

“FELIX COHEN WAS THE BLACKSTONE OF FEDERAL INDIAN LAW:” TAKING THE COMPARISON SERIOUSLY

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ABSTRACT

This paper explores the many facets of Rennard Strickland’s comparison between Sir William Blackstone, author of the 1765-69 Commentaries on the Laws of England, and Felix Cohen, architect of the 1942 Handbook of Federal Indian Law. It consists of a side by side analysis of both authors’ master works, political and educational projects, as well as general contribution to jurisprudence. It reveals that despite the stark differences between Blackstone’s work on the English common law from his professorship at Oxford in the late eighteenth century, and Cohen’s endeavors on the US federal law concerning Native Americans as a civil servant at the turn of the 1940s, there are remarkable similarities in the enterprises of legal scholarship the two jurists took on, the larger political projects they promoted, and their role in the development of legal thought. The idea that “Felix Cohen was the Blackstone of Federal Indian Law” has stylistic appeal and could have been little more than a gracious way to celebrate Cohen. An in-depth comparative examination of legal history and jurisprudence however corroborates and amplifies the soundness of the comparison.

KEYWORDS

Legal History, Jurisprudence, Comparative Law, Native American Law, Legal Education

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INTRODUCTION

Rennard Strickland has referred to Felix Cohen as “the Blackstone of Federal Indian Law,”¹ for his work on the *Handbook of Federal Indian Law*.² The analogy has been received positively by other experts of Native American Law, and used again over the years.³ Cohen and Blackstone did not know each other, for they lived at different times, on different continents. Moreover, while they both spent some time teaching law, their overall careers had little in common. Sir William Blackstone published his *Commentaries on the Laws of England* in eighteenth century England during his tenure as Vinerian Professor at Oxford;⁴ Felix Cohen was at the forefront of legal realism in American jurisprudence in the 1930s and contributed to the 1942 *Handbook* as a civil servant within the Department of Justice and then the Department of the Interior. Despite these striking differences at the outset, both Blackstone and Cohen achieved the unprecedented task of presenting the law of a field left to centuries of scattered accumulation through distinct and specialized sources in a comprehensive and logically organized fashion.

The comparison could soundly rest on this similar achievement alone and be fully justified. However, Strickland and others did not say “Cohen’s *Handbook* is the Blackstone’s *Commentaries* of Federal Indian Law”; the comparison is not between the two publications, or rather it is not just between the two publications, but between the two scholars. Although the instances where such comparison appears unmistakably focus on the comprehensive and organized character of the two works, the phrasing suggest that, beyond a stylistic praise of Cohen, the careful reader will consider comparing the two jurists in the total body of their work. Let us take this invitation seriously.

Looking at the work of Blackstone and Cohen, numerous elements lead me to think that there is more to be said and considered than the mere resemblance of the publications. This intuition gave birth to the present paper and should be the guiding thread in what follows. With this paper, I aim to explore and analyze the soundness and the depth of the comparison in its many potential meanings. This is why I will enlarge the breadth of inquiry at each step of the assessment so as to best appreciate the extent to which a comparison is tenable.

First of all, I will turn to the core of the comparison, i.e. the parallel between the *Commentaries* and the *Handbook*. I will distinguish here between on the one hand, the nature and characteristics of the works, and on the other hand, their reception and their impact on the jurisprudence. In this first section, I will test the following assumptions: (i) the structures of Cohen’s *Handbook* and Blackstone’s *Commentaries* share a similar rationale of comprehensive organization of the legal

¹ Rennard Strickland, *Indian Law and the Miner’s Canary: The Signs of Poison Gas*, 39 CLEV. ST. L. REV. 483, 483 (1991). We can note that Strickland was the main editor for a 1982 reedition of the HANDBOOK initially published in 1941, see HANDBOOK (1982), *infra* note 28.

² FELIX S. COHEN, U.S. DEP’T OF THE INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW (1941) [Hereinafter HANDBOOK (1941)].

³ See, e.g. Steven Paul McSloy, ‘The Miner’s Canary’: A Bird’s Eye View of American Indian Law and Its Future, 37 NEW ENGL. L. REV. 733 (2003).

⁴ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS (1765-69), [Hereinafter COMMENTARIES].

norms in the field, (ii) these features allowed the publications to become a primary source for lawyers and judges, and (iii) both works contributed to or led a renewal of legal thinking in the field they addressed.

We cannot assess the comparison between the two figures if we limit our inquiry to these two publications. This is why I will then focus on the authors' broader projects for legal education embedded in the *Commentaries* and the *Handbook*. For this analysis, I will examine whether (iv) both Blackstone and Cohen entertained comparable underlying grand projects; and whether (v) their respective projects met similar outcomes.

Lastly, I will assess the comparison between Blackstone and Cohen in terms of the two jurists' position in the history of legal thought. I will use their views on a central concept of legal philosophy that is property to illustrate their place in the history of jurisprudence. This third section will test the following assumption: vi) their respective views were similarly situated within the legal philosophy of their time.

I want to underscore at the outset that using the terminology of "Indian" in reference to what pertains to the Indigenous Peoples of North America is deeply problematic, and should not be perpetuated.⁵ American legal actors have only recently started shifting away from the "Indian law" vocabulary to adopt "American Indian law", or even the most respectful "Native American law" rhetoric. The flawed terminology however remains embedded in the laws and institutions (e.g. the Bureau of Indian Affairs).⁶ I make best efforts to use the modern and more respectful terminology in the following pages. However, as the article's title readily illustrates, it is impossible to expunge this outdated vocabulary when relying on historical works and analyzing the authors' ideas as they expressed them. I therefore go back and forth between mentions to "Federal Indian Law" and "Native American Law", depending on the context, to refer to the same field of law. I invite the readers to take the presence of this outdated vocabulary here as a reminder that settlers in North America have only recently started to recognize the need to correct the colonial framework based on the European explorers' initial ignorance that a continent laid between their homeland and Asia.

I. COMPARING THE HANDBOOK TO THE COMMENTARIES AS TWO MASTERPIECES

Blackstone and Cohen both authored publications of great importance in their own field: the former wrote the *Commentaries on the Laws of England* (1765-69) and the latter the *Handbook on Federal Indian Law* (1941). It is undoubtedly what sparked the comparison, since Cohen's *Handbook* was perceived as an achievement

⁵ For a discussion of the problematic nature of the "Indian" vocabulary, the (lesser) troubles with other options, see, e.g. H PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 60 n.1 (2014).

⁶ Compare the Canadian practice of using the "Indigenous" terminology in the applied name of official departments (e.g. INDIGENOUS SERVICES CANADA, <https://www.canada.ca/en/indigenous-services-canada.html> (last visited Sept. 17, 2019) despite the continued prevalence of the "Indian" terminology in legislation, (e.g. Indian Act, R.S.C. 1985, c I-5 (Can.)).

in the field of Native American Law similar to what Blackstone had done in the second half of the eighteenth century with the common law of England. Our inquiry into the tenability of the comparison therefore logically starts with an assessment of the similarity between the two *magna opera*.

*A. THE NATURE AND CHARACTERISTICS OF THE WORK: HISTORICAL
ANALYSIS, AGREEABLE STYLE, AND ORGANIZATION OF A MASS OF RULES INTO
A SYSTEM OF LEGAL PRINCIPLES*

A key characteristic of both masterpieces is the importance they give to history. Both insist on providing historical context to the principles they expound. Blackstone for instance rooted each principle of the common law that he presents as governing a certain area of English law in a history of customs and practice. This feature makes the *Commentaries* a significant contribution to English legal history; despite the historical shortcomings that modern knowledge can identify, it constitutes a largely reliable source especially from the end of the thirteenth century onwards.⁷ Cohen affirmed that appreciating the historical context was necessary to properly understand the law in his field as in others.⁸ This belief guided his work throughout the *Handbook*, for example when he used the history of long-term agricultural leases to shed light on the meaning of a statute affecting the validity of tribal leases made outside of a treaty framework.⁹ Moreover, knowing the laws that were in force at an earlier point in time is crucial when assessing the present day legal situation in Native American law since the field is replete with legal rights that are still enforceable even though the legislation on which they rely has long been repealed.¹⁰

Another characteristic of both the *Commentaries* and the *Handbook* is their distinctive style of writing: they are easy to read. Blackstone's clear and elegant style made the study immensely easier than the previously dominant treatise, *Coke on Littleton*.¹¹ Whereas Coke's style had supposedly brought Joseph Story to tears, and led Oliver Wendell Holmes, Snr., to study medicine instead of law,¹² Blackstone gathered praise for the ease with which even laymen could read and understand his writing.¹³ The best example of this would be the first pages of Book II telling the story of how property came about. As we will see in greater details below, Blackstone's presents a narrative of the different stages that have led to the present day notion of property, much like Rousseau took his readers through the different stages of human society developments to explain the civil state of men

⁷ S.D. HOLDSWORTH, *THE HISTORIANS OF ANGLO-AMERICAN LAW* 54-60 (Columbia University Press 1998) (1928) (affirming that Blackstone is "*clearly wrong*" in his account of the Anglo-Saxon period but "*generally sound and valuable*" from the reign of Edward I (i.e. 1272-1307) onwards.)

⁸ *HANDBOOK* (1941), *supra* note 3, at xviii.

⁹ *Id.* at 326-27.

¹⁰ *Id.* at xiv.

¹¹ B.H. MCPHERSON, *THE RECEPTION OF ENGLISH LAW ABROAD* 487 (2007).

¹² *Id.* at 485.

¹³ Even Bentham, who fiercely opposed Blackstone's legal and political philosophy at the time, acknowledged this quality, see L.H. DUNOYER, *BLACKSTONE ET POTHIER* 70 (1927).

