. Internally, contract law, through equitable principles and policing doctrines, intercedes at the case level to correct abuse—at least when found in categories of similarly-situated cases or fact patterns.

The pseudo-duel between pro-freedom and pro-regulation advocates is replicated in legal scholarship, such as the shifting questions of law (clear meaning) to questions of fact (ambiguity) in contract interpretation, as

255. See Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 New Eng. L. Rev. 265 (1999) (asserting that equitable values still play an important role in modern contract law); see also Roscoe Pound, *Introduction to the Philosophy of Law* (2d ed. 1959). Pound states: “The bigness of things in the economy today, which precludes the equality of the parties that the regime of free contract supposed and throws upon the service state to ensure the fulfillment of reasonable expectations which are increasingly beyond reach of the ordinary [person].” Id. at 163. And, Grant Gilmore asserts that: “Judges want to decide the cases which come before them sensibly, wisely, even justly. Sense, wisdom, and justice are community values, which change as the community changes. Gilmore, Ages, supra note 5, at 17.


257. Another scholar summarized the overall philosophy of legal development that Isaacs saw in Jewish law: “[Judaism] contains a body of ethical teaching that reckons realistically with the limitations of human nature without losing faith in its potential.” GORDIS, DYNAMICS OF JUDAISM, supra note 159, at 6.

258. NOVAK, supra note 218.
discussed in the previous section. The pseudo-debate references the fact that contract law—whether in a perceived formalistic or realistic phase—is always a blend of its two functions.\(^{259}\) Contract law scholarship, from the doctrinal level, to the heights of theoretical modeling for which American academe is infamous, is as cyclical in nature as the law itself. Current contract scholarship is built upon the works of Lord Mansfield, Fredrick Pollock, Samuel Williston, Karl Llewellyn, Benjamin Cardozo, E. Allan Farnsworth, Richard Posner, Ian Macneil, Patrick Atiyah, among many others. At times, however, especially at the level of high theory and abstraction, legal scholarship has become more like a spinning top on the heads of these giants. Recent comments by justices of the United States Supreme Court have been critical of the modern law reviews’ penchant for high theory.\(^{260}\)

An example of this exercise in high theory, evidenced by the cyclical nature of academic debates, is the academic banter between formalists (classical formalism), anti-formalists (realism), and more recently, the anti-anti-formalists (neo-formalism). Legal formalism characterized the era of the late-nineteenth and early-twentieth centuries.\(^{261}\) It was attacked by the Legal Realists of the 1920s and 1930s, who correctly and successfully argued that other considerations, such as public policy, equity, and bias, played important roles in judicial decisions other than the mere formalistic application of rules. In contract law this turn in legal reasoning was evidenced in the shift from formalistic to contextual approaches to contract interpretation. This realism about the law has held sway ever since, and remains the mainstream view, but the advent of the law and economics movement saw some scholars support a return to formalism in the interpretation of contracts. This body of work, known as neo-formalism or anti-anti-formalism,\(^{262}\) shows the cyclical nature of legal scholarship, which may or may not track changes in law or society. The problem is that much of such scholarship is mere academic gamesmanship and elitism, lacking anything new or any relevancy to legal practice.

\(^{259}\) Dennis Patterson, The Pseudo-Debate over Default Rules in Contract Law, 3 S. CAL. INTERDISC. L.J. 235 (1993). Patterson notes that a court simply looks at contextual evidence and weaves a conclusion of implied intent by examining the essence of the contract within the context of the contracting. Id. at 243.

\(^{260}\) Justice Breyer has commented: "there is evidence that law review articles have left terra firma to soar into outer space." Stephen G. Breyer, Response of Justice Stephen G. Breyer, 64 N.Y.U. ANN. SURV. AM. L. 33, 33 (2008); John Roberts C.J., A Conversation with Chief Justice Roberts, Annual Fourth Circuit Court of Appeals Conference, C-SPAN (June 25, 2011), https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts; Adam Liptak, Keep the Briefs Brief Literary Justices Advise, N.Y. TIMES (May 20, 2011), http://www.nytimes.com/2011/05/21/us/politics/2Icourt.html (Chief Justice Roberts states that "[w]hat the academy is doing, as far as I can tell is largely of no use or interest to people who actually practice law.").

