Article

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

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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 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 $29.85 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

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1. Interview with Helen Johnson, in Cass Lake, Minn. (May 25, 2007); *see also* Complaint, Bryan v. Itasca County, No. 25081 (Minn. 9th Jud. Dist. Dec. 8, 1973), *reprinted in* Appellant's Brief app. at A-2 to -3, Bryan v. Itasca County, 228 N.W.2d 249 (Minn. 1975) (No. 44947).

2. Interview with Helen Johnson, *supra* note 1.

3. 426 U.S. 373 (1976).

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 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 casebooks[5]—but in the gaming context it tends to be overlooked. A more recent decision, *California v. Cabazon Band of Mission Indians*,[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 280,[8] never conferred "general state civil regulatory

4. *See* Interview with Mariana Shulstad, former Field Solicitor, U.S. Dep't of the Interior, in Minneapolis, Minn. (Sept. 1, 2006); Interview with Steven Thorne, Esq., in St. Paul, Minn. (Aug. 22, 2006); *see also infra* note 132 (listing the cases associated with the Leech Lake hunting and fishing litigation).

5. *See, e.g.*, ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 885–90 (4th ed. 2003); DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 499–504 (5th ed. 2005).

6. 480 U.S. 202 (1987).

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

8. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2000) and 28 U.S.C. § 1360 (2000)). With respect to the current civil portion of Public Law 280:

> (a) Each of the States 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 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 within the State:
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> State of Indian country affected
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> Alaska[:] All Indian country within the State.
>
> 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.

control over Indian reservations."[9] *Bryan* thus was the bedrock upon 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 Cabazon* 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 U.S. 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 financial wherewithal

> 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.

9. Bryan v. Itasca County, 426 U.S. 373, 384 (1976).

10. *See* NAT'L INDIAN GAMING COMM'N, BIENNIAL REPORT OF THE NATIONAL INDIAN GAMING COMMISSION 1998–2000, at 3 (n.d.), *available at* http://www.nigc.gov (follow "Reading Room" hyperlink; then follow "Reports" hyperlink; then follow "Biennial Reports" hyperlink; then select "1998–2000 Biennial Report" pdf icon) ("In 1988, tribal governmental gaming produced approximately $500 million in total annual revenue."); STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING & TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 40 (2005) (estimating the figure at $110 million in 1988 and noting that the Indian gaming industry grew rapidly throughout the 1980s); Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 434 (2001) (estimating the annual revenue of Indian gaming at the time of the passage of the Indian Gaming Revenue Act in 1988 at approximately $500 million); Press Release, Fed. Bureau of Investigation, U.S. Dep't of Justice, Protecting Indian Country from Crime: The Indian Gaming Working Group (June 30, 2004), *available at* http://www.fbi.gov/pressrel/pressrel04/063004indiangaming.htm (estimating revenues of $100 million in 1988).

11. *See Hearing on Off-Reservation Gaming Before the S. Indian Affairs Comm.*, 109th Cong. (2006) (statement of Sen. Daniel K. Inouye), *available at* http://www.senate.gov/~scia/2006hrgs/020106hrg/Inouye.pdf ("I have personally witnessed the Indian gaming industry grow to a multibillion dollar indus-

that gaming has brought some tribes has strengthened tribal governmental services, including education, medical and healthcare services, and a wide range of other social services.[12] Gaming has also given tribes tremendous clout in Washington, D.C., as well as 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. In fact, *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.[14] 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

try. It has proven to be the most successful economic development tool for Indian country."); Carter W. Hick, *The Indian Gaming Regulatory Act: Why Tribes Can Build Casinos off the Reservation*, 10 GAMING L. REV. 110, 110 (2006) ("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."); Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 279 (2003–2004) ("[E]ven modest casino revenues and employment can have a dramatic effect on tribes and the states in which reservations are situated.").

12. Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 53–54 (2002).

13. In Minnesota, two large local law firms, Dorsey & Whitney, LLP, and Faegre & Benson, LLP, 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.*, Little Six, Inc. v. United States, 280 F.3d 1371, 1372–73 (Fed. Cir. 2002) (listing "Dorsey & Whitney, LLP, of Minneapolis, MN" as representing Little Six, Inc., a tribally owned operation); Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 910 (9th Cir. 1995) (listing Arnold & Porter of Denver, Colorado as representing the Hopi Tribe); Shakopee Mdewakanton Sioux (Dakota) Cmty. v. Babbitt, 906 F. Supp. 513, 515 (D. Minn. 1995) (listing Faegre & Benson of Minneapolis, Minnesota as representing the Shakopee Mdewakanton Sioux Tribe).

14. *See infra* text accompanying notes 32–37, 57–60, 104–05, 135–79, and 200–10 (demonstrating that there were different attorneys at the complaint, appeal, petition for certiorari, and Supreme Court argument phases of the litigation, respectively).

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 Indian gaming in the years following *Bryan* through and beyond the important decision in *Cabazon*. 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, was born on this land near Squaw Lake, her grandfather's land, and the same land where the trailer home would later sit.[15] The land was held, as a lot of Indian land is held, in trust by the federal government.[16]

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.[17] During the course of their marriage, Helen and Russell Bryan had five children, all of them raised on this plot of land.[18] In late 1971, the Bryans bought a mobile home.[19] Helen borrowed the down payment from her mother, who had received a cash settlement when Helen's brother 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]

15. *See* Interview with Helen Johnson, *supra* note 1; *see also* Telephone Interview by Julie A. Strother with Helen Johnson, in Cass Lake, Minn. (July 9, 2007) (indicating that "Charwood" was Helen Johnson's maiden name).

16. *See* Bryan v. Itasca County, 426 U.S. 373, 375 (1976).

17. *See* Telephone Interview by Julie A. Strother with Helen Johnson, *supra* note 15; Interview with Helen Johnson, *supra* note 1.

18. Interview with Helen Johnson, *supra* note 1.

19. *See* Complaint, *supra* note 1, at A-2.

20. *See* Interview with Helen Johnson, *supra* note 1.

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 of $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, far eclipsed the ninety-two dollars that Helen paid each month for the mortgage.[27] Since the tax payments were due thirty days from the time of the assessments,[28] Helen was being asked unexpectedly to produce the equivalent of one and one-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 (Legal Services Project). Af-

21. *Id*.

22. United States v. Rickert, 188 U.S. 432, 438 (1903); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 343 (1819).

23. Bryan v. Itasca County, 228 N.W.2d 249, 251 (Minn. 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."), *rev'd*, 426 U.S. 373 (1976).

24. Interview with Helen Johnson, *supra* note 1.

25. Complaint, *supra* note 1, at A-2 to -3.

26. Interview with Helen Johnson, *supra* note 1.

27. *Id.*

28. Stipulation of Facts, Bryan v. Itasca County, No. 25081 (Minn. 9th Jud. Dist. Dec. 8, 1973), *reprinted in* Appellant's Brief app. at A-12, Bryan v. Itasca County, 228 N.W.2d 249 (Minn. 1975) (No. 44947); *see also* Tax Notice to Russell Bryan (June 6, 1972) (on file with Anishinabe Legal Services, Cass Lake, Minn.).

ter a brief conversation with an attorney, Helen mailed the original tax notice to the Legal Services Project office.[29] Stapled to 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."[30] 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.[31]

B. THE CLASS ACTION LAWSUIT AND THE STRATEGIC CHOICE

In September 1972, attorney Patrick Moriarty, with the Legal Services Project, filed an eleven-paragraph complaint in the Minnesota District Court for Itasca County, styled as a class action on behalf of Russell Bryan and others similarly situated, and alleging that the personal property tax was unlawful.[32] The complaint reflected an aggressive strategic decision by the legal services office. At the time, it was clear that Itasca County could not assess taxes on real property held in trust by the federal government.[33] Though a factual argument may have been available that the Bryans' mobile home was affixed to the land and thus ought to be considered nontaxable real property, the legal services attorneys declined to argue that the Bryans' 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.[34] This aggressive strategic choice would be reconsidered time and again,[35] but it ultimately paid tremendous dividends.

Before the case was decided, Moriarty left the office, and a new legal services attorney, Nicholas Norden, made an appear-

29. Interview with Helen Johnson, *supra* note 1.

30. Letter from Helen Bryan, signed R. Bryan, to Leech Lake Reservation Legal Services Project (n.d.) (on file with Anishinabe Legal Services, Cass Lake, Minn.).

31. *See id.*; *see also* Interview with Helen Johnson, *supra* note 1 (including the statement by Helen Johnson that she wrote the note, but signed it as Russell Bryan).

32. Complaint, *supra* note 1, at A-3 to -4.

33. *See* United States v. Rickert, 188 U.S. 432, 438 (1903); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 343 (1819).

34. *See* Complaint, *supra* note 1, at A-3 ("[I]n actuality the County of Itasca and State of Minnesota have no lawful authority to assess or impose a tax upon his personal property . . . ."); *see also* Stipulation of Facts, *supra* note 28, at A-13 (stating that the tax involved personal property).

35. *See infra* text accompanying notes 88 and 174.

ance.[36] Because there was 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.[37] District Judge James F. Murphy had little state court precedent to consider. He considered certifying the question to the state supreme court, but ultimately decided that he had an adequate understanding upon which to base a decision.[38]

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.[39] While the judge recognized that "the Leech Lake Indians were part of a large Indian tribe, [and] that once upon a time they were an Indian sovereign nation,"[40] 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.[41] He distinguished the Leech Lake Reservation, an "open" reservation, from the Red Lake Reservation, which was a "closed" reservation.[42] Following a four-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.[43]

Before the case could be appealed, there was another transition at the Legal Services Project office. When the director left, the office placed an advertisement in the Minnesota *Bench*

36. *See* Findings of Fact, Conclusions of Law and Order for Judgment, Bryan v. Itasca County, No. 25081 (Minn. 9th Jud. Dist. Dec. 8, 1973), *reprinted in* Appellant's Brief app. at A-18, Bryan v. Itasca County, 228 N.W.2d 249 (Minn. 1975) (No. 44947) (stating that Patrick Moriarty was replaced by Nicholas Norden as attorney for the plaintiffs).

