

# THE (POTENTIAL) LEGAL HISTORY OF INDIAN GAMING

William Wood\*

*Indian gaming—casinos owned, operated, and regulated by Indian tribes—has been a transformative force for many Indigenous nations over the past few decades. The conventional narrative is that Indian gaming began when the Seminole Tribe of Florida opened a bingo hall in 1979, other tribes began operating bingo, litigation ensued across the continent, and the U.S. Supreme Court recognized tribes’ rights to operate casinos on their reservations in 1987, in California v. Cabazon Band of Mission Indians. Congress then passed the Indian Gaming Regulatory Act in 1988, ushering in the modern Indian gaming era.*

*This Article provides a heretofore-untold account of the early Indian gaming jurisprudence and related developments. Judges in the earliest Indian gaming cases, which have gone unnoticed, ruled against tribes. Then a series of cases involving the applicability of state law to mobile homes and cigarette and fireworks sales on Indian reservations produced a test under which states could exercise jurisdiction on reservations over activities they prohibit off-reservation but lack jurisdiction over activities they do not prohibit but only regulate. The Supreme Court applied this test in Cabazon to hold that state laws did not apply to tribes’ bingo halls and cardrooms.*

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\* Associate Professor of Law, Southwestern Law School. I thank Reid Chambers, Glenn Feldman, George Forman, Carole Goldberg, Bruce Greene, John Palinkas, Robert Pelcyger, Monroe Price, and Stephen Quesenberry for their numerous conversations, e-mails, and comments on various drafts, and Matthew Fletcher, Roman Hoyos, Benjamin Madley, and Kevin Washburn for their helpful comments on earlier drafts. I also thank David Selden and Anne Lucke at the National Indian Law Library of the Native American Rights Fund, David McFadden and Mauricio Ortiz at the Leigh H. Taylor Law Library at Southwestern Law School, Jennifer Lentz at the Hugh & Hazel Darling Law Library at the UCLA School of Law, and Jose Padilla at California Rural Legal Assistance for locating and sharing materials without which this Article would not have been possible. And I thank Lauren Bauman and Dorna Khazeni for their invaluable research assistance, as well as Daniel Bowman, Garrett Hable, and the editors and staff at the Arizona Law Review for their patience and dedicated work to improve this Article. This Article also benefitted from, and I thank the participants at, presentations before the faculties of Loyola Law School and the University of New Mexico School of Law, at the UCLA Law Review’s 2016 Annual Symposium, at the Law & Society Association’s 2017 Annual Meeting, and Professor Laura Gómez’s Critical Race Theory seminar at UCLA.

*This Article details the development of the legal doctrine around Indian gaming and how the people involved—legal services attorneys working with legal scholars at the behest and on behalf of Indigenous peoples asserting their sovereignty against state pushback—changed the course of the jurisprudence, providing the framework that yielded the result in Cabazon, and Indian gaming as it exists today.*

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## INTRODUCTION

Indian gaming—casinos owned, operated, and regulated by Indian tribes—accounts for nearly half of the total casino revenues in the United States, reflecting a phenomenal rate of growth over the past few decades.<sup>1</sup> The usual story is that tribal governmental gaming began in 1979, when the Seminole Tribe of Florida opened a high-stakes bingo hall on the Hollywood Reservation near Fort Lauderdale.<sup>2</sup> Then

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1. For the most recent figures on Indian gaming, see *2019 Indian Gross Gaming Revenues of \$34.6 Billion Set Industry Record and Show a 2.5% Increase*, NAT'L INDIAN GAMING COMM'N (Dec. 8, 2020), <https://www.nigc.gov/news/detail/2019-indian-gross-gaming-revenues-of-34.6b-set-industry-record-and-show-a-2.5-increase> [https://perma.cc/XHE7-T8TV] [hereinafter NIGC Press Release]. For commercial gaming, see *State of the States 2020: The AGA Survey of the Commercial Casino Industry*, AMERICAN GAMING ASS'N, <https://www.americangaming.org/resources/state-of-the-states-2020> [https://perma.cc/WEY4-MSXE] [hereinafter AGA Survey] (estimating 2019 revenues of \$43.6 billion).

2. See, e.g., *Seminole Casino Hollywood: Where Indian Gaming Began*, INDIAN GAMING, Mar. 2010, at 36.

other tribes started operations, and in 1987, after years of litigation with states and counties that were trying to shut them down, the U.S. Supreme Court recognized the rights of Indian tribes to conduct gaming on their reservations in *California v. Cabazon Band of Mission Indians*.<sup>3</sup> In response, Congress passed the Indian Gaming Regulatory Act (“IGRA”) the following year.<sup>4</sup>

Scholars, journalists, and others have described how modern Indian gaming developed through Indigenous sovereignty and ingenuity, expanding upon gambling activities dating back millennia.<sup>5</sup> Perhaps the most detailed accounts of the legal history of Indian gaming are by law professors Bob Clinton and Kevin Washburn, who both discussed a critical part of Indian gaming’s history that is often ignored—the Supreme Court’s 1976 decision in *Bryan v. Itasca County*, which

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3. 480 U.S. 202, 221–22 (1987).

4. Pub L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–21 and 18 U.S.C. §§ 1166–68). IGRA established the regulatory framework for modern Indian gaming but, contrary to popular misunderstandings, did not grant tribes the authority to regulate gaming on their reservations. Indeed, some tribes filed lawsuits challenging IGRA’s constitutionality and arguing it unlawfully infringed on their sovereignty. See RALPH A. ROSSUM, *THE SUPREME COURT AND TRIBAL GAMING: CALIFORNIA V. CABAZON BAND OF MISSION INDIANS* 160 (2011) and Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?*, 42 ARIZ. ST. L.J. 17, 18–19 (2010), both discussing litigation by the Red Lake Band of Chippewa Indians and the Mescalero Apache Tribe. See also Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 254 (2010) (“When Congress finally enacted the IGRA in 1988, an overwhelming majority of tribal leaders were against it. Their main objection was that the Act was an infringement on tribal sovereignty . . .”).

