

The Legacy of *Bryan v. Itasca County*: How a \$147 County Tax Notice Helped Bring Tribes \$200 Billion in Indian Gaming Revenue

Abstract: *The Supreme Court's landmark 1976 decision in Bryan v. Itasca County is known within Indian law academia for the story that Professors Phil Frickey and Bill Eskridge tell about the case: it reflects a dynamic and pragmatic interpretation of a termination-era statute to limit termination's harmful legacy during a more enlightened era of tribal self-determination. What is less well-appreciated about the case is that it is not only a good example of a particular interpretive approach; it is the case that provided the legal bedrock on which the Indian gaming industry was built. This article explores the genesis of the litigation, and traces its path to demonstrate how it came to produce a unanimous Supreme Court opinion of surprising breadth. It also demonstrates that the right to engage in gaming, which ultimately has produced vast tribal economic development and even riches for some tribes, had its roots in Indian poverty as much as Indian sovereignty.*

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Introduction

One day in the spring of 1972, a man walked across the property of Helen and Russell Bryan near Squaw Lake on the Leech Lake Indian Reservation, quietly measured the family's new sixty-by-twelve foot Skyline trailer home, and left without saying a word. The Bryans were left wondering about his purpose.¹ A short time later, the mystery was solved when the Bryans received a tax notice in the mail from Itasca County, assessing twenty-nine dollars and eighty-five cents in personal property taxes on the trailer home.² Though the tax was small, it set off a chain of events that would lead ultimately to the U.S. Supreme Court's landmark decision in *Bryan v. Itasca County*.³

The circumstances surrounding *Bryan* have never received much attention in Minnesota. When *Bryan* was litigated, the case was overshadowed locally by the Leech Lake hunting and fishing litigation, which sparked significant and heated attention by fishermen and other citizens of Minnesota.⁴ Hunting and fishing are near and dear to the hearts of Indian and non-Indian Minnesotans alike; *Bryan*, by contrast, was an esoteric

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¹ Informal Interview with Helen Johnson, at the offices of Anishinabe Legal Services, in Cass Lake, Minn. (May 25, 2007).

² *Id.*

³ *Bryan v. Itasca County*, 426 U.S. 373 (1976).

⁴ See *infra* note at 123; Interview with Mariana Shulstad, former Field Solicitor, U.S. Department of the Interior, in Minneapolis, Minn. (Sept. 1, 2006); Interview with Steven Thorne, of Counsel, Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C., in St. Paul, Minn. (Aug. 22, 2006).

tax case, and a seemingly insignificant tax at that. But while the fishing litigation was only important locally, *Bryan* has had national ramifications that continue to this day.

Bryan has received somewhat more attention nationally—and it is excerpted in each of the leading law school casebooks⁵—but in the gaming context it tends to be overlooked. A more recent decision, *Cabazon Band of Mission Indians v. California*,⁶ is often credited as the legal foundation for Indian gaming.⁷ While *Cabazon* is indeed an important case, its primary significance is that it followed *Bryan*'s holding that Congress in granting Minnesota jurisdiction over the tribe under Public Law 280⁸ never conferred

⁵ See, e.g., ROBERT N. CLINTON, CAROLE E. GOLDBERG & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM: SELECTED FEDERAL INDIAN LAW PROVISIONS 885, (LexisNexis 2004); DAVID H. GETCHES, ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW, 499 (Thompson West 2005).

⁶ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987).

⁷ E.g. Alexa Koenig and Jonathan Stein, *Lost in the Shuffle: State-Recognized Tribes and the Tribal Gaming Industry*, 40 U.S.F. L. Rev. 327, 348 (2006).

⁸ With respect to the civil portion of Public Law 280:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

<i>State or Territory of</i>	<i>Indian country affected</i>
Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

28 U.S.C. §1360 (1970).

With respect to the criminal portion of Public Law 280:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

<i>State or Territory of</i>	<i>Indian country affected</i>
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be

“general state civil regulatory control over Indian reservations.”⁹ *Bryan* thus was the bedrock on which the Indian gaming industry began. And if there is any doubt, consider that on the basis of the *Bryan* precedent, the Indian gaming industry was generating between one and five hundred million dollars in annual revenues *before* the *Cabazon* case was decided.¹⁰

If economic impact is a useful measure of importance, *Bryan* may be the most important victory for American Indian tribes in the Supreme Court in the latter half of the Twentieth Century. Indian gaming is simply the most successful economic venture ever to occur consistently across a wide range of American Indian reservations.¹¹ The

exercised by Indian tribes in Indian country over which State jurisdiction has not been extended

- California All Indian country within the State
- MinnesotaAll Indian country within the State, except the Red Lake Reservation
- Nebraska All Indian country within the State
- Oregon All Indian country within the State, except the Warm Springs Reservation
- Wisconsin All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

18 U.S.C § 1162 (1970).

⁹ *Bryan*, 426 U.S. at 384.

¹⁰ See National Indian Gaming Commission Biennial Report 1998-2000 at 3, http://www.nigc.gov/LinkClick.aspx?link=reading_room%2fbiennial_reports%2fnigc_2000_biennial_report.pdf&tabid=118&mid=753 (stating “in 1988, tribal government gaming produced approximately \$500 million in total annual revenue.”); Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 434 (2001) (putting the annual revenue of Indian Gaming at the time of the passage of Indian Gaming Revenue Act in 1988 at approximately \$500 million); STEVEN ANDREW LIGHT AND KATHRYN RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* 40 (Kansas U Press 2005) (putting the figure at \$110 million in 1988 and noting that the Indian gaming industry grew rapidly throughout the 1980s); Press Release, U.S. Dep’t of Justice, Fed. Bureau of Investigation, The Indian Gaming Working Group, Protecting Indian Country from Crime (June 30, 2004), available at <http://www.fbi.gov/pressrel/pressrel04/063004indiangaming.htm> (putting the figure at \$100 million in 1988).

¹¹ See Carter W. Hick, *The Indian Gaming Regulatory Act: Why Tribes Can Build Casinos Off the Reservation*, 10 GAMING L. REV. 110, 110 (2006) (discussing the importance of gaming, “IT CANNOT BE DENIED that Indian gaming is the most successful and lucrative economic development activity available to tribes. The business of Indian gaming generates billions of dollars annually.”); Symposium, *Cross-Border Issues in Gaming*, 4 NEV. L.J. 262, 279 (Winter2003/2004) (discussing the importance of both large scale and limited gaming operations, “even modest casino revenues and employment can have a dramatic effect on tribes and the states in which reservations are situated.”); Senator Daniel K. Inouye, Written Statement of Senator Daniel K. Inouye Before the Senate Indian Affairs Committee Hearing on Off-Reservation Gaming (Feb. 2, 2006) (not reprinted committee hearing record), available at

financial wherewithal that gaming has brought some tribes has strengthened tribal governmental services, including education, medical and health care services, and a wide range of other social services.¹² Gaming has also given tribes tremendous clout in Washington, D.C., and the ability to engage legal counsel in large transactions and to wage litigation.¹³

Given the financial ramifications of *Bryan*, one might reasonably assume today that the case was brought by a large private law firm or a well-financed plaintiffs' class action firm. Such an assumption would be incorrect. No attorney earned a fee in the *Bryan* case.¹⁴ *Bryan* was filed and litigated entirely by legal aid attorneys, in an office with such a high rate of turnover that the case was handled by a different attorney at virtually every stage.¹⁵ Absent the work of several young, idealistic (and almost certainly underpaid) public interest lawyers, who sought not wealth, but merely to serve the nation's poorest citizens, the Indian gaming phenomenon might never have occurred.

This Article places *Bryan* in historical context and gives credit where credit is due. From the perspective of three decades, it describes the litigation and its ramifications, and highlights the work of the legal services attorneys who brought Indian tribes this landmark victory. Part I briefly describes the litigation through the state Supreme Court. Part II discusses, in much greater detail, the appeal to the U.S. Supreme Court. Part III analyzes the unanimous Supreme Court opinion reversing the state courts and describes the breathtaking scope of the opinion, as well as its implications. Part IV briefly describes the development of the Indian gaming in the years following *Bryan* through and beyond the important decision in *California v. Cabazon Band of Mission Indians*.¹⁶ Part V offers some insights from this important episode in American legal history.

I. History of the Litigation through the Minnesota Supreme Court

The story of the *Bryan* case began with the aforementioned visit from the Itasca County tax assessor to a parcel of land on the Leech Lake Indian Reservation. Helen Charwood, a member of the Leech Lake Band of Ojibwe, had been born on this land near

<http://www.senate.gov/~scja/2006hrsg/020106hrg/Inouye.pdf> ("I have personally witnessed the Indian gaming industry grow to a multibillion dollar industry. It has proven to be the most successful economic development tool for Indian country.").

¹² Kathryn R.L. Rand, *There are no Pequot on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 53 (2001).

¹³ In Minnesota, two large local law firms, Dorsey & Whitney and Faegre & Benson, have successful Indian law practices, as do many other firms. Outside Minnesota, many of the nation's largest and most successful law firms handle Indian law matters. See e.g., *Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 906 F.Supp. 513, 515 (D.Minn.,1995) (Faegre & Benson, Minneapolis, Minn., representing the Shakopee Mdewakanton Sioux Tribe); *Little Six, Inc. v. U.S.*, 280 F.3d 1371, 1372 (C.A.Fed.,2002) (Dorsey & Whitney, LLP, Minneapolis, Minn., representing Little Six, Inc., a tribally owned operation); *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 910 (9th Cir. 1995) (Arnold & Porter, Denver, Colo., representing the Hopi Tribe).

¹⁴ Interview with Helen Johnson, in Cass Lake, Minn. (May 25, 2007).

¹⁵ See infra notes 31, 53 and 112 and accompanying text.

¹⁶ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Squaw Lake, her father's land, the same land where the trailer home would later sit.¹⁷ The land was held, as a lot of Indian land is held, in trust by the federal government.¹⁸

On October 22, 1957 Helen married Russell Bryan, a member of the White Earth Band of Chippewa, and he came to live on the land with Helen.¹⁹ During the course of their marriage, Helen and Russell Bryan had five children, all of them raised on this plot of land. In late 1971, the Bryans bought a mobile home. Helen borrowed the down payment from her mother, who had received a cash settlement when Helen's brother's died in a car accident. Though it was not spacious, containing only two bedrooms, the trailer was very welcome because it replaced a dwelling on the property that had burned down.²⁰

A. The County Tax Notice

Until 1972, just after the Bryans bought the trailer, Helen and her family had never received a tax notice from the county for property.²¹ It was clear that the state could not tax real property held in trust by the federal government,²² but there was an open question as to whether the state could tax a mobile home, which arguably was personal property.²³

The tax notice from Itasca County came at a bad time for the Bryan family. Russell Bryan was out of work and Helen was the family's sole breadwinner, earning an hourly wage at a local Head Start program.²⁴ The first notice, dated June 1972 and levying a tax of \$29.85 for two months of 1971, was soon followed by a second notice in July. This notice indicated a tax assessment for 1972 for \$118.10.²⁵

With five children and a husband to support on a meager income, Helen could not afford to pay the tax. Helen later recalled "I was desperate. I couldn't figure out how we would pay the taxes, and that would be every year you know?"²⁶ The taxes, totaling \$147.95,²⁷ far eclipsed the \$92 payment that Helen Bryan wrote out each month to pay

¹⁷ Informal Interview with Helen Johnson, at the offices of Anishinabe Legal Services, in Cass Lake, Minn. (May 25, 2007).

¹⁸ *Bryan*, 426 U.S. at 375.

¹⁹ Telephone Interview by Julie A. Strother with Helen Johnson, Cass Lake, Minn. (July 9, 2007).

²⁰ Informal Interview with Helen Johnson, at the offices of Anishinabe Legal Services, in Cass Lake, Minn. (May 25, 2007).

²¹ *Id.*

²² *U.S. v. Rickert*, 188 U.S. 432, 438 (1903); *M'Culloch v. Maryland*, 17 U.S. 316, 343 (1819).

²³ *Bryan v. Itasca County*, 303 Minn. 395, 397 (1975) ("The issue raised on this appeal is whether the State of Minnesota, or its political subdivisions, may impose a personal property tax upon a mobile home owned and occupied by an enrolled member of the Chippewa tribe of Minnesota who resides within a reservation upon land held in trust by the United States government for the tribe.")

²⁴ Informal Interview with Helen Johnson, at the offices of Anishinabe Legal Services, in Cass Lake, Minn. (May 25, 2007).

²⁵ Complaint at 2, *Itasca County, Ninth Judicial District* (Sept. 11, 1972), reprinted in Appellant's Brief Appendix at 2-3, *Bryan v. Itasca County*, 303 Minn. 395 (1975) (No. 44947).

²⁶ Informal Interview with Helen Johnson, at the offices of Anishinabe Legal Services, in Cass Lake, Minn. (May 25, 2007).

²⁷ *Bryan*, 426 U.S. at 375.

the mortgage.²⁸ Since the tax payments were due thirty days from the time of the assessments, Helen was being asked unexpectedly to produce the equivalent of one-and-a-half mortgage payments extra, in only a month's time.

Concerned about the cost of the tax and yet desperate to avoid the foreclosure that might result if she ignored the tax bill, Helen called the newly-established office of the Leech Lake Reservation Legal Services Project. After a brief conversation with an attorney, Helen mailed the original tax notice to the Legal Service Project office. Stapled at the top of the tax notice was a short message. Helen wrote, "Enclosed is the letter received from Itasca County Auditor! We are living on tribal trust land."²⁹ Since the tax notice was issued to Russell Bryan, in whose name the trailer was titled, Helen then signed her husband's name to the note.³⁰

B. The Class Action Lawsuit and the Strategic Choice

In September 1972, attorney Patrick Moriarty with the Leech Lake Reservation Legal Services Project filed a three-page complaint in Minnesota District Court for Itasca County, styled as a class action on behalf of Russell Bryan and others similarly situated, alleging that the personal property tax was unlawful.³¹ The complaint reflected an aggressive strategic decision by the legal services office. At the time, it was clear that the County could not assess taxes on real property held in trust by the federal government.³² Though a factual argument may have been available that the Bryan's mobile home was affixed to the land and thus ought to be considered non-taxable real property, the Legal Services attorneys declined to argue that the Bryan's trailer home was real property. Instead, they offered a much more aggressive position: the state could not assess a personal property tax on Indians living on Indian lands.³³ This aggressive strategic choice would be reconsidered time and again, but it ultimately paid tremendous dividends.

Before the case was decided, Moriarty left the office and a new Legal Services attorney, Nicholas Nordeen, entered an appearance. There being no significant factual dispute in light of the decision not to raise the fixture argument, the case was briefed on stipulated facts and without a trial.³⁴ District Judge James F. Murphy had little state court precedent to consider. He considered certifying the question to the state Supreme Court,

²⁸ Informal Interview with Helen Johnson, at the offices of Anishinabe Legal Services, in Cass Lake, Minn. (May 25, 2007).

²⁹ Letter from Helen Bryan, Signed R. Bryan, to Leech Lake Legal Services (1973) (on file with Anishinabe Legal Services, Cass Lake, Minn.).

