

THE NEW DEAL ORIGINS OF AMERICAN LEGAL PLURALISM

DALIA TSUK*

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* Copyright © 2001 by Dalia Tsuk, Associate Professor of Law, James E. Rogers College of Law, University of Arizona; Ph.D. Candidate (History), Yale University; S.J.D., 1999, Harvard Law School; M. Phil (History), 1998, Yale University; LL.B., 1992, Tel Aviv University. Many friends and colleagues engaged my musings on pluralism, commented on drafts, and offered encouragement and support throughout the different stages of this project. At the risk of forgetting someone, special thanks are due to Kathy Abrams, Jean-Christophe Agnew, Barbara Atwood, Paul Bennett, Jean Braucher, Nancy Cott, Dan Ernst, Martha Fineman, Robert Glennon, Carole Goldberg-Ambrose, Susan Gooding, Bob Gordon, Tom Green, Bernard Harcourt, Dirk Hartog, David Hollinger, Morty Horwitz, Laura Kalman, Kay Kavanagh, Sandy Levinson, Toni Massaro, Serena Mayeri, Martha Minow, Bill Nelson, Shannon O’loughlin, Dick Polenberg, Suzanne Rabé, Avi Soifer, Elizabeth Townsend, and Rob Williams. The Article also benefited from presentations and discussions at the Graduate Program Colloquium at Harvard Law School, the Legal History Colloquium at New York University School of Law, the 1999 annual meeting of the American Society for Legal History, the meeting of the Working Group on Culture, Law, and the Humanities in Washington, D.C., the 2000 annual meeting of the Yale Native American Association at Yale Law School, and a faculty workshop at UCLA School of Law. I also wish to acknowledge the assistance I have received in connection with this project from the archivists at the Franklin D. Roosevelt Library, the Joseph Regenstein Library (University of Chicago), Sterling Memorial Library (Yale University), and the Beinecke Rare Book and Manuscript Library (Yale University). Thanks are also due to Brittany Adams, the Editor-in-Chief of volume 28 of the *Florida State University Law Review*, for her great patience and help. Financial support was provided by the Beinecke Rare Book and Manuscript Library, the Samuel I. Golieb Fellowship in Legal History at New York University School of Law, and the University of Arizona College of Law Summer Research Fund. All errors are of course mine. The editorial board of the *Florida State University Law Review* did not verify archival sources located at the above mentioned libraries.

I. INTRODUCTION

Political, cultural, and religious groups around the world have sought in recent decades to exercise their rights to self-determination. Examples include indigenous peoples in Australia and Canada, Native Americans, ethnic groups in Eastern Europe, the Amish community in Pennsylvania, and the Orthodox Jewish community of Kiryas Joel. Responding to these efforts, legal scholars and policymakers are today attempting to develop legal mechanisms that would accommodate the unique interests of particular groups, while also mediating and settling potential conflicts and tensions between individuals, groups, and peoples. In this Article, I seek to add a historical dimension to these endeavors by examining early twentieth-century theories of pluralism¹ that are rich, complex, and highly relevant to these contemporary discussions of group rights, but that thus far have been neglected by political scientists and legal scholars.

In contemporary political science and legal scholarship, the term “pluralism” is often associated with process theories of democracy, which scholars like Robert Dahl articulated during the 1950s and 1960s. Rooted in models of equilibrium drawn from economics, process theories sought to create a conception of a neutral political process, free of any substantive commitment to particular values such as the celebration of diversity, in which different groups interact, compete, or trade ends.² This common association of “pluralism” with process theories is misleading. In the first half of the twentieth century, theories of pluralism often recognized diversity not merely as an empirical fact, something that we must tolerate grudgingly or try to reduce, but as a constitutive element of American democracy. Accordingly, the extent to which laws and policies sought to accommodate and promote diverse group interests, beyond the sheer recognition of their existence, reflected a nation’s commitment to democratic values.³

Given the recent rise in the number of groups seeking to exercise their rights to self-determination, the message of these early theories of pluralism, with their thick conception of democracy, warrants seri-

1. I use the term “pluralism” as a noun to refer to a commitment to devising a plural polity. As I suggest in this Article, in particular historical moments, individuals assigned different meanings to such a commitment. Hence, when I refer to interpretations of pluralism, or to models of pluralism, I am concerned with changing understandings of the commitment to devising a plural polity, or with different models that sought to create such a polity.

2. See, e.g., ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) [hereinafter DAHL, A PREFACE TO DEMOCRATIC THEORY]; ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967) [hereinafter DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES]; see also MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 251-58 (1992).

3. See *infra* Part II.A.

ous consideration. This Article begins to do so by “siting” pluralism. It locates three models of pluralism, which I label “socialist pluralism,” “systematic pluralism,” and “comparative pluralism,” within a particular attempt to devise a plural polity, and grounds each model in the changing ideologies⁴ of the historical agent who developed them.⁵ The particular attempt is federal Indian policy during the 1930s and 1940s, a period commonly labeled the “Indian New Deal.” The historical agent is Felix Solomon Cohen, who was the chief legal architect of federal Indian policy during the New Deal and who is also recognized today as one of the most important legal philosophers in the first half of the twentieth century.⁶

Federal Indian policy at the turn of the twentieth century sought to break down tribal organization and force all Indians⁷ to assimilate, particularly through the distribution of communal lands to individual owners.⁸ The essence of the Indian New Deal, at least as federal policymakers described it, was to stop allotment and assimilation by delegating to Indian tribes more authority over their economic, social, cultural, and political affairs.⁹ Cohen joined the Department of the Interior in 1933 to help draft the Indian Reorganization Act (IRA),¹⁰ which initiated the Indian New Deal by creating a procedure to re-establish tribal governments on Indian reservations.¹¹ Many present-day tribal governments were formed under the IRA.¹² While in office, Cohen authored the *Handbook of Federal Indian Law*

4. By ideology, I mean the structure of ideas and beliefs—about right and wrong, about the meaning of democracy, about the goals of national policy—that influences an actor’s understanding of reality. For a similar definition, see ELMER R. RUSCO, *A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT* xiii (2000).

5. This Article is part of a larger project in which I examine the development of theories of pluralism in the twentieth century, the interdependence of the different meanings attributed to pluralism in distinct historical moments, and the relationship between theories of pluralism and the emergence of the modern welfare state.

6. For discussions of Cohen’s legal philosophy, see HORWITZ, *supra* note 2, at 183; DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* 86 (1997); Joel R. Cornwell, *From Hedonism to Human Rights: Felix Cohen’s Alternative to Nihilism*, 68 *TEMPLE L. REV.* 197 (1995); and Martin P. Golding, *Realism and Functionalism in the Legal Thought of Felix S. Cohen*, 66 *CORNELL L. REV.* 1031 (1982). For Cohen’s writings, see *THE LEGAL CONSCIENCE: SELECTED PAPERS BY FELIX S. COHEN* (Lucy Kramer Cohen ed., 1960) [hereinafter *THE LEGAL CONSCIENCE*].

7. Given the historical nature of this Article, I use the terms “Indian” and “Indian tribes” rather than “Native Americans” or “Indian nations.”

8. *See infra* Part II.B.

9. *See infra* Part III.C.

10. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY 223-25 (Francis Paul Prucha ed., 3d ed. 2000) (1975) [hereinafter *DOCUMENTS OF UNITED STATES INDIAN POLICY*].

11. § 16, 48 Stat. at 987 (codified as amended at 25 U.S.C. § 476); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 224-25.

12. *E.g.*, RUSCO, *supra* note 4, at ix.

(*Handbook*),¹³ the first comprehensive treatise on Indian law. In 1946, a year before he left the Department, Cohen helped to draft the Indian Claims Commission Act (ICCA),¹⁴ which established a commission to settle tribal land claims against the federal government.¹⁵ Today, similar claims are litigated around the world by indigenous peoples.

While Cohen's contributions to federal Indian law have been widely acknowledged, thus far no one has attempted to place them within the history of pluralism. In a forthcoming book, I argue that Cohen lived a life dedicated to the celebration of pluralism.¹⁶ Cohen's jurisprudence and legal practice must thus be understood in relation to theories of pluralism.¹⁷ His view or interpretation of pluralism was fluid. At times it stood for the protection and accommodation of a variety of economic, social, political, and cultural interests. At others, it was a philosophical attitude that urged the understanding of reality as a variety of interdependent contexts and that celebrated the incompleteness of human knowledge. In still other moments, Cohen recognized the plurality of value systems and sought to devise mechanisms that would allow translation between distinct systems. The three models of pluralism examined in this Article were devised by Cohen during the New Deal. Using Cohen's legal work, his writings, and his correspondence, this Article investigates the Indian New Deal as a site for the evolution of competing meanings of pluralism and explicates the complex legal, intellectual, and personal assumptions that informed them.¹⁸

13. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (U.S. G.P.O. ed., 1941) [hereinafter *HANDBOOK*].

14. Ch. 959, 60 Stat. 1049 (1946). The ICCA was formerly codified at sections 70-70v-3 of the United States Code, until omitted from the Code upon termination of the Commission on September 30, 1978. Act of Oct. 8, 1976, Pub. L. No. 94-465, § 2, 90 Stat. 1990 (providing for the dissolution of the Commission); see also *DOCUMENTS OF UNITED STATES INDIAN POLICY*, *supra* note 10, at 231-33.

15. § 1, 60 Stat. at 1049; see also *DOCUMENTS OF UNITED STATES INDIAN POLICY*, *supra* note 10, at 232.

16. DALIA TSUK, *ENCOUNTERS WITH PLURALISM: THE LIFE AND THOUGHT OF FELIX S. COHEN* (forthcoming).

17. For an earlier attempt to assess the impact of Cohen's philosophy on his legal work, see Stephen M. Feldman, *Felix S. Cohen and his Jurisprudence: Reflections on Federal Indian Law*, 35 *BUFFALO L. REV.* 479 (1986). Feldman argues that Cohen's work on the *Handbook* reflected his legal realist philosophy. For a more recent attempt, see Jill E. Martin, *The Miner's Canary: Felix S. Cohen's Philosophy of Indian Rights*, 23 *AM. INDIAN L. REV.* 165 (1998-99). To the best of my knowledge, thus far no one has attempted to discern the relationship between Cohen's philosophy and legal practice and the history of American pluralism. Nor has anyone sought to determine the relationship between Cohen's political and personal aspirations and his work on federal Indian law.

18. Cohen's changing interpretations of pluralism were mediated through his personal experience as a son of a Jewish immigrant, his political involvement with the socialist movement, his intellectual fascination with legal realism, his professional role in the Department of the Interior, and his reaction to World War II and its aftermath. All of these

Contemporary scholars diverge in their assessment of the Indian New Deal.¹⁹ For some scholars, the New Deal was another period in the history of colonization. New Dealers²⁰ were, accordingly, white imperialists imposing their theoretical framework on Indians.²¹ Similar concerns are raised today with respect to any attempt to use the sovereign state to liberate indigenous peoples or to devise a plural polity.²² For other scholars, the Indian New Deal reflected a genuine attempt to establish self-governing Indian communities that failed due to political compromises and the policy of termination that was adopted during the 1950s.²³

Rather than assessing either position, I limit my discussion to the relationship between Cohen's work on federal Indian policy and his shifting interpretations of pluralism. I make no claim about other individual, social, or political forces that played a role in shaping federal Indian policy during the New Deal, about other pluralists, or about additional intellectual traditions that informed Cohen's work. Nor do I purport to provide a complete historical narrative of the events. For one thing, the voices of Indian tribes are conspicuously absent from this account, though Indians were hardly passive recipients of federal legislation, and their voices are clearly important to evaluating the successes and failures of the New Deal.²⁴ My focus is Cohen's changing theories of pluralism. I examine how these theories affected Cohen's understanding of his task and how they changed in the course of his interaction with Indian tribes.

aspects are more fully developed in *Encounters with Pluralism: The Life and Thought of Felix S. Cohen*. TSUK, *supra* note 16.

19. See generally RUSCO, *supra* note 4, at ix-xiv.

20. The term "New Dealers" in this Article refers to officials in the Department of the Interior, particularly those in the Solicitor's Office, who administered the Indian New Deal.

21. See, e.g., Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963 (1996).

22. See, e.g., Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615 (1992); S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309 (1994); Russel Lawrence Barsh, *Current Development: United Nations Seminar on Indigenous Peoples and States*, 83 AM. J. INT'L L. 599 (1989); Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L.J. 583 (1999); Robert A. Williams, Jr., *Frontier of Legal Thought III: Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples Survival in the World*, 1990 DUKE L.J. 660.

23. For these diverse opinions, see INDIAN SELF-RULE: FIRST HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN (Kenneth R. Philp ed., 1995) [hereinafter INDIAN SELF-RULE]; and THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE (M. Annette Jaimes ed., 1992) [hereinafter THE STATE OF NATIVE AMERICA]; and compare Deloria, *supra* note 21, to VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 187-206 (1985).

24. See generally RUSCO, *supra* note 4.

For Cohen, the IRA, the *Handbook*, and the ICCA reflected different models for devising a plural polity, that is, socialist pluralism, systematic pluralism, and comparative pluralism, respectively.²⁵ By exploring the Indian New Deal as a site for the evolution of theories of pluralism, this Article calls attention to an important chapter in the modern narrative of pluralism, a period that is also significant in the life of Felix Cohen and in the history of federal Indian law. By investigating the intellectual and personal assumptions underlying the three models that Cohen developed during the New Deal, this Article further shows that models of pluralism, and laws that are informed by them, are more than means for devising a plural polity. They are sites for the construction and negotiation of cultural, social, and political ideologies and for the assertion and reconfiguration of identity.²⁶ By siting pluralism, I also hope this Article offers insights from history about the assumptions, possibilities, and difficulties associated with attempts to devise legal mechanisms that would celebrate cultural, political, and religious diversity.²⁷

Part II provides the intellectual and legal background for the story of pluralism, Cohen, and the New Deal. It surveys the emergence of theories of pluralism, particularly cultural and political pluralism, during the turn of the twentieth century. Cohen's personal and intellectual attraction to theories of pluralism brought him to the New Deal. These theories provided him with tools for evaluating what he saw on the eve of the New Deal as the devastating impact of federal Indian policy. They also shaped the intellectual framework within which he worked to devise policies that arguably sought to improve the situation by transferring to Indian tribes more authority over their cultural, economic, and political affairs.

Part III focuses on "socialist pluralism"—Cohen's initial model for devising a plural polity. Cohen's socialist pluralism was grounded in

25. These models did not explicitly address the relationship between groups and individuals within and outside group boundaries. Thus, although the relationship between groups and individuals is always implicit in discussions of the status of collective entities, I do not expressly examine this issue in this Article. *See also infra* Part III.B.

26. This is not to suggest that only ideologies and conceptions of identity affected the outcomes of the Indian New Deal. As will be developed in the Article, political compromises and constraints derived from the nature of legislative processes were as important. I focus, nonetheless, on ideologies and conceptions of identity.

27. While the Indian New Deal is the site discussed in this Article, I wish to emphasize that my focus is the history of pluralism. The models that Cohen devised were imprinted upon federal Indian law. Yet, they were not necessarily effective on Indian reservations. *Cf.* Feldman, *supra* note 17, at 518-24 (discussing Cohen's legal realist plans going awry); Rebecca Tsosie, *American Indians and the Politics of Recognition: Soifer on Law, Pluralism and Group Identity*, 22 L. & SOC. INQUIRY 359 (1997) (discussing the unique status of Indian tribes with respect to conceptions of group rights). My interest in these models focuses on the lessons they tell about our ongoing commitment to pluralism and our ability (personal and collective) to embrace diversity as a constitutive element of our society.

a critique of the absolute sovereignty of the state and in a description of society as composed of a variety of self-governing groups, coordinated by a centralized government. It reflected Cohen's socialist politics, particularly his support for labor unions, and his aspirations as a Jewish American to be assimilated in the body politic of the nation. In the early 1930s, Cohen believed that socialist pluralism would solve not only the conflict between labor and capital, but also many other problems involving groups (that is, ethnic, racial, or religious tensions). When he joined the Department of the Interior to help draft the IRA, Cohen further assumed that Indian reservations were fertile fields where his socialist pluralist ideal of self-governing communities could be successfully planted.

Drawing on Cohen's correspondence, legal notes, and memoranda, Part III explores Cohen's articulation of his socialist pluralist ideal, his reasons for adopting it, and how Cohen's socialist pluralist assumptions affected his role in drafting and administering the IRA. Particularly, I show how Cohen's belief in the plausibility of universal political structures as solutions for diverse problems hindered his aspirations to protect the rights of Indian tribes and, more broadly, to devise a plural polity. Part III concludes with Cohen's reevaluation of socialist pluralism, especially his growing attentiveness to the importance of cultural interests.

The core of Part IV is "systematic pluralism"—Cohen's second model for realizing diverse group interests.²⁸ Systematic pluralism was informed by Cohen's growing alertness to cultural interests, which led him to identify not only a multiplicity of group interests within one system, but also a multiplicity of value systems. While his socialist pluralism expressed a commitment to the mediation of conflicting interests within one legal system, Cohen's systematic pluralism sought to reconcile conflicts between diverse value systems by expanding any given system to encompass the values and assumptions of other systems. It imagined law as capable of incorporating the variety of value systems that characterized American society. It meant to protect the rights of Native Americans—as well as Jewish Americans, particularly Jewish refugees from Europe—to bring their different values into the American polity. According to Cohen, the fulfillment of his ideal of systematic pluralism required a commitment to group rights.

As Part IV shows, the *Handbook* reflected this intellectual shift. Cohen wrote the *Handbook* in an attempt to improve the

28. I label this model "systematic pluralism" to allude to the article in which, as I show, Cohen articulated this interpretation of pluralism. See Felix S. Cohen, *The Relativity of Philosophical Systems and the Method of Systematic Relativism*, 36 J. PHIL. 57 (1939) [hereinafter Cohen, *Systematic Relativism*], reprinted in THE LEGAL CONSCIENCE, *supra* note 6, at 95; see also *infra* text accompanying notes 216-23.

understanding of the relationship between Indians and the federal government. Aiming at the inclusion of historically marginalized social and cultural voices, one of the main themes of the *Handbook* was that a long line of conquerors, including the federal government, had recognized tribal rights. Ironically, this recognition also entailed the subjection of tribal affairs to congressional control.²⁹ Cohen's attempt to universalize a theory of group rights, in short, tended to obscure the voices of particular groups in actively determining their own rights. As many have noted, the voices of Indian tribes were missing from the *Handbook*.³⁰

As Cohen's analysis became fixated on the need to protect particular group rights, his systematic pluralist assumption—that social, philosophical, legal, and ethical systems could be enlarged to include other systems, ultimately becoming one—gradually disintegrated. Part V examines Cohen's alternative—the third model for accommodating diverse group interests, which I label “comparative pluralism.” In the late 1940s, comparative pluralism endorsed the particular interests of groups (for example, Native Americans and Jewish Americans) as valid, and sought to mediate conflicting value systems, not by extending one system to include others, but by encouraging dialogue between and among distinct systems. It embraced the preservation of all particular traditions as the American ideal of democracy.

As Part V shows, the ICCA reflected this vision. In Cohen's view, the ICCA was meant to settle historical and cultural differences between Indian tribes and American society. Supposedly accepting that tribal sovereignty was inherent rather than delegated, the ICCA waived the sovereign immunity of the federal government and allowed Indian tribes to sue the government for damages for their relinquished lands. Seeking to recognize the voices of Indian tribes, the ICCA established a special investigatory commission to hear and determine tribal land claims against the United States.³¹ By providing a forum (however limited) for Indian tribes to tell their narratives of

29. Notably, the *Handbook* resurrected “the fiction of conquest,” thus preserving the plenary power of Congress to intervene in the tribes' domestic affairs. *E.g.*, RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 112 (1980). Barsh and Henderson explain:

According to the conquest myth, tribes possess, at first, all of the powers of a sovereign nation. Conquest by the United States renders the tribe subject to federal legislative powers, and effectively terminates the external sovereignty of the tribe. Finally, the balance of internal powers is subject to qualification by treaties and express legislation.

Id. at 278; *see also* Russel Lawrence Barsh, *Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition*, 57 WASH. L. REV. 799 (1982) (book review).

30. *E.g.*, Deloria, *supra* note 21, at 963.

31. Ch. 959, § 1, 60 Stat. 1049, 1049 (1946); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 232.

American history, Cohen hoped to encourage communication between distinct groups, for example, between Indians and non-Indians. By emphasizing the possibility of translation between holders of diverse value systems, Cohen—the Jewish American—also hoped that the ICCA would prove the superiority of comparative pluralism to what at the time seemed to be the alternative—totalitarianism. As Part V also shows, during the drafting and implementation of the ICCA, the interests of Indian tribes were often lost in this web of political, personal, and intellectual goals.³²

Finally, Part VI of the Article examines the aftermath of the Indian New Deal. Cohen's legal work during the New Deal both influenced and was motivated by his changing interpretations of pluralism. His fascination with pluralism was unique, particularly his attempts to devise legal mechanisms that would be sensitive to competing social, political, economic, and cultural systems. Also exceptional was Cohen's freedom to bring theories of pluralism to bear upon national policy. With its orientation toward group rights, pluralism did not seem as a natural outgrowth of the ideals of American liberalism. During the New Deal, the Department of the Interior welcomed Cohen's experiments. But as the Cold War developed, attacks mounted on anything remotely socialist, let alone communist, and pressures increased to change federal Indian policy. The 1950s thus witnessed a variety of attempts to end the special status of Indian tribes and their particular relationship to the federal government. In 1958, five years after Cohen's death, a new version of the *Handbook of Federal Indian Law* sought to eradicate the pluralistic characteristics of the original edition.³³ In such an atmosphere, the Indian Claims Commission failed to provide sufficient compensation for lost lands.

The Indian New Deal was a short moment in American history, but its impact is of enduring importance. Each of its products (the IRA, the *Handbook*, and the ICCA) was informed by a different interpretation of pluralism; each accepted diversity as a constitutive element of American society. The IRA attempted to create a general structure under which different tribes could exercise their autonomy. The *Handbook*, in turn, sought to expand the American legal system

32. Cf. BARSH & HENDERSON, *supra* note 29. They note:

The Indian Claims Act was not passed just to make it possible for tribes to sue the United States It was hoped that the Indian Claims Commission would *accelerate* the process of liquidating claims and thereby remove as quickly as possible Indians' supposed incentive for retaining their tribal allegiances.

Id. at 125.

33. OFFICE OF THE SOLICITOR, U.S. DEPT' OF THE INTERIOR, FEDERAL INDIAN LAW (1958) [hereinafter 1958 HANDBOOK]. In 1982, a new edition of the original *Handbook* was published. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds., 1982) [hereinafter 1982 HANDBOOK]. Another version is currently in production.

to take account of the particular interests of Indian tribes. Finally, the ICCA attempted to mediate the tensions between particular legal cultures, not by incorporating them under general or universal structures, but by creating forms of communication that would allow translation from one legal system to another.

It is important to remember, nonetheless, that the IRA, the *Handbook*, and the ICCA failed to fulfill the goals they were set to achieve. Indeed, their significance lies outside federal Indian policy during the New Deal.³⁴ As models of pluralism, they offer plausible archetypes for addressing issues involving indigenous peoples, ethnic, or religious groups. They, furthermore, contain lessons for contemporary attempts by demonstrating that the choices of policymakers reflect not only legal or intellectual ideologies, but also the intersection of the policymakers' own sense of identity with their understanding of other social and cultural identities.

I conclude both with doubt and with hope. The history of pluralism counsels doubt as it begins in an abyss of hate, violence, and colonization. The failure of the Indian New Deal may indicate the inadequacy of law (statutory, judicial, and codified) as a means of overcoming political, social, economic, or cultural chasms, and hence also the shortcomings of any attempt to devise a plural polity through law. Cohen naively viewed federal law as a site for remedying collective traumas, particularly the Indian trauma of colonization (or forced inclusion). Underlying this understanding of the law was Cohen's personal relationship to American law as a site for ameliorating the Jewish trauma of exile (or forced exclusion). The trauma that law inflicted, even as it sought to remedy past injuries to particular communities, was thus repressed. Similar constraints continue to impede contemporary attempts to devise a plural polity, as different *others* (ethnic, religious, cultural, and political groups) struggle both to escape law's violence and to come under its protection.³⁵

34. On the importance of Indian law to the main concerns of American legal thought, see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Frank Pommersheim, "Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community, 71 U. COLO. L. REV. 123 (2000); and Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

35. On the relationship between law and trauma, see Shoshana Felman, *Forms of Judicial Blindness: Traumatic Narratives and Legal Repetitions*, in HISTORY, MEMORY AND THE LAW (Austin Sarat & Thomas R. Kearns eds., 1999). See also Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986), reprinted in NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER 203 (Martha Minow et al. eds., 1995) [hereinafter THE ESSAYS OF ROBERT COVER].

Yet, in the shadows of the law lurks hope, as law's constraints may be transformed into possibilities. For those who seek to create a plural polity, and for those who are affected by such attempts, legal structures become sites for social contacts. Cohen's personal development, particularly the influence of interactions with Indian tribes on his own sense of identity as a Jewish American, is thus an important aspect of the narrative.³⁶ Not only is this transformation mapped out in the body of federal Indian law; it also illustrates how even failed attempts to devise formalistic legal structures to accomplish pluralistic goals create peripheries where pluralism might flourish. At the very least, such attempts force individuals to recognize themselves and their assumptions about others. In the shadows of the law, doubt may turn to hope.

II. SETTING

A. *Pluralism*

Emerging at the turn of the twentieth century, pluralism, especially as developed by William James, insisted on the plurality of things, as given in experience, and on the impossibility of a single law to traverse all the various domains of being.³⁷ A pluralist theory of knowledge insisted on the multiplicity (whether limited or infinite) of knowers in the world and various forms of knowledge or truth,³⁸ none of which could claim epistemological primacy.³⁹ In ethics, pluralism implied the existence of a variety of competing ends, among which policymakers had to choose. American democracy was accord-

36. My argument in this essay is limited to Cohen's personal transformation. The transformation of individual Indians (the other *other*) through such encounters is a topic for another article.

