Felix S. Cohen and His Jurisprudence: Reflections on Federal Indian Law

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I. INTRODUCTION

In 1942, Felix S. Cohen published the Handbook of Federal Indian Law,1 the first synthesis of that field. At that time, Cohen was renowned as a legal philosopher, a member of the American

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legal realist movement, and a leading advocate for Native Americans. The primary purpose of this Article is to relate Cohen's realist jurisprudence to the development of federal Indian law. The thesis is that Cohen's jurisprudence profoundly affected his writing of the *Handbook*, which, in turn, profoundly affected the development of contemporary federal Indian law. The United States Supreme Court has effectively adopted Cohen's realist method for resolving certain issues of federal Indian law. The Court has not, however, adopted his ethical values on those issues. Thus, although Cohen was a recognized advocate for Native Americans, the development of the law suggests that his realist methodology, in some respects, undermined tribal sovereignty and Native American rights.

Although this Article largely discusses Felix Cohen and federal Indian law, the discussion revolves around two general points. First, jurisprudential ideology—ideas and theories on how to approach and resolve legal problems—can greatly influence the development of law in the courts. Second, this influence on law is significant, often because of its ethical consequences. For example, jurisprudential ideology sometimes concentrates on encouraging a particular form of legal argument, such as the realist method. When this type of jurisprudential ideology influences the development of law, so that a particular form of argument is frequently used, then the ideology is significant insofar as the form of argument has ethical consequences. Therefore, one should be wary of ever discussing the form of an argument apart from its ethical repercussions.

The first part of this Article describes Cohen's jurisprudence—his brand of realism. To appreciate the development and texture of Cohen's jurisprudence, his thought is placed in an ideological context by a brief discussion of the philosophical and jurisprudential culture of his time. The second part of the Article turns to federal Indian law. Initially, there is a general discussion of Cohen's *Handbook of Federal Indian Law* and a description of its relationship to his realism. Then, to better illustrate the connections between his jurisprudence and the development of federal Indian law, the Article focuses specifically on the scope of state power in Indian country. Cohen's treatment of this subject in his *Handbook* and the development of the law in this area are described in detail and related to his realism. Finally, the implica-
ations and ironies of Cohen's work are discussed in the context of the development of federal Indian law.

II. FELIX S. COHEN'S JURISPRUDENCE

A. Philosophical and Jurisprudential Context

To a large extent, Cohen's jurisprudential ideas were a product of his times. A brief summary of the philosophical and jurisprudential culture of the late nineteenth and early twentieth centuries reveals the historical contingency of Cohen's thought. Because, as Max Radin noted, Cohen was first a philosopher who later became an attorney,\(^2\) I will begin with a description of the philosophical context of Cohen's work.

The philosophy of the late nineteenth and early twentieth centuries developed largely in reaction to Hegel's idealism. Hegel envisioned a world of an Absolute, and this Absolute is Reason itself. Thus, for Hegel, the history of the world is the dialectical development of the unfolding of Absolute Reason. Hegel believed that the human mind is the vehicle of Absolute Reason reflecting on itself; reality is, therefore, intelligible to the human mind. Thus, for Hegel, an understanding of the categories of human reason and thought is equivalent to an understanding of the Absolute or reality.\(^3\)

The philosophies that developed in reaction to idealism and that had the greatest influence on Cohen were pragmatism and analytic philosophy. In contrast to Hegel's high-minded idealism, the pragmatists focused on facts, consequences, and action—they were concerned with the relation of humans to their environ-

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\(^2\) See Radin, Book Review, 47 HARV. L. REV. 145, 146 (1933) (reviewing F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS (1933)). Cohen received his A.B. from City College of New York (CCNY) when he was eighteen. He wanted to attend law school immediately, but his father, Morris Raphael Cohen, persuaded him to study philosophy first. Felix Cohen consequently received an M.A. in 1927 and a Ph.D. in 1929 from Harvard, and eventually published his philosophy dissertation, Ethical Systems and Legal Ideals. Cohen then attended law school after receiving his Ph.D. See infra text accompanying notes 104-05. Biographical information on Cohen is drawn from two sources: WASHINGTON, D.C., CHAPTER OF THE ALUMNI OF THE CITY COLLEGE OF NEW YORK, FELIX S. COHEN: A FIGHTER FOR JUSTICE 17 (1956) [hereinafter A FIGHTER FOR JUSTICE]; Biography of Felix S. Cohen, 9 RUTGERS L. REV. 345 (1954) [hereinafter Biography].

\(^3\) G. HEGEL, PHENOMENOLOGY OF SPIRIT (A. Miller trans. 1977); see 7 F. COPLESTON, A HISTORY OF PHILOSOPHY 2-10, 21 (1965); M. WHITE, THE AGE OF ANALYSIS 13-21 (1955).
ment. For example, C. S. Peirce argued that the meaning of an intellectual conception is the sum of the practical consequences that result from that conception. Similarly, John Dewey argued that thought is instrumental and can therefore be used to resolve problematic situations.

Analytic philosophers, also in contrast to idealists, tended to focus on discrete problems instead of attempting to create all-encompassing systems of the world. Bertrand Russell, one of the leading analytics, described analytic philosophy as a process of reduction. A philosopher starts with a body of common knowledge as data and then logically reduces this knowledge, expressed in complex and interdependent propositions, to simple precise propositions, with certain initial propositions serving as premises for deductive chains. If the logically implied premises, that are arrived at through the analytic process, are open to doubt, then the philosopher has revealed that the common knowledge, which served as the original data, is also doubtful.

Just as the philosophy of the late nineteenth and early twentieth centuries was a reaction to Hegel’s idealism, the jurisprudence of the early twentieth century was a reaction to Langdell’s legal science. The most salient components of Langdellianism, which critics referred to as mechanical jurisprudence, are formalism, conceptualism, and autonomy. Formalism is the belief that law

4. William James wrote: “ideas (which themselves are but parts of our experience) become true just in so far as they help us to get into satisfactory relation with other parts of our experience.” James, Truth and Practice, in M. White, supra note 3, at 164-65 (emphasis deleted); see id. at 162-63; see also F. Copleston, A History of Philosophy 330-44 (1966).


6. See F. Copleston, supra note 4, at 352-79; M. White, supra note 3, at 175.

7. See Russell, A History of Western Philosophy, in M. White, supra note 3, at 201. G. E. Moore, another analytic philosopher, was particularly hostile to speculative metaphysics. For example, Moore argued that philosophy can offer no more to support the truth of some propositions related to everyday life than common sense can offer. Thus, philosophy cannot offer additional support for the truth of the statement: “There are material things.” See F. Copleston, supra note 4, at 415-16; M. White, supra note 3, at 190; Moore, The Revival of Realism and Common Sense, in M. White, supra note 3, at 27-43.

8. See F. Copleston, supra note 4, at 483-84; see, e.g., B. Russell & A. Whitehead, Principia Mathematica (1910-1913) (discussed in F. Copleston, supra note 4, at 438).


10. See Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 605-07 (1908).
consists of discoverable principles and rules that dictate results in specific cases; thus, judges discover, and do not make, the law. Conceptualism is the belief that principles and rules can be organized into a cohesive system, with the lower level rules following logically from the basic principles. Autonomy, the final component, is revealed in the belief that law is a science to be treated independently from other disciplines and from society. Thus, the Langdellian approach focused on the logical development of a system of law grounded on a few fundamental principles, with little regard for the realities of human experience.

The most significant reaction to Langdellianism was the development of American legal realism. The realists argued, contrary to Langdell, that law is not autonomous from society and


12. The philosophies of Oliver Wendell Holmes and of the sociological jurisprudences preceded realism as reactions to Langdellianism. Holmes' famous statement—"The life of the law has not been logic: it has been experience"—summarizes his view of Langdell's legal science. O. Holmes, The Common Law 1 (1881). Holmes criticized the Langdellian approach for focusing on logic as the sole force in the development of the law. See Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 465 (1897). Although, in Holmes' view, logic supports judicial decisions and law can be generalized into a system that can help to predict what the courts will do, a significant degree of inarticulate and unconscious judgment is also part of any judicial decision. Id. at 457-58, 465-66. Further, Holmes believed that judges have a duty to weigh the social advantages entailed in a decision, though he also believed—somewhat inconsistently—that judges should exercise restraint instead of attempting to use their judicial power to shape society. Id. at 467. See D. Hollinger, Morris R. Cohen and the Scientific Ideal 168 (1975). In other words, Holmes recognized that judges make law, but he believed that this recognition implied that judges should not become "conscious agents of social reform." Id.

The sociological jurisprudences, including Roscoe Pound, criticized the Langdellian approach as ignoring justice in the pursuit of elegant legal systems. See Pound, The Theory of Judicial Decision, 36 Harv. L. Rev. 940, 940 (1923). Pound was accused of transforming judicial decision-making into mechanical jurisprudence. See Pound, supra note 10. The sociological jurisprudences argued instead that a preexisting rule does not govern every case—judges must make law. See B. Cardozo, The Nature of the Judicial Process 10-11 (1921). Unlike Holmes, however, the sociological jurisprudences encouraged judges to engage in social engineering, which was viewed as the ideal end of the law. Social utility was the best guide for judges and legislators. See Pound, The Theory of Judicial Decision, supra, at 954-56. The sociological jurisprudences, however, did not ignore logic or legal precepts. Logic was viewed as a significant factor in the shaping of the law, but it was not the end of the law; the end was justice and social welfare. See B. Cardozo, supra, at 30-31, 40-43, 65-66, 112-13; Pound, The Scope and Purpose of Sociological Jurisprudence, 25 Harv. L. Rev. 489, 516 (1912). Thus, for the sociological jurisprudences, logic and rules remained significant, but the instrumentality of the law gained increased importance.
that abstract preexisting principles do not objectively dictate judicial decisions. Consequently, the heart of realism was the belief that the study of law should be focused on concrete disputes and on what officials at all levels do about those disputes. Realists focused on factual realities, and, correspondingly, distrusted abstract legal rules, principles, and systems. The realist study of law emphasized narrow categories that were analogous to real-world situations and largely focused on the accurate descriptions of judicial behavior and the consequences of judicial decisions, often from the perspective of social sciences such as psychology and sociology.

Thus, both the philosophy and jurisprudence of Cohen's era moved from a focus on pure reason and systematizing, with a disregard for the experiences of the "real" world, to a focus on consequences, facts, action, and instrumentalism. As early as 1880, the relationship between the developing trends in philosophy and jurisprudence had been recognized—Holmes wrote: "If Mr. Langdell could be suspected of ever having troubled himself about Hegel, we might call him a Hegelian in disguise . . . ."

Felix Cohen, as a philosopher and a jurisprude writing in the

13. See, e.g., K. Llewellyn, The Bramble Bush 9, 12-14, 107-08 (1951). The views of the realists overlapped with the views of the sociological jurisprudences on this point. See supra note 12. Some realists also believed, in agreement with the sociological jurisprudences, that law is instrumental because it can meet the evolving needs of society, see, e.g., Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1236 (1931), but this belief was not universally accepted amongst the realists. For an overview of the significance of the realist movement, see W. Twining, Karl Llewellyn and the Realist Movement 375-87 (1973).

