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PLURALISMS: THE INDIAN NEW DEAL AS A MODEL

DALIA TSUK*

I. INTRODUCTION

At least since Oliver Wendell Holmes substituted an emphasis on the social and political nature of law for the depiction of law as an autonomous body of natural and neutral rules,¹ legal scholars have struggled with the pluralist dilemma: given the plurality of competing visions of what law ought—as a social and political matter—to be, to allow the state to exercise its power over diverse groups risks imposing one set of concededly partial interests and beliefs in the name of a general, public good; on the other hand, the alternative of deferring to groups risks moral relativism, maybe even nihilism.² Recent attempts by political, cultural, and religious groups to exercise their rights to self-determination have brought the pluralist dilemma to the forefront of legal thought. Legal scholars and policymakers around the world are today attempting to develop legal mechanisms that would accommodate the unique interests of diverse group while also mediating and settling potential conflicts and tensions between individuals, groups, and peoples.

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1. 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* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 4, 139-42 (1992); Robert W. Gordon, *The Path of the Law after One Hundred Years: The Path of the Lawyer*, 110 HARV. L. REV. 1013 (1997).

2. *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).

This article adds to these endeavors by examining federal Indian policy during the 1930s and 1940s, a period commonly labeled the “Indian New Deal,” as an earlier attempt to create such mechanisms—as an earlier attempt to form a pluralistic state. In doing so, I hope to unravel a set of forces that are highly relevant to contemporary endeavors, but that traditional accounts of attempts to devise a pluralistic polity often ignore. Specifically, I propose that we can better understand different endeavors to develop legal mechanisms that would accommodate cultural, political, and religious diversity by exploring their relationship to contemporaneous intellectual visions of the state. I further suggest that different images of the state are interlaced with particular conceptions of individual and group identity. To illustrate, let me summarize my argument with respect to federal Indian policy during the New Deal.

The Indian New Deal was a major milestone in the history of federal Indian law. United States Indian policy at the turn of the twentieth century sought to break down tribal organization and force all Indians³ to assimilate, particularly through the distribution of communal lands to individual owners.⁴ The essence of the Indian New Deal, at least as policymakers described it, was to stop land allotment and assimilation by delegating to Indian tribes more authority over their economic, social, cultural, and political affairs.⁵

In retrospect, the Indian New Deal has been subject to conflicting judgments. For some scholars, federal Indian policy during the New Deal was not a break from the past, but rather another stage in the history of colonialism. Accordingly, the New Dealers⁶ were white imperialists who imposed their theoretical framework on Indians.⁷ Similar concerns are raised today with respect to any attempt to “liberate” indigenous peoples or to devise a pluralistic polity.⁸ For

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

4. See *infra* section II.A.

5. See *infra* section II.B.

6. 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.

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

8. 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:*

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.⁹

This article argues for the significance of a set of forces that these traditional accounts of the Indian New Deal neglect. It proposes that we can better understand the Indian New Deal by viewing it as one of several experiments undertaken during the early decades of the twentieth century intended at creating a pluralistic state. I further show how this attempt to devise a pluralistic polity was influenced by theories of pluralism that public philosophers had been articulating since the turn of the twentieth century.¹⁰ These theories explored the role of the sovereign state in accommodating the unique interests of diverse groups. While I do not intend to overstate the effects of philosophy on law, I mean to suggest that theories of pluralism were among the factors that affected federal Indian policy during the 1930s and 1940s. I also demonstrate that theories of pluralism were grounded in different conceptions of identity.¹¹

To underscore the relationship between law, pluralism,¹² and identity, this article investigates the Indian New Deal from the perspective of its chief legal architect—Felix Solomon Cohen, who is

Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples Survival in the World, 1990 DUKE L.J. 660.

9. 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, *Reserving to Themselves*, *supra* note 7, with VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 187-206 (1985) [hereinafter DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES].

10. 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.

11. This is not to suggest that only images of the state and conceptions of identity affected the outcomes of the Indian New Deal. As will be developed in this article, political compromises and constraints derived from the nature of legislative processes were important factors. I focus, however, on theories of pluralism and conceptions of individual and group identity. Cf. ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT (2000).

12. I use the term “pluralism” as a noun to refer to a commitment to devising a pluralistic polity. As I suggest in this article, in particular historical moments, individuals assigned different meanings to this 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 pluralistic polity, or with different models that sought to create such a polity.

also widely recognized today as one of the most important legal philosophers in the first half of the twentieth century.¹³ Cohen joined the Department of the Interior in 1933 to help draft the Indian Reorganization Act (IRA),¹⁴ which initiated the Indian New Deal by creating a procedure to reestablish tribal governments on Indian reservations.¹⁵ Many present-day tribal governments were formed under the IRA. In 1941, still in government service, Cohen authored the *Handbook of Federal Indian Law*,¹⁶ 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),¹⁷ which established a commission to settle tribal land claims against the federal government.¹⁸ Today, similar claims are litigated around the world by indigenous peoples.

This article shows that for Cohen, the IRA and the ICCA reflected different models for devising a pluralistic polity. I label these models “socialist pluralism” and “comparative pluralism,”

13. This article is an adaptation of a chapter in my book, ENCOUNTERS WITH PLURALISM: THE LIFE AND THOUGHT OF FELIX S. COHEN (forthcoming) [hereinafter TSUK, ENCOUNTERS WITH PLURALISM]. On Cohen’s legal philosophy, see also HORWITZ, *supra* note 1, at 183; DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 86-87 (1997); Joel R. Cornwell, *From Hedonism to Human Rights: Felix Cohen’s Alternative to Nihilism*, 68 TEMPLE L. REV. 197 (1995); Stephen M. Feldman, *Felix S. Cohen and His Jurisprudence: Reflections on Federal Indian Law*, 35 BUFFALO L. REV. 479 (1986); Martin P. Golding, *Realism and Functionalism in the Legal Thought of Felix S. Cohen*, 66 CORNELL L. REV. 1032 (1981); and Jill E. Martin, *The Miner’s Canary: Felix S. Cohen’s Philosophy of Indian Rights*, 23 AM. INDIAN L. REV. 165 (1998-99). For Cohen’s activities once in the Department of the Interior, see FELIX S. COHEN: A FIGHTER FOR JUSTICE (Theodore H. Haas ed., Washington D.C. Chapter of the Alumni of the City College of New York, 1956); and 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]. For Cohen’s writings, see THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN (Lucy Kramer Cohen ed., 1960) [hereinafter THE LEGAL CONSCIENCE].

14. 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) [hereinafter DOCUMENTS OF UNITED STATES INDIAN POLICY].

15. § 16, 48 Stat. at 987 (codified as amended at 25 U.S.C. § 476); see also DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 14, at 224-25.

16. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW WITH REFERENCE TABLES AND INDEX (U.S. G.P.O. ed., 1941) [hereinafter HANDBOOK OF FEDERAL INDIAN LAW].

17. 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 14, at 231-33.

18. § 1, 60 Stat. at 1049; see also DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 14, at 232.

respectively.¹⁹ Each model brought early twentieth-century theories of pluralism to bear upon federal Indian law. By examining Cohen's scholarship, correspondence, and memoranda, I show how the IRA and ICCA recorded and helped to shape theories of pluralism. While both acts ultimately failed to achieve the goals they were set to accomplish, they imprinted upon the body of federal Indian law the promises and pitfalls of particular images of the pluralistic state.²⁰

Drawing on Cohen's personal experience as a Jewish American, this article further demonstrates that the IRA and the ICCA reflected not only different images of the pluralistic state, but also particular conceptions of identity. I argue that Cohen's approach to the "Indian problem" and to pluralism, more broadly, was mediated through his experience as a son of a Jewish immigrant to the United States. I suggest that Cohen—the Jewish American—naively viewed federal law as a tool 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 means 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 pluralistic polity, as different *others* (ethnic, religious, cultural, and political groups) struggle both to escape law's violence and to come under its protection.²¹

19. In a previous article I have shown that the *Handbook of Federal Indian Law* reflected yet another model for devising a pluralistic polity, a model I labeled "systematic pluralism." Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U.L. REV. 189 (2001) [hereinafter Tsuk, *The New Deal Origins of American Legal Pluralism*]. See also *infra* section III.C and section IV.B. It is important to note that 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* section III.A.

20. While the Indian New Deal is the particular experiment 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. 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.

21. 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).

The article proceeds as follows: part II narrates the story of the Indian New Deal as it has been traditionally told. Using Cohen's scholarship, part III places the Indian New Deal within the broader intellectual history of American pluralism, while part IV examines the appeal of pluralism to Cohen, the Jewish American. My argument is not limited to Cohen's particular experience. My goal is to call attention to aspects of statutory drafting and policymaking that are often left unexplored. Specifically, I wish to emphasize that legislative and administrative attempts to accommodate the unique interests of diverse groups are particular sites in which images of the state and conceptions of identity are both recorded and shaped. By explicating the impact of these unexplored forces on the New Deal legislation, I hope this article offers a model for critically thinking about contemporary endeavors to devise a pluralistic polity and about ways out of the pluralist dilemma.

II. LEGISLATION

*A. Federal Indian Policy on the Eve of the New Deal*²²

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 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.²³ Yet, Indians' efforts to maintain their tribal organizations often proved futile in the face of military conquest, fraudulent or unfulfilled treaties, and the pressure of white settlement

22. 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 11, at 1-61.

23. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (Marshall, C.J.). See generally 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); 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); 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); 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).

that forced them away from most of their lands²⁴ and ultimately onto reservations.²⁵

During the second half of the nineteenth century, the federal government embraced a policy that legalized the disintegration of Indian ways of life. Beginning in the 1870s, government officials stressed the need to assimilate all Indians into American society. The General Allotment Act of 1887 (the Dawes Act),²⁶ which articulated this new policy of assimilation, targeted Indian tribes' communal holding of property. Grounded in classical legal thought and in a particular image of masculinity, the Dawes Act equated freedom with individual possession of property;²⁷ it sought to force assimilation and disintegration of tribal organization through the distribution of communal lands to individual owners.²⁸ 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."²⁹ The turn of the twentieth century thus witnessed the reduction of many

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

25. *E.g.*, RUSCO, *supra* note 11, at 1.

26. 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 14, at 170-73.

27. *See* Yuanchang 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 1, 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).

28. *E.g.*, TAYLOR, *supra* note 24, at 1-5.