37. JEAN WAHL, THE PLURALIST PHILOSOPHIES OF ENGLAND AND AMERICA 317-18 (Fred Rothwell trans., The Open Court Co. 1925).

38. This characterization is based on Hilary Putnam's interpretation of pluralism. Putnam traces pluralism to Kant. In the third Critique and in Kant's postcritical writings, according to Putnam, one can see more than "the simple dualism of a scientific image of the world and a moral image of the world." HILARY PUTNAM, PRAGMATISM: AN OPEN QUESTION 30 (1995). There is, Putnam argues, "a *tendency* towards genuine pluralism, which Kant perhaps resisted, but which nevertheless surfaces in his work." *Id.* Particularly, according to Putnam, one can see in Kant's writings "various interactions between these two [images] and various spinoffs—spinoffs that come from the interdependence of the moral image of the world and the scientific image of the world . . . spinoffs that come from the interaction of pure practical reason with sensibility and inclination, and so on." *Id.* Thus, Putnam argues, Kant began "to speak not only of a moral image of the world and a scientific image of the world, but also . . . of a religious image of the world . . . and . . . aesthetic images of the world, and also of legal images of the world, and so on." *Id.* at 30-31. However, Putnam continues, in spite of Kant's "*incipient* pluralism," Kant maintained that only the scientific image of the world contained what might properly be called "knowledge." *Id.*; see also WAHL, *supra* note 37, at 155 (discussing William James's pluralism).

39. See NELSON GOODMAN & CATHERINE Z. ELGIN, RECONCEPTIONS IN PHILOSOPHY AND OTHER ARTS AND SCIENCES 24-25 (1988).

ingly the outcome of constructive change, which resulted in individuals ideally considering all interests when making political decisions. “Values were ‘objective’ because they were inter-subjectively verifiable.”⁴⁰

Pluralism had much in common with pragmatism. Both approaches substituted empiricism, particularism, indeterminacy, and uncertainty for rationalism, universalism, determinacy, and certainty.⁴¹ Pragmatism, especially as espoused by James, emphasized that the understanding of reality was mediated through experience. It was a theory of truth that sought to redefine reality according to experience.⁴² Pluralism focused on the complex nature of reality. Not only was our conception of reality mediated through our individual experiences—as pragmatism suggested—but reality was also, for each one of us, one and many at the same time.⁴³ Individuals had “separate ideas of the chair, of the table, of the pew.”⁴⁴ They had “an idea of them all together. Yet this last idea [was] not made up of the former separate ones—it [was] a genuine unit, in which the separate ones [were] parts. The separate ones [were] independent of it and [were] not independent of it—and so on.”⁴⁵

Pluralism’s focus on the relationship between the *one* and the *many* appealed to Progressive thinkers. It offered a way out of the tension between conservative individualism, on the one hand, and radical collectivism, on the other.⁴⁶ During the early decades of the twentieth century, James’s students and followers thus transformed his pluralist philosophy—his discussion of forms of knowledge and the relationship between the *one* and the *many*—into arguments about democracy and national identity. Political theorists found in

40. BRUCE KUKLICK, *THE RISE OF AMERICAN PHILOSOPHY*, CAMBRIDGE MASSACHUSETTS, 1860-1930, at 510 (1977). This argument draws on an examination of the works of Ralph Barton Perry. Though not a self-proclaimed pluralist, Perry, whose *Thought and Character of William James* (1935) is still one of the best commentaries on James, was an ally, rejecting idealism in ethics in favor of a more pluralistic theory of values. See RALPH B. PERRY, *GENERAL THEORY OF VALUE: ITS MEANING AND BASIC PRINCIPLES CONSTRUED IN TERMS OF INTEREST* (1926); see also KUKLICK, *supra*, at 255, 409, 441-42, 505-15.

41. For a similar discussion of modernism and postmodernism, see Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 ARIZ. J. INT’L & COMP. L. 69, 71 (1998).

42. *E.g.*, WILLIAM JAMES, *PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING* (1907).

43. *E.g.*, WILLIAM JAMES, *A PLURALISTIC UNIVERSE: HIBBERT LECTURES AT MANCHESTER COLLEGE ON THE PRESENT SITUATION IN PHILOSOPHY* (University of Nebraska Press, 1996) (1909).

44. Horace M. Kallen, *A Pluralistic Universe: Professor James on the Present Situation in Philosophy*, BOSTON EVENING TRANSCRIPT, June 16, 1909, at 26 (book review).

45. *Id.*; see also Hilary Putnam, *James’s Theory of Truth*, in *THE CAMBRIDGE COMPANION TO WILLIAM JAMES* 166 (Ruth Anna Putnam ed., 1997).

46. *Cf.* Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943*, 11 L. & HIST. REV. 59, 60 (1993).

James's philosophy a solution to rapidly changing social and economic conditions—in particular, the rise of big corporations, labor agitation, and growing disparities of wealth and income. If, as James argued, “[t]he pluralistic world [was] . . . more like a federal republic than like an empire or a kingdom,”⁴⁷ then, political pluralists argued, sovereignty could not be absolute. Rather, sovereignty was distributed among different groups, in particular political groups such as churches, trade unions, neighborhood groups, but also—often to the dismay of many political pluralists who sided with labor in its battle against capital—the business corporation.⁴⁸ Cultural critics, in turn, turned to James's pluralism to attack the ideology of the melting pot, that is, the notion that all cultures were destined in the long run to become merged into one homogeneous mass, and that it was desirable for all cultural groups to divest themselves of traces of their native cultures. Instead, cultural pluralists stressed the significant contribution of diverse cultural groups—that is, ethnic or racial groups—to the western democratic tradition. In their writings, ethnic, racial, and class differences became important sources of—not obstacles to—individual freedom.⁴⁹

The analysis proposed by cultural and political pluralists anticipated issues raised in our contemporary discussions of civil society and our debates over the politics of identity, particularly with respect to indigenous peoples. Cultural pluralists sought legal mechanisms that would accommodate the distinct heritages of diverse cultural groups; political pluralists strove to empower distinct associations by recognizing their sovereignty, however limited. As a midway between radical collectivism, on the one hand, and conservative individualism, on the other, cultural and political pluralists chose the group as the forum in which individuals received meanings for their ideas and actions.⁵⁰ Their argument was teleological. Cultural pluralists emphasized the particular and group-derived identities of individuals and urged the polity to preserve the cultural heritage of every ethnic group. Political pluralists advocated a functional concept of political representation in order to protect the needs of distinct associations. Despite their seemingly distinct focal points—involuntary versus

47. JAMES, *supra* note 43, at 321-22.

48. *E.g.*, THE PLURALIST THEORY OF THE STATE: SELECTED WRITINGS OF G.D.H. COLE, J.N. FIGGIS, AND H.J. LASKI (Paul Q. Hirst ed., 1989); MARY P. FOLLETT, THE NEW STATE: GROUP ORGANIZATION THE SOLUTION OF POPULAR GOVERNMENT (1918); W.Y. ELLIOTT, THE PRAGMATIC REVOLT IN POLITICS: SYNDICALISM, FASCISM, AND THE CONSTITUTIONAL STATE (1928).

49. *E.g.*, Horace M. Kallen, *Democracy Versus the Melting-Pot* (pts. 1 & 2), NATION, Feb. 18, 1915, at 190-94, & Feb. 25, 1915, at 217-20 [hereinafter Kallen, *Democracy Versus the Melting Pot*], reprinted in HORACE M. KALLEN, CULTURE AND DEMOCRACY IN THE UNITED STATES: STUDIES IN THE GROUP PSYCHOLOGY OF THE AMERICAN PEOPLES 67 (1924) [hereinafter KALLEN, CULTURE AND DEMOCRACY].

50. *See* Ernst, *supra* note 46, at 60.

voluntary associations—cultural and political pluralists alike envisioned groups as repositories of particular ends that policymakers needed to recognize. Whether marching under the banner of “cultural self-determination” or that of “self-government,” advocates of both ideologies pledged a strong commitment to group autonomy.

Early theories of cultural and political pluralism laid the foundation for Felix Cohen’s changing understandings of pluralism and, more broadly, for the evolution of different interpretations of pluralism throughout the twentieth century. For most of the 1910s and 1920s, such interpretations were limited to criticisms of existing policies. The coming to power of the New Deal administration, however, offered an opportunity for many pluralists to bring their theories to bear upon national policy.⁵¹ The door of federal Indian law opened when in 1933, Harold L. Ickes, Roosevelt’s choice for a Secretary of the Interior, selected John Collier as the new Commissioner of Indian Affairs. To assist Collier, Ickes appointed William Zimmerman, an old family friend, as an Assistant Commissioner, and Nathan R. Margold as Solicitor of the Department of the Interior. Felix Cohen came as an Assistant Solicitor.⁵² As Part II.B details, what Cohen saw in 1933 on Indian reservations was “a condition approximating legalized anarchy.”⁵³

B. *Federal Indian Policy on the Eve of the New Deal*⁵⁴

Throughout the nineteenth and early twentieth centuries, Indian tribes were at the outer boundaries of American society. Until the mid-nineteenth century, white settlers sought mainly to push Indian tribes westward and made no attempt to integrate the tribes into Anglo-American society. Unlike other minority groups, Indian tribes were regarded as “distinct political communities” with limited sovereignty, as Chief Justice Marshall described them in his famous

51. *See id.* (noting the impact of pluralism on labor legislation).

52. For more information about these appointments, see T.H. WATKINS, *RIGHTEOUS PILGRIM: THE LIFE AND TIMES OF HAROLD L. ICKES, 1874-1952*, at 325-33 (1990); and KENNETH R. PHILP, *JOHN COLLIER’S CRUSADE FOR INDIAN REFORM, 1920-1954*, at 113-17 (1977). For correspondence between Margold, Collier, Ickes, and Felix Frankfurter, see John Collier Papers, Microfilm Reels 6 and 15, Manuscripts and Archives, Yale University Library. *See also* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 133-39* (1975) (examining the appointment of Margold).

53. [Felix S. Cohen], Memorandum: The Problem of Law and Order on Indian Reservations in Relation to the Wheeler-Howard Bill (ca. 1934), Felix S. Cohen Papers, Box 1, Folder 11, Yale Collection of Western Americana, Beinecke Library, Yale University [hereinafter Memorandum: Law and Order on Indian Reservations]. My attribution of this Memorandum to Cohen is based on its content and style and on a note from Fred Daiker to Harry Edelstein (Aug. 13, 1937), Felix S. Cohen Papers, Box 1, Folder 11, *supra*, which identifies Cohen as the author. *See also* RUSCO, *supra* note 4, at 200.

54. The following is a sketch of federal Indian policy at the turn of the twentieth century. For a more complete account, see RUSCO, *supra* note 4, at 1-61.

Worcester v. Georgia opinion.⁵⁵ Their efforts to maintain their tribal organization, however, often proved futile in the face of military conquest, fraudulent or unfulfilled treaties, and the pressure of white settlement that forced them away from most of their lands.⁵⁶ Beginning in the 1850s, Indians were forced onto reservations.⁵⁷

In the second half of the nineteenth century, the federal government took a more active role in Indian affairs, embracing a policy that legalized the devastating disintegration of Indian life. Beginning in the 1870s, government officials stressed the need to assimilate all Indians into the mainstream of American life. The General Allotment Act of 1887 (the Dawes Act),⁵⁸ which articulated the new policy of assimilation, targeted the tribes' communal holding of property.⁵⁹ Grounded in classical legal thought and in a particular image of masculinity, the Act equated freedom with individual possession of property.⁶⁰ It sought to force assimilation and the disintegration of tribal organization, particularly through the distribution of communal lands to individual owners.⁶¹ As Richard Hart has recently noted, "the Act was meant to force Indians to cease their tribal ways, to become individual farmers on small plots of lands, and thus to open the remainder of U.S. Indian reservations to non-Indian use."⁶² The turn

55. 31 U.S. 515, 559 (1832). See generally Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251 (1995) (discussing the changing relationship between the federal government and American Indians); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996) (describing the changing nature and extent of tribal sovereignty); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993) (discussing the role of law and the western legal system in rationalizing the colonization of Indians); Robert A. Williams, "The People of the States Where They Are Found Are Often Their Deadliest Enemies": *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981 (1996) (comparing the traditional legal narrative to its Indian counterpart).

56. GRAHAM D. TAYLOR, *THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-45*, at 1-3 (1980).

57. E.g., RUSCO, *supra* note 4, at 1.

58. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-54); see also DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 170-73.

59. § 1, 24 Stat. at 388 (codified at 25 U.S.C. § 331) (repealed) (providing for survey of reservation lands and allotment to individuals); see also DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 170.

60. See Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 N.M. L. REV. 273, 277-85 (1997). On possessive individualism and masculine identity, see MARK E. KANN, *ON THE MAN QUESTION: GENDER AND CIVIC VIRTUE IN AMERICA* (1991). On the relationship between classical legal thought and private property, see HORWITZ, *supra* note 2, at 145-67; and see also Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991) (showing how, despite the rhetoric of private property, Indian property was not protected).

61. See TAYLOR, *supra* note 56, at 1-5.

62. E. Richard Hart, *Foreword to INDIAN SELF-RULE*, *supra* note 23, at 6, 8. Vine Deloria has explained that railroads sought lands across the continent for their tracks and for settlements along their lines to ensure the use of the railroads to ship agricultural produce to both coasts. DELORIA, *supra* note 23, at 188. The Dawes Act institutionalized the

of the twentieth century thus witnessed the reduction of many tribal governments “from unalloyed internal sovereigns to virtual nonentities.”⁶³

A series of laws passed during the first decades of the century added insult to injury: they sought to enhance Indian assimilation, first by giving individual Indians their “pro rata share” of tribal funds and then by giving them “American” citizenship. The 1907 Lacey Act⁶⁴ authorized the Secretary of the Interior to grant to individual Indians control of their “pro rata share” of tribal funds.⁶⁵ The 1917 “Sells Declaration” sanctioned a variety of measures meant to swiftly accomplish the absorption of Indians into the nation.⁶⁶ The 1919 Citizenship for World War I Veterans Act⁶⁷ conferred citizenship on every veteran who so desired.⁶⁸ The Snyder Act of 1921⁶⁹ expanded the powers of the Bureau of Indian Affairs (BIA) “to expend congressional appropriations for most reservation activities, including health, education, employment, real estate administration, and irrigation.”⁷⁰ Finally, the 1924 Indian Citizenship Act⁷¹ declared “all non-citizen Indians born within the territorial limits of the United

concept of “wardship.” Under section 5 of the Act, the federal government would hold title to allotted lands for twenty-five years “in trust for the sole use and benefit” of the allottee. After twenty-five years, the property laws of “the State, or Territory where such lands [were] situated” would apply as to descent and partition. § 5, 24 Stat. at 389 (codified as amended at 25 U.S.C. § 348); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 171-72. The federal government, through negotiations with the Department of the Interior, would purchase any surplus, nonallotted lands, and hold the purchase money in trust for the sole use of the possessor tribes. However, Congress was authorized to appropriate money “as it saw fit” for “the education and ‘civilization’” of tribal members. *Id.* As Tadd Johnson and James Hamilton have noted, “by imbuing American Indians with respect and reverence for white American institutions,” assimilationists believed that “the American Indians could be made happier, wealthier, and wiser.” Johnson & Hamilton, *supra* note 55, at 1257.

63. Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 291 (1997).

64. Ch. 2523, 34 Stat. 1221 (1907) (codified as amended at 25 U.S.C. § 119); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 208.

65. Ch. 2523, 34 Stat. 1221; *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 208.

66. Indian Commissioner Sells, A Declaration of Policy, Extract from the Annual Report of the Commissioner of Indian Affairs, October 15, 1917, in DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 213-15.

67. Ch. 95, 41 Stat. 350 (1919); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 215.

68. Ch. 95, 41 Stat. 350; *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 215.

69. Ch. 115, 42 Stat. 208 (1921) (codified as amended at 25 U.S.C. § 13) (providing an “Authorization of Appropriations and Expenditures for Indian Affairs”); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 215-16.

70. Johnson & Hamilton, *supra* note 55, at 1258; *see also* ch. 115, 42 Stat. 208; DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 215-16.

71. Ch. 233, 43 Stat. 253 (1924) (codified as amended at 18 U.S.C. § 1401(b)); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 218.

States . . . to be citizens of the United States.”⁷² Indians were presumably welcomed into the polity but only as long as they relinquished their “old ways.”⁷³

The combination was disastrous. Outlining the failures of the allotment policy, the 1928 Meriam Report⁷⁴ described “poverty, disease, suffering, and discontent” among Indians.⁷⁵ Between 1887 and 1932 almost two-thirds of what remained of Indian lands were lost to white exploitation.⁷⁶ Many Indians were theoretically in possession of considerable property, including land, but were, in reality, paupers.⁷⁷ Few became successful farmers or ranchers, a fact that helped to deepen social and political divisions on the reservations.⁷⁸ The distribution of tribal lands also hastened the disintegration of many tribal governments or at least forced them to alter their traditional structures.⁷⁹ Finally, assimilation was never really even offered: Indians were “given” citizenship but denied the rights of citizens, including the right to vote, access to local schools, and the right to serve on juries.⁸⁰

By the late 1920s, the principal actors in the field of Indian policy were critical of the policy of allotment.⁸¹ With the coming to power of the New Deal administration, federal Indian policy was ripe for change. Shortly after his appointment in the spring of 1933, John

72. Ch. 233, 43 Stat. 253; *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 218.

73. *See generally* WALTER BENN MICHALES, OUR AMERICA: NATIVISM, MODERNISM, AND PLURALISM 30-31 (1995). For a discussion of Federal Indian policy during the first decades of the twentieth century, particularly the 1920s, see Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies*, 19 U. HAW. L. REV. 1 (1997).

74. INSTITUTE FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam et al. eds., 1928); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 219-22.

75. Johnson & Hamilton, *supra* note 55, at 1258. While criticizing the administration of Indian policy as inefficient and paternalistic, the Report recommended, nonetheless, a policy of assimilation that would encourage self-sufficiency. *Id.* For an innovative discussion of the problematic economic nature of allotment, see also Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 685-87 (1998).

76. TAYLOR, *supra* note 56, at 5.

77. [Felix S. Cohen], Draft of Address by [the New Solicitor of the Department of the Interior, Nathan] Margold, Felix S. Cohen Papers, Box 1, Folder 13, Yale Collection of Western Americana, Beinecke Library, Yale University [hereinafter Draft of Address by Margold]. My attribution of this Draft to Cohen is based on its content and style and on memoranda identifying Cohen as the author. Felix S. Cohen Papers, Box 1, Folder 13, *supra*.

78. RUSCO, *supra* note 4, at 56.

79. *Id.* at 57. No clearly stated policy toward Indian governments existed. Furthermore, since tribal governments did not disappear, the BIA was at times “forced” to acknowledge their existence and deal with them, rather than with individual Indians. *Id.* at 1-34.

80. Draft of Address by Margold, *supra* note 77.

81. RUSCO, *supra* note 4, at 62-93.

Collier—the new Commissioner of Indian Affairs—denounced land allotment as a violation of tribal sovereignty and the vested rights that Indians had secured in previous treaties in return for much of their lands. Collier pledged instead the moral and legal obligation of the government to stop land allotment and to act upon the bilateral contractual relationship that it had created before 1871 with Indian tribes.⁸² Such was the agenda that Collier envisioned the drafters of the IRA adopting.

A variety of reasons, including the fact that Collier was yet to solidify his passion into a comprehensive legal program, delayed the enactment of the IRA. Then, in the fall of 1933, a decision was made to bring in “experts” “with little previous involvement with Indian affairs to take the lead in preparing the legislative program.”⁸³ Felix Cohen was one of the two assistant solicitors appointed by Solicitor Margold to the task of bill drafting.⁸⁴ Upon his appointment, Cohen criticized the policy of allotment as creating on Indian reservations “a condition approximating legalized anarchy, controlled in practice only by the unreviewable disciplinary powers of the Indian Office.”⁸⁵ To repair the damage, Cohen suggested that the task of the new administration was to stop the pressing of “capitalist individualism” on Indian tribes “through the allotment of tribal property to individual Indians and through the inculcation of the capitalist psychology,” and instead, to protect and encourage “a communal ceremony.”⁸⁶

Cohen saw his role in the Department of the Interior as helping to carry out on Indian reservations an experiment in different forms of communal life and, more broadly, pluralism. According to Cohen, pluralism was compatible with centralized governmental planning. The balance between centralized planning and decentralized government was, however, very delicate. As the experiment progressed, the balance shifted along with Cohen’s understanding of pluralism. Parts III through V explore this transformation through the mediation of the IRA, the *Handbook*, and the ICCA. Part III investigates the relationship between the IRA and Cohen’s socialist pluralism. Part IV examines Cohen’s systematic pluralism and how it affected

82. Kenneth R. Philp, *Introduction: The Indian Reorganization Act Fifty Years Later*, in *INDIAN SELF-RULE*, *supra* note 23, at 15, 16-17.

83. RUSCO, *supra* note 4, at 192; *see also id.* at 177-92.

84. *Id.* at 192.

85. Memorandum: Law and Order on Indian Reservations, *supra* note 53.

86. Letter from Felix Cohen to Norman Thomas (Nov. 8, 1933), Joseph P. Lash Papers, Box 50, Folder 9, Franklin D. Roosevelt Library. Cohen was aware that real estate interests saw in “unrestricted Indian ownership of individual lands an opportunity to grab good land at low prices or simply to shift local taxes.” *Id.* Yet, he believed that “the officials in the service, whether misguided or not, [had] an honest idealism that one [didn’t] find in private business or private law practice to nearly the same extent.” *Id.*

his writing of the *Handbook*. Finally, Part V focuses on Cohen's comparative pluralism and how it was reflected in the ICCA.

III. "MAKING 'REDS' OF THE INDIANS": SOCIALIST PLURALISM AND THE INDIAN REORGANIZATION ACT, 1934

A. *Critique and Utopia*

Cohen's critique of the situation on Indian reservations on the eve of the New Deal, and, more broadly, his opposition to the policies of assimilation and allotment, stemmed from his objection to the imposition of "capitalist individualism" on Indian reservations. In his view, the oppression of Indian tribes was far more pervasive than suggested by critiques of particular programs and policies: Cohen believed that with respect to Indian tribes, capitalism itself was oppressive. To leave Indian tribes to compete with business corporations in a supposedly noncoercive world, he asserted, was as encumbering as the control of their affairs by the BIA. "We shall not add to the Indian's freedom by accepting the shallow arguments of those who insist that the Indian will be free when he is given his own individual property, [and] permitted to live under state laws and enjoy freedom of contract," Cohen proclaimed.⁸⁷ "The termination of governmental control," he concluded, "would not inaugurate Indian freedom. It would only exchange the slavery of bureaucracy for the slavery of poverty."⁸⁸

What, then, was a solution that served Indian interests? According to Cohen, in order to protect the economic and political interests of Indian tribes, the IRA had to establish self-governing socialist communities on Indian reservations. Ironically, the corporation—the symbol of capitalism—was his model.⁸⁹ Quoting from the conclusions of the 1928 Meriam Report⁹⁰ "that control from outside the social group secures only negative results,"⁹¹ Cohen suggested that "through the mechanism of municipal and quasi-municipal charters issued by the Secretary of the Interior to Indian tribes and ratified by

87. Draft of Address by Margold, *supra* note 77.

88. *Id.*; see also Memorandum: Law and Order on Indian Reservations, *supra* note 53.

89. On the corporation as a model for Progressive reform, see R. JEFFREY LUSTIG, *CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY, 1890-1920* (1982). For earlier calls to incorporate Indian tribes, including Collier's plans, see RUSCO, *supra* note 4, at 94-176. Unlike Rusco, who argues that the Memorandum on Law and Order on Indian Reservations did not discuss the incorporation of Indian tribes, *id.* at 199, I argue that Cohen called for incorporation. Yet, his plans were informed not by earlier calls to incorporate Indian tribes, but by a tradition that emerged out of the Progressive fascination with political pluralism. See *infra* Part III.B.

90. INSTITUTE FOR GOV'T RESEARCH, *supra* note 74.

91. Memorandum: Law and Order on Indian Reservations, *supra* note 53.

the Indians concerned,” Indian tribes would establish their self-government.⁹²

Cohen believed that the “incorporation” of Indian tribes would prevent future loss of Indian lands and allow the repurchase of reservation lands already lost to non-Indians. He further maintained that the government should provide Indians with the credit facilities they needed to develop their own properties and should encourage communal holding of lands and other resources that could not be efficiently used by individuals.⁹³ Ultimately, the various political and economic powers, which were in 1934 invested in the Department of the Interior, were to be transferred to their true “owners”—the Indians.⁹⁴ Through the establishment of “definite community ordinances” and community courts, as well as a special Federal Court of Indian Affairs, Cohen also expected an important shift toward legal stability and political advancement.⁹⁵ When all that was secured, he predicted, the powers of the BIA to govern tribal affairs could be entirely abolished.⁹⁶ Genuine socialist communities would then flourish on Indian reservations.⁹⁷

As Part III.B demonstrates, Cohen’s critique of federal Indian policy and his understanding of the tasks of the Indian New Deal were informed by socialist pluralism. In his opinion, Indian tribes were a test case for the feasibility of his socialist pluralist program. Cohen hoped that the establishment of socialist communities on Indian reservations would be a first step toward the formation of similar communities across the nation. As Part III.B shows, in the 1930s, socialist pluralism reflected both Cohen’s political aspirations and his sense of identity as a Jewish American.

92. *Id.*

93. Draft of Address by Margold, *supra* note 77.

94. *Id.*

95. Memorandum: Law and Order on Indian Reservations, *supra* note 53; *see also* RUSCO, *supra* note 4, at 197-201.

96. Draft of Address by Margold, *supra* note 77. The implications were clear to Cohen. As he noted:

The Indian Bureau should have no greater powers of government than the Weather Bureau. So far as I know, the Weather Bureau has never attempted to prevent the savage custom of clouds or to impose a model code of conduct upon the winds. I am sure the Indian Bureau could have contributed more to the happiness of its wards and to the richness of its American service if it had emulated the Weather Bureau’s illustrious example and restricted its functions to the fields of research and public service.

Id.

97. Letter from Felix Cohen to Joseph Lash (May 27, 1934), Joseph P. Lash Papers, Box 51, Folder 4, Franklin D. Roosevelt Library.