14. See K. Llewellyn, supra note 13, at 9, 12-14, 107-08.

15. See Llewellyn, supra note 13, at 1237; see, e.g., J. Frank, Law and the Modern Mind 130 (1930).

16. See Llewellyn, supra note 13, at 1237.


18. Book Review, 14 Am. L. Rev. 233, 234 (1880) (reviewing C. Langdell, A Selection of Cases on the Law of Contracts, with a Summary of the Topics Covered by the Cases (1879)) (although this book review was unsigned, it has been attributed to Holmes; see 2 M. Howe, Justice Oliver Wendell Holmes: The Proving Years 155-57 (1963)). Morris Cohen later wrote that Holmes' discussion of the meaning of legal principles resembled Peirce's pragmatic theory of meaning. M. Cohen, Justice Holmes and the Nature of Law, in Law and the Social Order 198, 213 (1933) (first printed in 31 Colum. L. Rev. 352 (1931)); see supra text accompanying note 5.
early twentieth century, naturally developed ideas similar to his contemporaries. Cohen was particularly sympathetic to the analytical approach for philosophical questions and used it in his more philosophical writing. For example, in his dissertation for his doctorate in philosophy, *Ethical Systems and Legal Ideals*, Cohen did an extensive "critical analysis" of ethical systems and repeatedly cited and discussed the two leaders of the analytical movement, G.E. Moore and Bertrand Russell. Moreover, in his dissertation, he occasionally criticized the pragmatists and never cited them with approval. Nonetheless, pragmatism had a greater influence than analytic philosophy on Cohen's legal writings. In fact, Cohen essentially equated his jurisprudential approach with pragmatism, although the utilitarianism of Jeremy Bentham also clearly affected Cohen's writing. In accord with those philosophical approaches, Cohen was a consequentialist and an instrumentalist. He combined those elements in his legal realism. With regard to consequentialism, for Cohen, the meaning of any definition is its consequences; in other words, the meaning of a definition is the sum of the human actions and effects that the definition causes. With


20. See F. Cohen Ethical Systems, supra note 19, at 145-229; see also F. Cohen, What is a Question?, in *The Legal Conscience* 3 (1960) (applies analytic approach to the problem of what is a question).

21. See, e.g., F. Cohen, Ethical Systems, supra note 19, at 18, 23-24, 121 nn.4-5, 139 n.17 (focusing on Russell); id. at 130 n.10, 135-38, 140 n.18 (focusing on Moore).

22. See, e.g., id., at 5 n.6, 192-93 & n.59.


regard to instrumentalism, Cohen wrote that the test of any definition is usefulness, not truth. More concretely, he wrote that law is "the most powerful and flexible instrument of social control." Law has instrumental power because it can promote the "good life": thus, if law has value, it is as a social tool that positively affects the social order and the people in society.

B. Ethical Functionalism

Cohen can be categorized as an American legal realist with an ethical twist. Although he often referred to his jurisprudential theory as functionalism, this label alone does not capture the strong ethical flavor of Cohen’s thought. A more appropriate label might be ethical functionalism, a label that he never used, but one that nonetheless more accurately describes his theory. Cohen’s major works reveal his dual emphasis on ethics and functionalism; his most significant writings in the field of jurisprudence are Ethical Systems and Legal Ideas, Transcendental Nonsense and the Functional Approach, and Modern Ethics and the Law. The thrust of these works is a concern for an appraisal or ethical criticism of law as it really is.

The essence of Cohen’s jurisprudence lies in his twofold first

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33, 50 (1934) (how to define justice) [hereinafter Cohen, Modern Ethics]; Cohen, Dialogue, supra note 23 (the meaning of private property).


27. F. COHEN, ETHICAL SYSTEMS, supra note 19, at 1.

28. Id. at 17-18.

29. See A FIGHTER FOR JUSTICE, supra note 2, at 8; see also Cohen, Modern Ethics, supra note 25, at 48.

30. Like many realists, Cohen’s writing sometimes resembles the writing of some contemporary critical legal scholars. See, e.g., F. COHEN, ETHICAL SYSTEMS, supra note 19, at 35-37 (an infinite number of general rules can fit a case); Cohen, Transcendental Nonsense, supra note 23, at 838 (attacks “apologists” for the existing social order). Cohen’s jurisprudence has been recently discussed. See Peller, The Metaphysics of American Law, 73 CALIF. L. REV. 1152, 1226-48 (1985).

31. See, e.g., Cohen, The Problems, supra note 23, at 5; Cohen, Transcendental Nonsense, supra note 23. Cohen used the term “functionalism” differently from modern social scientists. See, e.g., T. PARSONS, A Sociologist Looks at the Legal Profession, in ESSAYS IN SOCIOLOGICAL THEORY 370 (Rev. ed. 1954) (using a functionalist approach, argues that attorneys are a balancing mechanism in society because they mediate between the state and the citizens).

32. F. COHEN, ETHICAL SYSTEMS, supra note 19.


34. Cohen, Modern Ethics, supra note 25.
step. He separates the question of what law is from the question of what law should be—he distinguishes fact from value. Yet, he recognizes and emphasizes that any judicial decision necessarily entails an ethical value judgment. This twofold approach allows Cohen to isolate the two elements that occupy most of his jurisprudential writings and to underscore the necessary significance of both elements: the functional element and the ethical element.

The functional element of Cohen's jurisprudence entails an objective description of law. He seeks to analyze law as a function of judicial behavior, to focus on how courts decide cases of particular kinds, and to emphasize the consequences of judicial decisions. The ethical element of Cohen's jurisprudence entails the criticism of law. He seeks to appraise the law as a determinant of human behavior and to suggest how courts should decide cases of particular kinds.

Focusing first on the functional element, Cohen wrote that we must use positive science to identify and organize the law before we can criticize it. Positive science allows us to reduce law to its consequences, to get the meaning of the definition of law from a consequentialist approach. Thus, a functional analysis of a legal rule is essentially a process of describing its consequences.

Cohen wrote that science can "throw light upon the real meaning of legal rules by tracing their effects throughout the social order." For Cohen, therefore, we must scientifically test legal doctrines for their effects on human life. Thus, Cohen did not believe that law should be studied as an autonomous system; instead, we should use psychology, economics, sociology, anthro-

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35. See F. Cohen, Ethical Systems, supra note 19, at 14-48; Cohen, Transcendental Nonsense, supra note 23, at 849.
37. See F. Cohen, Ethical Systems, supra note 19, at 43-45; Cohen, Modern Ethics, supra note 25, at 41.
40. Id. at 46.
41. See F. Cohen, Ethical Systems, supra note 19, at 235-37; Cohen, Review of Cairns, supra note 36, at 807.
ology, and other sciences and social sciences to facilitate the study of law.\textsuperscript{42} He asserted that careful investigation of a law or a judicial decision can reveal its otherwise unforeseen effects and that those effects often diverge from the purposes of the law or the decision.\textsuperscript{43} In some of his writing, Cohen applied this scientific approach to concrete problems. He did a pragmatic analysis of the meaning of property,\textsuperscript{44} and he did an empirical study of summary judgments in New York State to show what difference the summary judgment procedures made in actual civil litigation.\textsuperscript{45}

Cohen argued that functionalism eliminates the legal fictions that abound in judicial opinions; he referred to these fictions as the transcendental nonsense of law. For example, the determination of where a corporation is located for jurisdictional purposes is transcendental nonsense—instead of discussing where a corporation is located, a court should focus on the consequences of deciding where the corporation can be sued. Similarly, Cohen would believe it absurd to hold that one cannot sue a labor union for a tort because it is not a person. Cohen attacked the use of supernatural justifications for judicial decisions: courts should focus instead on social facts and reality and should recognize their role in the distribution of wealth and power in society.\textsuperscript{46}

Cohen summarized functionalism as follows:

Functionalism, as a philosophy, may be defined as the view that a thing does not have a "nature" or "essence" or "reality" underlying its manifestations and effects and apart from its relations with other things; that the nature, essence, or reality of a thing is its manifestations, its effects, and its relations with other things; and that, apart from these, "it" is nothing, or at most a point in logical space, a possibility of something happening.\textsuperscript{47}

\textsuperscript{42} See F. COHEN, ETHICAL SYSTEMS, supra note 19, at 146, 271.
\textsuperscript{43} Id. at 66-67.
\textsuperscript{44} See Cohen, Dialogue, supra note 23.
\textsuperscript{45} See Cohen, A Factual Study of Rule 113, 32 COLUM. L. REV. 830 (1932).
\textsuperscript{46} See Cohen, Transcendental Nonsense, supra note 23, at 809-14.
\textsuperscript{47} Cohen, The Problems, supra note 23, at 7. If Morris Cohen were critiquing his son's functionalism, he might be tempted to attack it as nominalism. Morris Cohen, who was aligned with the sociological jurisprudens, see supra note 12, and Roscoe Pound engaged in a celebrated debate with the realists that was staged in the Harvard and Columbia law reviews of the early 1930s. See D. HOLLINGER, supra note 12, at 180-86; see, e.g., M. COHEN, Philosophy and Legal Science, in LAW AND THE SOCIAL ORDER 219 (1933) (first printed in 32 COLUM. L. REV. 1103 (1931)) [hereinafter M. COHEN, Philosophy]; M. COHEN, supra note 18; Yntema, The Rational Basis of Legal Science, 31 COLUM. L. REV. 925 (1931). Morris Cohen criticized the realists for, among other things, refusing to discuss metaphysical questions and for not ultimately recognizing the metaphysical underpinnings of their theories. See M.
Thus, Cohen concluded: "We shall concern ourselves not with the truth or falsity of a doctrine but with the significance of function-

Cohen, The Place of Logic in the Law, in LAW AND THE SOCIAL ORDER 165, 171-73 (1933) (first printed in 29 HARV. L. REV. 622 (1915)) [hereinafter M. COHEN, The Place]; M. COHEN, Philosophy, supra, at 221-23. The thrust of this criticism was Morris Cohen’s accusation that the realists were nominalists because they failed to acknowledge the reality of universals. He attributed this failure of the realists to their falling prey to the fallacy of reification—regarding universals as separate things, see M. COHEN supra note 18, at 210, which necessarily caused the realists, in Morris Cohen’s view, to believe that abstractions or rules could exist only in an individual skull at a particular time. See M. COHEN, Philosophy, supra, at 221, 223.

Morris Cohen, therefore, argued that the realists were unable to accept any objectivity of meaning because of their latent nominalism. See M. COHEN, supra note 18, at 211. Nominalism allowed the realists to maintain an atomistic conception of law that was reflected in their view that law consists of isolated decisions, which are no more than judicial behavior. See M. COHEN, Philosophy, supra, at 226. Thus, Morris Cohen argued, the realists were essentially irrationalists: they ignored the significance of logic in the law. See M. COHEN, supra note 18, at 203, 216. Morris Cohen countered by arguing that the fact that we can communicate with each other necessitates the existence of a common world or "objectivity." Id. at 211. Judicial decisions are connected or related in accordance with the prevailing rules and precedents, and these relations are somehow objective or universal. See M. COHEN, Philosophy, supra, at 226-27, 242; M. COHEN, The Place, supra, at 172-73.