(*l'état civil*).¹⁴ The *Handbook* is equally easy to read. The apparent organization with titles and sub-titles makes the overall work uncomplicated to apprehend; in addition, the fact that the many details and comments are relegated to the thousands of footnotes makes the reading straightforward. Even if a number of persons contributed to the actual writings presented in the *Handbook*, the architect Cohen must have supervised the general style of the document.

The true nature of Blackstone's and Cohen's works however seems to lie somewhere other than the historical exposition of the law in an elegant style. The exposition of rules from the past and the present connected only by relation to a single subject matter, that is to say a thematic chronology, is of a lesser value than the systematic analysis and presentation of the "common standards, principles, concepts, modes of analysis that run through [the] massive body of statutes and decisions."¹⁵ When compared with the more modest and/or less successful attempts that had been made previously to lay a structure for the complex set of legal rules and principles in English common law or in Native American law, the importance of Blackstone's and Cohen's respective works stands out. It is by making sense of the mass of rules and showing the interconnectedness among them, the articulations binding them together and governing their developments and their operation, that both Blackstone and Cohen each created a subject, to which scholarship and analysis could then on be applied.

In a 1979 publication that represents a major contribution in the understanding of the history of legal ideas, Kennedy stated that "Blackstone's work is the only systematic attempt that has been made to present a theory of the whole common law system."¹⁶ Milson, soon after, exposed an extensive review of the works published in the decades preceding Blackstone's own achievements and showed that several authors had attempted to present the common law in a systematic way; most of them focused on a particular area like Finch in the early seventeenth century and Wood a century later, and Hale is one of the very few who attempted to do the same for the whole of the common law. Watson also took issue with Kennedy's statement and successfully demonstrated that Blackstone's arrangement fits into a genealogy of common law lawyers, in particular Hale, who tried to expose the common law in a rational arrangement even if they did not gain the recognition Blackstone achieved.¹⁷ Hale never succeeded in his enterprise, and is credited with the following explanation: "[t]he particulars are thereof so many, and the connections of things so various therein that as I shall beforehand confess that I cannot reduce it to an exact logical method...".¹⁸ From Watson's and Milson's respective historical accounts, it is clear that Blackstone was not the only jurist in England thinking about the common law as whole and the difficulties of presenting it systematically.¹⁹ Nevertheless, Kennedy's statement remains exact in that

¹⁴ See generally JEAN-JACQUES ROUSSEAU, DISCOURS SUR L'ORIGINE ET LES FONDEMENTS DE L'INÉGALITÉ PARMI LES HOMMES (1754).

¹⁵ HANDBOOK (1941), *supra* note 3, at xiv.

¹⁶ Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 209 (1979).

¹⁷ Alan Watson, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795 (1988); see also S.F.C. MILSOM, STUDIES IN THE HISTORY OF THE COMMON LAW (1985).

¹⁸ Quoted in MILSOM, *supra* note 17, at 204.

¹⁹ Watson, *supra* note 17; MILSOM, *supra* note 17. Moreover, we should not forget

Blackstone was the only one who presented an exposition of the common law in general as a rational system. Blackstone's *Commentaries* are not a juxtaposition of legal maxims, rules and remedies found in the common law, but rather a justified organization of the general principles of the common law;²⁰ unlike Hale's work it satisfactorily came to terms with the many particulars and the various connections of things, and unlike Finch's and Wood's, it covers all the areas of the common law. These inquiries into the genealogy of Blackstone's own arrangement have a historical significance; Watson's narrative convincingly argues that Blackstone's choice for the ordering of his work is a combination of the Justinian *Corpus Iuris Civilis* as presented in Gothofredus's edition and of Hale's own attempts.²¹

Cohen similarly succeeded in organizing Federal Indian law in a systematic fashion. There had been previous attempts to reach the same outcome, and none was quite as successful as the *Handbook*. Some had tried to help lawyers interested in the field with documents presenting the law, but never all of the law. Cohen acknowledges the existence of Mansfield's 1897 *Digest*.²² This earlier publication had some influence as it was cited authoritatively in a number of Supreme Court decisions before the publication of the *Handbook*.²³ It fell short, however, of a comprehensive presentation of Federal Indian Law since it merely reproduced the statutes applying to Indian country. Although it must have been useful to have an overview of the decisions of the legislative branch, Federal Indian law could not be captured by Mansfield's *Digest* because of the prominent common law character of this area of law. In 1901, Murchison published a *Digest of Decisions Relating to Indian Affairs*,²⁴ prepared at the request of the Commissioner of Indian Affairs with funds allocated by Congress, "with a view to gathering together in compact form a complete line of decisions by courts [...] and the Executive Departments on the many and varied questions" that now form the field of Native American Law.²⁵ The first and only volume was completed as a digest of court decisions, but the second volume that had been planned to present the decisions of executive departments was apparently never completed.²⁶ Murchison's intentions expressed above reveal that although comprehensiveness was the goal of the enterprise, rational and systematic arrangement did not seem to be core concern. It aimed at being a compilation rather than a logical exposition. This 1901 *Digest* had however little to no impact in the field as it is mentioned nowhere in the secondary literature addressing the history of Native American Law; even more telling maybe is the fact that it is not even acknowledged by Cohen in the *Handbook*. The reason for the insignificance of the 1901 *Digest* most certainly lies in the failure to provide a comprehensive presentation since the second volume was never completed. The *Handbook* succeeded where

comparable works undertaken in the field of equity, such as HENRY BALLOW, A TREATISE OF EQUITY (1737) (focused on equity but also covering rules "at law").

²⁰ DUNOYER, *supra* note 13, at 71-72.

²¹ Watson, *supra* note 17.

²² W.W. MANSFIELD, A DIGEST OF THE STATUTES OF INDIAN TERRITORY: EMBRACING ALL LAWS OF A GENERAL AND PERMANENT CHARACTER IN FORCE AT THE CLOSE OF THE SESSION OF THE UNITED STATES CONGRESS ON MARCH 4TH, 1897 (1897).

²³ See, e.g. Stephens et al. v. Cherokee Nation. 174 U.S. 445 (1899).

²⁴ K.S. MURCHISON, DIGEST OF DECISIONS RELATING TO INDIAN AFFAIRS (1901).

²⁵ *Id.* at 3.

²⁶ L.F. SCHMECKEBIER, GOVERNMENT PUBLICATIONS AND THEIR USE 251-52 (1936).

the digests had failed: comprehensiveness and systematization. While the claim to be encyclopedic is rejected in the introduction,²⁷ it was nevertheless “a thorough and comprehensive treatise that attended to virtually every nook and cranny of the field.”²⁸ Neither Mansfield’s 1897 *Digest* or Murchison’s 1901 *Digest* attempted to give a structure to the volume of laws relating to Indian Affairs; they merely presented an accumulation of rules, where Cohen later offered a system of laws in the *Handbook*. The *Handbook* truly constituted the first treatise on the subject.²⁹

In sum, the *Commentaries* and the *Handbook* share the key characteristics that they are most famous for: a rational, systematic and comprehensive exposition of the law of the field. In both publications this structure and the content that is presented is firmly backed by historical explanations.

B. RECEPTION AND JURISPRUDENTIAL IMPACT: LEADING SOURCES OF LAW WITH TRANSFORMATIVE EFFECT ON FUTURE LEGAL SCHOLARSHIP

The succinct and logical exposition of the English common law that Blackstone achieved with the *Commentaries* soon became indispensable for students and lawyers, in England and even more so in America. Thanks to its organization and its completeness, the *Commentaries* made it possible for students and lawyers alike to gain an understanding of English law in a convenient way. Instead of digging into a mass of yearly reports and detailed abridgments on specific areas of law, they could consult Blackstone’s four books and be presented with a limited set of principles explaining the functioning of the legal rules. Travelers and settlers found this to be especially useful. Whether the popular image of frontier attorneys riding circuits on horseback with the four volumes of the *Commentaries* in their saddlebag³⁰ comes from actual events or not, it is very telling: the *Commentaries* were handy. The *Commentaries* were first published in America in 1771,³¹ decades before the creation of any institutionalized training for lawyers. Reading treatises was then the main way of studying law, whether alone or directed by a practicing lawyer as an apprentice. There is no doubt that this is why the *Commentaries* was put in the hands of all the prospective lawyers in America for at least one century, and remained on all the readings lists provided by instructors in law long after there had been local adaptation of their content (usually both the original and the adapted version, such as Kent’s *Commentaries*, were assigned).³²

It is the combined effect of its internal features and the consequence of being an essential element in every lawyer’s education that made Blackstone’s *Commentaries* an indispensable source for legal practitioners. Barnes calculated that over 10,000 American cases cited the *Commentaries* between 1787 and

²⁷ HANDBOOK (1941), *supra* note 2, intro., at xiii.

²⁸ FELIX S. COHEN, FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, at viii (RENNARD STRICKLAND ed., 1982) [Hereinafter HANDBOOK (1982)].

²⁹ HANDBOOK (1941), *supra* note 2, intro., at xiv.

³⁰ MCPHERSON, *supra* note 11, at 488 n.107 (citing BARNES, FRIEDMAN).

³¹ Bell’s first American edition of the *Commentaries* was published in Philadelphia in 1771, see MCPHERSON, *supra* note 11, at 486-87.

³² See *id.* at 486-88; and generally W.H. BRYSON, ESSAYS ON LEGAL EDUCATION IN NINETEENTH CENTURY VIRGINIA (1998).