29. E. Richard Hart, *Foreword to INDIAN SELF-RULE*, *supra* note 9, at 6, 8. Vine Deloria, Jr. has explained that railroad companies 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, *BEHIND THE TRAIL OF BROKEN TREATIES*, *supra* note 9, at 188. The Dawes Act institutionalized the 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. The federal government, through negotiation 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. Ch. 119, §5, 24 Stat. 388, 389-90 (codified as amended at 25 U.S.C. § 348); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 14, at 171-72. As Tadd Johnson and James Hamilton noted, "by imbuing American Indians with respect and reverence for white American institutions," assimilationists believed "the American Indians could be made happier, wealthier, and wiser." Johnson & Hamilton, *supra* note 23, at 1257.

tribal governments “from unalloyed internal sovereigns to virtual nonentities.”³⁰

A series of laws that were passed during the first decades of the twentieth century sought to enhance Indian assimilation, first, by giving individual Indians their “pro rata share” of tribal funds, and, then, by granting them “American” citizenship.³¹ Indians were presumably welcomed into the polity, but only as long as they relinquished their tribal ways.³²

The cumulative impact of these early twentieth-century policies was disastrous. Outlining the failures of the allotment policy, the 1928 “Meriam Report”³³ described “poverty, disease, suffering, and discontent” among Indians.³⁴ Between 1887 and 1932, Indians lost two-thirds of what remained of their lands to white exploitation.³⁵

30. Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 292 (1997).

31. The 1907 Lacey Act authorized the Secretary of the Interior to grant to individual Indians control of their “pro rata share” of tribal funds. 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 14, at 208. The 1917 “Sells Declaration” sanctioned a variety of measures meant to swiftly accomplish the absorption of Indians into the nation. 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 14, at 213-15. The 1919 Citizenship for World War I Veterans Act conferred citizenship on every veteran who so desired. Ch. 95, 41 Stat. 350 (1919); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 14, at 215. The Snyder Act of 1921 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.” Johnson & Hamilton, *supra* note 23, at 1258; *see also* 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”); DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 14, at 215-16. Finally, the 1924 Indian Citizenship Act declared “all non-citizen Indians born within the territorial limits of the United States ... to be citizens of the United States.” 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 14, at 218.

32. *See generally* WALTER BENN MICHALES, OUR AMERICA: NATIVISM, MODERNISM, AND PLURALISM 30-31 (1995). On federal Indian policy during the first decades of the twentieth century, particularly the 1920s, *see also* 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).

33. INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam et al. eds., 1928); *see also* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 14, at 219-22.

34. Johnson & Hamilton, *supra* note 23, at 1258 (quoting the Meriam Report). 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* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 685-87 (1998).

35. TAYLOR, *supra* note 24, at 5.

While theoretically in possession of considerable property, including land, many Indians were, in reality, paupers.³⁶ Few became successful farmers or ranchers, a fact that helped to deepen social and political divisions on reservations.³⁷ The distribution of tribal lands also hastened the disintegration of many tribal governments or at least forced them to alter their traditional structures.³⁸ Finally, assimilation was never really offered; Indians were given citizenship but were denied the rights of citizens, including the right to vote, access to local schools, or the right to serve on juries.³⁹

By the late 1920s, the principal actors in the field of Indian policy were critical of the policy of allotment.⁴⁰ 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 Collier, the new Commissioner of Indian Affairs, denounced land allotment as a violation of tribal sovereignty and vested rights that Indians had secured in previous treaties in return for much of their lands. Instead, Collier pledged the moral and legal obligation of the federal government to stop land allotment and to act upon the bilateral contractual relationship that it had created before 1871 with Indian tribes.⁴¹ Collier wanted the New-Deal legislative program to promote such an agenda.

B. The Indian Reorganization Act, 1934

Senator Burton K. Wheeler of Montana and Representative Edgar Howard of Nebraska, chairmen, respectively, of the Senate and House Committees on Indian Affairs, introduced an initial draft of the new legislation in mid-February 1934. It was a long and complex bill, covering forty-eight pages, and divided into four titles: Indian self-

36. [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*.

37. RUSCO, *supra* note 11, at 56.

38. *Id.* at 57. No clearly stated policy toward Indian governments existed. Furthermore, as tribal governments did not disappear, the BIA was at times "forced" to acknowledge their existence and deal with them, rather than with individual Indians. See generally *id.* at 1-34.

39. Draft of Address by Margold, *supra* note 36.

40. See generally RUSCO, *supra* note 11, at 62-93.

41. Kenneth R. Philp, *Introduction: The Indian Reorganization Act Fifty Years Later* [hereinafter Philp, *Introduction: The Indian Reorganization Act Fifty Years Later*], in INDIAN SELF-RULE, *supra* note 9, at 15, 16-17.

government, education for Indians, lands, and the court of Indian affairs.⁴²

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 instead should encourage tribal self-government.⁴³ The draft was rather enabling when discussing tribes' internal powers but more constraining with respect to tribes' economic powers. Lands classification, purchase of lands, transfer of titles, leasing of lands—in other words, the external scheme within which self-government was allowed—were to be approved by the Secretary of the Interior.⁴⁴ Overall, the New Dealers wanted to maintain control over tribal

42. TAYLOR, *supra* note 24, 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 informal 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 [BIA].” *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 two million dollars 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.” KENNETH R. PHILP, JOHN COLLIER’S CRUSADE FOR INDIAN REFORM, 1920-1954, at 143 (1977) [hereinafter PHILP, JOHN COLLIER’S CRUSADE FOR INDIAN REFORM]. 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 24, at 21.

43. *E.g.*, Donald Craig Mitchell, Alaska v. Native Village of Venetie: *Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 363-65 (1997).

44. *See* TAYLOR, *supra* note 24, at 19-21, 30.

governments so they could ensure a careful reconstruction of weakened self-governance capacities.⁴⁵

Because the Roosevelt administration endorsed the bill, Commissioner Collier assumed that Congress would quickly approve it. Yet, the passage was not smooth. Not only did most members of the House and Senate committees object to the complexity and length of the initial draft, they also favored assimilation. Apparent Indian opposition to the bill further influenced their negative response. The 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.⁴⁶ A second draft followed, leaving intact the major elements of the original draft, but including thirty amendments suggested at these congresses.⁴⁷ Among other things, these amendments abandoned a provision that mandated a transfer of allotted lands from living individuals to tribal control and modified a 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 protected water rights.⁴⁸ Finally, the Indians insisted on including a provision to prevent a few active voters from binding an entire tribe.⁴⁹

The second bill did not fare better than the initial draft. Collier was thus forced to accept a new and drastically abbreviated bill, which would become the IRA. This curtailed bill included most of the original ideas with respect to the termination of allotment, tribal incorporation and organization, and employment of Indians by the Bureau of Indian Affairs (BIA).⁵⁰ Furthermore, the bill authorized an annual appropriation of 250,000 dollars to help tribes draft constitutions, bylaws, and charters of incorporation, and it created a ten million dollar “revolving credit fund” to support economic development on reservations. In addition, the Indian Civilian Conservation Corps helped to bring Indians under different New-Deal relief programs; two policy statements guaranteed Indian religious freedom; states where Indians had enrolled in public schools were

45. *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 23, at 1258-59.

46. RUSCO, *supra* note 11, at 245-49; PHILP, JOHN COLLIER’S CRUSADE FOR INDIAN REFORM, *supra* note 42, at 145-54.

47. RUSCO, *supra* note 11, at 248.

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

49. *Id.* at 249; *see generally id.* at 220-49.

50. TAYLOR, *supra* note 24, at 27-28.

given federal funds; and an Indian Arts and Crafts Board was established.⁵¹

Yet, the bill diluted the ability of tribes and the Department of the Interior to acquire allotted lands in order to consolidate. Tribes were also denied the power to take over heirship lands. Collier would later claim that losing those features was “a major disaster to the Indians, the Indian Service, and the program.”⁵² Furthermore, the final draft 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 a tribe chose to come under the provisions of the Act. Tribes that rejected the IRA would remain under the BIA’s direct control, while tribes that accepted it could prepare a constitution to be ratified by “a majority of the Indians on a given reservation and officially recognized members of the tribe.”⁵³ 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.⁵⁴

The 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.”⁵⁵ After the initial referenda were administered to meet the two-year deadline, the New Dealers started drafting constitutions for the different tribes.⁵⁶ A

51. *Id.*; see also Philp, *Introduction: The Indian Reorganization Act Fifty Years Later*, *supra* note 41, at 17-18; DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 14, at 229-30.

52. TAYLOR, *supra* note 24, at 28 (quoting JOHN COLLIER, *THE INDIANS OF THE AMERICAS* 265 (1947)).

53. *Id.*

54. *Id.* at 27-28; see also PHILP, *JOHN COLLIER’S CRUSADE FOR INDIAN REFORM*, *supra* note 42, at 158-60.

55. TAYLOR, *supra* note 24, at 32. Numbers vary in different reports, but 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. The most significant rejection occurred on the Navajo Reservation in Arizona and New Mexico. 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 24, at 33.

56. 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 different 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 newly established councils. In addition to lawyers, Collier brought in anthropologists from the Smithsonian Institution’s Bureau of American Ethnology and from

model constitution was prepared and teams were sent to the reservations to discuss general and particular provisions with the Indians.⁵⁷ Some tribes chose to follow their own traditions; others substituted American-style constitutions for their Indian antecedents. As Graham Taylor 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.”⁵⁸

In general, the IRA fell short of most of its political and economic aims. The Act stopped allotment, but because 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 limited degree of control over Indian economic resources. As a time limit was imposed on the referenda, many Indians were rushed—maybe even coerced⁵⁹—into “a system of organization with which they were unfamiliar.”⁶⁰ Others found their powers limited.⁶¹ In retrospect, even Collier was disappointed, noting: “We had pressed the democratic philosophy not too far; we had not pressed it far enough nor skillfully enough.”⁶²

universities. In 1936 “an Applied Anthropology Staff was established within the [BIA] under H. Scudder Mekeel, formerly of Harvard University.” TAYLOR, *supra* note 24, at 36-38.

57. 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 11, at 296. While the IRA on its face did not adopt one structure, as this article suggests, individual policymakers shared certain sets of beliefs that determined their vision for the IRA and its administration. See *infra* section III. B and section IV.A. For model constitution and bylaws, see Felix S. Cohen Papers, Box 7, Folder 100, Yale Collection of Western Americana, Beinecke Library, Yale University.