Morris Cohen maintained that the realists’ failure to recognize the significance of legal rules and principles and their consequent focus on behavior caused them ultimately to be conservative. If, as the realists argued, law consists of uniformities of behavior, then, according to Morris Cohen, we cannot criticize the law. See D. HOLLINGER, supra note 12, at 183. Morris Cohen believed that normative questions about the law are as important as the realist descriptions of judicial behavior. Thus, ironically, one of Morris Cohen’s major criticisms of the realists is the same as his major criticism of the Langdellian mechanical jurispruders: they failed to recognize the need to discuss questions of what the law should be, as opposed to what the law is. See M. COHEN, Law and Scientific Method, in LAW AND THE SOCIAL ORDER 184, 189 (1933) (first printed in 6 AM. L. SCH. REV. 231 (1928)) [hereinafter M. COHEN, Law and Scientific Method]; M. COHEN, The Process of Judicial Legislation, in LAW AND THE SOCIAL ORDER 112 (1933) (first printed in part in 48 AM. L. REV. 161 (1914)); M. COHEN, Philosophy, supra, at 232; M. COHEN, The Place, supra, at 178; M. COHEN, supra note 18, at 208, 218.

Morris Cohen’s jurisprudence can be viewed as an attempt to balance delicately between the views of the mechanical jurispruders and the views of the realists. Indeed, a constant striving for balance marked Morris Cohen’s work, which was full of attempts to reconcile opposing forces or dualities of existence. See, e.g., M. COHEN, Reason and Nature, in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 615, 635, 696-99 (1951) [hereinafter M. COHEN, Reason and Nature]; M. COHEN, The Place, supra, at 183; see also D. HOLLINGER, supra note 12, at 79.

Felix Cohen manages to sidestep most of his father’s criticisms in developing his philosophy of law. In fact, David Hollinger wrote that Cohen attempted to define functionalism so that it would be consistent with his father’s antifunctional metaphysics. See D. HOLLINGER, supra note 12, at 198 n.67. Furthermore, Felix Cohen defended Bentham’s theory of utilitarianism, which he had categorized as functionalism and had described in a manner suggestive of his own theory, against a charge of nominalism. See F. COHEN, supra note 24, at 182.
functionalism as a methodologic principle. Functionalism as a method may be summed up in the directive: If you want to understand something, observe it in action."

Cohen's functionalism is consistent with much of the realist jurisprudence. He focused on the facts of judicial behavior as the reality of law, and thus necessarily concerned himself with narrow categories, not broad transcendental principles. Furthermore, he argued that judges make, and do not discover, law. And, of course, he underscored the difference between law-in-books and law-in-action. Cohen believed that because judicial opinions often mask the real decision of a case, we must observe the degree of obedience to judicial decisions and, consequently, the actual results of those decisions, placing less emphasis on the abstract legal reasoning of the opinions.

An accurate functional description of the law is thus important for Cohen, but it is no more important than an ethical appraisal of the law. Functionalism is necessary, but it is necessary as a precondition to a conscious ethical criticism of law. One must first accurately describe the law through functionalism before one can ethically assess the law. Cohen argued that a functionalist description is necessary to avoid the type of circular arguments, based on transcendental nonsense, that criticize legal rules in purely legal terms.

Cohen revealed his ethical concerns by repeatedly displaying in his writings a strong compassion for people that is unusual in

51. Id. at 237.
52. Id. at 62-63.

Cohen criticized the sociological jurisprudes, see supra note 12, in particular Pound, because they recognized that judges make law but they nonetheless wished to maintain the illusion that judges discover it. Cohen wrote that Pound sought to continue the illusion to reinforce the judges' sense of responsibility and the laypersons' sense of security. See F. Cohen, Book Review, in The Legal Consience 177, 177-78 (1960) (reviewing J. Frank, Law and the Modern Mind (1930)) [hereinafter F. Cohen, Review of Frank]. Cohen's major criticism of Pound and the sociological jurisprudences, however, was that they focus too heavily on the consequences of legal rules and consequently fail to recognize the significance of ethical decisions in the law. See F. Cohen, Ethical Systems, supra note 19, at 4-6 & nn. 6 & 9, 89-90; Cohen, The Problems, supra note 23, at 8-9; Cohen, Transcendental Nonsense, supra note 23, at 8-9; F. Cohen, supra note 24, at 181.
academia. He consistently reminded his readers that human values must be applied to disputes. In fact, Cohen stated that "ethical values are inherent in all realms of human conduct," and hence all people are morally responsible for the consequences of their action or inaction.

Cohen argued that we must counter the forces in modern society that undermine a concern for ethics. The rise of modern commerce has allowed us to discover the stark differences in values among cultures, which suggests that ethics is a futile endeavor and that all values are relative. Furthermore, while ethics had traditionally sought certainty, the growth of modern science reveals the limits of our knowledge and raises doubts about our beliefs. Nonetheless, Cohen emphasized: "An ethics, like a metaphysics, is no more certain and no less dangerous because it is unconsciously held."

Thus, Cohen believed that we must discuss ethics. We must recognize our tacit moral assumptions, whether we are dealing with the social sciences as applied to law or with a mechanical jurisprudence that obscures the ethical character of every judicial decision. Cohen insisted that every judicial decision involves an ethical choice. For example, the question, "Is there a contract?" really asks whether there should be a contract, or more precisely, whether one party should be liable for certain actions. Even choosing what facts are relevant in a case is an ethical decision; logic does not dictate which facts should be considered significant.


58. F. Cohen, Ethical Systems, supra note 19, at 3. Interestingly, Cohen’s belief in the necessity of discussing ethics is reminiscent of Morris Cohen’s insistence upon discussing metaphysics. See supra note 47.


60. See Cohen, Transcendental Nonsense, supra note 23, at 840.

61. Id. at 839-40.
and which facts should be ignored. Likewise, a court's determination of whether or not to follow precedent is an ethical decision. Ultimately, every decision must be judged as good or bad (or right or wrong), and that judgment is an ethical decision, not a question of truth or logic.

Cohen attempted to apply scientific method to ethics. He wrote that science is "dynamically conceived as a process of verification". Science questions everything and has no dogma or self-evident principles. Summarizing scientific method, Cohen wrote: "The two cardinal aspects of scientific method are (1) the logical explication and systematic development of possible hypotheses, and (2) the testing of these hypotheses and implications in the light of immediate observation."

Cohen argued that values are facts, though facts of a peculiar sort. Scientific methodology could, therefore, be applied to those facts (values). Cohen held that all fundamental ethical propositions are always subject to questioning: a science of ethics requires us to consider possible alternative ethical propositions "in the light of a systematic elaboration of the logical consequences" of the various propositions. Cohen wrote:

Ultimately the [ethical] systems we thus derive must face the scientific test of empirical confirmation. They must fit into our immediate moral observations just as a scientific physics must fit into our immediate physical observations . . . . But as the student of physics learns to distinguish what he actually sees in the physical phenomena before him from a mass of improper expectations and inferences, so the student of ethics may hope to refine his ethical observation by viewing the realm of abstract ethical possibilities and examin-

63. See F. Cohen, Ethical Systems, supra note 19, at 33.
64. See id. at 28-33; see also Cohen, The Problems, supra note 23, at 7, 24-25.
65. See F. Cohen, Ethical Systems, supra note 19, at 113-27; Cohen, Modern Ethics, supra note 25, at 42. Attempting to apply scientific method to almost everything was, of course, quite common when Cohen was writing. For example, Peirce and Russell also said that ethics was a science. See F. Copleston, supra note 4, at 318-19, 472.
66. F. Cohen, Ethical Systems, supra note 19, at 118.
67. See id. at 117.
68. Id. at 124.
69. See id. at 116.
70. See id. at 120-21.
71. Id. at 121.
ing the interconnection of propositions in that realm.\textsuperscript{72}

Most importantly, however, even a moral law that satisfies the scientific test of empirical confirmation must always be subject to doubt; all moral laws are constantly refined and brought closer to "truth."\textsuperscript{73}

Finally, Cohen warned that we should not expect to find one correct ethical theory or system.\textsuperscript{74} Indeed, late in his career, Cohen argued for an ethical theory analogous to the relativity theory in physics. Cohen referred to this ethical theory as "field theory" and intended it to coordinate different ethical judgments of the same event. Cohen, in other words, acknowledged that different ethical systems exist, but he theorized that the various systems were somehow related, so that different ethical judgments of the same event could be understood as judgments from different ethical systems. Field theory could relate the different ethical systems and, therefore, could relate the opposed or distorted ethical judgments.\textsuperscript{75} Cohen thus believed in an ethical theory with a changing content.\textsuperscript{76}

Cohen made an initial attempt to develop an ethical system that could be applied to legal problems. In \textit{Ethical Systems and Legal Ideals}, he extensively analyzed possible standards of legal criticism and argued, but was unable to prove, that the concept of the "good life" is most probably the proper ethical basis for legal criticism.\textsuperscript{77} Cohen then argued, but once again was unable to prove, that hedonism is most probably the proper criterion for determining goodness: \textsuperscript{78}"the standard of the good life has been most adequately formulated by the theory of hedonism . . . ."\textsuperscript{79} Similarly, Cohen wrote: "For a legal criticism which finds in happiness the

\textsuperscript{72} Id. (footnotes deleted).
\textsuperscript{73} See Cohen, \textit{Modern Ethics}, supra note 25, at 42.
\textsuperscript{74} See F. Cohen, \textit{Ethical Systems}, supra note 19, at 125-27.
\textsuperscript{76} Id. (footnotes deleted).
\textsuperscript{77} See F. Cohen, \textit{Ethical Systems}, supra note 19, at 146, 291.
\textsuperscript{78} See id. at 54-112.
\textsuperscript{79} See id. at 184-229.
\textsuperscript{79} Id. at 228. Max Radin wrote that Cohen's "hedonism could describe a life of virtuous self-denial as readily as the voluptuous frenzy of Sardanapalus." Radin, supra note 2, at 147.
substance of all valid moral judgment, it is the task of positive science to link the ceremonial show of the legal process with the joys and sufferings of sentient beings.”\(^8\)

Cohen’s ethical hedonism is a form of utilitarianism, and he relied heavily on Bentham in developing his theory.\(^8\) Cohen asserted that “the only things which are intrinsically good are things (experiences) which contain a pleasure surplus . . . .”\(^8\) Elaborating on the meaning of pleasure, Cohen wrote:

In the first place, the word [pleasure] is not restricted to the so-called “lower” pleasures, but includes all sorts of pleasure, such as the pleasures of aesthetic contemplation, self-discipline, altruism, and metaphysical argument. In the second place, pleasure does not mean the absence of desire or the absence of pain, as the absence of pleasure during sound sleep should show. In the third place, pleasure is not identical with the fulfillment of desire. We have all experienced unpremeditated, accidentally achieved pleasures, and on the other hand, things we seek frequently prove to be non-pleasurable.\(^8\)

Cohen’s ethics, in conjunction with his functionalism, allowed him to conclude that law is an instrument or social tool that should be used to promote the good life.\(^8\) Ethics defines the good life. Functionalism reveals the consequences of laws and judicial decisions and allows one to predict future consequences. Thus, one can direct the law to cause future consequences in accord with the good life.

Cohen’s emphasis on ethics distinguishes him from many other realists. Cohen himself separated the realists into two groups: a “right wing” and a “left wing.” The right wing realists, such as Thurman Arnold, focused solely on judicial behavior, re-

\(^{80}\) F. COHEN, ETHICAL SYSTEMS, supra note 19, at 231. As might be expected, Cohen favored equalization of wealth within society. See id. at 79. But Cohen noted that equality and liberty might sometimes be inconsistent, and thus, interestingly, Cohen believed that liberty might have to be restricted in the pursuit of the good life. See id. at 79, 83. Cohen also believed that hierarchy is inevitable in any social structure. See id. at 73-74.