1915.³³ It seems that it is in the United States, more than in any other country including Blackstone's homeland, that his authority reached its highest degree.³⁴ Because of the increasingly wide gap between the law described by Blackstone and the legal reality in America as well as in England, Blackstone lost most of his legal authority after the 19th century. Nevertheless, to this day, Blackstone remains a reference for legal history in common law jurisdictions; for example the *Commentaries* were used as an authority in 2008 to attest to the existence of a principle of law by the U.K. House of Lords in *R.(Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*.³⁵ They are most often used to evidence the historical meaning of legal principles and terms of arts. For instance in *Washington v. Glucksberg*, Chief Justice Rehnquist cited the *Commentaries* as authority to demonstrate that suicide and assisted suicide had been prohibited by the common law for 700 years.³⁶ More recently, in *Hobby Lobby*, Justice Alito for the majority and Justice Ginsburg in her dissent both used the *Commentaries* to support their respective view of whether, historically, corporations could further religious ends.³⁷

A similar phenomenon, on a much smaller scale, given the nature of Native American law, occurred with Cohen's *Handbook*. Supreme Court Justice Felix Frankfurter noted in 1956 that "Cohen's prestige as a scholar, the massive research effort that went into compiling the work, and the brilliant synthesis of case law and historical precedents reflected throughout the text enshrined the Handbook as the principal scholarly resource for lawyers and judges in the field of Indian law."³⁸ Empirical findings support Frankfurter's claim: the *Handbook* was referred to in at least 67 Supreme Court decisions and 687 briefs filed to the Supreme Court as of 14 May 2018 (all editions, except 1958 revision).³⁹ As a point of comparison, one can look at the empirical study undertaken by Fletcher in 2013, finding that from 1959 to 2013, the Supreme Court addressed 145 Native American law cases, and there have only been 40 citations to Native American law-centered law review articles.⁴⁰ Out of the 67 cases where I found a reference to the *Handbook*, 49 were decided within the date range of Fletcher's empirical study. Keeping in mind that a number

³³ McPHERSON, *supra* note 11, at 488 n.108 (citing BARNES).

³⁴ *Id.* at 489.

³⁵ *R. (Bancoult) v. Sec'y of State for Foreign & Commonwealth Affairs* (No.2), [2008] A.C. (H.L.) 61 [43, 70, 87, 124, 151].

³⁶ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

³⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 n.23 (2014); *id.* at 2796 (Ginsburg, J., dissenting).

³⁸ D.H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 197 (2011) (citing F. FRANKFURTER, *OF LAW AND MEN* (1956)).

³⁹ 29 Supreme Court cases cited to the original 1941 edition, 31 cited to the 1982 edition, and 7 to the 2005 and subsequent editions; a similar search on Court of Appeals across the nation showed 353 results, with the top circuits being 9th Circuit (136), 10th Circuit (80), and 8th Circuit (50). I excluded citations to the 1958 edition given that it constituted a revision on ideological grounds rather than an update of Cohen's work, as will be explored below, see *infra* note 96 and accompanying text; however, note that cases may cite the 1958 revision and another edition to support the same or different points. Moreover, due to the methodology as well as inconsistency of citing practices over time, the figures presented here should be considered as indications rather than exact reporting.

⁴⁰ Matthew L.M. Fletcher, *American Indian Legal Scholarship and the Courts: Heeding Frickey's Call*, 4 CALIF. L. REV. CIRC. 1 (2013).

of variables make the comparison imperfect,⁴¹ I believe that it nevertheless gives an idea of the authority enjoyed by the *Handbook* among legal sources in the field. The *Handbook* alone seems to have been relied upon more than all of the academic scholarship in the field together.

Whereas Blackstone's *Commentaries* succeeded because they were the best source (most convenient, most complete and easiest to read), the *Handbook* reached the same outcome partly because it was the only source. Fletcher affirmed that the *Handbook* remained the principal, and sometimes single source on the field from its publication until the 1990s, even as updates were irregular.⁴² There was no Coke, no Kent, no Story to produce competing works in Native American law. It is difficult to evaluate how much of this is due to internal qualities of the *Handbook* (it being convenient, comprehensive and rational enough to thwart any similar attempt) or the nature of the field of Native American law (which remains a discipline with only a limited number of dedicated scholars and practitioners). This is not to undermine the value of the *Handbook*, which was also convenient, complete and easy to read; had there been competitors, there is no doubt that Cohen's work would have been a fierce champion, but the fact is that there were none for a long time. It is only in the 1980s that a number of alternatives started to emerge:⁴³ Canby's *American Indian Law in a Nutshell* in 1981,⁴⁴ Pevar's *Rights of Indians and Tribes* in 1983,⁴⁵ and the Conference Of Western Attorneys General's *American Indian Law Deskbook* in 1993.⁴⁶ Moreover, in 2013 the American Law Institute launched a project of restatement of American Indian Law, and asked Fletcher to supervise it.⁴⁷

Finally, both Blackstone's *Commentaries* and Cohen's *Handbook* became key sources of law in their respective field in a large part due to the characteristics that I have highlighted previously. Maybe unsurprisingly, the same causes produced similar effects. Let us now turn to a more qualitative inquiry in the reception of the *Commentaries* and the *Handbook*; we need to assess whether the said characteristics, and the reliance on the new material they sparked, contributed to renewed legal thinking in the field, or at least made some measurable impact.

⁴¹ For instance, the number of scholarship citations reported by Fletcher is the *total number of citations in opinions* (e.g. if there are two citations in a same opinion, then the reported number will be two), whereas I am reporting the *total number of cases* in which the *Handbook* is cited, regardless of the number of citations in the opinions for the case. Moreover, not all the cases I am reporting in my own findings may belong in the 145 Native American law cases determined by Fletcher since I have not engaged in the qualitative sorting process that Fletcher went through to determine whether the cases included in my figures are primarily Native American law cases.

⁴² Fletcher, *supra* note 40, at 5 ("From the time it was first distributed in 1940 until the 1990s, the *Handbook of Federal Indian Law* dominated the field, despite irregular updates, because it was the only place to turn for a basic and comprehensive grounding in every aspect of American Indian law.").

⁴³ *Id.* at 5 n.26.

⁴⁴ The most recent edition is W.C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (6th ed. 2015).

⁴⁵ The most recent edition is S.L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* (4th ed. 2012).

⁴⁶ The most recent edition is CONFERENCE OF WESTERN ATTORNEYS GENERAL, *AMERICAN INDIAN LAW DESKBOOK* (2019 ed. 2019).

⁴⁷ This project is still in progress: AMERICAN LAW INSTITUTE, *THE LAW OF AMERICAN INDIANS*, <https://www.ali.org/projects/show/law-american-indians/>.

The presentation of the content of the laws of England into comprehensive categories is evidence that Blackstone meant to show the scientific character of his discipline; not only are the objects of study capable of being examined in a rational way, the very method displayed is of a scientific nature. The systematic presentation of legal rules, although it had already been thought of by the Romans, seems to mirror the efforts of biology to classify living species by means of taxonomy. Modern taxonomy was founded upon Linnaeus's works published from 1735, and in particular, the tenth edition published in 1758. This paradigmatic revolution and the debate it triggered in the scientific community happened only a few years before the publication of the *Commentaries* in 1765.⁴⁸ The scientific character of the study of the common law, and its proximity with established sciences, could therefore justify the inclusion of common law studies in the universities as a discipline worthy of study in its own right. Moreover, the novel distinction drawn between substance and procedure, rights and actions, and embedded in the very structure of the books was additional evidence for Blackstone's attempt to show that the common law could be subject to scientific inquiry.

Milsom notes that after Blackstone, a "new kind of legal literature"⁴⁹ appeared; conveyancers such as Cruise (*Essay on Fines* (1783); *Digest on the Laws of England Respecting Real Property* (1804)) and Sander (*Essay on the Nature of Uses and Trust* (1791))⁵⁰ began to write in a scholarly and almost speculative vein rather than primarily for the practical purposes of their business. They no longer focused on describing the procedures to follow in order to achieve certain outcomes in their practice, but started to reflect upon the articulation of the principles and their meaning. For instance, "fee simple" became an object worthy of scientific discussion rather than the possible result of a lawyer's handiwork.⁵¹ Blackstone's ability to express himself in a way particularly adapted to the idea he wanted to transmit and understandable by all was recognized even by his most fervent critic, Jeremy Bentham.⁵² As Blackstone was addressing laymen and law students, and adapting his language to this audience unfamiliar with the technical terms of lawyers, he led lawyers to reflect upon the purpose of phrases that had been used for centuries, giving them for the first time a sense that these phrases and maxims were worthy of scientific discussion.⁵³ Blackstone changed the way lawyers were thinking about the law, from a set of actions to a system of principles. This allowed in turn the emergence of text-books dedicated to presenting the substantive rules in an area of law with fewer references to the procedure by which they were enforced

⁴⁸ Harriet Ritvo, *La Résistance au Système: La Grande-Bretagne, Buffon et l'Eclipse Linnéenne*, in *L'HÉRITAGE DE BUFFON*, 219 (Marie-Odile Bernez ed., 2009) (arguing that Linnaeus's *SYSTEMA NATURAE* (1758) provoked mixed reactions in the English scientific community; this demonstrates in turn that the ideas of the Swedish botanist were received and debated in England in the years leading to the birth of the *Commentaries*).

⁴⁹ MILSOM, *supra* note 17, at 205.

⁵⁰ Other examples include CHARLES FEARNE, *ESSAY ON THE LEARNING OF CONTINGENT REMAINDERS* (1772), RICHARD PRESTON, *ELEMENTARY TREATISE BY WAY OF ESSAY ON THE QUALITY OF ESTATES* (1791), see S.F.C. MILSOM, *THE NATURE OF BLACKSTONE'S ACHIEVEMENT* 9 (1981).

⁵¹ MILSOM, *supra* note 50, at 9.

⁵² DUNOYER, *supra* note 13, at 70.

