

University of California, Hastings College of the Law
INDIAN LAW
Fall Semester 2012
Professor Leshy

Handout # 1

One: Early U.S. Indian policy

Johnson v. McIntosh

1. What legal principle did the Court apply to resolve this case, and what was its source? Common law? Treaty? Statute? International law? Was it a rule of international law? Was the rule a legal construct (or a legal fiction), or was it based on reality? If the latter, whose reality, the Indians' or the non-Indians'?
2. According to Chief Justice Marshall's reasoning, what property interest did the Indians have in 1491? In 1770? Recall the metaphor that property consists of a "bundle of sticks" – different features and rights. What "sticks" did the Indians possess in 1491? In 1770? Did they lose all claim of an ownership as a consequence of this decision? That is, did they have any "sticks" left?
3. Was possession relevant or irrelevant to the question of "ownership" (title) in Johnson? Apparently M'Intosh was in possession, because Johnson brought an action of "ejectment" to oust him. Did the M'Intosh win because he was in possession?
4. What might have been the consequences for land ownership in the United States if the Court had ruled for Johnson? Do you suppose Marshall was influenced by a concern about that? Was it appropriate for the Court to be influenced by such considerations?
5. Regarding the doctrine of "discovery," for comparison, Australia was settled by the English under the theory that it was an unoccupied country, and for two centuries the English settlers and their descendants and followers never regarded the Aborigines (native inhabitants) as having any right of occupancy or any property claim worth negotiating about. That has changed substantially, since the Australian High Court's decision in Mabo v. Queensland in 1988. If you're interested, see pp. 990-1004 (which I'm not assigning).

Indian Policy in the Formative Years of the U.S.

1. What was the policy of the Articles of Confederation concerning Indian affairs, and specifically, the respective authority of the states and the national government concerning same? See last two paragraphs on p. 62.

2. What change, if any, did the U.S. Constitution make in this regard? See p. 64, top.
3. To what extent did the Treaty of Hopewell, pp. 89-90, give the Indians power to punish wrongdoing non-Indians? What was its general thrust? Did it recognize any authority of the states (e.g., of Georgia) over the Indians?
4. What were the purposes of the Trade and Intercourse Acts, or sometimes called “non-intercourse acts” (1790-1834), pp. 90-94? Were they aimed at Indians? Or others? Who?

Removal and the Cherokee Cases

1. What is the precise issue before the Court in Cherokee Nation v. Georgia? On what does the answer turn?
2. Notice the split on the Court regarding the legal status of Indian tribes in our constitutional system. How many justices thought the Indians had some continuing sovereignty? What is meant by “sovereignty” here?
3. What role, if any, did the “Indian commerce clause” of the U.S. Constitution play in this decision?
4. In Worcester v. Georgia, note Marshall discusses the Treaty of Hopewell (starting at the bottom of p. 116). What conclusion does he draw from it? Is it the same conclusion Justice Johnson draws from it in his concurring opinion in Cherokee Nation (see p. 108)? From whose perspective does Marshall interpret the Treaty - the Tribe’s or the United States’?
5. What role did the Indian commerce clause play in this decision? Would the result have been the same if the Articles of Confederation had still been in force? Is it significant that the Constitution refers to “tribes” and Marshall here talks about Indian “nations”?
6. Is state law ousted here because Congress has done something to preempt it? Or is it ousted by virtue of federal common or constitutional law, as interpreted by the Supreme Court? Think about it this way: What do you think Marshall would say on the question of whether a future Congress could pass a law giving states authority over Indians? On whether the Supreme Court had the power to decide to give states authority over Indians? See notes 2-3, pp. 124-25.

Two: Treatymaking, U.S. v. Washington and Winans

1. What is the precise issue regarding the Treaty in U.S. v. Washington?
2. Who were the negotiators for the Indians in the treaties addressed in that decision? Think

about the difficulties of language as well as the representativeness of the negotiators for the Indians.

3. What were the Indians giving up and what were they getting by entering into these treaties?
4. What controls the interpretation Judge Boldt places on the key treaty language? The text? The context? Canons of construction? All of the above?
5. Is there a parallel between the Indian canon of treaty construction and general principles of contract law?
6. Answer the same questions in #1-5 above with respect to Winans. What was the Yakima Nation giving up and what was it getting in this treaty?
7. Does the Court in Winans acknowledge any possible role for state law? Does the treaty interpretation affect the rights of non-Indian private property owners? How? What if the Indians had dug along the shores for shellfish? See note 1, p 139.