5. See generally DAMON B. AKINS & WILLIAM J. BAUER JR., *WE ARE THE LAND: A HISTORY OF NATIVE CALIFORNIA* 308–18 (2021); SOVEREIGN: AN ORAL HISTORY OF INDIAN GAMING IN AMERICA (Suzette Brewer & Cheryl Cadue eds., 2009); JESSICA R. CATTELINO, *HIGH STAKES: FLORIDA SEMINOLE GAMING AND SOVEREIGNTY* (2008); KATHRYN GABRIEL, *GAMBLER WAY: INDIAN GAMING IN MYTHOLOGY, HISTORY, AND ARCHAEOLOGY IN NORTH AMERICA* (1996); MIKE HOEFT, *THE BINGO QUEENS OF ONEIDA: HOW TWO MOMS STARTED TRIBAL GAMING IN WISCONSIN* (2014); AMBROSE I. LANE, SR., *RETURN OF THE BUFFALO: THE STORY BEHIND AMERICA’S INDIAN GAMING EXPLOSION* (1995); STEVEN LIGHT & KATHRYN RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* (2005); W. DALE MASON, *INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS* (2000); DONALD CRAIG MITCHELL, *WAMPUM: HOW INDIAN TRIBES, THE MAFIA, AND AN INATTENTIVE CONGRESS INVENTED INDIAN GAMING AND CREATED A \$28 BILLION GAMBLING EMPIRE* (2016); ROSSUM, *supra* note 4; ROBERT L. PIRTLE, *TO RIGHT THE UNRIGHTABLE WRONG* 483–86 (2007); Clinton, *supra* note 4; Matthew Fletcher, *The Seminole Tribe and the Origins of Indian Gaming*, 9 FIU L. REV. 255 (2014); Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 CREIGHTON L. REV. 387 (1993); Kevin K. Washburn, *The Legacy of Bryan v. Itasca County: How an Erroneous \$147 County Tax Notice Helped Bring Tribes \$200 Billion in Indian Gaming Revenue*, 92 MINN. L. REV. 919 (2008); Bradley T. Dakota, *The Father of Indian Gaming*, INDIAN GAMING, Jan. 2010, at 44; *Seminole Casino Hollywood*, *supra* note 2; see also Washburn, *infra* note 356, at 287 n.8 (listing law-review articles documenting the history of Indian gaming).

Washburn called “the bedrock upon which the Indian gaming industry began.”<sup>6</sup> *Bryan* held that a county in Minnesota could not impose a property tax on tribal members’ homes on Indian reservations because Public Law 280 (“PL 280”), a law Congress passed in 1953, gave Minnesota and other states only criminal—not general civil regulatory—jurisdiction over Indians.<sup>7</sup>

Later courts used *Bryan*’s holding to develop a civil/regulatory–criminal/prohibitory distinction whereby states subject to PL 280 may exercise jurisdiction on Indian reservations over activities those states prohibit off-reservation but lack jurisdiction over activities they do not prohibit but only regulate.<sup>8</sup> Courts wrestled with whether bingo was something different states prohibited or regulated but consistently found that because states allowed charitable bingo, they lacked jurisdiction over tribes’ bingo operations. In 1987, the Supreme Court applied this distinction in *Cabazon* to hold that because California authorized charity bingo games, commercial cardrooms, horse racing, and conducted its own lottery, California did not prohibit gaming and thus could not enforce its laws against bingo halls and cardrooms on reservations.<sup>9</sup> Congress then enacted IGRA, implementing the framework for Indian gaming as it exists today.

This Article explores the interrelated history of *Bryan* and the early Indian gaming litigation—including case law predating *Bryan* and overlooked in previous scholarship—and situates this history in a broader context of Indigenous sovereignty, activism, and federal Indian policy in the mid-twentieth century; the origins of legal services organizations serving Indigenous and other underrepresented peoples in the 1960s; and the role legal services attorneys and law professors played in shaping the cases’ outcomes.<sup>10</sup> The story told here is not just

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6. 426 U.S. 373 (1976); Clinton, *supra* note 4, at 28–33; Washburn, *supra* note 5, at 921 (“[O]n 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.”).

7. See *infra* notes 157–206 and accompanying text (discussing *Bryan*); see also *infra* notes 21–33 and accompanying text (discussing Public Law 280).

8. See *infra* Part V (discussing the civil/regulatory-criminal/prohibitory distinction utilized after *Bryan*).

9. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987); see also *infra* notes 277–355 and accompanying text (discussing *Cabazon*).

10. For comparative examples of how women’s social movements changed interpretations of the U.S. Constitution (particularly the Establishment and Equal Protection Clauses), see Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK L. REV. 27, 53–54 (2005); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CAL. L. REV. 1323, 1331 (2006). For how social movements changed marriage equality law, see Doug NeJaime & Scott Cummings, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 665 (2012); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011). For the relationship between social movements and the civil rights revolution in the mid-twentieth century, see BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014). These scholars’ work is part of a “law and social movements” subdiscipline of legal scholars studying social movements. Amma A. Akbar,

about the origins of gaming, itself a transformative force among many Indigenous nations in recent decades. It is also about how a small group of attorneys and scholars fundamentally changed federal Indian law with an interpretation of PL 280 that preserved tribal sovereignty and reoriented tribal-state relations.

The first reservation gaming case commenced in 1949 after Richard Sosseur, a Lac du Flambeau Band of Lake Superior Chippewa Indians tribal member, received a license from the Tribe<sup>11</sup> and installed slot machines at his and fellow tribal member Hannah Maulson's businesses on the Tribe's reservation in southwestern Wisconsin, which "were patronized largely by the tourists visiting in that area."<sup>12</sup> Wisconsin law prohibited operating slot machines, and federal officials charged Sosseur and Maulson under the Assimilative Crimes Act, which made it a violation of federal law to commit a state crime on federal lands, including Indian

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Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825 (2021) (citing Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1556 (2017); Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & SOC. INQUIRY, 360, 360–63 (2018)). Leading scholarship in this field includes Lani Guinier and Gerald Torres's work on "demosprudence," which they define as "the study of the dynamic equilibrium of power between lawmaking and social movements," Lani Guinier & Gerald Torres, Essay, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749 (2014), and Larry Kramer's and Mark Tushnet's work on, respectively, "popular constitutionalism" and "populist constitutionalism." LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 174 (1999); see Lani Guinier, *Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence—Courting the People: Demosprudence and the Law/Politics*, 89 B.U. L. REV. 539 (2009); see also Akbar et al., *supra*, at 834 n.37 (listing "examples of foundational works in popular and democratic constitutionalism" and noting that "[o]ne premise of democratic constitutionalism is that social movement contestation over legal meaning is not simply integral to stories of constitutional change, but also essential to the legitimacy of the Constitution itself"). But whereas these scholars examine lawyering and social movements pursuing equality and change within the U.S. constitutional system, Indigenous peoples and the legal services organizations centered in this Article were focused not on equal rights but treaty rights and sovereignty. See Brewer & Cadue, *supra* note 5, at 30 (John Echohawk discussing "the change in thinking among Indian people that occurred in the [19]60s," "us[ing]" the Civil Rights Movement Strategy to push [Indian] treaty rights issues," and the difference between equal rights and treaty rights).