³⁰ Letter from Helen Bryan, Signed R. Bryan, to Leech Lake Legal Services (1973) (on file with Anishinabe Legal Services, Cass Lake, Minn.); *See also* Interview with Helen Johnson, in Cass Lake, Minn. (May 25, 2007) (for the statement by Helen Johnson that she wrote the note and not Russell Bryan).

³¹ Complaint at 1–2, Itasca County, Ninth Judicial District (Sept. 11, 1972), *reprinted in* Appellant's Brief Appendix at 2–3, *Bryan v. Itasca County*, 303 Minn. 395 (1975) (No. 44947).

³² *See supra* note 22.

³³ Stipulation of Facts at 1, line 7, *Bryan v. Itasca County*, Itasca County, Ninth Judicial District.

³⁴ *Bryan v. Itasca County*, Ninth Judicial District (Nov. 8, 1973) (No. 250.81), *reprinted in* Appellant's Brief Appendix at 18, *Bryan v. Itasca County*, 303 Minn. 395 (1975) (No. 44947).

but ultimately decided that he had an adequate understanding on which to base a decision.³⁵

In December 1973, Judge Murphy issued a decision. In his opinion, Judge Murphy summarily rejected the Bryans' position, holding that the state had the power to levy a personal property tax on tribal members living on tribal land.³⁶ While the judge recognized that "the Leech Lake Indians were part of a large Indian tribe, that once upon a time were an Indian sovereign nation,"³⁷ he noted that the Indians living on Leech Lake were citizens of Minnesota, that they had access to the justice system and county services and that, as citizens, they had the right to vote.³⁸ He distinguished the Leech Lake reservation, as an "open" reservation, from the Red Lake reservation, which was a "closed" reservation.³⁹ Following a five-page opinion, Judge Murphy attached twenty pages of analysis from a brief that had been filed by the State Commissioner of Taxation on behalf of the County and the State.⁴⁰

Before the case could be appealed, there was another transition at the Legal Services office. When the director left, Legal Services placed an ad in the Minnesota *Bench & Bar* magazine, in search of a new director for the Leech Lake Reservation Legal Services office.⁴¹

C. Enter Gerry Seck

Gerald Seck was a young attorney looking for adventure. He says that his wife didn't want their tombstones to say "born Minneapolis, lived Minneapolis, died Minneapolis"⁴² so he had applied for a Ford Foundation Fellowship in India. He was accepted into the program, but the fellowship to India fell through and the Ford Foundation assigned him to a university in Nigeria. He and his wife sold their house and their car, received a battery of immunizations, were feted at several going away parties, and were prepared to leave when the Nigerian government suddenly stopped issuing visas. After waiting around for a visa for a few months, Seck became restless. One day his wife called him at the office and read to him the Leech Lake Legal Services advertisement from the classifieds section of the *Bench & Bar* magazine.⁴³

Seck knew only a little about the Leech Lake Reservation, having spent a few weekends with his friend Dave Hanson at Hanson's Leech Lake cabin within the Reservation boundaries. Still, he had experienced reservation poverty. In a previous job in the Twin Cities, Seck had met a Leech Lake Ojibwe man who was the building janitor. Seck often exchanged pleasantries with the man. One day in winter, Seck asked the man

³⁵ *Id.*

³⁶ *Id.* at 21–22.

³⁷ *Id.* at 22.

³⁸ *Id.*

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 26–47.

⁴¹ Interview with Gerald Seck, Shareholder, Larkin Hoffman Daly & Lindgren Ltd., in Minneapolis, Minn. (Aug. 10, 2006).

⁴² *Id.*

⁴³ *Id.*

about his family and the man responded that his children were sick. Seck asked the man what made them sick and the man responded that winter was always tough because they lived in a tar paper shack with dirt floors. When Seck claimed that he didn't believe the man, the man invited him to visit. Seck arranged to visit Hanson's cabin on Leech Lake and accepted the man's invitation. He invited Hanson, a photojournalist, along to take photos.⁴⁴

When Seck and the photojournalist arrived at the Ojibwe man's home, the tableau was dismal. They saw a tar paper shack with dirt floors and heavy-duty plastic for windows. Six young children, all sick, peered out the door of the tar paper shack. Seck decided to make it a personal mission to change the man's life. He begged charities and, over the course of a year, raised approximately five thousand dollars to buy the man and his family a mobile home.⁴⁵

Seck soon realized that this family was not alone, and that the housing problem was a serious public health issue. He embarked on a long-term solution. One solution was an Indian housing loan program, funded by the state, that would allow Indian people to borrow money at a reduced interest rate. He felt that the program needed at least five million dollars to be successful, so he approached state Senate Majority Leader Nick Coleman.⁴⁶ According to Seck, Senator Coleman initially balked, so Seck used guerilla lobbying tactics. He followed Senator Coleman to the St. Paul Athletic Club and "from the sauna to the steam room to the whirlpool."⁴⁷ Seck threatened to follow Senator Coleman wherever he went every day through the end of the legislative session until Coleman agreed to appropriate five million dollars in an omnibus budget bill for the new program.⁴⁸ Finally, Coleman relented, and originated the housing program that ultimately allowed hundreds of Indian people to get better housing.⁴⁹

Thus, when Seck's wife called and mentioned the Leech Lake Legal Services ad in the *Bench & Bar Magazine*, Seck likely understood some of the challenges ahead. Seck applied for the job and soon found himself being interviewed by Bernard ("Bernie") Becker, who was a legal aid attorney in Minneapolis. Seck and Becker knew each other because Seck had been a student in a welfare law class that Becker had taught as an adjunct professor at the University of Minnesota Law School.⁵⁰

Seck soon landed the job, committed to stay for two years, and moved with his family to the Leech Lake Indian Reservation. Not long after taking the job, Seck's idealism collided head on with his pragmatism. He realized that routine legal services work did not appeal to him and did not call on the strengths that he had previously demonstrated.⁵¹ Instead of doing what he viewed as "glorified social work," he wanted to have a greater impact. As a result, Seck began to limit his intake to about half the normal

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

case load and concentrated on what he considered to be significant issues that could produce a wider impact.⁵²

One such significant issue was the Bryans' personal property tax challenge. When Seck arrived in Leech Lake in December of 1973, he took up the Bryan's appeal. Never having worked in Indian law, the issues that the Bryan's claim raised were new to him.⁵³ He reached out to experts, though, and soon found Dan Israel of the Native American Rights Fund (NARF), a litigation group established by the California Indian Legal Services located in Boulder, Colorado.⁵⁴ Israel, who had worked on a similar issue in federal courts in Nebraska, helped Seck flesh out the legal arguments for an appeal in the *Bryan* case.⁵⁵

D. Public Law 280

The *Bryan* case would ultimately turn on the effect of Public Law 280.⁵⁶ The Constitution grants the federal government, not the states, plenary power over Indian tribes.⁵⁷ Absent express congressional consent, states generally have no power over tribes.⁵⁸ Public Law 280 was a termination-era act that granted enumerated states limited jurisdiction over tribes primarily to deal with the issue of lawlessness on reservations.⁵⁹ However, the language of Public Law 280 went beyond a grant of criminal jurisdiction, forcing the *Bryan* litigants to argue over the scope of the federal law.

Congress enacted Public Law 280 in 1953 in response to the "complete breakdown of law and order on many Indian reservations . . ."⁶⁰ Before Public Law 280 was implemented, criminal jurisdiction over Indian reservations was divided among the state, the tribe and the federal government depending on the nature of the crime and the tribal membership of the victim and perpetrator.⁶¹ Because the federal law enforcement "was neither well-financed nor vigorous, and tribal courts often lacked the resources and

⁵² *Id.*

⁵³ *Id.*

⁵⁴ http://www.narf.org/about/about_whatwedo_mission.html ("In 1970 with funding from the Ford Foundation, California Indian Legal Services – one of the federally-funded legal services programs serving California Indians – implemented a pilot project to provide legal services to Indians on a national level. That project became known as the Native American Rights Fund (NARF)").

⁵⁵ Telephone Interview with Dan Israel, Sole Practitioner, in Boulder, Colo. (Apr. 4, 2007).

⁵⁶ Need a complete citation to the PL.

⁵⁷ *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 145 (1980); *see also*, *Worcester v. Georgia*, 31 U.S. 515, 573 (1832); U.S. Const. art. I § 8.

⁵⁸ *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

⁵⁹ Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 541 (1975).

⁶⁰ Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 541 (1975) (Citing Statement of Representative D'Ewart in *Hearings on H.R. 495, H.R. 3624 Before the Subcomm. on Indian Affairs of the House Comm. On Interior and Insular Affairs on State Legal Jurisdiction in Indian Country*, 82d Cong., 2d Sess., ser. 11, t 14 (1952)).

⁶¹ *See Ex Parte Crow Dog*, 109 U.S. 556 (1883); The Indian Country Crimes Act, 18 U.S.C. §1152; The Major Crimes Act, 18 U.S.C §1153; The Assimilative Crimes Act, 18 U.S.C. §13.

skills to be effective” the complex jurisdictional structure often practically resulted in the absence of law enforcement on reservations.⁶²

Public Law 280 changed the jurisdictional structure of Indian country by granting five, later six, states specific criminal and civil jurisdiction over reservation activities.⁶³ Public Law 280 granted criminal jurisdiction in section two of the act by giving enumerated states:

[J]urisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such state . . . has jurisdiction over offenses committed elsewhere within the state . . ., and the criminal laws of such State . . . shall have the same force and effect within such Indian Country as they have elsewhere within the State . . .⁶⁴

In contrast, the grant of civil jurisdiction in section four of Public Law 280 was arguably narrower, reflecting Congress’ primary concern with law and order issues.⁶⁵ In section four of Public Law 280 Congress granted enumerated states:

[J]urisdiction over civil causes of action between Indians or to which Indians are parties . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere with in the State . . .⁶⁶

Although the addition of civil jurisdiction was perhaps not the primary focus of Public Law 280, section four appeared to grant the state broad civil jurisdiction over tribes. At the time Seck appealed the *Bryan* case to the Minnesota Supreme Court, the question of whether state taxing power was included in section four’s grant of jurisdiction had not been made clear by either Congress or the courts.⁶⁷

⁶² Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 541 (1975) (Citing Statement of Representative D’Ewart in *Hearings on H.R. 495, H.R. 3624 Before the Subcomm. on Indian Affairs of the House Comm. On Interior and Insular Affairs on State Legal Jurisdiction in Indian Country*, 82d Cong., 2d Sess., ser. 11, t 14 (1952); 5 NATIONAL AMERICAN INDIAN COURT JUDGES ASS’N, JUSTICE AND THE AMERICAN INDIAN (1974)).

⁶³ The statute specified five states that were willing to take responsibility for law enforcement over reservations but allowed for the assumption of jurisdiction by other states. See Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 537-538 (1975).

⁶⁴ Public Law 280 Section 2(a), codified at 18 U.S.C. § 1162(a).

⁶⁵ See, Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 535 (1975).

⁶⁶ Public Law 280, Section 4(a), codified at 28 U.S.C. § 1360(a).

⁶⁷ See Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 538 (1975) (“Among the matters in dispute were whether states assuming jurisdiction under PL-280 acquired the power to tax and zone on Indian reservations . . .”); *But see Omaha Tribe of Indians v. Peters*, 382 F.Supp. 421, (1974) (holding that Public Law 280 grants state’s jurisdiction to tax tribal members on reservations).

E. Appeal to the Minnesota Supreme Court

Since Minnesota had no Court of Appeals at the time,⁶⁸ the appeal was made directly to the Minnesota Supreme Court.⁶⁹ When it reached the Minnesota Supreme Court, the *Bryan* case had attracted attention from other interested parties. In addition to the appearance of NARF attorneys on the Bryans' brief, the Minnesota Chippewa Tribe filed an amicus brief arguing for reversal.⁷⁰ The Tribe's brief was written by Kent Tupper and Bernie Becker, who was by then no longer a legal services attorney but a professor at William Mitchell College of Law.⁷¹ The United States also filed an amicus brief arguing in favor of the Bryans.⁷² The brief was written largely by Reid Chambers, who was the Associate Solicitor for Indian Affairs at the Department of the Interior.⁷³

When it came time for the argument, Seck traveled from his office in Cass Lake, Minnesota, to the state capitol in St. Paul. He and his wife had only one car, so Seck traveled by Greyhound bus—a journey of more than six hours.⁷⁴

Though the Bryans did not attend,⁷⁵ Seck packed the courtroom with tribal members in hopes that it would have an effect on the court.⁷⁶ He also attempted to use the position of the United States to good effect. While the United States had not asked for time at oral argument, and no attorney from the Department of Justice was present, Seck introduced the Field Solicitor, Mariana Shulstad, of the U.S. Department of the Interior, and invited the court to ask her questions. Surprised⁷⁷ but apparently not flustered, Shulstad advised the court that the United States was fully supportive of the Bryans' position.⁷⁸ Itasca County's case, which by now was the State of Minnesota's case, was

⁶⁸ RONALD C. AMUNDSON, *THE FIRST TEN: AN INFORMAL HISTORY OF THE FIRST TEN YEARS OF THE MINNESOTA COURT OF APPEALS* 29 (1993) (Nov. 2, 1982 an amendment to the Minnesota constitution passed creating the Minnesota Court of Appeals. The first members of the Court of Appeals took the oath of office on Nov. 2, 1983).

⁶⁹ Appellant's Brief, *Bryan v. Itasca County*, 303 Minn. 395 (1975) (No. 44947).

⁷⁰ Amicus Curiae Brief of the Minnesota Chippewa Tribe, *Bryan v. Itasca County*, 303 Minn. 395 (1975) (No. 44947).

⁷¹ *Id.* at cover page.

⁷² Brief of the United States as Amicus Curiae, *Bryan v. Itasca County*, 303 Minn. 395 (1975) (No. 44947). *See also* Letters from Reid Chambers to Assistant Attorney General Wallace Johnson, U.S. Department of Justice (Oct. 9, 1974 and Nov. 22, 1974) (on file with the Minnesota Historical Society, Files of Bernard Becker, Minnesota State Archives) (asking the Department of Justice to seek leave to file an amicus brief in the Minnesota Supreme Court and including proposed text for a brief).

⁷³ *Id.*

⁷⁴ Interview with Gerald Seck, Shareholder, Larkin Hoffman Daly & Lindgren Ltd., in Minneapolis, Minn. (Aug. 10, 2006).

⁷⁵ *Id.* *See also* Interview with Helen Johnson, in Cass Lake, Minn. (May 25, 2007) (for statements regarding the Bryan's limited involvement with the appeal).

⁷⁶ Interview with Gerald Seck, Shareholder, Larkin Hoffman Daly & Lindgren Ltd., in Minneapolis, Minn. (Aug. 10, 2006).

⁷⁷ Interview with Mariana Shulstad, former Field Solicitor, U.S. Department of the Interior, in Minneapolis, Minn. (Sept. 1, 2006).