Three: End of Treatymaking and Expanding Federal Power

1. Why did treatymaking end? Did it make any difference to overall U.S. policy toward Indians? To the course of Indian law?
2. Should the canon of construction for construing ambiguities in Indian *treaties* also be used in interpreting *statutes* dealing with Indian affairs? Why or why not? To *regulations* and other executive branch actions dealing with Indians?
3. Note the Grant Peace Policy described on pp. 151-52. Might that raise questions under modern interpretations of the “establishment of religion” prohibition in the First Amendment?
4. In Crow Dog, p. 153, what is the issue? The federal statute involved, which is called the General Crimes Act, is still in effect (with some modifications). Notice the statutory exceptions to the grant of jurisdiction to the federal courts (section 2146, p. 154). Does Crow Dog fit into any of these exceptions?
5. Is the Court construing the treaty here as the Indians would have understood it? Would John Marshall have approved of its reasoning?
6. Notice the aftermath - enactment of the Major Crimes Act, p. 157. Did it extend state authority over Indians? Why do you suppose Congress took the approach it did?

7. What problems and issues might arise from applying “white man’s law” in Indian country? What if tribal culture tolerated or encouraged euthanasia? Or did not recognize rape within the confines of marriage? Or rejected death or incarceration as a penalty for even the most heinous of crimes?

7. In Kagama, p. 158, what is the Court’s reasoning as to where Congress got the authority to enact the Major Crimes Act? The Indian Commerce Clause? The Property Clause? The Treaty Clause? Somewhere else?

8. Kagama is seen as a highwater mark in what is sometimes called the “plenary power” doctrine; “plenary” meaning “full; complete; entire; absolute; unqualified.” But can that be taken literally? Could Congress pass a law requiring execution of Indians without due process? Or denying Indians freedom of speech? Might “plenary” here mean that there is no limit on the subjects that Congress can address vis-a-vis Indians? Or that Congress can disestablish tribes as a matter of federal law? Or that Congress has full power to exclude states from having any role in Indian affairs? Or, conversely, to give the states the same jurisdiction over Indians and Indian lands as over non-Indians and other land within its borders?

9. In Sandoval, p. 160, what is the issue? Notice the unique history of the Indian communities (called “Pueblos”) in New Mexico. How do the Pueblos hold title to their land? Does that translate into any difference in legal status? Should it? (Do you think that the subject matter of the regulation -- liquor traffic -- made any difference to the outcome?) Who has the ultimate power to decide on the legal status of native peoples in the U.S., including defining who they are? The Supreme Court? The Congress? The President? Could a state choose to give a tribe within its borders special legal status, without the imprimatur of Congress? (We’ll revisit that last question in relation to Rice v. Cayetano, further below.)

Four: Allotment and the Indian Reorganization Act eras:

1. Allotment had a huge impact on Indian landholdings in some parts of Indian country, although some tribes were generally spared. See bottom p. 171 - top of p. 172. What was the purpose and goals of the allotment policy? Was it anti-Indian? Anti-Tribe? What was the role of the tribes in adopting or executing the policy?

Lone Wolf, p. 183

1. Does the Court here recognize any limit on the power of Congress? Can Congress break treaties with impunity?

2. Is that true under principles of international law; i.e., can the U.S. unilaterally abrogate a treaty with, say, France or China?

3. Is any judicial review available of Congress's action in either situation (domestic tribes or foreign nations)? What are the downsides in either case of Congress abrogating a treaty?

Indian Reorganization Act (188-197)

1. What was the fundamental thrust of the IRA? How did it differ from prior Indian policy?
 2. What specific changes were wrought by it?
 3. Did it revive traditional forms of tribal governance? Did it reinforce tribal customary cultural norms? Or did it impose alien forms of government on tribes?
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Five: Termination, Self-Determination, and Indians and Equal Protection:

1. What was the goal of the termination policy (pp. 200-04)? How did it differ from the allotment era policy?
2. How did fit in the larger political context of post-World-War-II America?
3. Was there any doubt about Congress's authority to adopt the policy, given historic precedents? Was it merely an exercise of the "plenary power" doctrine?
4. Was the policy evenly and uniformly applied?
4. Public Law 280, mentioned in the note on p. 203, is important in California and we'll take it up in more detail later on.