11. This Article uses "Tribe," the operative term in federal Indian law, when referring to particular Indigenous polities, both bands and tribes. See, e.g., Indian Reorganization Act, 25 U.S.C. § 5129 ("The term 'tribe' . . . refer[s] to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."). This Article also uses "nation" to refer to Indigenous polities, and "Indian" as well as "Indigenous" as a descriptor.

12. *United States v. Sosseur*, 87 F. Supp. 225, 226–27 (W.D. Wis. 1949), *aff'd and rev'd in part*, 181 F.2d 873 (7th Cir. 1950).

reservations.<sup>13</sup> The operations at Lac du Flambeau ceased as a result of the litigation, with Sosseur convicted and fined \$250.<sup>14</sup>

The next Indian gaming cases arose in the 1970s, during a period when federal and state courts interpreted PL 280 to give states and local governments jurisdiction over not just gambling but also taxation, land use, and hunting and fishing. Like *Sosser*, they involved exercises of Indigenous sovereignty against threats of prosecution. In 1970, the Rincon Band of Luiseño Indians sued San Diego County in federal court to prevent the county from enforcing its laws against a proposed cardroom on the Rincon reservation in Southern California.<sup>15</sup> In 1975, the Grand Portage Band of the Minnesota Chippewa Tribe authorized a lottery on the Grand Portage reservation, and Minnesota prosecuted Dennis Morrison, the Band's secretary and treasurer, in state court for selling lottery tickets in violation of state law.<sup>16</sup> The courts in both cases relied on PL 280 to find state jurisdiction, but neither case advanced beyond the trial court stage on the merits.

How might things have turned out had the first case reviewing state jurisdiction under PL 280 to reach the Supreme Court involved a cardroom or lottery instead of a county trying to tax tribal members' homes? An old lawyer adage holds that bad facts make bad law, the converse being that good facts make better law. Certainly, the optics of challenging a tax on trailer homes that lower-income families would struggle to pay differ significantly from challenging state and local government police jurisdiction over gambling, especially in the 1970s (before gambling was mainstreamed). Yet more than simple optics and more sympathetic facts were at play.

The Supreme Court's decision in *Bryan* was itself a major intervention, as Professors Clinton and Washburn have explained.<sup>17</sup> Clinton and Washburn also both acknowledged the important role a 1975 law-review article by Professor Carole Goldberg arguing for a narrow interpretation of PL 280 played in *Bryan*, and thus in the legal history of Indian gaming.<sup>18</sup> This Article examines the role of Goldberg's article alongside the lawyering of legal services attorneys and other events—including Indigenous activism and struggles for self-determination in the mid-twentieth century—that changed the interpretation of PL 280 and gave rise to Indian gaming.

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13. *Id.* at 227. Congress extended the Assimilative Crimes Act to Indian reservations in 1948, and federal law did not prohibit slot machines until 1951, when Congress passed the Johnson Act, 15 U.S.C. §§ 1171–78. See Clinton, *supra* note 4, 22–23, 25.

14. *Sosseur*, 181 F.2d at 876.

15. See *infra* notes 34–46, 65–68 and accompanying text (discussing *Rincon*).

16. See *infra* notes 69–75 and accompanying text (discussing *Morrison*).

17. See *supra* notes 4–6 and accompanying text.

18. Clinton, *supra* note 4, at 30; Washburn, *supra* note 5, at 940, 952; see also Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975). The *Bryan* Court cited Goldberg's article repeatedly and, according to Clinton, "[r]elied heavily on (in fact appropriate[ed] the entire theory of)" her article. Clinton, *supra* note 4, at 30. Clinton also argued that Goldberg's article "established both the intellectual framework for analyzing Indian gaming issues and the structure ultimately adopted in [IGRA]." *Id.*

The story told here is about how a group of lawyers and scholars provided the framework for the development of jurisprudence that yielded the result in *Cabazon* and thus Indian gaming as it exists today. This narrative is part of a broader history with dimensions beyond the scope of this Article: a changed political and economic landscape in many parts of the United States, where tribal governments and reservation economies have experienced a resurgence because of gaming; Indigenous nations as a result being able to reassert their presence, rebuild their land bases, institutions, and infrastructure, and promote their cultures, languages, and histories; and state and local governments expanding gambling in response to its success in generating much-needed revenues for tribal governments.<sup>19</sup> My goal is simply to provide a heretofore untold account of the jurisprudence that led to these developments, illustrating how the law evolved through a nuanced doctrinal history focused on the lawyers and scholars who shaped that jurisprudence. While this story centers these legal actors, it is imperative to remember that Indigenous people(s) at the grassroots and political-leadership levels ultimately drove the litigation and its outcomes.<sup>20</sup> The lawyers were merely responding in court to events already happening on the ground.

This Article begins with a brief overview of PL 280, which is necessary for understanding the case law interpreting it. Part II examines the early PL 280 cases, including the Rincon cardroom and Grand Portage lottery cases, wherein courts consistently ruled that PL 280 gave states and local governments broad jurisdiction on Indian reservations. Part III provides biographical and historical background on the lawyers, scholars, and legal services organizations that altered the trajectory of the PL 280 jurisprudence in the mid-1970s and explains the interrelationships among them. Part IV focuses on the cases, including *Bryan*, where these actors changed the courts' interpretation and application of PL 280, restricting state and local governments' jurisdiction. Part V examines the post-*Bryan* cases where federal courts developed the civil/regulatory–criminal/prohibitory distinction and analysis that the Supreme Court used in *Cabazon*, and Part VI details the history of *Cabazon* and other 1980s Indian bingo cases that led Congress to pass IGRA. The conclusion links current events and issues to the historical developments and actors discussed in the Article.

## I. PL 280 AND THE TERMINATION ERA

Congress passed PL 280 in 1953, when the United States was seeking to terminate the federal government's political relationships with Indigenous nations.<sup>21</sup>

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19. Cf. Skibine, *supra* note 4, at 255 (identifying “three major consequences” of Indian gaming: (1) “propel[ling] Indian tribes into the mainstream of American economic life”; (2) more attention being directed “to what is or should be the tribes’ relationship with state governments”; and (3) “put[ting] some stress on the conventional understanding concerning the traditional role of the federal government as a trustee for Indian tribes”).