B. Dreams and Subtexts

The eldest of the three children of Mary Ryshpan and Morris Raphael Cohen, the renowned Jewish philosopher of City College of New York, Felix Cohen graduated from CCNY in 1926 and pursued graduate studies both in the Department of Philosophy at Harvard University (Ph.D., 1929) and at Columbia Law School (LL.B., 1931). Immediately after graduating from law school, Cohen spent a year as a clerk for Justice Bernard Sheintag of the Supreme Court of New York. He then joined the law firm of Hays, Podell and Shulman in New York, a plaintiff's firm that specialized in minority stockholders' claims. In 1933, Nathan Margold, the newly appointed Solicitor of the Department of the Interior and a friend of the Cohen family, asked Felix to give up a year of private practice and join him in the Department of the Interior. Cohen accepted the offer and came in as an Assistant Solicitor. The planned year stretched to fourteen. In 1943, Cohen was promoted to the position of Associate Solicitor. Upon his resignation from government service in 1947, Cohen received the Distinguished Service Award. Six short years later he died at the age of forty-six.⁹⁸

According to his widow, Lucy M. Kramer, Felix Cohen was "attracted to Indian law because he had a great feel for the land and the return to the simple life. The Indian way, as he read it as a child, had a tremendous attraction for him."⁹⁹ Indeed, like many middle-class men of his generation who shared a nostalgic love for nature and the natural,¹⁰⁰ Cohen held a stereotypical, sentimental view of the "Indian." Informed by it, Cohen believed that Indian reservations held a promise for a better national future, a future premised on group self-government, centralized planning at the federal level, and protection for individual rights. As this Part shows, this combination of socialism and pluralism underlay Cohen's socialist pluralist ideal.

As a relative noted after his death, Cohen was "a doctrinaire socialist"; no one "could reason him out of it. He knew what was right."¹⁰¹ Cohen's Ph.D. dissertation advocated hedonism as the ethi-

98. See generally FELIX S. COHEN: A FIGHTER FOR JUSTICE (Theodore H. Haas ed., 1956) [hereinafter COHEN: A FIGHTER FOR JUSTICE]; Symposium, *Felix S. Cohen*, 9 RUTGERS L. REV. 348 (1954). See also Jill E. Martin, "A Year and A Spring of My Existence": *Felix S. Cohen and the Handbook of Federal Indian Law*, 8 W. LEGAL HIST. 34 (1995); Remarks at a Testimonial Dinner for Felix Cohen, held in Washington D.C. (Jan. 17, 1948), Felix S. Cohen Papers, Box 92, Folder 1470, Yale Collection of Western Americana, Beinecke Library, Yale University [hereinafter Testimonial Dinner for Felix Cohen].

99. Lucy Kramer Cohen et al., *Felix Cohen and the Adoption of the IRA*, in INDIAN SELF-RULE, *supra* note 23, at 70, 70.

100. See T.J. JACKSON LEARS, NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920, at 144-49 (1984).

101. David Ryshpan, Interview by Joseph Lash, ca. 1965, Joseph P. Lash Papers, Box 50, Folder 9, Franklin D. Roosevelt Library; see also correspondence between Felix Cohen

cal system befitting the political agenda of socialism.¹⁰² At Columbia Law School, he embraced the legal realist emphasis on the social and political character of law.¹⁰³ If, as legal realists argued, law reflected politics, and particularly the hegemony of class, then, Cohen suggested, progressive reform required the substitution of radical for conservative politics—that is, socialism for capitalism.¹⁰⁴ In the early 1930s, he published a series of essays in support of socialism.¹⁰⁵ Shortly after joining the Department of the Interior, he wrote a letter to “Comrade” Norman Thomas—“a statement of the position that one Socialist finds himself in within the framework of a capitalist government.” “I feel that I owe you, whose judgment in these matters I most respect,” Cohen concluded his letter, “a statement of my reasons for thinking that I can serve the Socialist movement, for a while at least, in my present status.”¹⁰⁶

Cohen’s reasons were simple. He believed that in the Department of the Interior, with colleagues who expressed “a pretty steadfast desire to protect challenged Indian rights against various forms of capitalist exploitation,”¹⁰⁷ he could bring to fruition his program for reform. “One expects enthusiasm in the [National Recovery Administration] crowd, who expect they’re ushering in the millennium with golden trumpets,” Cohen wrote to Joseph Lash, “but to find it in a staid and stable department like the Interior is a shock.” “Even the

and Joseph Lash, Joseph P. Lash Papers, Box 51, Folder 4, *supra* (discussing European socialism, municipal socialism, and affairs of the Socialist Party in America).

102. FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM* (1933) [hereinafter COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS*].

103. See generally HORWITZ, *supra* note 2, at 169-92.

104. For an analysis of Cohen’s legal realism, see TSUK, *supra* note 16 (manuscript at pt. II, on file with author).

105. E.g., Felix S. Cohen, *Politics and Economics*, in *SOCIALIST PLANNING AND A SOCIALIST PROGRAM: A SYMPOSIUM* 69 (Harry W. Laidler ed., 1932); Felix S. Cohen, *Socialism and the Myth of Legality*, 4 *AM. SOCIALIST Q.* 3 (1935).

106. Letter from Felix Cohen to Norman Thomas (Nov. 8, 1933), *supra* note 86. Thomas replied with approval, emphasizing (a) the importance of “real service”; (b) the opportunity to train for administrative work, a training that could, in the future, help the Socialist Party; and (c) Cohen’s freedom in the Department of the Interior to implement his policies. “[Y]ou will resign when your freedom in this respect is denied,” Thomas concluded. Letter from Norman Thomas to Felix Cohen (Nov. 14, 1933), Joseph P. Lash Papers, Box 50, Folder 9, Franklin D. Roosevelt Library.

107. Letter from Felix Cohen to Norman Thomas (Nov. 8, 1933), *supra* note 86; see also Letter from Felix Cohen to Joseph Lash (Oct. 26, 1933), Joseph P. Lash Papers, Box 51, Folder 4, Franklin D. Roosevelt Library. Cohen wrote:

I’m amazed at the amount of idealism floating around the place. Even old employees rally enthusiastically to the defense of the oppressed Indian. And the law librarian (who probably dates from Taft or Wilson) took me aside today and confidentially showed me Norman Thomas’s latest article in the *World Tomorrow* (I had asked for something much more prosaic). He was very much excited about this article on ending war—and also about an editorial tribute to Hillquit on the opposite page. “These are the pioneers,” he said. “After all, it’s the pioneers that count.”

lawyers around the place,” he added in self-reflection, “who might be expected to inject a shot of cynicism and reaction, are amusedly or sympathetically tolerant.”¹⁰⁸

Cohen’s program for reform was informed by earlier theories of political pluralism, particularly Harold Laski’s,¹⁰⁹ and by the legal realists’ view of law as an apology for political (social and economic) oppression.¹¹⁰ Troubled by the rise of big corporations and the growing agitation of labor, Cohen’s early works analogized what he viewed as the sovereign status of the corporation to the status of labor unions. He urged the distribution of sovereignty to all associations, including labor unions, “trade unions, industrial unions, consumer organizations, farm organizations, semigovernmental corporations, and forms of associations that have not yet been invented.”¹¹¹ Sovereignty was conditioned, however, upon a group’s willingness to be democratically governed and, if possible, to adopt an economic structure premised on communal holding of property. Cohen’s early works, in short, envisioned self-governing communities such as labor unions as the foundation of American democracy.¹¹²

Pluralists described a variety of principles according to which collective entities participated in the body politic of the nation. Many left the state devoid of any superior moral character or obliging force. The state was a “society of societies,” and individual allegiance to it was conditioned upon other—more immediate—allegiances to associations, the latter being the primary source of action and identification.¹¹³ In 1937, Louis Jaffe summarized this view, arguing that if groups were sovereign, they were also lawmaking entities and the state lost its absolute power as an exclusive producer of a singular system of national law.¹¹⁴

Cohen rejected such conclusions. As a socialist, he feared that without centralized planning, free competition between corporations and labor unions would benefit the former at the expense of the latter. He further predicted that the idea of a free market of groups would substitute the sovereignty of one group—the corporation—for

Id.

108. Letter from Felix Cohen to Joseph Lash (Oct. 26, 1933), *supra* note 107. Other New Dealers seem to have shared this feeling. *E.g.*, RUSCO, *supra* note 4, at 183 (describing William Zimmerman’s vivid picture of “zest and fun” combined with “a sense of urgency” during the first months of the new administration).

109. *See supra* text accompanying notes 47-48.

110. *See generally* HORWITZ, *supra* note 2.

111. Felix S. Cohen, *What City College Will Contribute to the Development of the Law*, 2 THE BARRISTER, 4, 8 (1938).

112. *See id.*; *see also* works cited *supra* note 105.

113. GREGOR MCLENNAN, PLURALISM 33 (1995).

114. Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

the sovereignty of the state.¹¹⁵ Instead of reducing sovereignty to its parts, Cohen's approach was premised on a strong commitment to governmental (socialist) planning. He believed that national planning was required not only to coordinate the plans of different self-governing associations, to balance production and consumption, and to distribute wealth and income, but also to protect fundamental individual rights.¹¹⁶

When he joined the New Deal, Cohen viewed Indian reservations as fertile fields for the cultivation of his socialist pluralism. The traditional tribal holding of land suggested to him that the Indian way of life was more akin to socialism than was the prevailing American way of life. Cohen's critique of assimilation did not stem from concerns about the effects of assimilation on tribal culture. Rather, he was troubled by the disintegration of the economic structure of Indian tribes and the inculcation of capitalist individualism on Indian reservations. In Cohen's opinion, in short, assimilation was an economic rather than a cultural phenomenon. He viewed Indian tribes as political groups, not ethnic or cultural ones; indeed, they were political groups whose economic structure (particularly their structure of property ownership) he hoped to appropriate for other political groups and for society in general. Accordingly, for a while after Cohen had joined the Department of the Interior to help draft the IRA, he used to comment that they were "making 'Reds' of the Indians."¹¹⁷

In 1948, upon his resignation from government service, Cohen would testify to the biased origins of his initial approach to Indian affairs, admitting that he had no practical experience with Indian issues before he was appointed.¹¹⁸ Though an admirer of the wilderness who, like young men of his generation, loved hiking and canoeing, he

115. See Felix S. Cohen, Address before the Columbia Law School Liberal Club (1939), Joseph P. Lash Papers, Box 1, Folder 11, Franklin D. Roosevelt Library; see also Felix S. Cohen, Government and the Social Contract: Ethical Evaluations in the Law, Address Before the Eastern Law Students Conference, New York University School of Law (Mar. 7, 1936), in *THE LEGAL CONSCIENCE*, *supra* note 6, at 350, 362.

116. In the mid-1930s, together with a few friends, Cohen composed a *Proposed Constitution for the Socialist Commonwealth of America*. It promoted decentralized control of the means of production by democratically governed groups coordinated through governmental planning. It also protected individual rights. Felix S. Cohen et al., *Proposed Constitution for the Socialist Commonwealth of America*, Joseph P. Lash Papers, Franklin D. Roosevelt Library.

117. Ambrose Doskow, Interview by Joseph Lash, ca. 1965, Joseph P. Lash Papers, Box 51, Folder 1, Franklin D. Roosevelt Library. Certainly, such hopes were not welcomed by all. "Lucy and I decided," Cohen wrote to Lash in 1934, "that it wouldn't be fair to publish anything on the Indian situation that might give ammunition to those who have been denouncing our bill as communism and me as a member of the American Civil Liberties Union (which was a bad guess)." Letter from Felix Cohen to Joseph Lash (May 27, 1934), *supra* note 97. The bill to which Cohen refers in this letter is the IRA.

118. Cf. *supra* text accompanying notes 83-86.

was a New Yorker, “from a city where there were no reclamation, public land, Indian or territorial problems,—problems of which [he] had never heard until [he] came to Washington.”¹¹⁹ I am “only a lawyer,” he wrote to anthropologist Alexander Goldenweiser two years after his appointment.¹²⁰ Read carefully, such comments reveal more than sheer unfamiliarity.

New York City certainly experienced its share of racial tensions. Yet, like many middle-class Progressives who came of age amidst heightening social conflict, Cohen was preoccupied with the struggle of labor against capital and believed that cultural and ethnic tensions would be resolved once disparities of wealth and income disappeared. His early writings dealt almost exclusively with economic issues. He easily saw that law was a tool of capitalism, but he failed to recognize its contribution to racial and cultural hegemony. The attitude of the Socialist Party, whose ranks he joined, toward race relations was indeed “hazy.”¹²¹ In 1936, Cohen and his friends composed a *Proposed Constitution for the Socialist Commonwealth of America*.¹²² Its third article promised that “the right to share in the work of society and to enjoy the product thereof shall not be denied or curtailed because of race, color, sex, religion or political or social beliefs.”¹²³ Such fundamental individual rights were subjected, nonetheless, to an overarching socialist pluralist structure.¹²⁴

What was the appeal of socialist pluralism? Clearly, Cohen found it intellectually and politically appropriate, but there was a stronger attraction. The combination of socialism and pluralism was a central aspect of Cohen’s own sense of identity as a Jewish American and, more important, as an heir to a secular, post-Enlightenment tradition of Judaism. Cohen’s paternal grandparents, Abraham Mordecai and Bessie Farfel Cohen, immigrated to America from Minsk, Russia in 1892. Like many first-generation immigrants, they remained Or-

119. Felix S. Cohen, Remarks, Testimonial Dinner for Felix Cohen, *supra* note 98, at 22 [hereinafter Cohen, Remarks at Testimonial Dinner]; *see also* Letter from Felix Cohen to Joseph Lash (Oct. 26, 1933), *supra* note 107 (describing an expected tour of Indian reservations, Cohen noted: “I was to have gone the day before yesterday, but I convinced my boss Margold that not knowing anything about the Department or the Indians I’d make a pretty lousy ambassador. But I’m learning.”).

120. Letter from Felix Cohen to Alexander Goldenweiser (April 15, 1936), Felix S. Cohen Papers, Box 1, Folder 7, Yale Collection of Western Americana, Beinecke Library, Yale University.

121. NATHAN IRVIN HUGGINS, *HARLEM RENAISSANCE* 50 (1971). John Buenker more pointedly noted that Socialists “shared the anti-black biases of white America generally, even though their animus took the form of neglect and ignorance more often than it did overt hostility.” John Buenker, *The New Politics, in 1915, THE CULTURAL MOMENT: THE NEW POLITICS, THE NEW WOMAN, THE NEW PSYCHOLOGY, THE NEW ART, AND THE NEW THEATER IN AMERICA* 15, 23 (Adele Heller & Lois Rudnick eds., 1991).

122. Cohen et al., *supra* note 116.

123. *Id.*

124. On socialist pluralism’s indifference to cultural interests, see *infra* Part III.D.

thodox, if not in faith at least in ritual. Many second-generation immigrants, like Felix Cohen's father, Morris Cohen, in turn, believed that religious Orthodoxy—which for centuries had required its adherents to separate themselves from the nations of the world—prevented them from gaining their freedom, and they zealously rejected it.¹²⁵ Instead of embracing the patriarchal formalism of Orthodoxy, second- and third-generation immigrants turned to the prophetic tradition, whose cry against injustice and search for eternal truth appealed to Jews and Christians alike.¹²⁶ This prophetic tradition had a strong affinity with the message of socialism—a socialism that rejected Orthodoxy, on the one hand, and celebrated solidarity and the improvement of economic conditions, on the other hand.¹²⁷ For young Jewish men and women who were second- and third-generation Americans, socialism thus provided a sense of inclusion, of belonging with others in a struggle against injustice.

Pluralism offered a similar haven. Like other immigrants, Jewish Americans were torn between their desire to maintain a particular identity—to be *ones*—and their eagerness to become Americans—part of the *many*. Given the resemblance of Jewish and American cultural symbols, Jewish immigrants often experienced this tension more strongly; they had come to America in search of the “promised-land,” seeking to leave behind a history of segregation and discrimination. The possibilities that Americans saw in the frontier were embedded for Jewish immigrants and their children in the eastern shores of America. “I am . . . grateful,” Felix Cohen stated more than five decades after his father had come to the United States, “grateful for the opportunity to serve the country that welcomed my father and my grandparents out of slavery into freedom.”¹²⁸

Having arrived in America at different historical moments and from various backgrounds, Jewish Americans attributed a variety of meanings to the confluence of Jewish and American dreams.¹²⁹ Some called for assimilation. Others, like Horace Kallen, advocated cultural pluralism, arguing that America was to remain a nation composed of many cultural or ethnic nations.¹³⁰ Between these two ends

125. See MORRIS R. COHEN, *A DREAMER'S JOURNEY: THE AUTOBIOGRAPHY OF MORRIS R. COHEN* 98-99 (1949) [hereinafter MORRIS COHEN, *A DREAMER'S JOURNEY*].

126. William S. Berlin, *The Roots of Jewish Political Thought in America* 222-23 (1975) (unpublished Ph.D. dissertation, Rutgers University) (on file with University Microfilm International) (referring to Morris R. Cohen, *Philosophy in Wartime, An Apologia*, NEW REPUBLIC, Dec. 3, 1919, reprinted in MORRIS R. COHEN, *THE FAITH OF A LIBERAL* 84 (1946) [hereinafter MORRIS COHEN, *THE FAITH OF A LIBERAL*]).

127. See MORRIS COHEN, *A DREAMER'S JOURNEY*, *supra* note 125, at 98-99.

128. Cohen, *Remarks at Testimonial Dinner*, *supra* note 119, at 25.

129. ARTHUR A. GOREN, *THE POLITICS AND PUBLIC CULTURE OF AMERICAN JEWS* 13-14 (1999).

130. See *supra* Part II.A.

were cosmopolitans, who viewed particular cultures, the Jewish culture being one example, as repositories for insights that when brought together would allow the development of a more comprehensive conception of national identity. Cosmopolitans did not suggest that cultural differences should be eradicated. They objected, however, to the preservation of such differences in a parochial form, as cultural pluralism could imply. Instead, they offered a more fluid understanding of cultural interaction and influence.¹³¹

Felix Cohen grew up in a household committed to cosmopolitanism. His father, Morris Cohen, espoused the universal ideals of the Enlightenment and mediated the tensions between separatism and assimilation by reconstructing the problems of minority groups as universal rather than particular. There were accordingly “many human problems, of which Jews, as human beings, [had] perhaps more than their share. But these problems, traced to their ultimate roots in reality, [were] also the problems of other minority groups, and [every] group of human beings [was] . . . a minority in one situation or another”¹³² For Morris, a democracy committed to social and economic equality was the universal solution to these problems.

Although intellectually (or philosophically) a pluralist,¹³³ Morris Cohen rejected all social forms of pluralism, warning against the possible oppressiveness of groups toward their members and toward society at large—oppressiveness that could potentially follow from either political or cultural pluralism. “We can draw more than one true picture of the social world, provided we do not claim that our picture is *the* true one,” he wrote in a critique of Laski’s political pluralism.¹³⁴ Jews, he similarly argued in a critique of Kallen’s cultural pluralism, adopted the “very popular racial philosophy of history”—that is, “the constant tendency to emphasize the consciousness of race”—but “[i]nstead of the Teuton, it is the Jew that is the pure or superior race.”¹³⁵

Felix Cohen was intrigued by cultural and political pluralism. To advocate any form of pluralism, however, would have been perceived

131. *E.g.*, David A. Hollinger, *Ethnic Diversity, Cosmopolitanism, and the Emergence of the American Liberal Intelligentsia*, in *IN THE AMERICAN PROVINCE: STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF IDEAS* 56 (1985).

132. MORRIS COHEN, *A DREAMER’S JOURNEY*, *supra* note 125, at 233.

133. Felix S. Cohen, *Foreword* to MORRIS R. COHEN, *AMERICAN THOUGHT: A CRITICAL SKETCH* 11 (1951).

134. Morris R. Cohen, *Communal Ghosts and Other Perils in Social Philosophy*, 16 *J. PHIL.* 673 (1919), *reprinted in* MORRIS R. COHEN, *REASON AND NATURE: AN ESSAY ON THE MEANING OF SCIENTIFIC METHOD* 396, 399 (1931).

135. Morris R. Cohen, *Zionism: Tribalism or Liberalism?*, *NEW REPUBLIC*, Mar. 19, 1919, *reprinted in* MORRIS COHEN, *THE FAITH OF A LIBERAL*, *supra* note 126, at 326, 328. The article was written as a critique of Zionism, which Morris Cohen associated with Kallen’s pluralism.

as a rebellion against Morris's intellectual authority. To adopt cultural pluralism would have, in addition, challenged Felix's own sense of identity as a Jewish American. Devoted to his father, intellectually and personally, he could thus go only as far as adopting socialist pluralism, an approach that bridged Harold Laski's political pluralism (by describing groups as sovereigns) and Morris Cohen's critique of it (by endorsing centralized planning). While Felix Cohen never disavowed his commitment to centralized planning, his experiences in the Department of the Interior altered his vision. Ultimately, he accepted that all groups, including ethnic and religious groups, had the right to self-determination. Such an attitude, however, depended upon Cohen's ability to celebrate his particular ethnic identity. In 1934, he was yet to recognize his Jewish identity as particular. Without this realization, it was safer to view Indian tribes as political—rather than racial or ethnic—groups.¹³⁶ Such was Cohen's assumption when he joined the Department of the Interior to help draft the IRA; hence his comment that they were “making ‘Reds’ of the Indians.”¹³⁷

The goal of the IRA, as New Dealers described it, was to stop allotment and assimilation by delegating to Indian tribes more authority over their economic, social, and political affairs. Cohen's advocacy of Indian self-government within prescribed limits and with the help of governmental authorities was radical in its proposed protection of Indian interests. Furthermore, Cohen maintained that the provisions of the IRA should not be imposed on Indian tribes; he believed that the charters should be tailored to the needs of each Indian community, and he was the first in the Department to suggest that Indians should be consulted during the legislative processes.¹³⁸ His proposed

136. On the character of Indian tribes as ethnic or political groups, see generally Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993); and Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311 (1993). For an analysis of the unique status of Indians in American constitutional history, see David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991).

137. See *supra* text accompanying note 117.

138. RUSCO, *supra* note 4, at 211. Indeed, Cohen noted that “[t]he feeling of the Indians towards white man's law [was] often very much like the attitude we should [have taken] if [our] country were to come under the domination of some foreign nation of alien race, and our conduct subjected to the laws and regulations of a far-off sovereign and to a strange judicial procedure.” Memorandum: Law and Order on Indian Reservations, *supra* note 53; see also Draft of Address by Margold, *supra* note 77. Cohen wrote:

The problem of securing a measure of freedom for the Indians of this country calls for more than the abolition of obsolete laws, it calls for more than the abolition of undemocratic methods of government. It calls for the active, constructive, cooperation of the Government with the Indians in building a form of organization through which the Individual Indian can protect and conserve his rights. Without such organization the Indian can enjoy freedom only as the favor of a benevolent administration.

community courts were indeed meant to allow tribes to create their own laws.¹³⁹ Cohen's socialist beliefs, however, limited the scope of such pluralistic assumptions.

Cohen did not merely wish to make "Reds' of the Indians"; he believed that Indians were socialists. "The Indian," he wrote—disclosing his biased position—was "too deficient in the white man's business equipment, the white man's love of work, and the white man's selfishness to maintain his economic independence when he is turned loose, as an individual, to face the mighty forces of the modern economic world."¹⁴⁰ Accordingly, the task of the IRA was to acknowledge the socialist temperament of the Indians and to correct the damage caused by earlier attempts to eradicate it. Cohen's proposals outlined ways to persuade, even force, Indians who wished to remain owners of individual property to turn over to their communities the lands they owned.¹⁴¹ Cohen also believed that unequal distribution of rights to land had to be eliminated "if every member of the community [was] to be granted some opportunity to wrest a livelihood from the limited resources of the community."¹⁴² After all, as self-governing socialist communities, Indian tribes were to provide a model that other groups could adopt. "Here in the center of the Laguna project," Cohen reported from Mexico, "one sees a true social revolution carried out without cruelty or intolerance, and damned efficiently."¹⁴³

Cohen genuinely advocated Indian self-government. Knowing little about Indian cultures and customs, he interpreted the interests of the Indians through his frames of reference. For one thing, when Cohen joined the Department of the Interior, he believed that the policy of allotment had destroyed tribal governments, turning Indian reservations in the eyes of the law (without an authority to enforce laws) into "almost a no-man's land."¹⁴⁴ The establishment of modern

Id. Cohen recruited his wife Lucy M. Kramer as an unpaid volunteer to "keep track of how various Indian tribes were reacting to the specific tentative provisions of the Wheeler-Howard bill." Kramer-Cohen et al., *supra* note 99, at 71.

139. See generally RUSCO, *supra* note 4, at 197-201.

140. Draft of Address by Margold, *supra* note 77.

141. RUSCO, *supra* note 4, at 197-98.

142. *Id.* at 198. While Cohen realized that stating such an objective was politically inadvisable, he also thought it was legally unnecessary, since Indian communities would have to arrive at such a policy by "reasoning and bargaining, no matter what the statute provides." *Id.*

143. Postcard from Felix Cohen to Joseph Lash (August 5, 1934) Joseph P. Lash Papers, Box 51, Folder 4, Franklin D. Roosevelt Library. Interestingly, Cohen was so confident that the rest of the nation would follow the model set on Indian reservations that he neglected to note the problems that might be associated with the creation of socialist communities in the midst of a society committed to the values of capitalism.

144. Draft of Address by Margold, *supra* note 77; see also Memorandum: Law and Order on Indian Reservations, *supra* note 53. As Cohen explained, according to the holding in *Worcester v. Georgia*, 31 U.S. 515 (1832)—the case that recognized Indian tribes as sepa-

governments, modeled after municipal and housing corporations¹⁴⁵ and subject to the supervision of the Department, was thus the only alternative to assimilation. Furthermore, while Cohen recognized the importance of receiving information from the reservations with respect to the IRA, he maintained that consulting the Indians was vital “to awaken sympathetic understanding among those most directly concerned with this policy.”¹⁴⁶ Critical of earlier attempts to impose capitalist individualism on Indian reservations,¹⁴⁷ Cohen initially failed to recognize that the structure he preferred was a cultural product, too, and not necessarily suitable for the customs and traditions of Indian tribes. Ironically, Cohen, who as an intellectual celebrated pluralism and as a Jewish American rejected assimilation, hoped to create a single economic, if not also political, structure on Indian reservations.