\(^{81}\) Bentham was a hedonistic utilitarian. He argued that we should seek to increase pleasure as opposed to increasing the satisfaction of preferences or desires. See J. BENTHAM, MORALS AND LEGISLATION, supra note 24 at 791-95; J. BENTHAM, THEORY OF LEGISLATION, supra note 24 at 1-4. Cohen cited Bentham and discussed utilitarianism repeatedly in his work. See, e.g., F. COHEN, ETHICAL SYSTEMS, supra note 19, at 43-54. But see id. at 131-32 (rejecting some utilitarian terminology). Cohen also argued that sociological and realistic jurisprudence are based on Bentham’s theories. See F. COHEN, supra note 24, at 179-81.

\(^{82}\) F. COHEN, ETHICAL SYSTEMS, supra note 19, at 185.

\(^{83}\) See id. at 186.

\(^{84}\) See id. at 17-18; Cohen, Modern Ethics, supra note 25, at 48.
jected the importance of all rules and principles, and essentially
denied ethics. For the right wing, realism had become a justification
for the status quo. The left wing realists, on the other hand,
used the functionalist approach to strip the gloss from legal decisions
in order to morally scrutinize the decisions as they really were. Cohen clearly fell into the left wing, and emphasized ethics more than any other realist, perhaps because of his background in philosophy.

The above discussion of ethics reveals that Cohen did not reject the possibility or importance of systematizing "knowledge." Cohen believed that ethical propositions can be systematized, but one must remember that the propositions and the system are always subject to scientific inquiry. Likewise, Cohen did not reject the possibility or value of systematizing the law. Such a systematization would not demonstrate what judicial decisions are "incorrect" and would not dictate the results in cases, but it would identify the diversity in a legal order or system. Cohen further argued that the systematic connections between judicial decisions are what give any one decision its meaning.

Nonetheless, Cohen argued that any systematic analysis of law should not treat law as an autonomous subject. Instead, such an analysis must recognize the importance of both functionalism—through the social sciences—and ethics. These aspects of the law must be a part of any system. Cohen summarized with a warning that systematizing the law does not establish its value:

86. See supra text accompanying notes 69-75; see also Cohen, Modern Ethics, supra note 25, at 41.
87. See F. COHEN, ETHICAL SYSTEMS, supra note 19, at 236.
88. See id. at 239-40. Morris Cohen had made a similar point. See supra note 47.
89. See F. COHEN, ETHICAL SYSTEMS, supra note 19, at 238-39.
90. Cohen wrote:
   Can we find any formula to collocate the relevant considerations in the task of tracing the reaction between any element of law and the rest of the legal order? Any such formula must take account of at least five factors: (1) The personal moral reactions of individuals to whom the administration of law is entrusted towards the substance of the particular legal element; (2) The professional sense of loyalty to the purpose of the original legal element; (3) The accuracy of the modes by which that purpose is transmitted and apprehended; (4) The professional thought-ways which bring different legal elements to mutual relevancy; and (5) The distribution of power within the realm of law administration.
   Id. at 240-41.
Jurisprudence, as the study of the reactions between any part of the dynamic legal order and the rest of that order, is relevant to every valuation of law which is directed to less than the whole law. Its subject matter is not rules of law in prepositional vacuum but the field of judicial conduct. It seeks to discover systematic relations of cause and effect within that field and in this task it is continually dependent upon psychology and general anthropology. Such a legal science does not become a normative science by reason of dealing with invocations to morality, any more than anthropology becomes religion by dealing with men's religious attitudes. It assumes its place in the valuation of law as an instrument for the accurate location of a legal element in the context of its systematic jural significance.91

Cohen further argued that systematizing the law is important because legal rules and principles unquestionably affect decisions. For example, rules and principles tend to control the personal biases of judges when they decide cases because the judges tend to respect their predecessors, who are in a sense reflected in the systematized precedent.92 Thus, Cohen admitted that even when the rules and principles are the myths of transcendental nonsense, they often impress the memories and imaginations of attorneys and judges.93

In a broader sense, Cohen argued that the way we systematize the law—the categories of thought we create—affects our perceptions of law and the meanings we attach to law. If, for example, testamentary disposition is categorized as a property right, then a limitation on testamentary disposition would be viewed as a threat to other property rights and would probably cause great insecurity. On the other hand, if testamentary disposition is distinguished from property rights, as is typically the case, then a limitation on it will not be as alarming.94

Cohen's belief in the value of systematizing further differentiates him from many other realists. Cohen criticized realists who viewed the law atomistically95 and who claimed that judicial decisions are merely based on hunches.96 Cohen argued instead that decisions are not all uncertainty and discretion.97 To Cohen, a ju-

91. Id. at 249.
92. See id. at 242.
94. See F. COHEN, ETHICAL SYSTEMS, supra note 19, at 282-83; see also id. at 86 (thought and expression affect society).
95. See Cohen, Review of Ehrlich, supra note 54, at 1134.
96. See Cohen Transcendental Nonsense, supra note 23, at 842-43.
97. See F. COHEN, Review of Frank, supra note 52, at 179.
dicial decision is a social event. Furthermore, he believed that “actual experience does reveal a significant body of predictable uniformity in the behavior of courts. Law is not a mass of unrelated decisions nor a product of judicial bellyaches.” In other words, Cohen tended to be more conceptualistic than most other realists.

Looking to the future, Cohen summarized his ethical functionalism:

[T]he really creative legal thinkers of the future will not devote themselves, in the manner of Williston, Wigmore, and their fellow masters, to the taxonomy of legal concepts and to the systematic explication of principles of “justice” and “reason,” buttressed by “correct” cases. Creative legal thought will more and more look behind the pretty array of “correct” cases to the actual facts of judicial behavior, will make increasing use of statistical methods in the scientific description and prediction of judicial behavior, will more and more seek to map the hidden springs of judicial decision and to weigh the social forces which are represented on the bench. And on the critical side, I think that creative legal thought will more and more look behind the traditionally accepted principles of “justice” and “reason” to appraise in ethical terms the social values at stake in any choice between two precedents.

III. Reflections of Felix S. Cohen’s Jurisprudence in Federal Indian Law

The thesis of this section is that Cohen’s unique brand of realism is manifested in his Handbook of Federal Indian Law, that the Handbook has had a tremendous affect on the development of much of federal Indian law, and that, therefore, some parts of federal Indian law reflect unusually strong realist tendencies, often arguably to the detriment of tribes and Native Americans.

This section begins with a brief history of how Cohen came to write the Handbook and then discusses, in general, how the Handbook reflects Cohen’s realism. This general discussion is then expanded upon with a detailed illustration in one of the most important areas of contemporary federal Indian law—the scope of state
power in Indian country. Focusing specifically on this area, the approach of the Handbook, and then the development of the law, is described and related to Cohen's realism. Finally, this section concludes with a discussion of the implications and ironies of Cohen's work in the context of federal Indian law.

A. The Handbook of Federal Indian Law

1. How Cohen Came to Write the Handbook. Cohen graduated from Columbia Law School in 1931 and worked for a year as a research assistant to a New York State trial judge. Cohen then entered private practice, but, in 1933, he accepted a one-year appointment in Washington as an Assistant Solicitor in the Department of Interior. Cohen, however, remained in government service in that city for fourteen years, until he retired in 1948.

During his time in Washington, Cohen was involved heavily in Indian affairs. In 1939, he was appointed as a Special Assistant to the Attorney General to conduct an Indian law survey by the Department of Justice. With his friend and colleague, Theodore H. Haas, plus a staff of forty-seven members and contributors, Cohen compiled a forty-six volume collection of federal laws and treaties relating to Native Americans. Based on this study, Cohen prepared the Handbook, which was published in 1942.

When Cohen began working on the Handbook, there had been a century and a half of legal developments concerning Native Americans: over 4,000 treaties and statutes and thousands of judicial decisions and administrative rulings already existed. "Indian law was understandably perceived by lawyers, judges, and legislators as a mass of loosely connected rules without a center of coherent principles." Thus, with no previous synthesis of fed-

103. See infra note 125; see, e.g., California v. Cabazon Band of Mission Indians, 54 U.S.L.W. 3717 (U.S. April 17, 1986) (California appealed from holding that state gambling laws did not apply on reservation and that therefore tribe could operate bingo and gambling parlor), appealing, Cabazon Band of Mission Indians v. County of Riverside, 783 F.2d 900 (9th Cir. 1986).

104. Biographical information on Cohen is drawn from two sources: A Fighter for Justice, supra note 2; Biography, supra note 2.


106. See F. Cohen, supra note 105, at vii; Ickes, Foreword to F. Cohen, supra note 1, at xix.

107. F. Cohen, supra note 105, at vii.
eral Indian law into a "field," Cohen undertook the needed task of systematic analysis of the subject area. Felix Frankfurter wrote:

Only a passionate desire to vindicate our democratic professions would have led anyone to undertake the forbidding task of bringing meaning and reason out of the vast hodge-podge of treaties, statutes, judicial and administrative rulings, and unrecorded practice in which the intricacies and perplexities, the confusions and injustices of law governing Indians lay concealed. Only a ripe and imaginative scholar with a synthesizing faculty would have brought luminous order out of such a mish-mash.

The analytical synthesizing of a field of law is an odd task for a realist: it sounds more like the work of a Langdellian formalist. Thus, for example, the realists often criticized the American Law Institute's Restatement movement of the 1920s, which attempted to encourage uniformity in the law by synthesizing subject areas into "restatements." In fact, Cohen wrote: "The age of the classical jurists is over . . . . The 'Restatement of the Law' by the American Law Institute is the last long-drawn-out gasp of a dying tradition. The more intelligent of our younger law teachers and students are not interested in 'restating' the dogmas of legal theology."

Cohen, however, was not a typical realist. Two unique aspects of his realism—his belief in the value of systematizing and his ethical concerns—fueled his creation of the Handbook. As discussed above, Cohen believed that law can be systematized, but only from a functionalist approach, and not with transcendental nonsense. Cohen wrote:

The realistic author of textbooks will not muddy his descriptions of judicial behavior with wishful thinking; if he dislikes a decision or line of decisions, he will refrain from saying, "This cannot be the law because it is contrary to sound principle," and say instead, "This is the law, but I don't like it," or more usefully, "This rule leads to the following results, which are socially

108. See id.
109. See Margold, Introduction to F. Cohen, supra note 1, at xxviii.
111. See D. Hollinger, supra note 12, at 179. Karl Llewellyn, however, was the chief draftsman for the Uniform Commercial Code—which was also a strange task for a realist. See J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code 3-6 (2d ed. 1980); Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 Stan. L. Rev. 621 (1975).
113. See supra text accompanying notes 86-99.
undesirable for the following reasons * * *.'"114

Cohen's strong ethical concerns were apparent in his sensitivity to the differences between cultures and in his consistent concern for minorities, especially Native Americans.115 He believed strongly that tribes should govern themselves, and that the majority society should not force its notion of expert government onto the tribes.116 Cohen expressed his ethical sentiments in his Acknowledgments to the Handbook:

What has made this work possible, in the final analysis, is a set of beliefs that form the intellectual equipment of a generation—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 . . . . 117


Cohen's ethical concerns have already been noted above as one of the factors that prompted him to write the Handbook—Cohen's concern for Native Americans reflected his concern for ethics.119 Essentially, Cohen recognized an overriding ethical question in federal Indian law: Does the majority society owe, as a matter of justice, a special moral duty to protect and aid

117. F. Cohen, supra note 1, at xxxii.
118. See A Fighter for Justice, supra note 2, at 8, 12-13.
119. See supra text accompanying notes 115-17. See generally F. Cohen, Judicial Ethics, supra note 62, at 162-64 (Indian land cases involve basic ethical questions).
Native American tribes as compensation for past and present societal injustices, including violent coercion and psychological duress? Cohen's affirmative answer to this question is expressed in the specifics and in the flavor of the *Handbook*, which indicate his support for Native Americans in their efforts to maintain their cultures and their independence.