20. This Article uses “people(s)” here and elsewhere when referencing both collective polities (Indigenous peoples) and individual persons (people).

21. 67 Stat. 588–90 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–26, and 28 U.S.C. § 1360). For a general discussion of the government's termination policy, see DONALD FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960* (1990).

Under termination, the U.S. government sought to dissolve tribal governments and distribute tribal lands and assets to individual tribal members—and to end federal health, education, and other benefits available to members of federally recognized tribes. Doctrinally, termination represented a return to the United States’ assimilation policies of the late 1800s and early 1900s, and a departure from the historical government-to-government relationship that recognized Indian tribes as sovereign entities with jurisdiction over territories where states generally lacked authority.<sup>22</sup> Termination began after World War II and became official through House Concurrent Resolution 108 (passed the same day as PL 280), which declared a policy to make Indians “subject to the same laws” as other U.S. citizens and “end their status as wards of the United States.”<sup>23</sup>

Tribes overwhelmingly opposed PL 280 and termination generally.<sup>24</sup> In 1956, for example, some 400 Indians met at the Rincon Indian Reservation and petitioned the California governor, “request[ing] the repeal” of PL 280.<sup>25</sup> In response to tribes’ resistance, Congress amended PL 280 in 1968 to require that tribes consent in order for PL 280 to apply on their reservations.<sup>26</sup> Because no tribe has since consented, PL 280 applies only on reservations in the few states where it took effect before 1968.<sup>27</sup> Significantly, these “PL 280 states” include those where the first legal challenges to Indian gaming happened: California, Florida, Minnesota, and Wisconsin.<sup>28</sup>

PL 280 clearly gave the covered states criminal jurisdiction in Indian country.<sup>29</sup> However, the statute’s civil jurisdiction language provided only that the

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22. See, e.g., Goldberg, *supra* note 18, at 535–57; see also Williams v. Lee, 358 U.S. 217, 220–21 (1959) (holding that states generally “have no power to regulate the affairs of Indians on a reservation” absent an express grant of jurisdiction from Congress).

23. 67 Stat. B132 (1953).

24. See, e.g., AKINS & BAUER, *supra* note 5, at 256–58 (discussing opposition by National Congress of American Indians, Federated Indians of California, California Indian Congress, and others).

25. BENJAMIN MADLEY, *California Indians, in AMERICAN HISTORY: OXFORD RESEARCH ENCYCLOPEDIAS* 11–12 (2021) (quoting petition), <https://oxfordre.com/american-history/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-117> [<https://perma.cc/AJ5P-3GP8>]. For California Indian opposition more generally, including lobbying the state of California to oppose termination legislation, see AKINS & BAUER, *supra* note 5, at 257–58.

26. 82 Stat. 78–79 (1968) (codified at 25 U.S.C. §§ 1321–26).

27. DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280, at 14–18 (2012).

28. PL 280 initially covered five states: California, Minnesota (except for the Red Lake Reservation), Nebraska, Oregon (except for the Warm Springs Reservation), and Wisconsin (except for the Menominee Reservation). It was later extended to provide state criminal and (in some states) civil jurisdiction on all or some reservations in Alaska, Florida, Idaho and Washington, and the Flathead Reservation in Montana. *Id.*

29. 18 U.S.C. § 1162(a) (“Each of the States or Territories listed . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal

states “shall have jurisdiction over causes of action between Indians or to which Indians are parties[,]” and that “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 in the State[.]”<sup>30</sup> The statute also expressly stated that it did not authorize the alienation, encumbrance, or taxation of property held in trust by the United States for Indians, or the regulation of such property in a manner inconsistent with federal law.<sup>31</sup>

Thus, the extent to which Congress intended PL 280 to give states civil-regulatory (legislative), as opposed to civil-adjudicatory (judicial), jurisdiction was unclear. Also unclear was whether the “civil laws of [the] State” that PL 280 said applied on reservations included only state—or also county and municipal—laws, and what laws constituted an “encumbrance” or were inconsistent with federal law such that PL 280 prohibited them.<sup>32</sup> These issues would be resolved in a series of cases in the 1960s and 1970s, including *Bryan*, that lay the legal framework and foundation for Indian gaming.

The attorneys who worked on these cases were part of a cadre of legal services attorneys and other lawyers representing Indian tribes and individuals in cases where state and local governments relied on PL 280 to apply their land use and zoning laws, hunting and fishing regulations, and income, property, and sales taxes on Indian reservations in California, Minnesota, Nebraska, Washington, and other states.<sup>33</sup> In the first of these cases, decided in the late 1960s and early and mid-1970s, state and federal courts consistently held that PL 280 gave states and local governments criminal and general civil jurisdiction—both regulatory and adjudicatory—on Indian reservations unless one of the listed statutory exceptions barred such jurisdiction.

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laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory . . . .”). “Indian country,” the operative jurisdictional term in federal Indian law, is defined in 18 U.S.C. § 1151 to include reservations, allotments, and “dependent Indian communities.”

30. 28 U.S.C. § 1360(a).

31. 18 U.S.C. § 1162(b) and 28 U.S.C. § 1360(b) (“Nothing in this [statute] shall authorize the alienation, encumbrance, or taxation of any real or personal property belonging to any Indian or any Indian tribe . . . held in trust by the United States or . . . 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 . . . .”). The civil jurisdiction language further states that “[a]ny tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe . . . 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(c).

32. 28 U.S.C. § 1360(b)–(c).

33. The land use and zoning cases are discussed in Parts II and IV.A, *infra*, the tax cases (including *Bryan*) in Parts IV.B and V.A, *infra*. See also *Cnty. of San Bernardino v. LaMar*, 271 Cal. App. 2d 718 (Cal. Ct. App. 1969) (holding state and county zoning laws applied to mobile home park on reservation); *Elser v. Gill Net No. One*, 246 Cal. App. 2d 30 (Cal. Ct. App. 1966) (holding that PL 280 made the California Fish and Game Code applicable to fishing nets used by Yurok tribal members); ROSSUM, *supra* note 4, at 74 (categorizing and discussing PL 280 jurisdiction cases).