58. TAYLOR, *supra* note 24, at 36; see also *id.* at 30-36.

59. See Floyd A. O’Neil, *The Indian New Deal: An Overview*, in INDIAN SELF-RULE, *supra* note 9, at 30, 42.

60. TAYLOR, *supra* note 24, at 31.

61. See, e.g., Barsh, *supra* note 55.

62. TAYLOR, *supra* note 24, 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 9, at 87, 95-98.

C. *The Indian Claims Commission Act, 1946*

The settlement of tribal land claims against the federal government presented an important hurdle on the path to Indian self-government. As already noted, throughout the nineteenth century, Indian tribes 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 1855⁶³ did little to change the situation as an 1863 provision removed from its jurisdiction all claims against the federal government arising out of treaties with Indians.⁶⁴ In the early twentieth century, as an increasing number of 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 its sovereign immunity and allowed individual tribes to bring their claims.⁶⁵

In 1928, the Meriam Report⁶⁶ recommended the establishment of a fairer and more efficient device to resolve Indian land claims against the federal government.⁶⁷ In its third title, the original draft of the IRA aimed to prohibit future land allotments and to restore to tribal ownership those lands which 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.⁶⁸ The ICCA was passed in the late summer of 1946, establishing the Indian Claims Commission.⁶⁹

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

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

65. Charles F. Wilkinson, *The Indian Claims Commission*, in INDIAN SELF-RULE, *supra* note 9, at 151, 151.

66. INSTITUTE FOR GOVERNMENT RESEARCH, *supra* note 33.

67. Wilkinson, *supra* note 65, at 151-52.

68. James E. Officer, *Termination as Federal Policy: An Overview*, in INDIAN SELF-RULE, *supra* note 9, at 114, 118.

69. Several bills that were introduced in Congress during the late 1930s and early 1940s shifted the attention from the need to establish a formal court to the goal of setting up a commission. As Vine Deloria, Jr. 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, *BEHIND THE TRAIL OF BROKEN TREATIES*, *supra* note 9, at 221. The Indian Claims Commission was patterned after the Pueblo Land Board. TAYLOR, *supra* note 24, at 149-50.

Different policy tides made the passage of the ICCA possible. Many legislators thought that the resolution of Indian claims would help to terminate the special status of Indian tribes by removing “a major barrier to federal withdrawal,” and by promoting the economic self-sufficiency of the tribes that would receive awards. Others supported the adjudication of Indian claims as a matter of fairness to the Indians.⁷⁰

Reflecting this ambivalence of legislators, the remedies provided by the ICCA were limited. While public announcements declared that all Indian claims would receive serious consideration, strict limitations were imposed on the remedies that the Commission could offer.⁷¹ 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.”⁷² Despite a flood of cases (over 600 were 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.”⁷³ The Indian Claims Commission continued to hear cases until 1978, when its docket was transferred to the United States Court of Claims.⁷⁴

Like the IRA that helped to reestablish tribal governments while simultaneously forcing many tribes into an unfamiliar system of government, the ICCA provided some compensation to certain tribes, but failed to resolve tribal land claims.⁷⁵ Scholars continue to have mixed evaluations of the IRA and the ICCA. For the most part, their analyses focus on the place of both acts in the broader story of race relations in American history. Part III of this article argues for the importance of a more complex narrative. It examines the ways in which both acts recorded and helped to shape a particular discourse in American intellectual and cultural history—pluralism.

By placing the IRA and the ICCA within the broader narrative of American legal pluralism, I do not mean to suggest that the acts

70. Officer, *supra* note 68, at 118; *see also* RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 125 (1980).

71. Officer, *supra* note 68, at 118; *see also* Wilkinson, *supra* note 65, at 152.

72. Mark A. Michaels, *Indigenous Ethics and Alien Laws: Native Traditions and the United States Legal System*, 66 *FORDHAM L. REV.* 1565, 1578-79 (1998).

73. *Id.*; *see also* MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES* (1997).

74. The Commission was terminated on Sept. 30, 1978, turning over sixty-eight pending cases to the United States Court of Claims. 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 9, at 139, 147.

75. *See* Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 *GA. L. REV.* 453, 468-70 (1994).

were the dependent variables, and theories of pluralism the independent ones. Rather, while theories of pluralism influenced the intellectual setting of the early twentieth century—including the New Dealers' policies that arguably sought to improve the situation of Indian tribes by allowing them to exercise more authority over their cultural, economic, and political affairs—these theories were also shaped by different attempts to devise a pluralistic polity.

While my analysis in the following sections is limited to Felix Cohen's changing interpretations of pluralism, I see Cohen as a representative of a generation of young reformers. Like many second- and third-generation Americans, he joined the New Deal administration to help create a "pluralistic state"—a state, which Cohen and his colleagues viewed as composed of multiple loci of participation and representation. For Cohen, Indian reservations were such locations. As his story will show, the opportunity to bring theories of pluralism to bear upon national policy was transforming, causing a re-envisioning of the nature of the pluralistic polity and of the role of law in helping to shape it. While both the IRA and the ICCA ultimately failed to achieve the goals they were set to accomplish, they imprinted upon the body of federal Indian law both the promises and the uncertainties of different images of the pluralistic state. As part IV will show, such visions were interlaced with particular conceptions of individual and group identity.

III. PLURALISM

A. Pluralism on the Eve of the New Deal

At the turn of the twentieth century, after the trauma of the Civil War, amid heightening social conflict produced by immigration, urbanization, industrialization, and the decline of religious assurance, a young cohort of intellectuals came to challenge the ideology of American exceptionalism.⁷⁶ Abandoning "the idea that America occupied an exceptional place in history, based on her republican

76. See DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* xiii-xv (1991); HORWITZ, *supra* note 1, at 9-10; see also GEORGE M. FREDRICKSON, *THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISIS OF THE UNION* (1965); THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH CENTURY CRISIS OF AUTHORITY* (1977); LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001).

government and economic opportunity,”⁷⁷ young philosophers searched for a new philosophy to fit the changing American temperament.⁷⁸ “[T]he American spirit,” Jean Wahl explained at the time, “was on the look for a new faith, a philosophy wherein there would meet and blend together ... an idealist conception and the will for practical action, the eagerness after individual effort and the sense of mightier realities in which individual souls are, as it were, immersed.”⁷⁹ They found pluralism.

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.⁸⁰ 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,⁸¹ none of which could claim epistemological primacy.⁸² In ethics, pluralism implied the existence of a variety of competing ends, among which policymakers had to choose. American democracy was accordingly 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.”⁸³

77. ROSS, *supra* note 76, at xiv; *see also* HORWITZ, *supra* note 1, at 10.

78. *See* BRUCE KUKLICK, *THE RISE OF AMERICAN PHILOSOPHY*, CAMBRIDGE MASSACHUSETTS, 1890-1930, at xx (1977); *see also* DANIEL J. WILSON, *SCIENCE, COMMUNITY, AND THE TRANSFORMATION OF AMERICAN PHILOSOPHY, 1860-1930* (1990).

79. JEAN WAHL, *THE PLURALIST PHILOSOPHIES OF ENGLAND AND AMERICA* 101 (Fred Rothwell trans., The Open Court Co. 1925).

80. *Id.* at 317-18.

81. This characterization is based on Hilary Putnam’s interpretation of pluralism. Putnam traces pluralism to Kant. According to Putnam, in the third Critique and in Kant’s postcritical writings, 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 79, at 155 (discussing William James’s pluralism).

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

83. KUKLICK, *supra* note 78, at 510. This argument draws on an examination of the works of Ralph Barton Perry. Though not a self-proclaimed pluralist, Perry, whose *Thought*

Pluralism had much in common with pragmatism. Both approaches substituted empiricism, particularism, indeterminacy, and uncertainty for rationalism, universalism, determinacy, and certainty.⁸⁴ 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.⁸⁵ 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.⁸⁶ Individuals had “separate ideas of the chair, of the table, of the pew.”⁸⁷ 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.”⁸⁸

Pluralism’s focus on the relationship between the *one* and the *many* appealed to Progressive thinkers; it resonated with visions of the modern state that did not succumb to conservative individualism or to radical collectivism.⁸⁹ 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 James’s philosophy a solution to rapidly changing social and economic conditions, particularly, 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

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* note 78, at 255, 409, 441-42, 505-15.

84. For a similar characterizing 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).

85. *E.g.*, WILLIAM JAMES, *PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING: POPULAR LECTURES ON PHILOSOPHY* (1907).

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

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

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

89. *Cf.* Ernst, *supra* note 2.

an empire or a kingdom,"⁹⁰ then, political pluralists argued, sovereignty could not be absolute. Rather, sovereignty was distributed among different 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.⁹¹ Cultural critics, in turn, found in James's pluralism a response to the ideology of the melting pot, that is, the notion that all cultures were destined to become merged into a homogeneous mass, and that all cultural groups should thus seek to divest themselves of traces of their native cultures. Instead, cultural pluralists stressed the significant contributions of diverse ethnic and racial groups to the western democratic tradition. In their writings, ethnic, racial, and class differences became important sources of, not obstacles to, individual freedom.⁹²

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, especially with respect to indigenous peoples. Cultural pluralists sought legal mechanisms that would accommodate the distinct heritages of diverse cultural groups, while political pluralists strove to empower distinct associations by recognizing their sovereignty, however limited. As a midway between radical collectivism and conservative individualism, cultural and political pluralists chose the group as the forum in which individuals received meanings for their ideas and actions.⁹³ Cultural pluralists emphasized the particular and group-derived identities of individuals and urged the preservation of different cultural heritages. Political pluralists advocated a functional concept of political representation to protect the needs of diverse associations. Despite their seemingly distinct focal points—involuntary versus voluntary associations—cultural and political pluralists alike envisioned groups as repositories of particular ends that policymakers needed to recognize. Whether espousing the idea of "cultural self-determination"

90. JAMES, A PLURALISTIC UNIVERSE, *supra* note 86, at 321-22.

91. *See, 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). *But see* W. Y. ELLIOTT, THE PRAGMATIC REVOLT IN POLITICS: SYNDICALISM, FASCISM, AND THE CONSTITUTIONAL STATE (1928).

92. *See, e.g.* Horace M. Kallen, *Democracy Versus the Melting-Pot* (pts. 1 & 2), THE 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 IN THE UNITED STATES].

93. *See* Ernst, *supra* note 2, at 60.

or promoting the idea of “self-government,” advocates of both ideologies pledged a strong commitment to group autonomy.