Menominee p. 207

1. What did the 1854 treaty give the tribe? Did it expressly guarantee hunting and fishing rights? Did the termination act in 1961 extinguish these rights?
2. Notice the unusual posture of the case, as both the U.S. and Tribe appeared on the same side in the Supreme Court, with the state as amicus curiae on the other side. Why do you suppose the U.S. supported the tribe here?
3. What was the court's reasoning? Wasn't the termination act fairly clear (see dissent) in contemplating the extinguishment of all the tribe's rights under federal law?
4. If the dissent had prevailed, and tribe entitled to compensation for loss of its hunting and fishing rights, how would compensation be determined? Is it the right to hunt and fish, or the right to hunt and fish free from state regulation? (But note that tribal treaty rights might not be

entirely free from state regulation; see Kimball II, top p. 212; cf. what Winans said about state law and treaty rights, pp. 138-39.)

5. Did termination extinguish tribal sovereignty altogether? Could tribes continue to exist? If so, what was their legal status? Whose law would determine it? Tribal law, state law or federal law? See notes 5-6, pp. 212-13.

The shift to self-determination

1. Regarding the materials on the shift from termination to self-determination (216-20), notice that Menominee was decided as the termination era was ending, with Congress and the executive on record as not really favoring continuation of the termination policy. Is it appropriate for the Court to pick up on the shift in the prevailing winds in deciding this case? To narrowly interpret termination-era statutes when they no longer were popular? How should the Court interpret the Allotment Act today? Broadly, narrowly, or straight down the middle, regardless of historical context? Given the abrupt and radical shifts in federal Indian policy over the last two centuries, this kind of issue is very common in Indian law.

2. What are the goals of the self-determination policy and how does it differ from what came before?

3. As the materials on pp. 220-24 show, the self-determination era has led to a proliferation of statutes at the tribal, federal and even state levels, greatly complicating the landscape of Indian law.

Insert: Regarding the modern role of the BIA, consider the following remarks of Kevin Gover, Assistant Secretary of the Interior for Indian Affairs, at the ceremony acknowledging the 175th anniversary of the BIA, September 8, 2000:

In March of 1824, President James Monroe established the Office of Indian Affairs in the Department of War. Its mission was to conduct the nation's business with regard to Indian affairs. We have come together today to mark the first 175 years of the institution now known as the Bureau of Indian Affairs.

It is appropriate that we do so in the first year of a new century and a new millennium, a time when our leaders are reflecting on what lies ahead and preparing for those challenges. Before looking ahead, though, this institution must first look back and reflect on what it has wrought and, by doing so, come to know that this is no occasion for celebration; rather it is time for reflection and contemplation, a time for sorrowful truths to be spoken, a time for contrition.

We must first reconcile ourselves to the fact that the works of this agency have at various times profoundly harmed the communities it was meant to serve. From the very beginning, the Office

of Indian Affairs was an instrument by which the United States enforced its ambition against the Indian nations and Indian people who stood in its path. And so, the first mission of this institution was to execute the removal of the southeastern tribal nations. By threat, deceit, and force, these great tribal nations were made to march 1,000 miles to the west, leaving thousands of their old, their young and their infirm in hasty graves along the Trail of Tears.

As the nation looked to the West for more land, this agency participated in the ethnic cleansing that befell the western tribes. War necessarily begets tragedy; the war for the West was no exception. Yet in these more enlightened times, it must be acknowledged that the deliberate spread of disease, the decimation of the mighty bison herds, the use of the poison alcohol to destroy mind and body, and the cowardly killing of women and children made for tragedy on a scale so ghastly that it cannot be dismissed as merely the inevitable consequence of the clash of competing ways of life. This agency and the good people in it failed in the mission to prevent the devastation. And so great nations of patriot warriors fell. We will never push aside the memory of unnecessary and violent death at places such as Sand Creek, the banks of the Washita River, and Wounded Knee.

Nor did the consequences of war have to include the futile and destructive efforts to annihilate Indian cultures. After the devastation of tribal economies and the deliberate creation of tribal dependence on the services provided by this agency, this agency set out to destroy all things Indian.

This agency forbade the speaking of Indian languages, prohibited the conduct of traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worst of all, the Bureau of Indian Affairs committed these acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually. Even in this era of self-determination, when the Bureau of Indian Affairs is at long last serving as an advocate for Indian people in an atmosphere of mutual respect, the legacy of these misdeeds haunts us. The trauma of shame, fear and anger has passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country. Many of our people live lives of unrelenting tragedy as Indian families suffer the ruin of lives by alcoholism, suicides made of shame and despair, and violent death at the hands of one another. So many of the maladies suffered today in Indian country result from the failures of this agency. Poverty, ignorance, and disease have been the product of this agency's work.