His colleagues were similarly at fault. Whether or not they drew on theories of pluralism, New Dealers sought to protect the autonomy of Indian tribes without segregating them from the mainstream of American life, however broadly defined. Their solution was thus a problematic mixture: they relied on American structures of government to protect Indian ways of life and assumed that uniform political and economic structures—self-government and communal holding of lands—would promote the interests of the Indians. Neither the

rate nations—the states had no constitutional power to regulate the conduct of tribal Indians or the conduct of their own citizens toward such Indians where the acts in question occurred in Indian country, that is, restricted individual lands as well as unallotted tribal lands. Memorandum: Law and Order on Indian Reservations, *supra* note 53. While some historians have recently argued that the policy of allotment did not destroy tribal governments on a wholesale basis, New Dealers in general seem to have believed that the policy of allotment had hastened the disintegration of tribal governments and left no machinery of justice on the reservations. *Cf.* RUSCO, *supra* note 4, at 56-61. Though several criminal laws applied to these territories, Cohen suggested that they were, at most, sporadic and irregular. An Indian reservation, Cohen noted, was still in 1933 “as it had been a century earlier, a happy hunting ground for criminals, provided only [that] they refrained from seditious activities.” Draft of Address by Margold, *supra* note 77. Furthermore, as Cohen explained, neither Indians nor non-Indians were entitled to the ordinary constitutional civil liberties while on Indian reservations. Federal laws authorized the Commissioner of Indian Affairs to summarily remove from any reservation, “with such force as might be necessary,” any person whose presence within the limits of an Indian reservation the Commissioner viewed as “detrimental to the peace and welfare of the Indians.” *Id.*; see also Memorandum: Law and Order on Indian Reservations, *supra* note 53.

145. See Bibliography for use in drafting Tribal Constitutions, Felix S. Cohen Papers, Box 6, Folder 77, Yale Collection of Western Americana, Beinecke Library, Yale University.

146. RUSCO, *supra* note 4, at 211 (quoting Cohen in a memorandum to Collier).

147. For Cohen’s view of attempts to impose policies on Indian reservations, see, for example, Draft of Letter from Felix Cohen to Thomas Dignan, Felix S. Cohen Papers, Box 7, Folder 95, Yale Collection of Western Americana, Beinecke Library, Yale University. (“The matter of working out a charter of self-government is something which the Indians must do themselves, if the bill is passed, with the aid of private attorneys in whom they have confidence, and of officials of the Interior Department.”).

liberals nor the socialists among the New Dealers fully realized the situated nature of their frames of reference.¹⁴⁸ Some of the gaps that were left in the IRA due to such misconceptions are examined in Part III.C after a brief description of the Act.

Daily encounters with Indian tribes during the first months of the New Deal taught Cohen the importance and diversity of tribal interests. As Part III.D shows, this led him to reassess his socialist pluralist ideal. With reevaluation came the realization that diverse interests were not contained within one value system but rather spread over a variety of value systems—hence also the inappropriateness of universal solutions that focused on the mediation of conflicts within one value system. Such an understanding laid the foundation for Cohen's systematic pluralism, which emphasized the need to expand the American legal system, not merely to accommodate different interests within one system, but also to encompass the value systems or ideals in which such interests were grounded. Part IV will explicate Cohen's systematic pluralism and its relationship to the *Handbook*.

C. Realism and Transformation

The initial draft of the IRA was introduced in mid-February 1934 by Senator Burton K. Wheeler of Montana and Representative Edgar Howard of Nebraska, chairmen, respectively, of the Senate and House Committees on Indian Affairs. It was a long and complex bill; it covered forty-eight pages, and was divided into four titles: Indian self-government, education for Indians, lands, and the court of Indian affairs.¹⁴⁹

148. Cf. James P. Boggs, *NEPA in the Domain of Federal Indian Policy: Social Knowledge and the Negotiation of Meaning*, 19 B.C. ENVTL. AFF. L. REV. 31 (1991). Boggs notes:

[M]ost scholars regard the Indian Reorganization Act (IRA) of 1934 as inaugurating a distinctly new policy—promoting the reconstitution of tribal governments—in reaction to the excesses of the allotment period. One may argue, however, that the IRA merely signaled a shift from the individualist mode of assimilation that drove allotment to a corporatist mode that accorded with the emergence of the corporation in everyday life. The IRA undoubtedly was a reaction to the devastation of allotment. Nevertheless, it reflected assimilation in a different guise rather than a new-found respect for Native American culture.

Id. at 59.

149. TAYLOR, *supra* note 56, at 19-21. The first title, *Indian Self Government*, declared the right of tribal societies to control their lives by establishing their own governments. It authorized the Secretary of the Interior to grant “powers of local self-government and the right of incorporation for economic purposes upon petition of one-fourth of the adult Indians residing on a reservation and ratification of the charter by three-fifths of the residents.” *Id.* at 20. Such local governments could then establish and enforce ordinances, “contract with the federal government for public services,” regulate membership, and “take over other administrative functions deemed suitable by the secretary of the interior.” *Id.* The title left room for the institution of tribal constitutions, which would be the task of the Department in the following years. In general, the first title aimed at transforming infor-

The draft expressed the general view that Congress should abandon the breaking down of tribal organization and the assimilation of individual Indians as the objectives of its Indian policy and should instead encourage tribal self-government.¹⁵⁰ New Dealers disagreed, however, on the structure of government that Indian tribes should adopt. Some believed that the Indians would choose modern (American-style) constitutions; others hoped that they would follow their tribal traditions.¹⁵¹ The draft was thus rather enabling when discussing the tribes' internal powers. However, all seemed to agree on an economic structure premised on communal holding of lands. The draft was thus constraining with respect to the tribes' economic powers. Land classification, purchase of lands, transfer of titles, leasing of lands—in other words, the external scheme within which self-government (or, for Cohen, socialist pluralism) was allowed—were to be approved by the Secretary of the Interior.¹⁵² Overall, New Dealers wanted to maintain some form of control (or guardianship) over tribal governments so that they could ensure the careful reconstruction of destroyed self-governance capacities.¹⁵³

mal Indian processes into formal—and western—institutions, which the federal government would—and could—respect. The *second* title, *Special Education for Indians*, announced that educational policy would emphasize the value of Indian culture. Government schools would aim to bring to Indian communities a sense of their own past and values. The title thus created a fund for formal education of Indians and different measures to “restore traditional Indian cultures.” *Id.* at 21. The title also provided for training for Indians “to take over service positions in the bureau.” *Id.* The *third* and most controversial title prohibited future land allotments and restored to tribal ownership those lands which had been declared surplus under the respective allotment acts but never settled. All lands allotted under the Dawes Act were to be classified into productive units. “Those allotments could then be exchanged for shares in the tribal corporation, while heirship lands would be ceded to the community and the individual heirs compensated for improvements.” *Id.* at 20. The Department of the Interior was also empowered to purchase lands for the tribes. It could spend up to \$2 million annually for land purchases for existing reservations and for the creation of new colonies for landless Indians. *Id.* at 20-21. The *fourth* title called for the establishment of a *Court of Indian Affairs* that would consist of seven justices “appointed by the president with the consent of the Senate.” PHILP, *supra* note 52, at 143. The Court was to have authority over all legal controversies affecting Indian tribes. *Id.* It was to “protect the Indian community . . . against unnecessary obstruction and delay in carrying out of the program contemplated in this bill . . . [and afford] effective protection of the rights of individuals in the administration of the program.” TAYLOR, *supra* note 56, at 21.

150. *E.g.*, Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 363-64 (1997).

151. Cohen seems to have initially preferred modern constitutions. *See supra* Parts III.A-B. Commissioner Collier, on the other hand, favored traditional ones. For Collier's position, see Mark A. Michaels, *Indigenous Ethics and Alien Laws: Native Traditions and the United States Legal System*, 66 FORDHAM L. REV. 1565, 1578 (1998). *See also* DELORIA, *supra* note 23, at 187-206.

152. *See* TAYLOR, *supra* note 56, at 19-21, 30.

153. *See generally* Outline of Bill on Indian Self-Government (ca. 1934), Felix S. Cohen Papers, Box 9, Folder 120, Yale Collection of Western Americana, Beinecke Library, Yale University. For Collier's vision, see Johnson & Hamilton, *supra* note 55, at 1258-59.

Commissioner Collier assumed that Congress would quickly approve the bill, if only because it was endorsed by the Roosevelt administration. To his dismay, the passage was not smooth. In addition to their objection to the complexity and length of the initial draft, most members of the House and Senate Committees favored assimilation. Another factor affecting their response was apparent Indian opposition. New Dealers were thus forced to appeal to the Indians. In an unprecedented move, they summoned Indian congresses around the country where they explained the bill and listened to suggestions.¹⁵⁴ A second draft followed, leaving intact the major elements of the original draft, but including thirty amendments initiated at these congresses.¹⁵⁵ Among other things, these amendments abandoned the forced transfer of allotted lands from living individuals to tribal control and modified the provision for transferring such lands to the tribe upon the death of the allottee. They further prohibited “the disposition of any community or tribal assets without the consent of the tribe or community,” and specifically included water rights under the protection of the Act.¹⁵⁶ Finally, the Indians insisted on including a provision that would prevent “the possibility of having 50 active voters out of a thousand eligible adults bind the entire tribe.”¹⁵⁷

The second bill did not fare better than the initial draft, forcing Collier to accept a new and drastically abbreviated bill, which would become the IRA. It included most of the original ideas with respect to the termination of allotment, tribal incorporation and organization, and employment of Indians by the BIA.¹⁵⁸ To help tribes with the drafting of constitutions, bylaws, and charters of incorporation for business purposes, an annual appropriation of \$250,000 was authorized. A \$10 million revolving credit fund was further created to support economic development on reservations. In addition, the Indian Civilian Conservation Corps helped to bring Indians under many of the New Deal relief programs; two policy statements guaranteed Indian religious freedom; states where Indians had enrolled in public schools were given federal funds; and an Indian Arts and Crafts Board was established.¹⁵⁹

On the other hand, the ability of the tribes and the Department of the Interior to acquire allotted lands in order to consolidate was notably diluted. Tribes were also denied the power to take over heirship

154. RUSCO, *supra* note 4, at 245-49; *see also* PHILP, *supra* note 52, at 145-54.

155. RUSCO, *supra* note 4, at 248.

156. *Id.* at 248 (quoting the House Committee, *Readjustment of Indian Affairs* (1934)).

157. *Id.* at 249 (quoting the House Committee, *Readjustment of Indian Affairs* (1934)). *See generally id.* at 220-49.

158. TAYLOR, *supra* note 56, at 27-28.

159. *Id.*; *see also* Philp, *supra* note 82, at 17-18; DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 229-30.

lands. Later, Collier would claim that losing those features was “a major disaster to the Indians, the Indian Service, and the program.”¹⁶⁰ Furthermore, the final form of the IRA called for a referendum to be held on reservations included under the Act within one year (subsequently extended to two years) to determine whether or not the tribe chose to come under the provisions of the Act. Tribes that rejected the IRA would remain under the BIA’s direct control. Tribes that accepted it could then prepare a constitution, to be ratified by “a majority of the Indians on a given reservation and officially recognized members of the tribe.”¹⁶¹ The establishment of a tribal council and a charter of incorporation would follow. The time limit of the referenda requirement put an undue burden both on the Indians and on the Department, and produced mistakes that might have otherwise been avoided.¹⁶²

New Dealers rushed to administer reorganization. According to one report, during the first year of the IRA “172 [Indian groups] with a total population of 132,000 accepted reorganization and 73 with a total population of 63,000 rejected it.”¹⁶³ The most significant rejection occurred on the Navajo Reservation in Arizona and New Mexico.¹⁶⁴ After the initial referenda were administered to meet the two-year deadline, New Dealers started drafting constitutions for the different tribes.¹⁶⁵ Cohen was the leading architect of these constitutions. A model constitution was prepared and teams were sent to the reservations to discuss general and particular provisions with the Indians.¹⁶⁶ Some tribes chose to follow their own traditions; others

160. TAYLOR, *supra* note 56, at 28 (quoting JOHN COLLIER, *THE INDIANS OF THE AMERICAS* 265 (1947)).

161. *Id.*

162. *Id.* at 27-28; *see also* PHILP, *supra* note 52, at 158-60.

163. TAYLOR, *supra* note 56, at 32. Numbers vary in different reports, yet the pattern seems accurate. *But see* Russel Lawrence Barsh, *Another Look at Reorganization: When Will Tribes Have a Choice?*, *INDIAN TRUTH*, Oct. 1982, at 4.

164. While the BIA attributed the defeat to campaigns carried on by special interest groups, the vote probably reflected the bitter controversy between the BIA and the Navajos over stock reduction, a controversy that coincided with the referendum. TAYLOR, *supra* note 56, at 33.

165. The basic administrative framework was complete by the end of 1936. Indian groups were enrolled in the program, formal procedures for tribal organization were developed, and units were created within the Department to oversee the process and to coordinate the various political and economic programs for the Indians. The Indian Organization Division was such a unit. It supervised the preparation of constitutions and reviewed the operations of the new established councils. In addition to lawyers, Collier brought in anthropologists from the Smithsonian Institution’s Bureau of American Ethnology and from universities. In 1936, “an Applied Anthropology Staff was established within the bureau under H. Scudder Mekeel, formerly of Harvard University.” *Id.* at 36-38.

166. In his recent analysis of the legislative process of the IRA, Elmer Rusco noted that “nothing in the IRA was designed to impose any particular structure of government on an Indian society.” RUSCO, *supra* note 4, at 296. While the IRA on its face did not adopt one structure, as this Article suggests, individual policymakers held certain sets of beliefs that determined their vision for the IRA and how they went about administering it. For model

were willing to substitute a modern constitution for their Indian antecedents. As Graham Taylor has concluded, “[b]y the middle of 1937, sixty-five tribes had established constitutions and thirty-two had also ratified corporate charters. Altogether, between 1936 and 1945, ninety-three Indian groups set up tribal governments, and seventy-four of them had business charters. All but seven of the tribes were organized before 1938, indicating the intensity of the effort.”¹⁶⁷

In general, the IRA fell short of most of its political and economic aims. It stopped allotment, but since the transfer of lands from individual to tribal ownership was voluntary, and as appropriations for land consolidation and purchases were restricted, the federal government had a relatively limited degree of control over Indian economic resources. Since a time limit was imposed on the referenda, many Indians were rushed—maybe even coerced¹⁶⁸—into “a system of organization with which they were unfamiliar.”¹⁶⁹ Others found their powers limited.¹⁷⁰ Even Collier concluded in retrospect: “We had pressed the democratic philosophy not too far; we had not pressed it far enough nor skillfully enough.”¹⁷¹

Political compromises aside, the failure of the IRA to fulfill its aims also reflected a lack of clear guidelines. In particular, the IRA did not specify whether tribal governments were to follow Indian traditions or modern American law. As I have indicated, this omission mirrored conflicting views within the Department about whether the tribes should adopt modern constitutions, or follow their own, often unwritten, tribal traditions. Knowing very little about Indian ways of life, both “modernists” and “traditionalists” seem to have agreed that Indian tribes, no matter what governmental structure they chose, would adopt a modern economic structure. Such assumptions often impeded the efforts of tribes that chose to use traditional tribal council systems to develop their economic resources.

Tribes that chose to write modern constitutions did not fare better. As Robert Clinton has recently noted, “[t]ribal constitutions were often drafted from models provided by the BIA whose bureaucratic hold on the governance of Indian country was directly threatened by

constitution and bylaws, see Felix S. Cohen Papers, Box 7, Folder 100, Yale Collection of Western Americana, Beinecke Library, Yale University.

167. TAYLOR, *supra* note 56, at 36; *see also id.* at 30-36.

168. Floyd A. O’Neil, *The Indian New Deal: An Overview*, in INDIAN SELF-RULE, *supra* note 23, at 30, 42.

169. TAYLOR, *supra* note 56, at 31.

170. *See, e.g.*, Barsh, *supra* note 163.

171. TAYLOR, *supra* note 56, at 31 (quoting JOHN COLLIER, FROM EVERY ZENITH: A MEMOIR 224 (1962)). For a critical evaluation of Collier’s role in forcing Indian tribes to come under the IRA, see Rebecca L. Robbins, *Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance*, in THE STATE OF NATIVE AMERICA, *supra* note 23, at 87, 95-98.

the emergence of strong, autonomous Indian tribal governments.¹⁷² Determined “to keep their jobs and their power,” BIA bureaucrats thus “drafted into many tribal constitutions provisions requiring most or all tribal law making or resource management decisions to be directly approved by the Secretary of the Interior (through the BIA, of course).”¹⁷³ Cohen wished to do away with the BIA; still, the failures of the IRA should not be blamed only on BIA bureaucrats. The pluralist Cohen, too, had initially opted for American-style constitutions, believing that the structure of municipal corporations could easily be adapted to protect the interests of Indian tribes.

Finally, by forcing tribes to choose between American-style constitutions and their own, the IRA did not only undermine traditional forms of Indian government. It also helped to intensify divisions between traditional and more assimilated factions on many reservations, erecting another obstacle on the tribes’ path to self-government and economic independence.¹⁷⁴ In short, not only congressional opposition, but also the New Dealers’ unfamiliarity with Indian cultures, hindered the fulfillment of the radical potential of the IRA—that is, the creation of truly sovereign communities on Indian reservations (or, for Cohen, the fulfillment of socialist pluralism).

One compromise would become advantageous for Indian tribes. Since members of the Senate and House Committees on Indian Affairs had no intention of granting the governing bodies of Indian tribes the sovereign powers enumerated in the initial draft, Collier was forced to negotiate language that was included in section 16 of the ultimate bill.¹⁷⁵ In its final form, section 16 admitted that the

172. Clinton, *supra* note 55, at 104.

173. *Id.* at 105.

174. These divisions persist to this day and are at the root of many intra-Indian conflicts. Michaels, *supra* note 151, at 1578. Russel Barsh has similarly claimed that “[a]rguably, tribal governments have grown stronger and somewhat more independent since 1934, but decision-making processes have changed little. Rooted in problems of social control rather than the promotion of families, justice, or equity, tribal governments are ideal vehicles for self-serving elites and ‘strongmen.’” Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J.L. REFORM 277, 302 (1993).

175. Of particular concern to Congress was section 4 of the title on *Indian Self-Government*. Section 2 of this title authorized the Secretary of the Interior to issue charters that would grant to any Indian community any or all of the powers of government fitting its experience, capacities, and desires. Section 4 of the title authorized the Secretary to grant to any community chartered under the Act any or all of ten enumerated governmental powers. Mitchell, *supra* note 150, at 394 n.176, 395. A brief comparison between the initial bill and the final bill reflects these congressional concerns. Cohen and Collier viewed the IRA as a means for tribes to assert full control over their reservations. The final version of the bill reflected, however, congressional intent to limit tribal jurisdiction to consenting members. Furthermore, the original bill contemplated that where an extensive consolidation of Indian land and population existed, tribes would have civil and criminal jurisdiction over members and nonmembers. The final version of the bill, however, as Chairman Wheeler of the Committee on Indian Affairs observed, eliminated all the compulsory provisions, especially the right of Indian communities to make laws on their reser-

governing bodies of tribes that would be issued IRA constitutions possessed not only the limited powers specified in the Act, but also “all powers vested in any Indian tribe or tribal council by existing law.”¹⁷⁶ Members of the Senate and House Committees clearly did not realize that they were building a foundation for a more radical understanding of Indian self-government.

On October 25, 1934, four months after the IRA was enacted, Solicitor Margold published an opinion titled *Powers of Indian Tribes*.¹⁷⁷ Likely drafted by Cohen, the opinion detailed the powers that were “vested in the various Indian tribes under existing law.”¹⁷⁸ As Cohen later noted, *Powers of Indian Tribes* adopted the theory that “those powers which [were] lawfully vested in an Indian tribe [were] not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which [had] never been extinguished.”¹⁷⁹ Tribes, in short, already held sovereign powers and “needed only to surrender those powers, or at least some of them, to the tribal corporations authorized by the IRA.”¹⁸⁰ Some of these powers were historical in origin; some could be found in treaty provisions or negotiations. Other powers were simply what Cohen and Margold believed were rights that Indian tribes had accrued since their basic sovereignty had been established. According to *Powers of Indian Tribes*, only a previous act of Congress limiting tribal sovereignty could abridge tribes’ inherent sovereignty. Yet, since Congress had never presumed that tribes had these sovereign powers, it was

variations. Gould, *supra* note 55, at 832-33 (referring to Bradley B. Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. PUGET SOUND L. REV. 211, 241-50 (1991)).

176. Indian Reorganization Act, ch. 576, § 16, 48 Stat. 984, 987 (1934) (codified as amended at 25 U.S.C. § 476); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 224-25; Mitchell, *supra* note 150, at 394-95 n.176.

177. 55 Interior Dec. 14 (1934).

178. *Id.* at 15. The powers included the following: power to determine the tribe’s form of government, *id.*; power to determine membership (“subject to supervision of the Secretary of the Interior where rights to Federal property are involved”), *id.*; power to regulate domestic relations of its members, *id.*; power to prescribe rules of inheritance “[e]xcept with respect to allotted lands,” *id.*; “power to tax members of the tribe and nonmembers accepting privileges of trade or residence, to which taxes may be attached as conditions,” *id.*; power to remove nonmembers from the reservation, *id.*; power to regulate tribal property, except as restricted by acts of Congress, *id.*; power to administer justice “except as criminal or civil jurisdiction has been transferred by statute to Federal or State courts”, *id.* at 16; and power to prescribe duties of federal employees where powers of supervision are delegated to them, *id.* Though this was an impressive list of inherent powers (especially given congressional opposition), since New Dealers in 1934 knew very little about Indian laws and customs, the powers enumerated were still incomplete. Deloria, *supra* note 21, at 975-76.

179. HANDBOOK, *supra* note 13, at 122; *see also* RUSCO, *supra* note 4, at 5; *infra* Part IV.

180. VINE DELORIA JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 158 (1984); *see also* Mitchell, *supra* note 150, at 394-95 n.176.

unlikely that they were limited.¹⁸¹ *Powers of Indian Tribes* thus turned congressional intent on its head. The lawyers of the Department of the Interior simply announced that the powers that Congress refused to grant to Indian tribes were “inherent from the very beginning.”¹⁸² Not only had they succeeded in protecting these powers from congressional intervention; under the interpretation provided by *Powers of Indian Tribes*, such powers were inherent, not delegated.¹⁸³

Contemporary scholars have criticized *Powers of Indian Tribes* for embracing the “fiction of conquest,” and thus dispelling “any lingering hopes that congressional intervention in tribes’ domestic affairs could be limited by treaties.”¹⁸⁴ From a pluralistic perspective, especially in relation to Cohen’s changing interpretations of pluralism, however, *Powers of Indian Tribes* is an important transitional statement. Socialist pluralism was one model for devising a plural polity. It envisioned the American legal system as accommodating the interests of multiple sovereign groups. It failed on Indian reservations because it was not always adaptable to the diverse tribal traditions. It sought to protect the political and economic interests of the Indians without taking full cognizance of the cultural and social systems in which such interests were formed, or of the unique status of these systems in American law. Daily interactions with Indian tribes were informative. *Powers of Indian Tribes* reflected the New Dealers’ growing attentiveness to the history of Indian tribes and the history of their relationship with the federal government. More broadly, it indicated an admission, albeit limited in scope, that Indian tribes had unique legal and political systems that federal law had to accommodate.

Powers of Indian Tribes illustrated a transformation in Cohen’s view, which he more elaborately articulated in his writings during the late 1930s. Part III.D examines this change. It explores how Cohen came to see Indian tribes not only as political but also as cultural groups. Cohen was the first to recognize the problems associated with his socialist pluralist model, particularly its universalist assumptions. This recognition was reflected first in his turn away

181. DELORIA & LYTLE, *supra* note 180, at 159; *see also* 55 Interior Dec. 14 (1934).

182. DELORIA & LYTLE, *supra* note 180, at 160; *see also* Mitchell, *supra* note 150, at 394-95 n.176.

183. However, as Deloria and Lytle note, “it would be another generation before Indian tribes would understand the difference and begin to talk in the proper terms about their status.” DELORIA & LYTLE, *supra* note 180, at 160. Deloria, Lytle, and Mitchell suggest that Collier sought to hide the real scope of his revolutionary approach to Indian sovereignty. “Since few people could understand the difference between inherent and delegated powers, and no one really cared to understand that distinction, the substance of Collier’s revolution went unchallenged.” *Id.* at 169; *see also* Mitchell, *supra* note 150, at 394-95 n.176. For a more critical evaluation of Collier’s position, *see* Robbins, *supra* note 171.

184. BARSH & HENDERSON, *supra* note 29, at 112.

from economics and toward anthropology, and then, in his reinterpretation of pluralism. Cohen's socialist pluralism assumed that federal law could accommodate, with one structure, the interests of a variety of groups. It neglected to notice that particular interests were grounded in distinct legal and political systems. In the late 1930s, Cohen suggested that a plural polity required a more inclusive legal ideal, one that would not only seek to accommodate different interests, but that would, more broadly, aim to embrace the diverse value systems in which such interests were formed. Such was his ideal of systematic pluralism. Part IV will explicate its meaning and examine how it influenced Cohen's work on the *Handbook*.

D. *The Importance of Culture: The IRA in Retrospect*

Many factors, including political compromises and "a certain blindness," contributed to the failures of the IRA.¹⁸⁵ Perceptive as the New Dealers might have been, they sought reorganization on universal foundations. Even Cohen, who in his writings admitted the relativity of frames of reference¹⁸⁶ and celebrated pluralism, stumbled when he attempted to draft policy outside his familiar context. New Dealers were willing to let Indian tribes run their internal affairs, but the system they devised was an American system. Even when

185. I use the term "blindness" to allude to a late-nineteenth-century speech in which William James noted that we were all afflicted by blindness "in regard to the feelings of creatures and people different from ourselves." William James, *On A Certain Blindness in Human Beings*, Speech, in WILLIAM JAMES, *TALKS TO TEACHERS ON PSYCHOLOGY AND TO STUDENTS ON SOME OF LIFE'S IDEALS* (1899). The speech—written, as George Cotkin showed, as a critique of imperialism, especially American policy toward the Philippines—revolved around two forms of blindness: blindness toward differences and blindness toward similarities. James wished his audience to realize how blind they were to ways of life different from their own; yet, he also wanted his audience to recognize that by focusing on external differences they were rendered blind to inner similarities. For James, individual will indicated the possibility of overcoming blindness, and, more important, the possibility of unity within diversity. I allude to *On a Certain Blindness in Human Beings* because it expressed the core of James's pluralist philosophy. James's two versions of blindness corresponded to two central themes in his pluralist philosophy. On the one hand, James's pluralism celebrated diverse ways of life, each blind to the other. Recognizing the blindness of individuals and groups toward differently situated others, James suggested that distinct ways of life should be allowed to coexist, each within its separate sphere. On the other hand, James's pluralism also stressed the possibility of unity. Focusing on the ability of individuals to imagine (or know) themselves as the *other*, James urged the transcendence of boundaries. James was aware of the difficulty of adjudicating conflicting inner realities, but he believed that the possibility of better relationships between individuals lay in their ability to sympathize with the inner realities of individuals different from themselves. See generally GEORGE COTKIN, *WILLIAM JAMES, PUBLIC PHILOSOPHER* 139-45 (1990); Anthony Skillen, *William James, "A Certain Blindness" and an Uncertain Pluralism*, in *PHILOSOPHY AND PLURALISM* 33 (David Archard ed., Royal Inst. Philosophy Supp. No. 40, 1996). For James's place in the history of pluralism, see *supra* Part II.A.