37. *Id.*

38. *See id.* (indicating that District Judge James F. Murphy was the judge deciding the case); Memorandum, *appended to* Findings of Fact, Conclusions of Law and Order for Judgment, *Bryan*, No. 25081, *reprinted in* Appellant's Brief app. at A-22 to -25, *Bryan*, 228 N.W.2d 249 (No. 44947) (indicating Judge Murphy's consideration of certifying the question to the state supreme court and outlining the legal principles used to support his decision).

39. Memorandum, *supra* note 38, at A-22.

40. *Id.*

41. *Id.* at A-22 to -23.

42. *Id.* at A-23.

43. *Id.* at A-25 (stating that the following twenty pages of analysis was taken from the brief filed by the Commissioner of Taxation); *see also id.* at A-26 to -47 (constituting the entire attached analysis from the Commissioner of Taxation's brief).

& Bar magazine, in search of a new director for the Legal Services Project office.[44]

C. ENTER JERRY SECK

Gerald ("Jerry") Seck was a young attorney looking for adventure. He says that his wife did not want their tombstones to say "born Minneapolis, lived Minneapolis, died Minneapolis," so he applied for a Ford Foundation Fellowship in India.[45] 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.[46] After waiting around for a visa for a few months, Seck became restless. One day his wife called him and read to him the Legal Services Project advertisement from the classifieds section of the *Bench & Bar* magazine.[47]

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's boundaries. Still, he had experienced reservation poverty. At a previous job in the Twin Cities, Seck 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 about his family, and the man responded that his children were sick. Seck asked the man what had 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 did not 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.[48]

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

44. Interview with Gerald Seck, Esq., in Minneapolis, Minn. (Aug. 10, 2006).

45. *Id*.

46. *Id.*

47. *Id*.

48. *Id*.

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.[49]

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, which 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.[50] 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."[51] 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.[52] Finally, Coleman relented, and originated the housing program that ultimately allowed hundreds of Indian people access to better housing.[53]

Thus, when Seck's wife called and mentioned the Legal Services Project advertisement 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 was a student in a welfare law class that Becker taught as an adjunct professor at the University of Minnesota Law School.[54]

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.[55] Instead of doing what he viewed as "glorified social work," he wanted to

49. *Id*.
50. *Id.*
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*.
55. *Id*.

have a greater impact. As a result, Seck began to limit his intake to about half of the normal case load and concentrated on what he considered to be significant issues that could produce a wider impact.[56]

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 Bryans' appeal. Never having worked in Indian law, the issues that the Bryans' claim raised were new to him.[57] He reached out to experts, though, and soon found Dan Israel of the Native American Rights Fund (NARF),[58] a Boulder, Colorado litigation group established by California Indian Legal Services.[59] Israel, who had worked on a similar issue in the federal courts in Nebraska, helped Seck flesh out the legal arguments for an appeal in the Bryans' case.[60]

D. PUBLIC LAW 280

The *Bryan* case would ultimately turn upon the effect of Public Law 280. The U.S. Constitution grants the federal government, not the states, plenary power over Indian tribes.[61] Absent express congressional consent, states generally have no power over tribes.[62] Public Law 280 was a termination-era act[63]

56. *Id.*

57. *Id.*

58. *Id.*

59. Native American Rights Fund, Our History, http://narf.org/about/history.htm (last visited Mar. 6, 2008) ("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).").

60. Telephone Interview with Dan Israel, Esq., in Boulder, Colo. (Apr. 4, 2007).

61. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980); *see* U.S. CONST. art. I, § 8; Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 573 (1832).

62. *Colville*, 447 U.S. at 154.

63. During the termination era, Congress took several actions intended to end the trust relationship between the tribes and the federal government. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.06, at 89–97 (Nell Jessup Newton et al. eds., 2005). Congress adopted House Concurrent Resolution 108 in 1953. *Id.* at 94.

> [I]t is the policy of Congress, as rapidly as possible, to make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citi-

that granted enumerated states limited jurisdiction over tribes primarily to deal with the issue of lawlessness on reservations.[64] 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 of the Indian reservations.'"[65] Before Public Law 280 was implemented, criminal jurisdiction over Indian reservations was divided among the state, the tribe, and the federal government, depending upon the nature of the crime and the tribal membership of victim and perpetrator.[66] Because the federal law enforcement "was neither well-financed nor vigorous, and tribal courts often lacked the resources and skills to be effective," the complex jurisdictional structure often practically resulted in the absence of law enforcement on reservations.[67]

Public Law 280 changed the jurisdictional structure of Indian country by granting five (later six) states specific criminal

> zenship . . . . [I]t is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes . . . should be freed from Federal supervision and control and from all disabilities and limitations specifically applicable to Indians . . . .

H.R. Con. Res. 108, 83d Cong. (1953).

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

65. *Id.* (citing *State Legal Jurisdiction in Indian Country: Hearings on H.R. 495 and H.R. 3624 Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 82d Cong. 16 (1952) (statement of Rep. D'Ewart)).

66. *See* 18 U.S.C. § 1152 (2000) (stating that the general laws of the United States "shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe"); *id.* § 1153 (listing offenses that, when committed in Indian country by an Indian against an Indian, are subject to "the same law and penalties as all other persons . . . within the exclusive jurisdiction of the United States" and if the offense is not punishable at the federal level, it "shall be punished in accordance with the laws of the State in which the offense was committed"); Goldberg, *supra* note 64, at 541 (describing the "irrationally fractionated" nature of law enforcement on Indian reservations in 1953); *cf. Ex parte* Crow Dog, 109 U.S. 556, 572 (1883) (finding that the conviction of an Indian for the murder of another Indian in Indian territory was void for lack of jurisdiction).

67. Goldberg, *supra* note 64, at 541; *see also* 5 NAT'L AM. INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN: FEDERAL PROSECUTION OF CRIMES COMMITTED ON INDIAN RESERVATIONS 7 (1974) (describing the many issues surrounding "allocation of jurisdiction for crimes committed on Indian reservations").

and civil jurisdiction over reservation activities.[68] Public Law 280 granted criminal jurisdiction in section 2 of the act by giving enumerated states

> jurisdiction 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.[69]

In contrast, the grant of civil jurisdiction in section 4 of Public Law 280 was arguably narrower, reflecting Congress's primary concern with law and order issues.[70] In section 4 of Public Law 280, Congress granted enumerated states

> jurisdiction 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 within the State.[71]

Although the addition of civil jurisdiction was perhaps not the primary focus of Public Law 280, section 4 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 4's grant of jurisdiction had not been made clear by either Congress or the courts.[72]

E. APPEAL TO THE MINNESOTA SUPREME COURT

Since Minnesota had no court of appeals at the time,[73] the appeal was made directly to the Minnesota Supreme Court.[74]

68. 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* Goldberg, *supra* note 64, at 537–38.

69. Act of Aug. 15, 1953, ch. 505, § 2(a), 67 Stat. 588, 588 (codified as amended at 18 U.S.C. § 1162(a) (2000)).

70. *See* Goldberg, *supra* note 64, at 541.

71. Act of Aug. 15, 1953, ch. 505, § 4(a), 67 Stat. at 589.

72. *See* Goldberg, *supra* note 64, at 538 ("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, 424 (D. Neb. 1974) (holding that Public Law 280 grants the states jurisdiction to tax tribal members on reservations), *aff'd*, 516 F.2d 133 (8th Cir. 1975), *vacated*, 427 U.S. 902 (1976).

73. ROLAND C. AMUNDSON, THE FIRST TEN: AN INFORMAL HISTORY OF THE FIRST TEN YEARS OF THE MINNESOTA COURT OF APPEALS 29–31 (1993) (explaining that on November 2, 1982, the Minnesota Constitution was amended to create the Minnesota Court of Appeals and that the first members of the Court of Appeals took the oath of office in November 1983).

When it reached the Minnesota Supreme Court, the *Bryan* case attracted attention from other interested parties. In addition to the appearance of NARF attorneys on the Bryans' brief,[75] the Minnesota Chippewa Tribe filed an amicus brief arguing for reversal.[76] The Tribe's brief was written by Kent Tupper and Bernie Becker,[77] who was by then no longer a legal services attorney, but a professor at the William Mitchell College of Law.[78] The United States also filed an amicus brief arguing in favor of the Bryans.[79] The brief was written largely by Reid Peyton Chambers, who was the Associate Solicitor for the Division of Indian Affairs at the Department of the Interior.[80]

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.[81]

Though the Bryans did not attend,[82] Seck packed the courtroom with tribal members, hoping that it would have an effect on the court.[83] 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.[84] Surprised,[85]

74. *See* Appellant's Brief, Bryan v. Itasca County, 228 N.W.2d 249 (Minn. 1975) (No. 44947).

75. *See id.* (listing Dan Israel and two other attorneys from the Native American Rights Fund on the cover page of the brief).

76. Amicus Curiae Brief of the Minnesota Chippewa Tribe at 29, *Bryan*, 228 N.W.2d 249 (No. 44947).

77. *Id.* at 30.

78. Interview with Carol Becker, in Minneapolis, Minn. (Sept. 8, 2006).

79. Brief for United States as Amicus Curiae in Minnesota Supreme Court, *Bryan*, 228 N.W.2d 249 (No. 44947).

80. *Compare id.*, *with* Letter from Reid Peyton Chambers, Assoc. Solicitor for Div. of Indian Affairs, U.S. Dep't of the Interior, to Wallace H. Johnson, Assistant Att'y Gen., U.S. Dep't of Justice (Nov. 22, 1974) (on file with the Minnesota Historical Society, Files of Bernard Becker, Minnesota State Archives) (referencing a previous letter sent by his office asking the Department of Justice to seek leave of the Minnesota Supreme Court to file an amicus brief in *Bryan v. Itasca County*, and including proposed text for an amicus brief).