In the Foreword to the *Handbook*, Secretary of Interior Harold L. Ickes wrote that the purpose of the *Handbook* was to empower Native Americans and to avoid their oppression. And, in an article published after the *Handbook*, Cohen, with eloquent sarcasm, criticized the Supreme Court for sometimes ignoring the ethical component inherent in federal Indian law cases:

[Before Europeans came] to North America, this country was claimed by Indians who thought they owned it. Ever since the arrival of the first white immigrants, they have been devoting some of their finest legal talents to discovering defects in these Indian titles and, in that way, devising justifications for the removal of land, minerals, and timber from Indian ownership to white ownership, in the interest of progress. One of the most brilliant and ingenious justifications of this process is that which is given by Justice Jackson in his concurring opinion in [the] Northwest Shoshone case. He advances the theory that Indians were really communists, who did not understand or appreciate property rights. Ownership of land, he says, "meant no more to them than . . . sunlight and the west wind, and the feel of spring in the air. Acquisitiveness, which develops a law of real property, is an accomplishment only of the civilized." It follows, then, that the United States being civilized, is under no legal obligation to pay Indians when it takes away their homes, their timber, their fisheries, their water power, or anything else that might be needed for railroads, canneries, pulp companies, or other progressive organizations that appreciate property rights. In advancing this theory that civilized people have the right to relieve less civilized people of their possessions, Justice Jackson insists that the moral and the legal have nothing to do with each other. He says specifically, referring to moral deserts [sic] and legal rights, "we do not mean to leave the impression the two have any relation to each other."

Ultimately, Cohen wanted the *Handbook* to reduce the number of instances, in the area of federal Indian law, where the courts and administrators ignored the ethical realities and implications of their decisions.

Cohen approached the subject matter of federal Indian law


through the functional method, focusing on actual behavior and consequences. In the Introduction to the *Handbook*, the Interior Solicitor, Nathan R. Margold, wrote:

History and analysis need to be supplemented by an understanding of the actual functioning of legal rules and concepts, the actual consequences of statutes and decisions. Language on statute books, in the field of Indian law as in other fields, frequently has only a tenuous relation to the law-in-action which courts and administrators and the process of government have derived from the words of Congress. The words of court opinions frequently have as tenuous a relation to the actual holdings. Magic "solving words" like "Indian title," "wardship," and "competency," are often used to establish connections, between a case under consideration and some precedent, that turn out on reflection to be purely verbal. Functional study of the federal Indian law in action is essential to a work that may serve the practical purposes of administrators.\textsuperscript{122}

Except for a brief final paragraph on Cohen's experience, Margold concluded the Introduction to the *Handbook* with a long quotation from one of Cohen's jurisprudence articles, appropriately entitled *The Problems of a Functional Jurisprudence*.\textsuperscript{123}

Cohen attempted to systematize the field of federal Indian law by concentrating on factual situations and consequences of decisions and by minimizing his reliance on "transcendental nonsense." Applying a broad functional perspective to the problems of the field, Cohen wrote that an "understanding of the law, in Indian fields as elsewhere, requires more than textual exegesis, [it] requires appreciation of history and understanding of economic, political, social, and moral problems."\textsuperscript{124}

Cohen's approach is best illustrated by focusing on one area of federal Indian law.\textsuperscript{125} In this manner, the broad organization of

\footnotesize

125. As mentioned earlier, the area that will be focused on is the scope of state power in Indian country, which today is one of the most important areas in federal Indian law. See F. Cohen, *supra* note 105, at x; Feldman, *Preemption and the Dormant Commerce Clause: Im-
the Handbook as well as the internal structures and content of Cohen's arguments are more easily explored and related to his realism.

B. An Illustration: State Power in Indian Country

1. The Handbook of Federal Indian Law: State Power in Indian Country. A scan of the "Analysis of Chapters," which is a detailed table of contents in the Handbook, hints at the tenor of Cohen's approach: a focus on narrow factual categories, not broad principles. Although one chapter is entitled "The Scope of State Power Over Indian Affairs," several other chapters also deal with that subject. One chapter focuses on taxation, another focuses on civil jurisdiction of courts, and a third focuses on criminal jurisdiction. Each of these chapters contain sections that deal with state power over Indian affairs.126

The structure within the chapter entitled "The Scope of State Power Over Indian Affairs" is most instructive. It begins with an introduction and then has a section on federal statutes that relate to state power. This latter section has two subsections: the first relates to general federal statutes that empower the states in Indian country, and the second relates to more specific federal statutes.127 The next section is the most significant in terms of demonstrating the influence of Cohen's realism—it is entitled "Reserved State Powers Over Indian Affairs."128 Cohen breaks this section into seven subsections that are based on specific and narrow factual situations: he isolates "situs, person and subject matter"129 in his scheme of organization. Thus, the first subsection is entitled "Indian outside Indian country engaged in non-federal transaction."130 The second is "Indian outside Indian country engaged in federal transaction."131 The third is "Indian

126. See F. COHEN, supra note 1, at xxxiii-xxxviii; see also id. at 116 n.1 (in chapter entitled "The Scope of State Power Over Indian Affairs," the first footnote states that specific bodies of state law are dealt with in other chapters).
127. See id. at xxxiv, 116-19.
128. See id. at xxxiv, 119.
129. Id. at 119.
130. Id. at xxxiv, 119.
131. Id.
within Indian country engaged in non-federal transaction."\textsuperscript{132} The fourth is "Non-Indian outside Indian country engaged in federal transaction."\textsuperscript{133} The fifth is "Non-Indian in Indian country engaged in federal transaction."\textsuperscript{134} The sixth is "Non-Indian in Indian country engaged in non-federal transaction."\textsuperscript{135} The final subsection is a summary.

Cohen breaks down the other chapters on state power with similar detail and focus on narrow factual categories.\textsuperscript{136} In fact, the chapter on criminal jurisdiction has sections that correspond closely with the subsections outlined in the previous paragraph.\textsuperscript{137}

The thrust of this description of the \textit{Handbook} is that its organizational structure is typically realist. It emphasizes specific factual categories corresponding to real-world situations. In this organization, Cohen displays an aversion towards an organization based more on abstract general principles—in Cohen's words, there is a dearth of formalistic "transcendental nonsense."\textsuperscript{138}

With respect to content, Cohen begins the introduction to the chapter entitled "The Scope of State Power Over Indian Affairs" by stating a general proposition that state laws have no force within Indian country in matters affecting Native Americans.\textsuperscript{139} He finishes the introduction by asserting two exceptions to this general proposition: courts can uphold state jurisdiction that affects Native Americans only if either: (1) Congress has expressly delegated to or recognized in a state the power to govern Native Americans, or (2) a question that involves Native Americans also "involves non-Indians to a degree which calls into play the jurisdiction of a state government."\textsuperscript{140} Additionally, when Cohen begins the section on reserved state powers over Indian affairs, he restates the vague second exception: a state has power "where the matter involves non-Indian questions sufficient to ground state jurisdiction."\textsuperscript{141} Cohen then explores the six factual categories

\begin{itemize}
\item 132. \textit{Id.} at xxxiv, 120.
\item 133. \textit{Id.}
\item 134. \textit{Id.}
\item 135. \textit{Id.} at xxxiv, 121.
\item 136. \textit{See id.} at xxxvi-xxxvii.
\item 137. \textit{See id.} at xxxvii, 358-65.
\item 138. \textit{See} Cohen, \textit{Transcendental Nonsense, supra} note 23.
\item 139. \textit{See} F. Cohen, \textit{supra} note 1, at 116.
\item 140. \textit{Id.} at 117.
\item 141. \textit{Id.} at 119.
\end{itemize}
based on situs, person, and subject matter.\textsuperscript{142}

The vague second exception could be called, in a sense, a general principle, but perhaps it is better categorized as a loose standard.\textsuperscript{143} In other words, Cohen is not stating or synthesizing a transcendental principle of federal Indian law that courts could rely upon when deciding cases (to whatever extent courts can ever rely upon transcendental principles). Rather, Cohen essentially invites the courts to focus on the concrete factual circumstances of each individual case. He thus encourages case-by-case analysis with a focus on the narrow facts of each particular case, which is likely to require a balance of interests, such as when a court applies a reasonableness test.\textsuperscript{144}

Another excellent illustration of how the \textit{Handbook} reflects Cohen's realism is found in the chapter on taxation. When Cohen discusses the taxing powers of the states, his approach is either to state a fact-oriented rule and then to expend a tremendous amount of space on a case-by-case march through the judicial decisions relating to that rule, or to start with an extensive case-by-case march through the decisions and then to conclude with a fact-oriented rule. For example, Cohen begins the section on state taxation of personal property of Native Americans with a statement of a fact-oriented rule:

\begin{quote}
Wherever personal property is acquired by or for tribal Indians for use on Indian reservation lands in connection with or in furtherance of the policy adopted by the Government in encouraging the Indians to cultivate the soil and to establish permanent [sic] homes and families, or otherwise aid in their economic rehabilitation, such property may not be taxed by the state.\textsuperscript{145}
\end{quote}

\textsuperscript{142} See id. at 119-21.


\textsuperscript{144} Cohen restates the general proposition regarding state power over Indian affairs and the two exceptions in the summary to this section of the chapter, but, his restatement is as loose and typically realist as before. He writes:

The foregoing sections may be summarized in two propositions: (1) \textit{In matters involving only Indians on an Indian reservation, the state has no jurisdiction in the absence of specific legislation by Congress.} (2) \textit{In all other cases, the state has jurisdiction unless there is involved a subject matter of special federal concern.}

F. Cohen, \textit{supra} note 1, at 121 (emphasis in original).

\textsuperscript{145} Id. at 262.
Cohen then continues with a detailed case-by-case discussion of the subject, using excessively long quotations from the cases.\textsuperscript{146}

Thus, the content as well as the structure of Cohen's arguments is typically realist. Cohen does not make a great effort to synthesize the cases in an attempt to withdraw some overriding principle to supposedly govern them. That type of approach would lead to transcendental nonsense; therefore, he focuses on factual realities and on what the courts are actually doing. To the extent that Cohen does "synthesize" the cases, he utilizes a functional approach to emphasize the factual circumstances of the particular cases and the consequences of the judicial decisions. One could, therefore, say that Cohen \textit{systematizes} the field of federal Indian law, but does not \textit{synthesize} the cases into formalistic rules or principles.\textsuperscript{147}

2. \textit{The Development of the Law: State Power in Indian Country}. The seminal case relating to state power in Indian country\textsuperscript{148}

\begin{itemize}
\item 146. \textit{Id.} at 262-63; \textit{see also id.} at 258-59.
\item 147. In an article published in the same year as the \textit{Handbook}, Cohen did state that there are four basic principles of federal Indian law: (1) the principle of the legal equality of races; (2) the principle of tribal self-government; (3) the principle of federal sovereignty (as opposed to state sovereignty) in Indian affairs; and (4) the principle of governmental protection of Indians. \textit{See F. Cohen, The Spanish Origin, supra} note 124, at 232. These four principles were also stated by Nathan R. Margold in the Introduction to the \textit{Handbook}. \textit{See Margold, supra} note 109, at xxiii-xxv. Nonetheless, these principles were expressed in the body of the \textit{Handbook} more as a perspective of Cohen than as transcendental principles governing the field of federal Indian law. Cohen approached this field largely with the perspective that the federal government should protect tribal cultures and encourage self-government; the principles were the foundation of that perspective. Cohen did not rely on these principles as transcendental principles justifying particular judicial decisions.
\item 148. Congress defined Indian country in 1948:
\begin{quote}
[T]he term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
\end{quote}
18 U.S.C. \textsection 1151 (1982). Congress enacted this definition as part of a criminal code, but the Supreme Court has extended the definition to civil jurisdiction cases. \textit{See DeCoteau v. District County Court}, 420 U.S. 425, 427 \textit{n.2} (1975); \textit{see also Rice v. Rehner}, 463 U.S. 713, 715 \textit{n.1} (1983).