186. See generally Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) [hereinafter Cohen, *Transcendental Nonsense*], reprinted in *THE LEGAL CONSCIENCE*, *supra* note 6, at 33.

recognizing particular differences, they viewed the general framework in universal, absolute terms. They were critical of American institutions, but the alternatives they devised were no less American.

One of the major drawbacks of the IRA was the New Dealers' naïveté with respect to Indian cultures, customs, and laws. Cohen, for one, came to the New Deal believing that racial and ethnic tensions would disappear once class conflict was resolved. His daily encounters with Indian tribes, particularly, I suspect, his study of tribal constitutions in preparation for writing new ones,¹⁸⁷ taught him otherwise. As early as 1935, Cohen admitted that American law represented not only the force of the state utilized by a dominant capitalist class, but also the force of the state utilized for the hegemony of culture.¹⁸⁸ Given the multiplicity of social (economic, political, cultural) interests, he wrote, the multiple meanings of legal concepts were tools in the hands of powerful lawmaking agencies. They gave a concept one meaning when applied to one interest group, and another when applied to a different group.¹⁸⁹ Recognizing, with pluralists, the incompleteness of human knowledge,¹⁹⁰ Cohen thus urged the understanding of legal reality, and hence the definition of legal rules, as reflecting a variety of interrelated particular and collective interests.¹⁹¹ Such a definition required, of course, a better comprehension of these interests.

In the hope of redefining legal concepts according to a complex array of individual and collective experiences, Cohen turned to the social sciences.¹⁹² In 1937, he published an article that he considered to

187. See generally Felix S. Cohen, *Indian Self-Government*, 5 AM. INDIAN 3 (1949) [hereinafter Cohen, *Indian Self-Government*], reprinted in THE LEGAL CONSCIENCE, *supra* note 6, at 305, 306-7. See also Felix S. Cohen Papers, Box 7, Folder 100, Yale Collection of Western Americana, Beinecke Library, Yale University.

188. See Cohen, *Transcendental Nonsense*, *supra* note 186.

189. See *id.*

190. See *supra* text accompanying notes 37-46.

191. See generally Cohen, *Transcendental Nonsense*, *supra* note 186; Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5 (1937), reprinted in THE LEGAL CONSCIENCE, *supra* note 6, at 77. For an examination of the importance of *Transcendental Nonsense* to the history both of pluralism and of legal realism, see TSUK, *supra* note 16 (manuscript at pt. II, on file with author).

192. The turn to the social sciences was common among legal realists, though they differed in what they hoped to derive from the social sciences. Cohen sought to combine the methods of inquiry of the social sciences with the discourses of moral and political philosophy in order to make law reflect better—that is, more Progressive—politics. Many, however, turned to the social sciences in an attempt to create a legal system that would mirror social relations and would thus be less politically biased than the classical legal model. Some believed that the functions and consequences of legal rules would be better understood through detailed studies of social facts. Others wanted law to mirror social customs. Still others urged the deferment of value questions, and the prioritization of value-free empirical studies of the determinants, administration, and effects of legal decisions and rules. Informed by their concerns about economic and social problems, most legal realists turned to economics and sociology. Only a few relied on anthropology (including, interest-

be “a list of jobs that an administrator would like to see done on the scientific [anthropological] front”; it was a “‘help wanted’ advertisement.”¹⁹³ Already in 1933, the Department of the Interior, under Collier’s leadership, sought information from anthropologists, particularly with respect to the structure of tribal governments. Cohen found their advice “extremely useful.”¹⁹⁴ “I believe,” he wrote, “that when we are finally in a position to move ahead with our legislative program on the different Indian jurisdictions they will prove invaluable, and should be made the basis of follow up inquiries.”¹⁹⁵ In 1937, once the basic IRA structure was in place, Cohen undertook such a follow-up inquiry, this time, however, assigning a more active role to anthropologists. In the tradition of Bronislaw Malinowski and Franz Boas, Cohen called for “functional” field studies, “a movement away from two types of study: the naive reporting and classification of striking human peculiarities; and the more sophisticated attempt to trace the historical origin, evolution, and diffusion of ‘complexes.’”¹⁹⁶ Instead of these types of study, Cohen asked anthropologists to help administrators “trace the social consequences of diverse customs, beliefs, rituals, social arrangements and patterns of human conduct.”¹⁹⁷

Cohen urged anthropologists to provide the Department with facts helpful to the development of policy. Specifically, he believed that the Indian conception of property rights, which anthropologists could explicate, should be enforced on Indian reservations, rather than the American ideal of private property. Similarly, Cohen believed that anthropology would show the benefit of leisure-like economic activities, to the disappointment of BIA officials—as he sarcastically noted—who for decades had attempted to teach Indians to be “good” farmers or stockmen.¹⁹⁸ Overall, it seems that Cohen sought scientific

ingly, Karl N. Llewellyn, the movement’s official voice). *See generally* HORWITZ, *supra* note 2, at 169-92; LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); *see also* ROBERT W. GORDON, *Legal Realism, in A COMPANION TO AMERICAN THOUGHT* (Richard Wightman Fox & James T. Kloppenberg eds., 1995); DALIA TSUK, *Legal Realism, in LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA* (Herbert M. Kritzer ed., forthcoming 2002).

193. Letter from Felix Cohen to Franz Boas (May 15, 1936), Felix S. Cohen Papers, Box 1, Folder 7, Yale Collection of Western Americana, Beinecke Library, Yale University (referring to Felix S. Cohen, *Anthropology and the Problems of Indian Administration*, 18 SW. SOC. SCI. Q. 1 (1937) [hereinafter Cohen, *Anthropology and the Problems of Indian Administration*], reprinted in *THE LEGAL CONSCIENCE*, *supra* note 6, at 213).

194. RUSCO, *supra* note 4, at 190 (quoting Felix S. Cohen). However, as Rusco notes, since many anthropologists did not submit their responses to the questionnaire sent by the Department of the Interior until after the IRA bill was sent to Congress, the impact of these anthropological studies on the IRA is unclear. *See generally id.* at 188-90.

195. *Id.* at 190 (quoting Felix S. Cohen).

196. Cohen, *Transcendental Nonsense*, *supra* note 186, at 57.

197. *Id.*

198. Cohen stressed that the belief among certain Indian Service employees that Indians were naturally lazy indicated an Indian Service failure. It showed, he added, that the

proof for the priority of communal values over possessive individualism,¹⁹⁹ a testimony that socialist pluralism was a feasible program.

While Cohen's socialist pluralism lurked in the shadows, his writings already indicated a growing attentiveness to culture. For example, Cohen suggested that New Dealers should seek to accommodate the historical and ethnological groupings of the Indians. He believed that education policies should aim to maintain Indian culture, values, and history. He further argued that health services should consider traditional Indian medicine, and he called on anthropologists to resurrect "forms of Indian art and recreation which [could] serve in modern life the same functions that they [had] served decades ago," or discover and invent their modern equivalents.²⁰⁰

Cohen did not think that law should mirror or imitate Indian culture. Rather, he believed that policymakers should determine the functional relevance of various aspects of Indian culture. They should examine Indian social organization—"the functional significance of family, clan, and tribal groupings as social determinants in the production, distribution, and use of property, as well as in the non-economic human relationships of education, religion, play, sex, and companionship."²⁰¹ They should look to Indian art as an indication of the motivations and purposes of the craftsman, and recognize its significance as an individualizing or socializing force. They should explore the nature of Indian laws, the incentives to obedience and their efficacy, the techniques of law enforcement, and the relationship between legal sanctions and other social forces. Finally, Cohen urged reformers to look to Indian political systems for models of institutions of social organization and collective behavior.²⁰² Three years after he joined the Department of the Interior, Cohen, in short, sug-

bearers of modern civilization had not offered certain Indian groups a "moral equivalent" for the work that had traditionally been honored and respected by them. *See generally* Cohen, *Anthropology and the Problems of Indian Administration*, *supra* note 193. For Cohen's earlier argument in favor of leisure, see Felix S. Cohen, *The Blessing of Unemployment*, 2 AM. SCHOLAR 203 (1933).

199. *See* Cohen, *Anthropology and the Problems of Indian Administration*, *supra* note 193; *see also* Felix S. Cohen, *Invisible Indian Resources* (ca. 1938), Felix S. Cohen Papers, Box 1, Folder 5, Yale Collection of Western Americana, Beinecke Library, Yale University. Cohen wrote:

[I]ndividual farming is, according to the traditions of the Indian service, more honorable than group farming. Therefore, tribal herds on two or three reservations today are being broken up New projects on tribal lands are usually arranged so that each family will have to buy its own team of horses, although a communally owned tractor and truck would cost considerably less.

Id. No one, Cohen sarcastically added, forced American corporations to distribute their assets among a million stockholders. *Id.*

200. Cohen, *Anthropology and the Problems of Indian Administration*, *supra* note 193, at 221.

201. Cohen, *Transcendental Nonsense*, *supra* note 186, at 57.

202. *Id.* at 57-58.

gested that New Dealers should aim beyond the establishment of self-governing socialist communities; they should aim to understand Indian cultures so that they could promulgate laws and policies that would better fit Indian traditions.

The radical nature of Cohen's transformation—from politics to culture—was captured in the reaction of anthropologists. Refusing to publish Cohen's appeal to anthropologists, Leslie Spier, the Editor of *The American Anthropologist* explained that there was no room for applied anthropology in their journal.²⁰³ His concerns ran deeper. The editor obviously understood the radical implications of Cohen's growing attentiveness to cultural interests. Underlying functional anthropology was an acceptance, even celebration, of the plurality of social, cultural, political, and economic interests that characterized society. It endorsed diversity, not merely as an empirical fact to be constrained through universal structures, but as a constitutive element of society that should be normatively embraced. Robert Lowie, who found Cohen's piece "admirable, both in form and substance,"²⁰⁴ took pains to explicate its problematic nature. Anthropologists, he told Cohen, varied greatly "in their individual attitude towards 'applied anthropology.'"²⁰⁵ Many of them—especially in America—believed that most tribes were weak numerically; thus, especially in the absence of permanent government policy, they expected that the elimination of tribes as cultural entities was "a matter of relatively few years."²⁰⁶ In the view of these anthropologists, Lowie's letter implied, Cohen's advocacy of applied anthropology could impede gradual cultural assimilation.²⁰⁷

Unlike economic and political interests, which could be conceived as universal, cultural interests were particular. To emphasize their functional significance was to engage in a normative argument about pluralism, which even Lowie found troubling. There was a chasm, he

203. See correspondence between Leslie Spier and Felix Cohen, Felix S. Cohen Papers, Box 1, Folder 7, Yale Collection of Western Americana, Beinecke Library, Yale University.

204. Letter from Robert Lowie to Felix Cohen (May 27, 1936), Felix S. Cohen Papers, Box 1, Folder 7, Yale Collection of Western Americana, Beinecke Library, Yale University.

205. *Id.*

206. *Id.*

207. *Id.* Interestingly, other anthropologists reiterated Lowie's enthusiasm for Cohen's article. Collier, for example, thought that Cohen's article was "a particularly lucid, concrete and stimulating discussion." Letter from John Collier to superintendents (Nov. 3, 1937), Felix S. Cohen Papers, Box 1, Folder 9, Yale Collection of Western Americana, Beinecke Library, Yale University. He sent out copies to superintendents and others associated with the Department of the Interior. *Id.*; see also correspondence in Felix S. Cohen Papers, Box 1, Folder 9, *supra*. M.E. Opler thought it was an "admirable paper." Letter from M.E. Opler to Felix Cohen (Mar. 27, 1937), Felix S. Cohen Papers, Box 1, Folder 7, *supra*. Alexander Goldenweiser was supportive, too. Even before he received a copy of the article, Goldenweiser expressed an interest in the work undertaken by the Department of the Interior. Letter from Alexander Goldenweiser to Felix Cohen (Mar. 2, 1936), Felix S. Cohen Papers, Box 1, Folder 7, *supra*.

explained to Cohen, “between a normative and a purely descriptive approach.”²⁰⁸ Like Cohen, Lowie believed that “the ethnographer should fully expound whatever he knows that might be pertinent to the purposes of officialdom.”²⁰⁹ Still, Lowie questioned, should the ethnographer go any further? For example, “[h]ow can the anthropologist, qua anthropologist, learn and advise which craft activities should be stimulated in response to expectable demands of the market?”²¹⁰ Should the New Dealers, Lowie’s questions implied, aim beyond protecting the economic and political interests of Indian tribes? Should they embrace cultural pluralism as a normative ideal? Four short years earlier, Cohen’s reply might have been different, but when Lowie asked the question, Cohen was already drawing on anthropological field studies to develop a pluralist approach (systematic pluralism) that would celebrate both socialist and cultural pluralism.

Part IV investigates Cohen’s systematic pluralism and how it was reflected in the *Handbook*. Informed by cultural pluralism, Cohen’s systematic pluralism recognized the multiplicity of value systems within which diverse cultural interests were embedded and urged the expansion of any given system to include the values of other systems. It envisioned law as encompassing the diverse value systems that characterized American society. Part IV.A describes this approach. Drawing on Cohen’s writings on ethics and systematic relativism, it grounds Cohen’s new interpretation of pluralism in his novel ethical ideal—a socialized morality. Cohen’s socialized morality rejected atomistic or individualistic understandings of society and instead emphasized the possibility of social integration (or the integration of systems). Such an approach, I suggest, was informed not only by Cohen’s interactions with Indian tribes, but also by his concerns about the plight of Jews in Europe. Part IV.B explores the relationship between Cohen’s systematic pluralism and his agenda for the *Handbook*. It further examines the reaction to Cohen’s approach, particularly an attempt by the Justice Department, once the nature of the *Handbook* was revealed, to halt its publication. Part IV.C suggests that in the *Handbook* Cohen sought not only to celebrate diverse cultural interests, but also to articulate a theory of group rights that would protect different cultural systems. It meant to allow Native Americans, as well as Jewish Americans, to bring their different values into the American polity. Aiming at the inclusion of historically marginalized voices, the main theme of the *Handbook* was that a long line of conquerors, including the federal government, had already recognized tribal rights. This recognition, however, also en-

208. Letter from Robert Lowie to Felix Cohen (May 27, 1936), *supra* note 204.

209. *Id.*

210. *Id.*

tailed the subjection of tribal affairs to congressional control. Cohen's attempt to universalize a theory of group rights indeed tended to obscure the role of particular groups in actively determining and protecting their own rights. As Part V will show, ultimately, this attempt also led Cohen to articulate a new interpretation of pluralism—comparative pluralism.

IV. "THE INTELLECTUAL EQUIPMENT OF A GENERATION": SYSTEMATIC PLURALISM AND THE *HANDBOOK OF FEDERAL INDIAN LAW*

A. *Systematic Pluralism*

Cohen's growing attentiveness to the complexity of legal reality as reflecting a variety of social, cultural, economic, and political interests helped to transform his understanding of pluralism. Gradually, he began to suggest that diverse interests were not contained within one value (or legal) system. Rather, they were spread over different systems. For example, concepts like communal holding of property meant one thing for socialists and another for Indians. The success of the IRA thus depended not only on the establishment of stable economic and political structures on Indian reservations. It further required an understanding of the cultural and emotional meaning that Indian tribes attributed to tribal sovereignty. "It is extremely likely that organized Indian tribes will continue to exist," Cohen wrote in 1939, "as long as American democracy exists and as long as the American people are unwilling to use the army to carry out Indian policies."²¹¹ More important, they would exist "provided that the Indians themselves feel that tribal governments satisfy important human wants."²¹² The life expectancy of various tribal constitutions could thus be figured, according to Cohen, by assigning numbers to a variety of factors:

[T]he extent to which the organized tribe ministers to the common economic needs of the people, the degree in which the organized tribe satisfies recreational and cultural wants, the extent and efficiency of municipal services which the tribe renders, the general social solidarity of the community, and the vigor with which the tribal government expresses the dissatisfactions of the people and organizes the wishes of the people along rational lines.²¹³

A (tribal) constitution became, in short, "*the formal structure of a reality that exists in human hearts.*"²¹⁴ So, Cohen proclaimed, "[a]n

211. Felix S. Cohen, *How Long Will Indian Constitutions Last?*, 6 INDIANS AT WORK (Dep't of Interior), 40 (1939), reprinted in THE LEGAL CONSCIENCE, *supra* note 6, at 222, 223-24.

212. *Id.*

213. *Id.* at 228.

214. *Id.* at 229 (emphasis added).

Indian constitution will exist as long as there remains in human hearts a community of interdependence, of common interests, aspirations, hopes, and fears, in realms of art and politics, work and play.”²¹⁵ Only the Indians—not the administration—could establish stable tribal governments; and only when they did, could one talk about self-determination and pluralism.

The recognition of a multiplicity of value systems raised important questions about the resolution of conflicts that could transpire between such systems. In a letter to Collier dated March 13, 1939, Cohen expressed his concerns. “It is because I don’t want to see either black or white suppressed or liquidated,” Cohen wrote, “that I oppose any absolutism which would make either white or black ‘false’, ‘unreal’ or ‘secondary’. It is perhaps because I . . . love . . . diversity and ‘irrepressible conflicts’ that I reject absolutism.”²¹⁶ Conflicts, however, had to “be put on a stable basis if they [were] not to end in the annihilation of one side or both.”²¹⁷ “I think,” Cohen concluded, that “[t]he relativist approach . . . justifies the stable kind of conflict that we find in music, art or mathematics, where neither side is ever annihilated.”²¹⁸

Like earlier discussions of political pluralism,²¹⁹ socialist pluralism—Cohen’s model for the IRA—was premised on a categorical description of conflict as a struggle over limited economic resources:

215. *Id.* Almost four decades later, Nathan Glazer and Daniel Patrick Moynihan would echo Cohen. In an introduction to a collection of essays titled *Ethnicity: Theory and Experience*, they wrote that “the cultural *content* of each ethnic group in the United States seems to have become very similar to that of others, but the emotional significance of attachments to the ethnic group seems to persist.” Nathan Glazer & Daniel Patrick Moynihan, *Introduction* to *ETHNICITY: THEORY AND EXPERIENCE* 8 (1975) (quoted in WERNER SOLLORS, *BEYOND ETHNICITY: CONSENT AND DESCENT IN AMERICAN CULTURE* 35 (1986)). Sollors similarly commented that American ethnicity “is a matter not of content but of the importance that individuals ascribe to it.” SOLLORS, *supra*, at 35.

216. Letter from Felix Cohen to John Collier (March 13, 1939), John Collier Papers, Microfilm Reel 12, Frame 301, Manuscript and Archives, Yale University Library. Cohen’s letter was a response to a comment made in a letter from Allan Harper to Collier. Harper suggested that Cohen’s “thesis proved unpalatable” because “he seems to say that there is no substantial difference between colors like black and white; there is only our emotional attitude and approach to the question.” Letter from Allan Harper, Director, TC-BIA (Denver, Colorado), to John Collier (Mar. 7, 1939), John Collier Papers, Microfilm Reel 14, Frame 107, *supra*. Collier—who believed that Cohen’s essay offered “the pluralistic way of looking at things,” that is, the view that “[w]e unify the disunited world . . . by accepting disunity as being properly of the nature of things”—sent a copy of Harper’s letter to Cohen. Letter from John Collier to Allan Harper (Mar. 10, 1939), John Collier Papers, Microfilm Reel 14, Frame 108, *supra*; Memorandum from John Collier to Felix Cohen (Mar. 10, 1939), John Collier Papers, Microfilm Reel 12, Frame 300, *supra*. While the correspondence between Harper, Collier, and Cohen does not mention the title of Cohen’s essay, the content of the letters and their respective dates suggest that they refer to Cohen, *Systematic Relativism*, *supra* note 28.

217. Letter from Felix Cohen to John Collier (March 13, 1939), *supra* note 216.

218. *Id.*

219. See *supra* text accompanying notes 47-48.

employers against employees, corporations against labor unions, producers against consumers, and Indians against non-Indians. The solution was universal and “scientific”: redistribution. It seldom meant more than a repositioning of two sides to a conflict. It neglected to notice that interests were embedded in distinct legal and political systems. Given the multiplicity of cultures, groups, and forms of knowledge, gradually, Cohen came to find unfeasible the assumption that one could provide a universal solution for diverse conflicts. Although grounded in theories of pluralism, such a solution, Cohen’s letter to Collier suggested, forced assimilation. How, then, should one accommodate diversity? By the late 1930s, Cohen articulated an ideal of systematic pluralism, or what he labeled systematic relativism, as a model for realizing diverse interests. Informed by earlier theories of cultural pluralism, particularly Horace Kallen’s orchestral vision of America,²²⁰ it was, in Cohen’s view, a “principle of logical tolerance.”²²¹

Building on his 1935 critique of abstract concepts as tools of cultural and political oppression,²²² Cohen’s principle of systematic relativism recognized that the meaning of concepts depended upon systems of reference that were external to them, and that many such systems were possible. Legal change thus required not only the understanding of legal reality as a variety of interrelated particular and collective experiences, but also the reconstitution of different legal systems as broader and more inclusive. If different philosophical systems could be increased in scope to maintain common content, then the distinction between the meaning given to abstract concepts within each of them was one of degree—of emotions and attitudes—not of kind. Such, Cohen believed, was also the difference between “red” and “white” America.²²³

Systematic pluralism was supported by a particular theory of ethics, which Cohen articulated in the mid-1930s. Throughout his life,

220. See *supra* text accompanying note 49.

221. See Cohen, *Systematic Relativism*, *supra* note 28, at 98.

222. See Cohen, *Transcendental Nonsense*, *supra* note 186.

223. See Cohen, *Systematic Relativism*, *supra* note 28. Cohen concluded the article by noting:

The method of systematic relativism, applied in the jungles of politics, frequently demonstrates that what appear to be bitter differences of opinion on practical matters are actually differences of terminology or perspective. Rational argument in this situation becomes possible only when, through some emotional shift, one party comes to accept the postulates and definitions of his adversary, and to talk in the same system, or when a third party (i.e. a “politician” or “statesman”) is found who can talk to each of the disputants in his own system and thus offer each a practical solution which is what he wanted all along and was convinced his adversary did not want, but which, as a matter of fact, his adversary does not object to if only it is phrased in the proper way.

Id. at 110.

Cohen rejected moral positivism and instead emphasized the interdependence of legal science and ethical criticism. Law, he believed, should be grounded in a normative system.²²⁴ Cohen's early writings sought to anchor legal criticism in hedonism.²²⁵ As he turned away from socialist pluralism, his ethical ideal changed, too. Instead of hedonism (a rather monistic theory), Cohen adopted a "socialized morality"—an ethical theory that sought to integrate "the life of society as traditional morality has integrated the lives of individuals."²²⁶

Traditional morality, with its focus on individual life, presupposed a metaphysical dogma, "the dogma that the individual is an ultimate unity and society an ultimate plurality."²²⁷ "[A]ll the adjustments, balances, and compromises which are the substance of morality" were thus described as taking place "within an individual life."²²⁸ Social balance, particularly the redistribution of wealth, was preordained to be unjust (though similar balance within a single life—that is, "the sacrifice of today's pleasure for tomorrow's"—was commendable).²²⁹ Cohen's alternative was a socialized morality. Its metaphysical dogma revealed "something of the unity of the individual in society itself and something of the plurality of society in the individual life."²³⁰ By admitting that adjustment and integration of diverse interests were possible (according to individualized morality such was indeed the essence of individual life), socialized morality made the normative endorsement of cultural pluralism less threatening to the traditional understanding of society. "The possibility of a social integration of conflicting interests is substantiated," Cohen proclaimed, "by the integration of conflicting interests in an individual life."²³¹

224. For Cohen's rejection of the dichotomy between descriptive and normative social science, see COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS*, *supra* note 102; Felix S. Cohen, *Modern Ethics and the Law*, 4 *BROOK. L. REV.* 33 (1934), *reprinted in THE LEGAL CONSCIENCE*, *supra* note 6, at 17; and Cohen, *Transcendental Nonsense*, *supra* note 186.

225. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS*, *supra* note 102; *see also supra* Part III.B.

226. Felix S. Cohen, *The Socialization of Morality*, in *AMERICAN PHILOSOPHY TODAY AND TOMORROW* 83 (Horace M. Kallen & Sidney Hook eds., 1935) [hereinafter Cohen, *Socialization of Morality*], *reprinted in THE LEGAL CONSCIENCE*, *supra* note 6, at 337, 348.

227. *Id.* at 347.

228. *Id.*

229. *Id.*

230. *Id.* at 347-48.

231. *Id.* at 348. As in his advocacy of pluralism, in his discussion of a socialized morality, Cohen followed in the tradition of William James. See, for example, Hilary Putnam's summary of James's views in *Essays in Radical Empiricism*:

[T]he self isn't a unity and the world isn't a unity, and so Kant had the wrong problem. The problem shouldn't be to show that the unity of the world is correlative with the unity of the self, but to show that the disunity of the world is correlative with the disunity of the self.

HILARY PUTNAM, *REALISM WITH A HUMAN FACE* 233-34 (James Conant ed., 1990) (discussing WILLIAM JAMES, *ESSAYS IN RADICAL EMPIRICISM* (1912)).

The central point of Cohen's socialized morality was the rejection of individualism, because, as his argument implied, individualistic theories resisted pluralism. Some positively denied pluralism, others normatively urged moral consensus as an attractive ideal. Still others created procedural mechanisms that could presumably constrain pluralism.²³² Instead, Cohen wanted to guarantee that law favored solutions that encouraged the flourishing of diverse social ideas, beliefs, and values; he wanted law to promote solutions that would sustain the individual as a modern social being in a pluralistic society. Every law, Cohen thus argued, should be examined in light of its effects on the enterprise of social integration. "Today, more than ever before," Cohen would write in the midst of the Second World War, "we need to study the legal relations that have served to bind together in common cause and common effort peoples of different races, different creeds, different social structures, and different ways of life."²³³ This was the premise of his systematic pluralism.