81. Interview with Gerald Seck, *supra* note 44.

82. *Id.*; *see also* Interview with Helen Johnson, *supra* note 1 (explaining the Bryans' limited involvement with the appeal).

83. Interview with Gerald Seck, *supra* note 44.

84. Interview with Mariana Shulstad, *supra* note 4.

85. *Id.*

but apparently not flustered, Shulstad advised the court that the United States was fully supportive of the Bryans' position.[86] Itasca County's case, which by now was the State of Minnesota's case, was argued by a young attorney in the Minnesota Attorney General's office named Steven Thorne, who was appearing for his first ever argument before the Minnesota Supreme Court.[87]

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.[88]

A former law clerk at the Minnesota Supreme Court, 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.[89] Both Steven Thorne and Gerald Seck left the Minnesota Supreme Court that day feeling that they had made compelling arguments.[90]

F. 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.[91] The issue to be decided was the scope of the jurisdiction conferred on the states by Congress in Public Law 280.[92] The law gave state courts full criminal jurisdiction and civil jurisdiction over

86. *See* Bryan v. Itasca County, 228 N.W.2d 249, 254 (Minn. 1975), *rev'd*, 426 U.S. 373 (1976).

87. Interview with Steven Thorne, *supra* note 4. Thorne later headed the state's Department of Natural Resources and then worked as a private attorney at Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C., an Indian law boutique firm in Minnesota. *Id.*

88. Appellant's Brief, *supra* note 74, at 19–22.

89. *See* Interview with Gerald Seck, *supra* note 44.

90. *See id.*; Interview with Steven Thorne, *supra* note 4.

91. *See* Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2000) and 28 U.S.C. § 1360 (2000)); *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).

92. Bryan v. Itasca County, 228 N.W.2d 249, 251 (Minn. 1975), *rev'd*, 426 U.S. 373 (1976); Appellant's Brief, *supra* note 74, at 1.

all disputes and provided that "those civil laws . . . 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."[93] Based primarily on this language, the court had little difficulty deciding the case.[94]

The Minnesota Supreme Court issued a unanimous ruling in favor of the State and against Seck and the Bryans.[95] 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 Indians v. Peters*,[96] a case decided two years earlier by a federal district court in Nebraska, for which Dan Israel had served as counsel.[97] The court also summarily rejected Seck's argument that the mobile home constituted real property because it had not been alleged in the complaint.[98]

When Seck read the Minnesota Supreme Court's unanimous affirming opinion, he was dismayed.[99] He immediately began discussing the possibility of appeal.[100] Attorneys for the Minnesota Chippewa Tribe agreed that it was a good case to appeal and, with continued support from attorneys at NARF, Seck informed the Bryans that he would seek an appeal to the U.S. Supreme Court.[101]

II. APPEAL TO THE UNITED STATES 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

93. Act of Aug. 15, 1953, ch. 505, § 4(a), 67 Stat. at 589.

94. *See Bryan*, 228 N.W.2d at 255–56.

95. *Id.* at 250.

96. 382 F. Supp. 421 (D. Neb. 1974), *aff'd*, 516 F.2d 133 (8th Cir. 1975), *vacated*, 427 U.S. 902 (1976).

97. *See id.* at 422; Telephone Interview with Dan Israel, *supra* note 60; *see also Peters*, 382 F. Supp. at 422–26 (discussing *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), the language of Public Law 280, and the fact that Public Law 280 does not give the state jurisdiction over Indians by "implication," but rather does so clearly and expressly); *Bryan*, 228 N.W.2d at 251, 253–55 (discussing the same).

98. *Bryan*, 228 N.W.2d at 256.

99. Interview with Gerald Seck, *supra* note 44.

100. *Id.*

101. *Id.*; Interview with Helen Johnson, *supra* note 1.

550 miles southeast of Guam,[102] where he had been recruited to litigate a large land-claim case.[103] With the assistance of a new legal services attorney, Kent Peterson, Seck drafted the petition for a writ of certiorari.[104] 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.[105]

By the time the writ of certiorari was granted in November 1975,[106] a new director had taken over at the Legal Services Project.[107] Seck was living with his family in Micronesia and received notice by cable that the *Bryan* case would be heard by the Supreme Court.[108] 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.[109] 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 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.[110] The new director of the Legal Services Project, Michael Hagedorn, was also listed on the brief.[111]

For Dan Israel, who had been working on the *Peters* case in Nebraska[112] 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 280 and federal termination legislation.[113] 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 to grant general regulatory power."[114] To Israel, the Congress that enacted Public Law 280 in 1953 was a

102. John H. Brandt, *Nests and Eggs of the Birds of the Truk Islands*, 64 CONDOR 416, 417 (1962).

103. Interview with Gerald Seck, *supra* note 44.

104. *Id*.

105. *Id.*

106. Bryan v. Itasca County, 423 U.S. 923 (1975).

107. Telephone Interview by Julie A. Strother with Michael Hagedorn, Esq., in St. Paul, Minn. (Sept. 7, 2006).

108. Interview with Gerald Seck, *supra* note 44.

109. *Id*.

110. *Id.*; *see also* Telephone Interview with Dan Israel, *supra* note 60.

111. Brief for the Petitioner, Bryan v. Itasca County, 426 U.S. 373 (1976) (No. 75-5027).

112. *See* Omaha Tribe of Indians v. Peters, 382 F. Supp. 421 (D. Neb. 1974), *aff'd*, 516 F.2d 133 (8th Cir. 1975), *vacated*, 427 U.S. 902 (1976).

113. Telephone Interview with Dan Israel, *supra* note 60.

114. *Id.* (emphasis added).

Congress that had enacted termination laws that explicitly provided for the taxation of Indians by states.[115] Since Congress knew how to draft explicit language thought to abrogate Indian tax immunities, it knew how to be clear about such matters.[116] To Israel, the absence of clear language authorizing state taxation was a compelling indicator of the limits of Public Law 280.[117] 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 argued that the Court had adopted a strict standard that "prohibits the inferral of state taxing authority not specifically authorized" by Congress.[118] Thus, the brief sought to use the ambiguity to the Bryans' benefit.

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, D.C.[119] From Micronesia, Seck discussed the 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.[120] Legal Services Project Director Michael Hagedorn concurred.[121]

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 re-

115. *See* Brief for the Petitioner, *supra* note 111, at 32–33; Telephone Interview with Dan Israel, *supra* note 60.

116. *See* Brief for the Petitioner, *supra* note 111, at 11 ("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 . . . ."); Telephone Interview with Dan Israel, *supra* note 60.

117. *See* Brief for the Petitioner, *supra* note 111, at 11; Telephone Interview with Dan Israel, *supra* note 60.

118. Brief for the Petitioner, *supra* note 111, at 12–13.

119. Interview with Gerald Seck, *supra* note 44.

120. *Id*.

121. Telephone Interview by Julie A. Strother with Michael Hagedorn, *supra* note 107.

cording of the argument, and expressed melancholy about his stint in Micronesia. "I'm getting very bored with things here," he wrote. "Every day is the same . . . . For those who dream of living on a South Seas island, laying in the sun each day and having no cares—All I can say is you have to try it."[122] Turning back to the upcoming argument, he predicted a reversal and signed the letter, "Optimistically, Jerry."[123]

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.[124]

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.[125] 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 Minneapolis Legal Aid Society, where he spent the next few years of his career.[126] By the time the *Bryan* case reached the U.S. Supreme Court, Becker had become a full-time law professor at the William Mitchell College of Law in St. Paul, though his legal services connection remained strong.[127]

122. Letter from Gerald Seck, Esq., to Bernie Becker, Esq. (Mar. 26, 1976) (on file with the Minnesota Historical Society, Files of Bernard Becker, Minnesota State Archives).

123. *Id*.

124. Letter from Daniel H. Israel, Esq., to Bernie Becker, Esq. (Feb. 18, 1976) (on file with the Minnesota Historical Society, Files of Bernard Becker, Minnesota State Archives).

125. Interview with Carol Becker, *supra* note 78.

126. *Id*.

127. *See* Eric S. Janus, *A Memorial to Bernie Becker*, 17 WM. MITCHELL L. REV. 409, 412 (1991).

By all accounts, Becker was larger than life. Though a physically large man, indeed unhealthily 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.[128] Using teaching methods that he had learned from his own potent professors at the University of Minnesota, Jack Cound and Yale Kamisar, Becker could be intimidating to students.[129] Other attorneys sometimes felt the strength of his presence as well. Steven 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."[130] But despite the powerful personality, Thorne said that he "had a heart of gold."[131]

Becker had gained the trust of the Minnesota Chippewa Tribe for previous work related to the Leech Lake hunting and fishing rights litigation[132] as well as his amicus representation of the Tribe in the Minnesota Supreme Court phase of *Bryan*.[133] Beyond his strong knowledge of Indian law, Bernie Becker was a strong advocate and charismatic speaker. Heading into the oral argument before the U.S. Supreme Court, which was his first, Bernie Becker was well acquainted with the case.[134]

128. *See* Interview with Mariana Shulstad, *supra* note 4; Interview with Steven Thorne, *supra* note 4.

129. Interview with Carol Becker, *supra* note 78.

130. Interview with Steven Thorne, *supra* note 4.

131. *Id.*

132. *See* Leech Lake Citizens Comm. v. Leech Lake Band of Chippewa Indians, 355 F. Supp. 697, 697 (D. Minn. 1973) (declining to enjoin the state from entering into agreements with the Chippewa Indians 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, 1004–06 (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, 343 (Minn. 1977) (describing the "long and acrimonious history of litigation concerning fishing and hunting rights in the Leech Lake area").