⁵³ MILSOM, *supra* note 17, at 205.

in the nineteenth-century.⁵⁴ In the nineteenth-century also, the English common law relating to contracts became consolidated into a comprehensive and rational theory of contracts including formation, discharge and performance with relevant remedies for breaches.⁵⁵ This theoretical achievement owed much to Blackstone's attempt to prompt scientific discussion about the common law maxims. In mapping the law and providing a general overview of it, as well as trying to make sense of established rules and structures for laymen, Blackstone started the processes that led about a century later to this radical reconsideration of the rules and forms of actions related to contracts.⁵⁶ Furthermore, Kennedy credits Blackstone with pivotal developments for what he terms the "liberal mode of American legal thought" arguing that the *Commentaries* "set out together, for the first time in English, all the themes that [...] characterize attempts to legitimate the status quo through doctrinal exegesis."⁵⁷

Much as Blackstone's *Commentaries* transformed the approach of lawyers to their own discipline, showing them the way to think about articulated principles rather than describing procedure, Cohen's *Handbook* transformed the "vast hodgepodge of treatises, statutes, judicial and administrative rulings, and unrecorded practice"⁵⁸ into a field for scholarship and academic analysis. Felix S. Cohen was the first true scholar of Indian Law,⁵⁹ and the academic community that has dedicated itself to the field over the past decades is his offspring. He transformed the way lawyers interested in the field saw their discipline; for the first time Indian law was a system articulated around a set of principles rather than a mass of rules with no internal rationale. This is a major shift in legal thinking. Native American law scholars sometimes spoke about the influence of the *Handbook* on their own thinking. What Getches called "without question, the single most influential passage ever written by an Indian law scholar"⁶⁰ is a passage of the 1941 edition of the *Handbook*. In this passage, Cohen introduced "the most basic principle of all Indian law,"⁶¹ explaining that all judicial decisions on tribal powers had adhered to three fundamental principles.⁶² Cohen's claim reproduced by Getches has political

⁵⁴ *Id.* at 200.

⁵⁵ See WARREN SWAIN, *THE LAW OF CONTRACT 1670–1870 172–200* (2015) (exposing the evolution of the literature of contracts in England throughout the nineteenth century); P. LEGRAND & G. SAMUEL, *INTRODUCTION AU COMMON LAW* (2008).

⁵⁶ JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 134 (1991); and generally MILSOM, *supra* note 50, at 9.

⁵⁷ Kennedy, *supra* note 16, at 211.

⁵⁸ D.T. MITCHELL, *ARCHITECT OF JUSTICE - FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* 171 (2007) (quoting F. Frankfurter).

⁵⁹ Fletcher, *supra* note 40, at 2.

⁶⁰ GETCHES ET AL., *supra* note 38, at 198.

⁶¹ HANDBOOK (1941), *supra* note 2, at 122 (this principle is the following: "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.").

⁶² HANDBOOK (1941), *supra* note 2, at 123 (the three underlying principles are: "(1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its powers to enter into treaties with foreign nations, but does not by itself affect the internal

implications which will be analyzed in detail later, but it truly is an articulation of "all Indian law" around one basic principle, subject to sub-division in three fundamental principles. If this is truly the core of Cohen's *Handbook's* influence, which we have no reason to doubt, then Cohen has undoubtedly given birth to new legal thinking in the field of Native American law. The internal characteristics of the *Handbook* highlighted above (succinctness, comprehensiveness and systematized structure) were certainly instrumental in the achievement of this novel jurisprudence of Native American law.

This first section of the inquiry has argued that the *Commentaries* and the *Handbook* both share a number of characteristics; they both present comprehensive and rationalized expositions of the law of the field in an accessible style and with a strong historical approach. These features undoubtedly allowed the two publications to become the most used and relied upon source of legal knowledge in their field for a significant time. As primary sources for lawyers' practice and training, and thanks to their characteristics and nature, they influenced legal thinking in a new way; the presentation of the law as a system of principles rather than a mass of rules transformed the field into a discipline fit for scholarship.

II. THE COMMENTARIES AND THE HANDBOOK AS VEHICLES FOR THEIR AUTHORS' BROADER PEDAGOGIC AND POLITICAL PROJECTS

Blackstone and Cohen did much more than map the law of the field and provide students and professionals with a succinct, comprehensive and accessible source for legal knowledge; they advocated for a certain vision of social relations and a political view of the role of law and legal knowledge. In this second section, I will first analyze the nature of Blackstone's and Cohen's respective project as it is expressed through the *Commentaries* and the *Handbook*; then I will compare and contrast the extent to which both scholars succeeded in making their political and pedagogical views prevail.

A. THE NATURE OF THE PROJECTS: PROPOSALS FOR THE ROLE OF LAW AND LEGAL EDUCATION IN SOCIAL RELATIONS

Blackstone prepared the *Commentaries* as he was giving lectures at Oxford on the common law of England. He inserted as an introduction to the four volumes the lecture he gave in 1758 to mark his appointment to the Vinerian professorship. At the time it was delivered, the *Commentaries* had not yet been published, and Blackstone refers only once to work he had already undertaken for them when he mentions the outline of the course he will be giving. The lecture is therefore not about the work he has undertaken before nor about how he will be using it in his teachings. I would argue instead that by inserting in print the lecture on the study of the law at the very opening of his major work the author reveals the nature of his project, namely to use his position at Oxford to change the way English law is

sovereignty of the tribe, i.e., its powers of self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.")

studied in order to give it the place it deserves as a discipline worthy of teaching and learning in its own right.

The lecture first of all addresses at length the many reasons why Englishmen of all social status should have some knowledge of the common law.⁶³ Unsurprisingly Blackstone recommends that the nobility become versed in the common law. Proper knowledge of the laws in force in England is required to fulfil their dual functions as legislators and judges of last resort in the House of Lords (at the time cases were heard before the entire chamber rather than a dedicated committee). The gentlemen who owned enough property to be called as jurors or pursue a political career in the House of Commons would equally need foundational legal knowledge to accomplish their duties. These arguments seemed all the more compelling to Blackstone as he blamed the defects in the English laws on the frivolous amendments brought by Parliament to long-standing common law rules, and such failings would be prevented if legislators were not “utterly ignorant” of the rules they are called on to modify.⁶⁴ However, and this is perhaps most noteworthy, Blackstone also argues for Englishmen who owned less than the previous two categories to learn about property rights and the transmission of such property through wills to ensure that their intentions regarding whatever they owned would be enforced by the courts.

Blackstone then attempts to demonstrate that the study of the common law is superior and more useful than that of the canon law or civil law (two already-established university disciplines). The Vinerian professor reminds his audience that the design of the civil law, as codified under Emperor Justinian, was for the “despotic monarchy of Rome and Byzantine,” in contrast with the common law so well-adapted to “[perpetuate] the free constitution of Britain.”⁶⁵ Blackstone limits the relevance of learning the canon law or the civil law to the clergy and those destined to serve in the courts of equity. He thoroughly casts these legal traditions as foreign to England, and advocates instead for the study of local laws rooted in the “immemorial customs” of Britain, affirming that “[i]t is incumbent upon every man to be acquainted with [...] the obligations which it lays him under” (as opposed to those applicable elsewhere).⁶⁶

Lastly, Blackstone develops the reasons why the science of the common law should be taught in the universities rather than learnt through apprenticeship with practicing lawyers. Blackstone argues that unlike with the inns of court, students will find companions and teachers to assist with their learning in the universities. Moreover, according to him the science of common law “employs in its theories the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart; [...] is universal in its use and extent, accommodated to each individual, yet comprehending the whole community”, and is therefore “properly and regularly academical.”⁶⁷ The scientific status of the field of study is grounded in the use of objective methods to examine an object affecting the entire society. Universities are deemed to be the best home for the teaching of sciences since that is where they can flourish and benefit from the proximity of other sciences for their own developments.

⁶³ 1 COMMENTARIES, *supra* note 4, at 5-12.

⁶⁴ *Id.* at 9.

⁶⁵ *Id.* at 5.

⁶⁶ *Id.* at 6.

⁶⁷ *Id.* at 27.

This overreaching pedagogic project was also deeply political. In establishing it as a respectable science to be taught and studied in the university, Blackstone legitimized the common law as it was. Grounded in historical continuity, the status quo of the common law was to be preferred to radical changes, such as those of the philosophers of the Enlightenment movement in Continental Europe in the same era, or even the codification proposals advocated by Bentham. Blackstone defended the perpetuation of a system of private property inherited from feudal England over the more egalitarian ideas that flourished elsewhere in the eighteenth century. It took the form of a justifying legal rules and principles as grounded in the customs of the English people, as a natural emanation of their character over time. According to Kennedy, this constituted an "attempt to naturalize purely social phenomena"; moreover, it framed as a freedom-inspired rational order something that Kennedy saw as servitude and chaos.⁶⁸ Accordingly, one can see Blackstone's work as an embrace and praise for an unjust social order. We are therefore see that a striking paradox in Blackstone's project: the wish to empower and enlighten the English people with applicable legal knowledge through a radically novel academic endeavor, which by the same token sustains a truly conservative approach to social and legal relations.