Indian country can be recognized by general federal actions such as treaties, statutes, or executive orders. \textit{See Merrion v. Jicarilla Apache Tribe}, 455 U.S. 130, 133 \textit{n.1} (1982); D. \textit{Getches, D. Rosenfelt, \& C. Wilkinson, Federal Indian Law} 296 (1979).
\end{itemize}
is **Worcester v. Georgia**,\(^{149}\) decided in 1832. In **Worcester**, the state of Georgia had convicted non-Indians of a state crime that had been committed on the Cherokee reservation. Chief Justice Marshall wrote for the Supreme Court, which held:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.\(^{160}\)

Thus, the **Worcester** Court, while invalidating the state convictions, established a broad principle: state laws were absolutely barred on Indian reservations.\(^{151}\) The source of this bar was unclear, though the Court discussed both federal power over Indian affairs and inherent tribal sovereignty, suggesting that they were each possible sources.\(^{152}\) In any event, the **Worcester** doctrine, barring state power on Indian reservations, remained largely intact\(^{153}\) until 1881, when **United States v. McBratney**\(^{154}\) held that a state had criminal jurisdiction over a non-Indian who had murdered another non-Indian in Indian country.

The next seventy-eight years—in the midst of which the **Handbook** was published—produced a confused development in the field of state power in Indian country, with the Court failing to develop any clear or consistent doctrine.\(^{155}\) Some early cases

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149. 31 U.S. (6 Pet.) 515 (1832).
150. Id. at 559-61.
151. The Court extended the doctrine of **Worcester**, which involved state criminal jurisdiction, to state civil jurisdiction also. See, e.g., The Kansas Indians, 72 U.S. (5 Wall.) 217 (1866) (state could not tax lands belonging to an Indian tribe).
153. Some early cases with highly unusual circumstances allowed state power to extend somewhat into Indian country. See, e.g., **Langford v. Monteith**, 102 U.S. 145 (1880) (process could be served within a reservation for a suit in territorial court between two non-Indians); **New York ex rel. Cutler v. Dibble**, 62 U.S. (21 How.) 366 (1858) (state law, which prohibited non-Indians from settling or residing on Indian lands, did not conflict with federal law because it protected the Native Americans).
155. A good example of the Court's inconsistent approach to the area of state power in Indian country involves the federal instrumentality doctrine. For a period of time, the Court relied on the federal instrumentality doctrine to prevent states from taxing the activ-
upheld jurisdiction. For example, in 1885, the Court upheld a state tax on non-Indian fee land located within a reservation, and in 1898, the Court upheld a state property tax imposed on the cattle of non-Indian lessees who had been grazing the cattle on leased reservation lands. But, in some later cases, the Court barred state jurisdiction. In 1921, the Court held that a federal statute and Department of Interior regulations concerning inheritances barred the application of state inheritance laws to Native Americans. Likewise, in 1924, the Court held that a state law that required both spouses to execute a lease was repugnant to federal law when applied to Native Americans.

In 1959, the Supreme Court decided *Williams v. Lee*, a landmark decision that clarified the scope of state power in Indian country to an extent unsurpassed since *Worcester* had been in full flower. In *Williams*, a non-Indian brought a civil action against a Native American to collect for goods sold on credit on a reservation. The Court reviewed *Worcester* and the subsequent cases, and then articulated a test: "Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." The Court held that state civil jurisdiction was barred because it would infringe upon tribal self-government. Thus, *Williams* identified two barriers to state power: "governing Acts of Congress," and infringement on tribal sovereignty. The latter barrier came to be referred to as the *Williams* infringement test.

The Court shifted its emphasis in 1973 when it decided *McClanahan v. Arizona State Tax Commission*, in which the state sought to tax a Native American for income earned on the reservations of non-Indians who leased mineral lands in Indian country, see *Choctaw & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914), but the Court then rejected that doctrine and upheld state taxes on the activities of non-Indian mineral lessees, see *Oklahoma Tax Comm’n v. Texas Co.*, 336 U.S. 342, 365 (1949).
vation. The Court reviewed *Worcester* and *Williams* and then stated: "Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." The Court held that the treaty, which recognized the reservation, and the applicable federal statutes preempted state law.

McClanahan was significant for several reasons. Although earlier cases had applied the doctrine of preemption, *McClanahan* was the first federal Indian law case to expressly use the word "pre-emption." Moreover, the Court's analysis in *McClanahan* clarified the aspects of Indian preemption that were similar to and different from other fields of preemption law. Like other preemption analyses, Indian preemption focused on congressional intent. In Indian preemption cases, however, a traditional backdrop of tribal sovereignty and canons of construction applicable only to statutes and treaties related to Native Americans increased the likelihood that a court would hold that Congress had intended to preempt state law. Furthermore, the Court moved to resolve an ambiguity still lingering from *Worcester*: was federal power or inherent tribal sovereignty the source of the bar to state power in Indian country? *McClanahan* clearly focused on federal power in the form of federal preemption, which is primarily grounded in the supremacy clause of the federal Constitution. Nonetheless, the ultimate relationship between *Williams* and *McClanahan* re-
mained to be clarified. 173

The Court radically altered the Williams infringement test in 1980, when it decided Washington v. Confederated Tribes of Colville. 174 The state of Washington sought to tax the on-reservation sales of cigarettes to nonmembers of the tribes. 175 The tribes owned and operated the smoke shop that sold the cigarettes and also imposed a tribal tax on the sales. The Court restated the infringement test: "The principle of tribal self-government . . . seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." 176 Thus, to determine whether state law applied in Indian country, the Court would weigh federal and tribal interests against state interests. The Court had changed the infringement test into a balancing test.

The Court similarly modified the Indian preemption analysis in White Mountain Apache Tribe v. Bracker, 177 decided later in 1980. The state of Arizona sought to impose its motor carrier license and use fuel taxes on non-Indian corporations, that had contracted with a tribal timber enterprise to perform logging operations on the reservation. The Court stated that there are "two independent but related barriers" 178 to state power in Indian country: federal preemption and infringement of tribal sovereignty. 179 The Court began its preemption analysis consistently with the traditional notions of Indian preemption law—focusing on congressional intent in light of the backdrop of tribal sovereignty and the canons of construction. 180 But, the Court continued by stating that it must make a "particularized inquiry" into

173. See Feldman, supra note 125.
175. The Court distinguished tribal members from non-Indians and Native Americans on the reservation who were not members of the tribes. See id. at 160-61.
176. Id. at 156; see id. at 161. McClanahan had been the first case to mention state interests as a legitimate consideration in the context of a dispute involving state power in Indian country. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171, 179 (1973). Three years after McClanahan, the Supreme Court held that a state law imposed only a "minimal burden" on the Native Americans and thus did not frustrate tribal self-government or congressional enactments. Moe v. Confederated Salish and Kootenai Tribes of Flathead Indian Reservation, 425 U.S. 463, 481-83 (1976).
178. Id. at 142.
179. Id.
180. Id. at 143-44.
the state, federal, and tribal interests.\textsuperscript{181} Thus, although concluding that federal law governing Indian timber harvesting left no room for state regulation, the Court nonetheless weighed the federal and tribal interests against the state interests.\textsuperscript{182}

Thus, \textit{White Mountain} was significant for two reasons. First, it clarified the relationship between the \textit{Williams} infringement test and the \textit{McClanahan} preemption analysis: they are two independent but related barriers to state power. Second, \textit{White Mountain} apparently changed the Indian preemption analysis into a balancing test similar to the one that \textit{Colville} had used with the infringement analysis.

Although \textit{White Mountain} might have left some doubt about the approach to be used in an Indian preemption analysis,\textsuperscript{183} subsequent cases erased all ambiguities. In \textit{New Mexico v. Mescalero Apache Tribe},\textsuperscript{184} the Court stated: “State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.”\textsuperscript{185}

Thus, in summary, the Court in \textit{Worcester} began with a clear and absolute bar to state power in Indian country, based arguably on federal power and tribal sovereignty. Over the next 127 years, the Court modified the \textit{Worcester} doctrine, though without clear analytical articulation, until the Court announced the \textit{Williams} infringement test. Then, the Court in \textit{McClanahan} explicitly identified a second bar to state power: federal preemption. Subsequent cases clarified these two bars as independent but related barriers to state power, but also changed the two bars into balancing tests. Thus, in any case arising today, to determine the scope of state power in Indian country, a court must balance federal and tribal interests against state interests. Each case must essentially be approached ad hoc, with a particularized inquiry into its narrow concrete facts.

These changes in the law regarding state power in Indian

\textsuperscript{181} \textit{Id.} at 145.
\textsuperscript{182} \textit{Id.} at 145-50.
\textsuperscript{183} See Feldman, \textit{supra} note 125, at 676 n.54.
\textsuperscript{184} 462 U.S. 324 (1983).
country have heralded in greater and greater state incursions into Indian affairs.\textsuperscript{186} For example, in \textit{Colville}, the Court allowed the state to apply its sales tax to all nonmembers of the tribes who bought cigarettes at the tribal smoke shop. Moreover, the Court allowed the state to require the tribes both to collect the tax and to keep records of all sales, including nontaxable sales to tribal members. Even further, the Court held that the state could enforce its sales tax by seizing tribal cigarette shipments before they reached the reservation.\textsuperscript{187}

More recently, in \textit{Rice v. Rehner},\textsuperscript{188} the Supreme Court held that Congress had delegated authority to the State of California permitting the State to regulate liquor sales by a federally licensed Indian trader who was operating a general store on an Indian reservation. \textit{Rice} was extraordinary because the Court of Appeals had actually held that federal law preempted the state regulations. The Supreme Court, however, by focusing heavily on the specific facts of the case and on state interests, found that Congress had not preempted but had instead authorized state law. Without question, decisions like \textit{Colville} and \textit{Rice} would have been nearly impossible to justify without the advent of the ad hoc and fact-specific balancing test.