⁷⁸ *See* 303 Minn. 395, 402–03, 228 N.W.2d 249, 254.

argued by a young attorney in the Minnesota Attorney General's office named Steve Thorne, who was appearing for his first ever argument before the state Supreme Court.⁷⁹

As a matter of strategy, Seck revisited the decision by the trial attorney who filed the complaint to make a broad challenge to the state's right to tax on Indian reservations. In his brief and in argument, he sought to make the much more narrow argument that the mobile home was "annexed" to real property, which was federal trust property, and thus exempt from taxation.⁸⁰

A former law clerk at the Minnesota Supreme Court, Gerald Seck had many friends on the court. When the argument was finished, the justices invited him back into chambers to chat. They congratulated Seck on his argument but they gave no indication as to how they would rule.⁸¹ Both Steven Thorne and Gerald Seck left the Minnesota Supreme Court that day feeling that they had made compelling arguments.⁸²

E. The State Supreme Court Decision

The case turned on the effect of Public Law 280, a termination-era law that gave Minnesota courts, and the courts of certain other states, jurisdiction over Indian reservations.⁸³ The issue to be decided was the scope of the jurisdiction conferred on the states by Congress in Public Law 280.⁸⁴ The law gave state courts full criminal jurisdiction and civil jurisdiction over all disputes and provided that the "those civil laws . . . that are of general application to private persons or private property shall have the same force and effect within Indian country as they have elsewhere with the State[.]"⁸⁵ Based primarily on this language, the court had little difficulty deciding the case.⁸⁶

The Minnesota Supreme Court issued a unanimous ruling in favor of the state and against Seck and the Bryans.⁸⁷ Seck had made little headway on the broader argument that the state lacked the power to tax on Indian reservations. The court's decision was concise, but thorough. It drew the bulk of its analysis on the Public Law 280 issue verbatim from *Omaha Tribe of Indian v. Peters*,⁸⁸ a case decided two years earlier by the

⁷⁹ Interview with Steven Thorne, of Counsel, Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C., in St. Paul, Minn. (Aug. 22, 2006). Thorne later headed the state's Department of Natural Resources and then worked as a private attorney at the Jacobson Buffalo firm, Minnesota's leading Indian law boutique firm.

⁸⁰ Appellant's Brief at 19–21, *Bryan v. Itasca County*, 303 Minn. 395 (1975) (No. 44947).

⁸¹ See Interview with Gerald Seck, Shareholder, Larkin Hoffman Daly & Lindgren Ltd., in Minneapolis, Minn. (Aug. 10, 2006).

⁸² Interview with Gerald Seck, Shareholder, Larkin Hoffman Daly & Lindgren Ltd., in Minneapolis, Minn. (Aug. 10, 2006); Interview with Steven Thorne, of Counsel, Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C., in St. Paul, Minn. (Aug. 22, 2006).

⁸³ 28 U.S.C. §1360 (1970); 18 U.S.C. § 1162 (1970). See also, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 374 (1990) (discussing the intent of Congress in passing Public Law 280 and the concurrent termination legislation).

⁸⁴ *Bryan v. Itasca County*, 303 Minn. 395, 307 (1975); Appellant's Brief at 1, *Bryan v. Itasca County*, 303 Minn. 395 (1975) (44947).

⁸⁵ 28 U.S.C. §1360 (1970).

⁸⁶ See *Bryan*, 303 Minn. at 406.

⁸⁷ *Bryan v. Itasca County*, 303 Minn. 395 (1975).

⁸⁸ 382 F.Supp. 421 (D. Neb. 1974).

federal district court in Nebraska, for which Dan Israel had served as counsel.⁸⁹ The Supreme Court summarily rejected Seck's argument that the mobile home constituted real property because it had not been alleged in the complaint.⁹⁰

When Seck read the Minnesota Supreme Court's unanimous affirmance, he was dismayed.⁹¹ He immediately began discussing the possibility of appeal.⁹² Attorneys for the Minnesota Chippewa Tribe agreed that it was a good case to appeal and, with continued support from attorneys at the Native American Rights Fund, Seck informed the Bryans that he would seek an appeal to the United States Supreme Court.⁹³

II. Appeal to the U.S. Supreme Court

By the time Seck began preparing the petition for a writ of certiorari in *Bryan*, he was also preparing to leave the Leech Lake Reservation to move to Micronesia, a small archipelago five hundred and fifty miles southeast of Guam,⁹⁴ where he had been recruited to litigate a large land claim case.⁹⁵ With the assistance of a new legal services attorney, Ken Peterson, Seck drafted the petition for a writ of certiorari.⁹⁶ He knew that it was a long shot, but he bought Peterson a plane ticket to Washington, D.C., and sent him to file the petition with the U.S. Supreme Court.⁹⁷

By the time that the writ of certiorari was granted in November of 1975, a new director had taken over at the Leech Lake Legal Services Project.⁹⁸ Seck was living with his family in Micronesia and received notice by cable that the *Bryan* case would be heard by the Supreme Court.⁹⁹ Still the attorney of record but stuck in Micronesia, Seck soon received word that the Chippewa Tribe would pay for his flight back to allow him to write the brief.¹⁰⁰ Leaving his wife and two children in Micronesia, Seck flew back to Minnesota for two weeks to work on the brief. For several days in a row, Seck worked

⁸⁹ *Peters*, 382 F.Supp. at 422; Telephone Interview with Dan Israel, Sole Practitioner, in Boulder, Colo. (Apr. 4, 2007).

⁹⁰ *Bryan*, 303 Minn. at 407.

⁹¹ Interview with Gerald Seck, Shareholder, Larkin, Hoffman, Daly & Lindgren Ltd., in Minneapolis, Minn. (Aug. 10, 2006).

⁹² *Id.*

⁹³ Interview with Helen Johnson, in Cass Lake, Minn. (May 25, 2007).

⁹⁴ John H. Brandt, *Nest and Eggs of the Birds of the Truk Islands*, 64 *The Condor* 5, 417 (1962) ("The atoll of Truk (7°N latitude, 152°E longitude) is located in the United States Administered Trust Territory of the Pacific Islands, in the eastern half of the Caroline Island Archipelago. It is within the northeast trade wind belt and lies approximately 550 miles southeast of Guam and about the same distance north of New Ireland.")

⁹⁵ Interview with Gerald Seck, Shareholder, Larkin, Hoffman, Daly & Lindgren Ltd., in Minneapolis, Minn. (Aug. 10, 2006).

⁹⁶ *Id.*

⁹⁷ Interview with Gerald Seck, Shareholder, Larkin, Hoffman, Daly & Lindgren Ltd., in Minneapolis, Minn. (Aug. 10, 2006).

⁹⁸ Telephone Interview by Julie A. Strother with Michael Hagedorn, Southern Minnesota Legal Services, Inc., in St. Paul, Minn. (Sept. 7, 2006).

⁹⁹ Interview with Gerald Seck, Shareholder, Larkin, Hoffman, Daly & Lindgren Ltd., in Minneapolis, Minn. (Aug. 10, 2006).

¹⁰⁰ *Id.*

with Bernie Becker and Dan Israel, who flew out from Boulder, at the law library at the William Mitchell College of Law, where they drafted the petitioner's opening brief.¹⁰¹ The new director of Leech Lake Legal Services, Michael Hagedorn, was also listed on the brief.¹⁰²

For Dan Israel, who had been working on the similar case in Nebraska for more than two years, "the light went on" in his head late one evening in the law library while doing research about both Public Law 280¹⁰³ and federal termination legislation for the *Peters* case.¹⁰⁴ It became clear to Israel that "Congress intended the civil portion of Public Law 280 to govern the 'where' and 'how' of disputes and not grant general regulatory power."¹⁰⁵ To Israel, the Congress that enacted Public Law 280 in 1953 was a Congress that had enacted termination laws that explicitly provided for the taxation of Indians by states.¹⁰⁶ Since Congress knew how to draft explicit language thought to abrogate Indian tax immunities, it knew how to be clear about such matters.¹⁰⁷ To Israel, the absence of clear language authorizing state taxation was a compelling indicator of the limits of Public Law 280.¹⁰⁸ In addressing why Congress had not explicitly protected Indian tax immunities in Public Law 280, the Bryans' brief conceded that the scope of tribal immunities was not fully developed in the case law when Public Law 280 was enacted, but the Court had adopted a strict standard that prohibits the inference of a limitation on tribal tax immunities absent specific abrogation by Congress.¹⁰⁹ Thus, the brief sought to use the ambiguity to the Bryans' benefit.¹¹⁰

A. Bernie Becker Takes Center Stage

After these theories were honed and the brief completed the only question that remained was who would argue the case before the Supreme Court. As the attorney of record, Seck wanted to argue the case but could not commit because of the likelihood that he would be going to trial in his land claim case in Micronesia at the same time the case would need to be argued in Washington.¹¹¹ From Micronesia, Gerry Seck discussed the

¹⁰¹ Telephone Interview with Dan Israel, Sole Practitioner, in Boulder, Colo. (Apr. 4, 2007).

¹⁰² Petitioner's Brief, *Bryan v. Itasca County*, 426 U.S. 373 (1976) (No. 75-5027).

¹⁰³ 28 U.S.C. §1360 (1970); 18 U.S.C § 1162 (1970).

¹⁰⁴ Telephone Interview with Dan Israel, Sole Practitioner, in Boulder, Colo. (Apr. 4, 2007); *Omaha Tribe of Indians v. Peters*, 382 F.Supp. 421 (D.Neb. 1974), *aff'd* 526 F.2d 133 (8th Cir. 1975), *vacated* 427 U.S. 902 (1976).

¹⁰⁵ Telephone Interview with Dan Israel, Sole Practitioner, in Boulder, Colo. (Apr. 4, 2007).

¹⁰⁶ Telephone Interview with Dan Israel, Sole Practitioner, in Boulder, Colo. (Apr. 4, 2007); Petitioner's Brief at 23, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

¹⁰⁷ Telephone Interview with Dan Israel, Sole Practitioner, in Boulder, Colo. (Apr. 4, 2007). *See also* Petitioner's Brief at 11, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027) ("The limited scope of the civil jurisdiction conferred can be most clearly perceived by comparing Public Law 280 with the contemporaneous termination acts enacted by the same 83rd Congress which unlike Public Law 280 made use of explicit language to confer specific taxing authority[.]").

¹⁰⁸ *Id.*

¹⁰⁹ Petitioner's Brief at 12-13, *Bryan v. Itasca County*, 426 U.S. 373 (1976) (No. 75-5027).

¹¹⁰ *Id.*

¹¹¹ Interview with Gerald Seck, Shareholder, Larkin, Hoffman, Daly & Lindgren Ltd., in Minneapolis, Minn. (Aug. 10, 2006).

case by cable and letter with Bernie Becker and to a lesser extent, Dan Israel. Seck ultimately yielded to Bernie Becker to argue on behalf of the Bryans.¹¹² Legal Services Director Michael Hagedorn concurred.¹¹³

Seck was very sorry to have to give up the argument. In his last letter to Becker before the argument, he expressed confidence in Becker's abilities, asked Becker to try to secure a recording of the argument, and expressed melancholy about his stint in Micronesia: "I'm getting very bored with things here. Every day is the same[.] For those who dream of living on a South Seas island, laying in the sun all day and having no cares—all I can say is you have to try it."¹¹⁴ Turning back to the upcoming argument, he predicted a reversal and signed the letter, "Optimistically, Gerry."¹¹⁵

Dan Israel also wrote Becker shortly before the oral argument. In a letter, he described a recent nightmare about the oral argument:

After talking to you yesterday, I went home and went to sleep. Several hours later, I was awakened by one of Boulder's typical wind storms. I tossed and turned all night and in the process had a dream which dealt with our [upcoming] hearing before the United States Supreme Court. The hearing was held on a New York subway platform, I was late, you could not be heard by the Court, and the lawyers for the State of Minnesota kept walking in front of us with big smiles on their faces. The only reassuring thing about the dream was that the State never got a chance to argue because the entire proceeding was engulfed by the rush hour traffic.¹¹⁶

In some ways, Bernie Becker was a curious choice to argue the case. Becker was born and raised in New York City. Although he had moved to Minnesota to earn a law degree at the University of Minnesota Law School, he immediately returned to New York upon graduation.¹¹⁷ Becker spent his first year out of law school working for the Appeals Bureau of the Legal Aid Society in New York, but his time in Minnesota had taken root. After only a year in New York, Becker moved back to Minnesota with his wife, Carol Becker, and immediately took a job with the Legal Aid Society of Minnesota in Minneapolis, where he spent the next decade of his career.¹¹⁸ By the time the *Bryan* case reached the U.S. Supreme Court, Becker had become a full-time law professor at the

¹¹² *Id.*

¹¹³ Telephone Interview by Julie A. Strother with Michael Hagedorn, Southern Minnesota Legal Services, Inc., in St. Paul, Minn. (Sept. 7, 2006).

¹¹⁴ Letter from Gerald Seck, Truck, Micronesia, to Bernie Becker, Esquire, William Mitchell College of Law (Mar. 26, 1976) (on file with the Minnesota Historical Society, Files of Bernard Becker, Minnesota State Archives).

¹¹⁵ *Id.*

¹¹⁶ Letter from Daniel Israel, Native American Rights Fund, to Bernie Becker, Esquire, William Mitchell College of Law (Feb. 18, 1976) (on file with the Minnesota Historical Society, Files of Bernard Becker, Minnesota State Archives).

¹¹⁷ Interview with the late Carol Becker, in Minneapolis, Minn. (Sept. 8, 2006).

¹¹⁸ *Id.*

William Mitchell College of Law in St. Paul, though his legal services connection remained strong.¹¹⁹

By all accounts, Becker was larger than life. Though a physically large man, indeed, unhealthfully overweight, his personality exceeded his physical size. According to those who knew him, Becker was a skilled raconteur, always ready with an entertaining story. He spoke in perfect paragraphs and could carry on a conversation single-handedly for a half hour or more.¹²⁰ Using teaching methods that he had learned from his own potent professors at the University of Minnesota, Jack Cound and Yale Kamisar,¹²¹ Becker could be intimidating to students. Other attorneys sometimes felt the strength of his presence as well. Steve Thorne, who had been opposite Becker on other cases before *Bryan* while at the state Attorney General's office, described "Bernie" as "a big guy with a gravelly, booming voice. He was always smoking cigars. He didn't follow the Minnesota rules of discourse. He could roll all over you." But despite the powerful personality, Thorne said that he "had a heart of gold."¹²²

Becker had gained the trust of the Minnesota Chippewa Tribe for previous work related to the Leech Lake hunting and fishing rights litigation¹²³ as well as his amicus representation of the Tribe in the Minnesota Supreme Court phase of *Bryan*.¹²⁴ Beyond his strong knowledge of Indian law, Bernie Becker was a strong advocate and charismatic speaker.¹²⁵ Heading into the oral argument before the U.S. Supreme Court, which was his first, Bernie Becker was well-acquainted with the case.

B. Oral Argument

The Supreme Court heard oral arguments in *Bryan v. Itasca County* on April 20, 1976.¹²⁶ Becker attended the argument with his family, NARF attorney Dan Israel, and then-Director of Leech Lake Legal Services Michael Hagedorn. From the gallery, Becker's wife Carol watched her husband anxiously. Trusting that he was capable, but

¹¹⁹ Eric S. Janus, *A Memorial to Bernie Becker*, 17 Wm. Mitchell L. Rev. 409, 412 (1991).