133. *See* Amicus Curiae Brief of the Minnesota Chippewa Tribe, *supra* note 76.

134. Interview with Carol Becker, *supra* note 78; Telephone Interview by Julie A. Strother with Michael Hagedorn, *supra* note 107.

B. ORAL ARGUMENT

The Supreme Court heard oral arguments in *Bryan v. Itasca County* on April 20, 1976.[135] Becker attended the argument with his family, NARF attorney Dan Israel, and then-Director of the Legal Services Project, Michael Hagedorn.[136] From the gallery, Becker's wife Carol watched her husband anxiously. Trusting that he was capable, but 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.[137] Perhaps because the Court was presided over by Chief Justice Warren E. Burger, who had attended the law school where Becker then taught[138] or, more likely, because it simply was a good forum for his personality, Becker seemed very comfortable at the oral argument.[139]

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.[140] 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."[141] According to Becker, Congress stopped short of applying all state civil laws of general applicability on the reservations in contexts outside causes of action. He said,

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

136. Interview with Carol Becker, *supra* note 78.

137. *Id.*

138. Chief Justice Burger, who presided over the Court, graduated from the William Mitchell College of Law. *See* Transcript of Oral Argument at 1, *Bryan*, 426 U.S. 373 (No. 75-5027) (indicating that the oral argument was heard before Chief Justice Burger and the eight other Justices); Sandra Day O'Connor, In Memoriam, *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 also* Robert M. Jarvis, *A Brief History of Law School Names*, 56 J. LEGAL EDUC. 388, 406 (2006).

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

140. Transcript of Oral Argument, *supra* note 138, at 4.

141. *See id.* at 5.

> 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 . . . .[142]

Becker's first challenge from the Court was a hostile series of questions from then-Associate Justice William H. 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?"[143] With his response, Becker painted Rehnquist into a corner: "I think 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."[144]

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 decision?"[145] Becker's argument here dovetailed nicely with the leading scholarly work on Public Law 280, an article by UCLA law professor Carole Goldberg.[146] The article 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.[147]

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 the "taxation of any real or personal

142. *Id.* at 5–6.
143. *Id.* at 7.
144. *Id.* at 7–8.
145. *Id.* at 8.
146. Goldberg, *supra* note 64.
147. *Id.* at 540–42.

property . . . held in trust by the United States."[148] 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?"[149]

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.[150] 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."[151] 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.[152]

Becker's next challenge came from Justice Byron R. White. White picked up on Rehnquist's line of questions and argued that, if Public Law 280 was a termination statute, it only "terminated" tribes in the areas in which it specifically applied.[153] Becker responded forcefully, suggesting that White misunderstood the statute, and explaining that Public Law 280 explicitly gave every other state the ability to opt into the statute.[154] 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."[155] In parrying the questions from Justices White and Rehnquist, 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

148. Act of Aug. 15, 1953, ch. 505, § 4(b), 67 Stat. 588, 589 (codified as amended at 28 U.S.C. § 1360(b) (2000)); Transcript of Oral Argument, *supra* note 138, at 8 (asking about subsection B of the civil jurisdiction section of Public Law 280, "which purports to be an exemption from a much more general type of authority").

149. Transcript of Oral Argument, *supra* note 138, at 9.

150. *Id*. at 8–9.

151. *Id*. at 9.

152. *Id*. at 9–10.

153. *Id.* at 12.

154. *Id.*

155. *Id.*

precisely because "this statute was not imposed upon the Indians. The Indians came looking for this statute."[156] And they did not oppose it, he argued, because everyone agreed that it would not give states the 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."[157]

Justice John Paul Stevens then forced Becker to backtrack on this point. He professed confusion regarding Becker's argument that tribes asked for the statute, on the one hand, and yet it was up to states to opt in unilaterally.[158] 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.[159] Since it was then noon, Chief Justice Burger interrupted the argument and ordered a recess until 1:00 p.m. for a lunch break.[160]

Perhaps the only Minnesota tribal member who was watching from the courtroom gallery that day was Margaret ("Peggy") Treuer, who stood in line at the courthouse 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.[161] She was surprised that she seemed to be the only tribal member attending the oral argument. Sitting in the gallery, Treuer noted that from the outset of the argument, 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.[162]

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 had grown up on the Leech Lake Reservation, and, as a member of the Minnesota Chippewa Tribe, thanked him for his work on her tribe's behalf. When Becker asked her what she thought of the argument

156. *Id*. at 11.
157. *Id*.
158. *Id.* at 13, 15.
159. *Id*. at 13–14.
160. *Id*. at 14.
161. Interview with Margaret Treuer, *supra* note 139.
162. *Id*.

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.[163] 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 Legal Services Project as a summer clerk. Later in her career, she would return to that office as the executive director.[164] Peggy Treuer's daughter, Megan Treuer, has also worked in that office, now called Anishinabe Legal Services.[165]

When argument resumed, Becker returned to the consent provisions regarding Public Law 280, tweaking his argument slightly, no doubt to account for Treuer's criticism.[166] 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.[167] He argued 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.[168] Becker also argued that if Public Law 280 conferred state taxing authority on Indian reservations, Congress would have "slipped one by the Indians."[169]

163. *See* Transcript of Oral Argument, *supra* note 138, at 11; Interview with Margaret Treuer, *supra* note 139.

164. Interview with Margaret Treuer, *supra* note 139. Treuer was one of the first members of the White Earth 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 currently serves as a tribal court judge in Minnesota and has served on the Leech Lake Tribal Court, the Bois Forte Band of Chippewa Tribal Court, the Upper Sioux Indian Community Tribal Court, and the Red Lake Nation Tribal Court as chief judge. *Id.*

165. *Id.*; *see also* Anishinabe Legal Services, Who We Are, http://www.alslegal.org/index2.htm (last visited Mar. 6, 2008) (stating that Anishinabe means "the people" in the Ojibwe language).

166. *See* Transcript of Oral Argument, *supra* note 138, at 15.

167. *Id*. at 15–17.

168. *Id*. at 16–17.

169. *Id*. at 18.

C. IMPORTANT QUESTIONS CONCERNING 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 was 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."[170] However, he quickly returned the argument to the narrow issue of taxes.[171] 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.[172] Then again, 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.[173]

Becker concluded his opening argument by attempting to resurrect the very narrow argument that Seck unsuccessfully attempted to raise in the Minnesota Supreme Court—that the trailer was affixed to the land and constituted real property.[174] In doing so, he drew a link to the issues of poverty that lay 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?[175] Becker noted that fifteen percent of tribal members live in mobile homes.[176]

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?"[177] While Becker played it straight, Treuer, in the back of

170. *Id.* at 19.

171. *Id.*

172. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 180–81 (1973) (holding Arizona's income tax unlawful when applied to Navajo Indians living on the reservation and deriving their income from reservation sources).

173. *See* Transcript of Oral Argument, *supra* note 138, at 19.

174. *Id.* at 21–22.

175. *Id.* at 22.

176. *Id.*

177. *Id.*; Interview with Margaret Treuer, *supra* note 139 (describing Justice White's question).

the courtroom, rolled her eyes and marveled at the ignorance of a member of the Supreme Court.[178] 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:

> [A]n 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 . . . has to be judged by the number of bricks or blocks underneath the home to determine whether it is attached. Now, we don't think the federal law requires that.[179]

In contrast to Becker, the attorney from the State Attorney General's office arguing on behalf of Itasca County was not at ease.[180] 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.[181] 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.[182] 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.[183] He adopted a logical approach that might have worked well in another court in 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."[184] 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.[185] He quickly moved to legislative history, but

178. Interview with Margaret Treuer, *supra* note 139.

179. Transcript of Oral Argument, *supra* note 138, at 22–23.

180. Interview with Margaret Treuer, *supra* note 139.

181. Interview with Steven Thorne, *supra* note 4.

182. *See* Transcript of Oral Argument, *supra* note 138, at 1; Interview with Steven Thorne, *supra* note 4.

183. *See* Transcript of Oral Argument, *supra* note 138, at 23–25. 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. *Id.* Notably, Luther was allowed the equivalent of two full pages of transcribed text to outline his argument, although Becker was allowed three. *Id.* at 3–6, 23–25.

184. *Id.* at 24.

185. *Id.*

argued that it was not helpful.[186] When he reached his third consideration, judicial decisions, he listed the Minnesota District Court and Minnesota Supreme Court *Bryan* decisions, as well as the federal district court and Eighth Circuit opinions in *Peters*, dealing with income taxes.[187]

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.[188] Luther responded affirmatively to each.[189] 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 that the inheritance tax would apply."[190] 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.[191]

Turning to the policy considerations, Luther argued that Public Law 280 was designed as an "integration and assimilation" initiative.[192] He made a compelling argument that it should be interpreted in that fashion:

> Indians are citizens of the state. . . . [It is] only just and proper that they bear their fair share of the expenses of the state. . . . [W]hy should not these citizens of the state who are enjoying all the rights and privileges of all the other citizens of the state share in the expenses, at least to the extent of . . . the sales tax, the gas tax, personal property tax.[193]

Having made his best argument, Luther soon began to seem out of his element and flustered. An observer to the proceedings thought he was nervous and described him as "red-headed and red-faced."[194] 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 assi-

186. *Id.* at 25.

187. *Id.*; *see also* Omaha Tribe of Indians v. Peters, 382 F. Supp. 421, 421 (D. Neb. 1974) (involving a challenge to a state income tax "levied against an Indian's income derived from employment performed wholly upon an Indian reservation"), *aff'd*, 516 F.2d 133 (8th Cir. 1975), *vacated*, 427 U.S. 902 (1976).