\(^{261}\) C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871); see also Thomas C. Grey, Langdell’s Orthodoxy, 45 U. PITT. L. REV. 1 (1983).

In this story of legal scholarship, instead of legal formalism being a target of critique, realism and contextualism are the initial straw men. The neo-formalists seek to discredit the Llewellynian-Mansfieldian view that a contract between merchants includes the background of business custom, trade usage, and prior dealings. This attack is premised on the assumption that businesspersons neither need nor want their contracts to be interpreted using contextual evidence to determine the true meaning of their contracts. As discussed previously, such an argument has no anchor in real world contract disputes and to expect courts to ignore all extrinsic or contractual evidence no matter how probative is fantastical!

D. PRINCIPLES-BASED EVOLUTION

Isaacs observed that John Dewey’s definition of logic included “any of the methods actually used to reach conclusions, whether they have been careless or extremely careful, whether they involve demonstration or only approximation of the truth sought.” 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. Despite the seeming incoherency of melding natural law principles with changing legal rules, Isaacs believed that a successful mediation between the conflicting elements of general principles and changing content was possible. Isaacs looked to the pragmatic philosophy of Dewey to support the compatibility of fixed principles and changing rules. Put simply, different tasks require different types of logic. Depending on the immediate task, one kind of logic may depend heavily on intuition, while others may require more mathematical rigor. For Isaacs, there was no one ideal form of logic. He believed that this type of pragmatic, flexible reasoning had deep roots in the common law.

263. Both Lord Mansfield and Karl Llewellyn believed that commercial law was merchant-created law that was recognized in law. In this way law is constantly updated to respond to real world developments. This grassroots view of the law requires the flow of contextual evidence into the courtroom. Lord Mansfield made a great effort to bring English merchant law up to the same standards as that of other European nations, defining his position by saying that “the daily negotiations and property of merchants ought not to depend on subtleties and niceties, but upon rules easily learned and easily retained because they are dictates of common sense drawn from the truth of the case.” EDMUND HEWARD, LORD MANSFIELD: A BIOGRAPHY OF WILLIAM MURRAY 1ST EARL OF MANSFIELD 1705–1793, at 101 (1979). Karl Llewellyn incorporated the contextual approach of interpretation into the U.C.C. See U.C.C §§ 1-201 (good faith obligation), 1-205 (course of dealing and usage of trade), 2-202 (final written expression: parol or extrinsic evidence), and 2-208 (course of performance or practical construction).


267. Isaacs, How Lawyers Think, supra notes 264, at 556.

268. Id. at 557.
The danger of a simplistic view of legal development is that it never provides the nuances of real understanding. The opinion that law, or at least the common law, is purely a progressive movement becomes a self-fulfilling prophecy. The prism of progressive evolution biases the interpreter toward a revisionist view of history in order to confirm progressive legal evolution. At the same time, Isaacs believed that common law development should not be characterized by chaotic shifts. Thus, it is important to examine the relationship between legal change and guiding principles. One measure of cycle theory is demonstrated by the differences and commonalities found in the various common law systems. At a given time the differences in the systems may be explained as a product of being at different places in the cycle. Cycle theory, as progressive evolution, is possible, under Isaacs’s scheme, by the discovery of universal principles upon which the cycles are guided. These principles, some in tension with each other, guide the constant change in the content of the law: “Through a careful combination of fidelity to the past and, when necessary, innovation and creativity, legal authorities have responded to these challenges by applying settled and known legal principles to resolve the questions accompanying new and unanticipated circumstances.” Thus, principles of historical dimensions provide the means to understand and predict legal change.

Principles-based evolution is found in the analogical reasoning ensconced in the common law. It is the recognition of the belief in underlying principles that cut across areas of law, and more fundamentally across disparate areas of law. The key to the dynamic nature of law is that principles can be found by deductive and inductive reasoning. On the conceptual side, underlying principles are used as a guide in applying existing law to novel cases. On the factual side, the recognition of novel cases leads to the categorization of those cases as a specific “type” in which new rules or exceptions can be based. These needed new rules or exceptions are best created by the use of underlying principles. In Dworkinian terms, the new rules or exceptions need to fit within the overall framework of the given body of law.