¹²⁰ Interview with Mariana Shulstad, former Field Solicitor, U.S. Department of the Interior, in Minneapolis, Minn. (Sept. 1, 2006); Interview with Steven Thorne, of Counsel, Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C., in St. Paul, Minn. (Aug. 22, 2006).

¹²¹ Interview with the late Carol Becker, in Minneapolis, Minn. (Sept. 8, 2006).

¹²² Interview with Steven Thorne, of Counsel, Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C., in St. Paul, Minn. (Aug. 22, 2006).

¹²³ *Leech Lake Citizens Committee v. Leech Lake Band of Chippewa Indians*, 355 F.Supp. 697 (D.Minn. 1973) (declining to enjoin the state from entering agreements with the tribe to address hunting and fishing), *aff'd*, 486 F.2d 888 (8th Cir. 1973); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F.Supp. 1001 (D.Minn.1971) (holding that the Nelson Act, which provided for allotment of Indian lands had not abrogated Indian hunting and fishing rights). *See also* *State v. Forge*, 262 N.W.2d 341, pincite (Minn. 1977) (describing "long and acrimonious history of litigation" related to hunting and fishing at Leech Lake").

¹²⁴ Amicus Curiae Brief of the Minnesota Chippewa Tribe, *Bryan v. Itasca County*, 303 Minn. 395 (1975) (No. 44947).

¹²⁵ Interview with the late Carol Becker, in Minneapolis, Minn. (Sept. 8, 2006); Telephone Interview by Julie A. Strother with Michael Hagedorn, Southern Minnesota Legal Services, Inc., in St. Paul, Minn. (Sept. 7, 2006).

¹²⁶ *Bryan*, 426 U.S. 373 (1976).

knowing also that he could be too informal, Carol's greatest preoccupation was whether or not Becker would keep his suit coat buttoned as she had instructed him.¹²⁷ Perhaps because the Court was presided over by a judge who had attended law school where Becker then taught (Chief Justice Burger graduated from William Mitchell College of Law¹²⁸) or, more likely, because it simply was a good forum for his personality, Becker seemed very comfortable at the oral argument.¹²⁹

Becker was given time at the outset to begin his argument without interruption. He began with the history of Public Law 280, which Becker implicitly acknowledged was an unusual way to refer to a federal law, but noted that the term had become "the jargon of the trade, so to speak," thus subtly communicating to the Court both his expertise in the area of Indian law and his willingness to serve as the Court's guide.¹³⁰ While presenting the history of Public Law 280, Becker flowed seamlessly into his argument by explaining that Public Law 280 gave the state courts jurisdiction only over criminal laws and civil "causes of action."¹³¹ According to Becker, Congress stopped short of applying all state civil laws of general applicability on the reservation in contexts outside causes of action. He said,

This is a lawyer's statute. . . . Nobody uses 'cause of action' in general parlance. If somebody is going to say 'The laws are applicable here,' you are subject to that law. Nobody says, 'You shall have a cause of action' and what it shall be. It is just not the kind of language most people would use unless they happened to be trained in the law[.]¹³²

Becker's first challenge from the Court was a hostile series of questions from then-Associate Justice Rehnquist, who seemed less willing to interpret the "cause of action" language as a limitation on the further provision that state civil laws of general application shall apply on Indian reservations. Asked Rehnquist, "Well, if I live in Itasca County and don't pay my taxes, doesn't either the county or the state have a cause of action against me for failure to pay the taxes?"¹³³ With his response, Becker painted Rehnquist into a corner: "I think that you misread this statute if you read it as a termination statute because that is the way it comes out. You are reading it, Mr. Justice Rehnquist as, I think, as the termination acts have been read. That is, all laws, civil and criminal, shall be applicable."¹³⁴

¹²⁷ Interview with the late Carol Becker, in Minneapolis, Minn. (Sept. 8, 2006).

¹²⁸ Justice Sandra Day O'Connor, *A Tribute to Warren E. Burger*, 22 Wm. Mitchell L. Rev. 7, 7 (1996) ("Chief Justice Burger graduated magna cum laude in 1931 from Saint Paul College of Law, the earliest forerunner of William Mitchell College of Law"). See Robert M. Jarvis, *A Brief History of Law School Names*, 56 J. Legal Educ. 388, 406 (2006) (referencing the 1956 merger of the St. Paul College of Law and Minneapolis-Minnesota College of Law and the name change to William Mitchell College of Law).

¹²⁹ Transcript of Oral Argument, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027); See also, Interview with Margaret Treuer, Tribal Judge, in Bemidji, Minn. (May 25, 2007).

¹³⁰ Transcript of Oral Argument at 4, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

¹³¹ *Supra* note 8.

¹³² Transcript of Oral Argument at 5-6, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

¹³³ *Id.* at 7.

¹³⁴ *Id.* at 7-8.

With Rehnquist as the foil, Becker then offered the Court a way out of reading Public Law 280 as a termination act and explained why Congress had provided that all state civil laws apply to Indians as to all other citizens. He argued that Public Law 280 was merely intended, on the civil side, to create a forum for civil disputes. Once that decision to make available a forum had been made, “the problem arises what kind of law is applied in that forum? What are the rules of decisions?”¹³⁵ Becker’s argument here dovetailed nicely with the leading scholarly work on Public Law 280, an article by UCLA law professor Carole Goldberg which built as part of its thesis an argument from legislative history that Public Law 280 had been proposed primarily to deal with problems of “lawlessness” on Indian reservations, that is, to make available forums for justice by Indians.¹³⁶

Rehnquist was not willing to be put off so easily, however. He noted that a provision of Public Law 280 provided that the law did not authorize “taxation of any real or personal property . . . held in trust by the United States[.]” According to Rehnquist, “You said a moment ago that this was a lawyer’s statute . . . Now, certainly, a lawyer would read [this language] as carving out a portion of authority that is otherwise delegated, wouldn’t he?”¹³⁷

Becker countered that it was a savings clause, an assurance to the Indians that Public Law 280 was not intended to change the status quo. Rehnquist responded, “If you wanted to give the Indians some assurance, you would say ‘nothing in this section shall authorize any taxes on Indians or their property, period.’”¹³⁸ Becker respectfully responded that Rehnquist had, at best, made the statute appear ambiguous, and then he fell back to his argument that the legislative history of the statute had a clear purpose: not termination, but law and order.¹³⁹

Becker’s next challenge came from Justice White. White picked up on Rehnquist’s argument and argued that, if Public Law 280 was a termination statute, it only “terminated” tribes in the areas in which it specifically applied.¹⁴⁰ Becker responded forcefully, accusing White of misunderstanding the statute, and explaining that Public Law 280 explicitly gave every other state the ability to opt in to the statute. He was then able to explain why South Dakota had not opted in: “South Dakota did not [opt in] because of the tax problem because they felt they weren’t going to get the revenue to achieve that end.”¹⁴¹ In parrying the questions from Rehnquist and White, Becker seemed to use every question to reinforce his claims and to shed new light on his central argument.

Possibly because it was a convenient claim in the heat of argument or perhaps it sprung from ignorance, but Becker oversimplified some of the facts related to the passage of Public Law 280. He argued, in essence, that Public Law 280 passed precisely because

¹³⁵ *Id.* at 8.

¹³⁶ Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 *UCLA L. REV.* 535, pincite (1975).

¹³⁷ Transcript of Oral Argument at 9.

¹³⁸ *Id.* at 9.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 12.

¹⁴¹ *Id.*

“this statute was not imposed on the Indians. The Indians came looking for this statute.”¹⁴² And they did not oppose it, he argued, because everyone agreed that it would not give the states authority to tax Indians on Indian reservations. Referring perhaps implicitly to the Red Lake Band of Chippewa Indians, he argued that the tribes that had adequate law and order “were exempted without any difficulty. Nobody fought about it. Nobody argued about it.”¹⁴³

Justice Stevens then forced Becker to backtrack on this point. He professed confusion in Becker’s argument that tribes asked for the statute, on the one hand, and yet it was up to states to opt in unilaterally. Becker admitted that tribes originally wanted a tribal consent provision, but he said that there was agreement with tribes in the mandatory Public Law 280 states.¹⁴⁴ Since it was then noon, Chief Justice Burger interrupted the argument and ordered a recess until 1:00pm for a lunch break.¹⁴⁵

Perhaps the only Leech Lake tribal member who was watching from the courtroom gallery that day was Margaret (Peggy) Treuer, who had stood in line at the court since early in the morning to make sure that she could watch the argument. Peggy Treuer had lived in Washington, D.C., since 1968, and was then a law student at Catholic University.¹⁴⁶ She was surprised that she seemed to be the only tribal member attending the oral argument. Sitting in the gallery, Treuer had noted that from the outset of the argument that Becker had been allowed a significant period of time to begin his argument. She listened to the discussion with interest, worrying when she thought that the Court was focusing on an unimportant matter.¹⁴⁷

During the lunch recess, Treuer wandered into the Supreme Court cafeteria for a sandwich. As she ordered her lunch, she saw Becker sitting alone and eating. She approached him and introduced herself, told him that she was from Leech Lake, and thanked him for his work on her Tribe’s behalf. When Becker asked her what she thought of the argument so far, though, she did not hold her tongue. She challenged him on his statement that tribes in the mandatory states had consented to Public Law 280.¹⁴⁸ Treuer could tell that it made Becker uncomfortable that she was criticizing his argument midstream, so a few moments later she politely excused herself and left him to eat his lunch in peace.

Seeing the argument and interacting with Becker, however, made a positive impression on Treuer. The next summer, she went to work at the Leech Lake Legal Services Project as a summer clerk. After she graduated from law school, she returned to that office as an attorney.¹⁴⁹ (Peggy Treuer’s daughter, Megan Treuer, works in that office today; it is now called Anishinabe Legal Services¹⁵⁰).

¹⁴² *Id.* at 11.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 13.

¹⁴⁵ *Id.* at 14.

¹⁴⁶ Interview with Margaret Treuer, Tribal Judge, in Bemidji, Minn. (May 25, 2007).

¹⁴⁷ *Id.*

¹⁴⁸ See Transcript of Oral Argument at 11, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

¹⁴⁹ Interview with Margaret Treuer, Tribal Judge, in Bemidji, Minn. (May 25, 2007). Treuer was one of the first members of the Leech Lake Band of Ojibwe Indians to earn a law degree, earning her J.D. from Catholic University of America in 1977. Admitted to the Minnesota Bar in 1977, Treuer is currently

When argument resumed, Becker returned to the consent provisions regarding Public Law 280, nuancing his argument slightly no doubt to account for Treuer's criticism.¹⁵¹ In response to a question from the Court, he admitted that tax jurisdiction on Indian reservations was not at all settled at the time Public Law 280 was enacted, but he turned this point in his favor.¹⁵² He said that Congressional uncertainty provided more reason to think that Congress had not intended to take up taxes as a concept and, in any event, it had not undertaken clearly to resolve such uncertainty.¹⁵³ Becker also argued that if Public Law 280 conferred state taxing authority on Indian reservations, Congress would have "slipped one by the Indians."¹⁵⁴

C. Important Questions on the Scope of the Case

The Court was clearly interested in the breadth of the argument. When the Court inquired as to the further ramifications of Becker's argument, asking whether there is any other kind of authority that was not conveyed, Becker may have inadvertently foreshadowed the gaming controversy by noting that his argument would include "certain other kinds of regulatory powers" but he quickly returned the argument to the narrow issue of taxes.¹⁵⁵ This was to his advantage because the Court had dealt with taxation before and the case law suggested that Indian immunity from state taxes was strong.¹⁵⁶ However, it could have had the effect of narrowing the holding. Becker also accused states of only recently adopting the broad reading of Public Law 280, implying that states too agreed at the time that it was enacted that it did not confer taxing authority.¹⁵⁷

Becker concluded his opening argument by attempting to resurrect the very narrow argument that Seck had unsuccessfully attempted to raise in the Minnesota Supreme Court that the trailer was affixed to the land and constituted real property.¹⁵⁸ In doing so, he drew a link to the issues of poverty that lie within the case. Does the Minnesota Supreme Court's reading of Public Law 280, Becker asked rhetorically, "mean that an Indian who buys a mobile home because he is not rich enough to put a foundation in, and concrete in the ground" suffers the tax burden, though a wealthier person would not? Becker noted that fifteen percent of tribal members live in mobile homes.¹⁵⁹

serving as a tribal court judge in Minnesota and has served on the Leech Lake Tribal Court, The Bois Forte Band of Chippewa Tribal Court and the Upper Sioux Indian Community Tribal Court. *Id.*

¹⁵⁰ www.alslegal.org (Anishinabe Legal Services "Anishinabe means "the people" in the Ojibwe language).

¹⁵¹ Transcript of Oral Argument at 15, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

¹⁵² *Id.* at 15-17.

¹⁵³ *Id.* at 16-17.

¹⁵⁴ *Id.* at 18.

¹⁵⁵ *Id.* at 19.

¹⁵⁶ See *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 176-177 (1973) (holding Arizona's income tax unlawful when applied to Navajo Indians living on the reservation but deriving income off the reservation).

¹⁵⁷ Transcript of Oral Argument at 19, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

¹⁵⁸ *Id.* at 21-22.

¹⁵⁹ *Id.* at 22.

This argument drew the oddest question at oral argument. Justice White tentatively offered that the use of trailers “is consistent with the Indian tradition too, isn’t it, to keep mobility?”¹⁶⁰ While Becker played it straight, Treuer, in the back of the courtroom, rolled her eyes and marveled at the ignorance of a member of the Supreme Court (which likely was not the first or the last such impression by an Indian during a Supreme Court argument).¹⁶¹ Becker used the question to end his opening argument with one more mention of the poverty issue and the “rather absurd reading” suggested by the state: “An Indian who builds a home, has sufficient income to build a home, however small, and put a foundation in, is home-free because his property cannot be taxed. . . . But an Indian who buys a mobile home, you know, then has to be judged by the number of bricks or blocks underneath his home to determine whether it is attached. Now, we don’t think that federal law requires that.”¹⁶² Becker then sat down.

In contrast to Becker, the attorney from the state Attorney General’s office arguing on behalf of Itasca County was not at ease.¹⁶³ C.H. Luther was relatively new to the case; he had no part in the drafting of the Minnesota Supreme Court brief and came into the case for the first time at the U.S. Supreme Court phase.¹⁶⁴ Although he was a senior supervising attorney in the Attorney General’s office and was the Deputy Attorney General for the state Department of Revenue, he was primarily a tax attorney and knew little about Indian law.¹⁶⁵ Since the County had won so handily in the state courts, he likely did not realize the challenge that he faced.

When C.H. Luther reached the podium, he was given a few minutes, like Becker, to begin his argument.¹⁶⁶ He adopted a logical approach that might have worked well in another court and another era. He offered to discuss “four considerations. One is the statute itself. The second is the legislative history. The third is the judicial decisions and the fourth is the policy.”¹⁶⁷ He then began discussing the statute by conceding that if the trailer home was indeed real property, it would be immune from the County’s tax.¹⁶⁸ He quickly moved to legislative history but argued that it was not helpful.¹⁶⁹ When he reached his third consideration, judicial decisions, he listed the Minnesota district court

¹⁶⁰ *Id.*

¹⁶¹ Interview with Margaret Treuer, Tribal Judge, in Bemidji, Minn. (May 25, 2007).