188. Transcript of Oral Argument, *supra* note 138, at 26.

189. *Id*. at 26–27.

190. *Id*. at 27.

191. *Id.*

192. *Id*. at 29.

193. *Id.* at 29–30.

194. Interview with Margaret Treuer, *supra* note 139.

milation," Luther demurred by saying, "I'm not clear on that, your honor."[195]

When subsequently asked why the Red Lake Reservation was an exception to Minnesota's grant of jurisdiction under Public Law 280, Luther answered,

> Well, I would defer to Mr. Becker. He is more of an expert than I. I think it was because they had a—what can I say?—a better tribal operation there.[196] In other words, they were able to handle their problems internally tribally where these other tribes didn't have as effective an organization.[197]

With that, Luther abruptly announced, "if there are no further questions, that is all I have,"[198] and he took his chair, yielding most of his time.[199]

Stepping to the podium for rebuttal, Becker turned almost immediately to the Red Lake question. He suggested that Red Lake and other tribes were specifically exempted from Public Law 280 "because they [had] ongoing tribal governments . . . 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 of assimilation those tribes that had advanced over the pupilage state which was" the justification for federal involvement.[200] "Yet, in fact, it was only the tribe[s] in the areas where the tribes were the least developed" where Public Law 280 was made mandatory.[201] 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 along over a difficult period" by

195. Transcript of Oral Argument, *supra* note 138, at 30.

196. The loss for words here is curious. Luther may have been trying to avoid the word "government," or he may have been honestly unsure of what to call the tribal government.

197. *Id.* at 31.

198. *Id.*

199. *See id.* For comparison purposes, Becker's opening argument ranged across more than twenty-one pages of the oral argument transcript, and his rebuttal ran three more pages. *See id.* at 3–23, 31–34. Luther's entire argument filled only eight pages from beginning to end. *See id.* at 23–31.

200. *Id.* at 32.

201. *Id.* 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* Goldberg, *supra* note 64, at 543.

making "state courts available."[202] Before Becker sat down, a member of the Court offered that Public Law 280 may have done that, but stated, "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."[203]

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.[204] Becker admitted that state tax authority on reservations was wholly unsettled and unclear, but indicated that Indians had not acquiesced to state taxes.[205] He said that it had not come before the Supreme Court, but "[t]here 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 gaveled the argument to a close.[206]

During the argument, Carol Becker's worst fears were realized. Not long after the argument began, Becker unbuttoned his coat.[207] Although he failed to follow his wife's principal instruction, he had argued competently and had successfully withstood difficult and aggressive questioning. Given the strong way the argument ended, Becker had reason to be hopeful.[208] Becker, Michael Hagedorn, and Dan Israel left the Court feeling comfortable with the potential for a reversal.[209] However, there was clearly strong opposition reflected in the questions from Justices White, Rehnquist, and to a lesser extent, Stevens.[210]

After the oral argument, the attorneys returned to work and nervously awaited the decision. Michael Hagedorn returned to Cass Lake, Minnesota, to the Legal Services Project,

202. Transcript of Oral Argument, *supra* note 138, at 33.

203. *Id*. at 33–34.

204. *Id*. at 34.

205. *Id*.

206. *Id*.

207. Interview with Carol Becker, *supra* note 78.

208. *See id*.; Telephone Interview by Julie A. Strother with Michael Hagedorn, *supra* note 107.

209. Telephone Interview by Julie A. Strother with Michael Hagedorn, *supra* note 107.

210. *See supra* text accompanying notes 143–59.

where he was joined by new summer law clerk Peggy Treuer.[211] Dan Israel returned to Boulder to work on other litigation with NARF.[212] Jerry Seck continued his work in Micronesia, despite the extensive damage caused by a recent typhoon.[213] Becker returned to the William Mitchell College of Law to finish out the semester, and then took his family on a long vacation.[214]

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.[215] The decision was not to come for nearly two months.

D. VICTORY

On Jerry Seck's first day back from Micronesia, he fielded a call from *Minneapolis Tribune* reporter Nick Coleman[216] (son of the state senator whom Seck had pestered to initiate the Indian housing loan program).[217] When Coleman said, "Jerry, you won!," Seck responded, "What are you talking about?"[218] Seck was thus informed of the unanimous ruling by the U.S. Supreme Court.[219]

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!"[220]

It was Becker who called from Mexico to inform the Legal Services Project office about the victory. Michael Hagedorn took the call. Peggy Treuer, who sat in a cubicle in the corner of the

211. *See* Interview with Margaret Treuer, *supra* note 139.

212. Telephone Interview with Dan Israel, *supra* note 60.

213. Interview with Gerald Seck, *supra* note 44.

214. Interview with Carol Becker, *supra* note 78.

215. *See Justices Bar State's Taxation of Reservation Indians*, N.Y. TIMES, June 15, 1976, at 19; Interview with Helen Johnson, *supra* note 1.

216. *See* Interview with Gerald Seck, *supra* note 44.

217. *See supra* text accompanying notes 50–53; *see also* Jackie Crosby, *Coleman Campaign Opens with Promises*, STAR TRIB. (Minneapolis, Minn.), Jan. 13, 2005, at B1 (stating that Nick Coleman, writer for the Minneapolis-based *Star Tribune*, and his brother Chris Coleman, candidate for Mayor of St. Paul, are the children of the late Senator Nicholas Coleman).

218. Interview with Gerald Seck, *supra* note 44.

219. Bryan v. Itasca County, 426 U.S. 373, 374 (1976) (indicating that the decision was unanimous).

220. Interview with Carol Becker, *supra* note 78.

small office, heard the normally reserved Michael Hagedorn shout, "We won!"[221]

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 *Peters*.[222] Indeed, following *Bryan*, the Supreme Court granted certiorari in *Peters*, vacated the decision, and remanded the case to the Eighth Circuit,[223] which summarily ordered the district court to enter judgment for Israel's clients.[224] When 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 homes.[225]

The *Minneapolis Tribune* carried the *Bryan* victory as its top story in a banner headline on June 15, 1976, announcing,

221. Interview with Margaret Treuer, *supra* note 139.

222. *See* Omaha Tribe of Indians v. Peters, 382 F. Supp. 421 (D. Neb. 1974), *aff'd*, 516 F.2d 133 (8th Cir. 1975), *vacated*, 427 U.S. 902 (1976); *supra* text accompanying notes 96–97 (describing Dan Israel's role as counsel in the case).

223. *Peters*, 427 U.S. 902 (granting certiorari, vacating the Eighth Circuit's decision, and remanding the case back to the Eighth Circuit).

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

225. Interview with Helen Johnson, *supra* note 1. While the ruling garnered them little local attention, the Bryans received a grateful letter from the Minnesota Chippewa Tribe. The letter, from Arthur Gahbo, President of the Minnesota Chippewa Tribe, read:

> Dear Mr. and Mrs. Bryan:
>
> As the President of our Tribal organization, I must take this opportunity, [o]n 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 strengthene[d] and solidified the issue of Tribal Sovereignty.
>
> Because of 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.

Letter from Arthur Gahbo, President, Minn. Chippewa Tribe, to Mr. & Mrs. Russell Bryan (Aug. 9, 1976) (on file with Helen Johnson). Enclosed with the letter were two bronze tribal medallions. *Id.*; Interview with Helen Johnson, *supra* note 1. 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, *supra* note 1.

State Forbidden to Tax on Reservations.[226] 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*.[227] The *Saint Paul Pioneer Press* likewise reported, on page fourteen, *Court Limits Taxing on Reservations*.[228]

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 upon either taxes or real property. It issued a much broader holding, something that may have been foreshadowed by the Court's 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 among the circuits.[229] In a preliminary memorandum discussing whether or not the *Bryan* case would be a good candidate for certiorari, one clerk wrote, "The most persuasive argument for a grant 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."[230] After deciding to grant certiorari, 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

226. Dennis Cassano, *State Forbidden to Tax on Reservations*, MINNEAPOLIS TRIB., June 15, 1976, at 1A.

227. *Justices Bar State's Taxation of Reservation Indians*, *supra* note 215, at 19.

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

229. *See* Robert J. Nordhaus et al., *Revisiting* Merrion v. Jicarilla Apache Tribe*: Robert Nordhaus and Sovereign Indian Control over Natural Resources on Reservations*, 43 NAT. RESOURCES J. 223, 268–69 (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 certiorari); Comments of DP (Aug. 20, 1975), *attached to* Preliminary Memorandum from Mason, Summer List 10, Sheet 4 (Aug. 19, 1975) (on file with the Library of Congress, Collections of the Manuscript Division) (discussing whether or not the Court should grant certiorari in the *Bryan* case).

230. Comments of DP, *supra* note 229.

others. However, the Court did go beyond the briefs. Indeed, the Court began its discussion of Public Law 280 in Part 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.[231] 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.[232] In doing so, the Court echoed Becker's position at oral argument that Public Law 280 was a "lawyer's statute,"[233] primarily about adjudicatory jurisdiction, not civil authority.[234] Otherwise, the Court noted in a footnote, it would have been codified in title 25 of the United States Code (the Indian title) rather than title 28, which governed courts and jurisdiction.[235]

Part 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.[236] 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 that intent was to subject reservation Indians to the full sweep of state laws and state taxation."[237] The Court also cited a law review article that Israel penned while he was working on the *Peters* case.[238]

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 least developed and most inadequate tribal legal institutions."[239] Evidence

231. *See* Bryan v. Itasca County, 426 U.S. 373, 379 (1976); Goldberg, *supra* note 64, at 541–42.

232. *See Bryan*, 426 U.S. at 387–92.

233. *See* Transcript of Oral Argument, *supra* note 138, at 5 (describing Public Law 280 as a "lawyer's statute").

234. *See Bryan*, 426 U.S. at 384–85.

235. *Id.* at 385 n.11. This argument surely elevated the importance of a nameless legislative clerk somewhere.