Turning now to the project underlying Cohen's *Handbook*, as with Blackstone, the introductory sections are extremely instructive. Three substantive sections come before the *Handbook* itself: Secretary of the Interior Ickes's Foreword, Solicitor Margold's Introduction, and Assistant Solicitor Cohen's Author's acknowledgment. Despite the different signatures, Cohen drafted all three of them.⁶⁹ This justifies reading them together, as three aspects of the same ideas, in order to best comprehend the project embodied in the *Handbook*. Moreover, the fact that Cohen and the preparation of the *Handbook* were moved to the Interior after starting within the Department of Justice shows that there was political will and eagerness in the Interior's administration to see the completion of the *Handbook* on shared premises. The Department of Justice put an initial end to Cohen's work because they wanted a guide on how to win Native American law cases, and especially the many land claims pending at the time. The Interior made sure Cohen could resume his work because they shared his view that the end result should help protect Native American tribes' rights (for the government to fulfill its duty "as guardian of the Indians" and for the Native Americans to defend themselves) and be useful to all potential parties in Native American law cases.⁷⁰

Two elements of historical context should be recalled to facilitate comprehension of the pedagogic and political aspects of Cohen's project. First, the *Handbook* was published after several decades of federal policy aimed at putting an end to tribalism. The allotment era that had started with the General Allotment Act of 1887 had demonstrated that Congress could sweep away tribal powers affirmed by treaties or by a long line of Supreme Court decisions, even against the principles of tribal sovereignty that could be derived from the Marshall trilogy.⁷¹ Second, the global context of the late 1930s and early 1940s was demonstrating on an unimaginable scale the vulnerability of minorities, racial, religious or political,

⁶⁸ Kennedy, *supra* note 16, at 211.

⁶⁹ MITCHELL, *supra* note 58, at 171.

⁷⁰ *See id.* at 166-70.

⁷¹ GETCHES ET AL., *supra* note 38, at 198.

when faced with a hostile government. The Introduction acknowledged the topical character of the European and East-Asian events and their relevance to the work in progress: Cohen's Introduction opens with a quotation by Ickes, who affirms that the subject of "how governments treat minorities [...] never was a more burning subject than in [...] December 1939".⁷² These two features of the period during which the *Handbook* was prepared should not be forgotten when examining the meaning of its author's ambitions.

Moreover, Cohen's previous works as a legal scholar already demonstrated his political commitment to certain ideals. As will appear later, Cohen championed legal realism in American jurisprudence, for instance with his 1935 *Transcendental Nonsense and the Functional Approach*.⁷³ In opposition to the legal process school of thought, he rejected the idea that legal processes and principles could be neutral and allow for a fair competition of unbalanced group interests. Instead, he believed that the state had a central role to play in protecting minorities from competing interests.

Cohen's pedagogic project was very different from Blackstone, and was not focused on creating an academic discipline to study and teach Native American law. The primary pedagogic aim pursued by the *Handbook* was to give Native Americans "useful weapons in the continual struggle that every minority must wage to maintain its liberties" and providing those who dealt with them "the understanding that may prevent oppression."⁷⁴ At the same time it should allow "the Indian people to take an active and responsible part in the solution of their problems," and help the Federal government in fulfilling its obligation to "protect and safeguard the rights of our oldest national minority."⁷⁵ Cohen moreover believed that "confusion and ignorance in the field of law are allies of despotism."⁷⁶ The *Handbook* therefore was an attempt to empower the Native Americans with means to know and protect their rights, and let the general public know about them so that they do not infringe upon them. The publication being comprehensive, rationally organized and easy to read, it was appropriately equipped to fulfill such a role. Cohen's pedagogical project was primarily concerned with empowering a minority to give them the tools to be actors in the creation of the laws they were to be governed by; this is a sharp contrast with Blackstone's attempt to educate a majority in the knowledge of laws. Despite the lack of resemblance between Blackstone's and Cohen's context and subject, the dissimilarity of their respective pedagogic projects reveals different political approaches.

The *Handbook* was also a piece of political advocacy. Unlike Blackstone's *Commentaries*, it did not purport to legitimize the state of the law as it was at the end of the allotment era and defend natural evolutions of the laws in the field. To the contrary, it relied on legal analysis to advance progressive social policies and constituted "one of the more voluminous lawyers' briefs ever produced for the revival of tribal sovereignty—the overarching goal of the Indian Reorganization

⁷² HANDBOOK (1941), *supra* note 2, intro., at vi.

⁷³ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

⁷⁴ HANDBOOK (1941), *supra* note 2, foreword, at v.

⁷⁵ *Id.* at v-vi.

⁷⁶ *Id.*, author's acknowledgment, at xviii.

Act."⁷⁷ Felix Cohen was instrumental in the drafting and enacting of the Indian Reorganization Act (IRA, referred to in the *Handbook* as the Wheeler-Howard bill) which was sponsored by Commissioner of Indian Affairs Collier and signed into law by President Roosevelt in 1934. It primarily meant to put an end to the allotment policies and thus preserve communal tribal land bases, as well as encouraging tribes to (re-)institute self-government. The *Handbook* "represents a vigorous defense of tribal sovereignty and, like the Indian Reorganization Act itself, promoted the revival of American Indian tribalism within the context of federal power over Indian tribes";⁷⁸ it can be seen as an extension of the IRA pursuing the same policies, supported by the same actors. It contributed to the recast of the federal-tribal relationship initiated by the IRA. While Congress expressly recognized the survival of tribal inherent powers in the IRA after "the destructive forces of the allotment era reforms,"⁷⁹ the *Handbook* was a comprehensive exposition of them, of their practice and their theory.

The existence of this political project in the design of the *Handbook* is maybe best illustrated by what its opponents did to it later on. In the 1950s, the Eisenhower administration decided to follow a policy antagonistic to the one embodied in the IRA and the 1942 *Handbook*: it started ending federal responsibility over the tribes, thus subjecting them to state laws and abolishing their sovereignty by the same token as the provision of federal services.⁸⁰ All of a sudden, the existence of a document published under the supervision of the Department of the Interior presenting a very different view on the topic proved "embarrassing."⁸¹ A simple solution was found: "rewrite Cohen's book and discredit the original under the guise of a revision."⁸² The authors of the 1958 edition of the *Handbook* themselves acknowledged in the introduction that their purpose was "of foreclosing, if possible, further uncritical use of the earlier edition by judges, lawyers and laymen."⁸³ The 1958 edition had one constant theme: stressing the plenary character of federal powers over Native Americans and understate the idea of tribal sovereignty.⁸⁴ In sum, "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

⁷⁷ GETCHES ET AL., *supra* note 38, at 197.

⁷⁸ *Id.* at 197-98.

⁷⁹ *Id.*

⁸⁰ This policy has been called "termination," see e.g. Kenneth R. Philp, *Termination: A Legacy of the Indian New Deal* 14(2) WESTERN HIST. Q. 165 (1983).

⁸¹ FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 3 (R.L. BENNETT & F.M. HART eds., 1971) [Hereinafter HANDBOOK (1971)] (this is a facsimile reprint of Cohen's original edition of the HANDBOOK initiated by the Native American law scholars of the University of New Mexico as an attempt to counter the administration propaganda embodied in the 1958 edition of the HANDBOOK).

⁸² *Id.*

⁸³ OFFICE OF THE SOLICITOR, U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 1 (1958) (citation for this publication sometimes indicates Felix S Cohen as the author; perpetuating this habit would be misleading given the profound departure from Cohen's presentation of Federal Indian Law that it features, and would provide undue legitimacy to the revisionism it constitutes).

⁸⁴ HANDBOOK (1971), *supra* note 81, at 4; HANDBOOK (1982), *supra* note 28.

government.”⁸⁵ The profoundly ideological revision of 1958 shows by contrast the powerful political messages of Cohen’s original work.

To conclude this section, it is now clear that both Blackstone and Cohen furthered broader pedagogic and political projects with their most famous publications. They both published vehicles for a grand project with a pedagogical and a political facet, organically intertwined. Despite some commonalities, like the aim to ease access to legal knowledge, their respective projects were extremely different. Nevertheless, neither the *Commentaries* nor the *Handbook* were written solely to provide a single source of legal knowledge in their field; on the contrary, they both contributed to advancing the political endeavor of their author.

B. THE EXTENT OF THEIR ACHIEVEMENTS: BLACKSTONE’S QUASI-TRIUMPH AND COHEN’S FLUCTUATING FORTUNE

The extent of Blackstone’s achievements is summarized by Twining in a terse phrase: Blackstone “left a legacy of ideas rather than institutions.”⁸⁶ It is not before the middle of the 20th century that law really became a subject for academic teaching and study in England; that is almost two centuries for Blackstone’s pedagogical project to become reality. However, in the meantime, universities began to train lawyers in America: the forerunner was College of William and Mary in Virginia from the very first years of the nineteenth century,⁸⁷ mirrored by a few others in the following decades, until the final victory of law-schools over competing settings for lawyer’s training in the aftermath of the American Civil War and under the influence of Langdell’s model. Generations of American lawyers started their studies in law with Blackstone’s *Commentaries*,⁸⁸ it took only about a century after their first publication for Blackstone’s proposal for legal education to be widely accepted in America. It took a shorter time for American scholarship on common law to emerge, as Kent, Story and Tucker took on truly academic work on the law of their land.⁸⁹ Blackstone’s pedagogical project was succeeding in America when it was still ignored in England. Regarding the political aspect of Blackstone’s grand project, things look a bit different. The English common law was not subjected to comprehensive codification, as Blackstone feared and as Bentham hoped, but overall left to its organic growth with increasing legislative intervention starting in the end of the nineteenth century. Blackstone’s *Commentaries* were instrumental in preserving this state of things, since they “became the old Gothic castle of the

⁸⁵ *Id.* (citing Philip S. Deloria).

⁸⁶ W. TWINING, BLACKSTONE’S TOWER: THE ENGLISH LAW SCHOOL 24 (1994).

⁸⁷ George Tucker, professor of law at William and Mary, published his own edition of Blackstone’s *Commentaries* adapted for his students with annotations regarding the laws in Virginia and in the United States, in 1803. *See* MCPHERSON, *supra* note 11, at 487-88.