¹⁶² Transcript of Oral Argument at 22–23, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

¹⁶³ Interview with Margaret Treuer, Tribal Judge, in Bemidji, Minn. (May 25, 2007).

¹⁶⁴ Interview with Steven Thorne, of Counsel, Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C., in St. Paul, Minn. (Aug. 22, 2006).

¹⁶⁵ Interview with Steven Thorne, of Counsel, Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C., in St. Paul, Minn. (Aug. 22, 2006).

¹⁶⁶ Transcript of Oral Argument at 23-25, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027). Although Luther is asked a question almost immediately, the Court gave Luther significant time to develop and establish his argument before any back and forth questioning. Luther was allowed the equivalent of two full pages of transcribed text to outline his argument compared to Becker’s three.

¹⁶⁷ *Id.* at 24.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 25.

and Supreme Court cases in the case, and the federal district court and Eighth Circuit opinions in *Peters*,¹⁷⁰ dealing with income taxes.¹⁷¹

A member of the Court asked which other kinds of taxes might be involved, including income taxes, gasoline taxes, sales taxes, and any other taxes of general applicability.¹⁷² Luther responded affirmatively to each¹⁷³. When the Court asked about inheritance taxes, however, Luther played into Becker's argument, saying "Well, the Indians are so impoverished that it is doubtful than the inheritance tax would apply."¹⁷⁴ The Court then guided him back to the personal property taxes which were the immediate subject. This prompted Luther's spontaneous concession that the personal property tax in Minnesota is not very broad and is primarily aimed at mobile homes and similar types of personal property.¹⁷⁵

Turning to the policy considerations, Luther argued that Public Law 280 was designed as an "integration and assimilation" initiative.¹⁷⁶ He made a compelling argument that it should be interpreted in that fashion: "Indians are citizens of the state" and it is "only just and proper that they bear their fair share of the expenses of the state . . . why should not these citizens of the state who are enjoying all the rights and privileges of all other citizens of the state share in the expenses, at last to the extent of . . . the sales tax, the gas tax, personal property tax."¹⁷⁷

Having made his best argument, Luther soon began to seem out of his depth and flustered. An observer to the proceedings thought he was nervous and described him as "red-headed and red faced."¹⁷⁸ When a member of the Court asked whether the mandatory Public Law 280 states were chosen based on whether the Indians there were "more ready for assimilation," Luther demurred, saying "I'm not clear on that, your honor."¹⁷⁹

When the Justice followed up by asking why the Red Lake Reservation was an exception to Minnesota's grant of jurisdiction under Public Law 280, Luther answered, "Well, I would defer on that to Mr. Becker. He is more of an expert than I. I think that it was because they had—what can I say?—a better tribal operation there."¹⁸⁰ In other words, they were able to handle their problems internally tribally where these other tribes didn't have as effective an organization."¹⁸¹ With that, Luther abruptly announced, "If

¹⁷⁰ *Omaha Tribe of Indians v. Peters*, 382 F.Supp. 421 (D.Neb. 1974), *aff'd* 526 F.2d 133 (8th Cir. 1975), *vacated* 427 U.S. 902 (1976), *remanded to* 537 F.2d 318 (8th Cir. 1976).

¹⁷¹ Transcript of Oral Argument at 25, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

¹⁷² *Id.* at 26.

¹⁷³ *Id.* at 26-27.

¹⁷⁴ *Id.* at 27.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 29.

¹⁷⁷ *Id.* at 29-30.

¹⁷⁸ Interview with Margaret Treuer, Tribal Judge, in Bemidji, Minn. (May 25, 2007).

¹⁷⁹ Transcript of Oral Argument at 30, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

¹⁸⁰ The loss for words here is curious. Was Luther trying to avoid the word "government" or was he honestly unsure of what to call the tribal government.

¹⁸¹ Transcript of Oral Argument at 31, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

there are no further questions, that is all I have,” and he took his chair, yielding most of his time.¹⁸²

Stepping to the podium for rebuttal, Becker turned almost directly to the Red Lake question. He opined that Red Lake and other tribes were specifically exempted from Public Law 280 “because they did have ongoing tribal governments and they were, if the idea is that this statute should be read against an assimilationist, terminationist background, then you would think that Congress would pick for termination those tribes that had advanced out of the pupilage state which was” the justification for federal involvement. “Yet, in fact it was the tribes in the areas where the tribes were least developed” where Public Law 280 was made mandatory.¹⁸³ Becker’s argument thus sought to undermine the assimilation purpose of Public Law 280 offered by Luther.

When a member of the Court noted that federal policy had changed “and now it is to preserve the integrity of the tribes[,]” Becker opined that perhaps the best purpose of the statute was “to help the tribal governments over a difficult period” by making “state courts available.”¹⁸⁴ Before Becker sat down, a member of the Court offered that Public Law 280 may have done that, but “I don’t think it worked a major change of subjecting the Indians to . . . the full panoply of state taxes. That would have engendered an awful lot of opposition from an awful lot of tribes and it just doesn’t come up anywhere in the legislative history.”¹⁸⁵

Another Justice accused Becker of having conceded earlier in the argument that no one knew which state taxes Indians might generally be subject to when Public Law 280 was enacted in 1953.¹⁸⁶ Becker admitted that state tax authority on reservations was wholly unsettled and unclear, but indicated that Indians had not acquiesced to state taxes.¹⁸⁷ He said that it had not come before the Supreme Court, but that “there had been a number of state court decisions.” A member of the court queried, “Both ways?” Becker responded, “Umm hmm” and that was his last utterance to the Court as Chief Justice Burger gavelled the argument to a close.¹⁸⁸

During the argument, Carol Becker’s worst fears were realized. Not long after the argument began, Becker unbuttoned his coat.¹⁸⁹ Although he failed to follow his wife’s principal instruction, he had argued competently and stood up well to difficult and aggressive questioning. Given the strong way the argument ended, Becker had some

¹⁸² Interview with Margaret Treuer, Tribal Judge, in Bemidji, Minn. (May 25, 2007). For comparison purposes, Becker’s opening argument ranged across more than twenty-two pages of the oral argument transcript and his rebuttal ran three more pages; Luther’s entire argument utilized only eight pages from beginning to end. Transcript of Oral Argument at 23-31, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

¹⁸³ Transcript of Oral Argument at 32, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027). Though it was an expedient argument, the notion that Congress had selected particularly dysfunctional or undeveloped tribes for the extension of state authority under Public Law 280 is dubious in retrospect. *See generally* Goldberg, 22 UCLA L Rev at around n. 43.

¹⁸⁴ Transcript of Oral Argument at 33, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

¹⁸⁵ *Id.* at 33-34.

¹⁸⁶ *Id.* at 31.

¹⁸⁷ *Id.* at 34.

¹⁸⁸ *Id.* at 34.

¹⁸⁹ Interview with the late Carol Becker, in Minneapolis, Minn. (Sept. 8, 2006).

reason to be hopeful.¹⁹⁰ Becker, Mike Hagedorn and Dan Israel left the Court feeling comfortable with the potential for a reversal.¹⁹¹ However, there was clearly strong opposition reflected in the questions from Rehnquist, White and to a lesser extent, Stevens.

After the oral argument, the attorneys returned to work and nervously awaited the decision. Mike Hagedorn returned to Cass Lake, Minnesota, to the Leech Lake Legal Services Project, where he was joined by new summer law clerk Peggy Treuer.¹⁹² Dan Israel returned to Boulder to work on other litigation with the Native American Rights Fund.¹⁹³ Gerry Seck continued his work in Micronesia despite the extensive damage caused by a recent typhoon.¹⁹⁴ Becker returned to William Mitchell to finish out the semester, and then took his family on a long vacation.¹⁹⁵

Meanwhile, for the Bryans, life had improved. Russell Bryan had found employment in road construction and Helen Bryan continued to work with the Head Start program.¹⁹⁶ The decision was not to come for nearly two months.

D. Victory

On Gerry Seck's first day back from Micronesia, he fielded a call from Minneapolis Tribune reporter Nick Coleman (son of the state senator whom Seck had pestered to initiate the Indian housing loan program¹⁹⁷). When Coleman said, "Gerry, you won!," Seck responded, "what are you talking about?" Thus was Seck informed of the unanimous ruling by the Supreme Court.¹⁹⁸

Becker was on vacation with his family in Mexico when news came of the Court's decision. When Becker received the telephone call informing him of the victory, he shared the news with his family by leaving the phone and shouting "nine zip! nine zip!"¹⁹⁹

It was Becker who called from Mexico to inform the Leech Lake Legal Services office about the victory. Mike Hagedorn took the call. Peggy Treuer, who sat in a cubicle

¹⁹⁰ Interview with the late Carol Becker, in Minneapolis, Minn. (Sept. 8, 2006); Telephone Interview by Julie A. Strother with Michael Hagedorn, Southern Minnesota Legal Services, Inc., in St. Paul, Minn., (Sept. 7, 2006).

¹⁹¹ Telephone Interview by Julie A. Strother with Michael Hagedorn, Southern Minnesota Legal Services, Inc., in St. Paul, Minn., (Sept. 7, 2006).

¹⁹² Interview with Margaret Treuer, Tribal Judge, in Bemidji, Minn. (May 25, 2007).

¹⁹³ Telephone Interview with Dan Israel, Sole Practitioner, in Boulder, Colo. (Apr. 4, 2007).

¹⁹⁴ Interview with Gerald Seck, Shareholder, Larkin, Hoffman, Daly & Lindgren Ltd., in Minneapolis, Minn. (Aug. 10, 2006).

¹⁹⁵ Interview with the late Carol Becker, in Minneapolis, Minn. (Sept. 8, 2006).

¹⁹⁶ *Justices Bar State's Taxation of Reservation Indians*, N.Y. TIMES, June 15, 1976, at 19; *See also* Interview with Helen Johnson, in Cass Lake, Minn. (May 25, 2007).

¹⁹⁷ *See supra* notes 45 through 49; *See also* Jackie Crosby, *Chris Coleman Launches Bid for St. Paul Mayor*, STAR TRIBUNE, Jan. 13, 2005 (stating that Nick Coleman, writer for the Star Tribune, and his brother Chris Coleman, Mayor of St. Paul, are the children of the late Senator Nick Coleman).

¹⁹⁸ Interview with Gerald Seck, Shareholder, Larkin, Hoffman, Daly & Lindgren Ltd., in Minneapolis, Minn. (Aug. 10, 2006).

¹⁹⁹ Interview with the late Carol Becker, in Minneapolis, Minn. (Sept. 8, 2006).

¹⁹⁹ *Justices Bar State's Taxation of Reservation Indians*, N.Y. TIMES, June 15, 1976, at 19.

in the corner of the small office, heard the normally-reserved Mike Hagedorn shout, “we won!”²⁰⁰

For Dan Israel, the victory was doubly sweet because it vindicated his losing position in the federal district court in Nebraska and the Eighth Circuit in *Omaha Tribe v. Peters*.²⁰¹ Indeed, following *Bryan*, the Supreme Court granted certiorari in *Peters*, vacated the decision, and remanded to the Eighth Circuit, which summarily ordered the district court to enter judgment for Israel’s clients.²⁰² When Gerry Seck called to inform the Bryans of their victory in the Supreme Court, the ramifications of the ruling for others was not something that occurred to Helen Bryan. She simply understood that her family, and perhaps others, would no longer be burdened by a personal property tax on their trailer home.²⁰³

The Minneapolis Tribune carried the *Bryan* victory as its top story in a banner headline on June 15, 1976, announcing “State Forbidden to Tax on Indian Reservations.”²⁰⁴ The New York Times printed a story on the same day on page nineteen, under the headline, “Justices Bar State’s Taxation of Reservation Indians.”²⁰⁵ The Saint Paul Pioneer Press likewise reported, on page fourteen, “Court Limits Taxing on Reservations.”²⁰⁶

III. The Supreme Court’s Opinion

Despite the way it had been characterized by the press, the Court’s unanimous decision in *Bryan* was striking for its breadth. The Court had strongly resisted attempts by the Bryans’ cautious attorneys to focus on either taxes or real property. It issued a much broader holding—something that may have been foreshadowed by the Court’s

²⁰⁰ Interview with Margaret Treuer, Tribal Judge, in Bemidji, Minn. (May 25, 2007).

²⁰¹ *Omaha Tribe of Indians v. Peters*, 382 F.Supp. 421 (D.Neb. 1974), *aff’d* 526 F.2d 133 (8th Cir. 1975), *vacated* 427 U.S. 902 (1976), *remanded to* 537 F.2d 318 (8th Cir. 1976).

²⁰² *Omaha Tribe of Indians v. Peters*, 537 F.2d 318, 318 (8th Cir. 1976).

²⁰³ Interview with Helen Johnson, in Cass Lake, Minn. (May 25, 2007). While the ruling garnered them little local attention, the Bryans received a grateful letter from the Minnesota Chippewa Tribe. The letter, from Art Gabow, Chair of the Minnesota Chippewa Tribe, read: “Dear Mr. and Mrs. Bryan, As the President of our Tribal organization I must take this opportunity, on behalf of the Minnesota Chippewa tribe and our thousands of Indian People to express our sincere appreciation and admiration for your courage, your dedication, and your perseverance that resulted in the recent favorable United States Supreme Court decision that strengthens and solidifies the issue of Tribal sovereignty. Through your noble stand in the face of tremendous odds and against enormous opposition, a precedent of tribal self government has been set nationwide that can only benefit tribal people throughout this vast country. Please accept this letter and these humble tokens as emblems of your Tribe’s heartfelt appreciation to your tribal spirit.” Enclosed with the letter were two bronze tribal medallions. Letter from Art Gabow, Chair of the Minnesota Chippewa Tribe (on file with Helen Johnson);

The Tribe also gave the Bryans a trip to Escanaba, Michigan, to attend a meeting of the Tribal Executive Committee of the Minnesota Chippewa Tribe, where they were honored with a dinner and briefly introduced to the assembled tribal leaders. Interview with Helen Johnson, in Cass Lake, Minn. (May 25, 2007).

²⁰⁴ Dennis Cassano, *State Forbidden to Tax on Reservations*, MINNEAPOLIS TRIBUNE, June 15, 1976, at 1.

²⁰⁵ *Justices Bar State’s Taxation of Reservation Indians*, N.Y. TIMES, June 15, 1976 at 19.

²⁰⁶ Ed Zuckerman, *Court Limits Taxing on Reservations*, ST. PAUL PIONEER PRESS, June 15 1976 at 14.

original decision to grant certiorari. There was no obvious reason for the Court to hear this Indian tax case, particularly because there was no conflict between the circuits.²⁰⁷ In a preliminary memo discussing whether or not the *Bryan* case would be a good candidate for cert one clerk wrote “the most persuasive argument for a grant [of cert] may be that this Court has been particularly solicitous of Indian interests . . . and the decisions in the lower courts on this point have been against those interests.”²⁰⁸ After deciding to grant cert, the Court did decide in favor of the Bryans, the “Indian interest.” However, the Court looked far beyond the narrow tax issue before it and took the opportunity to issue a much broader opinion.