236. *See id*. at 389–90; *supra* text accompanying notes 112–18.

237. *Bryan*, 426 U.S. at 389 (footnote omitted).

238. *See id*. at 381 (citing Daniel H. Israel & Thomas L. Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D. L. REV. 267 (1973)).

239. *See id*. at 385–86 & n.12, 388 n.13; *see also supra* text accompanying notes 145–47.

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.[240] 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 Indian tribes.[241]

The Court's opinion also accepted an argument raised in the Solicitor General's amicus brief,[242] 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] tribal governments to a level below that of counties and municipalities."[243] This reference to contemporary federal policy was later revealed to be a telling insight into Supreme Court decision making.[244]

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."[245] And, the opinion rejected the notion that "tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers."[246] The Court

240. *See* Goldberg, *supra* note 64, at 543–44.

241. *See Bryan*, 426 U.S. at 385–86 ("[C]ertain 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. 83-848 (1953), *as reprinted in* 1953 U.S.C.C.A.N. 2409, 2412)).

242. 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 from the Department of Justice. *See* Memorandum for the United States as Amicus Curiae, *Bryan*, 426 U.S. 373 (No. 75-5027); *see also supra* note 80 and accompanying text (describing Chambers' letter to the Department of Justice, requesting that it file a brief with the Minnesota Supreme Court).

243. *Bryan*, 426 U.S. at 388 n.14; *see* Memorandum for the United States as Amicus Curiae, *supra* note 242, at 10.

244. *See infra* text accompanying notes 255–70.

245. *Bryan*, 426 U.S. at 384.

246. *Id.* at 388.

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.[247] The Court aggressively staked out a position broader than that advocated by the Bryans.

The loss was probably surprising to the Attorney General's office, and the fact that the opinion was unanimous was equally surprising to the Bryans' attorneys.[248] Apparently, even Justice 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.[249]

The unanimous decision by the Court may be explained by the fact that it was Justice William J. Brennan, Jr. 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.[250] Despite the hesitation that some Justices may have had, all joined in Brennan's opinion.[251]

247. *See supra* text accompanying notes 88 and 174–75; *see also* Brief for the Petitioner, *supra* note 111, at 15 (arguing primarily about tax immunity, not regulatory immunity).

248. Telephone Interview by Julie A. Strother with Michael Hagedorn, *supra* note 107 (noting that there were some reservations about Justice Douglas).

249. *See supra* text accompanying notes 143–52.

250. *See* Owen Fiss, Tribute, *A Life Lived Twice*, 100 YALE L.J. 1117, 1120 (1991) ("Brennan could be trusted to choose his words in a way that would minimize the disagreement among the [J]ustices, 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*, 57 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.").

251. A letter from Justice Harry Blackmun to Justice Brennan is illustrative of some of the behind-the-scenes navigation Brennan used to strengthen his majority opinion. Blackmun suggested a softening of the language in the opinion, writing:

> 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 think it could be softened, as by inserting the words "we feel that" before "the construction"? . . . [I]f we can, I prefer to take a sympathetic approach this time.

Letter from Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court, to William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court (June 4, 1976) (on file with the Library of Congress, Collections of the Manuscript Division); *see*

Evidence of Justice Brennan's persuasive powers can be seen in the few words written on the Justices' letters to Brennan indicating that they would join. A letter from Justice Lewis F. Powell, Jr. stated, "I am following my Brother White's capitulation to your persuasive powers! Please join me also."[252] 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."[253]

Justice Brennan's persuasive powers clearly went beyond the ability to convince his fellow Justices to join him on the issue at hand. Eleven 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*.[254]

C. THE SCHOLARLY RECEPTION

In hindsight, the *Bryan* decision is surprising not only for its breadth, but also its interpretative methodology. According to Professors Philip Frickey and William Eskridge, the 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 the 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.[255]

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 fa-

also Bryan, 426 U.S. at 386 (reflecting the text that Justice Blackmun requested be included).

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

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

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

255. Eskridge & Frickey, *supra* note 91, at 374–75 (footnote omitted).

vor, with ambiguities being resolved in favor of the Indians.[256] 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."[257] Yet, despite the unusual interpretive approach, which Frickey and Eskridge have labeled "practical reasoning,"[258] Frickey agreed with the result.[259]

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.[260] 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.[261] 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.[262] As in *Bryan*, courts should "fuse the contemporary horizon with past congressional expectations, not . . . ignore the former in misguided allegiance to the latter."[263] Moreover, since the federal-tribal relationship is an ongoing one and congres-

256. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 63, at 119.

257. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1168 (1990). 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. *See, e.g.*, Alex Tallchief Skibine, Braid of Feathers*: Pluralism, Legitimacy, Sovereignty, and the Importance of Tribal Court Jurisprudence*, 96 COLUM. L. REV. 557, 580 (1996) (reviewing FRANK POMMERSHEIM, BRAID OF FEATHERS (1995)). 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. *See supra* note 64 and accompanying text.

258. *See* Eskridge & Frickey, *supra* note 91, at 354–62 (describing the considerations used in the practical reasoning model).

259. *Id*. at 375 ("[W]e believe the case was correctly decided . . . .").

260. *Id*. at 373–74.

261. *See* Frickey, *supra* note 257, at 1165–67, 1179 (demonstrating that the Court used post enactment considerations when analyzing Public Law 280 in *Bryan*, rather than strictly adhering to the language of the statute).

262. *See id*. at 1179.

263. *Id*. at 1212.

sional power in the field is plenary, post-enactment developments in Congress ought to be relevant, especially in cases in which they render obsolete the intentions behind the original enactment.[264]

Frickey argues that the decision in *Bryan* reflects the Court's appreciation of the "structural values at stake."[265] He compliments the Court on the best "instinctive approximation of Chief Justice Marshall's methodology in *Worcester* [*v. Georgia*][266] as is found in any modern case."[267] *Worcester*, which was the last of the so-called Marshall trilogy of cases on Indian law,[268] 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,[269] at least in the Indian law context.[270] 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.

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264. *See id*. at 1212–14, 1239–40.

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

266. 31 U.S. (6 Pet.) 515 (1832).

267. Frickey, *supra* note 265, at 432. Frickey argues that both the *Bryan* Court and the *Worcester* Court viewed the issues in the cases to be "structural and rooted in sovereignty, rather than to involve the regulation of a disadvantaged minority group" and both "assumed a baseline of ongoing tribal sovereignty that should be judicially protected against all but clear congressional intrusion." *Id.*

268. The other two cases in the trilogy are *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), and *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

269. 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." Frickey, *supra* note 257, at 1166 n.173.

270. 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 *Cabazon*, which also dealt with Public Law 280 and followed *Bryan*'s narrow interpretation. In affirming *Bryan* and its broad implications, *Cabazon* 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) (referencing President Reagan's statements in regard to Indian policy, as well as then-current policies of the Department of the Interior).

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,[271] 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"[272] was pregnant with possibility. During the years around the time when *Bryan* was decided, Indian tribes embarked on many economic development initiatives.[273] At a time of great progress in tribal governance on reservations,[274] *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.[275] The Cabazon Band was also operating a liquor sales enterprise.[276] Moreover, the Band's tribal council had to repeatedly beat back a proposal from one of the Band's vice-chairmen to begin a marijuana cultivation business that would combine "'Indian traditional plants such as jimson weed, peyote and marijuana.'"[277]

The Cabazon Band approved a plan to begin a gambling enterprise in June 1979, and gaming was underway by October 1980.[278] Gaming on the Seminole Reservation in Florida started even earlier.[279] By late 1979, three years after *Bryan*

271. *See* Cassano, *supra* note 226; Zuckerman, *supra* note 228; *Justices Bar State's Taxation of Reservation Indians*, *supra* note 215; *see also supra* text accompanying notes 226–28 (illustrating that the newspaper headlines after the *Bryan* decision all focused on the states' inability to tax Indian reservations).

272. Bryan v. Itasca County, 426 U.S. 373, 384 (1976).

273. *See* Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 790–93 (2006) (describing the rise of modern tribal self-governance in the late 1960s and 1970s).

274. *See id.*

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

276. *Id.*

277. *Id.* at 34, 44–45, 54, 92.

278. *See id.* at 51–54, 60; W. DALE MASON, INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS 48–49 (2000).

279. *See* Seminole Tribe of Florida, Seminole Casino Hollywood, http://www.seminoletribe.com/enterprises/hollywood/casino.shtml (last visited Mar. 6, 2008) ("Seminole Casino Hollywood was the first high stakes operation in the

was decided, the Seminole Tribe was embroiled in litigation with Broward County over the legality of the Seminole Tribe's high-stakes bingo operation.[280] Other tribal operations spawned litigation as well.[281] In general, the lower courts had read *Bryan* broadly and had developed a theory as to the civil/regulatory and criminal/prohibitory distinction that *Bryan* interpreted Public Law 280 to create.[282] As cases percolated in the federal courts all over the country, and in several different federal circuit courts, it became apparent that the issue might reach the Supreme Court.[283]

A. THE REPRISE OF *BRYAN* IN THE *CABAZON* BRIEFING

Litigation in the federal courts in Florida and California culminated in the 1987 Supreme Court case *California v. Cabazon Band of Mission Indians*.[284] The practical issue was whether an Indian tribe could conduct gaming in a Public Law 280 state that had criminal prohibitions against gaming that was not in compliance with the state's regulatory laws.[285] 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.[286]

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country opening on December 14, 1979 at 5:00pm[, a]fter court challenges by the State of Florida . . . .").

280. *See* Seminole Tribe of Fla. v. Butterworth, 658 F.2d 310, 311 (5th Cir. 1981).

281. *See, e.g.*, Oneida Tribe of Indians of Wis. v. Wisconsin, 518 F. Supp. 712, 713 (W.D. Wis. 1981) (involving bingo operations on an Indian reservation).