3. \textit{Relationship Between the Handbook and the Development of the Law.} Cohen's approach in the \textit{Handbook} to the problem of state power in Indian country reflected the functional component of his realism. He focused on narrow concrete factual situations, and when he did synthesize the cases to some limited extent, he typically articulated a loose standard that invited a case-by-case analysis tailored to the narrow factual circumstances of each situation. He did not rely upon transcendental principles as bars to state power in Indian country.\textsuperscript{189}

The law addressing the problem of state power in Indian country has developed from the once clear and absolute bar of \textit{Worcester} to the traditional infringement and preemption analyses, and now to the present standard that requires a balance of interests—a typically realist approach to the issue. The law today re-

\begin{itemize}
\item \textsuperscript{186} See Feldman, \textit{supra} note 125; see, \textit{e.g.}, \textit{Rice}, 463 U.S. 713 (1983).
\item \textsuperscript{188} 463 U.S. 713 (1983).
\item \textsuperscript{189} See \textit{supra} text accompanying notes 126-47.
\end{itemize}
quires a particularized inquiry into the narrow concrete facts of each case. Since no broad and clear principles govern the cases, a case-by-case analysis is necessary.\textsuperscript{190}

The realist approach of Indian preemption law is particularly evident when it is compared with preemption in other fields. Originally, Indian preemption developed similarly to preemption in other fields in that the focus of both analyses was the discovery of congressional intent. Indian preemption differed only because tribal sovereignty served as a significant backdrop to the analysis and because special canons of construction affected the interpretation of congressional acts related to Native Americans. Thus, preemption was more likely to be found in an Indian preemption case than in a case from another field.\textsuperscript{191}

With preemption analysis in other fields, the Supreme Court has steadfastly maintained its traditional approach of searching for congressional intent,\textsuperscript{192} despite frequent criticisms and suggestions that it move toward an approach of balancing state interests against federal interests.\textsuperscript{193} Yet, in Indian preemption cases, the Court has wholeheartedly adopted a balance of interests test, though it still pays lip-service to congressional intent. Thus, the development of Indian preemption unmistakably reflects a realist influence—in particular, Cohen's realist influence—whereas preemption in other fields has maintained a more formalistic approach.

With the courts making a particularized inquiry into the interests at stake in each case, the continuance of legitimate tribal sovereignty is largely at the whimsical sway of political pressures: in any particular case, a court can reach the decision that is best for the majority of society at that time. Needless to say, states and state governments represent many more people and wield considerably more economic and political power than tribes or tribal governments. Further, the sovereign powers of the states are much more clearly defined than the powers of most tribes—the

\textsuperscript{190}See supra text accompanying notes 148-87.

\textsuperscript{191}See supra text accompanying notes 169-71.


sovereignty of the states is to a great extent constitutionalized in both the federal and state constitutions.¹⁹⁴ Thus, the balance of interests test is likely to allow the states to extend their power further and further into Indian country and over Native American affairs. Moreover, every extension of state power entails a corresponding weakening of tribal sovereignty.¹⁹⁵

One certainly cannot prove that the *Handbook* has alone caused the law to develop along this realist path. Nonetheless, an examination of the *Handbook* reveals that it reflects Cohen's realism, and the description of the present state of the law regarding state power in Indian country reveals that it too reflects a similar realist approach. Thus, one can reasonably conclude that the *Handbook* has significantly influenced the development of the law.

Besides the descriptive similarities between the *Handbook* and the development of the law, another factor strongly suggests that the *Handbook* has heavily influenced the development of the law in this field. Namely, the *Handbook* has had a tremendous affect on all aspects of federal Indian law. It has been cited often, and even when not cited, it has influenced how attorneys and judges approached Indian law cases. For example, in 1956, Chief Justice Warren stated that Cohen was "an acknowledged expert in Indian law,"¹⁹⁶ and then quoted and followed the *Handbook*.¹⁹⁷ Felix Frankfurter wrote: "His *Handbook of Federal Indian Law* established Felix Cohen as the unrivaled authority within the field. It became the vademecum of all concerned with its problems—administrators, legislators, lawyers, friends and exploiters of Indians. It was an acknowledged guide for the Supreme Court in Indian litigation."¹⁹⁸

This argument is not intended to suggest that the *Handbook* was the sole cause of the development of the law along a realist

¹⁹⁵. See generally Comment, *supra* note 125, at 578-87 (discusses the possible implications of a balancing test in the context of disputes involving environmental law).
¹⁹⁷. *Id.* at 9.
path—five other factors and their relationships to the Handbook and the law are worth noting. First, an obvious factor is that realism was a powerful movement in American law that significantly influenced the development of many fields. \textsuperscript{199} Second, the membership of the Supreme Court at any particular time certainly affected the decisions made during that time. Third, the tenor of feeling toward Indian affairs influenced decisions: congressional policies towards Native Americans have fluctuated wildly over the years, ranging from policies actively seeking to terminate tribes to policies promoting tribal survival and self-government. \textsuperscript{200} Fourth, the nature of the field of Indian law, manifested in several ways, may have influenced the development of the field. For example, focusing on the area of the scope of state power in Indian country, when Cohen wrote the Handbook, the once clear Worcester doctrine was in shambles and an essentially unrelated mass of cases constituted that area of the law. This state of the development of the law probably affected how Cohen wrote the Handbook and how the Supreme Court subsequently developed the area. Also, federal Indian law is a unique field because it encompasses almost all fields of law—criminal law, taxation, trusts, and many other fields. Thus, synthesizing federal Indian law presents an unusually difficult task. Fifth and finally, the development of the law has been influenced by the subsequent editions of the Handbook. The Handbook was reissued three times. In 1958, the Department of Interior revised and republished the Handbook. In 1971, the American Indian Law Center and the University of New Mexico republished the original Handbook in facsimile form. Again in 1982, the Handbook was revised and republished by a board of editors, composed of current Indian law scholars. These subsequent publications make the task of tracing the effect of the original Handbook more difficult, but a brief exploration of the circumstances surrounding the subsequent editions suggests that the

\textsuperscript{199} See W. Twining, supra note 13 at 375-87 (overview of the significance of the realist movement). Twining wrote: "Few jurists, few practising lawyers, and few academic lawyers have consciously and openly opposed the proposition that it is desirable to adopt a broad perspective and consider the law in its social context." Id. at 382.

original is of unquestioned importance.

The original 1942 edition had been published under the auspices of the Department of Interior. Subsequent to its publication, however, official government policy towards Native Americans shifted dramatically towards an anti-Indian policy of termination. The original Handbook was therefore an embarrassment to the government. Consequently, the Department of Interior rewrote the Handbook, publishing the new edition in 1958. This new version reflected the changed governmental approach towards Indian affairs; it focused more on the plenary power of the federal government over Native Americans and it downgraded tribal sovereignty. In fact, the Introduction to the 1958 edition expressly stated that it was published "for the purpose of foreclosing, if possible, further uncritical use of the earlier edition by judges, lawyers, and laymen."

In response to an increasing demand, the American Indian Law Center and the University of New Mexico published, in 1971, a facsimile of the original Handbook. Then in 1982, a board of editors rewrote the Handbook to account for the considerable changes that had occurred in the field since 1942. The approach in the 1982 edition was much more sympathetic to Cohen's outlook and to tribal sovereignty than the 1958 edition had been. Indeed, the Introduction to the 1982 edition rejected the 1958 edition as an unscholarly piece of propaganda.

Over the years, attorneys, judges, and administrators have not been relying solely on the original Handbook and its 1971 facsimile

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201. See supra note 200 and accompanying text.
202. UNITED STATES DEPARTMENT OF INTERIOR, FEDERAL INDIAN LAW (1958) [hereinafter DEPT. OF INTERIOR].
203. See F. COHEN, supra note 105, at ix. Philip S. Deloria wrote about the 1958 edition:

Tribal power and tribal abilities are downgraded; a preoccupation with federal power over the tribes is evident; Cohen's description of history is mitigated without specific disagreement or citation to opposing authorities. Where Cohen sees the tribes as sovereign peoples, entitled to self-government and responsible for their own destinies, the 1958 edition tends to see them as thorns in the side of the American system of government.

F. COHEN, supra note 1, at xviii (Publisher's Note).
204. DEPT. OF INTERIOR, supra note 202, at 1.
205. F. COHEN, supra note 1.
207. See id. at ix.
edition; they have also been relying on the 1958 and 1982 editions. Because of this varied reliance, one might question the importance of the original to the development of federal Indian law. Nevertheless, several reasons demonstrate that the original *Handbook* has unquestionably and significantly influenced the development of the law.

The original edition became the standard reference book in the field long before any subsequent editions were published. Thus, the approach of many people to the problems of federal Indian law was already shaped when the subsequent editions were published. Additionally, the original *Handbook* significantly influenced the form and content of the subsequent editions in two ways. First, a review of the subsequent editions reveals that they were modeled after the original. For example, the chapter in the 1958 edition on the scope of state power over Indian affairs is almost identical to the same chapter in the original edition. Second, the developments in the law that already reflected the influence of the original edition had to be incorporated by the subsequent editions.

Finally, the 1982 edition was published so recently that it has not yet supplanted the original as a significant factor in the overall historical development of the law. For example, the area of the scope of state power in Indian country was largely developed to its present form before the 1982 edition became available. Of course, the 1982 edition is now frequently cited in federal Indian law cases and is unquestionably destined to influence the field over time.


209. See DEPT. OF INTERIOR, supra note 202, at 501-14. The only difference between the 1958 edition and the original edition is that the six subsections of the last section in the chapter of the original edition, which related to specific factual possibilities, have been condensed into four subsections. The first three subsections in the 1958 edition are the same as the first three in the original edition. The last three subsections, disregarding the summary, are condensed under the heading of “non-Indian activities.” Compare id. with supra text accompanying notes 127-35.
C. Implications and Ironies

Comparing Cohen's realism—ethical functionalism—with his *Handbook of Federal Indian Law*—with its narrow factual categories, loose standards, lack of transcendental principles, and strong ethical concerns for Native Americans—has revealed striking similarities, suggesting that the *Handbook* reflects Cohen's brand of realist jurisprudence. Not coincidentally, in the area of the scope of state power in Indian country, federal Indian law has adopted a strong realist approach. In that area, the Court now makes a particularized inquiry into the unique facts of each case, focusing on a balance of federal, tribal, and state interests. Previously overarching principles, such as tribal sovereignty and congressional intent, are now merely factors that influence the balance—they are no longer determinative principles. Moreover, recent developments in Supreme Court doctrine on tribal sovereignty illustrate that this realist trend in federal Indian law is spreading beyond the field of state power in Indian country. Tribal sovereignty—the right of tribes to govern their members and territories—has traditionally been a broad and fundamental principle. The Supreme Court has held that tribal sovereignty is not derived from the federal government; instead, tribal powers are "inherent powers of a limited sovereignty which has never been extinguished."²¹⁰ Furthermore, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status [on the federal government]."²¹¹

Despite these Supreme Court endorsements of broad tribal powers, two recent cases suggest that the Court has begun to approach questions of tribal sovereignty with a more fact-oriented or realist method that is weakening tribal power. In *Montana v. United States*,²¹² decided in 1981, the Court held that the Crow tribe lacked the power to regulate hunting and fishing by non-Indians on non-Indian fee land located within reservation boundaries. The Court reasoned that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to con-

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²¹¹. Id. at 325; see Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
trol internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”

Then, in 1983, Rice v. Rehner held that the significance of the backdrop of tribal sovereignty in preemption cases is undermined if the tribe does not have a history of regulating the disputed field. Thus, the Court held in Rice that tribal sovereignty was not significant to its determination of whether Congress had preempted state liquor regulations because the tribe had not historically regulated the sale of liquor on its reservation. The Court, by suggesting that tribal sovereignty does not extend to activities other than those that have been historically regulated by a tribe, is establishing a trend that, if continued, will require an ad hoc factual inquiry to determine the scope of tribal power in each judicial decision regarding tribal sovereignty. Thus, the realist trend in federal Indian law may be most evident in the field of the scope of state power in Indian country, but it is not limited to that field.