A. The Source of the Holdings

Like most judicial opinions, the *Bryan* opinion was not so much an original work as a synthesis of arguments raised by others. However, the Court did go beyond the briefs. Indeed, the Court began its discussion of Public Law 280 in Section II of the opinion with a citation to the leading article on the subject in which UCLA Professor Carole Goldberg framed Public Law 280 as a law designed to provide a judicial forum for crimes and civil disputes, not a unilateral grant of broad authority to states.²⁰⁹ The Court then articulated Professor Goldberg’s central thesis over several paragraphs and ultimately rejected “the expansive reading” of Public Law 280 given by the Minnesota Supreme Court and urged by the state Attorney General.²¹⁰ In doing so, the Court echoed Becker’s position at oral argument that the Public Law 280 was a “lawyer’s statute” primarily about adjudicatory jurisdiction, not civil authority.²¹¹ Otherwise, the Court noted in a footnote,²¹² it would have been codified in Title 25 of the U.S. Code, the Indian title, rather than Title 28, which governed courts and jurisdiction (an argument that surely elevated the importance of a nameless legislative clerk somewhere).

Section III of the opinion offered a version of Dan Israel’s law library epiphany that the language of Public Law 280 could be sharply contrasted with the various termination acts.²¹³ In the Court’s articulation of the argument, “the same Congress that enacted [Public Law 280] also enacted several termination Acts, legislation which is cogent proof that Congress knew well how to express its intent directly when it intended to subject reservation Indians to the full sweep of state laws and state taxation.”²¹⁴ The

²⁰⁷ See Robert J. Nordhaus, G. Emlen Hall & Anne Alise Rudio, *Revisiting Merrion v. Jicarilla Apache Tribe: Robert Nordhaus and Sovereign Indian Control Over Natural Resource on Reservations*, 43 NAT. RESOURCES J. 223, 268–269 (2003) (discussing the book *The Brethren* and its allegation that the Supreme Court disliked both Indian and tax law cases, making an Indian tax law case an undesirable choice for cert).

²⁰⁸ Preliminary Memo, written by “DP,” in reference to *Bryan v. Itasca County*, Aug. 20, 1975 (75-5027) (on file with the Library of Congress, Collections of the Manuscript Division).

²⁰⁹ 22 UCLA L. Rev. 535. Though the Tribe’s brief cited Goldberg’s article only once, the Court cited Goldberg’s work throughout its opinion. *Bryan*, 426 U.S. 379.

²¹⁰ *Bryan*, 426 U.S. at 387-392.

²¹¹ *Bryan*, 426 U.S. at 384; Transcript of Oral Argument at 5, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

²¹² *Bryan*, 426 U.S. at 385 n. 11.

²¹³ *Id.* at 389–90.

²¹⁴ *Id.* at 389.

Court also cited a law review article Israel penned while he was working on the *Peters* case.²¹⁵

In several places in the opinion, one can see that the Court favored Becker's argument that Public Law 280 was designed to extend especially to "those reservations with the most inadequate tribal legal institutions."²¹⁶ Evidence suggested that the states were chosen based more on political machinations by various states and the states' willingness to undertake the costs of jurisdiction than any careful study of the development of various tribal institutions.²¹⁷ The Court's acceptance of Becker's argument thus no doubt reflected the Court's yearning to see rationality rather than crass politics or economics in Congressional policy, especially when it concerned the nation's solemn obligations toward tribes.²¹⁸

The Court's opinion also accepted an argument raised in the Solicitor General's amicus brief,²¹⁹ and credited in both contexts to Professor Goldberg, that a broad reading of Public Law 280 would undermine tribal governments and modern federal Indian policy by making tribal governments irrelevant or by "relegat[ing] them to a status below that of counties and municipalities."²²⁰ This reference to contemporary federal policy was later revealed to be a telling insight into Supreme Court decision making.²²¹

B. The Breadth of the Opinion

In language that would reverberate for decades with the advent of Indian gaming, the Court made clear that its holding was far broader than mere taxing authority. In the legislative history, the Court found nothing "remotely resembling an intention to confer general state civil regulatory control over Indian reservations."²²² And the opinion rejected the notion that "tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers[.]"²²³ The Court thus ignored various attempts by the Bryans' own attorneys to present a more cautious case, such as that the principle applied only to taxes, or that the mobile home constituted federal trust property.²²⁴ The Court aggressively staked out a position broader than that advocated by the Bryans.

²¹⁵ *Id.* at 381-383 (citing Daniel H. Israel & Thomas L. Smithson, Indian taxation, *Tribal Sovereignty and Economic Development*, 49 NO. DAK. L. REV. 267 (1973)).

²¹⁶ *Id.* at 385-86 and notes 12 & 13.

²¹⁷ 22 UCLA L. Rev 543.

²¹⁸ *See Bryan*, 426 U.S. at 385-386 ("certain tribal reservations were completely exempted from the provisions of Pub.L.280 precisely because each had a 'tribal law-and-order organization that functions in a reasonably satisfactory manner.'" Citing H.R.Rep No. 848, p. 7, U.S. Code Cong & Admin.News 1953, p. 2413).

²¹⁹ As it had at the request of Associate Solicitor Reid Chambers at the state Supreme Court, the United States once again appeared as amicus curiae, and filed a brief authored by Harry Sachse, an Assistant to the Solicitor General, and several attorneys in the Department of Justice's Lands Division. *See Memorandum for the United States as Amicus Curiae, Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

²²⁰ *Bryan*, 426 U.S. at 388 n.14, citing Goldberg.

²²¹ *See Infra* notes 231-245 and accompanying text.

²²² *Bryan*, 426 U.S. at 384-85.

²²³ *Id.* at 388.

²²⁴ *See supra* text accompany notes 80 and 158-159; Petitioner's Brief at 15, *Bryan v. Itasca County*, 426 U.S. 373 (1976) (No. 75-5027) (arguing primarily about tax immunity not regulatory immunity);

The loss was probably surprising to the Attorney General's office, but the fact that the opinion was unanimous was likely surprising to the Bryans' attorneys.²²⁵ Apparently, even Rehnquist was won over. Despite the fact that he had made a reasonable—and even somewhat compelling—textual argument that Public Law 280 was a partial termination statute, he chose not to dissent.

The unanimous decision by the Court may be explained by the fact that it was Justice Brennan delivering the opinion of the Court. Known not only for his passion and hard work, but also for his charm, Justice Brennan frequently labored to win over as many justices as possible to strengthen the force of his majority opinions.²²⁶ Despite the hesitation that some justices may have had, all joined in Brennan's opinion.²²⁷ Evidence of Brennan's persuasive powers can be seen in the few words written on the Justices' letters to Brennan indicating they would join. Justice Powell's letter stated "I am following in my Brother White's capitulation to your persuasive powers! Please join me also."²²⁸ Justice White's capitulation, however, had not been without reservation. He stated, "Dear Bill: I was the other way in this case but I shall acquiesce with a graveyard dissent."²²⁹

Justice Brennan's persuasive powers clearly went beyond the ability to convince his fellow justices to join him on the issue at hand. Ten years after the *Bryan* decision was issued, the graveyard dissenter would be writing the majority opinion in *Cabazon*, affirming the broadest interpretation of the Court's holding in *Bryan*.²³⁰

C. The Scholarly Reception

In hindsight, the *Bryan* decision is surprising not only for its breadth, but also its interpretative methodology. According to Professors Phil Frickey and Bill Eskridge, the

²²⁵ Telephone Interview by Julie A. Strother with Michael Hagedorn, Southern Minnesota Legal Services, Inc., in St. Paul, Minn. (Sept. 7, 2006) (noting that there was some reservations about Justice Douglas).

²²⁶ Owen Fiss, *A Live Lived Twice*, 100 YALE L.J. 1117, 1120 (1991) ("Brennan could be trusted to choose his words in a way that would minimize disagreement among the justices, not only to avoid those silly squabbles . . . but also to produce a majority opinion and strengthen the force of what the Court had to say."); Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement within the Supreme Court*, HASTINGS L.J. 759, 772 n.56 (2006) ("Justice Brennan was well known for using his personal charm and his related ability to forge majorities on the Court").

²²⁷ See Letter from Justice Harry A. Blackmun, U.S. Supreme Court, to Justice William J. Brennan, U.S. Supreme Court (June 4, 1976) (on file with the Library of Congress, Collections of the Manuscript Division) (Blackmun suggests a softening of the language of the opinion, writing to Justice Brennan "I know all 'these guys' on the Minnesota Court. For some reason the sentence near the middle of page 9 beginning with the word 'Accordingly' struck me as a little blunt . . . do you thin it could be softened, as by inserting 'we feel that' before 'the construction'? . . . [I]f we can, I prefer to take a sympathetic approach at this time"); see also *Bryan*, 426 U.S. at 386 (for the text that Justice Blackmun requested included).

²²⁸ Letter Joining in Opinion from Justice Lewis F. Powell, Jr., U.S. Supreme Court, to Justice William J. Brennan, U.S. Supreme Court (June 4, 1976) (on file with the Library of Congress, Collections of the Manuscript Division).

²²⁹ Letter Joining in Opinion from Justice Byron R. White, U.S. Supreme Court, to Justice William J. Brennan, U.S. Supreme Court (June 4, 1976) (on file with the Library of Congress, Collections of the Manuscript Division).

²³⁰ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209–10 (1987).

Court “ignore[d the] apparent textual meaning” of Public Law 280 when it ruled for the Bryans:

On the face of the statute, Minnesota probably had the better argument. [As for legislative history,] if the enacting Congress had been asked about the Bryan issue while it was considering Public Law 280, one would guess that the answer would have supported Minnesota as well. Indeed, it would be difficult to find a Congress in this century that seemed more clearly animated by a desire to destroy tribal sovereignty. . . . By the time Bryan made its way to the Supreme Court, the firmly established federal policy was to promote tribal sovereignty.²³¹

Professor Frickey has challenged the Court’s reliance on the familiar Indian law canon of construction that statutes passed for the benefit of Indian tribes are to be liberally construed in their favor, with ambiguities being resolved in favor of the Indians.²³² He argues that the canon is inapplicable because the justification for the canon was absent: “Public Law 280 is a statute designed to undermine, not enhance, the authority of tribes.”²³³ Yet, despite the unusual interpretive approach, which Frickey has labeled “practical reasoning,” Frickey agreed with the result.²³⁴

Professor Frickey found the Court to be unusually forthright in *Bryan* in going beyond the text of the statute as well as the likely intent of the enacting Congress to consider the ramifications of the broader issue to contemporary Indian policy.²³⁵ To Frickey, *Bryan* is a paradigmatic example of a phenomenon that happens often in Supreme Court decision making, yet that is seldom quite as obvious.²³⁶ Frickey prefers the approach used in *Bryan* to the more traditional approach that would yield blind obedience to the dead hand of a long-since adjourned Congress.²³⁷ As in *Bryan*, courts should “fuse the contemporary horizon with past congressional expectations, not . . . ignore the former in misguided allegiance to the latter.”²³⁸ Moreover, since the federal-tribal relationship is an ongoing one and Congressional power in the field is plenary,

²³¹ William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 374 (1990).

²³² Cohen’s Handbook of Federal Indian Law 2005 Edition 119 (Nell Jessup Newton et al. eds., 2005).

²³³ Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1231 (1990).*Id.* at 1167-68. A problem with this theory is that it ignores a more fundamental problem with the canon: its terms are so ambiguously broad as to make it elastic enough to be applied in virtually any context involving Indians. Indeed, from the standpoint of Indians, many harmful laws, from the allotment acts to Public Law 280, have been enacted ostensibly for the benefit of the Indians. For example, the allotment acts through which Indian tribes ultimately lost nearly 100 million acres of land, were frequently justified on the basis that they would assist with the advancement of Indians. Likewise, Public Law 280 masqueraded as a law designed to address the problem of “lawlessness” on Indian reservations, a purpose that was certainly designed to benefit Indians.

²³⁴ Eskridge & Frickey, 42 STAN. L. REV. at 374 (“we believe the case was rightly decided”).

²³⁵ *Id.* at 374.

²³⁶ 78 CAL. L. REV. at 1165–66, 1179.

²³⁷ *Id.* at 1179,

²³⁸ *Id.* at 1212.

post-enactment developments in Congress ought to be relevant, especially in cases in which they render obsolete the intentions behind the original enactment.²³⁹

Frickey argues that the decision in *Bryan* reflects the Court's appreciation of the structural values at stake.²⁴⁰ He compliments the Court on the best "instinctive approximation of Chief Justice Marshall's methodology in *Worcester* [*v. Georgia*] as is found in any modern case."²⁴¹ *Worcester*,²⁴² which was the last of the so-called Marshall trilogy of cases on Indian law,²⁴³ reflected, of course, Marshall's most sophisticated understanding of the proper role of tribes in the United States. Thus, this is a high compliment indeed.

Bryan may well have been a high water mark for the Court's willingness to admit to a kind of practical reasoning and dynamic interpretation that Frickey endorses,²⁴⁴ at least in the Indian law context.²⁴⁵ Though it may have been a rare and noteworthy example of candidness from the Court in the reasoning of its decisions, and a paradigm of a contextual basis for reaching decisions regarding old legislation, it is even more important for another development it spawned.

IV. The Rise of Indian Gaming

While a casual observer might have viewed *Bryan* as an unimportant tax case, and been justified in doing so based on the newspaper headlines,²⁴⁶ the opinion was breathtaking in scope. The Court's broad holding that Public Law 280 did not confer "general state civil regulatory control over Indian reservations"²⁴⁷ was pregnant with possibility. During the years after *Bryan* was decided, Indian tribes embarked on many economic development initiatives. At a time of great progress in tribal governance on

²³⁹ *Id.* at 1212–14 & 1239–40.

²⁴⁰ Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 431 (1993).

²⁴¹ *Id.* at 432.

²⁴² 31 U.S. (6 Pet.) 515 (1832).

²⁴³ The other two being *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823) and *Cherokee Nation v. Georgia* 30 U.S. 1 (1831).

²⁴⁴ Frickey notes that "the Court buried its best textual argument in a footnote [which] suggests that it did not consider the apparent meaning of the statutory language of great importance[.]" 78 CAL. L. REV. n.173.

²⁴⁵ It is hard to imagine a more important case in which the Supreme Court limited a federal statute in such a way, unless, of course, it is the *Cabazon Band* case, which also dealt with Public Law 280 and followed *Bryan*'s narrow interpretation. In affirming *Bryan* and its broad implications, *Cabazon Band* also focused strongly on contemporary federal policy specific to Indian gaming. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216–17 (1987) (for a reference to President Regan's statements in regard to Indian policy as well as then current policies of the Department of Interior).

²⁴⁶ Dennis Cassano, *State Forbidden to Tax on Reservations*, MINNEAPOLIS TRIBUNE, June 15, 1976, at 1; Ed Zuckerman, *Court Limits Taxing on Reservations*, ST. PAUL PIONEER PRESS, June 15, 1976 at 14; *Justices Bar State's Taxation of Reservation Indians*, N.Y. TIMES, June 15, 1976 at 19.

²⁴⁷ *Bryan*, 426 U.S. at 384.

reservations,²⁴⁸ *Bryan* seems to have spurred even more creative thinking about tribal economic development.