270. For an example of analyzing the comparative efficiency of rules found in the common law versus the civil legal systems, see Larry A. DiMatteo & Daniel T. Ostas, Comparative Efficiency in International Sales Law, 26 AM. U. INT’L L. REV. 371 (2011).

271. Samuel Flaks summarizes Isaacs’s view of the role of universal principles in legal evolution: “Isaacs’s cyclical theory of legal development posits that law is constantly changing in order to bridge the ideals of justice and the shifting realities of society.” Flaks, Law, Religion, and Pluralism, supra note 1, at 324.


274. Dworkin described hard cases as follows: “Some cases, moreover, raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules. So judges must sometimes make new law, either covertly or explicitly.” Dworkin, supra note 94, at 1058. Under Dworkin’s view of
Under Isaacs's theory of legal development, the court's duty is to uncover underlying historical principles to guide them in rendering decisions in hard or novel cases. Isaacs's student notes (from Dean Pound's class) reveal that he was attracted to the work of German Philosopher Rudolph Stammler and his concept of "a natural law with a variable content." While Isaacs believed that law constantly changed to better serve the needs of society, he also accepted as a tenet of his legal faith that there is such a thing as justice as an ideal—an unchanging goal that is independent of the changing historical context, and that there are different ways of approximating that goal in different historical contexts.

Isaacs sought to use cycle theory to uncover underlying principles that provide the means to make changes in the law. The tension between competing principles would have to be properly balanced in order for legal reform to make law functional and just. In contract law, the tension between the principles of private economy and fairness, or as the balancing contract law's facilitative and regulatory functions, constantly work to effect change in the law. A blend of these seemingly intractable adversaries is found in all eras of the law. Isaacs's cycle theory recognizes that changes in law are simply movements towards one of the competing core principles. In contract law, changes in society lead to greater protections of weaker contracting parties or towards free contracting.

E. PROGRESSIVE-CYCLICAL EVOLUTION

Cycle theory should not be construed as a series of advancements and regressions in the development of the law. Dynamism in the law is needed to respond to societal changes and is inherently progressive in nature, but it is not a linear progression as symbolized by Maine's famous adage. Instead, it is better described, as a cyclical progression based upon the premise that unregulated freedom of contract is its own worst enemy. The 2008 world financial crisis is a testament to freedom of contract's abuses in the creation of new financial instruments that masked underlying risks. Inevitably, such

law as interpretation the perfect judge in approaching hard cases finds the right answer by applying principles that results in the creation of a rule that is the best fit to the entire body of law:

Hercules must discover principles that fit, not only the particular precedent to which some litigant directs his attention, but all other judicial decisions within his general jurisdiction and, indeed, statutes as well, so far as these must be seen to be generated by principle rather than policy. He does not satisfy his duty to show that his decision is consistent with established principles, and therefore fair, if the principles he cites as established are themselves inconsistent with other decisions that his court also proposes to uphold.

Id. at 1094.

275. Cf. CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 249 (1930) (quoting RUDOLF STAMMLER, THEORIE DER RECHTSWISSENSCHAFT 124 (1911); RUDOLF STAMMLER, DIE LEHRE VON DEM RIICHTIGEN RECHTE 93, 196 (1902)).

276. Cf. MOSCOVITZ, supra note 151, at 339-42 ("the impact of explicit legal principles seems rather limited" in Talmudic reasoning).

abuse results in greater regulation of the free market. This last crisis resulted in the creation of a number of status-based concepts from “too-big-to-fail” bailouts of financial companies to the establishment in the United States of a new consumer protection agency to provide greater protections in consumer lending, such as fuller disclosures of the nature of financial instruments, the meaning of ratings, and prohibitions against predatory lending.

The cyclical nature of contract is seen at the grassroots of deal making. The engines that drive the free market include innovation and creativity. Entrepreneurs often gravitate away from heavily regulated transaction types through the creation of new transaction types. A classic example is the evolution of the franchise contract. This new form of doing business allowed for the rapid expansion of an entity through the creation of independently owned franchise operations. The franchise paradigm was a creature of business and legal innovation, and has become a popular form of doing business. The innovation of franchising was made possible by freedom of contract. Oliver Wendell Holmes’s view of legal development was that it evolved as a practical response to societal change: “Holmes’ thesis—that societies are constantly reinterpreting legal forms to serve new purposes—has been labelled ‘evolutionary pragmatism.’” For Holmes, law is inherently a dynamic phenomenon that is a mixture of old and new, and the new is often a reinvention of old ideas applied to new settings. This idea of pragmatic evolution is best captured in the aphorism that: “[T]he law is always approaching, and never reaching, consistency.” The interesting question is whether pragmatic evolution is the same as progressive evolution.