⁸⁸ *See, e.g.* ANGELA FERNANDEZ & MARKUS DUBBER, LAW BOOKS IN ACTION: ESSAYS ON THE ANGLO-AMERICAN LEGAL TREATISE 23 (2012).

⁸⁹ *See, e.g.* McPherson’s demonstration that Story and Kent undertook works of the nature and scale of Blackstone’s own at the beginning of the nineteenth century, MCPHERSON, *supra* note 11, at 489; and Hoeflich’s reference to Tucker as one of the “American Blackstones”, M. Hoeflich, *American Blackstones*, in BLACKSTONE AND HIS COMMENTARIES – BIOGRAPHY, LAW, HISTORY (W. Prest ed., 2009).

Common law" for eighteenth and nineteenth century English lawyers to inhabit.⁹⁰ As an identifiable source of knowledge on the common law, the *Commentaries* diverted the need to enact a single source of law, i.e. a code. This holds true to an even greater extent in America: during its formative years after the War of Independence, in a truly Anglophobe period, the new Republic contemplated the French example (Napoleon's *Code Civil des Français* was enacted in 1804) and Bentham's proposals before rejecting them.⁹¹ The fact that the *Commentaries* were already firmly adopted by American lawyers must have been instrumental in preventing the success of codification efforts in this country as well. Lastly, Kennedy starts his history of American legal thought with Blackstone, and emphasizes the unity that has remained from Blackstone's first articulation of principles justifying the legal status quo to the present dominant legal thinking.⁹² This further demonstrates that Blackstone's political project was successful overall in England, and even more so in America.

Cohen's success may be contrasted. The mention above of the publication of the 1958 version of the *Handbook* should not mislead us in thinking that Cohen failed in achieving the political project embodied in his *Handbook*. The termination policies of the 1950s were a setback for those sharing Cohen's views. They unquestionably show that Cohen's grand project was not unanimously embraced, and that its opponents took control of federal policies regarding Native Americans in the decade following the *Handbook's* publication. This must be why Cohen assessed his own achievements as "at best a move between giant failure and microscopic success" in 1953 correspondence with Frankfurter.⁹³ However, in 1971, scholars at the University of New Mexico published a facsimile of the 1942 edition of Cohen's *Handbook* in order to prevent the 1958 edition from winning the political war over the approach to Native American affairs. These scholars, Bennett and Hart in particular, were direct heirs to Cohen's work since they were among the first law professors to dedicate themselves to Native American Law. In the 1968 Indian Civil Rights Act, Congress mandated an updating of the work; the project was undertaken by Native American law scholars under the leadership of Strickland, outside of the supervision of government administrations, and was completed in 1982.⁹⁴ It followed the spirit of Cohen's tribal sovereignty approach, and brought significant new materials to the *Handbook*. It was updated in 2005 and 2012, again by scholars not affiliated with the federal government.⁹⁵ Although the 1958 edition "is almost universally reviled to this day"⁹⁶ and is often referred to as

⁹⁰ FERNANDEZ & DUBBER, *supra* note 88, at 27.

⁹¹ MCPHERSON, *supra* note 11, at 473.

⁹² See generally Kennedy, *supra* note 16.

⁹³ MITCHELL, *supra* note 58, at 271 (quoting Cohen).

⁹⁴ Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M. L. REV. 153, 158-59 (1996).

⁹⁵ Fletcher, *supra* note 40, at 5 n.25.

⁹⁶ *Id.* at 5 n.25; since the 1958 revision of the HANDBOOK came out, 21 Supreme Court decisions cited it, but only two such decisions are subsequent to the publication of the 1982 edition: Nevada v. Hicks, 533 U.S. 353 (2001), and California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). The pattern appears even more clearly with regards to Courts of Appeals: whereas there were 33 cases from Courts of Appeals citing to the 1958 revisions (including 20 from the 9th Circuit, and 10 from the 8th Circuit) between 1958 and 1986, there has not been a single one since 1986 (as of 14 May 2018). Compare these results with citations of other editions of the HANDBOOK, *supra* note 39.

a “vulgate version,”⁹⁷ the struggle between the 1958 editions on one side, and the original 1941 edition accompanied with the ‘loyal’ recent updates on the other side remains an illustration of competing approaches to policies and legal analysis of Native American law issues. For instance, Justice Scalia writing for the majority in *Nevada v. Hicks* in 2001 cited the 1958 edition to support the anti-tribal sovereignty claim that “an Indian reservation is considered part of the territory of the State.”⁹⁸ On the other hand, Justice Souter cited the 1982 edition in his dissent as an authority for a more sovereignty-friendly argument about the inapplicability of the Bill of Rights and the Fourteenth Amendment to Native American tribes since “Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes.”⁹⁹ Cohen’s ideas seem to be prominent among the academic community dedicated to Native American law, but to be embraced only by a minority of Supreme Court Justices. Supreme Court decisions as to which cases to hear and how to decide them remain overall unfavorable to tribal interests.¹⁰⁰ Cohen’s grand project has not prevailed, but it remains at the center of the current political debate over Federal Indian law and policies.

In sum, the fate of Blackstone’s and Cohen’s respective grand projects indicates that the former achieved a quasi-triumph over time whereas the latter has thus far known fluctuating fortune. Blackstone’s *Commentaries* succeeded in establishing his grand project in America over the course of a few decades, and entrench his political proposals for the law in the English consensus very quickly. Cohen’s political project has gained momentum at some times and has encountered setbacks at others. The significant differences in this section between Blackstone and Cohen demonstrates that broadening the scope of analysis beyond the initially perceivable common traits provides a more accurate understanding of the acuity of the Blackstone-Cohen comparison. The analysis should however not stop at the first distinction between the two scholars and their achievements; to the contrary, the findings here justify pursuing the analysis further, and broadening again the scope of our inquiry.

III. COMPARING THE TWO SCHOLARS’ PHILOSOPHY OF PROPERTY AS AN EXAMPLE OF THEIR ROLE IN THE INTELLECTUAL HISTORY OF LAW

In this section I analyze Blackstone’s and Cohen’s respective positions in the intellectual history of jurisprudence. Both contributed to the development of jurisprudence in their

⁹⁷ See, e.g. BENNETT & HART, *supra* note 81, at 4.

⁹⁸ *Nevada v. Hicks*, 533 U.S. 353, 362 (citing Federal Indian Law (1958) HANDBOOK, *supra* note 83).

⁹⁹ *Id.* at 384 (Souter, J., concurring) (citing HANDBOOK (1982), *supra* note 28).

¹⁰⁰ See, e.g. Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009); Alexander Tallchief Skibine, *The Supreme Court’s Last 30 years of Federal Indian Law: Looking for Equilibrium or Supremacy?*, 8 COLUM. J. RACE & L. 277 (2018). Skibine also notes that Justice Kagan (in *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016)) and Justice Breyer (in *United States v. Lara*, 541 U.S. 193, 200 (2004)) have both written opinions “in line with the paradigm articulated by Felix Cohen”, *id.* at 334-35.

own time by taking an active role in thinking, teaching and writing on issues pertaining to legal philosophy. Their shared commitment to academia is illustrated by their respective careers and publications. William Blackstone joined Oxford University at age 15 in 1738, commenced a doctorate of civil law in 1750 and soon after decided to dedicate himself to academic endeavors. He unsuccessfully applied for the chair of Regius Professor of Civil Law; after this initial failure, he was appointed in 1758 to the first chair of English law as Vinerian Professor. It is only after the publication of his *Commentaries* that Blackstone would return to the Bar.¹⁰¹ The *Commentaries* are the result of his work as university professor of English law at Oxford. Cohen's elaboration of the *Handbook* in his capacity within the government administration should not mislead us into thinking that he did not, as Blackstone, primarily belong to the academy. Strickland rightly recalls that "Felix S. Cohen [remained] a son of the academy no matter where he happened to be";¹⁰² Morris R. Cohen, Felix's father was celebrated as a great American academic, with contributions in fields ranging from logic and metaphysics to legal and social philosophy.¹⁰³ Like father, like son as Morris and Felix Cohen co-authored together *Readings in Jurisprudence and Legal Philosophy* in 1951,¹⁰⁴ and Felix Cohen demonstrated his own taste for academia as a visiting professor at the Yale Law School and City College.¹⁰⁵ Blackstone's and Cohen's background demonstrates the relevance of this broader inquiry in the philosophical foundations of their work.

I have confined the analysis of Blackstone's and Cohen's position in the intellectual history of law to one subject: property. A comparative assessment of one major concept of their legal thinking should give enough indications as to the validity of the comparison, and it would be impossible here to assess Blackstone's or Cohen's situation comprehensively. I have focused the analysis on the notion of property because it was a key topic in both Blackstone's and Cohen's epochs of jurisprudence, and because it also unifies the two authors. First, Blackstone's *Commentaries* were published at a time of fruitful thinking by a number of European philosophers on the concept of property; it is in the era that Locke's¹⁰⁶ and Rousseau's¹⁰⁷ seminal works addressing the origins, operation and meaning of property. Then, Cohen's academic works were undertaken from the late 1920s to the early 1950s, a period during which different views on property were central in the exchanges on legal theory since this theme was central in defining the world's order between capitalism and communism. Furthermore, substantial sections of property law taught today in American law schools derive from the peculiarities of English common law articulated by Blackstone in the Second Book of his *Commentaries*.¹⁰⁸

¹⁰¹ See the brief biography of Blackstone in the introduction of C.E. HARMAN, *CRITICAL COMMENTARIES ON BLACKSTONE* vii-ix (2002).

¹⁰² Strickland & Valencia-Weber, *supra* note 94, at 156.

¹⁰³ *Obituary: Morris Raphael Cohen*, N. Y. TIMES, Jan. 31, 1947, at 22, <http://nyti.ms/1AkDUe9>; Sidney Ratner, *Tribute to Professor Cohen*, N. Y. TIMES, Feb. 1, 1947, at 14, <http://nyti.ms/1AkIYiz>.