## II. THE EARLY CASES: PL 280 AS AN ASSIMILATIONIST STATUTE

In October 1970, the Rincon Band of Luiseño Indians adopted an ordinance that authorized a cardroom on the Tribe's reservation and permitted games allowed under California law.<sup>34</sup> People at Rincon and other reservations in Southern California had regularly held annual fiestas—cultural gatherings that also served as fundraising events for tribal projects where activities included traditional tribal games of chance and card games in which many non-Indians participated.<sup>35</sup> Seeking to expand on these activities, the Rincon Band moved to build a facility regularly offering these games in order to promote economic development and “regain and retain” the Rincon people's cultural integrity.<sup>36</sup>

After an exchange of correspondence between the Tribe's attorneys and the San Diego County sheriff wherein the sheriff expressed concern about the Rincon reservation becoming a “little Las Vegas” and said he would enforce the county's laws against the cardroom, the Tribe filed suit in the U.S. District Court for the Southern District of California.<sup>37</sup> Noting that any county jurisdiction to apply its gambling ordinance on the reservation derived solely from PL 280, Judge Howard Turrentine held that the county had jurisdiction to enforce what he characterized as a state criminal law.<sup>38</sup> None of PL 280's jurisdictional exceptions made the county ordinance inapplicable: it was “aimed squarely at conduct, not land use[,]” and thus it was not an encumbrance or an otherwise impermissible regulation of Indian trust land prohibited by PL 280.<sup>39</sup>

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34. Rincon Band of Mission Indians v. Cnty. of San Diego, 324 F. Supp. 371, 373 (S.D. Cal. 1971).

35. Aff. of Frank Mazzetti, Jr. at 1–2, *Rincon Band*, 324 F. Supp. 371 (No. 70-360-T).

36. *Id.* at 2–3; *see also* Mem. of Points and Authorities in Supp. of Mot. for Summ. J. and in Opp'n to Mot. to Dismiss or in the Alternative for Summ. J. at 27, *Rincon*, 324 F. Supp. 371 (No. 70-360-T) (discussing Rincon “cultural tradition of games of chance”); Clinton, *supra* note 4, at 28 (“As early as 1970, the Rincon Band of Mission Indians in San Diego, California, which had long used gambling at fiestas as tribal fund raising projects, passed a tribal gaming ordinance.”).

37. Rincon Band of Mission Indians v. Cnty. of San Diego, 495 F.2d 1, 3–4 (9th Cir. 1974); *Rincon*, 324 F. Supp. at 373. California law allows state-licensed cardrooms where authorized by a city and/or county, but San Diego County prohibited gambling in unincorporated areas of the county, which included the Rincon reservation. *Rincon*, 324 F. Supp. at 373.

38. *Rincon*, 324 F. Supp. at 378. Turrentine concluded that because, under California law, “local governments in the exercise of their general police power” could either permit or prohibit cardrooms offering games not prohibited by the state, gambling was a legislative subject “where state and local authorities together prescribe the standards operative in a particular area.” *Id.* at 375 (citing Cal. Pen. Code § 330).

39. *Id.* at 377–78. Judge Turrentine also ruled that because the state and county gambling laws were criminal laws, the provision in 28 U.S.C. § 1360(c) requiring that tribal ordinances “not inconsistent with any applicable civil law of the State[] be given full force and effect in the determination of civil causes of action” did not apply because “it deals with civil law only and even there requires that a tribal ordinance yield to a contrary state civil law.” *Id.* at 378.

Judge Turrentine's decision was based, fundamentally, on his overall characterization of PL 280 as an assimilationist statute and a limited conception of tribal sovereignty and governance. According to Turrentine, PL 280's purpose was to make Indians "full and equal citizens" and "terminate the wardship of the federal government over their affairs[.]"<sup>40</sup> Congress intended that "local governments would assume the same role in relation to Indian citizens as they occupy with respect to the other citizens of the state[.]"<sup>41</sup> And "[i]t would be as unlawful and as destructive of the full and equal citizenship of Indian citizens to exempt them from local laws on gambling as it would be to deny them specific benefits of county laws solely because of their Indian status."<sup>42</sup>

Turrentine concluded his opinion by stating that although "a residual sovereignty remains in Indian tribes" even in PL 280 states, this "limited self government" could not "rise to challenge state law."<sup>43</sup> If the county ordinance were preempted, "the [Tribe] would be assuming a co-equal authority with . . . cities and counties[.]"<sup>44</sup> Turrentine refused "[t]o in effect constitute the [Tribe] a local government with [such] authority . . . ."<sup>45</sup>

Judges in the U.S. District Court for the Central District of California took a similar approach in cases involving the application of local government land use laws on reservations in Riverside County. In two unpublished 1971 opinions (one issued before and one after Turrentine's *Rincon* decision), Judge Avery Crary held that Riverside County's zoning ordinance applied on the Cahuilla Reservation, and that the county's building code applied on the Pechanga Reservation.<sup>46</sup> In 1972, Judge Jesse Curtis held that the City of Palm Springs' zoning laws applied on the

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40. *Id.* at 374.

41. *Id.*

42. *Id.* (also noting that the lawsuit "was in fact occasioned by the Sheriff's declaration that 'the laws of the State and County are not made for a few, but meant to include everyone, and they shall be administered in that manner'" and stating that "the proper recourse is to convince the County Board of Supervisors that a change in the law is desirable"); *see also id.* at 376–77 (citing favorably *People v. Rhoades*, 12 Cal. App. 3d 720, 725 (Cal. Ct. App. 1970) (rejecting "the proposition . . . that Congress . . . intended to give Indians or Indian trust lands (alone among the state's inhabitants) a free ticket to endanger the state's forest and grass lands"))).

43. *Id.* at 378.

44. *Id.*

45. *Id.*

46. In *Madrigal v. County of Riverside*, Crary ruled that county permits were required for a proposed three-day music festival and fiesta on the Cahuilla Indian Reservation with an expected attendance of 25,000 people, as well for food service, digging a well, and building a stage and other structures for the festival. Findings of Fact and Conclusions of Law at 2–4, *Madrigal v. Cnty. of Riverside*, Civ. No. 70-1893 (C.D. Cal. Feb. 16, 1971). A group of Cahuilla tribal members had planned to hold the festival on Lela Madrigal's lands, but the Cahuilla Tribal Council voted to oppose the festival and passed a resolution asking the County Sheriff to prevent it. *Id.* at 2–3. In *Ricci v. County of Riverside*, Civ. No. 71-1134-EC (C.D. Cal. Sep. 9, 1971), Crary held that Riverside County's building code applied but enjoined the county from requiring Pechanga tribal member Elizabeth Ricci to get a county building permit for her house, which was built without a county permit and did not comply with the county's code. *Rincon*, 495 F.2d at 6–7.