282. *See, e.g.*, Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1189–90 (9th Cir. 1982) (holding that the California bingo laws were civil/regulatory and thus could not be applied to Indian reservations); *Butterworth*, 658 F.2d at 311, 316 (holding that the Florida law prohibiting bingo was "civil/regulatory," not "criminal/prohibitory," and thus could not be applied to the Seminole Tribe); *Oneida Tribe of Indians*, 518 F. Supp. at 720 (holding that Wisconsin's regulation of bingo could not be applied to the Oneida Tribe because it was a civil regulation).

283. *See supra* note 282; *see also* Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245, 245 (D. Conn. 1986) (holding that Connecticut could not regulate bingo games occurring on an Indian reservation).

284. 480 U.S. 202 (1987).

285. *Id.* at 207 (discussing the scope of jurisdiction in Public Law 280 states).

286. *See* Appellants' Closing Brief at 14–15, *Cabazon*, 480 U.S. 202 (No. 85-1708) (arguing that Public Law 280 gives California the ability to enforce its gaming prohibitions); Brief of Appellees at 7–8, *Cabazon*, 480 U.S. 202 (No.

That the scope of *Bryan* was the heart of the issue in *Cabazon* was apparent from the briefs. Nearly all of the briefs submitted to the Court include an extensive discussion of *Bryan*.[287] 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.[288] They argued that the broad prohibition on state civil regulatory authority was dicta.[289] Instead, they argued that the Court should follow *Rice v. Rehner*,[290] a case that had narrowly upheld state authority in the context of liquor licensing.[291]

85-1708) (arguing that Public Law 280 does not confer state jurisdiction over regulatory matters such as gaming).

287. *See* Brief of the Appellants at 9, 34–42, *Cabazon*, 480 U.S. 202 (No. 85-1708); Appellants' Closing Brief, *supra* note 286, at 14–15; Brief of Appellees, *supra* note 286, at 11, 33, 35–36, 39, 42–43, 47 n.33, 48–49; Brief of the States of Arizona et al. as Amici Curiae in Support of the State of California at 3, 6–7, 21–23, 25, 27–28, *Cabazon*, 480 U.S. 202 (No. 85-1708) [hereinafter Arizona Brief]; Amici Curiae Brief of Chehalis Indian Tribe et al. in Support of Appellees at 2, 13–15, 18, 22, *Cabazon*, 480 U.S. 202 (No. 85-1708) [hereinafter Chehalis Brief]; Amici Curiae Brief of States of Florida et al. in Support of Appellants' Jurisdictional Statement at 16, *Cabazon*, 480 U.S. 202 (No. 85-1708) [hereinafter Florida Brief]; Brief for Amicus Curiae State of Minnesota in Support of Appellants at 3, 7–9, 20 n.9, *Cabazon*, 480 U.S. 202 (No. 85-1708) [hereinafter Minnesota Brief]; Brief Amici Curiae of Pueblo of Laguna et al. at 10, 12, 18–19, *Cabazon*, 480 U.S. 202 (No. 85-1708); Brief of the San Manuel Band of Mission Indians as Amicus Curiae in Support of Appellees at 5, 15–16, 19–21, 26–31, *Cabazon*, 480 U.S. 202 (No. 85-1708); Brief of the Tulalip Tribes of Washington et al. as Amici Curiae in Support of the Cabazon and Morongo Tribes at 15–17, 21, 27, 39, 41–62, *Cabazon*, 480 U.S. 202 (No. 85-1708) [hereinafter Tulalip Brief]; Brief of the States of Washington et al. as Amici Curiae in Support of Appellants at 4, 9–12, *Cabazon*, 480 U.S. 202 (No. 85-1708) [hereinafter Washington Brief]. For briefs that did not discuss *Bryan* extensively, see Brief of the Jicarilla Apache Tribe et al. as Amici Curiae in Support of the Appellees at 7–8, *Cabazon*, 480 U.S. 202 (No. 85-1708); Motion of the Pueblo of Sandia et al. for Leave to File Brief Amici Curiae at 24, *Cabazon*, 480 U.S. 202 (No. 85-1708); and 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 Appellees, *Cabazon*, 480 U.S. 202 (No. 85-1708) [hereinafter Seminole Brief].

288. *See* Brief of the Appellants, *supra* note 287, at 35 (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"); Florida Brief, *supra* note 287, at 16 (disagreeing with lower courts' interpretation of *Bryan* by arguing that "the courts fashioned a legal theory premised on this Court's ruling in a tax case").

289. *See* Appellants' Closing Brief, *supra* note 286, at 14–15; Brief of the Appellants, *supra* note 287, at 9.

290. 463 U.S. 713 (1983).

291. *See id.* at 734–35; Brief of the Appellants, *supra* note 287, at 35 (arguing that in *Rice*, the Court itself "cast doubts on *Bryan's* 'civil regulatory-criminal prohibitory' distinction").

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.[292] In an amicus brief, the State of Arizona argued that 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.[293] 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.[294] Using a slightly different tactic, 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.[295]

The brief by the Cabazon Band rebuffed state attempts to 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

292. Brief of the Appellants, *supra* note 287, at 35–36.

293. *See* Arizona Brief, *supra* note 287, at 23–24. 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*. *See* Goldberg, *supra* note 64. 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. *See* Arizona Brief, *supra* note 287, at 23–26.

294. Minnesota Brief, *supra* note 287, at 3.

295. Washington Brief, *supra* note 287, at 11–12. The brief notes:

> 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.

Id.

> in *Bryan*: that Congress, in enacting PL-280, did not intend to confer upon the states "general civil regulatory powers, including taxation." In addition, the Court quoted from and cited with 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.[296]

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 intervention. No persuasive argument has been advanced in this case that would justify any weakening of *Bryan*."[297]

Several of the tribal amicus briefs unabashedly adopted the strategy successful in *Bryan* which called upon the Court to use the interpretive approach that Frickey later labeled "practical reasoning."[298] 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.[299]

The tribal amicus briefs strongly rejected the argument that *Bryan*'s statements on regulatory authority were dicta.[300] 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."[301] 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."[302]

296. Brief of Appellees, *supra* note 286, at 42–43 (citation omitted); *see also* Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 657 (9th Cir. 1975) (involving the applicability of county zoning ordinances and building codes to Indian reservations).

297. Brief of Appellees, *supra* note 286, at 43.

298. *See supra* text accompanying notes 256–64.

299. *See* Brief of the Oneida Indian Nation of New York as Amicus Curiae in Support of the Cabazon and Morongo Bands of Mission Indians of California at 2–3, 7, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (No. 85-1708); Seminole Brief, *supra* note 287, at 4.

300. *See* Tulalip Brief, *supra* note 287, at 41; *see also* Chehalis Brief, *supra* note 287, at 13 (noting that *Bryan* "specifically held that state civil regulatory laws were not included within Public Law 280's grant of jurisdiction").

301. Tulalip Brief, *supra* note 287, at 51.

302. *Id.* at 52.

B. THE SUPREME COURT'S DECISION IN *CABAZON*

Surprisingly, when the decision came out, Justice White, the graveyard dissenter in *Bryan*,[303] wrote the majority opinion.[304] The Court upheld the principle from *Bryan* that Public Law 280 embodied a distinction between civil/regulatory and criminal/prohibitory state laws.[305] 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.[306] It found the *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*[307] and *Seminole Tribe of Florida v. Butterworth*[308] decisions' application of the civil/regulatory and criminal/prohibitory distinction consistent with *Bryan*, and dismissed California's argument regarding *Rice*[309] in a footnote.[310]

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.[311] Dismissing California's argument 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."[312] 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.[313]

303. *See supra* text accompanying notes 253–54.

304. *Cabazon*, 480 U.S. at 203.

305. *Id.* at 209.

306. *Id.* at 209–10.

307. 694 F.2d 1185, 1189–90 (9th Cir. 1982) (holding that the California bingo laws were civil/regulatory and thus could not be applied to the Indian reservations).

308. 658 F.2d 310, 311, 316 (5th Cir. 1981) (holding that the Florida law prohibiting bingo was "civil/regulatory," not "criminal/prohibitory," and thus could not be applied to the Seminole Tribe).

309. Rice v. Rehner, 463 U.S. 713, 734–35 (1983) (upholding state authority in the context of liquor licensing).

310. *Cabazon*, 480 U.S. at 209–10 & n.8.

311. *Id.* at 210–11.

312. *Id.* at 210–11 & n.10.

313. *Id.* at 216–19.

The dissent, written by Justice Stevens and joined by Justices Sandra Day O'Connor and Antonin Scalia, argued that "Congress [had] not pre-empted California's prohibition against high-stakes bingo games."[314] The dissent did not seek to overrule *Bryan* but, consistent with the state arguments, attempted to distinguish *Bryan* and confine it to its facts.[315]

Bryan provided the legal theory that authorized a handful of Indian gaming operations in diverse locations around the country.[316] *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*.[317]

Within eighteen months of *Cabazon*, Congress enacted the Indian Gaming Regulatory Act (IGRA).[318] 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.[319] The states' lever was this: tribes could operate casino-style (Class III) gaming only if they entered a tribal-state compact that addressed the state's legitimate regulatory concerns.[320]

In the IGRA, Congress thus limited the *Bryan* principle, at least in the gaming context, to the *Cabazon* facts.[321] Instead of

314. *Id*. at 222 (Stevens, J., dissenting).

315. 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.

316. *See supra* text accompanying notes 275–80 (discussing the development of gaming operations on Indian reservations after *Bryan*).

317. *See supra* note 10 and accompanying text (illustrating the rapid growth in gaming revenues); *see also* 25 U.S.C. § 2701(5) (2000) (affirming the holding of *Cabazon* and stating that 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").

318. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–2721 (2000)).