Cohen's systematic pluralism was an attempt to articulate a universal ideal (a common cause) that would include all particular systems of reference. It accepted cultural pluralism, but rejected separatism, that is, the idea that different cultures were detached from each other. It opposed the forced assimilation of all cultural systems into one, but envisioned all systems becoming one. The reasons for such an "in-between" approach reached beyond federal Indian policy. Like his attraction to socialist pluralism, Cohen's fascination with systematic pluralism was influenced by his own sense of identity. Indeed, Cohen's new model of pluralism was not limited to the accommodation of Indian interests. In the late 1930s and early 1940s, as European Jews were facing ever expanding economic, political, and physical sanctions, Cohen also criticized exclusionary immigration laws—laws that barred refugees from finding a haven within America's borders. Challenging nativist arguments, Cohen emphasized the important contributions of immigrants to the social and economic welfare of the country and urged the admission of European refugees into the body politic of the nation.²³⁴

In his writings on the problem of exclusionary immigration laws, Cohen sought to extend his pluralist approach beyond labor unions and Indian tribes to ethnic communities. His works, however, re-

232. More recently, Joshua Cohen offered a similar critique. See Joshua Cohen, *Pluralism and Proceduralism*, 69 CHI.-KENT. L. REV. 589 (1994). See also *infra* Part VI (discussing post-1945 theories of pluralism).

233. Felix S. Cohen, *The Spanish Origins of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1 (1942) [hereinafter Cohen, *Spanish Origins of Indian Rights*], reprinted in THE LEGAL CONSCIENCE, *supra* note 6, at 230, 231.

234. FELIX S. COHEN, IMMIGRATION AND NATIONAL WELFARE (League for Industrial Democracy Pamphlet Series, 1940), condensed as *Exclusionary Immigration Laws*, 3 CONTEMP. JEWISH REC. 141 (1940).

ferred to European rather than Jewish refugees, an evasion that reflected not only Cohen's political concerns about anti-Semitism, but also his continuing ambivalence toward Kallen's cultural pluralism.²³⁵ As a Jewish American, Cohen always felt the tension between the preservation of one's particular identity and the desire to be accepted as an American. Motivated by such a desire, his socialist pluralist ideal aimed to create a universal economic, if not also political, structure on Indian reservations almost to the extent of forced assimilation. In the 1940s, informed by his experience in administering the IRA, Cohen, the lawyer for Indian tribes, was willing to accept the plurality of cultural systems. The particular heritage of every group was the premise of his systematic pluralism. Yet, his eagerness as a Jewish American to be admitted into the polity, as well as the cosmopolitanism he inherited from his father, limited the scope of this new approach. Cohen rejected separatism and instead sought to show that legal systems could be expanded to include the voices of various groups. Such was his vision when he was asked to head the survey of federal Indian law and to write the *Handbook*.

As if admitting the lessons learned during the first years of the Indian New Deal, the introduction to the *Handbook* (which was signed by Margold but likely drafted by Cohen) noted that the IRA reflected a change in the conceptualization of law. It attempted to compensate for "many of the evils resulting from attempts to impose a uniform pattern of treatment upon groups with different wants, and thus [had] strengthened the tendency towards special consideration of the legal problems of particular tribes."²³⁶ Indian tribes, in short, taught Cohen and his colleagues that law was "made for, and in large part by, diverse groups with divergent economic interests, political institutions, and levels of cultural attainment."²³⁷

As Part IV.B suggests, Cohen intended the *Handbook* to provide a comprehensive analysis of the relationship between Indian tribes and the federal government, and to expand the scope of the American legal system to embrace values and assumptions embedded in tribal systems. Such aims reflected Cohen's systematic pluralism, with its emphasis on the need to make value systems more comprehensive, as well as his ideal of socialized morality, with its emphasis on social integration.²³⁸ Cohen believed that a better understanding of the rela-

235. See *supra* text accompanying notes 49, 130-37.

236. Nathan R. Margold, *Introduction* to HANDBOOK, *supra* note 13, at ix [hereinafter Margold, *Introduction* to HANDBOOK].

237. *Id.*

238. On the relationship between Cohen's ethical philosophy and the *Handbook*, see also Feldman, *supra* note 17, at 501 (noting that ultimately Cohen wanted the *Handbook* "to reduce the number of instances, in the area of federal Indian law, where the courts and administrators ignored the ethical realities and implications of their decisions").

tionship between Indians and the federal government would permit the inclusion and integration of their voices into the body politic of the nation. Not everyone, however, shared Cohen's hopes. Still, from Cohen's perspective, in the revolutionary politics of the New Deal, the IRA was an act of liberation; the *Handbook* was its social contract.²³⁹

B. *Integration and Discord*

The opportunity to write the *Handbook* surfaced during the autumn of 1938. Carl McFarland, Assistant Attorney General, and Charles E. Collett, the Chief of the Trial Section of the Lands Division, asked Cohen to organize and head a survey of federal Indian law. The survey was to involve the compilation of statutes dealing with Indians that had never been compiled or codified hitherto, and their annotation with reference to cases, Attorneys General's opinions, and Solicitors' opinions. Based on these materials, a handbook was to be prepared for the legal and administrative officers of the Indian Service, who, before 1938, were forced to look for legal authorities in hundreds of scattered sources.²⁴⁰ After some deliberation, the work began, as a cooperative project of the Lands Division of the Department of Justice and the Department of the Interior under Cohen's supervision.²⁴¹

Cohen admitted that "the task of systematizing this law and preparing a comprehensive handbook on the subject" was "one of peculiar difficulty."²⁴² No textbook or treatise on the subject had ever been written, and as Cohen had learned in the preceding five years, the law relating to Indian affairs was complex and difficult.²⁴³ However, the potential uses of the survey and the proposed handbook made the endeavor worthwhile.

As Jill Martin has recently noted, Cohen envisioned "a book that would last into the future, setting forth how the laws had developed

239. For a discussion of liberation and social contracts in revolutionary politics, see MICHAEL WALZER, *EXODUS AND REVOLUTION* (1985).

240. Memorandum from Felix Cohen to Mr. Stull (Dec. 5, 1938), Papers Relating to the Handbook of Federal Indian Law, Folder 6, Yale Collection of Western Americana, Beinecke Library, Yale University; see also Felix S. Cohen, Report of Work as Chief of Indian Law Survey: 1939-1940 [hereinafter Cohen, Report of Work as Chief of Indian Law Survey], attached to Memorandum from Felix Cohen to the Solicitor of the Department of the Interior (Feb. 10, 1940), Papers Relating to the Handbook of Federal Indian Law, Folder 7, *supra*; cf. Martin, *supra* note 98, at 36; Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M. L. REV. 153, 155-57 (1996).

241. Cohen's duties were to "be performed under the general supervision of the Solicitor of the Department of the Interior, and in collaboration with attorneys of the Department of Justice." Cohen, Report of Work as Chief of Indian Law Survey, *supra* note 240.

242. Memorandum from Felix Cohen to Mr. Stull (Dec. 5, 1938), *supra* note 240.

243. *Id.*

over time and explaining the legal interests of all parties involved.”²⁴⁴ The handbook was to be an evolving treatise: a book that would represent not only federal and state regulation of Indian affairs, but also changing Indian customs and laws. A statute for the American ideal of democracy²⁴⁵—which at the time Cohen interpreted through the mediation of his concept of systematic pluralism—the treatise was meant to familiarize lawyers with the diverse aspects of Indian law. The proposed handbook, Cohen hoped, would restore an age-old heritage to its warranted status. Federal and state laws, judicial and administrative decisions would then aim to fulfill the promise of this tradition.²⁴⁶

Not everyone shared Cohen’s aspirations. Indeed, Cohen’s eagerness (and the willingness of the Department of the Interior) to protect the rights of Indian tribes caused much aggravation to many in the Justice Department. They believed that the handbook should be written to assist those attorneys in their department who litigated cases against Indians.²⁴⁷ Cohen’s prophecy, during the initial deliberations, that “this project would be resented by certain Justice Department employees”²⁴⁸ was quickly fulfilled. From the start, the Justice Department raised a variety of bureaucratic obstacles.²⁴⁹ Then, as McFarland, who had a keen interest in the project, left the Department, and with a Second World War on the horizon, “there wasn’t much interest in this ‘Indian thing.’”²⁵⁰ On October 31, 1939, eight months into the project, Cohen was called before Assistant Attorney General Norman M. Littell, who advised him that “he was dissatisfied with the work of the project and had determined to put

244. Martin, *supra* note 98, at 37.

245. *Id.*

246. See Cohen, Report of Work as Chief of Indian Law Survey, *supra* note 240.

247. *E.g.*, Deloria, *supra* note 21, at 964. As Jill Martin writes:

Some lawyers at Justice wanted a litigation manual that explained how to win Indian cases—mostly against the Indians themselves. Others wanted to know only about the government’s rights and responsibilities, and not about the Indians’ rights. Still others felt that history was not important, and that only cases exemplifying the current state of the law should be included. Some believed that the current caseload of the Justice Department’s lawyers should determine which topics were included.

Martin, *supra* note 98, at 42. As Martin shows, in a staff meeting, Cohen rejected these assumptions. He did not regard vested interests in perpetuating litigation as relevant, and instead indicated that the aim of the proposed handbook was to protect the property and rights of the Indians. The argument with respect to the current caseload was similarly dismissed by Cohen; it was, he suggested, relevant to the past, yet, the handbook was to last into the future. “Our job,” Cohen concluded, “is one of prophecy, based on careful observation of present trends.” *Id.* (quoting Felix S. Cohen).

248. Cohen, Report of Work as Chief of Indian Law Survey, *supra* note 240.

249. In particular, they engaged in a petty administrative warfare—for example, disallowing Cohen’s assistants to enter the Department of Justice building after hours, or failing to provide mimeographing when required. *Id.*

250. Strickland & Valencia-Weber, *supra* note 240, at 156.

an end to it.”²⁵¹ On the following day, Cohen was “publicly relieved of [his] command in the presence of [his] staff, which was then assigned to various other units of the Lands Division.”²⁵² Attacks on Cohen’s scholarship and his character “before [his] superiors in the Interior Department and before various senators and other officials” succeeded the termination of the project.²⁵³

For the most part, Littell’s sudden change of heart—only weeks before the incident he had indicated that the work was “very interesting, and . . . quite valuable”²⁵⁴—was due to his growing concerns about the use that Indian tribes could make of the proposed handbook.²⁵⁵ The Attorney General formally explained that the work on the handbook was terminated “because the drafts of chapters submitted were of such inferior quality that no practicable amount of revisions would make them adequate to serve the needs of attorneys either in [the Justice Department] . . . or the Department of the Interior.”²⁵⁶

Cohen’s superiors in the Department of the Interior were not impressed by these accusations. Acting Secretary E.K. Burlew advised Littell that in view of their knowledge of Cohen’s prior work, Solicitor Margold and Acting Solicitor Frederic Kirgis found it difficult to accept the view that the material submitted was “hopelessly worthless.”²⁵⁷ They thus “requested an opportunity fully to examine into the matter on the merits.”²⁵⁸ Following this examination, the Department of the Interior and its “pro-Indian” lawyers took over the project.²⁵⁹

251. Memorandum from Felix Cohen to the Solicitor of the Department of the Interior (Feb. 10, 1940), *supra* note 240.

252. *Id.*

253. *Id.*

254. *Id.* (quoting Norman M. Littell).

255. To some extent, Littell simply lacked knowledge of Indian law, or interest in it. Cohen, Report of Work as Chief of Indian Law Survey, *supra* note 240. Cohen seems to have believed that the Justice Department was also becoming uneasy with his critique of conditions within the Department, which, in Cohen’s opinion, were “inconsistent with ordinary standards of efficiency, economy and fair play in Government service, and which . . . [would have] greatly discredit[ed] [the] Administration if they [became] generally known before appropriate remedial steps [were] taken.” Memorandum from Felix Cohen to the Solicitor of the Department of the Interior (Feb. 10, 1940), *supra* note 240.

256. Letter from Attorney General [Frank Murphy] to Harold Ickes (Dec. 13, 1939), Papers Relating to the Handbook of Federal Indian Law, Folder 1, Yale Collection of Western Americana, Beinecke Library, Yale University. For Cohen’s response, see Papers Relating to the Handbook of Federal Indian Law, Folder 6, *supra*.

257. Memorandum from Felix Cohen to the Solicitor of the Department of the Interior (Feb. 10, 1940), *supra* note 240.

258. *Id.*; see also Letter from E.K. Burlew to Attorney General (Jan. 16, 1940), Papers Relating to the Handbook of Federal Indian Law, Folder 2, Yale Collection of Western Americana, Beinecke Library, Yale University.

259. The story goes that Cohen went to his father’s close friend, Felix Frankfurter, who then went to see his friend, Franklin D. Roosevelt. Roosevelt apparently said that he could

Cohen and his team completed the *Statutory Compilation of the Indian Law Survey: A Compendium of Federal Laws and Treaties Relating to Indians* in 1940, and “[a]fter intensive work by some forty-seven staff members and contributors,”²⁶⁰ the *Handbook of Federal Indian Law* was “printed and officially released on August 25, 1941” under the auspices of the Department of the Interior.²⁶¹ In a letter written after the events, Cohen noted that he was “trying to regain the mark of a civilized man,” that is, “the capacity to doubt one’s own first principles, which [had] entirely evaporated in the course of a year’s strain of battle . . . over the [*Handbook*] . . . with colleagues, whose livelihood and prestige were threatened by the publication of trade secrets.”²⁶² “It was a tough and dirty fight while it lasted,” Cohen concluded, “and the ensuing *dolce far niente* is without blemish.”²⁶³

Writing in retrospect, Felix Frankfurter observed that the *Handbook* was an attempt to bring “meaning and reason out of the vast hodge-podge of treaties, statutes, judicial and administrative rulings, and unrecorded practice in which the intricacies and perplexities, the confusions and injustices of the law governing Indians lay concealed.”²⁶⁴ While the *Handbook* did not “purport to be a cyclopedia,” it was, as the editors of the 1982 edition noted, “a thorough and comprehensive treatise that attended to virtually every nook and cranny of the field.”²⁶⁵

As Part IV.C demonstrates, with respect to Cohen’s changing interpretations of pluralism, the importance of the *Handbook* was its proclamation, supported by historical evidence, that Indian tribes were sovereign bodies, with “all the powers of self-government of any sovereignty except insofar as those powers have been modified or repealed by act of Congress or treaty.”²⁶⁶ Ironically, Cohen’s argument endorsed the fiction of conquest, thus subjecting tribal affairs to congressional control. As Part IV.C shows, such a claim was grounded in a particular theory of group rights, which Cohen articulated in the 1940s. As his analysis became fixated, however, on the need to pro-

not “overrule the Attorney General,” but Frankfurter convinced him that no “overruling” was required, just “re-establishing.” That, Roosevelt agreed to do, and the task-force moved from the Justice Department to the Department of the Interior. Strickland & Valencia-Weber, *supra* note 240, at 156.

260. *Introduction to 1982 HANDBOOK*, *supra* note 33, at viii. For a detailed examination of the writing process, see Martin, *supra* note 98.

261. Martin, *supra* note 98, at 55.

262. Letter from Felix Cohen to Sam Thorne (ca. 1941), Joseph P. Lash Papers, Box 50, Folder 7, Franklin D. Roosevelt Library.

263. *Id.*

264. Felix Frankfurter, *Foreword to Symposium: Felix S. Cohen*, 9 RUTGERS L. REV. 355, 356 (1954).

265. *Introduction to 1982 HANDBOOK*, *supra* note 33, at viii.

266. Margold, *Introduction to HANDBOOK*, *supra* note 236, at x.

tect particular group rights, his systematic pluralist assumption—that value systems could be enlarged to include other systems, ultimately becoming one—gradually disintegrated. Part V will examine Cohen’s alternative—comparative pluralism—and how it informed the drafting of the ICCA.

C. Systematic Pluralism, Revisited: A Group Right To Be Different

The major theme of the *Handbook* and of Cohen’s writings during the early 1940s was that the history of Indian nations and the history of international law provided ample precedents for the protection of the collective rights of Indian tribes. According to Cohen, the history of Indian nations revealed that the constitutions written by the Iroquois confederacy and other peoples preceded the American Constitution and were indeed the hidden roots of civilization.²⁶⁷ He further suggested that a long line of conquerors, including the federal government, recognized these constitutions. Traced back to the “Spanish School” of international law, this recognition, according to Cohen, indicated that both American law and international law were sufficiently expansive to embrace a conception of group rights. Cohen admitted that American Indians were widely oppressed under Spanish rule, but he asserted that “the oppression was in defiance of, rather than pursuant to, the laws of Spain.”²⁶⁸ While the American colonies “appealed to the traditional legal rights of Englishmen when they rebelled against a royal administration that had violated those rights,” Cohen wrote, “the peoples of Latin America appealed again and again to the humane Spanish legal ideal of racial equality in rebelling against administrations which had been faithless to that ideal.”²⁶⁹

Many have accused Cohen of endorsing in his historical analysis the fiction of conquest, that is, the idea that while tribes initially possessed all the powers of a sovereign nation, after conquest, these powers were subject to qualification by the conqueror, for example, the federal government.²⁷⁰ Cohen’s writings during the early 1940s clearly supported the argument that the conquerors were the arbiters of Indian rights. Yet, Cohen did not seek to encourage congres-

267. Felix S. Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 147-84 (1940) [hereinafter Cohen, *Indian Rights*]. In a footnote in the *Handbook*, Cohen listed the sixty-five “constitutions or documents in the nature of constitutions recorded in the Interior Department” prior to approval of any IRA constitutions. HANDBOOK, *supra* note 13, at 129. As Rusco notes, a few of these constitutions were organized “in response to the first notice to Indians that a major revision of Indian law was planned, but most predate[d] the Indian Reorganization Act.” RUSCO, *supra* note 4, at 40.

268. Cohen, *Spanish Origins of Indian Rights*, *supra* note 233, at 243; *see also id.* at 239-252.

269. *Id.* at 243; *see also id.* at 240-43.

270. *E.g.*, BARSH & HENDERSON, *supra* note 29, at 112, 278.

sional intervention in Indian affairs. He truly wanted to defend tribal rights. Why, then, did he subject tribal affairs to congressional control? The reasons, I suspect, reach back to Cohen's systematic pluralism, with its ethical grounding and its relationship to Cohen's sense of identity as a Jewish American.

On its face, it seems that Cohen adopted the fiction of conquest to de-radicalize the *Handbook's* argument in defense of tribal rights. Motivated by his faith in the feasibility of expanding legal and moral systems, Cohen hoped that by showing that the protection of tribal rights had been an important aspect of different legal traditions, including the American one, he would gain support for his advocacy of group rights, a claim that reached back to the IRA, particularly to *Powers of Indian Tribes*.²⁷¹ He wanted the *Handbook* to be a social contract between Indians and non-Indians, a social contract that would protect the communal rights of Indian tribes. In this context, history was a means to an end. Cohen hoped that the display of historical evidence would support the protection of tribal rights, including the right to self-government, without appearing—amidst the growing expansion of federal powers during World War II—to threaten congressional powers.

According to Cohen, his concerns were informed by his experience during his first year in office. As he was studying the legal rights of Indian tribes—a study that was to serve as a guide in the drafting of tribal constitutions under the IRA—Cohen had concluded that “the laws and court decisions clearly recognized that Indian tribes [had] all the governmental rights of any state or municipality except in so far as those rights [had] been curtailed or qualified by Act of Congress or by treaty, and such qualifications [were] relatively minor.”²⁷² His work was adopted as the Solicitor's Opinion and then approved by the proper authorities in the Department of the Interior. Yet, all copies were carefully hidden away in a cabinet, and, Cohen sarcastically added, “when an Indian was found reading this opinion, the copy was forthwith taken from his hands and placed under lock and key.”²⁷³ In such an atmosphere, Cohen consciously sought to provide a passive facade for his *Handbook*, suggesting that it did not rewrite Indian law; rather, it uncovered what “every schoolboy” already

271. See *supra* text accompanying notes 175-84.

272. Cohen, *Indian Self-Government*, *supra* note 187, at 306-07.

273. *Id.* “Incidentally,” Cohen commented, “the Indian whose reading was thus interrupted had spent more years in school and college than the men who controlled the lock and key.” *Id.* If the opinion troubled the Indian office, its suppression provoked Cohen. He distributed copies of the opinion wherever he could. *Id.* *Indian Self-Government* was published shortly after Cohen had left the Department of the Interior.

knew—that a long line of conquerors had left tribal sovereignty intact.²⁷⁴ Systematic pluralism was thus feasible.

There was, I believe, a more personal (and less instrumental) reason for Cohen's endorsement of the fiction of conquest. Cohen came to the New Deal to promote tribal self-government. Almost a decade in the service of the Department, as well as the rise of totalitarianism in Europe, helped to shift his focus from sovereignty to racial discrimination. In the late 1930s, Cohen no longer believed that racial tensions would disappear once social or political conflicts were resolved. Rather, his ideal of systematic pluralism envisioned social and cultural integration as an alternative to discrimination.

Cohen knew that the fiction of conquest meant that sovereigns (for example, the federal government) could intervene in tribal affairs. He embraced it, I suspect, not only because it de-radicalized the message of the *Handbook*. Rather, endorsing the fiction of conquest allowed Cohen to celebrate tribal rights, on the one hand, and to argue, on the other hand, that tribes were not excluded from the mainstream of American life. It laid a foundation for a more general theory of group rights; a theory that admitted diversity, denied separatism, and made the sovereign the force of social integration. According to Cohen's narrative, such a conception of group rights was already an element of American law.

The limits of Cohen's systematic pluralism, I have suggested, were determined by his aspirations as a Jewish American to be included in the polity.²⁷⁵ For Cohen—the pluralist, but also the Jewish American, who was at the time struggling to keep American borders open to European refugees—both the possibility of inclusion and the role of the sovereign in battling racial discrimination were vital. “The victim of economic oppression may be buoyed up in the struggle by the hope that he can improve his economic status,” he wrote in 1940.²⁷⁶ “The victim of political oppression may change his political affiliation,” and “[t]he victim of religious oppression,” Cohen wished to believe, “may embrace the religion of his oppressors.”²⁷⁷ Yet, “[t]he victim of racial persecution” could not “change his race.”²⁷⁸ “For these

274. The term “every schoolboy” is an allusion to Cohen's argument in support of tribal land claims. In *Original Indian Title*, Cohen rejected the myth that “[e]very American schoolboy [was] taught to believe,” that is, “that the lands of the United States were acquired by purchase or treaty from Britain, Spain, France, Mexico, and Russia.” Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947) [hereinafter Cohen, *Original Indian Title*], reprinted in THE LEGAL CONSCIENCE, *supra* note 6, at 273, 279-80. Instead, Cohen argued that the lands were acquired from their original Indian owners. *Id.* at 280; see also *infra* text accompanying notes 342-45.

275. See *supra* text accompanying note 235.

276. Cohen, *Indian Rights*, *supra* note 267, at 185.

277. *Id.*

278. *Id.*

victims,” Cohen proclaimed, there was “no sanctuary and no escape.”²⁷⁹ To be integrated into the polity, these victims needed the protection of the sovereign.

However, “since all the minority groups that [had] reason to fear discriminatory legislation [made] up together a great majority of [the] population,” Cohen maintained that at “the heart of our democratic institutions” was an asserted right (of individuals and groups) to be immune from racial discrimination.²⁸⁰ The long history described in the *Handbook* culminated in the Fifth, Fourteenth, and Fifteenth Amendments to the United States Constitution,²⁸¹ which, according to Cohen, endorsed this asserted right.²⁸² “[T]he right to be immune from racial discrimination by governmental agencies,” Margold similarly wrote in the introduction to the *Handbook*, “is an essential part of the fabric of democratic government in the United States.”²⁸³

With the rise of totalitarianism in Europe, many liberals were moving toward rights consciousness.²⁸⁴ Cohen, who never disavowed his socialist convictions, adopted a collective (or group), rather than an individualistic, conception of rights.²⁸⁵ His systematic pluralism focused on the possibility that any given value system could be expanded to encompass other value systems. In similar manner, in the

279. *Id.*; cf. Kallen, *Democracy Versus the Melting Pot*, *supra* note 49.

280. Cohen, *Indian Rights*, *supra* note 267, at 185.

281. U.S. CONST. amend. V; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

282. Cohen, *Indian Rights*, *supra* note 267, at 191; Felix S. Cohen, *Colonialism: A Realistic Approach*, 55 ETHICS 167 (1945) [hereinafter Cohen, *Colonialism*], reprinted in THE LEGAL CONSCIENCE, *supra* note 6, at 364.

283. Margold, *Introduction to HANDBOOK*, *supra* note 236, at x.

284. See generally ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (1995). For the reemergence of “democracy” in the 1940s, see also MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973); *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* (Mark Tushnet ed., 1993); Morton J. Horwitz & Orlando do Campo, *When and How the Supreme Court Found Democracy—A Computer Study*, 14 QUINNIPIAC L. REV. 1 (1994).

285. By an “individualistic conception of rights,” I refer to the assumption that every individual is a unique being with concrete needs, but that what constitutes one’s moral dignity is not what differentiates him or her from the other but what they, as rational beings, have in common. By a “collective conception of rights,” I refer to the assumption that what constitutes one’s moral dignity is what differentiates him or her, as a member of a particular group, from others. A collective conception of rights assumes not only formal equality between groups, but also a concept of equality that takes into account the unique needs of any given group. My interpretation of Cohen’s approach draws upon contemporary political theory. See Seyla Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory*, in FEMINISM AS CRITIQUE: ON THE POLITICS OF GENDER 77, 86-91 (Seyla Benhabib & Drucilla Cornell eds., 1987). For Cohen’s approach, see generally Cohen, *Indian Rights*, *supra* note 267; Cohen, *Spanish Origins of Indian Rights*, *supra* note 233; Cohen, *Colonialism*, *supra* note 282; and Cohen, *Indian Self-Government*, *supra* note 187.

legal realm, Cohen sought not only to acknowledge the existence of different cultures, but also to articulate a comprehensive legal doctrine that would protect them. A group right to be different—culturally, politically, and socially—was Cohen’s choice. His writings during the 1940s suggested that an individualistic conception of rights could not attend to the multiplicity of competing cultural, social, economic, and political systems that characterized American society. Social integration accordingly required the celebration of the rights of groups to assert their differences. Such a collective conception of rights, Cohen also wished to show, was already an element of the American legal system. By way of introduction to the *Handbook*, he suggested that it reflected “a set of beliefs that [formed] the intellectual equipment of a generation”.²⁸⁶

a belief that our treatment of the Indian in the past is not something of which a democracy can be proud, a belief that the protection of minority rights and the substitution of reason and agreement for force and dictation represent a contribution to civilization, a belief that confusion and ignorance in fields of law are allies of despotism, a belief that it is the duty of the Government to aid oppressed groups in the understanding and appreciation of their legal rights, a belief that understanding of the law, in Indian fields as elsewhere, requires more than textual exegesis, requires appreciation of history and understanding of economic, political, social, and moral problems. These beliefs represent . . . the American mind in our generation as it impinges upon one tiny segment of the many problems which modern democracy faces.²⁸⁷

At the dawn of the 1940s, Cohen portrayed the protection of minorities’ rights not only as a fundamental legal principle, but also as an already existing feature of American law. “[T]he American community is made up of wolves and sheep, and the sheep have got to be protected against the wolves,” Cohen believed.²⁸⁸ As Russel Barsh has noted, Cohen “was a man with a mission The law as he conceived it was an evolving instrument of human progress which, like any tool, worked best if well understood and properly used.”²⁸⁹ Accordingly, Cohen did not only include legal decisions in the *Handbook*. Rather, he annotated them to support his ideal of systematic pluralism and its legal correlate—a conception of group rights.