¹⁰⁴ M.R. COHEN & F.S. COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* (1951).

¹⁰⁵ *Felix Cohen Dead; Aided US Indians; Ex-Associate Solicitor of the Interior Department Was Champion of Tribes' Rights*, N. Y. TIMES, Oct. 20, 1953, at 29, <http://nyti.ms/1AlxV8O>.

¹⁰⁶ See, e.g. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (1689).

¹⁰⁷ See, e.g. JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL* (1764).

¹⁰⁸ HARMAN, *supra* note 101, at 107.

In American law schools, “property was what Indian Law was about or primarily about before the Second World War,”¹⁰⁹ and property law courses have long been avenues for law teachers with an interest in Native American issues to integrate them into the curriculum, at the very beginning of the twentieth century as well as in recent decades.¹¹⁰ Lastly, the foundational case for Native American law deals primarily with issues of property: *Johnson v. M’Intosh* in 1823.¹¹¹ We can therefore see a bridge of sorts between Blackstone and Cohen in this domain.

An alternative approach could have been to look at constitutional theory. Constitutional issues in jurisprudence were also prominent in Blackstone’s era and constitutional law courses have also been a part of the American law school curriculum where teachers could introduce students to Native American law issues.¹¹² However, the differences between the parliamentary monarchy of the United Kingdom supported by an unwritten Constitution and the federal republican form of government in the United States embodied in a written Constitution are sufficiently great as to make any comparison of the two jurists this aspect of legal philosophy nearly impossible. Before assessing each author’s position in the history of legal thought, and in their respective times’ legal thinking, it is necessary to explore their own views on property.

Blackstone believed that there are laws of nature among men as among things. With regard to property, the scope of natural law is however restricted to a single principle that all things are the general property of all mankind, exclusive of other beings,¹¹³ since the Creator gave to man “dominion over all the earth, and over the fish of the sea, and over the fowl of the air, and every other living thing that moves upon the earth.” Blackstone writes that this is the “only true and solid foundation of man’s dominion over external things.”¹¹⁴ In the beginning, as per the law of nature formulated by God himself and as recorded in the book of Genesis, all men thus enjoyed common ownership over all things present on Earth. In the early days of mankind, while men were in a state of “primeval simplicity,”¹¹⁵ this general notion of property was sufficient as there were plenty of things for the then few human beings to enjoy for their current needs and they had no need of individual titles for their activities did not require anything beyond this communion of goods. As men “took from the public stock for [their] own use such things as [their] immediate necessities required,”¹¹⁶ and abandoned them back when these necessities ceased, they actually only enjoyed the goods as theirs when they were in their possession; they individually enjoyed an usufructuary property in them, while the whole of mankind always retained the general ownership of all external things. Thus, “the right of possession continued the same time only that the act of possession lasted.”¹¹⁷

¹⁰⁹ Strickland & Valencia-Weber, *supra* note 94, at 157.

¹¹⁰ See *id.* at 157-58; and James M. Grijalva, *Compared When - Teaching Indian Law in the Standard Curriculum*, 82 N.D. L. REV. 697, 698 (2006).

¹¹¹ 21 U.S. 543 (1823); see also *infra* note 125 and accompanying text.

¹¹² Strickland & Valencia-Weber, *supra* note 94, at 158.

¹¹³ 2 COMMENTARIES 3.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

Profound changes such as the adoption of a sedentary lifestyle and the start of agriculture then gave rise among early humans to a need for a more permanent entitlement to the things on which they had applied their labor. For instance, men would not invest time and craft in building habitations if another man could obtain a title to the habitation as soon as the builder walked out of his home. Likewise, as men began to breed animals to avoid the uncertainties of hunting, and also began to till the soil, they wanted to ensure that nobody but the breeder and the farmer could enjoy the fruits of such "industry, art, and labour."¹¹⁸ From there rose the idea that "bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein."¹¹⁹ In the introduction dedicated to *the nature of laws in general*, Blackstone had already evoked the end of the migratory lifestyle as a cause leading to the establishment of property and civil government.¹²⁰ In the Second Book, the author explains how the new needs of mankind made it necessary to 'invent' a more permanent and individualized form of ownership than the one supplied by the natural law. According to Blackstone, "[n]ecessity begat property; and in order to insure that property, recourse was had to civil society,"¹²¹ and the concomitants such as states, government and laws.

After the invention of property by men, Blackstone shows that the notion developed in many ways in different times and places. For example, some communities accepted that men could grant ownership in their property to strangers by writing a will in their favor, thus disposing of their property as they wished after their death, while others could not tolerate transmission of goods in this form since possession and ownership ceased to exist when a man dies.¹²² In the varieties of legal rules regarding transmission of property across human communities, the common principle remained that "occupancy is the thing by which the title was in fact originally gained."¹²³ This is the civil foundation of property. The permanent right of property is a civil right and not a natural right since natural property is general in character, and it represents a political establishment;¹²⁴ the diversity of rules in this regard is clear evidence to support this theoretical understanding of property.

Let us pause briefly here to note the intellectual genealogy connecting the foundations of US property law and Native American law to Blackstone's explanation of property. In 1823, Chief Justice Marshall of the U.S. Supreme Court decided the case *Johnson v. M'Intosh*¹²⁵ very much in line with Blackstone's views of property. Although Chief Justice Marshall does not explicitly mention Blackstone (generally speaking, references to authorities of any nature are extremely rare in

¹¹⁸ *Id.* at 7.

¹¹⁹ *Id.* at 5.

¹²⁰ 1 COMMENTARIES intro. § II, 47-49.

¹²¹ 2 COMMENTARIES 8.

¹²² *Id.* at 12-13.

¹²³ *Id.* at 8.

¹²⁴ *Id.* at 11.

¹²⁵ 21 U.S. 543 (1823) (Chief Justice Marshall does not explicitly mention Blackstone, and this is no surprise given how rare references to authorities of any nature are Chief Justice Marshall's opinions; nonetheless, his reasons echo the arguments submitted by Winder and Murray, M'Intosh's attorneys, who themselves cited the first pages of 2 COMMENTARIES).

Marshall's opinions), his reasons echo the arguments submitted by Winder and Murray, M'Intosh's attorneys, who themselves mentioned the first pages of the Second Book of Blackstone's *Commentaries*. In spite of the rich developments in both property law and Native American law in the past 200 years since this decision, the case remains a landmark of the Marshall era and is very often examined in the very first year of law school across America.

Blackstone's view of property is most often characterized by scholars as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."¹²⁶ Schoor and Kreitner suggest that it was Cohen himself, a prolific writer on the history and philosophy of property,¹²⁷ who crystalized and gave broad currency to this perception of Blackstone's perspective.¹²⁸ However, Schoor reminds us that a careful reader of the *Commentaries* will discover numerous explications, delimitations and qualifications for "less-than-absolute property rights."¹²⁹ Cohen's 1954 *Dialogue on Private Property* attributes to Blackstone a philosophy of property deprived of the complex arrangement of rules that he had described as the law of England throughout the Second Book of the *Commentaries*.¹³⁰

What is then Cohen's philosophy of property and why does he misuse Blackstone in that respect? In *Dialogue on Private Property*,¹³¹ Cohen presents a comprehensive and pedagogical explanation of his own understanding of property. He defines it as "the exclusions that individuals can impose or withdraw with state backing against the rest of society," in relation to their enjoyment of a thing.¹³² He distinguishes this approach from Blackstone's, summarizing it as focused on the "sole and despotic dominion," as the latter could not apply to anything in reality given that there always are limitations on one's ability to enjoy a thing,¹³³ and thus is unable to account for the operations of law in "concrete, real-world problems."¹³⁴ As things constantly interact with others, one could not possibly exert a "sole and despotic dominion" over a something without making it impossible for others to enjoy an equally broad right to their own things. Cohen paints Blackstone's definition as absolute in order to highlight the nuances of his own and the matter of degree:¹³⁵ everything lies in the extent to which one can enjoy his things. To define such limits, Cohen looks at what judges and other state authorities

¹²⁶ David B. Schoor, *How Blackstone became a Blackstonian* 10 THEORETICAL INQUIRIES L. 103, 104 (2009) (the original quote is to 2 COMMENTARIES 1).

¹²⁷ F.S. Cohen, *Dialogue on Private Property* (Yale Law Sch. Faculty Scholarship Series, Paper No. 4360, 1954).

¹²⁸ Schoor, *supra* note 126, at 124 ("my intuition is that 'sole and despotic dominion' was popularized through the good offices of Felix Cohen"); see also Roy Kreitner, *On the Use and Abuse of Blackstone – A Comment on Professor Schoor*, 10 THEORETICAL INQUIRIES L. (1 FORUM) (2009).

¹²⁹ Schoor, *supra* note 126, at 107. See e.g. 2 COMMENTARIES 38-39 (exposing the right of all to hunt "ravenous beasts of prey" on another's turf).

¹³⁰ Cohen, *supra* note 127.

¹³¹ *Id.*

¹³² *Id.* at 378.

¹³³ *Id.* at 362-63.

¹³⁴ *Id.* at 378.