For most of the 1910s and 1920s, pluralistic visions of the state were limited to critiques of existing policies. But the coming to power of the New Deal administration offered an opportunity for many pluralists to bring their theories to bear upon national policy.⁹⁴ The door of federal Indian law opened with the appointment of John Collier, a cultural pluralist, as Commissioner of Indian Affairs.⁹⁵ Shortly after his appointment, Collier announced that the government was obligated to reestablish Indian communities and to “reawaken in the soul of the Indian not only pride in being an Indian, but also hope for his future as an Indian . . . to preserve the Indian’s love of and ardor toward the rich values of Indian life as expressed in their arts, rituals, and cooperative institutions.”⁹⁶

The enactment of legislation that would promote tribal sovereignty was delayed for various reasons, including the fact that Collier had yet to solidify his passion into a comprehensive legal program. 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.”⁹⁷ Felix Cohen was one of the two assistant solicitors appointed by Nathan R. Margold, the new Solicitor of the Department of the Interior, to the task of bill drafting; Cohen’s task was to help draft the IRA.⁹⁸

Shortly after his appointment, Cohen criticized federal Indian policy, particularly 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.”⁹⁹ To repair the damage, Cohen suggested that the new

94. *See id.* (explaining the impact of early twentieth-century theories of pluralism on labor legislation).

95. *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). For more information on the appointment of Collier and others, see T.H. WATKINS, *RIGHTEOUS PILGRIM: THE LIFE AND TIMES OF HAROLD L. ICKES, 1874-1952*, at 325-33 (1990); and PHILP, *JOHN COLLIER’S CRUSADE FOR INDIAN REFORM*, *supra* note 42, at 113-17.

96. Kenneth R. Philp, *John Collier and the American Indian, 1920-1945*, in *ESSAYS ON RADICALISM IN CONTEMPORARY AMERICA* 63, 70 (Leon Borden Blair ed., 1972).

97. RUSCO, *supra* note 11, at 192.

98. *Id.* at 177-92.

99. [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 in Relation to the Wheeler-Howard Bill]. My attribution of this Memorandum to Cohen is based on its content and style

administration should 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 should protect and encourage “a communal ceremony.”¹⁰⁰ Cohen believed that these ends should guide the drafting of the IRA.

As the following section demonstrates, Cohen’s critique of federal Indian policy and his understanding of the goals of the Indian New Deal were informed by a particular interpretation of pluralism. I suggest that when Cohen joined the Department of the Interior, he envisioned a society composed of a variety of self-governing groups, coordinated by a centralized government. I label this image “socialist pluralism.” In Cohen’s opinion, Indian reservations were to become a symbol of the feasibility of his socialist pluralist ideal. He hoped that the establishment of socialist communities on Indian reservations would be a first step toward the formation of similar communities nationwide.

B. Reorganization and Socialist Pluralism

The eldest of the three children of Mary Ryshpan and Morris Raphael Cohen (the renowned Jewish philosopher), Felix Cohen graduated from City College of New York 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). Following his graduation from law school, Cohen spent a year clerking 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, when Nathan Margold, the newly appointed Solicitor of the Department of the Interior, offered Cohen a year-long position as an Assistant Solicitor in the Department, Cohen accepted and left private practice. The planned year stretched to fourteen. In 1943, Cohen was promoted to the position of Associate Solicitor. Upon his resignation

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 11, at 200. For a description of federal Indian policy on the eve of the New Deal, see *supra* section II.A.

100. Letter from Felix Cohen to Norman Thomas (Nov. 8, 1933), Joseph P. Lash Papers, Box 50, Folder 9, Franklin D. Roosevelt Library. Of course, Cohen added, 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.* He stressed, however, 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 really the same effect.” *Id.*

from government service in 1947, Cohen received the Distinguished Service Award. Six short years later he died at the age of forty-six.¹⁰¹

According to his widow, Lucy M. Kramer, Cohen was “attracted to Indian law because he had a great feel for the land and the return to the simple life.”¹⁰² Indeed, like many middle class men of his generation who shared a nostalgic love for nature and the natural,¹⁰³ 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 of individual rights. 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.”¹⁰⁴ Cohen’s Ph.D. dissertation advocated hedonism as the ethical system befitting the political agenda of socialism.¹⁰⁵ At Columbia Law School, he embraced the legal realist emphasis on the social and political character of law.¹⁰⁶ If, as legal realists argued, law reflected politics, particularly the hegemony of class, then, Cohen suggested, progressive reform required the substitution of radical for conservative politics, that is, socialism for capitalism.¹⁰⁷ In the early 1930s, Cohen published a series of essays in support of socialism.¹⁰⁸ 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,”

101. See FELIX S. COHEN: A FIGHTER FOR JUSTICE, *supra* note 13; Symposium: *Felix S. Cohen*, *supra* note 13.

102. Lucy Kramer-Cohen et al., *Felix Cohen and the Adoption of the IRA*, in *INDIAN SELF-RULE*, *supra* note 9, at 70, 70.

103. See T.J. JACKSON LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920*, at 144-49 (1981).

104. 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 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).

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

106. See generally HORWITZ, *supra* note 1, at 169-92.

107. For an analysis of Cohen’s legal realism, see TSUK, *ENCOUNTERS WITH PLURALISM*, *supra* note 13 (manuscript at pt. II, on file with author).

108. See 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).

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."¹⁰⁹

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,"¹¹⁰ 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."¹¹¹ "Even the 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."¹¹²

Cohen's program for reform was informed by theories of political pluralism, particularly Harold Laski's,¹¹³ and by the legal realists' view of law as an apology for political (social and economic) oppression.¹¹⁴ Reflecting Cohen's concerns about the rise of big corporations and the growing agitation of labor, his early works analogized what Cohen viewed as the sovereign status of corporations to the status of labor unions. He urged the distribution of sovereignty to all associations, including labor unions, "trade unions, industrial

109. Letter from Felix Cohen to Norman Thomas (Nov. 8, 1933), *supra* note 100. 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.

110. Letter from Felix Cohen to Norman Thomas (Nov. 8, 1933), *supra* note 100. 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 employers 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."

Id.

111. Letter from Felix Cohen to Joseph Lash, (Oct. 26, 1933), *supra* note 110.

112. *Id.* Other New Dealers seem to have shared this feeling. *E.g.*, RUSCO, *supra* note 11, 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).

113. See *supra* text accompanying notes 90-91.

114. See generally HORWITZ, *supra* note 1.

unions, consumer organizations, farm organizations, semi-governmental corporations, and forms of associations that have not yet been invented.”¹¹⁵ Sovereignty was conditioned, however, upon a group’s willingness to be democratically governed and, if possible, its readiness to adopt an economic structure premised on communal ownership of property. Cohen’s early works, in short, envisioned self-governing communities such as labor unions as the foundation of the modern American state.¹¹⁶

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 individuals’ allegiance to it was conditioned upon their other—more immediate—allegiances to associations, the latter being the primary source of action and identification.¹¹⁷ In 1937, Louis Jaffe summarized this view, concluding 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.¹¹⁸

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 the corporation for the sovereignty of the state.¹¹⁹ 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.¹²⁰

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

116. *See id.*; *see also* works cited *supra* note 108.

117. GREGOR MCLENNAN, PLURALISM 33 (1995).

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

119. *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 13, at 350, 362.

120. 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.

When he joined the New Deal, Cohen viewed Indian reservations as fertile fields for the cultivation of his ideal of socialist pluralism. The traditional tribal holding of lands suggested to him that the Indian way of life was more akin to socialism than was the contemporaneous American way of life. Cohen's critique of assimilation did not stem from concerns about the effects of forced assimilation on tribal culture. Rather, Cohen was troubled by the disintegration of the economic structure of Indian tribes and the imposition of capitalist individualism on Indian reservations. In short, in Cohen's opinion, 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) Cohen hoped to appropriate for other political groups and for society in general. Accordingly, for a while after he had joined the Department of the Interior to help draft the IRA, Cohen used to comment that they were "making 'Reds' of the Indians."¹²¹

Arguably, the IRA intended to stop allotment and assimilation and to delegate to Indian tribes more authority over their economic, social, and political affairs.¹²² For example, 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 the Indians concerned," Indians would establish their self-government.¹²³ He believed that the incorporation of Indian tribes would prevent future loss of Indian lands and would allow the repurchase of reservation lands already lost to non-Indians. Cohen 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.¹²⁴ 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—to Indian tribes.¹²⁵ Through the establishment of "definite community ordinances" and community courts, as well as a special

Roosevelt Library [hereinafter Cohen et al., *Proposed Constitution for the Socialist Commonwealth of America*].

121. Ambrose Duskow, Interview by Joseph Lash, ca. 1965, Joseph P. Lash Papers, Box 51, Folder 11, Franklin D. Roosevelt Library.

122. See *supra* section II.B.

123. Memorandum: Law and Order on Indian Reservations in Relation to the Wheeler-Howard Bill, *supra* note 99.

124. Draft of Address by Margold, *supra* note 36.

125. *Id.*

Federal Court of Indian Affairs, Cohen also expected an important shift toward legal stability and political advancement.¹²⁶ When all that was secured, he predicted, the powers of the BIA to govern tribal affairs could be entirely abolished.¹²⁷

Yet, in Cohen's view, the goals of the IRA reached beyond the establishment of tribal governments. Cohen hoped that the Act would promote his ideal of socialist pluralism. He did not merely wish to "make 'Reds' of the Indians"¹²⁸; Cohen 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."¹²⁹ Accordingly, solutions that did not attend to the economic and political interests of Indian tribes were oppressive. "We will 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.¹³⁰ Instead, he wanted the IRA to acknowledge the socialist temperament of Indian tribes and to correct the damage caused by earlier attempts to eradicate it. According to Cohen, in short, the IRA was meant to create genuine socialist communities on Indian reservations¹³¹ and to provide a model that other groups could adopt.

Lest I am misunderstood, Cohen genuinely advocated Indian self-government. Furthermore, he maintained that the provisions of

126. Memorandum: Law and Order on Indian Reservations in Relation to the Wheeler-Howard Bill, *supra* note 99; see also RUSCO, *supra* note 11, at 197-201.

127. Draft of Address by Margold, *supra* note 36. 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.

128. Ambrose Doskow, Interview by Joseph Lash, *supra* note 121.

129. Draft of Address by Margold, *supra* note 36.

130. *Id.*; see also Memorandum: Law and Order on Indian Reservations in Relation to the Wheeler-Howard Bill, *supra* note 99.

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

the IRA should not be imposed on Indian tribes; he urged the tailoring of charters to the needs of each Indian community; and he stressed the importance of consultation with Indians during the legislative processes.¹³² Cohen's proposed community courts indeed intended to allow tribes to create their own laws.¹³³

Cohen wanted to reestablish tribal governments. Yet, knowing little about Indian cultures and customs, he interpreted Indian tribes' interests 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."¹³⁴ The establishment of

132. RUSCO, *supra* note 11, 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 in Relation to the Wheeler-Howard Bill, *supra* note 99; *see also* Draft of address by Margold, *supra* note 36. 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.