When he joined the New Deal, Cohen saw on Indian reservations a socialist structure that he wished the nation to imitate; he saw on Indian reservations what he wished to prescribe for American soci-

286. Felix S. Cohen, *Author’s Acknowledgments* in HANDBOOK, *supra* note 13, at xviii [hereinafter Cohen, *Author’s Acknowledgments*].

287. *Id.*

288. Kramer-Cohen et al., *supra* note 99, at 77.

289. Barsh, *supra* note 29, at 800.

ety. In the 1940s, as he was seeking to promote his ideal of systematic pluralism, especially his argument in favor of group rights, he found supporting evidence, again, on Indian reservations. Cohen's history of the relationship between Indian tribes and the different colonial conquerors, in short, unraveled his ideal of systematic pluralism.

Many scholars have more recently sought to identify in American legal history a concept of rights that could embrace not only the Lockean, liberal notion of individual rights, but also a conception of group rights.²⁹⁰ Some have suggested that a communitarian tradition that stressed the priority of communal values informed American law throughout the nineteenth and early twentieth centuries.²⁹¹ Others have argued that a republican tradition that emphasized civic virtue and endorsed notions of individual and collective rights influenced American legal thought.²⁹² Still others claim that liberalism itself supports group rights.²⁹³

Cohen's theory of rights drew on his ethical conception of the good society and his ideal of systematic pluralism. It grounded human equality in the celebration of human differences. The state was not a neutral night-watchman. Rather, it was charged with the affirmative protection of group rights. Lest he be misunderstood, Cohen emphasized that such an image of the state did not sanction the trust doctrine, which viewed Indians as wards of the state. The protection of group rights was thus subject to the limitation that it was for the welfare of those protected and in their interests.²⁹⁴

Rights, in short, were need-based and historically construed through open social dialogues, defined and redefined through the interaction of particular groups and the relationship between groups and the polity. In his writings during the 1940s and in the *Handbook*, Cohen elaborated and celebrated such a dynamic ideal of group (and individual) rights. Articulating his systematic pluralist ideal, these writings aimed to show that law was more than words and more than brute force. Law was a system, or an organization, which

290. *But see* Tsosie, *supra* note 27 (discussing the unique status of Indian tribes with respect to conceptions of group rights).

291. *See, e.g.*, MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996).

292. *See, e.g.*, Symposium, *The Republican Civic Tradition*, 97 *YALE L.J.* 1493 (1988).

293. *See, e.g.*, Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 *VA. L. REV.* 1053 (1998). Compare WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995), with Robert Justin Lipkin, *Can Liberalism Justify Multiculturalism?*, 45 *BUFF. L. REV.* 1 (1997).

294. *See, e.g.*, Cohen, *Spanish Origins of Indian Rights*, *supra* note 233, at 244-47.

translated diverse visions of social reality and thus made the impact of social forces more predictable.²⁹⁵

Cohen's ideal of group rights as a means of social integration assigned, however, little active role to groups in determining and protecting their rights. Focusing on the expansion of systems, systematic pluralism was premised on the plausibility of universal solutions. It admitted the particularity of different systems, but suggested that distinctions disappeared once all systems grew more inclusive, ultimately becoming one. The fiction of conquest, too, implied that as the voice of the conqueror became dominant, the voices of particular groups became almost irrelevant. Notably, the voices of Indian tribes were missing from the *Handbook*.

Ironically, critics of Cohen's aims pointed him toward a more explicit recognition of the importance of particular voices. For one thing, many rejected Cohen's appeal to open America's borders to European refugees because more lenient immigration laws were conceived not as making the polity more inclusive, but as protecting the particular interests of Jewish refugees. Beginning in the 1940s, the Indian New Deal, too, was coming under attack as preserving the particular status of Indian tribes.²⁹⁶ In the mid-1940s, Cohen was thus searching for an approach that would better mediate the demands of particularism and universalism. Coinciding with his work on the ICCA, his quest ultimately led him to articulate an ideal of comparative pluralism. It sought to mediate conflicting value systems not by expanding one system to include others, but by encouraging dialogue and translation between and among distinct systems.

Part V examines Cohen's comparative pluralism and its relationship to the drafting of the ICCA. Part V.A describes the Act. Presumably accepting the inherent sovereignty of Indian tribes, as it was articulated in the *Handbook*, the ICCA waived the sovereign immunity of the federal government and allowed Indian tribes to sue for damages for their relinquished lands. Many have since criticized the ICCA for restrictions it imposed on the remedies available to Indian tribes and for its significant role in promoting the policy of termination. As Part V.B suggests, for Cohen, the Act was symbolic. Intellectually, he believed that the establishment of an investigatory commission—rather than an adversarial body—to hear and determine tribal land claims against the federal government would illustrate the importance of agency and the possibility of communication

295. On the relationship between law and social narratives, see Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983), reprinted in THE ESSAYS OF ROBERT COVER, *supra* note 35, at 95; Nomi M. Stolzenberg, *Un-Covering the Tradition of Jewish "Dissimilation": Frankfurter, Bickel, and Cover on Judicial Review*, 3 S. CAL. INTERDISC. L.J. 809 (1994).

296. See *infra* Part VI.

and translation between and among distinct value systems. These were the premises of his developing ideal of comparative pluralism. Part V.C identifies the personal appeal of comparative pluralism by closely examining Cohen's article, *How We Bought the United States*,²⁹⁷ which Cohen wrote in support of the ICCA. *How We Bought the United States* replaced the fiction of conquest with a contractual approach, assigning an active role to Indian tribes in determining and protecting their collective rights. By accentuating historical exchanges between Indians and non-Indians, Cohen intended to defend the history of race relations in America against comparisons to totalitarianism. By encouraging dialogue between distinct value systems, comparative pluralism was indeed Cohen's alternative to totalitarianism. In the postwar years, Cohen, once again, found proof for the feasibility of his pluralist ideal on Indian reservations.

V. "EVERYTHING HAS TWO HANDLES": COMPARATIVE PLURALISM AND THE INDIAN CLAIMS COMMISSION ACT, 1946

A. *Indian Claims*

Throughout the nineteenth century, Indian tribes had lost most of their lands to non-Indian settlement. Because the United States as a sovereign could not be sued until it waived its privilege, Indian tribes could not protect their lands in courts. The establishment of the Court of Claims in 1855²⁹⁸ did little to change the situation, as an 1863 provision removed from its jurisdiction all claims arising out of treaties with the Indians.²⁹⁹ In the early twentieth century, as more and more tribes pressed for a resolution of their claims, Congress passed a series of special acts granting the Court of Claims jurisdiction to hear individual tribes' cases. Congress did not rule on these cases. Rather, it waived sovereign immunity and allowed individual tribes to bring their claims.³⁰⁰

In 1928, the Meriam Report³⁰¹ recommended the establishment of a fairer and more efficient device to resolve Indian claims.³⁰² In its third title, the original draft of the IRA had aimed to prohibit future land allotments and to restore to tribal ownership those lands which

297. Felix S. Cohen, *How We Bought the United States*, COLLIER'S, Jan. 19, 1946, at 22 [hereinafter Cohen, *How We Bought the United States*], reprinted with adaptation in Cohen, *Original Indian Title*, *supra* note 274, at 279-88.

298. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (current version at 28 U.S.C. §§ 1491-1509).

299. Act of Mar. 3, 1863, ch. 92, § 9, 12 Stat. 765, 767 (current version at 28 U.S.C. § 1502).

300. Charles F. Wilkinson, *The Indian Claims Commission*, in INDIAN SELF-RULE, *supra* note 23, at 151, 151.

301. INSTITUTE FOR GOV'T RESEARCH, *supra* note 74.

302. Wilkinson, *supra* note 300, at 151-52.

had been declared surplus under the respective allotment acts but were never settled. In 1945, when William A. Brophy took office as Commissioner of Indian Affairs, he declared as one of his goals the creation of a tribunal for hearing and determining Indian land claims against the federal government.³⁰³ Cohen assisted Brophy in securing the passage of the ICCA in the late summer of 1946 and the establishment of the Indian Claims Commission;³⁰⁴ the Commission was patterned after the Pueblo Land Board.³⁰⁵ For Cohen, its intellectual and legal roots were the IRA's endorsement of distributive sovereignty and the *Handbook's* discussion of inherent sovereignty.

Throughout the early 1940s, Cohen paved the way for the ICCA. In 1941, he helped to secure the land rights of the Walapai Indians against the Santa Fe Pacific Railroad Company.³⁰⁶ In 1942, he assisted in protecting the fishing rights of the Yakima Indians.³⁰⁷ After the war, the time was ripe for bringing a closure to Indian land claims against the federal government. Different policy tides made the passage of the ICCA possible. Many legislators thought that the resolution of Indian claims would help the termination process by removing "a major barrier to federal withdrawal,"³⁰⁸ and by promoting the economic self-sufficiency of tribes that would receive awards. Some supported the adjudication of Indian claims as a matter of fairness to the Indians.³⁰⁹ Cohen's hopes were with them.

Cohen envisioned an act that would provide "creative solutions" to tribal claims.³¹⁰ In his view, the ICCA was a direct challenge to the absolute sovereignty of the federal government. Given their inherent sovereignty, as he defined it in *Powers of Indian Tribes* and in the *Handbook*,³¹¹ Cohen believed that Indian tribes were on a par with the federal government; hence, their ability to sell their lands and to

303. James E. Officer, *Termination as Federal Policy: An Overview*, in INDIAN SELF-RULE, *supra* note 23, at 114, 118.

304. Several bills that were introduced in Congress during the late 1930s and early 1940s already shifted the attention from the need to establish a formal court to the goal of setting up a commission. As Vine Deloria recently noted, "[t]he investigatory commission appeared to be the only feasible vehicle for handling claims which involved history and anthropology as much as they involved legal theories." DELORIA, *supra* note 23, at 221.

305. TAYLOR, *supra* note 56, at 149-50.

306. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941).

307. *Tulee v. Washington*, 315 U.S. 681 (1942). In 1949, Cohen would similarly work to secure the rights of the native inhabitants of the Karluk Reservation in Alaska to prevent commercial fishing in their waters. *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *see also* COHEN: A FIGHTER FOR JUSTICE, *supra* note 98, at 9.

308. Officer, *supra* note 303, at 118; *see also* BARSH & HENDERSON, *supra* note 29, at 125.

309. Officer, *supra* note 303, at 118; *see also* Ward Churchill, *The Earth is Our Mother: Struggles for American Indian Land and Liberation in the Contemporary United States*, in THE STATE OF NATIVE AMERICA, *supra* note 23, at 139, 144-47.

310. EDWARD LAZARUS, BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES 1775 TO THE PRESENT 185 (1991).

311. *See supra* text accompanying notes 267-74.

sue when the government failed to fulfill its obligations according to the terms of the sale.³¹²

In reality, the remedies provided by the ICCA were limited. While public announcements declared that all Indian claims would receive serious consideration, the Act imposed strict limitations on the remedies that the Commission could offer.³¹³ The ICCA provided only for “the fair market value of the land at the time of the taking, without interest, and it could not restore land to Indians under any circumstances.”³¹⁴ Despite a flood of cases (over 600 had been docketed by 1951), “in 1959 only \$17.1 million in restitution had been paid, and throughout the 1960s, the average award was approximately \$500,000.”³¹⁵ In part, changes in federal Indian policy and in the personnel of the Department of the Interior determined the fate of the ICCA.³¹⁶ Indeed, when he drafted the Act, Cohen was already caught between the pressing needs of bringing justice to Indian tribes, on the one hand, and not alienating Congress, on the other.³¹⁷

Part V.B elaborates Cohen’s intellectual reasons for believing that the ICCA would benefit the Indians. It shows that for Cohen, the establishment of an investigatory commission to hear and determine tribal land claims against the federal government was symbolic. By recognizing Indian tribes’ voices, Cohen believed that the Commission would illustrate the importance of agency and the possibility of dialogue between and among distinct legal systems; it would endorse his developing ideal of comparative pluralism. As Part V.C demonstrates, when he drafted the ICCA, Cohen, the Jewish American, needed to believe in the possibility of dialogue and coexistence.

312. See Cohen, *Original Indian Title*, *supra* note 274; Felix S. Cohen, *Indian Claims*, 2 AM. INDIAN 3, (1945), *reprinted in* THE LEGAL CONSCIENCE, *supra* note 6, at 264.

313. Officer, *supra* note 303, at 118; Wilkinson, *supra* note 300, at 152.

314. Michaels, *supra* note 151, at 1578.

315. *Id.* at 1579; see also MICHAEL LIEDER & JAKE PAGE, WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES (1997). The Commission was terminated on September 30, 1978, turning over sixty-eight pending cases to the U.S. Court of Claims. Churchill, *supra* note 309, at 147. It is also important to note that the ICCA brought about some internal conflict between tribal members who wished to settle the claims and those who wished a “full accounting by the United States of its illegal acts against the tribe.” DELORIA, *supra* note 23, at 226-28.

316. See *infra* Part VI.

317. The initial draft of the ICCA was largely Cohen’s product. After it was introduced before the House Indian Affairs Committee, it was revised, however, to incorporate the ideas of Ernest Wilkinson, who worked with Cohen, and to work out a series of amendments that the members of the House and Senate Indian Affairs Committees suggested. LIEDER & PAGE, *supra* note 315, at 62-68. The tension between his eagerness to help Indian tribes and Congress’s intent to terminate their special status ultimately led Cohen to resign, see *infra* Part VI. In the following years, he acted as consultant to a consortium of law firms that pooled their resources to explore legal questions common to tribal claims. LAZARUS, *supra* note 310, at 218.

B. Comparative Pluralism

Like his ideal of systematic pluralism, Cohen's comparative pluralism embraced the plurality of value systems, but rather than forcing them into one encompassing mass, it focused on the possibility of communication, dialogue, and translation between and among distinct systems. The understanding of any proposition "in the context of its own field," Cohen would write in the early 1950s, would allow individuals to "translate the proposition into language that will convey the same informational content in any other value field [they] understand."³¹⁸ This, he further explained, would allow individuals not only "to uncover the inarticulate value premises" of themselves and of others, but also "to understand the similarities and dissimilarities that exist between any two value perspectives," and thus to become more tolerant of "cultural diversities."³¹⁹

The possibility of translation (and dialogue) depended, however, on human agency. The main drawback both of the IRA and of the *Handbook* was indeed their reliance, apparent in many pluralist projects, on humanistic experts—dedicated to democracy and the decentralization of bureaucratic power—to lead the transformation toward a pluralist society.³²⁰ More recently, Vine Deloria has similarly noted that even under the supervision of the "pro-Indian" Department of the Interior, the *Handbook* did not always "represent a neutral or even pro-Indian point of view."³²¹ "People in those days," Deloria explained, "simply could not understand that racial minorities, especially Indians, would have their own interpretation of historical events and legal rights."³²² Many "important interpretations of policy development, statutes, and case law," according to Deloria, retained "a definite federal bias in that no question [was] ever raised as to whether federal action [sic] were proper or whether or not the federal government violated previously agreed upon principles of the federal-Indian relationship."³²³

In the mid-1940s, however, the intellectual faith in experts and, more broadly, in the social sciences declined.³²⁴ The strength of

318. Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950), reprinted in THE LEGAL CONSCIENCE, *supra* note 6, at 121, 151.

319. Felix S. Cohen, *The Reconstruction of Hidden Value Judgments: Word Choices as Value Indicators*, in SYMBOLS AND VALUES 545, 561 (Lyman Bryson ed., 1954); see also Felix S. Cohen, *The Vocabulary of Prejudice*, 19 FELLOWSHIP 5 (1953), reprinted in THE LEGAL CONSCIENCE, *supra* note 6, at 429, 435.

320. Cf. Everett Helmut Akam, *Pluralism and the Search for Community: The Social Thought of American Cultural Pluralists* (1989) (unpublished Ph.D. dissertation, University of Rochester) (on file with University Microfilm International).

321. Deloria, *supra* note 21, at 964.

322. *Id.*

323. *Id.*

324. See generally HORWITZ, *supra* note 2, at 213-46.

American democracy, Cohen wrote then, was in the recognition that government was not “a matter of wisdom, technique, or efficiency,” but “a matter of right,” a right which depended upon diverse human purposes.³²⁵ Government, in short, was “a matter chiefly of human purpose” and each person was “a more faithful champion of his own purposes than any expert.”³²⁶ Though, as Cohen also noted, governmental power often created “in its holders aspirations that [conflicted] with those of the rest of society.”³²⁷

In retrospect, Cohen disavowed his initial assessment of the enthusiasm in the Department of the Interior.³²⁸ He suggested that the faith in expertise, which prevented Indian self-government, amplified and was augmented by what Ralph Barton Perry (Cohen’s mentor at Harvard) labeled “the egocentric predicament”—that is, the fact that each person views the world “through his own eyes and from his own position,” and finds it difficult, without “a certain amount of sophistication to realize that the vision of others who see the world from different perspectives is just as valid”³²⁹ In the mid-1940s, Cohen suggested that the “bureaucratic mind” lacked such sophistication.³³⁰ Each division in the Department—that is, Education, Forestry, Credit, and Law and Order—Cohen argued in 1949, was in favor of self-government in general, but opposed to it in the field over which the division itself had jurisdiction. Experts, he explained, were reluctant to give up control over matters with which they were concerned, especially when they disagreed with tribal decisions. To protect against the possibility that such tribal decisions would become law on the reservations, these experts imposed limits on self-government.³³¹

Expertise, Cohen’s analysis implied, could not cultivate tolerance. Instead, his writings in the mid-1940s emphasized the ability of individuals and groups to actualize their destiny. “The most important task” of his generation, Cohen wrote in 1945, was “that of finding patterns by which men who differ in race, religion, and economic outlook may live in peace and contribute to each other’s prosperity.”³³² Yet, while in the *Handbook* Cohen envisioned the sovereign state as the force behind social integration,³³³ in 1949 he suggested that it

325. Cohen, *Colonialism*, *supra* note 282, at 369.

326. Cohen, *Indian Self-Government*, *supra* note 187, at 313.

327. Cohen, *Colonialism*, *supra* note 282, at 369.

328. *See supra* text accompanying notes 107-08.

329. Cohen, *Indian Self-Government*, *supra* note 187, at 308-09.

330. *Id.*

331. *Id.* at 309.

332. Cohen, *Colonialism*, *supra* note 282, at 364.

333. *See supra* text accompanying notes 275-89. In particular, see Cohen’s acknowledgment that among the beliefs that supported the *Handbook* was “a belief that it is the

was not “the business of the Indian Bureau or of any other federal agency to integrate Indians or Jews or Catholics or Negroes or Holy Rollers or Jehovah’s Witnesses into the rest of the population as a solution of the Indian, Jewish, Negro, or Catholic problem, or any other problem.”³³⁴ It was, nonetheless, the duty of the federal government “to respect the right of any group to be different so long as it [did] not violate the criminal law.”³³⁵

Seemingly subtle, the shift in Cohen’s rhetoric—from social integration to the promulgation of a group right to be different—is important. As he described them in his writings during the early 1940s, groups had little active role in the act of social integration. The premise, which many pluralists shared, that identity was socially (if not biologically) determined, often implied that the individual and the group were social constructs, stripped of any notion of volition or human agency, whose interests were protected by the government. Instead, Cohen’s comparative pluralism, which focused on dialogue between distinct value systems, emphasized action. Individuals and groups were active agents; they shaped their own destiny and the destiny of others. Though Cohen fully articulated his ideal of comparative pluralism only in the late 1940s, its seeds were planted in his work on the ICCA.

Cohen believed that by waiving sovereign immunity and allowing Indian tribes to sue the federal government, the Indian Claims Commission would give Indian tribes an active voice in the present. The voices of Indian tribes, seemingly missing from the *Handbook*, were amplified in Cohen’s hopes for the ICCA. As the proof of title would often require the testimony of Indians and their experts, rather than authorities external to the tribes, Cohen hoped that the Commission would provide a forum for Indian tribes and individual Indians to tell their side of American history. According to Cohen, the investigatory commission was thus to operate not “on a purely legal level”; it was “to operate as an administrative agency empowered to reach a just solution within broad limits established by law.”³³⁶ In his opinion, it was sufficient that Indians proved their aboriginal title to claim damages; they did not need to show a title recognized by the federal government.³³⁷ The Commission, Cohen assumed, would

duty of the Government to aid oppressed groups in the understanding and appreciation of their legal rights.” Cohen, *Author’s Acknowledgments*, *supra* note 286, at xviii.

334. Cohen, *Indian Self-Government*, *supra* note 187, at 308.

335. *Id.*

336. Cohen, *Indian Claims*, *supra* note 312, at 272. Ironically, the establishment of an administrative commission also indicated the continuing impact of the trust in experts.

337. *E.g., id.* at 266-68. On November 25, 1946, Chief Justice Vinson announced that to recover compensation for original title, Indian tribes needed only to identify themselves as entitled to sue, prove their original Indian title to designated lands, and demonstrate that their interest in such lands was taken without their consent and without compensation.

address “all Indian claims, legal, equitable and moral.”³³⁸ If the IRA set out to refute the antiquated policy of assimilation, and the *Handbook* was about history, the Indian Claims Commission, Cohen believed, would rewrite the future by telling a different narrative; it would give Indian tribes a forum to voice their versions of American history.

By providing Indian tribes with a forum to tell their side of American history, Cohen also believed that the Indian Claims Commission would encourage dialogue. In his view, its proceedings were to become exercises in hearing and learning from the testimony of the *other*. By investigating “the entire field of Indian claims, even for those tribes which may be too poor to hire their own lawyers,” Cohen hoped that the Commission would “conclude once and for all this chapter of our national history,”³³⁹ while simultaneously calling attention to it. The legal remedy was meant to bring closure. Yet, it was also intended to memorialize a different historical narrative. At least in the eyes of its drafter, the last product of the Indian New Deal was a genuine attempt to use law as a tool of reconciliation and commemoration. Cohen hoped that the Commission would settle historical acts of political and cultural violence between particular groups while reconstructing new memories, upon which they could build a pluralistic present.³⁴⁰

Thus described, Cohen’s hopes for the ICCA seem both ambitious and extremely naive. A more cynical viewer would describe Cohen’s aims as either blind to the realities of federal Indian law, or as excusing colonization. That the interests of Indian tribes were ultimately impaired supports such charges. Yet, as Part V.C suggests, in the

The Court announced that tribes did not need to show that the original Indian title had ever been formally recognized by the United States. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946). Though the establishment in the preceding summer of the Indian Claims Commission foreshadowed the decision, its importance did not escape Cohen. As he wrote to Mary-K Morris Bell, who worked with him on the *Handbook*:

You will be happy to learn . . . that the Supreme Court this week handed down a most important decision on Indian claims—I am having a copy sent to you under separate cover—which relies very considerably on a portion of the *Handbook* that you wrote. It must be very gratifying to you, as it is to me, that the Supreme Court does not agree with some of our critics who made the historical portions of the *Handbook* an object of particular scorn. It is really a matter of poetic justice that the Department of Justice should have lost an important case on this issue.

Letter from Felix Cohen to Mary-K Morris Bell (Nov. 29, 1946), Felix S. Cohen Papers, Box 71, Folder 1132, Yale Collection of Western Americana, Beinecke Library, Yale University.

338. Cohen, *Indian Claims*, *supra* note 312, at 272.

339. *Id.*

340. Ironically, as Vine Deloria has demonstrated, in practice, government attorneys (among them some of the drafters of the Act) transferred all the procedures and theories of the Court of Claims to the Commission, hence transforming it into a court and eliminating the flexibility that Cohen hoped to achieve by creating an investigatory commission. *See generally* DELORIA, *supra* note 23, at 222-26.

mid-1940s, Cohen wanted to believe that the Commission would benefit Indian tribes;³⁴¹ personally, he needed to believe in the possibility of dialogue and coexistence. Determined to assert the feasibility of his ideal of comparative pluralism, Cohen found evidence to support it in the history of race relations in America. Like the IRA and the *Handbook* that preceded it, the ICCA, in short, reflected a set of personal and intellectual goals. Unfortunately, the interests of Indian tribes were often lost in this web.

C. “*How We Bought the United States*”: *The ICCA in Perspective*

In January of 1946—anticipating the passage of the ICCA in the late summer of 1946—Cohen published an article that baffled his colleagues. Titled *How We Bought the United States*,³⁴² it stressed the “historic fact . . . that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners.”³⁴³ In a paragraph that was omitted in the original publication Cohen emphasized that the record of dealings with Indians had its dark pages. Americans had driven “hard Yankee bargains;” they often did not make the payments they promised; they did not always respect the boundaries of lands that the Indians reserved to themselves or other promises they made to the Indians in return for their land. Yet, Cohen stressed, whenever Congress was apprised of such deviations, “it [had] generally been willing to submit to court decisions the claims of any injured Indian tribe. And . . . to make whatever restitution the facts supported for wrongs committed by blundering or unfaithful public servants.”³⁴⁴ No nation, Cohen proclaimed, had “set for itself so high a standard of dealing with a native aboriginal people,” or had been “more self-critical in seeking to rectify its deviations from those high standards.”³⁴⁵

Many criticized Cohen for downplaying the darker side of America’s dealings with Indian tribes.³⁴⁶ “I might be disposed to wonder whether you have not placed too high a value upon the goods and services with which we have supplied the Indians in certain circum-

341. To a limited extent, the establishment of the Indian Claims Commission benefited Indian nations. See generally Churchill, *supra* note 309.