¹³⁵ *Id.* at 379.

would actually do to protect one's property rights.¹³⁶ It is in respect that Cohen's philosophy of property truly belongs to legal realism: "what judges do is more important than what they say" and property relationships are defined and shaped as "*a resultant of court activity*" "whether or not the court calls them property."¹³⁷ In determining property relationships, Cohen (who had undoubtedly read Holmes) knew that courts would be faced with conflicting groups' interests. Moreover, his long involvement with Native American law issues, taught him that "divergences of values [were] common when groups with different traditions and experiences came in contact."¹³⁸ Cohen firmly believed that the government has an affirmative obligation to protect the social and economic rights of groups and individuals,¹³⁹ and presented this democratic ideal in his Foreword to the *Handbook*.¹⁴⁰ There lay the solution to the problem of conflicting group interests: various groups should be able to express their collective right to be different, and these voices have to be included and protected. Cohen embraced and advocated legal pluralism as the best way to protect individuals from oppression and promote social integration.¹⁴¹ The consequence of Cohen's legal pluralism for the operation of property would be the reconciliation of other groups' interests in the enforcement by the state of property rights.

Property laws presented by Blackstone, and his principled articulation of them, accommodated a myriad of stakeholders' interests instead of celebrating the owner's "sole and despotic dominion" over the things that he owned. In this respect, we can see that there is much similitude with Cohen's beliefs. Despite all the apparent differences between Blackstone and Cohen, there seems, once again, to be a sense of unity. The similarities between Blackstone's and Cohen's views on property are further highlighted by an underlying view of social relations. Kennedy demonstrated that Blackstone's *Commentaries* operate to legitimate and perpetuate the status quo.¹⁴² With regards to property, the rules that Blackstone enunciated as law resulted from the imposition of power by the strong on the weak in the power struggles of feudal England. However unfair the processes that led to them, Blackstone entrenched the outcomes and reaffirmed their legal force for the future. The last pages of Cohen's *Dialogue* offer a striking parallel: Cohen stresses that the functional operation of property principles, stemming from the fundamental rule of first occupancy, perpetuates the governing group's own power over time.¹⁴³

Blackstone's understanding of property revealed above was not ground-breaking. It was an elaboration on natural law presenting no major inconsistency

¹³⁶ *Id.* at 379-80.

¹³⁷ *Id.*; Cohen himself calls his definition "*realistic*", see *id.* at 378; See also Schoor, *supra* note 126, at 124 n.138.

¹³⁸ HANDBOOK (1941), *supra* note 2, at 147.

¹³⁹ MITCHELL, *supra* note 58, at 174.

¹⁴⁰ *Id.* at 172.

¹⁴¹ See generally *id.* at 172-77.

¹⁴² See generally Kennedy, *supra* note 16.

¹⁴³ See Cohen, *supra* note 127, at 386-87 ("the rule of first occupancy [...] preserves the status quo. [It] maintains or strengthens the power of the possessing group. [...] Our examination of the situation in terms of power indicates that the rule of first occupancy may appeal very much to a law-giver who is interested only in strengthening the power of his government or its ruling class.").

with Locke's own philosophy of property,¹⁴⁴ and fits in a genealogy tracing back to Pufendorf and Grotius. What is important for the intellectual history of law regarding Blackstone's philosophy of property is its inclusion in the *Commentaries*. The way Blackstone narrates the birth of civil property is an instance of scientific, philosophical, discussion of a legal notion in a rational fashion. The legal principles, just like the concept of property, are therefore, a proper object for a logical examination. Moreover, while the term 'property' may be used in daily life, it has a precise meaning in law and Blackstone undertakes to not only investigate its historical developments but also to explain its meaning. His writing style, similar to Rousseau's, is a way to make this study available to all of those who are not familiar with legal jargon. The clarity of his language and narrative style certainly make for easier reading for students than the technical and confused abridgments then available. It is with explanations such as those for the concept of property that Blackstone "changed the way in which people think."¹⁴⁵ Blackstone participated in the shift from a period of "legal creation" (the invention of new forms of actions over centuries of cumulative English legal developments) to a "period of literary creation in which legal results were reduced to coherent substantive systems."¹⁴⁶ Blackstone's efforts in pedagogy to explain the law to non-jurists was instrumental in leading jurists to transform the law into a substantive system rather than a compilation of procedures.¹⁴⁷ Blackstone for the first time expressed what became self-evident subsequently:¹⁴⁸ the categories of problems encountered in life by members of society are reflected in categories of legal solutions. These categories are the "elementary legal ideas," and are "elementary precisely because, in a sense, they classify life."¹⁴⁹ Introducing this idea to lawyers' thinking is what Milsom calls the true nature of Blackstone's achievement.¹⁵⁰ Blackstone's decisive role in introducing in legal thinking what is now considered as obvious unquestionably demonstrates Blackstone's key role in the intellectual history of law.

In *The Path of the Law*,¹⁵¹ Holmes challenged "the description of law as a body of natural and neutral rules."¹⁵² Acceptance or rejection of this idea dominated American jurisprudence in the first decades of the twentieth century. This disillusion with law seemed to leave only two future alternatives: giving the state the power to govern diverse groups in the name of general public good, necessarily in accordance with one's own biased sense of justice, or deferring to groups at the risk of lapsing into moral relativism or, worse, nihilism.¹⁵³ The struggle between the two alternatives envisioned after Holmes, the question of legal pluralism, has stayed alive long into the twentieth century, with legal realism as an incarnation of the latter option.¹⁵⁴ Before articulating the principles for legal pluralism, Cohen gave

¹⁴⁴ Blackstone himself acknowledges Locke's influence on his own works, *see, e.g.* 1 COMMENTARIES, 125-26; *See generally* LOCKE, *supra* note 106.

¹⁴⁵ MILSOM, *supra* note 17, at 9.

¹⁴⁶ *Id.* at 11.

¹⁴⁷ *Id.* at 12.

¹⁴⁸ *Id.* at 11.

¹⁴⁹ *Id.* at 6-7.

¹⁵⁰ *See generally* MILSOM, *supra* note 17.

¹⁵¹ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

¹⁵² MITCHELL, *supra* note 58, at 271.

¹⁵³ *Id.*

¹⁵⁴ *See, e.g.* Carrington's fear in the mid-1980s that LEGAL REALISTS, or rather their heirs

its credentials to legal realism in a period when legal thinking was dominated by the process theorists who asserted the existence of "neutral processes in which different groups supposedly interact, compete, and trade ends"¹⁵⁵ as an answer's to Holmes's dilemma. In 1935, Cohen provided the most satisfactory alternative to legal process for those who believed that law could not escape embracing substantive norms¹⁵⁶ so far with his *Transcendental Nonsense and the Functional Approach*.¹⁵⁷ This work was received and has "remained a classic example of the legal realists' critique of conceptualism."¹⁵⁸ This publication was critical in earning Cohen what Frankfurter referred to as his prestige as a scholar¹⁵⁹ years prior to the preparation of the *Handbook*. Cohen's articulation of legal realism in *Transcendental Nonsense and the Functional Approach*, and then of legal pluralism as presented in particular for the Native Americans in the *Handbook*, allowed the movement to develop and gain momentum in the 1960s,¹⁶⁰ and later give birth to critical legal studies and its own offsprings such as critical race theory and critical feminism. Cohen was, with Llewellyn,¹⁶¹ the architect of legal realism. As such, he occupies a pivotal role in the development of American legal theory in the twentieth century.

Hence, we have seen that not only do Blackstone and Cohen both articulate comprehensive and rationalized visions of property; they also understand this notion with surprising points of likeness. Neither Blackstone nor Cohen became the great jurists we consider them to be to this day thanks to their analysis of property; nonetheless, analyzing their respective stance on this concept helps understand the pivotal role they played in the intellectual history of law. Property is one of the few concepts which has shaped the history of jurisprudence, and the above analysis revealed that Blackstone and Cohen both played an original role in its intellectual developments. Blackstone greatly contributed to making it a subject of rational examination for lawyers, and Cohen articulated legal pluralism in the understanding of property; their respective achievements in this field echo the momentous role for the development of legal writing and legal sources.

CONCLUSION

Comparing the most influential scholars in a given field to Blackstone is common practice. For instance, the United States Supreme Court referred to Col W. Winthrop as "the Blackstone of Military Law."¹⁶² Native American Law is no different, as

that were then only emerging as the CRITICAL LEGAL STUDIES movement, would bring nihilism into legal education and corrupt the spirit of prospective lawyers: Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUCATION 222.

¹⁵⁵ MITCHELL, *supra* note 58, at 272 (citing Dalh).

¹⁵⁶ *Id.*

¹⁵⁷ Cohen, *supra* note 73.

¹⁵⁸ MITCHELL, *supra* note 58, at 271.

¹⁵⁹ See GETCHES ET AL., *supra* note 38.

¹⁶⁰ See, e.g. the jurisprudential changes brought about by the Warren Court.

¹⁶¹ See, e.g. Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431 (1930).

¹⁶² Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006) (citing *Reid v. Covert*, 354 U.S. 1, 19, n.38 (1957)); See W. WINTHROP, *MILITARY LAW* (1886); J.E. KASTENBERG, *THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP* (2009).

we have seen with the comparison between Cohen and Blackstone popularized by Strickland. We can however now affirm that such a comparison is not some stylistic device set by the genre of academic writing in the case of Cohen—the comparison is sound, accurate and profound.

Testing the six initial assumptions I described in the introduction by using the three different lenses employed to conduct this inquiry has been illuminating. The assumptions based on deference to Native American law scholars' comparison of Cohen to Blackstone were overwhelmingly confirmed. Cohen was indeed the Blackstone of Federal Indian Law, and the *Handbook*, the *Commentaries* of Federal Indian Law; Cohen was the first scholar of Native American law, and the *Handbook* was the first piece of scholarship in the field, in the same way as Blackstone was the first scholar of English common law. In presenting a political vision for the discipline, Cohen also contributed to the thinking in the field much as Blackstone had done two centuries earlier. Lastly, Cohen played a key role in the development of American jurisprudence, mirroring to a great extent Blackstone's fundamental role in making the common law a substantive field fit for academic analysis.