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 102, at 71.

133. RUSCO, *supra* note 11, at 197-201.

134. Draft of Address by Margold, *supra* note 36; *see also* Memorandum: Law and Order on Indian Reservations in Relation to the Wheeler-Howard Bill, *supra* note 99. As Cohen explained, according to the holding in *Worcester v. Georgia*, 31 U.S. 515 (1832)—the case that recognized Indian tribes as separate 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 in Relation to the Wheeler-Howard Bill, *supra* note 99. While some historians have recently argued that the policy of allotment did not destroy tribal governments on a wholesale basis, the 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 11, 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 36. Furthermore, as Cohen explained, neither Indians nor non-Indians were entitled to 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 the reservation the Commissioner viewed as "detrimental to the peace and welfare of

American-style governments, modeled after municipal and housing corporations and subject to the supervision of the Department, was thus the only alternative to assimilation.¹³⁵ Furthermore, 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.¹³⁶ Cohen also believed that "if every member of the community [was] to be granted some opportunity to wrest a livelihood from the limited resources of the community," unequal distribution of rights to land had to be eliminated.¹³⁷ Finally, while Cohen recognized the importance of receiving information from 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."¹³⁸ Critical of earlier attempts to impose capitalist individualism on Indian reservations,¹³⁹ Cohen initially failed to recognize that the structure he preferred (that is, socialist pluralism) was a cultural product, too, and not necessarily suitable for the customs and traditions of Indian tribes. Intellectually committed to pluralism, Cohen, nonetheless, hoped to create a single economic, if not also political, structure on Indian reservations.

Cohen's colleagues shared his assumptions. Whether or not they drew on theories of pluralism, the New Dealers sought to protect the autonomy of Indian tribes without segregating them from American society. Their solution was thus a problematic mixture: they relied on American structures of government to protect Indian traditions and customs, and they assumed that uniform political and economic structures—self-government and communal holding of lands—would promote Indians' interests. While the New Dealers recognized particular differences, they viewed the general framework

the Indians." *Id.*; see also Memorandum: Law and Order on Indian Reservations in Relation to the Wheeler-Howard Bill, *supra* note 99.

135. 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.

136. RUSCO, *supra* note 11, at 197-98.

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

138. *Id.* at 211 (quoting Cohen in a memorandum to John Collier).

139. 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. Cohen wrote: "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." *Id.*

in universal, absolute terms. Neither the liberals, nor the socialists among them fully realized the situated nature of their frames of reference.¹⁴⁰

Situating the IRA within the broader story of American legal pluralism underscores the interplay between philosophy and law—theory and practice. Cohen's attempt to bring theories of pluralism to bear upon national policy resembled other endeavors to devise a pluralistic polity undertaken during the early twentieth century. Spurred by a new American philosophy and an abundance of good intentions, many such attempts at creating a pluralistic state ended up harming those they were intended to help or, at most, were symbolic in their success. As already noted, the IRA failed to accomplish the goals it was set to achieve. Yet, as the following sections show, legal practice gradually reshaped theory.

C. Interlude: Systematic Pluralism¹⁴¹

Socialist pluralism was one model for devising a pluralistic polity. It assumed that federal law could accommodate, with one structure, the interests of a variety of groups. Hence, it was not necessarily adaptable to the diverse tribal traditions. Inspired by socialist pluralism, the IRA attempted to protect the political and economic interests of Indian tribes without taking full cognizance of the cultural and social systems in which these interests were formed. Indeed, one of the major drawbacks of the IRA was the New Dealers' naïveté with respect to Indian cultures, customs, and laws. Cohen, for

140. 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.

141. The label “systematic pluralism” is meant to allude to an article in which, as I show, Cohen articulated this particular interpretation of pluralism—an intermediate between his models of socialist and comparative 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 13, at 95.

example, 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 ones¹⁴²—taught him otherwise.

As this section shows, Cohen's experience in administering the IRA made him more attentive to cultural interests and gradually led him to identify not only a multiplicity of group interests within one system, but also a multiplicity of value systems. This was the premise of Cohen's ideal of systematic pluralism, which he articulated in the late 1930s.

As early as 1935, Cohen suggested 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.¹⁴³ 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.¹⁴⁴ Recognizing with pluralists the incompleteness of human knowledge,¹⁴⁵ Cohen thus urged the understanding of legal reality, and hence the definition of legal rules, as reflecting a variety of interdependent particular and collective interests.¹⁴⁶

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, these interests were spread over different systems. For example, concepts like communal holding of property meant one thing to socialists and

142. See Felix S. Cohen, *Indian Self-Government*, 5 AM. INDIAN 3 (1949) [hereinafter Cohen, *Indian Self-Government*], reprinted in THE LEGAL CONSCIENCE, *supra* note 13, at 305, 306-07. See also Felix S. Cohen Papers, Box 7, Folder 100, Yale Collection of Western Americana, Beinecke Library, Yale University.

143. See 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 13, at 33.

144. *Id.*

145. See *supra* text accompanying notes 80-82.

146. See Cohen, *Transcendental Nonsense*, *supra* note 143; Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5 (1937), reprinted in THE LEGAL CONSCIENCE, *supra* note 13, at 77. For an examination of the importance of *Transcendental Nonsense* to the history both of pluralism and of legal realism, see TSUK, ENCOUNTERS WITH PLURALISM, *supra* note 13 (manuscript at pt. II, on file with author).

another to 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."¹⁴⁷ More important, organized tribes would exist "provided that the Indians themselves feel that tribal governments satisfy important human wants."¹⁴⁸ The life expectancy of various tribal constitutions could thus be figured, Cohen concluded, 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.¹⁴⁹

A (tribal) constitution became, in short, "*the formal structure of a reality that exists in human hearts.*"¹⁵⁰ As Cohen proclaimed, "[a]n 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."¹⁵¹ Only Indian tribes—not the administration—could establish

147. 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 13, at 222, 223-24.

148. *Id.*

149. *Id.* at 228.

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

151. *Id.* Almost four decades later, Nathan Glazer and Daniel Patrick Moynihan would echo Cohen. In an introduction to a collection of essays on *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.

stable tribal governments, and only when they did, could there be a pluralistic polity.

Here is where Cohen's analysis during the late 1930s departed from his model for the IRA. Like earlier discussions of political pluralism,¹⁵² socialist pluralism was premised on a categorical description of conflict as a struggle over limited economic resources: 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 particular interests were embedded in distinct legal and political systems. In the late 1930s, having realized the multiplicity of cultures, groups, and forms of knowledge, 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 suggested, forced assimilation.

How, then, should the modern American state accommodate the plurality of interests that characterized society? 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,¹⁵³ systematic relativism was, in Cohen's view, "a principle of logical tolerance."¹⁵⁴

Building on his 1935 critique of abstract concepts as tools of cultural and political oppression,¹⁵⁵ 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 interests, but also the reconstitution of different systems as broader and more inclusive. If different philosophical systems could be increased in scope to maintain common content, Cohen wrote, then, the distinction between the meanings 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.¹⁵⁶

152. See *supra* text accompanying notes 90-91.

153. See *supra* text accompanying note 92.

154. Cohen, *Systematic Relativism*, *supra* note 141, at 98.

155. See Cohen, *Transcendental Nonsense*, *supra* note 143.

156. See Cohen, *Systematic Relativism*, *supra* note 141. Cohen concluded the article by noting:

Systematic pluralism was supported by a particular theory of ethics, which Cohen articulated in the mid-1930s. Throughout his life, 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.¹⁵⁷ Cohen's early writings sought to anchor legal criticism in hedonism.¹⁵⁸ 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."¹⁵⁹

The central point of Cohen's socialized morality was a rejection of traditional morality. Specifically, Cohen wished to rebut the metaphysical dogma that traditional morality presupposed, that is, "the dogma that the individual is an ultimate unity and society an ultimate plurality."¹⁶⁰ According to Cohen, such a dogma helped to prevent the development of a pluralistic state by describing "all the adjustments, balances, and compromises which are the substance of morality" as taking place "within an individual life."¹⁶¹ Social balance, particularly the redistribution of wealth, was thus preordained to be unjust, though a similar balance within a single life—that is, "the sacrifice of today's pleasure for tomorrow's"—was commendable.¹⁶²

The method of systemic 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.

157. For Cohen's rejection of the dichotomy between descriptive and normative social science, see COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS*, *supra* note 105; Felix S. Cohen, *Modern Ethics and the Law*, 4 *BROOK. L. REV.* 33 (1934), *reprinted in* THE LEGAL CONSCIENCE, *supra* note 13, at 17; and Cohen, *Transcendental Nonsense*, *supra* note 143.

158. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS*, *supra* note 105; *see also supra* section III.B.

159. Felix S. Cohen, *The Socialization of Morality*, in *AMERICAN PHILOSOPHY TODAY AND TOMORROW* 83 (Horace M. Kallen & Sidney Hook eds., 1935), *reprinted in* THE LEGAL CONSCIENCE, *supra* note 13, at 337, 348.

160. *Id.* at 347.

161. *Id.*

162. *Id.*

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."¹⁶³ 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 pluralism less threatening to traditional understandings 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."¹⁶⁴

Drawing on the ethical ideal of socialized morality, Cohen articulated his ideal of systematic pluralism to advocate policies that would encourage the flourishing of diverse social ideas, beliefs, and values. Cohen wanted law to promote solutions that could 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 reiterate 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."¹⁶⁵

While Cohen's ideal of socialist pluralism was rooted in a commitment to the mediation of conflicting interests within one legal system, his model of systematic pluralism was an attempt 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 Indians 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.

163. *Id.* at 347-48.

164. *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)).

165. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1 (1942) [hereinafter Cohen, *The Spanish Origin of Indian Rights*], reprinted in THE LEGAL CONSCIENCE, *supra* note 13, at 230, 231.