342. Cohen, *Original Indian Title*, *supra* note 274, at 279-88; see also *supra* text accompanying note 297. The material was also presented in a speech to the Indian Rights Association. Letter from Felix Cohen to John Collier, United Nations Assembly, England (Jan. 11, 1946), Felix S. Cohen Papers, Box 65, Folder 1041, Yale Collection of Western Americana, Beinecke Library, Yale University.

343. Cohen, *Original Indian Title*, *supra* note 274, at 280.

344. *Id.* at 288.

345. *Id.*

346. See generally correspondence in Felix S. Cohen Papers, Box 65, Folder 1041, Yale Collection of Western Americana, Beinecke Library, Yale University.

stances,” Harold Ickes wrote to Cohen.³⁴⁷ “I wonder,” Ickes added, “whether you have not been too optimistic in your averments as to our fairness.”³⁴⁸ Having known Cohen to be “more disposed to discover wrongs and insist upon their being righted” than to take “a complaisant point of view,” Ickes concluded, nonetheless, that “the article was a good one.”³⁴⁹ “I only hope,” he noted, “that our record is as fair as you present it.”³⁵⁰

Ickes clearly recognized Cohen’s goals. Like the IRA and the *Handbook*, in Cohen’s view, the ICCA was meant to empower Indian tribes, and he employed every piece of historical evidence to support (or de-radicalize) its underlying assumptions—that is, the postulates of his ideal of comparative pluralism: agency, dialogue, and coexistence. As he did when he sought to defend his socialist and systematic pluralism, at least on its face, Cohen wrote *How We Bought the United States* to demonstrate that his ideal of comparative pluralism was already an element of the reality of race relations in America.

In the early 1940s, the terminology of conquest advanced Cohen’s ideal of group rights. In the mid-1940s, however, social, political, and intellectual conditions made an argument about treaties more appealing. *How We Bought the United States* replaced the fiction of conquest, which the *Handbook* arguably promoted, with a “contractual” approach.³⁵¹ If in the *Handbook* Cohen argued that a long line of conquerors recognized Indian rights, his writings in the mid-1940s suggested that Indians were fortunate to have their needs recorded in abundant treaties. The different legal rules to which tribes were sometimes subjected, Cohen stressed, were the fruits of treaties, contracts, and statutes that Indians were able to secure from the federal government. The peculiar status of Indian tribes was thus not a diminution of full citizenship (a claim, which, according to Cohen, bureaucrats used to defend the erosion of such unique rights in order to make Indians “equal” citizens).³⁵² Rather, it was an addition to full citizenship. Reiterating, with respect to treaties, the argument he had made in the *Handbook*, Cohen emphasized that without the recognition of Indian rights by earlier generations, there would have been no problem of Indian claims. Wrongs never create rights, he

347. Letter from Harold Ickes to Felix Cohen (Jan. 17, 1946), Felix S. Cohen Papers, Box 65, Folder 1041, Yale Collection of Western Americana, Beinecke Library, Yale University.

348. *Id.*

349. *Id.*

350. *Id.*

351. For a contemporary contractual approach, see the discussion of “treaty federalism,” in BARSH & HENDERSON, *supra* note 29, at 279-87.

352. Felix S. Cohen, *Indians Are Citizens*, 1 AM. INDIAN 12 (1944), reprinted in THE LEGAL CONSCIENCE, *supra* note 6, at 253. Excerpts were reprinted in WALTER M. DANIELS, AMERICAN INDIANS 103-07 (Reference Shelf Series 29, no. 4, 1957).

wrote. Indeed, according to Cohen, there was “no problem of Negro Claims for the uncompensated labors of two and one-half centuries of slavery, because the Negroes had no legal rights during the period of slavery.”³⁵³ The fact that Indian claims were considered a “problem” thus indicated not only that wrongs had been committed against Indians, but also “that Indians [had] always occupied a high and protected position in the law of the land.”³⁵⁴

It is easy to challenge Cohen’s simplistic theory of race relations.³⁵⁵ It would be a mistake, however, to assume that Cohen was oblivious to the darker side of the relationship between Indians and non-Indians. He wanted his audience to recognize, nonetheless, that throughout American history, Indians were neither slaves nor victims; they were active agents, indeed sovereign peoples, with histories, traditions, and legal systems of their own, coexisting with the American system. They accepted the presence of non-Indians, they were capable of dealing with them, and they protected their own interests. In Cohen’s opinion, the fact that Indians were able to deal with American settlers also suggested that dialogue and translation between different systems were possible—that comparative pluralism was feasible. When he wrote *How We Bought the United States*, I wish now to suggest, Cohen needed to believe that the ICCA merely revived an age-old tradition, a tradition premised on coexistence.

Cohen’s work in the mid-1940s was informed by his concerns about the events in Europe and their potential ramifications in the United States. Throughout the late 1930s and early 1940s, Cohen saw what he described as “[t]he common beliefs that have held us together as a nation, the moral and intellectual foundations of our democracy” being “subjected . . . to sustained attacks from totalitarian quarters.”³⁵⁶ Cohen’s different interpretations of pluralism offered internal critiques of the American way of life. Yet, like many Jewish intellectuals, Cohen was determined to rebut comparisons between the history of race relations in America and totalitarianism in

353. Cohen, *Indian Claims*, *supra* note 312, at 268.

354. *Id.*

355. Indeed, recent scholarship on reparations offers a different argument. *E.g.*, Symposium, 40 B.C. L. REV. 385 (1998); Adrienne D. Davis, *The Case for United States Reparations to African Americans*, 7 HUM. RTS. BR. 3 (2000).

356. Felix S. Cohen, *Foreword* to COMBATING TOTALITARIAN PROPAGANDA: A LEGAL APPRAISAL i (Felix S. Cohen ed., 1944) [hereinafter Cohen et al., COMBATING TOTALITARIAN PROPAGANDA]. This work originally appeared as three articles: Felix S. Cohen & Edith Lowenstein, *Combating Totalitarian Propaganda: The Method of Suppression*, 37 ILL. L. REV. 193 (1944); James E. Curry, Felix S. Cohen & Bernard M. Newburg, *Combating Totalitarian Propaganda: The Method of Exposure*, 10 U. CHI. L. REV. 107 (1943); and Lucy M. Kramer & Felix S. Cohen, *Combating Totalitarian Propaganda: The Method of Enlightenment*, 27 MINN. L. REV. 545 (1943). The studies were carried out by the Institute of Living Law, “a non-profit agency engaged in socio-legal research in the problems of democracy.” Cohen et al., COMBATING TOTALITARIAN PROPAGANDA, *supra*, at 8.

Europe. In a series of articles that he published in the early 1940s, and in a handbook on totalitarian propaganda³⁵⁷ that he coauthored with several colleagues, Cohen thus called attention to the great American democratic achievements in the field of minority rights. “The propaganda assaults of Nazism, Fascism and Communism have been skillfully organized and lavishly financed,” Cohen wrote in the foreword to *Combating Totalitarian Propaganda*.³⁵⁸ “With complete disregard for the canons of ordinary decency and honesty, the purveyors of totalitarian propaganda have insidiously and persistently sought to undermine loyalty to the American way of life.”³⁵⁹ Ironically, in an effort to combat totalitarian propaganda, Cohen’s writings on the ICCA similarly ventured into propagandist aims.

“I have written up the story of ‘How we Bought the United States,’” Cohen wrote to the editors of *Collier’s*, “in not too technical terms and illustrated the piece with a map of the United States showing the various Indian cessions.”³⁶⁰ Amidst growing concerns about the treatment of minority groups, Cohen noted, he wanted to call attention to “the story of our land dealings with the Indians,” especially since most Americans were “quite unfamiliar with the basic facts on this subject and accept[ed] without question the myth that Indian land rights were ruthlessly disregarded in the growth of our country.”³⁶¹

Publishing the piece, Cohen believed, should help in the war against totalitarian propaganda. “Possibly,” he wrote to John Collier, who was then at the United Nations Assembly in England, “this piece will help you, as an American diplomat abroad, to live down the bad name of the United States in the field of native affairs.”³⁶² At least, Cohen hoped, it would refute the assertions of “Jap, Nazi and Fascist propagandists [who] lost no time in pointing out that what their countries were doing in Asia, Africa and Europe was no different from what the United States did years ago in taking a continent from the Indians in the name of a superior race.”³⁶³

357. Cohen et al., *COMBATING TOTALITARIAN PROPAGANDA*, *supra* note 356.

358. *Id.* at i.

359. *Id.*

360. Letter from Felix Cohen to Editors of *COLLIER’S* (Jan. 26, 1945), Felix S. Cohen Papers, Box 65, Folder 1040, Yale Collection of Western Americana, Beinecke Library, Yale University.

361. *Id.*

362. Letter from Felix Cohen to John Collier, United Nations Assembly, England (Jan. 11, 1946), *supra* note 342.

363. Cohen, *How We Bought the United States*, *supra* note 297, at 22.

“This is the way *so much else* about Indians and about all dependent peoples could be put across,” Collier replied with approval.³⁶⁴

Cohen aimed his work not only at totalitarian propagandists outside the United States, but also at those who voiced racial antagonism—against Indians, blacks, Jews, or any other cultural group—in America. Asserting that the ideals of the American Revolution guaranteed to Indians equal citizenship, Cohen concluded that discrimination against them, as well as against other groups, deviated from American standards.

Cohen well knew that the ideals he ascribed to American life were not always carried out. “I probably overstated the high standards embodied in our treaties and statutes,” he confessed to Ickes, and the omission of darker paragraphs by the editors created an even more exaggerated picture.³⁶⁵ Perhaps, he added, “twelve years among the bureaucrats have made me less astute to criticize our Indian record than I should be.”³⁶⁶ His goal, Cohen admitted, was to counteract opposition to “righting Indian wrongs,” objections that were often founded “on the mistaken idea that we have consistently robbed the Indians of all they owned and that laying down any higher standard of public conduct now would be unprecedented, revolutionary, and terribly expensive.”³⁶⁷ “[B]y bringing to public attention some of the better side of our Indian dealings,” he hoped to put the “program . . . for general Indian claims legislation in a more appealing setting.”³⁶⁸ At any rate, Cohen emphasized:

[I]n my own dealings with Congressmen and others in public life I have found much illumination in a saying of Epictetus: “Everything has two handles: one by which it may be borne, another by which it cannot. If your brother acts unjustly, do not lay hold on the affair by the handle of his injustice, for by that it cannot be borne; but rather by the opposite, that he is your brother, that he was brought up with you; and thus you will lay hold on it as it is to be borne.”³⁶⁹

Perhaps, Cohen concluded his letter to Ickes, “even an over-optimistic commentary on the high standards set by our Indian legis-

364. Letter from John Collier to Felix Cohen (Jan. 18, 1946), Felix S. Cohen Papers, Box 65, Folder 1041, Yale Collection of Western Americana, Beinecke Library, Yale University.

365. Letter from Felix Cohen to Harold Ickes (Jan. 22, 1946), Felix S. Cohen Papers, Box 65, Folder 1041, Yale Collection of Western Americana, Beinecke Library, Yale University.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

lation may prove helpful in arousing critical attention to lapses from those standards.”³⁷⁰

Cohen’s hopes were transparent. With the events in Europe, on the one hand, and growing opposition to federal Indian policy, on the other hand, Cohen wanted Americans to adopt his ideal of comparative pluralism as the only alternative to totalitarianism. As early as 1924, Horace Kallen indicated that “[t]he alternative before Americans [was] Kultur Klux Klan or Cultural Pluralism.”³⁷¹ The latter, according to Kallen, was possible “only in a democratic society whose institutions encourage individuality in groups, in persons, in temperaments, whose program liberates these individualities and guides them into a fellowship of freedom and cooperation.”³⁷² Faced with totalitarianism in Europe and growing critiques of the Indian New Deal at home, Kallen’s pointed alternative became for Cohen a matter of life and death. He needed to believe that Americans had already chosen between Kallen’s alternatives—that they preferred cultural pluralism, or what he developed into comparative pluralism, to Kultur Klux Klan, and democracy to totalitarianism.

Establishing American standards was the aim both of *How We Bought the United States* and of the ICCA. In a world where victims were many, where force and violence abundant, where genocide became an aspect of modernity, the preservation of diverse cultures seemed the only alternative to total annihilation. The original owners of America, who reached agreements to preserve their traditions with the immigrants to the new world, proved, in Cohen’s view, the feasibility of his ideal of comparative pluralism, an ideal that endorsed cultural pluralism not as a separatist ideology, but as grounds for dialogue and inclusion. By emphasizing the success of earlier cultural dialogues, Cohen hoped to provide an incentive for agreements in postwar America: between “whites” and “reds”; between old inhabitants and European immigrants; and maybe even globally. In the aftermath of World War II, in short, Indian tribes taught Cohen what he rejected in 1933, but was willing to admit in 1946—that the preservation of cultural traditions, one’s own and others, was liberating.³⁷³

Unfortunately, Cohen’s new pluralistic ideal stood in sharp contrast to what was happening after the war in the Department of the

370. *Id.*

371. HORACE M. KALLEN, *Postscript—To Be Read First—Culture and the Ku Klux Klan*, in KALLEN, *CULTURE AND DEMOCRACY*, *supra* note 49, at 9, 43.

372. *Id.*

373. Throughout the early twentieth century, many second-generation European immigrants, who were “upwardly mobile and ready to cast off the immigrant past,” nonetheless, “sought to maintain their ethnic identity, which they reinforced by creating Americanized forms of traditional institutions.” LYNN DUMENIL, *THE MODERN TEMPER: AMERICAN CULTURE AND SOCIETY IN THE 1920S*, at 253 (1995).

Interior. It would be futile to assess whether Cohen's failure to admit this contrast, and include in the ICCA legal mechanisms to address it, cost Indian tribes some of their land claims. Instead, as Part VI suggests, we may wish to use Cohen's encounters with pluralism to reflect on our own attempts to devise a plural polity.

VI. BEYOND THE INDIAN NEW DEAL

Throughout the first half of the twentieth century, pluralists, as Cohen's story manifests, struggled to mediate the tensions between their situated frames of reference, their dreams and aspirations, and their pluralist epistemology. Due to the unique personnel composition of the Department of the Interior,³⁷⁴ the Indian New Deal reached further than any other experiment in transforming theories of pluralism into real life reform. Despite their faults, the legislative and administrative products of the Indian New Deal made significant contributions to federal Indian law. The IRA recognized the importance of self-government, the *Handbook* sought to empower the legal and cultural traditions of Indian tribes, and the ICCA aimed to create a forum where Indians could challenge common American myths and tell their versions of American history. The onset of the Cold War, however, brought the Indian New Deal under direct attack.

The Indian New Deal was grounded in a viable critique of the American way of life and offered a plausible formula for reform. Its orientation toward the group, however, rendered it foreign on the soil of liberal America. As the Cold War spurred mounting attacks on anything remotely socialist (let alone communist), "Making 'Reds' of the Indians" was no longer a symbol of reform. It was seen as a threat to American ideals. Beginning in the 1940s, the IRA was criticized as "promoting communistic tendencies and imposing an unwanted primitive tribal state on developing Indians who desired to assimilate."³⁷⁵ Instead of "a device for Indians to rebuild their shattered communities through local, tribal economic and political organizations," the Indian New Deal was rapidly seen as "an impediment toward Indian economic and political assimilation."³⁷⁶

Gradually, pressure increased to abolish the special status of Indian tribes. The desire to obtain Indian lands and resources, objections to Indian religious practices, and the depiction of the Indian New Deal as "socialistic" buttressed the argument that the federal government should discontinue its role as trustee of Indians' property. Protective guardianship, it was argued, could be detrimental to individual welfare. "Development of the property to full utilization

374. See *supra* text accompanying notes 51-53, 107-08.

375. Clinton, *supra* note 55, at 105.

376. *Id.*

and encouragement of the owner to accept responsibility for management" were offered as better goals of Indian policy.³⁷⁷

As political pressures to change federal Indian policy increased, the group of reformers that drafted and administered the Indian New Deal fell apart. Collier resigned in 1945, followed by Ickes, who left the Truman Cabinet in February 1946. On December 15, 1947, Cohen sent his letter of resignation to then Secretary of the Interior, Julius A. Krug.³⁷⁸ "You will resign when your freedom . . . is denied," Norman Thomas had told Cohen back in 1933.³⁷⁹ In 1947, with other disillusioned New Deal colleagues, as well as like-minded Indians, Cohen came to realize that he would be able to better assist the Indian cause by representing tribes against the government.³⁸⁰ Within a few years, termination became official government policy, aiming to end the special status of Indian tribes.³⁸¹ As Judith Royster has recently noted, it was "assimilation with a vengeance"³⁸²: "Congress withdrew federal recognition, liquidated tribal assets, including the land base, and transferred jurisdiction over Indians to the states. The loss of tribal territory and sovereignty was immediate and com-

377. Michaels, *supra* note 151, at 1579 (quoting Report of Commissioner of Indian Affairs John R. Nichols (June 30, 1949), *reprinted in* 2 AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY 975 (Wilcomb E. Washburn ed., 1973)). Michael Walch divides the objections to the Indian New Deal into two groups: ideological and economic. Ideological opponents stressed that the Indians' communal ownership of property was in direct contradiction to the American liberal ideal of private ownership of property; that the Indians' religious practices, which were encouraged by the IRA, promoted heathenism; and that the BIA's control on many reservations denied freedom to individual Indians. According to these opponents, to make Indians "equal citizens," these aspects had to be changed. Opponents who emphasized economic grounds stressed the growing competition for natural resources in the postwar years and urged the opening of Indian lands for private development. The committee responsible for Indian affairs in Congress included many members from Western states, where the pressure from developers and private businesses was particularly insistent. It is important to recognize, however, that objection to the IRA came not only from non-Indians. Some Indians wished to escape the pervasive control of the BIA. Assimilated Indians, in turn, wanted a share of tribal resources. Only a minority of Indians, nonetheless, supported termination. Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1185-86 nn. 24-25 (1983).

378. Cohen wrote:

When I came to work for Interior in October of 1933 it was with the expectation that I would finish, in a year or so, the work I came to do, and then return to private practice and teaching. The many kindnesses that have been extended to me in this work by my colleagues, and its fascinating variety and never-ending opportunities for defense of the public interest, have made leaving very difficult. I have now overstayed my appointed tour of duty by thirteen years and, I fear, largely outlived my usefulness in the Department.

Cohen, Remarks at Testimonial Dinner, *supra* note 119, at 19.

379. Letter from Norman Thomas to Felix Cohen (Nov. 14, 1933), *supra* note 106.

380. D'arcy McNickle, Remarks, Testimonial Dinner for Felix Cohen, *supra* note 98, at 13-14.

381. H.R. Con. Res. 108 (1953); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 234.

382. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 18 (1995).

plete.”³⁸³ In 1958, five years after Cohen’s untimely death, a new version of the *Handbook of Federal Indian Law* eradicated the pluralistic characteristics of the original edition; instead, it suggested that Indians were wards of the state.³⁸⁴

The 1950s also witnessed the emergence of a new theory of pluralism: a descriptive social theory purportedly with no ethical conviction. It was inspired, as Edward Purcell showed, by a rejection of all absolutism including any morally based pleas for social reform. The American ideal of democracy became a balancing theory. America was composed of interest groups, and group conflict reflected the dispersal of political power. Furthermore, the delicate balance between groups was presumed to be preserved by existing political institutions and cultural consensus, a “consensus rooted in the common life, habits, institutions, and experience of generations.”³⁸⁵ The status quo became a normative theory.³⁸⁶ Instead of seeking policies that would promote diverse interests, scholars directed their efforts toward finding a “morality of process” independent of results. Robert Dahl’s interest group pluralism was the ultimate example.³⁸⁷

Interest group pluralism sought to evade the pluralist dilemma, that is, the need to determine the normative limits of a commitment to pluralism. On the one hand, to allow the state to exercise power over diverse groups risked imposing one’s own, concededly partial interests and beliefs, in the name of a general, public good. On the other hand, the alternative of deferring to groups risked moral relativism, maybe even nihilism.³⁸⁸ At least since Oliver Wendell Holmes challenged the description of law as a body of natural and neutral rules,³⁸⁹ legal scholars had struggled with this dilemma. Faced with diverse social and cultural interests, and hence with a variety of visions of what law ought—as a social and political matter—to be, many adopted one system of beliefs and treated it as the primary guiding light in their analysis of law. In the 1930s, many legal realists, for example, offered some form of “policy analysis” assuming that “there were correct—liberal—answers to the hot legal questions of the day but that conservative judges couldn’t be expected to reach

383. *Id.*; see also Walch, *supra* note 377, at 1182-86.

384. 1958 HANDBOOK, *supra* note 33.

385. PURCELL, *supra* note 284, at 255.

386. See generally *id.* at 253-66.

387. See DAHL, A PREFACE TO DEMOCRATIC THEORY, *supra* note 2; DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES, *supra* note 2.

388. Cf. Ernst, *supra* note 46.

389. Oliver Wendell Holmes Jr., The Path of the Law, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), reprinted in 110 HARV. L. REV. 991 (1997); see also HORWITZ, *supra* note 2, at 4, 139-42; Robert W. Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013 (1997).

them.”³⁹⁰ In the 1950s, interest group pluralism, and the legal process school that was informed by it, adopted a different approach. Instead of endorsing any particular vision of the good, these process theorists found refuge in creating conceptions of neutral processes in which different groups supposedly interact, compete, and trade ends.³⁹¹ This turn to process attracted criticism, however, from those who saw law as necessarily embracing substantive norms.³⁹² More recently, critical legal studies, the new institutional economics, and feminist legal theory, to name a few, have sought to direct legal discourses toward substance and away from process.³⁹³ The current resurgence of formalism³⁹⁴ keeps the debates alive. In this context, Cohen’s experience in the New Deal is of enduring importance.

Inspired by early twentieth-century normative theories of pluralism, each of the models Cohen devised sought to accommodate diversity without either promoting certain moral absolutes or succumbing to moral relativism. Cohen’s socialist pluralism, which informed his plans for the IRA, urged the distribution of sovereignty to political groups, including Indian tribes, as a means of encouraging group self-determination. His systematic pluralism, which influenced the writing of the *Handbook*, advocated the inclusion of diverse cultural traditions under an all-encompassing (universal) legal system. Finally, comparative pluralism, which was already reflected in Cohen’s hopes for the ICCA, emphasized the possibility of exchange between and among different value systems. Realizing that we might never be able to articulate a universal ideal that would endorse all particular systems, comparative pluralism sought to find legal mechanisms that would allow the coexistence of distinct value systems.

These models were not perfect. The IRA ended up imposing a universal structure of government on all Indian reservations. The *Handbook* neglected to acknowledge the importance of Indian voices, while the ICCA was hardly more than symbolic in its remedies. The significance of Cohen’s experience in the New Deal reaches, however, beyond the ultimate success or failure of the policies he devised. Cohen’s experience illustrates that models of pluralism and laws that are informed by them are sites for the construction and negotiation of cultural, social, and political ideologies. In siting pluralism, his story also illustrates how mapped in the body of law are struggles with identity. It further shows that even as formalistic legal structures

390. KENNEDY, *supra* note 6, at 88.

391. See *supra* text accompanying note 2.

392. See, e.g., Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Themes*, 89 YALE L.J. 1063 (1980).

393. See, e.g., THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1998).

394. See, e.g., Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999).

cannot accomplish the goals of accommodating diversity, pluralism might flourish in their peripheries.

Each of the models devised by Cohen reflected his changing construction of “the Indian problem,” and his sense as a Jewish American of the tensions between particularism and universalism. Cohen’s attraction to socialist pluralism was motivated by his wish as a Jewish American to emphasize the insignificance of racial and ethnic differences. Informed by his experience in administering the IRA, Cohen came to accept the importance of diverse cultural traditions. Yet, consistent with his desire to be included in the polity, his systematic pluralism endorsed cultural pluralism but stressed that all systems would ultimately become a singular cosmopolitan whole. In the aftermath of World War II, Indian tribes became a symbol for the possibility that cultural traditions, the Jewish tradition among them, could be—in fact should be—cherished and preserved. Comparative pluralism thus celebrated cultural pluralism and embraced dialogue as a foundation for coexistence.

As if admitting his personal transformation, two years after he left the Department of the Interior, Cohen concluded a commentary on Indian self-government with the following paragraph:

The issue we face is not the issue merely of whether Indians will regain their independence of spirit. Our interest in Indian self-government today is not the interest of sentimentalists or antiquarians. We have a vital concern with Indian self-government because the Indian is to America what the Jew was to the Russian Czars and Hitler’s Germany. For us, the Indian tribe is the miners’ canary and when it flutters and droops we know that the poison gasses of intolerance threaten all other minorities in our land. And who of us is not a member of some minority?³⁹⁵

The “rise, fall and return of pluralism”³⁹⁶ in the twentieth century may reflect law’s inadequacy in the face of political, social, and cultural chasms. Every reiteration, nonetheless, creates sites in which pluralism flourishes, peripheries where practice challenges theory. Since Cohen used it, many have turned to the image of the *miners’ canary* to illustrate the importance of tolerance. As vital is Cohen’s pointed question, “And who of us is not a member of some minority?” Because each of us is a member of some minority, our identities are constructed and negotiated as we seek to accommodate diversity. A commitment to pluralism is both political and personal. It requires an admission that the diverse cultural, political, economic, and social interests that characterize our society are grounded in multiple value

395. Cohen, *Indian Self-Government*, *supra* note 187, at 313-14.

396. For this terminology, though in a different context, see Peter F. Drucker, *The Rise, Fall and Return of Pluralism*, WALL STREET J., June 1, 1999, at A22.

systems, and it requires faith in the possibility of social integration, inside and outside the law. This is not to suggest that the celebration of diversity is equivalent to an endorsement of moral relativism. Indeed, the tensions that were reflected in the Indian New Deal—between one's frames of reference and one's commitment to pluralism—are inherent in pluralism as a normative theory. The endorsement of all pluralities and differences as morally and politically valid is impossible. Still, in order to devise a plural polity, in order to thrive, we must make diversity the starting point for reflection and action, and aim to discern—through dialogue and communication—universal principles that can yield a point of view acceptable to all.³⁹⁷ Our treatment of *different* groups (and individuals), as Cohen so aptly described it, is the litmus test of our democracy; it reflects “a set of beliefs that forms the intellectual equipment of a generation.”³⁹⁸ It is up to us to develop the content of such beliefs.

397. See Benhabib, *supra* note 285, at 81; HILARY PUTNAM, *WORDS AND LIFE* 185-86 (James Conant ed., 1994) (arguing that pluralism does not deny a universal ethics).

398. Cohen, *Author's Acknowledgments*, *supra* note 286, at xviii.