Agua Caliente Reservation.<sup>47</sup> After quoting Judge Turrentine's language from the Rincon case about tribes' residual sovereignty and status vis-à-vis states, counties, and cities, Curtis wrote that Congress "intended to grant the state[s] the full exercise of police power, including the authority to make and enforce against Indians and non-Indians alike, upon lands both Indian and non-Indian, rules and regulations pertaining to such things as traffic control, fire control, building safety, health, sanitation, and zoning."<sup>48</sup> Curtis also cited Turrentine's opinion to hold that the city zoning laws were not an "encumbrance" of Indian land prohibited by PL 280 because encumbrances included only burdens like mortgages, liens, easements, and leases that affected title or the ability to transfer land.<sup>49</sup>

Judges Crary, Curtis, and Turrentine all rejected what Turrentine called the Washington Supreme Court's "very broad" interpretation of the encumbrance exemption in PL 280 to preclude the application of Snohomish County's zoning ordinance to a landfill on trust land on the Tulalip Indian Reservation, some 40 miles north of Seattle on the Puget Sound.<sup>50</sup> The Tulalip Tribes leased the land in 1964 to Seattle Disposal Company, a waste-management company that operated the landfill. Snohomish County sued the company in Washington state court, arguing that the landfill required a county permit. After the Tulalip Tribes intervened, the trial court ruled that applying the county's zoning ordinance would constitute an encumbrance of Indian trust land in violation of PL 280.<sup>51</sup>

The Washington Supreme Court affirmed the trial court's ruling in March 1967. Writing for the court, Chief Justice Robert C. Finley held that "encumbrance" should be interpreted broadly to include county zoning laws, and thus that PL 280 prohibited its application.<sup>52</sup> As an alternative ground for its ruling, the court cited a 1942 U.S. Department of the Interior Solicitor's opinion and a 1959 opinion from Washington's Attorney General, both concluding that states could not apply their zoning laws to "interfere" with Indian trust land.<sup>53</sup> Although the court held that the Snohomish County ordinance did not apply because it fell under PL 280's

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47. *Agua Caliente Band of Mission Indians v. City of Palm Springs*, 347 F. Supp. 42, 53 (C.D. Cal. 1972).

48. *Id.* at 48–51.

49. *Id.* at 49–50.

50. *Id.* (discussing *Snohomish Cnty. v. Seattle Disposal Co.*, 425 P.2d 22 (Wash. 1967), *cert. denied*, 389 U.S. 1016 (1967)); *Rincon Band of Mission Indians v. Cnty. of San Diego*, 324 F. Supp. 371, 373–76 (S.D. Cal. 1971); *Madrigal*, No. 70-1893, at 4. Crary, Curtis and Turrentine instead followed a California Court of Appeals opinion holding that a state law requiring fire breaks around buildings on Indian trust land was not an encumbrance. *Agua Caliente*, 347 F. Supp. at 49–50 (discussing *People v. Rhoades*, 12 Cal. App. 3d 720, 723 (Cal. Ct. App. 1970) (upholding a misdemeanor state court conviction of an Indian living on trust land, finding that the state statute was "the regulatory measure designed to preserve California's forests from conflagration" and "a valid exercise of the state's police power"), *pet. for reh'g denied, cert. denied*, 404 U.S. 823 (1971)); *Rincon*, 324 F. Supp. at 376–77; *Madrigal*, No. 70-1893, at 5.

51. *Seattle Disposal*, 425 P.2d at 24–26. The Tulalip Tribes had passed an ordinance authorizing the landfill and lease, and the court ruled that the Tribes had exclusive jurisdiction to regulate use of the land. *Id.*

52. *Id.* at 26 (citing *Squire v. Capoman*, 351 U.S. 1 (1956)).

53. *Id.*

prohibition against encumbrances of Indian trust land, Justice Finley wrote that PL 280 “clearly” granted Washington and its counties both criminal and civil jurisdiction on Indian reservations,<sup>54</sup> pointing to a “Congressional intent to make Indians as nearly as possible full and equal citizens.”<sup>55</sup>

The three dissenting Justices, in an opinion authored by Justice Frank Hale, emphasized the Tulalips’ status as “citizens of the United States and the State of Washington” who should be treated “equally” with “all citizens” and contended that the trust status of the land “d[id] not make an Indian reservation a foreign country.”<sup>56</sup> Indians, Justice Hale wrote, “ought not be permitted to flout the state’s laws enacted to preserve the public peace, health, safety and welfare,” and Washington “may and should” exercise its police powers on Indian reservations to “preserve the peace, safety and welfare of its citizens—including, of course, its Indian citizens.”<sup>57</sup> The county’s zoning ordinance came within these police powers and was not an encumbrance of Indian land that PL 280 prohibited.<sup>58</sup> Thus the state and county had jurisdiction to regulate on-reservation “activities which immediately and directly affect the citizenry at large.”<sup>59</sup> Moreover, whatever limitations Congress included in PL 280 against states exercising jurisdiction over Indians and their lands “should not cover” non-Indian lessees like the waste-disposal company.<sup>60</sup>

Snohomish County petitioned the U.S. Supreme Court for review, which the Court denied in December 1967.<sup>61</sup> Justices William O. Douglas and Byron White dissented, arguing that the case presented substantial federal questions: whether zoning laws regulating burning and dumping of garbage constituted an encumbrance under PL 280, and whether PL 280’s prohibition against encumbrances of Indian trust land extended to non-Indian lessees.<sup>62</sup> Douglas and White agreed with the Washington Supreme Court dissent that subjecting the waste-disposal company to state and county regulations for garbage and sewage disposal was not a burden or encumbrance on Indians’ rights to lease their lands.<sup>63</sup> Additionally, Douglas and White argued that the Court should decide the “important federal question” of whether the U.S. Interior Department’s regulation providing that local government zoning ordinances did not apply to land leased from an Indian tribe was valid or

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54. *Id.* at 25 (noting Washington’s “assumption of civil and criminal jurisdiction over Indians and their lands within the state. This general proposition is clearly the law . . .”).

55. *Id.* at 27.

56. *Id.* at 28 (Hale, J., dissenting) (arguing that because “Indians born in the United States and residing in Washington are citizens of the United States and the State of Washington[,]” they “assume the same responsibilities as all other citizens, subject to no privileges and immunities not shared equally by all citizens”).