319. *See* Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 289–93 (2003–2004).

320. *See id*. at 291.

321. *See* Washburn, *supra* note 10, at 428–30 (describing the effect of the IGRA on Indian gaming).

the unilateral authority under Public Law 280 to regulate Indian gaming, which they lost in *Bryan* and *Cabazon*, states now have something less. The IGRA gives states negotiating authority to demand that tribes consent to state regulatory authority.[322] Absent *Bryan*'s narrow interpretation of section 4 of Public Law 280 (the civil adjudicatory authority section), however, gaming may never have occurred and *Cabazon* likely would not have been decided in such a way.[323]

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, with approximately 387 individual Indian gaming enterprises, brings in more than twenty-five billion dollars a year.[324] Increasing well over twenty-fold since the passage of the IGRA in 1988,[325] total historical Indian gaming revenue was over $170 billion and growing rapidly at the end of 2006, the latest period for which there are records.[326]

322. *See id.* at 429–30; *cf. Oversight Hearing on the Regulation of Indian Gaming: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. 38–42 (2005) (prepared statement of Kevin K. Washburn) (arguing that, in the wake of *Cabazon*, the federal government should play a more active role in the regulation of tribal gaming).

323. *Bryan* did not necessarily authorize Indian gaming outside of Public Law 280 states. In the absence of Public Law 280, 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 a much greater incentive to engage in Indian gaming than those in other states because such tribes were located more strategically close to large non-Indian populations that could make such gaming especially profitable. *See* Washburn, *supra* note 319, at 287–88, 293–96 (analyzing the impact of Public Law 280 and the factors that make Indian gaming successful).

324. Press Release, Nat'l Indian Gaming Comm'n, NIGC Announces 2006 Indian Gaming Revenue (June 4, 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 2006).

325. NAT'L INDIAN GAMING COMM'N, *supra* note 10, at 8 (stating that the size of the Indian gaming industry had increased nearly twenty-fold by 1999).

326. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GDD-97-91, TAX POLICY: A PROFILE OF THE INDIAN GAMING INDUSTRY 6 fig.1 (1997) (displaying a chart with Indian gaming revenues from 1985–1995, totaling nearly fifteen billion dollars); NAT'L INDIAN GAMING COMM'N, *supra* note 10, at 25 (reflecting the tribal gaming revenues from 1996–1999, which totaled nearly thirty-two billion dollars); Press Release, *supra* note 324 (putting the total Indian gaming revenue for 2006 at over twenty-five billion dollars); National Indian Gaming Commission, Tribal Gaming Revenues 2000–2005, http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/tribalgamingrevenues05.pdf (last

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

Helen Bryan might never have called the Legal Services Project but for her desperate need to avoid the county tax bill.[327] It was legal services attorneys, sometimes called "poverty lawyers," who brought the *Bryan* case.[328] Indeed, poverty was not only a background dynamic in the case. Bernie 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.[329] Even the State's attorney, C.H. Luther, facilitated this view of the case, suggesting that inheritance taxes were irrelevant to Indians.[330]

The poverty manifested in *Bryan* thus may have provided the higher purpose for the decision, and perhaps helped to pave the way for the economic activity explicitly protected in *Cabazon* and, later, the IGRA. 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.[331] 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.[332]

visited Mar. 6, 2008) (showing the tribal gaming revenues from 2000–2005, totaling just over ninety-seven billion dollars).

327. *See* Interview with Helen Johnson, *supra* note 1.

328. *See supra* text accompanying notes 29–32.

329. *See* Transcript of Oral Argument, *supra* note 138, at 22–23; *see also supra* text accompanying notes 177–79 (describing the discussion of poverty during the oral argument).

330. *See* Transcript of Oral Argument, *supra* note 138, at 27 (responding to a Justice's question about state imposition of inheritance taxes, C.H. Luther stated that "the Indians are so impoverished that it is doubtful that the inheritance tax would apply").

331. *See* Sam Deloria, *Commentary on Nation-Building: The Future of Indian Nations*, 34 ARIZ. ST. L.J. 55, 60 (2002) (discussing the moral superiority associated with poverty and oppression).

332. *See id*.

B. LEGAL SERVICES ATTORNEYS IN THE HISTORY OF INDIAN LAW

The *Bryan* victory and many others 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, but for the Legal Services Project as an organization. Indeed, at each stage the *Bryan* litigation was handled by a different attorney.[333] Though the attorneys changed, the broader organization kept pressing the case.

Though one might think that legal services offices are sometimes handicapped by inexperienced attorneys and high rates of turnover,[334] *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 indispensable to achieving the result. The *Bryan* victory never would have happened without the help of several legal aid attorneys who started the litigation and kept it moving.[335]

Through the late 1960s and 1970s, legal aid attorneys around the country—lawyers at local and regional legal services offices, the nationally active Indian law experts at NARF and the DNA-People's Legal Services on the Navajo Reservation—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.[336] Their victories suggest

333. Patrick Moriarty filed the complaint. *See supra* text accompanying notes 32–34. Nicholas Norden substituted in as counsel while the case was pending in the state district court. *See supra* text accompanying notes 36–37. Jerry Seck argued the state appeal. *See supra* text accompanying note 57. Kent Peterson filed the petition for certiorari. *See supra* text accompanying notes 104–05. Bernie Becker argued before the Supreme Court. *See supra* text accompanying notes 135–79 and 200–10.

334. *See* Jack Katz, *Lawyers for the Poor in Transition: Involvement, Reform, and the Turnover Problem in the Legal Services Program*, 12 LAW & SOC'Y REV. 275, 286–97 (1978).

335. The work of a law professor, Carole Goldberg, also loomed large in the oral argument and the Supreme Court's decision in the case. *See* Goldberg, *supra* note 64; *supra* text accompanying notes 145–47, 231–34, and 242–44.

336. *See, e.g.*, Brief Amici Curiae of the Allottees Association and Affiliated Tribes and Bands of the Quinault Reservation et al. in Support of Respondents, Babbitt v. Youpee, 519 U.S. 234 (1997) (No. 95-1595) (illustrating the involvement of the DNA-People's Legal Services attorneys); Brief of Native American Rights Fund as Amicus Curiae in Support of Appellant, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973) (No. 71-834) (illustrating

that the many capable attorneys who staff legal services offices today can also change the world, in ways both big and small.[337]

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, attorneys along the way regretted the decision not to argue that the mobile home constituted real property because it was affixed to the land.[338] 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.[339] 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 real property, even if such a holding could have been reached as a principle of federal law. Even a decision holding that states cannot tax Indian personal property on Indian reservations would not have had such broad ramifications. In this bet, perhaps the first ma-

the involvement of the Native American Rights Fund); *see also Babbitt*, 519 U.S. at 236–37 (finding an escheat-to-tribe provision of the Indian Land Consolidation Act was an unconstitutional taking); *McClanahan*, 411 U.S. at 165 (holding that a state income tax applied to reservation Indians, derived solely from reservations sources, was unlawful).

337. However, the Legal Services Corporation has undergone dramatic changes since the *Bryan* era. During the Reagan 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, 983–84 (2006). In 1996, the Legal Services Corporation's budget was cut by over forty percent, forcing offices to reduce case loads and leave hundreds of thousands of cases unfinished. *Id.* Moreover, Congress went beyond the budget cuts to undermine the power of the Legal Services Corporation and enact significant limitations on how the Legal Services Corporation funding could be spent. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321–53. This appropriations legislation prohibited Legal Services Corporation-funded programs from bringing or participating in class action lawsuits. *See id.*; Wirtz, *supra*, at 994. This development limited the ability of such offices to continue to do "impact" litigation. *See* Wirtz, *supra*, at 994–95. 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.

338. *See supra* text accompanying notes 32–34, 88, and 174.

339. *See supra* text accompanying notes 32–33.

jor 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.[340] 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 ensure a victory.[341] 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.[342] In any event, both the state supreme court and the U.S. Supreme Court forced the appellate attorney to stick with the original bet.[343]

The gamble in this case paid off, probably because of the personality of Justice Brennan.[344] Though he infamously once disparaged an Indian law case as unimportant,[345] he singlehandedly ensured 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

340. Richard W. Painter, *Convergence and Competition in Rules Governing Lawyers and Auditors*, 29 J. CORP. L. 397, 404 (2004).

341. *See id.* (describing the cognitive biases that influence lawyers' decision making).

342. *See supra* text accompanying note 174 (indicating that Becker sought to conclude his oral argument by attempting to resurrect the argument that the mobile home constituted real property).

343. *See supra* text accompanying notes 98 and 245–47.

344. *See supra* text accompanying notes 250–54 (describing Justice Brennan's charm and remarkable ability to gain the support of other Justices).

345. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 359 (1979) ("One decision [Brennan] was assigned to write . . . 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 a similar fashion, former Deputy Solicitor General Louis Claiborne, using *Bryan* as an example, once said that many Indian cases were unanimous because none of the Justices were interested enough to dissent. Louis F. Claiborne, Special Feature, *The Trend of Supreme Court Decisions in Indian Cases*, 22 AM. INDIAN L. REV. 585, 586 (1998).

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.[346] Her five children are grown.[347] 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 living in her retirement.[348] Perhaps as a result of gaming revenues, the house was financed by the tribe.[349]

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 that is now called Anishinabe Legal Services.[350] Over a catered luncheon of fresh walleye and blueberry pie, she offered her memories of receiving the tax notice and calling the legal services office.[351] 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."[352]

346. *See* Interview with Helen Johnson, *supra* note 1.

347. *See id.*

348. *Id.*

349. Telephone Interview by Julie A. Strother with Helen Johnson, *supra* note 15.

350. *See supra* note 165 and accompanying text.

351. Interview with Helen Johnson, *supra* note 1.

352. *Id.* (highlighting the quote on the wall of the Anishinabe Legal Services office).