The development of the law along this realist path, particularly with respect to state power in Indian country, reflects the significance of the Handbook, which in turn reflects Cohen’s realism. The Handbook directly influenced attorneys, judges, and administrators, and further served as a catalyst allowing other factors to push the law in realist directions. Thus, federal Indian law today reflects the significance of Cohen’s jurisprudence: his realist or functional methodology has significantly shaped the development of the law. Indeed, Cohen’s influence on federal Indian law illustrates that jurisprudential ideology can, and sometimes does, significantly affect the course of the law in the courts.

The importance of Cohen’s work is a monument to his scholarship and dedication. Nonetheless, the success of his work is somewhat tempered by painful ironies. Cohen unquestionably supported tribal self-government and believed that the protection of Native American cultures from the dominance of the majority society was an ethically significant problem. Overall, Cohen’s work

213. Id. at 564. The Court, however, ignored Montana in Merrion v. Jicarilla Apache Tribe, decided in 1982, where it held that the tribe had the power to impose a severance tax on minerals extracted by non-Indian lessees. 455 U.S. 130 (1982).
215. Id. at 719-33.
was undoubtedly beneficial to Native Americans. But, the law regarding the scope of state power in Indian country has developed so that states are increasingly able to extend their power over Native Americans, thus undermining tribal self-government. This development of the law is partially due to Cohen’s functional jurisprudence, as reflected in his *Handbook*. Thus, although Cohen always fought on behalf of Native Americans, his realist approach to problems of federal law has thwarted the attainment of some of his goals. This unfortunate realization is even more ironic because of Cohen’s sensitivity to how judicial decisions and laws can ultimately have effects that diverge from their purposes.

This irony is better understood by exploring a possible alternative approach to the problem of the scope of state power in Indian country. As discussed above, the current stance of the law is that the Supreme Court recognizes two independent but related barriers to state power: federal preemption and infringement of tribal sovereignty. These two barriers, however, have merged into one balancing test: weighing federal and tribal interests against state interests. Both barriers are grounded on federal power and primarily spring from the supremacy clause of the federal Constitution.

An alternative approach to this issue is to maintain the two barriers, but to clarify (or change) how they are applied. One can reasonably argue that the infringement barrier should spring primarily from the dormant Indian commerce clause, not from the supremacy clause. Accepting this theoretical foundation for the infringement barrier, the use of a balancing test to determine infringement of tribal sovereignty would then be analytically or conceptually more understandable. The Supreme Court presently uses a balancing test to apply the dormant interstate commerce clause—the Court weighs federal interests against state interests to determine if a state law interferes with the dormant interstate commerce clause. The use of a balancing test to apply the dor-

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217. *See supra* note 43 and accompanying text.


219. I develop this argument in Feldman, *supra* note 125.

The corollary to this argument is that the application of the Indian preemption barrier would be clarified (or changed). By referring to the infringement barrier as a dormant Indian commerce clause test and by paralleling it with dormant interstate commerce clause doctrine, the infringement barrier would be distanced from the preemption barrier, which would still primarily spring from the supremacy clause. Consequently, Indian preemption law could be altered so that it would once again be conceptually consistent with preemption doctrine in other fields. That is, Indian preemption would be based on a search for congressional intent to preclude state law. This search for congressional intent would be informed or guided by a backdrop of tribal sovereignty and the special canons of construction applicable to treaties and statutes dealing with Native Americans.

This alternative approach to the issue of the scope of state power in Indian country is certainly vulnerable to a functionalist attack. Hypothetically, Cohen could argue that this approach is a slave to an empty formalism because it focuses on the conceptual consistency of the legal system. Furthermore, a decision based on so-called congressional intent and special canons of construction would be transcendental nonsense. Cohen would prefer a more candid discussion of the consequences of the legal rules and of the actual concrete interests and values that are at stake in each isolated judicial decision.

The weakness with Cohen’s hypothetical retort is that, again ironically, it ignores the realities of judicial decision making. Cohen believed that the application of the functional method must be accompanied by an ethical appraisal of the law. But, the Supreme Court has adopted his functional method without adopting his ethical focus or values. If a person has particular ethical values that he or she is seeking to advance through the law, then formalistic principles (or transcendental nonsense) might sometimes prove to be the most effective means of attaining that goal. Courts dislike express ethical questions and rarely discuss them explicitly. Thus, in reality, if a court is applying a balancing test to arrive at a decision, one factor that is unlikely to get its due consideration is the ethical aspect of the case. Courts do not readily discuss eth-
Ethical considerations, however, can be packaged into legal principles and rules. If an advocate can convince a court to adopt a legal rule that tacitly incorporates his or her ethical values, then, future application of that rule will, to some extent, also be a tacit application of those particular ethical values. I am not suggesting that the purposes of every legal principle and rule are always manifested simply by applying that principle or rule. But, I am suggesting that, in some circumstances, a particular ethical value might be better advanced by a formalistic legal principle or rule than by an ad hoc balancing of interests. For example, in the area of state power in Indian country, if the Court decided preemption cases by focusing on congressional intent and the special canons of construction, the Court would tacitly but strongly advance the ethical value that the majority society owes, as a matter of justice, a special moral duty to protect and aid Native American tribes as compensation for past and present societal injustices, including violent coercion and psychological duress. The corollary of this ethical value is that Native Americans have, as a matter of justice, a moral right to maintain their independent societies and cultures in any manner that they choose. As the law currently stands, however, when the Court decides an Indian preemption case, it is unlikely to explicitly discuss or to give sufficient weight to ethical values. These values are likely to be subordinated to more "acceptable" judicial factors, such as the economic effects of a decision.

This discussion suggests that one should be hesitant to separate the form of legal reasoning or argument from its ethical consequences. Although the form of legal argument can strongly influence the development of the law, that influence is significant often because of its ethical consequences. Different forms of reasoning, such as realist or formalist, might in specific circumstances influence the attainment of certain ethical goals. With the example of Indian preemption, a formalist approach might protect the

221. Of course, there are exceptions. For example, in a dissent in a federal Indian law case, Justice Black wrote: "I regret that this court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word." Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

rights of Native Americans better than a realist approach. The formal question of what type of reasoning to use is, however, less significant than the substantive question of whether certain ethical goals are attained. The significance of the form of argument arises from its ethical consequences. Unfortunately for Native Americans, the Supreme Court has adopted Cohen's functional method with respect to the issue of state power in Indian country, but the Court has not embraced his ethical values about Native Americans. Without Cohen's ethical values, his functional method, as expressed in the balancing test of contemporary Indian preemption law, facilitates judicial decisions that undermine Native American rights.

This leads to another ironic element of Cohen's work, though this element has had a less tangible influence upon federal Indian law. Cohen clearly was sensitive to the differences between cultures and loathed the notion of one government imposing its beliefs upon another government. Despite this conviction, Cohen also believed in a hedonistic utilitarian ethics and a functional methodology that together entailed social engineering. Social engineering, however, necessarily requires some people imposing their value judgments onto others—that is, social engineering dictates that supposed experts determine the fates of other people. Such a social methodology has frightening potential for a minority such as Native Americans: a utilitarian court or legislature will ordinarily pursue the path that promises the greatest total pleasure for society, even if some minorities bear an unfair burden. Thus, for example, the termination policy of the 1950s, when Congress sought to force Native Americans to assimilate into the majority society by withdrawing recognition of tribal entities, could theoretically be justified as increasing the total pleasure of society even though it injured Native Americans.

Cohen, however, clearly did not believe that tribes should be forced to assimilate into the majority society. Cohen might even hypothetically argue that social engineering could be used on the majority society to influence it to accept continuing and powerful tribal sovereignty, but he would be hard pressed to convince anyone that this tactic would increase the overall pleasure of society.

This inconsistency in Cohen's work suggests that although he expressly argued for a consequentialist ethics in the form of hedonistic utilitarianism, he also tacitly followed a more intuitive or deontological ethical approach. This intuitionist morality may have been the basis for his lifelong support of minorities, especially Native Americans. Thus, Cohen's ethical stance concerning Native Americans—that, as a matter of justice, the majority society owes a duty to protect and aid Native Americans because of past societal wrongs—was probably based more on an intuitive ethical framework than on a true utilitarian calculation.

This recognition of the inconsistency in Cohen's ethics suggests a final ironic conclusion. One can argue that the Supreme Court has not only explicitly adopted Cohen's functional methodology but has also implicitly adopted his utilitarian ethics as manifested in the balancing test for state power in Indian country. By balancing the various interests at stake in a case, the Court attempts to maximize the total pleasure of the society. That this approach may lead to results that are inconsistent with Cohen's more intuitive ethical values about Native Americans is problematic. Thus, the fact that Cohen did not expressly acknowledge the more intuitive elements of his ethical framework may have prevented him from envisioning how his functional methodology could subvert Native American rights.


225. For example, Cohen characterized one of the ethical issues in federal Indian law cases as a "question of the right of the powerful to take from the weak," and called this question "theological." F. Cohen, Judicial Ethics, supra note 62, at 164.

226. See supra text accompanying note 117.

227. The ironies of Cohen's work should alert and sensitize future advocates of Native Americans to the impacts of a judicial decision for the future of their tribal or Native American clients. The importance of winning one case today should not overshadow the significance of the decision to the long-range interests of the client as well as of all Native Americans. Certainly, an advocate should always seek to win every case, but in federal Indian law, one must be especially sensitive to the implications of one's arguments for the future development of the field. For example, cases such as Williams v. Lee and White Mountain Apache Tribe v. Bracker were decisions that the Native Americans won, but the reasoning of the decisions ultimately led to greater state incursions into Indian country. See Comment, supra note 125, at 565-74.
IV. Conclusion

This study of Felix S. Cohen's jurisprudence, his *Handbook of Federal Indian Law*, and the development of federal Indian law revolves around two general points: jurisprudential ideology can influence the development of the law in the courts, and this influence is significant often because of its ethical consequences. One should, therefore, be wary of discussing forms of legal argument apart from their ethical consequences.

More specifically, this study reveals a previously unrecognized but nonetheless significant influence on the development of federal Indian law: namely, Cohen's realist jurisprudence. In particular, the Supreme Court has largely adopted Cohen's functional approach to the problem of the scope of state power in Indian country. The Court now weighs federal and tribal interests against state interests to determine whether state law should be upheld in Indian country.

Even though Cohen was a strong advocate for Native Americans, the Court's use of his functional approach has to some extent facilitated the weakening of Native American rights. In a dispute over state power in Indian country, the most significant factor favoring Native Americans is a commitment to their ethical right to maintain their independent societies and cultures in any manner that they choose. This ethical right is a matter of justice and is based on past societal wrongs inflicted by the majority society. Such an ethical factor, however, is unlikely to be expressly considered or given sufficient weight in the current balancing test for determining the scope of state power.

In some circumstances, Cohen's functional methodology may be an effective means to attain certain goals. In the context of federal Indian law, however, a functional approach may be particularly harmful to Native Americans and Indian advocates. For tribes to prosper culturally, federal Indian law uniquely needs to develop broad doctrines that could theoretically govern cases and lead to, or at least facilitate, results that favor tribal independence. As long as cases are decided ad hoc, with a focus on the nonethical interests at stake, tribes are likely to continue to have their powers slowly eroded under the constant pressures of the economic, political, and cultural forces of the majority society.