And so today I stand before you as the leader of an institution that in the past has committed acts so terrible that they infect, diminish, and destroy the lives of Indian people decades later, generations later. These things occurred despite the efforts of many good people with good hearts who sought to prevent them. These wrongs must be acknowledged if the healing is to begin.

I do not speak today for the United States. That is the province of the nation's elected leaders,

and I would not presume to speak on their behalf. I am empowered, however, to speak on behalf of this agency, the Bureau of Indian Affairs, and I am quite certain that the words that follow reflect the hearts of its 10,000 employees.

Let us begin by expressing our profound sorrow for what this agency has done in the past. Just like you, when we think of these misdeeds and their tragic consequences, our hearts break and our grief is as pure and complete as yours. We desperately wish that we could change this history, but of course we cannot. On behalf of the Bureau of Indian Affairs, I extend this formal apology to Indian people for the historical conduct of this agency.

And while the BIA employees of today did not commit these wrongs, we acknowledge that the institution we serve did. We accept this inheritance, this legacy of racism and inhumanity. And by accepting this legacy, we accept also the moral responsibility of putting things right.

We therefore begin this important work anew, and make a new commitment to the people and communities that we serve, a commitment born of the dedication we share with you to the cause of renewed hope and prosperity for Indian country. Never again will this agency stand silent when hate and violence are committed against Indians. Never again will we allow policy to proceed from the assumption that Indians possess less human genius than the other races. Never again will we be complicit in the theft of Indian property. Never again will we appoint false leaders who serve purposes other than those of the tribes. Never again will we allow unflattering and stereotypical images of Indian people to deface the halls of government or lead the American people to shallow and ignorant beliefs about Indians. Never again will we attack your religions, your languages, your rituals, or any of your tribal ways. Never again will we seize your children, nor teach them to be ashamed of who they are. Never again.

We cannot yet ask your forgiveness, not while the burdens of this agency's history weigh so heavily on tribal communities. What we do ask is that, together, we allow the healing to begin: As you return to your homes, and as you talk with your people, please tell them that time of dying is at its end. Tell your children that the time of shame and fear is over. Tell your young men and women to replace their anger with hope and love for their people. Together, we must wipe the tears of seven generations. Together, we must allow our broken hearts to mend. Together, we will face a challenging world with confidence and trust. Together, let us resolve that when our future leaders gather to discuss the history of this institution, it will be time to celebrate the rebirth of joy, freedom, and progress for the Indian Nations. The Bureau of Indian Affairs was born in 1824 in a time of war on Indian people. May it live in the year 2000 and beyond as an instrument of their prosperity.

Indians and Equal Protection (224-42)

1. In Morton v. Mancari, notice the long history of the Bureau of Indian Affairs hiring preference policy. Is how the Court deals with the statutory issue – whether that policy survived the non-discrimination command of the 1964 Civil Rights Act – straightforward and persuasive?

2. What about the constitutional issue? Technically, what was at issue was not the “equal protection” clause of the 14th Amendment, but the “due process” clause of the Fifth Amendment. Do you understand why? Hint: Bolling v. Sharpe, cited in the middle of p. 228, a companion case to Brown v. Board of Education, involved racial school segregation in the District of Columbia (which is not a state but an arm of the federal government).
3. Is the constitutional issue an easy one? Is there a clear line to draw between Indians and other racial minorities? Is the classification of Indians in these statutes “political,” as Justice Blackmun says, footnote 24, p. 229? Or is there an element of race? Notice the 1834 statute speaks of “persons of Indian descent.” (Footnote 7, p. 226).
4. What are the legal implications of saying the classification is racial? Does it affect the standard of review? What standard of review is applied in Morton?
5. What are the possible legal bases for singling out Indians for different, and preferential treatment, in federal law?