It is important that law changes to meet the needs and changes of society, but such change may only be progressive on the surface. At a deeper level this may not be so. Societies and governments often make errors, such as instituting forms of discrimination. In such cases, society and law would be regressive from the perspective of what is good and right. Surprisingly, Maine also never stated that legal evolution was always a normatively positive progression. It is important to note that Maine’s status-to-contract progression adage was qualified by the word “hitherto.” Thus until the mid-nineteenth century, progress had been characterized by a movement from kinship (status) relationships to individual freedom to contract. This implies that the future does not preclude the evolution of other status-based protections or relationships.

Initially, franchise contracts were lightly regulated—but both internally by contract law and externally by government regulation. But, the search for additional profits was inevitable given the moral hazard problems that most franchise agreements present. In the early stages of a franchise, the interests

280. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 32 (M. Howe ed., 1963). Holmes further states that the law “is forever adopting new principles from life at one end, and it always retains old ones from history at the other . . . . It will become entirely consistent only when it ceases to grow.” Id.
of the franchisor and the franchisee are aligned. Their self-interests are one in the same—the launch of a profitable franchise operation. However, the more profitable the franchise, the greater possibility that one of the parties will try to capture more profits or value. The franchisee may feel they no longer need the franchisor and see franchise costs and fees as a result of overreaching by the franchisor. The franchisee may take steps to avoid full payment of fees or elect to terminate the franchise agreement and go it alone. The more likely scenario is that of franchisor opportunism. This could include franchise encroachment (locating company operations in proximity to the franchised operation) and franchise termination (franchisor takes over franchised operation); often within the terms of its franchise agreement, such as termination with cause or by way of non-renewal. The abusive exercise of freedom of contract by franchisors resulted in the law converting the relationship to a partially status-based one. Courts have used the doctrine of unconscionability to void overly one-sided franchise terms. More importantly, many states passed anti-termination statutes to protect franchisees from opportunistic terminations.

As noted with the evolution of franchising and its regulation, freedom of contract is the force behind change and subsequently the regulation of the product of that change. If the amount of regulation, internally (contract law) or externally (government regulation), becomes pervasive, then entrepreneurs will seek ways around such laws by the use or creation of alternative transaction types. For example, the franchisor may shift to a limited liability company business model for each of its franchised locations. The freedom of contract rationale is the core concept underlying limited liability company law in the United States. The former franchisor could draft an operating agreement in which it retains all powers as a member-manager. In the future, the abuse of such powers is likely to persuade courts to protect the minority investor (member) by viewing the member-manager and member relationship as status-based. 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.

From the internal perspective of case law development, as noted earlier, Isaacs, and subsequently Llewellyn, 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 are subsequently recognized in law.

281. See Robert W. Emerson, Franchise Encroachment, 47 AM. BUS. L.J. 191 (2010) (arguing franchise value is dependent on the franchisee right to defend its territory from the franchisor or other franchisees).
283. Llewellyn advocated that commercial law was found in the background of business custom and commercial practice. In addition, law created new rules based upon “situation sense” in which cases are organized into transaction types. Through the grouping of similar “fact-situations” (patterns) the courts uncover the “immanent law” found in real world practice: “Only as a judge or court knows the facts of life... can they lift the burden [that] lays upon them: to uncover and to implement the immanent
As discussed in previous sections, progressiveness of law’s evolution is supported by the common sense thesis that law is dynamic and changes to meet the needs of changing societal conditions. The cyclical nature recognizes that there are relatively stable dichotomies whose opposing poles fluctuate over time. What is also clear is that even when given ends of the poles become dominant in a given era of legal development, its dominance is never absolute. Every era possesses both sides of the dichotomies.