57. *Id.* at 29.

58. *Id.* at 28.

59. *Id.* at 29.

60. *Id.* at 27.

61. *Snohomish Cnty. v. Seattle Disposal Co.*, 389 U.S. 1016 (1967).

62. *Id.* at 1019 (Douglas, J., dissenting).

63. *Id.* (further stating that “[t]here may also be merit to the dissent’s view that the immunity of Indian lands to a state ‘encumbrance’ cannot frustrate state programs to check air and water pollution”).

“unduly restrict[ed] the state authority conferred by Public Law 280.”<sup>64</sup> This language about PL 280 conferring state authority embodied the Justices’ understanding, shared by all the judges on the Washington Supreme Court—and the California federal courts in the Agua Caliente, Cahuilla, Pechanga, and Rincon cases—that PL 280 gave states and local governments broad civil-regulatory authority as well as criminal jurisdiction, except as expressly limited by the statute.

Seven years later, Justice Douglas dissented from the Supreme Court’s November 1974 decision to deny certiorari in the Rincon cardroom case.<sup>65</sup> The Ninth Circuit had dismissed the Rincon lawsuit in March 1974, together with the Cahuilla and Pechanga zoning cases from Riverside County—all three cases were consolidated on appeal—ruling that the lower courts lacked jurisdiction to hear them.<sup>66</sup> The Ninth Circuit court held that there was no jurisdiction in the Rincon case because San Diego County’s threat of prosecution was too general: the county had not yet prosecuted anyone for gambling on the reservation.<sup>67</sup> The dissenting judge, however, argued there was a justiciable controversy and that the Ninth Circuit should have decided whether the county had jurisdiction to enforce its gambling ordinance.<sup>68</sup>

In June 1975, the Grand Portage Band of the Minnesota Chippewa Tribe enacted an ordinance authorizing a lottery “as a Reservation business for the purpose of furthering the economic well-being” of Grand Portage tribal members.<sup>69</sup> Two

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64. *Id.* at 1020 (Douglas, J., dissenting). Although the Washington Supreme Court did not rely on the Interior Department regulation, it incorporated the same principle (state zoning laws could not interfere with Indian trust land) as the 1942 Interior Department Solicitor’s opinion the Washington Supreme Court cited. *Snohomish Cnty. v. Seattle Disposal Co.*, 425 P.2d 22, 26 (Wash. 1967).

65. *Rincon Band of Mission Indians v. Cnty. of San Diego*, 419 U.S. 1008 (1974).

66. *Rincon Band of Mission Indians v. Cnty. of San Diego*, 495 F.2d 1, 4–12 (9th Cir. 1974).

67. *Id.* at 4–5. The court similarly found there was no threat of prosecution and thus no controversy in the Pechanga case—the house at issue was already built—and that there was no federal subject-matter jurisdiction because the amount in controversy did not exceed the amount required by statute at the time. *Id.* at 6–8. The court also dismissed the Cahuilla case due to an insufficient amount in controversy. *Id.* at 10–12.

68. *Id.* at 12 (Browning, J., concurring in part and dissenting in part) (arguing that the controversy in *Rincon* was “real and immediate” because the litigation “involve[d] a challenge to a fairly recent ordinance” which “the sheriff stated, though perhaps not as directly as he might, . . . was being enforced and would continue to be”).

69. *Minnesota v. Morrison*, Stipulation as to Facts ¶ 4 (Cook County Court, Criminal Division n.d.); *see also Morrison Fined on Gambling Count*, Ni-Mi-Kwa-Zoo-Min, Vol. II, No. 8, at 1 (Apr. 1976). In between the Rincon Band’s 1970 cardroom ordinance and the Grand Portage Band’s 1975 lottery ordinance, the Keweenaw Bay Indian Community (“KBIC”) in Michigan enacted a gaming ordinance in 1974 that “authorized licensing of casino-style gaming establishments.” Dakota, *supra* note 5, at 44. But KBIC did not issue the first license under the law until 1983, when KBIC tribal member Fred Dakota opened a casino offering dice (craps) games, poker, blackjack, and pull-tabs. *Id.* Mr. Dakota closed his casino after the United States sued him and the courts sided with the federal government. *Id.* at 45; Philip Conneller, *Fred Dakota, ‘Grandfather of Indian Gaming,’ Dies at Age 84*, CASINO.ORG (Sept. 15, 2021, 5:25 AM), <https://www.casino.org/news/fred-dakota-father-of-indian->

months later, Minnesota officials charged Dennis Morrison, the secretary and treasurer of the Grand Portage Band who “conceived” the lottery and said he was “ready to be arrested and test the issue in the courts,” with selling lottery tickets on the Grand Portage Reservation in violation of state law.<sup>70</sup> After describing the case as presenting “an extremely difficult legal problem,”<sup>71</sup> the Minnesota trial court judge held that PL 280 gave the state jurisdiction, calling the U.S. district court opinion in *Rincon* “persuasive” because it similarly “involved an attempt by an Indian Band to set up a gambling operation on its Public Law 280 Reservation.”<sup>72</sup> Minnesota’s law against selling lottery tickets was “obviously a criminal statute[,]” and none of PL 280’s exemptions applied, including its prohibitions against encumbrances or regulation of Indian trust land in contravention of federal law.<sup>73</sup> Morrison was fined \$100 and issued a suspended ten-day sentence on April 7, 1976, two weeks before the Supreme Court heard oral argument in *Bryan v. Itasca County*.<sup>74</sup>

What if the Grand Portage case had been appealed and gone to the Supreme Court like *Bryan*, another case involving the Minnesota Chippewa Tribe?<sup>75</sup> What if one of the other two Ninth Circuit judges in the *Rincon* case had sided with the dissent and the court ruled on the merits, upholding the lower court’s decision in favor of the county?<sup>76</sup> What if three more Justices had agreed with Justice Douglas, and the Supreme Court granted review to hear the *Rincon* case?<sup>77</sup> What if two other Justices had voted with Justices Douglas and White to grant certiorari in the Tulalip

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gaming-dies-aged-84/ [https://perma.cc/RG8P-SHW6]; see also *United States v. Dakota*, 666 F. Supp. 989 (W.D. Mich. 1985), *aff’d*, 796 F.2d 186 (6th Cir. 1986). By then, litigation was underway in Florida, Wisconsin, and California that culminated in the 1987 *Cabazon* U.S. Supreme Court case that superseded the Dakota opinions. See *infra* Part VI.