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 have its cultural, political, and social values accommodated by law was Cohen's legal ideal. 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, according to Cohen, required law to recognize the collective rights of diverse groups.¹⁶⁶ By way of introduction to the *Handbook of Federal Indian Law*, which was published in 1941, Cohen suggested that the legal endorsement of collective rights reflected "a set of beliefs that [formed] the intellectual equipment of a generation"¹⁶⁷:

[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

166. An individualistic conception of rights rests on 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. A collective conception of rights, in turn, rests on the assumption that what constitutes one's moral dignity is what differentiates him or her, as a member of a particular group, from others; hence, the need to accommodate the unique interests of different groups. 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 Felix S. Cohen, *Indian Rights and the Federal Courts*, 24 *MINN. L. REV.* 145 (1940) [hereinafter Cohen, *Indian Rights*]; Cohen, *The Spanish Origin of Indian Rights*, *supra* note 165; Felix S. Cohen, *Colonialism: A Realistic Approach*, 55 *ETHICS* 167 (1945) [hereinafter Cohen, *Colonialism: A Realistic Approach*], reprinted in *THE LEGAL CONSCIENCE*, *supra* note 13, at 364; and Cohen, *Indian Self-Government*, *supra* note 142.

167. Felix S. Cohen, *Author's Acknowledgments*, in *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 16, at xviii [hereinafter Cohen, *Author's Acknowledgments*].

impinges upon one tiny segment of the many problems which modern democracy faces.¹⁶⁸

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, and it viewed the sovereign state as the driving force behind social integration. While Cohen continued to embrace the rights of groups to have their different values and needs accommodated by law, by the mid-1940s, as he was working to resolve Indian land claims against the federal government, his understanding of pluralism changed. Cohen continued to emphasize the plurality of value systems; yet, instead of assigning to the state the role of integrating different systems into a singular whole, his analysis focused on the ability of the state to encourage communication, dialogue, and translation between and among distinct systems. As the following section elaborates, such were the premises of his ideal of comparative pluralism.

D. Indian Claims and Comparative Pluralism

Like other 1930s attempts to devise a pluralistic polity, Cohen's models of socialist and systematic pluralism relied on the ability of humanistic experts—dedicated to democracy and the decentralization of bureaucratic power—to lead the transformation toward a pluralistic modern society. Early twentieth-century intellectuals, more generally, believed that experts could arrive at objective solutions to a wide range of social problems.¹⁶⁹

In the mid-1940s, however, the intellectual faith in the ability of experts to develop a pluralistic society declined.¹⁷⁰ Each expert division in the Department of the Interior—that is, Education, Forestry, Credit, and Law and Order—Cohen would write 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

168. *Id.*

169. See Akam, *supra* note 95.

170. See HORWITZ, *supra* note 1, at 213-46.

decisions. To protect against the possibility that such tribal decisions would become law on the reservations, these experts imposed limits on self-government.¹⁷¹

As his disillusion with experts grew, the focus of Cohen's analysis turned to volition and agency. The strength of American democracy, Cohen wrote in the mid-1940s, 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.¹⁷² 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."¹⁷³ Though, as Cohen also noted, governmental power often "[created] in its holders aspirations that [conflicted] with those of the rest of society."¹⁷⁴

Instead of entrusting the development of a pluralistic polity to experts, Cohen's 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."¹⁷⁵ Yet, while in the early 1940s, Cohen envisioned the sovereign state as the force behind social integration,¹⁷⁶ in 1949 he would suggest that it 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 for the Indian, Jewish, Negro, or Catholic problem, or any other problem."¹⁷⁷ 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."¹⁷⁸

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

171. Cohen, *Indian Self-Government*, *supra* note 142, at 309.

172. Cohen, *Colonialism: A Realistic Approach*, *supra* note 166, at 369.

173. Cohen, *Indian Self-Government*, *supra* note 142, at 313.

174. Cohen, *Colonialism: A Realistic Approach*, *supra* note 166, at 369.

175. *Id.* at 364.

176. See *supra* text accompanying notes 165-68. In particular, see Cohen's acknowledgment that among the beliefs that supported the *Handbook of Federal Indian Law* was "a belief that it is the duty of the Government to aid oppressed groups in the understanding and appreciation of their legal rights." Cohen, *Author's Acknowledgments*, *supra* note 167, at xviii.

177. Cohen, *Indian Self Government*, *supra* note 142, at 308.

178. *Id.*

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 individuals and groups were social constructs, stripped of any notion of volition or human agency, whose interests were protected by the pluralistic state. Instead, Cohen's writings in the mid-1940s envisioned individuals and groups as active agents, shaping their own destiny and the destiny of others. This was also the premise of his ideal of comparative pluralism.

Cohen's ideal of comparative pluralism envisioned individuals and groups actively engaged (with others) in dialogue and translation. It was rooted in the realization that understanding propositions "in the context of [their] own field" would allow individuals to "translate [every] proposition into language that will convey the same informational content in any other value field [they] understand."¹⁷⁹ This, Cohen would explain in the early 1950s, 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."¹⁸⁰ Though Cohen fully articulated his ideal of comparative pluralism only in the late 1940s, its seeds were planted in his work on the ICCA.¹⁸¹

The Indian Claims Commission was created by the ICCA to hear, determine, and bring an end to tribal land claims against the federal government.¹⁸² Cohen hoped that by waiving sovereign immunity and allowing Indian tribes to sue the federal government, the Indian Claims Commission would recognize Indian tribes' voices. 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

179. Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950), reprinted in *THE LEGAL CONSCIENCE*, *supra* note 13, at 121, 151.

180. Felix S. Cohen, *The Reconstruction of Hidden Value Judgments: Word Choices as Value Indicators*, in *SYMBOLS AND VALUES: AN INITIAL STUDY* 549, 561 (Lyman Bryson et al. eds., 1954). See also Felix S. Cohen, *The Vocabulary of Prejudice*, 19 FELLOWSHIP 5 (1953), reprinted in *THE LEGAL CONSCIENCE*, *supra* note 13, at 429, 435.

181. On the ICCA, see *supra* section II.C.

182. The initial draft of the ICCA was largely Cohen's product. After it was introduced before the House Indian Affairs Committee, it was revised to incorporate the ideas of Ernest Wilkinson, who worked with Cohen, and to work out a series of amendments that members of the House and Senate Indian Affairs Committees suggested. See LIEDER & PAGE, *supra* note 73, at 62-68.

Cohen, the 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.”¹⁸³ Furthermore, in Cohen’s opinion, to claim damages, Indians needed only to prove their aboriginal title; they did not need to show a title recognized by the federal government.¹⁸⁴ The Commission, Cohen assumed, would address “all Indian claims, legal, equitable and moral.”¹⁸⁵ If the IRA set out to refute the antiquated policy of assimilation, the Indian Claims Commission, Cohen believed, would shape the future by telling a different narrative; it would give Indian tribes a forum to voice their versions of American history.

By creating a forum for Indian tribes to tell their side of American history, Cohen also believed that the Indian Claims Commission would encourage dialogue. In his view, its proceedings were meant 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,”¹⁸⁶ while simultaneously calling attention to it. The legal remedy was meant to bring closure. Yet, it was also intended to memorialize a different

183. Felix S. Cohen, *Indian Claims*, 2 AM. INDIAN 3 (1945) [hereinafter Cohen, *Indian Claims*], reprinted in THE LEGAL CONSCIENCE, *supra* note 13, at 264, 272. Ironically, the establishment of an administrative commission also indicated the continuing impact of the trust in experts.

184. *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. 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, in Cohen’s opinion, the establishment in the preceding summer of the Indian Claims Commission foreshadowed the decision, its importance did not escape him. As he wrote to Mary-K Morris Bell, who worked with him on the *Handbook of Federal Indian Law*:

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 S. 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.

185. Cohen, *Indian Claims*, *supra* note 183, at 272.

186. *Id.*

historical narrative. At least in the eyes of its drafter, the ICCA 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 would build a pluralistic state in the present.¹⁸⁷

Thus described, Cohen's hopes for the ICCA, as his vision for the IRA, seem both ambitious and naive. That the interests of Indian tribes were ultimately impaired supports such charges. The tensions that were reflected in the Indian New Deal—between theory and practice, between visions of the pluralistic state and the outcomes of attempts to devise it—seem to be a recurring motif in the history of legal pluralism. As part IV suggests, these tensions are complex and perhaps impossible to resolve, at least in part, because they are personal. Cohen's interpretations of pluralism, for example, were mediated through his own experience as a Jewish American. As I show, federal Indian policy during the New Deal did not only record and help to shape particular images of the pluralistic state; it also reflected and helped to reconstruct different conceptions of identity.

IV. IDENTITY

A. Socialism and Assimilation

In 1948, upon his resignation from government service, Cohen admitted that he had no practical experience with Indian issues before he joined the Department of the Interior to help draft the IRA.¹⁸⁸ Though an admirer of the wilderness who, like young men of his generation, loved hiking and canoeing, he 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.”¹⁸⁹ I am “only a lawyer,” Cohen wrote to anthropologist

187. Ironically, as Vine Deloria, Jr. has demonstrated, in practice, government attorneys (among them some of the drafters of the ICCA) 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 DELORIA, *BEHIND THE TRAIL OF BROKEN TREATIES*, *supra* note 9, at 222-26.

188. *Cf. supra* text accompanying notes 97-98.

189. Felix S. Cohen, Remarks, Testimonial Dinner for Felix Cohen, *supra* note 13, at 22 [hereinafter Cohen, Remarks at Testimonial Dinner]. See also Letter from Felix Cohen to Joseph Lash (Oct. 26, 1933), *supra* note 110. Describing an expected tour of Indian reservations, Cohen noted: “I was to have gone the day before yesterday, but I convinced my

Alexander Goldenweiser two years after his appointment.¹⁹⁰

Read carefully, these statements open a door to exploring the relationship between Cohen's shifting interpretations of pluralism and his changing understanding of his own identity as a Jewish American. Each of the following sections is devoted to a different model: socialist, systematic, and comparative pluralism. This section begins by examining Cohen's early attraction to socialist pluralism, the model that influenced his vision for the IRA. Specifically, I argue that Cohen's socialist pluralism reflected not only his view of the modern state, but also his aspirations as a Jewish American to be assimilated into the body politic of the nation.

New York City, where Cohen was born and raised, certainly experienced its share of racial tensions during the early decades of the twentieth century. 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.¹⁹¹ He easily saw that law was a tool of capitalism, but he failed to recognize law's contribution to racial and cultural hegemony. The attitude of the Socialist Party, whose ranks he joined, toward race relations was indeed "hazy."¹⁹² In 1936, Cohen and his friends composed a *Proposed Constitution for the Socialist Commonwealth of America*.¹⁹³ Its third article guaranteed 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."¹⁹⁴ Yet, such fundamental individual rights were subjected to an overarching socialist pluralist

boss Margold that not knowing anything about the Department or the Indians I'd make a pretty lousy ambassador. But I'm learning." *Id.*

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

191. *See, e.g.*, works cited *supra* note 108.