The complexity of contract law also makes any monist theory of legal reasoning incomplete. The whole body of contract can only be explained by a matrix of values; these values often are addressed by different modes of legal reasoning. The lens of history allows for the acceptance of most theories of contract law as viable and helpful as part of a composite understanding of contract as a whole. Only as a composite of different theories or principles can contract law be fully explained. However, individual areas or rules of contract reflect different “blends” of the competing values. For example, the lack of precontractual liability for bad faith negotiations in the common law was based upon the belief that parties should not be constrained in their negotiation of contracts. But, over time, American common law developed the doctrine of promissory estoppel that can be used to prevent abuse in the pre-contract process in order to prevent injustice.

Cycle theory can be reduced to the idea that there is a remixing of contract law’s competing values from time to time. For contract law, the status-contract dichotomy possesses descriptive power in explaining the different eras of contracts, the sway of the underlying poles of contact law—freedom versus regulation—and the persistence of formalistic and contextual modes of interpretation. The dichotomy is a powerful tool to analyze the surface crust of contract law—its principles, standards, and rules. However,
the scholar needs to dig below the crust to better understand the tensions that underlie society and contract law. Cycle theory is a useful descriptive tool in understanding those tensions and the evolution of contract law.

In the end, however, despite the explanatory power of cycle theory and the status versus contract-based relationships model, any description or theory of contract cannot escape the curse of reductionism. H. Patrick Glenn states that “the nature of the western, philosophical enquiry relating to incommensurability, which is that of seeking incommensurable values ‘within a conceptual scheme, way of life, or culture.’ There would thus be incommensurabilities within western life, but they would all nest within the range of permissible choices which western life offers to us.” The “range of permissible choices” is determined by the normative composite that lies behind contract law, including the values of freedom, private autonomy, justice, and fairness. Since these values are often in tension, the law continues to cycle between the different poles of the discussed dichotomies in response to real world developments, but always within a stable framework of a “permissible” mix of norms and values.

VI. CONCLUSION

The constant need to update law is captured nicely in Nathan Isaacs’s cycle theory. The anachronistic nature of an area of law is confronted in a number of ways. The two most obvious include the use of judicial discretion or the enactment or revision by statute. The recognition by legislatures of law’s obsolescence motivates it to update the law. Once enacted, the courts strive to set initial precedents that accurately represent the meaning of the statutory text. However, over time novel cases challenge the ability of a court to apply statutory text to resolve such cases. Ultimately, the ill fit of rule to case is resolved by the creation of a rule adjustment, either through the creation of an exception or through the creation of a judicial fiction.

The recognition of an application of appropriate core principles can be used to guide the rule adjustment. At some point, however, basic principles can no longer be plausibly stretched, resulting in anachronistic rules becoming so attenuated that the divergence between text and application becomes irreparable. At this point of obsolescence, either courts will have to dramatically disregard legal precedent or the legislature will have to intervene to restate or reform what has become a chaotic jurisprudence of fictions and exceptions. The cycle then begins anew.

Isaacs’s paradigm calls on judges to continuously strive to uncover underlying objective principles and to understand their historical evolution. He sought to blend an evolving, cyclical, and organic theory of legal development with the pragmatism needed to make rules work. To do this, the contingent nature of law must be contained within a framework of moral, political, and cultural values. Isaacs’s analysis of contract law and other areas

290. See Dworkin, supra note 94.
of law reflected both a critical and positive theory of the legal order. This fusion of an organic natural law with the inherent indeterminacy of legal conceptualism moves beyond rules to a principle-based contextualism.

Isaacs's cycle theory contests Henry Sumner Maine Thesis' linear progression paradigm that societies move from status to contract-based private ordering; it better explains legal evolution and the dynamic nature of law. From a law and society perspective the dynamism of law can be explained as a reaction to developments in society. The legal cycle begins with grassroots changes in practice and subsequently in the law. Cycle theory, if correct, has major implications on how we view legal development. Plausible implications include: (1) the development of law is best undertaken through a contextual methodology of interpretation. (2) Although there is a powerful argument for the contingent nature of law, that contingency does and must work within a framework of moral, political, and cultural values. (3) Recognition of the dynamic and cyclical nature of law allows for a negative critique along with a positive theory of development. This is largely done by grounding rules and adjustment in historically evolved principles. Thus, "hard cases" are not decided by pure deduction, but by reference to underlying reason and equities. Cycle theory seeks to reconcile the universality of principles with the indeterminacy of legal conceptualism.

291. Beyond Rules, supra note 76.