One noteworthy example is the Cabazon Band of Mission Indians, located in Southern California. Long before the Cabazon Band became famous for gaming and a Supreme Court case bearing its name, it had opened a tribal tobacco smoke shop, with a mail order cigarette business on the side.²⁴⁹ The Cabazon Band was also operating a liquor sales enterprise.²⁵⁰ Moreover, the Band's tribal council had to repeatedly beat back a proposal from the Band's Vice-Chairman to begin a marijuana cultivation business that would combine "Indian traditional plants, such as jimson weed, peyote, and marijuana."²⁵¹

The Cabazon Band approved a plan to begin a gambling enterprise in June of 1979, and gaming was underway by October of 1980.²⁵² Gaming on the Seminole Reservation in Florida started even earlier.²⁵³ By late 1979, three years after *Bryan* was decided, the Seminole Tribe was embroiled in litigation with Broward County over the legality of the Seminole Tribe's high stakes bingo operation.²⁵⁴ Other tribal operations spawned litigation as well.²⁵⁵ In general, the lower courts had read *Bryan* broadly and had developed a theory as to the civil-regulatory criminal prohibitory distinction that *Bryan* interpreted Public Law 280 to create.²⁵⁶ As cases percolated in the federal courts all over the country and in at least four different federal judicial circuits, it became apparent that the issue might reach the Supreme Court.²⁵⁷

A. *Reprise of Bryan in Cabazon Briefing*

²⁴⁸ See generally Kevin K. Washburn, *Tribal Self Determination at the Crossroads*, 38 CONN. L. REV. 777, pincite (2006) (and authorities cited therein) (describing the rise of modern tribal self-governance in the late 1960s and 1970s).

²⁴⁹ See generally AMBROSE I. LANE, JR., RETURN OF THE BUFFALO: THE STORY BEHIND AMERICA'S INDIAN GAMING EXPLOSION 49–50 (1995) (a history of the Cabazon Band's gaming enterprise).

²⁵⁰ *Id.*

²⁵¹ *Id.* at 34, 44–45.

²⁵² AMBROSE I. LANE, JR., RETURN OF THE BUFFALO: THE STORY BEHIND AMERICA'S INDIAN GAMING EXPLOSION 51–54 (1995); W. DALE MASON, INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS 47–49 (2000).

²⁵³ Seminole Tribe, <http://www.seminoletribe.com/enterprises/hollywood/casino.shtml> ("Seminole Casino Hollywood was the first high stakes operation in the country opening on December 14, 1979 at 5:00pm. After court challenges by the State of Florida . . .").

²⁵⁴ Seminole Tribe of Florida v. Butterworth, 658 F.2d 310, 311 (5th Cir. 1981).

²⁵⁵ See e.g., Oneida Tribe of Indians of Wisconsin v. Wisconsin, 518 F.Supp. 712, 713 (W.D. Wis.1981).

²⁵⁶ Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy, 694 F.2d 1185 (9th Cir. 1982) (holding that the California bingo laws were civil/regulatory and thus could not be applied to the Indian Reservations); Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981) (holding that the Florida law prohibiting Bingo was "civil/regulatory" and not "criminal/prohibitory" and thus could not be applied to the Seminole Tribe); Oneida Tribe of Indians of Wisconsin v. Wisconsin, 518 F.Supp. 712 (W.D. Wis.1981) (holding that Wisconsin's regulation of Bingo could not be applied to the Oneida nation because it was a civil regulation).

²⁵⁷ See note 256 *supra*; see also Mashantucket Pequot Tribe v. McGuigan, 626 F.Supp. 245 (D.Conn. 1986).

Litigation in the federal courts in Florida and California culminated in the 1987 Supreme Court case *California v. Cabazon Band of Mission Indians*.²⁵⁸ The practical issue was whether an Indian tribe could conduct gaming in a Public Law 280 state that had criminal prohibitions against gaming not in compliance with state regulatory laws.²⁵⁹ The legal question was whether *Bryan*'s prohibition on state regulatory authority applied, or whether the criminal provisions of Public Law 280 could be read broadly to confer state authority over regulatory offenses.²⁶⁰

That the scope of *Bryan* was the heart of the issue in the *Cabazon* case was apparent from the briefs. Nearly all of the briefs submitted to the Court include an extensive discussion of *Bryan v. Itasca County*.²⁶¹ The briefs submitted by California and its amici in the litigation argued that *Bryan* should be interpreted narrowly, its holding applying only to cases involving state tax laws.²⁶² They argued that the broad prohibition on state civil regulatory authority was dictum.²⁶³ Instead, they argued that the Court

Comment [KS1]: Please add pincites to the pages where *Bryan* is discussed in each.

²⁵⁸ *Cabazon*, 480 U.S. 202 (1987).

²⁵⁹ *Cabazon*, 480 U.S. at 207 (discussing scope jurisdiction in Pub. L. 280 states).

²⁶⁰ See Appellant's Closing Brief at 14, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708) (arguing that Pub. L. 280 gives California the ability to enforce its gaming prohibitions); Brief for Appellee at 8, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708) (arguing that Pub. L. 280 does not confer state jurisdiction over regulatory matters such as gaming).

²⁶¹ Brief for Appellee, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); Brief of the Tulalip Tribes of Washington, et al., as Amici Curiae in Support of the Appellee, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); Brief of Chehalis Indian Tribe as Amici Curiae in Support of the Appellee, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); Brief of the San Manuel Band of Mission Indians as Amici Curiae in Support of the Appellee, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); Brief Amici Curiae of Pueblo of Laguna Band of Mission Indians, et al., as Amici Curiae in Support of the Appellee, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); Brief for Appellant, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); Appellant's Closing Brief, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); Brief for the State of Minnesota as Amici Curiae in Support of Appellants, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); Brief of States of Florida, et al., as Amici Curiae in Support of the Appellant, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); Brief of State of Arizona et al., as Amici Curiae in Support of the Appellants, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); Brief of the State of Washington, et al., as Amici Curiae in Support of the Appellants, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); *But see* Brief of the Seminole Tribe of Florida and the Fond Du Lac Band of Lake Superior Chippewa of Minnesota as Amici Curiae in Support of the Appellee, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); Brief of the Jicarilla Apache Tribe, et al. as Amici Curiae in Support of Appellee at 7-8, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708), and Brief of the Pueblo of Sandia, et al. as Amici Curiae in Support of Appellee at 24, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708) (for briefs that do not rely heavily or make significant attempts to distinguish *Bryan*).

²⁶² Brief of the Appellant at 35, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (No. 85-1708) (noting that unlike California's gaming laws "the property tax laws involved in *Bryan* were not regulatory; they raised revenue but did not regulate conduct."); Brief for the States of Florida, et al. as Amici Curiae Supporting Appellants at 16, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (No. 85-1708) (disagreeing with lower court's interpretation of *Bryan* by arguing "the courts fashioned a legal theory premised on this Court's ruling in a tax case.")

²⁶³ Brief of the Appellant at 9, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (No. 85-1708); Appellant's Closing Brief at 14, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708).

should follow *Rice v. Rehner*,²⁶⁴ a case that had narrowly upheld state authority in the context of liquor licensing.²⁶⁵

California and several amici also used the briefing in the *Cabazon* case to attempt to reargue *Bryan*. California asserted that *Bryan*'s interpretation of Public Law 280 actually left states with narrower jurisdiction than they would have had without Public Law 280.²⁶⁶ In an amicus brief, the State of Arizona argued the *Bryan* Court overlooked legislative history that would support the conclusion that Public Law 280 would grant states jurisdiction in the context of a regulation that has a penal sanction.²⁶⁷ Likewise, Minnesota's amicus brief argued that *Cabazon* was an opportunity for the Court to "re-examine some of its own dicta in *Bryan*" and to straighten out extreme interpretations of *Bryan* by the lower courts in various gaming cases.²⁶⁸ Using a slightly different tack, the State of Washington's amicus brief sought to distinguish *Bryan*. It argued that *Bryan*'s interpretation of Section 4 of Public Law 280 (the section on state civil adjudicatory authority) had no limiting effect on the scope of Section 2 (state criminal authority), and since the consequence of violating the California regulatory law is penal, the law should fall under the scope of California's criminal jurisdiction.²⁶⁹

The brief by the Cabazon Band rebuffed state attempts narrow *Bryan*, arguing:

Bryan v. Itasca County is an important cornerstone in the foundation of Indian tribal self-determination. It is not surprising, then, that the appellants seek to narrow its scope by arguing that it applies only to state taxation powers. Although the appellants contend that it was mere dicta, we believe that the Court meant what it repeatedly said in *Bryan*: that Congress, in enacting PL-280, did not intend to confer upon the states "general civil regulatory powers, including taxation." 426 U.S. at 390; 388 n.14; 387 and 384. In addition, the Court quoted from and cited with

²⁶⁴ *Rice v. Rehner*, 463 U.S. 713, 726 (1983).

²⁶⁵ Brief of Appellant at 35, 480 U.S. 202 (1987) (No. 85-1708) (arguing that in *Rice*, the Court itself "cast doubts on *Bryan*'s 'civil regulatory-criminal prohibitory' distinction.>").

²⁶⁶ *Id.* at 36.

²⁶⁷ Brief for the States of Arizona, et al. as Amici Curiae in Support of Appellants at 23, *California v. Cabazon Band of Mission Indians, Cabazon*, 480 U.S. 202 (1987) (No. 85-1708). The Arizona brief also took issue with the *Bryan* Court's selective reliance on Carole Goldberg's article, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975). In a curious argument that essentially elevated Goldberg's article to a status above the actual legislative history of Public Law 280 or the Supreme Court's own analysis, Arizona accused the *Bryan* Court of failing to acknowledge statements in Goldberg's article which would support state jurisdiction where there is a penal sanction for a regulation. Brief for the States of Arizona, et al., *supra* note 261, at 24–26.

²⁶⁸ Brief for the State of Minnesota as Amicus Curiae in Support of Appellants at 3, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708).

²⁶⁹ Brief of the State of Washington, et al., as Amici Curiae in Support of the Appellants at 11-12, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708) ("Can a State circumvent the holding of *Bryan* engrafting criminal sanctions onto its tax laws, for example, and thereby make them applicable to reservation Indians? We would agree that the States may not do this. But the reason is not to be found in the illusory distinction developed by the lower courts. Rather, it is to be found in the language of § 2(b) . . . Congress, in § 2(b), carefully excluded from the scope of § 2(a) any such use of its criminal law system.")

approval Santa Rosa Band, a case not involving taxation, but the application of local building codes and zoning ordinances, giving further indication that a narrow reading of Bryan would be improper.²⁷⁰

The Band recognized that though *Bryan* dealt with taxation and the Court here faced gaming, “the overriding concern is the same: protecting the economic security of fragile tribal governments from unwarranted state jurisdiction. No persuasive argument has been advanced in this case that would justify any weakening of *Bryan*.”²⁷¹

Several of the tribal amicus briefs unabashedly adopted the strategy successful in *Bryan* which called on the Court to use the interpretive approach that Professor Frickey later labeled “practical reasoning.”²⁷² They argued that Indian gaming advanced the then-current governmental policy of tribal self-sufficiency, and thus urged a narrow reading of Public Law 280.²⁷³

The tribal amicus briefs strongly rejected the arguments that *Bryan*’s statements on regulatory authority were dicta.²⁷⁴ The Tulalip Tribe of Washington, for example, noted that the Court explicitly recognized how its interpretation in *Bryan* would affect “other regulatory assertions of state jurisdiction.”²⁷⁵ Indeed, the *Bryan* opinion identified the “lack of intent to grant such [state] regulatory authority as a basic premise of its decision” and noted this lack of intent “at least four different times.”²⁷⁶

B. The Supreme Court’s Decision in *Cabazon*

Surprisingly when the decision came out, Justice White, the graveyard dissenter in *Bryan*,²⁷⁷ wrote the majority opinion.²⁷⁸ The Court upheld the principle from *Bryan* that Public Law 280 embodied a distinction between civil regulatory and criminal prohibitory state laws.²⁷⁹ After reaffirming the central reasoning of *Bryan*, the Court examined the lower court cases that interpreted *Bryan* and refined the civil regulatory-criminal prohibitory distinction.²⁸⁰ It found the *Barona* and *Butterworth* decisions’

²⁷⁰ Brief for Appellee Cabazon Band at 42-43, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708).

²⁷¹ *Id.* at 43.

²⁷² Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1231 (1990).

²⁷³ Brief of the Seminole Tribe of Florida, et al. as Amici Curiae in Support of Appellee, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708); Brief of the Oneida Indian Nation of New York as Amici Curiae in Support of Appellee, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708).

²⁷⁴ Brief of the Tulalip Tribe of Washington, et al. as Amici Curiae in Support of Appellee at 41, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708). *See also* Brief of the Chehalis Indian Tribe, et al., as Amici Curiae in Support of Appellee at 13, *Cabazon*, 480 U.S. 202 (1987) (No. 85-1708) (noting that *Bryan* “specifically held that the state civil regulatory laws were not included within Public Law 280’s grant of jurisdiction” and that such repeated holdings cannot be considered dicta).

²⁷⁵ Tulalip Brief at 51, *Cabazon*, 480 U.S. 202 (1987)(No. 85-1708).

²⁷⁶ *Id.* at 52 (citing *Bryan*, 426 U.S. at 384, 387, 388 and n. 14).

²⁷⁷ *See note 229 supra* and accompanying text.

²⁷⁸ *Cabazon*, 480 U.S. at 202.

²⁷⁹ *Cabazon*, 480 U.S. at 109.

²⁸⁰ *Cabazon*, 480 U.S. at 109–10.

application of the civil regulatory-criminal prohibitory distinction consistent with *Bryan*, and dismissed California's argument regarding *Rice v. Rehner* in a footnote.²⁸¹

In analyzing whether California's gaming laws should be considered civil regulatory, which under *Bryan* would deny the state jurisdiction, or criminal prohibitory, which would allow state jurisdiction under Public Law 280, the Court held that the gaming laws were in fact regulatory.²⁸² Dismissing California's arguments that the civil regulatory-criminal prohibitory distinction would be unworkable, the Court declined to find a bright line rule but concluded that the lower courts have "not demonstrated an inability to identify prohibitory laws."²⁸³ Echoing the dynamic approach used in *Bryan*, the Court cited the strong federal interest in the policy of tribal self sufficiency and independence as well as the Indians' sovereign tribal interest in economic self-sufficiency and self-determination.²⁸⁴

The dissent, written by Justice Stevens and joined by O'Connor and Scalia, argued that Congress had not preempted California's prohibition on the narrow behavior of high stakes bingo.²⁸⁵ The dissent did not seek to overrule *Bryan* but, consistent with the state arguments, attempted to distinguish *Bryan* and confine it to its facts.²⁸⁶

Bryan provided the legal theory that authorized a handful of Indian gaming operations in diverse locations around the country.²⁸⁷ *Cabazon* ignited an explosion. The right of Indian tribes to conduct Indian gaming free of state interference, implicitly recognized in *Bryan*, was now explicit. Indian gaming was no longer a legal argument based on *Bryan*, but a legal principle based on *Cabazon*.²⁸⁸

Within eighteen months of *Cabazon*, Congress enacted the Indian Gaming Regulatory Act ("IGRA").²⁸⁹ The Act left in place *Bryan*'s general principle that Public Law 280 failed to give states authority to regulate existing types of Indian gaming, such as high-stakes bingo, but it created a lever that would allow states to demand regulatory authority over broader casino-style gambling, such as roulette, slot machines, and house-banked card games like blackjack.²⁹⁰ The state's lever was this: tribes could operate

²⁸¹ *Cabazon*, 480 U.S. at 209-210. Citing *Barona Group of Capitan Grande Band of Mission Indians, San Diego Cal. v. Duffy*, 694 F.2d 1185 (9th Cir. 1982) and *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981).