192. NATHAN IRVIN HUGGINS, *THE 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).

193. Cohen, et al., *Proposed Constitution for the Socialist Commonwealth of America*, *supra* note 120.

194. *Id.*

structure, with its emphasis on multiple loci of participation and representation.¹⁹⁵

What, then, 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 Orthodox, 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.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ 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

195. *Id.*

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

197. See 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].

198. See MORRIS COHEN, A DREAMER'S JOURNEY, *supra* note 196, at 98-99.

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."¹⁹⁹

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.²⁰⁰ 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.²⁰¹ Between these two ends 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.²⁰²

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..."²⁰³ For Morris, a democracy committed to social and economic equality was the universal solution to these problems.

Although intellectually (or philosophically) a pluralist,²⁰⁴ Morris Cohen rejected all social forms of pluralism, warning against

199. Cohen, Remarks at Testimonial Dinner, *supra* note 189, at 25. See also ARTHUR A. GOREN, *THE POLITICS AND PUBLIC CULTURE OF AMERICAN JEWS* 13-14 (1999).

200. See generally GOREN, *supra* note 199, at 13-14.

201. See *supra* text accompanying note 92.

202. See 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).

203. MORRIS COHEN, *A DREAMER'S JOURNEY*, *supra* note 196, at 233.

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

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 Harold Laski’s political pluralism.²⁰⁵ Jews, he similarly argued in a critique of Horace 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.”²⁰⁶

Felix Cohen was intrigued by cultural and political pluralism. To advocate any form of pluralism, however, would have been perceived 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, particularly his desire to be accepted into the polity. Devoted to his father, intellectually and personally, Felix Cohen 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). Felix Cohen’s attraction to socialist pluralism, in short, was motivated by his wish, as a Jewish American and as the son of Morris Cohen, to minimize the significance of racial and ethnic differences. With this in mind, it was easier to assume that Indian tribes were political groups, not ethnic or cultural ones. Such was Cohen’s belief when he joined the Department of the Interior to help draft the IRA.²⁰⁷

Cohen’s belief that the IRA should establish on Indian reservations American-style governments was rooted not only in a particular vision of the modern state, but also in his understanding of individual and group identity. His socialist pluralist model was an attempt to create a universal economic, if not also political, structure on Indian reservations almost to the extent of forced assimilation. As already noted, ultimately, Cohen articulated a different model of

205. 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* 386, 399 (1931). For Harold Laski’s political pluralism, see also *supra* text accompanying notes 90-91.

206. Morris R. Cohen, *Zionism: Tribalism or Liberalism?*, NEW REPUBLIC, Mar. 19, 1919, reprinted in MORRIS COHEN, *THE FAITH OF A LIBERAL*, *supra* note 197, at 326, 328. The article was written as a critique of Zionism, which Morris Cohen associated with Horace Kallen’s pluralism. For Horace Kallen’s cultural pluralism, see also *supra* text accompanying note 92.

207. See *supra* section III.B.

pluralism: comparative pluralism; it accepted that all groups, including ethnic and religious groups, had the right to self-determination. The following sections explore the relationship between Cohen's shifting interpretations of pluralism and his changing conceptions of identity.

B. Interlude: Systems and Cosmopolitanism

Cohen came to the New Deal to promote tribal self-government. His experience in drafting and administering the IRA, 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. Having realized the diversity of Indian customs, traditions, and constitutions, Cohen articulated his ideal of systematic pluralism.

Unlike socialist pluralism, which imagined the state as composed of multiple loci of participation and representation, systematic pluralism focused on the role of the state in bringing about social and cultural integration. It assumed that the American legal system could encompass all particular value systems. Still, while opposing the forced assimilation of all cultural systems into a homogenous mass, systematic pluralism envisioned all systems becoming a cosmopolitan one.²⁰⁸ The reasons for such an "in-between" approach, I wish to suggest, reached back to Cohen's own sense of identity as a Jewish American.

Like his model of socialist pluralism, Cohen's attempt to articulate a universal (or legal) ideal that would include all particular systems was meant to accommodate not only the rights of Indian tribes to bring their particular values into the polity, but also the interests of other groups to have their different needs accommodated. Indeed, in the late 1930s and early 1940s, as European Jews were facing ever expanding economic, political, and physical sanctions, Cohen drew on his ideal of systematic pluralism to criticize 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

208. See *supra* section III.C.

welfare of the country, and he urged the admission of European refugees into the body politic of the nation.²⁰⁹

In Cohen's writings on the problem of exclusionary immigration laws, one can clearly see the interdependence of theories of pluralism and conceptions of identity. In these works, Cohen sought to extend his pluralist approach beyond labor unions and Indian tribes to ethnic communities, especially to Jewish immigrants. Yet, his works on immigration laws referred 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 Horace Kallen's cultural pluralism.²¹⁰ While his experience in administering the IRA led Cohen, the lawyer for Indian tribes, to accept the plurality of cultural systems (celebrating the particular heritage of every group was the premise of his systematic pluralism), his eagerness as a Jewish American to be admitted into the polity, as well as the cosmopolitanism he inherited from his father, continued to limit the scope of his approach. Cohen's model of systematic pluralism rejected separatism and instead sought to articulate a universal ideal of social and cultural integration—a conception of collective rights.

Let me reiterate my argument. Cohen's encounters with Indian tribes led him to recognize a multiplicity of value systems. His ideal of systematic pluralism was thus an attempt to encourage social and cultural integration. Because for Cohen—the pluralist, but also the Jewish American, who was in the 1940s 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, his systematic pluralist ideal also stressed the role of the state in bringing about social and cultural integration.

“The victim of economic oppression may be buoyed up in the struggle by the hope that he can improve his economic status,” Cohen wrote in 1940.²¹¹ “[T]he 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.”²¹² Yet, “[t]he victim of racial persecution,” could not “change his

209. 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).

210. See *supra* text accompanying notes 203-07.

211. Cohen, *Indian Rights*, *supra* note 166, at 185.

212. *Id.*

race.”²¹³ “For these victims,” Cohen proclaimed, there was “no sanctuary and no escape.”²¹⁴

To be integrated into the polity, victims of racial and ethnic persecutions, according to Cohen, needed the protection of the sovereign. His analysis thus suggested that “since all the minority groups that [had] reason to fear discriminatory legislation [made] up together a great majority of [the] population,” at “the heart of our democratic institutions” was an asserted right (of individuals and groups) to be immune from racial discrimination.²¹⁵ According to Cohen, the Fifth, Fourteenth, and Fifteenth Amendments to the United States Constitution²¹⁶ endorsed this asserted right.²¹⁷ “[T]he right to be immune from racial discrimination by governmental agencies,” Nathan Margold similarly wrote in the introduction to Cohen’s *Handbook of Federal Indian Law*, “is an essential part of the fabric of democratic government in the United States.”²¹⁸

As I hope to have shown, socialist pluralism and systematic pluralism reflected both Cohen’s political and his personal aspirations. Nothing, however, better illustrates the interdependence of theories of pluralism and Cohen’s sense of identity than his writings in the mid-1940s in support of his ideal of comparative pluralism and the ICCA.

C. Comparison and Coexistence

Cohen’s ideal of comparative pluralism, which he began to articulate in the aftermath of the Second World War, celebrated cultural pluralism and embraced dialogue as a foundation for coexistence. As already noted, by the mid-1940s, Cohen’s faith in the ability of experts to develop a pluralistic society declined. Instead, his writings focused on the ability of individuals and groups to actualize their destiny. He devised the Indian Claims Commission in the hopes of encouraging deliberation as a means of reconciliation and commemoration.²¹⁹ Cohen’s comparative pluralism and his belief in the feasibility of communication as a means of resolving ethnic conflicts, I wish now to suggest, reflected not only a particular vision

213. *Id.*

214. *Id.* Cf. Kallen, *Democracy Versus the Melting-Pot*, *supra* note 92.

215. Cohen, *Indian Rights*, *supra* note 166, at 185.

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

217. Cohen, *Indian Rights*, *supra* note 166, at 191; *see also* Cohen, *Colonialism: A Realistic Approach*, *supra* note 166.

218. Nathan R. Margold, *Introduction to HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 16, at x. The Introduction was signed by Margold but likely drafted by Cohen.

219. *See supra* section III.D.

of the state, but more deeply, Cohen's serious concerns—as a Jewish American—about the events in Europe and their potential ramifications in the United States.

Throughout the 1930s, Cohen's different interpretations of pluralism offered internal critiques of the American way of life. Yet, like many Jewish intellectuals of his generation, Cohen was determined to rebut comparisons between the history of race relations in America and totalitarianism in Europe. His writings in the mid-1940s thus sought to defend what he described as “[t]he common beliefs that have held us together as a nation, the moral and intellectual foundations of our democracy” against “sustained attacks from totalitarian quarters.”²²⁰ In a series of articles that he published in the early 1940s, and in a handbook on totalitarian propaganda that he coauthored with several colleagues,²²¹ Cohen called attention to the 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*.²²² “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.”²²³

Seeking to combat totalitarian propaganda, Cohen's writings during the mid-1940s, particularly his work on the ICCA, similarly ventured into propagandist aims. In January 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*,²²⁴ it stressed the “historic fact ... that practically all of the real

220. 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.

221. Cohen et al., *COMBATING TOTALITARIAN PROPAGANDA: A LEGAL APPRAISAL*, *supra* note 220.

222. *Id.* at i.

223. *Id.*

224. 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 Felix S. Cohen, *Original Indian Title*, 32 *MINN. L. REV.* 28 (1947) [hereinafter Cohen, *Original Indian Title*], reprinted in *THE LEGAL CONSCIENCE*, *supra* note 13, at 273, 279-88. The material was

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."²²⁵ 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."²²⁶ 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."²²⁷

Many criticized Cohen for downplaying the darker side of America's dealings with Indian tribes.²²⁸ "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 circumstances," Harold Ickes wrote to Cohen.²²⁹ "I wonder," Ickes added, "whether you have not been too optimistic in your averments as to our fairness."²³⁰ 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."²³¹ "I only hope," he noted, "that our record is as fair as you present it."²³²

Cohen knew that the ideals he ascribed to American society were not always carried out. "I probably overstated the high standards embodied in our treaties and statutes," he confessed to Ickes, and the

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.

225. Cohen, *Original Indian Title*, *supra* note 224, at 280.

226. *Id.* at 288.