Rice v. Cavetano (notes 6-7, pp. 233-34)

1. What’s the action being complained of here, and who took the action - the federal or state government?
2. Is the definition of “Native Hawaiian” in Hawaiian law a racial classification or a cultural one? What about the definition of “Hawaiian”?
3. Would the outcome have been different if the state had not discriminated in voting (thereby triggering the 15th amendment)? For example, would it be constitutional for the state to enact benefit programs for which only Native Hawaiians were eligible? That would be tested under the fifth amendment due process clause (effectively incorporating the fourteenth amendment equal protection clause), like Morton v. Mancari. Would it have made Mancari a closer fit?
4. How much of Morton survives Rice? Would the outcome have been different if Congress had enacted the voter limitation as a matter of federal law? Could Congress pass a law giving federally recognized tribes the right to elect the Commissioner of Indian Affairs (a federal government position)?
5. What now is the constitutionality of statutes enacted by Congress which make Native Hawaiians eligible for many of the same programs for which American Indians are eligible?
6. Can a state university administer a scholarship program for which only Native Americans (or Native Hawaiians) are eligible? For which only members of federally recognized Indian tribes are eligible?

6. Recall the Sandoval case, p. 160, where the Court ruled that Congress could, if it chose, treat New Mexico Pueblo Indians (which got title to their land in fee simple from the government of Spain prior to the U.S. taking jurisdiction over the territory) as Indian. Why doesn't that control here?
7. Is it bad for native peoples (Indians, Native Hawaiians) in the long run to be measured differently, to allow them to be singled out in the law for differential treatment? Or is it O.K. so long as they are favored rather than treated in an inferior manner?
8. Many biologists argue that the whole idea of "race" is an arbitrary and meaningless one anyway. Why should the Court try to draw lines in this area? Why doesn't it let the legislative bodies, such as the State of Hawaii or the Congress, do what they want in this area, so long as there is no "invidious" (defined as hateful, or calculated to create ill will or resentment) discrimination against racial/cultural minorities?
9. The political danger, one might argue, is that the majority will discriminate against minorities. Therefore, the courts shouldn't be that concerned about discrimination in favor of minorities. If the courts were to take that approach, who decides whether the differential is favorable or unfavorable, invidious or not?

Six: Tribal Property Interests

Shoshone Tribe (1938) (p. 245)

1. What is the difference between "recognized" title and unrecognized or aboriginal title, in terms of Johnson v. McIntosh?
2. What did the 1868 Treaty with the Shoshone say, if anything, about timber and minerals? What did the government argue the effect of the treaty was on timber and minerals? In the context of the time and the rest of the treaty, what might the Indians have understood about the treaty's effect on timber and minerals? If the overall thrust of the treaty was to convert the Indians into farmers, what might that imply about ownership of timber and minerals?
3. What was the effect of subsequent, post-treaty actions by the parties – specifically, the 1904 cession by the tribes – with regard to the ownership of timber and minerals? Might the U.S. crediting to the tribes of proceeds from sale of timber be seen as a gift to the tribes from the U.S., or was it a recognition of a pre-existing ownership by the tribes? What was the meaning of the Cook decision in 1873, according to the Court? See note 1, p. 248.

Sioux Tribe (1942) p. 249.

1. Why did the President withdraw these tracts of land by Executive Order for the use of the tribe? Did the President's action have any legal effect on the Indians' claim of title to the land? Did it constitute federal "recognition" of Indian title?
2. Under what authority did the President act? Where does the Constitution place authority over federal lands, in the President or the Congress?
3. The Court discusses what the understanding of Congress and the Executive was concerning the legal effect of such executive orders affecting lands occupied and/or claimed by Indians. But what about the Indians' understanding? Wasn't that relevant? Had it been relevant in the Shoshone case, decided by the Court only four years earlier? Why didn't its approach control?
4. The Sioux holding was in effect reversed by the Congress, subject to an important limitation; see the discussion on pp. 272-73, which we'll cover below.

Montana (1981) (p. 253)

1. What do you suppose the Crow Tribe understood the treaties of 1851 and 1868 meant in terms of ownership of the bed of the Big Horn River? Look closely at the language of the treaties; e.g., "absolute and undisturbed use and occupation by the Indians." What would the canon of construction regarding ambiguities in treaties affecting Indians teach here? Wasn't the tribe's claim (note, here supported by the U.S.) sound and fully supported by decisions like Shoshone?
2. Why does the Court reject the tribe's claim of ownership here? Is there a competing canon of construction that trumps? What is it? Is the Court saying the states' interests trump tribal interests? Is that consistent with John Marshall's view in Worcester v. Georgia?
3. Notice how the results in these cases have not been very consistent; see notes pp. 257-59, and especially Idaho v. United States (2001), where the state's "equal footing" claim to a lakebed was rejected.