²⁸² *Cabazon*, 480 U.S. at 210.

²⁸³ *Id.* at 210-11 (see note 10 for the Court's conclusion that lower courts have been able to successfully determine what is prohibitory and what is regulatory).

²⁸⁴ *Id.* at 219.

²⁸⁵ *Id.* at 222.

²⁸⁶ For example, the dissent drew a distinction between the state personal property tax at issue in *Bryan* and the commercial transactions between Indians and non-Indians at issue in *Cabazon* and in *Rice*. *Id.* at 223.

²⁸⁷ See *supra* note 253-257.

²⁸⁸ See *supra* note 10 (illustrating the rapid growth in gaming revenues); See also 25 U.S.C. § 2701(5) (IGRA affirming the holding of *Cabazon*, stating "The Congress finds that . . . Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.")

²⁸⁹ 25 U.S.C. §§2701-21 (2000).

²⁹⁰ See Kevin K. Washburn, 4 NEV. L. J. 285, 286-89 (203-04).

casino-style (Class III) gaming only if they entered a tribal-state compact that addressed the state's legitimate regulatory concerns.²⁹¹

In IGRA, Congress thus limited the *Bryan* principle, at least in the gaming context, to the *Cabazon* facts.²⁹² Instead of the unilateral authority under Public Law 280 to regulate Indian gaming, which they lost in *Bryan* and *Cabazon*, states now have something less. IGRA gives states negotiating authority to demand that tribes consent to state regulatory authority.²⁹³ Absent *Bryan*'s narrow interpretation of Section 4 of Public Law 280, however, gaming may never have occurred and *Cabazon* likely would not have been decided in such a way.²⁹⁴

V. Broader Insights

It should now be quite obvious that *Bryan* was the legal bedrock for the tribal authority to begin gambling operations. The Indian gaming industry today brings in more than twenty-five billion dollars a year, with approximately 387 individual Indian gaming enterprises.²⁹⁵ Increasing well over twenty-fold since the passage of the Indian Gaming Regulatory Act in 1988, total historical Indian gaming revenue was over 170 billion dollars and growing rapidly at the end of 2006, the latest period for which we have records. Total Indian gaming revenue is swiftly closing in on two hundred billion dollars.²⁹⁶ Perhaps one of the most striking features of this legal narrative, however, is that the tribal gaming phenomenon sprang directly from tribal economic poverty.

A. The Moral High Ground of Poverty

²⁹¹ *Id.*

²⁹² Kevin K. Washburn, *Recurring Issues in Indian Gaming*, 1 WYO. L. REV. 427, 428–30 (2000).

²⁹³ See *Oversight Hearing on the Regulation of Indian Gaming: Hearing before the S. Comm. On Indian Affairs*, 109th Cong. (2005) (statement of Kevin K. Washburn); See also Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 429 (2001).

²⁹⁴ *Bryan* did not necessarily authorize Indian gaming outside of Public Law 280 states. In the absence of Public Law, this authority presumably was never in doubt. But it was in Public Law 280 states where Indian gaming first flourished. Tribes in Public Law 280 states, such as Florida and California, had much greater incentive to engage in Indian gaming than those in other states because most tribes were located more strategically close to large non-Indian populations that could make such gaming especially profitable.

²⁹⁵ National Indian Gaming Commission, NIGC Announces 2006 Indian Gaming Revenues, June 4, 2006 (PR-63 07-2007) available at

<http://www.nigc.gov/ReadingRoom/PressReleases/PR63062007/PR63072007/tabid/784/Default.aspx>

(putting the total Indian gaming revenue at \$25,075,829,000 for the 2006 year).

²⁹⁶ See U.S. Gen. Accounting Office, Report to the Chairman, Committee of Ways and Means, House of Representatives, *Tax Policy: A profile of the Indian Gaming Industry* 6 (1997)(for a chart with Indian gaming revenues from 1985-1995); National Indian Gaming Commission, Biennial Report of the National Indian Gaming Commission 1998-2000,

http://www.nigc.gov/LinkClick.aspx?link=reading_room%2fbiennial_reports%2fnigc_2000_biennial_report.pdf&tabid=118&mid=753 (for the total tribal gaming revenue from 1988, 1996-1999); and National Indian Gaming Commission Tribal Gaming Revenues 2000-2005

<http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/tribalgamingrevenues05.pdf> (for the total tribal gaming revenue from 2000-2005).

Helen Bryan might never have called the Legal Services Project but for her desperate need to avoid the county tax bill. It was legal services attorneys, sometimes called “poverty lawyers,” who brought the *Bryan* case.²⁹⁷ Indeed, poverty was not only a background dynamic in the case. Professor Becker placed Indian poverty front and center at oral argument, rebutting Justice White’s argument that living in trailer homes was a cultural choice by highlighting the fact that those living in mobile homes were among the poorest of the poor.²⁹⁸ Even the state’s attorney, C.H. Luther, facilitated this view of the case, suggesting that inheritance taxes were irrelevant to Indians.²⁹⁹

The poverty manifested in *Bryan* thus may have provided the higher purpose for the decision, and may thus have helped pave the way for the economic activity explicitly protected in *Cabazon* and, later, the Indian Gaming Regulatory Act. The victory in *Bryan* may thus indirectly support the hypothesis that it is the moral high ground of poverty, not aggressive assertions of sovereignty, that has tended to account for past tribal victories in the Supreme Court.³⁰⁰ Legal scholar Sam Deloria has suggested that the loss of the perception of poverty will prove costly to tribes in litigation and public policy, which will be an especially bitter result for those poor tribes without gaming who continue to occupy the same barren ground that they occupied before the gaming phenomenon.³⁰¹

B. Legal Services Attorneys in the History of Indian Law

The *Bryan* victory and others too numerous to count demonstrate the power of legal services attorneys in establishing and protecting Indian legal rights. This victory was a significant achievement not so much for any single attorney as for the Leech Lake Legal Services Project as an organization. Indeed, at each stage, the *Bryan* litigation was handled by a different attorney.³⁰² Though the attorneys changed, the broader organization kept pressing the case.

Though one might think that such legal services offices are sometimes handicapped by inexperienced attorneys and high rates of turnover, *Bryan* demonstrates that even attorneys who stay only a short time can, collectively, have an outsized impact on the law. Indeed, while personalities in these cases sometimes stand out, one lesson from the *Bryan* victory is that no single “hero” can produce a victory alone. For every Becker or Brennan, there are numerous other people who are indispensable to achieving

Comment [KS2]: Footnote (there must be a source somewhere making this claim)

²⁹⁷ See *supra* note 15.

²⁹⁸ See text accompanying notes 159 and 162 above and Transcript of Oral Argument at 22, *Bryan*, 426 U.S. 373 (1976) (No. 75-5027).

²⁹⁹ See text accompanying note 174 *supra*, citing *Bryan* argument transcript at 27 (to a justice’s question about state imposition of inheritance taxes, C.H. Luther responded that “the Indians are so impoverished that it is doubtful than the inheritance tax would apply.”)

³⁰⁰ Sam Deloria, Symposium, Cultural Sovereignty: Native Rights in the 21st Century, *Commentary on Nation-Building: The Future of Indian Nations*, 34 ARIZ. ST. L.J. 55, 60 (2002).

³⁰¹ *Id.*

³⁰² Patrick Moriarty filed the complaint. Nicholas Nordeen substituted in as counsel while the case was pending in the state district court. Gerry Seck argued the state appeal. Kent Peterson filed the petition for certiorari. Bernie Becker argued before the Supreme Court.

the result. The *Bryan* victory never would have happened without the help of a half-dozen legal aid attorneys who started the litigation and kept it moving.³⁰³

Through the late 1960s and 1970s, legal aid attorneys around the country—lawyers at local and regional legal services offices, nationally-active Indian law experts at the Native American Rights Fund in Boulder, the DNA-Peoples Legal Services on the Navajo Reservation—³⁰⁴ helped Indian people and tribes achieve landmark rulings in the Supreme Court and in numerous lower courts. Without the work of these attorneys, the complexion of federal Indian law might be far different. Their victories suggest that the many capable attorneys who staff legal services offices today can also change the world, in ways both big and small.³⁰⁵

C. Lessons on Careful Lawyering and Ambitious Judging

The most striking aspect of *Bryan* itself is the broad scope of the Court's opinion. At times in the litigation, it is apparent that several attorneys along the way regretted the decision not to argue that the mobile home constituted real property because it was affixed to the land.³⁰⁶ Yet it was the original decision not to make this the central and obvious argument and to argue a far broader position that ultimately made *Bryan* such an important precedent. The initial aggressive position taken by the attorney who drafted the complaint cast the die.³⁰⁷ The ultimate holding, that Public Law 280 did not confer state civil regulatory authority on Indian reservations, was far more important to tribes than a holding that mobile homes constituted personal property, even if such a holding could have been reached as a principle of federal law. Even a holding that states cannot tax Indian personal property on Indian reservations would not have had such broad

³⁰³ The work of a law professor (Carole Goldberg) also loomed large in argument and the Supreme Court's decision in the case.

³⁰⁴ See Brief of Native American Rights Fund as Amicus Curie in Support of Appellant, *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 14 (1973) (No. 71-384) (for involvement of the Native American Rights Fund); Brief Amici Curiae of the Allottees Association and Affiliated Tribes and Bands of the Quinault Reservation, et al., *Babbitt v. Youpee*, 519 U.S. 234 (1997) (No. 95-1595) (for a DNA People's Legal Services attorney involvement).

³⁰⁵ However, the Legal Services Corporation has undergone dramatic changes since the *Bryan* era litigation. During the Regan administration, the Legal Services Corporation saw its budget reduced significantly. See Liza Q. Wirtz, Note, *The Ethical Bar and the LSC: Wrestling with Restrictions on Federally Funded Legal Services*, 59 VAND. L. REV. 971, 984 (2006). Moreover, in 1996, the Legal Services Corporation's budget was cut by over forty percent, forcing offices to reduce case load and leave hundreds of thousands of cases unfinished. In 1996, Congress went beyond the budget cuts to undermine the power of Legal Services Corporations and enact significant limitations on how the Legal Services Corporation funding could be spent. See Omnibus Consolidated Reversions and Appropriations Act of 1996, Public Law 104-134, April 26, 1996). This appropriations legislation that prohibited Legal Services Corporation-funded programs from bringing or participating in class action lawsuits. This development limited the ability of such offices to continue to do "impact" litigation. Attorneys in legal services offices continue to have the ability to represent clients like the Bryans but they would no longer be able to style the case as a class action. Moreover, the extreme caseload placed on legal services attorneys would likely prohibit attorneys from reducing their case load, as Seck did, in order to spend time on "larger issues."

³⁰⁶ See *supra* notes 80 and 158–159 and accompanying text.

³⁰⁷ See text accompanying note 31.

ramifications. In this bet, perhaps the first major bet related to Indian gaming, a very aggressive gamble paid off.

Are Seck and Becker's efforts to narrow the argument surprising? Not really. Lawyers tend not to be gamblers. By nature, lawyers are risk averse.³⁰⁸ Once a case is framed, litigators tend to want to win, and they sometimes are willing to look at the case far more narrowly to insure a victory. The lawyers in *Bryan* began with a broad proposition and then sought to narrow it after they had lost in the state district court. It is a natural reaction, after losing, to seek to narrow the argument in hopes of a win.

Should the attorneys be criticized for attempting to narrow their argument? Perhaps not. Perhaps Becker seemed more careful and less bold to the Court for offering a more modest avenue to rule for the Bryans.³⁰⁹ In any event, both the state Supreme Court and the U.S. Supreme Court forced the appellate attorney to stick with the original bet.

The gamble in this case paid off probably because of the personality of Justice Brennan.³¹⁰ Though he infamously once disparaged an Indian law case as unimportant,³¹¹ he single-handedly insured that *Bryan* would never be so characterized, and thereby helped spawn an entire industry. In so doing, Brennan ignored cautious lawyers who sought a more narrow victory and won over justices who might have dissented. If Brennan *was* motivated by poverty, then *Bryan* was a remarkable step toward addressing poverty nationwide, whether or not Brennan could have possibly forecasted the importance of the case.

Postscript

Thirty-five years after she first contacted the Leech Lake Legal Services Project, Helen Bryan still lives on the same plot of land on the Leech Lake Reservation.³¹² Her five children are grown.³¹³ The trailer home that gave rise to the litigation has long been sold and replaced by a four-bedroom house where Helen Bryan, now Helen Johnson, is

³⁰⁸ Richard W. Painter, *Symposium: Evaluation and Response to Risk by Lawyers and Accountants in the U.S. and E.U.: Convergence and Competition in Rules Governing Lawyers and Auditors*, 29 J. CORP. L. 397, 404 (Winter2004).

³⁰⁹ See note and accompanying text at 158.

³¹⁰ See text accompanying notes 226–230 above.

³¹¹ BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 425 (Avon 1981) (1979) (“One decision he [Brennan] was assigned to write (*Antoine v. Washington*) addressed the question of whether Indians in Washington state could hunt and fish in the off season . . . Brennan seethed at having to write this ‘chickenshit case.’”). In similar fashion, former Deputy Solicitor Louis Claiborne once said that many Indian cases were unanimous because none of the Justices were interested enough to dissent and used *Bryan* as an example. Louis Claiborne, *The Trend of Supreme Decisions in Indian Cases*, 22 AM. IND. L. REV. 585, 586 (1998) (reprinting remarks made in 1980).

³¹² Interview with Helen Johnson, in Cass Lake, Minn. (May 25, 2007).

³¹³ See Interview with Helen Johnson, in Cass Lake, Minn. (May 25, 2007) (Helen Johnson's children were all young at the time of the *Bryan* case).

living in her retirement.³¹⁴ Perhaps as a result of gaming revenues, the house was financed by the tribe.³¹⁵

In a recent interview, Helen sat in a modest conference room with the current crop of legal services attorneys and staff in the offices of the organization which is now called Anishinabe Legal Services. Over a catered luncheon of fresh walleye and blueberry pie, she offered her memories of receiving the tax notice and calling legal services.³¹⁶ Behind her on the wall of the conference room hung a decorative plaque with a famous quote by Margaret Mead: “Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has.”³¹⁷

³¹⁴ Interview with Helen Johnson, in Cass Lake, Minn. (May 25, 2007).

³¹⁵ Telephone Interview by Julie A. Strother with Helen Johnson, Cass Lake, Minn. (July 9, 2007).

³¹⁶ Interview with Helen Johnson, in Cass Lake, Minn. (May 25, 2007).

³¹⁷ *Id.* (reading the quote on the wall of the Anishinabe Legal Services Office); http://www.quoteland.com/author.asp?AUTHOR_ID=390