227. *Id.*

228. See generally correspondence in Felix S. Cohen Papers, Box 65, Folder 1041, Yale Collection of Western Americana, Beinecke Library, Yale University. For a recent critique, see Aviam Soifer, *Descent*, 29 FLA. ST. U.L. REV. 269, 269-71 (2001).

229. 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.

230. *Id.*

231. *Id.*

232. *Id.*

omission of darker paragraphs by the editors created an even more exaggerated picture.²³³ Perhaps, Cohen added, “twelve years among the bureaucrats have made me less astute to criticize our Indian record than I should be.”²³⁴

Let me suggest that not bureaucracy, but rather professional, intellectual, and personal reasons dictated Cohen’s approach. As a government lawyer, his goal was to counteract opposition to “righting Indian wrongs”; he wanted to offset objections that were raised against the pending ICCA, and that were often founded, according to Cohen, “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.”²³⁵ “[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.”²³⁶ At any rate, Cohen concluded his letter to Ickes, perhaps “even an over-optimistic commentary on the high standards set by our Indian legislation may prove helpful in arousing critical attention to lapses from those standards.”²³⁷

Furthermore, Cohen wrote the article *How We Bought the United States* to support his ideal of comparative pluralism. He wanted his audience to recognize 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.²³⁸ In Cohen’s opinion, the fact that

233. 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.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. Cohen’s writings in the mid-1940s indeed 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). Rather, it was an addition to full citizenship. Felix S. Cohen, *Indians Are Citizens*, 1 AM. INDIAN 12 (1944), reprinted in THE LEGAL CONSCIENCE, *supra* note 13, at 253. 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 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

Indians were able to deal with American settlers suggested that dialogue and translation between different legal systems were possible—that his ideal of comparative pluralism was viable.

As a government lawyer working on behalf of Indian tribes, Cohen wanted to believe that his plans for the ICCA and his model of comparative pluralism, more broadly, were feasible. Yet, he wrote the article *How We Bought the United States* to prove another fact: Cohen—the Jewish American—wanted to demonstrate to Americans, and to those outside the United States, that American society could not succumb to totalitarianism, that it had already chosen comparative pluralism over totalitarianism.

“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.”²³⁹ 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,”²⁴⁰ especially as most Americans were “quite unfamiliar with the basic facts on this subject and [accepted] without question the myth that Indian land rights were ruthlessly disregarded in the growth of our country.”²⁴¹

Publishing the piece, Cohen further 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.”²⁴² 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 not different from what the United States did years ago in taking a continent from the Indians in the name of a superior race.”²⁴³ “This is

period of slavery.” Cohen, *Indian Claims*, *supra* note 183, at 268. In Cohen’s opinion, the fact that Indian claims were considered a “problem” 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.” *Id.*

239. 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.

240. *Id.*

241. *Id.*

242. Letter from Felix Cohen to John Collier, United Nations Assembly, England (Jan. 11, 1946), *supra* note 224.

243. Cohen, *How We Bought the United States*, *supra* note 224, at 22.

the way *so much else* about Indians and about all dependent peoples could be put across," Collier replied with approval.²⁴⁴

With the events in Europe, on the one hand, and growing opposition to federal Indian policy, on the other hand, Cohen wrote the article *How We Bought the United States* to refute totalitarian propaganda outside the United States as well as racial antagonism—against Indians, blacks, Jews, or any other cultural group—in America. He wanted Americans to adopt his ideal of comparative pluralism, with its emphasis on dialogue and coexistence, 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."²⁴⁵ 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."²⁴⁶ Faced with totalitarianism in Europe, and growing critiques of the Indian New Deal at home, Kallen's pointed alternative became for Cohen—the lawyer, the pluralist, and the Jewish American—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. By suggesting that Indian tribes—the original owners of America—reached agreements to preserve their traditions with immigrants to the new world, Cohen hoped to demonstrate the feasibility of his ideal of comparative pluralism, an ideal that endorsed cultural pluralism not as a justification for separatism, 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

244. 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.

245. Horace M. Kallen, *Postscript—To Be Read First—Culture and the Ku Klux Klan*, in KALLEN, CULTURE AND DEMOCRACY IN THE UNITED STATES, *supra* note 92, at 9, 43.

246. *Id.*

immigrants; these agreements may even be made globally. In the aftermath of the Second World War, 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.²⁴⁷

V. EPILOGUE

As if admitting the relationship between his work on federal Indian law, his interpretations of pluralism, and his shifting conceptions of identity, in 1949, 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?²⁴⁸

When Cohen used the image of the *miners’ canary*, the Indian New Deal was already under growing attack. As the Cold War spurred mounting attacks on anything remotely socialist, “Making ‘Reds’ of the Indians” was no longer a symbol of reform. Rather, federal Indian policy during the New Deal was described 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

247. Throughout the early twentieth century, many second- and third-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).

248. *Indian Self Government*, *supra* note 142, at 313-14.

assimilate.”²⁴⁹ 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.”²⁵⁰

Opposition to the Indian New Deal was motivated by a variety of reasons, including a desire to obtain Indian lands and resources, objections to Indian religious practices, and the depiction of federal Indian policy during the New Deal as “socialistic.” Opponents urged the federal government to 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 and encouragement of the owner to accept responsibility for management” were offered as better goals of Indian policy.²⁵¹

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.²⁵² “You will resign when your freedom ... is

249. Clinton, *supra* note 23, at 105-06.

250. *Id.*

251. Michaels, *supra* note 72, at 1578-79 (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 has divided the objections to the Indian New Deal into two groups: ideological and economic. Ideological opponents stressed that Indians’ communal ownership of property contradicted the American liberal ideal of private ownership of property; that 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 up 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 did not come 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, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1185-86 nn. 24-25 (1983).

252. 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.

denied," Norman Thomas told Cohen back in 1933.²⁵³ 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.²⁵⁴ Within a few years, termination became official government policy, aiming to end the special status of Indian tribes.²⁵⁵ As Judith Royster has recently noted, it was "assimilation with a vengeance"²⁵⁶: "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 complete."²⁵⁷

The 1950s also witnessed the emergence of a new theory of pluralism: a process theory that sought to create a conception of a neutral political process, free of any substantive commitment to particular values, in which different groups interact, compete, and trade ends.²⁵⁸ This new theory of pluralism—interest group pluralism—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."²⁵⁹ The status quo became a normative theory.²⁶⁰

Like federal Indian policy during the New Deal, interest group pluralism reflected and helped to shape a particular vision of the

Cohen, Remarks at Testimonial Dinner, *supra* note 189, at 19.

253. Letter from Norman Thomas to Felix Cohen (Nov. 14, 1933), *supra* note 109.

254. D'arcy McNickle, Remarks, Testimonial Dinner for Felix Cohen, *supra* note 13, at 13-14. After his resignation and until his death in 1953, Cohen acted as consultant to a consortium of law firms that pooled their resources to explore legal questions common to tribal claims. See EDWARD LAZARUS, BLACK HILLS WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT 218 (1991).

255. House Concurrent Resolution 108, Aug. 1, 1953; see also DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 14, at 234.

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

257. *Id.*; see also Walch, *supra* note 251, at 1182-86.

258. 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]; see also Horwitz, *supra* note 1, at 251-58.

259. EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 255 (1973).

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

modern, pluralistic state. Indeed, throughout the twentieth century, legal scholars have attempted to develop a pluralistic polity—to articulate policies that would accommodate diverse social, economic, cultural, and religious interests. Many adopted one system of beliefs and treated it as the primary guiding light in their endeavors. For example, in the 1930s, many legal realists relied on 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 them.”²⁶¹ In the 1950s, interest group pluralists adopted a different approach. Instead of endorsing any particular vision of the public good, these process theorists directed their efforts toward finding a “morality of process” independent of results.²⁶² This turn to process attracted criticism, however, from those who saw law as necessarily embracing substantive norms.²⁶³ More recently, critical legal studies scholars, the new institutional economists, and feminist legal theorists, to name a few groups, have sought to direct legal discourses away from process and toward substance.²⁶⁴ The concurrent resurgence of formalism²⁶⁵ keeps the debates alive. In this context, the story of the Indian New Deal is of enduring importance.

Inspired by early twentieth-century normative theories of pluralism, each of the models Cohen devised was an attempt to accommodate diverse interests without either promoting certain moral absolutes or succumbing to moral relativism. Cohen’s ideal of 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 ideal of systematic pluralism envisioned the inclusion of diverse cultural traditions under an all-encompassing (universal) legal system. Finally, Cohen’s ideal of comparative pluralism, which was already reflected in his hopes for the ICCA, emphasized the possibility of exchange between and among different value systems. Realizing that policymakers might never be able to articulate a universal ideal that would endorse all particular systems, comparative pluralism was an

261. KENNEDY, *supra* note 13, at 88.

262. *See, e.g.*, DAHL, A PREFACE TO DEMOCRATIC THEORY, *supra* note 258; DAHL, PLURALIST DEMOCRACY, *supra* note 258.

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

264. *See, e.g.*, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998) (1982).

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

attempt to find legal mechanisms that would allow the coexistence of distinct value systems.

These models were not perfect. Indeed, they failed on Indian reservations. The IRA ended up imposing a universal structure of government on all reservations, 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 successes or failures of the policies he devised. Cohen's models of pluralism and his experience in the New Deal, more broadly, vividly illustrate the relationship between images of the state, conceptions of identity, and laws seeking to accommodate a plurality of interests. Taken as a whole, the story of the Indian New Deal provides a model for critically thinking about theoretical and personal constraints that continue to impede attempts to devise a pluralistic polity. Let me conclude, however, not with constraints, but with possibilities.

Cohen's encounters with Indian tribes helped to transform his understanding of law, pluralism, and identity. His story illustrates how policymaking can benefit from such encounters and from similar interactions and dialogues. A commitment to pluralism is political, intellectual, and personal. It requires an admission that the diverse cultural, political, and social interests that characterize our society are grounded in multiple value systems; and it requires faith in the possibility of social integration, inside and outside the law. The endorsement of all pluralities and differences as morally and politically valid is impossible. Still, in order to devise a pluralistic polity, we must make diversity the starting point for reflection and action, and we must aim to discern—through dialogue and communication—universal principles that can yield a point of view acceptable to all.²⁶⁶ 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.”²⁶⁷ It is up to us to develop the content of such beliefs.

266. See Benhabib, *supra* note 166, at 81; HILARY PUTNAM, WORDS AND LIFE 185-86 (James Conant ed., 1994) (arguing that pluralism does not deny a universal ethics).

267. Cohen, *Author's Acknowledgment*, *supra* note 167, at xviii.