Tee-Hit-Ton (1955) (p. 259)

1. What was the nature of the Indians' claim of title? How had they lost full fee simple title to the timber? Johnson v. McIntosh recognized that the U.S. could take the Indians' right of occupancy by either "purchase or conquest." See p. 67. Had the U.S. taken it here by purchase? By conquest?
2. Is the result here an application of the "political question" doctrine - that the issue raises questions that must be resolved through the political, rather than the judicial, process? Is that what the Court means when it says "[e]very American schoolboy knows" the U.S. wrested title from Indians by force without adequate compensation (p. 278)?

3. How, according to the dissent, had the U.S. “recognized” the Indians’ right to the timber?
 4. What does Tee-Hit-Ton say about whether the United States owed the Crow Tribe compensation for the riverbed in Montana v. U.S.?
 5. Notice that the historical record is clear that the U.S. often took Indian right of occupancy by “purchase” rather than by “conquest,” compensating the Indians in some fashion. See Cohen article, note 4, p. 266. And notice that Congress established the Indian Claims Commission in 1946 to hear claims against the U.S. arising out of previous U.S.- Indian dealings. And one of the causes of action was “claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity,” 25 U.S.C. 70a(5), quoted on p. 268.
 6. Regarding the material on the Alaska Native Claims Settlement Act, pp. 888-93, is what Congress did here consistent with Tee-Hit-Ton? Could Congress have done nothing to compensate Alaska Natives for extinguishment of their aboriginal right of occupancy? What do you suppose Congress acted? Notice also how Congress structured the settlement in terms of land title, and the use of corporate status under state law.
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Seven: Reviving Indian Claims to Land and Defining a Tribe

County of Oneida (1985) (p. 280)

1. Why did the state rather than the U.S. take the lead in dealing with the Indians here in the 18th century?
2. Was New York’s conduct in 1795 in patent violation of the Non-Intercourse Act? Would it have been in violation of the principles of Indian law as announced in Johnson v. McIntosh? (See the discussion of Oneida I (1974) on p. 283.)
3. What was New York’s defense? Can a right of action for the tribe be found in common law or in the Non-Intercourse Act itself?
4. Regarding whether the tribe’s claim is time-barred, is there an applicable statute of limitations? What about the defense of laches? How do the majority and the dissent differ?
5. What would you advise the tribe to do after this decision? Amend their complaint for damages to also seek ejectment of non-Indian persons occupying the land in question? What would you advise the state or the non-Indian occupants to do?

City of Sherrill v. Oneida Indian Nation, p. 290.

1. Is Sherill consistent with Oneida II? Are the equitable considerations behind laches as forcefully applied in the Indian context as where Indians are not involved? Notice Justice Stevens dissented from both decisions; was he being consistent?
2. Is Justice Stevens correct in arguing that this is a matter for Congress, and not the courts, to resolve? Had the decision gone the other way, could Congress have stripped the tribe's lands of immunity from state and local taxation and regulation? If it did so, would it owe compensation to the Tribe? If so, how would compensation be measured? By the value of the land? By the difference between the value of the land with the tax and regulatory immunity and the value without it?
3. Could Congress act now to restore these immunities to the tribe's lands? Assuming Congress could go either way - either immunize or strip the immunity from these lands - and if it is better for all concerned that Congress address these issues, should the Court resolve this litigation by taking the course of action that is best designed to lead to Congress addressing the matter? That is, to make a decision that makes it more likely than not that Congress will address the matter? Which result would likely spur Congress to act - a decision for or against the tribe?
4. Notice the differing results and rationales and settings in which so-called "eastern land claims" have been resolved, notes pp. 295-99.

What is a "tribe"? Who resolves that question and how?

1. Regarding the material on pp. 299-305, notice how sometimes Congress has resolved this and sometimes left it up to the courts or the executive branch to resolve. The current "recognition" process inside the BIA is governed by regulations discussed on pp. 303-04. These recognition proceedings today are often funded by gaming developers, who wish to partner with Indian groups who do not yet have federal recognition, in order to develop gaming enterprises under the Indian Gaming Regulatory Act, which we will take up later.
2. Regarding the regulatory criteria, pay particular attention to § 83.7(b) and (c), p. 303. How does an unrecognized Indian group go about showing - by what kinds of evidence - the presence of a "distinct community" that exercises "political influence or authority over its members as an autonomous entity," and how does it show that these things existed "from historical times until the present?"
3. Note subsection (f) at the top of p. 304. What do you suppose is the purpose behind that limitation?