70. Jack Anderson & Les Whitten, *Chippewa Chips*, WASH. POST, Aug. 13, 1975, at B11 [https://perma.cc/F5DX-H69M].

71. Charles Hillinger, *Indians Plan a Las Vegas of the North: Minnesota Officials Fighting Casino*, L.A. TIMES, Feb. 9, 1976, at B15 [https://perma.cc/FG6D-V6YR].

72. *Minnesota v. Morrison*, Memorandum Opinion and Order, at 5, 7 (Cook County Court, Criminal Division, Mar. 11, 1976).

73. *Id.* at 3–5 (discussing and comparing *Rincon*, 324 F. Supp. 371 (S.D. Cal. 1971), *People v. Rhoades*, 12 Cal. App. 3d 720 (Cal. Ct. App. 1970), and *Snohomish Cnty. v. Seattle Disposal Co.*, 425 P.2d 22 (Wash. 1966)). The court also ruled that Minnesota’s regulation of gambling on the reservation did not violate an 1854 treaty with the United States, *id.* at 7–10, and that federal law did not preempt Minnesota’s jurisdiction, *id.* at 10–11.

74. See *Morrison Fined*, *supra* note 69, at 1.

75. The Minnesota Chippewa Tribe is “comprised of the Bois Forte, Fond du Lac, Grand Portage, Leech Lake, Mille Lacs, and White Earth reservations.” MINNESOTA CHIPPEWA TRIBE, <https://www.mnchippewatribe.org> [https://perma.cc/A5DU-F9F8] (last visited Oct. 4, 2021). The *Bryan* litigation arose at Leech Lake, and the Minnesota Chippewa Tribe participated as an amicus curiae. See *infra* Part IV.B.

76. As noted in Part VI, *infra*, the courts in the next Indian gaming cases (involving bingo) would find there were justiciable controversies—and thus jurisdiction—where county sheriffs threatened to enforce state law under facts almost identical to *Rincon*’s. See *infra* Part VI text and accompanying notes (discussing Seminole, Oneida, and Barona cases).

77. Under the Court’s “rule of four,” four Justices must vote to review a case. See, e.g., *United States v. Genesee*, 405 U.S. 93, 115–16 (1972) (Douglas, J., dissenting).

case? If the Court had granted review in the Tulalip case—when the assumption across the board was that PL 280 gave states criminal and civil jurisdiction—there may never have been the 1976 *Bryan* holding that PL 280 did not give states civil-regulatory authority over tribes and their members’ on-reservation activities. And if either *Rincon* or *Morrison* had been the first Indian gaming case to reach the Supreme Court—instead of the *Cabazon* case over a decade later, after the *Bryan* Court had limited the scope of PL 280—Indian gaming might not exist today. This not-too-fanciful thought exercise marks this Article’s point of departure.

The judges in the early PL 280 cases emphasized state and local governments’ authority to apply their laws to govern the conduct of individual Indians as “equal citizens” with non-Indians.<sup>78</sup> On the whole, these judges discounted the possibility that tribal governments might exercise jurisdiction over those same activities, especially when they involved non-Indians. But later courts, including the U.S. Supreme Court in *Bryan* and *Cabazon*, interpreted PL 280 to hold not only that tribes had such authority, but that states and local governments did not.

What explains the different outcomes in the cases? To begin, federal Indian policy was different. In the late 1960s and early 1970s, it shifted from an official policy of termination to a policy of supporting tribes’ self-government in response to Indigenous activism at the grassroots level including the Red Power Movement, the 1969 Occupation of Alcatraz, the 1973 Occupation of Wounded Knee, Sasheen Littlefeather’s speech at the 1973 Oscars when accepting Marlon Brando’s best actor award for his performance in *The Godfather*, the 1974 Trail of Broken Treaties walk and occupation of the Bureau of Indian Affairs, and “fish-ins” asserting Indigenous treaty fishing rights, as well as political efforts by the National Congress of American Indians under the leadership of Executive Director Vine Deloria, Jr.<sup>79</sup> This

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78. In addition to the gambling and zoning cases discussed here, courts adopted this assimilationist view of PL 280 in cases involving state taxes in Minnesota, Nebraska, and Washington. See *infra* Parts IV.B, V.A.

79. Aurélie A. Roy, ‘The Sovereignty that Seemed Lost Forever’: The War on Poverty, Lawyers, and the Tribal Sovereignty Movement, 1964–1974, at 54–55 (2017) (Ph.D. dissertation, Columbia University), <https://academiccommons.columbia.edu/doi/10.7916/D82N5DV8> [<https://perma.cc/BNS3-EFA8>]; see also VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (1974); Jaelyn Diaz, *Hank Adams, The ‘Most Important Indian,’ Dies at 77*, NAT’L PUB. RADIO (Dec. 25, 2020), <https://www.npr.org/2020/12/25/950199899/hank-adams-the-most-important-indian-dies-at-77> [<https://perma.cc/RK49-9ZFY>]; Steve Rose, ‘I Promised Brando I Would Not Touch His Oscar’: The Secret Life of Sasheen Littlefeather, THE GUARDIAN (June 3, 2021), <https://www.theguardian.com/us-news/2021/jun/03/i-promised-brando-i-would-not-touch-his-oscar-secret-life-sasheen-littlefeather> [<https://perma.cc/6C97-UZU2>]. For Indigenous activism in the mid-twentieth century, see DANIEL M. COBB, NATIVE ACTIVISM IN COLD WAR AMERICA: THE STRUGGLE FOR SOVEREIGNTY (2008); BEYOND RED POWER: AMERICAN INDIAN POLITICS AND ACTIVISM SINCE 1900 (Daniel Cobb & Loretta Fowler eds., 2007); TROY R. JOHNSON, THE AMERICAN INDIAN OCCUPATION OF ALCATRAZ ISLAND: RED POWER AND SELF-DETERMINATION (2008); AMERICAN INDIAN ACTIVISM: ALCATRAZ TO THE LONGEST WALK (Troy Johnson, Joane Nagel & Duane Champagne eds., 1997); ALVIN M. JOSEPHY, JR., RED POWER: THE AMERICAN INDIANS’ FIGHT FOR FREEDOM (1971); JOANNE NAGEL, AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY

mobilization “pave[d] the way” for President Richard Nixon’s 1970 statement to Congress formally announcing the end of the termination policy and a new tribal self-determination policy in 1970 that was adopted into law through the Indian Self-Determination and Education Assistance Act of 1975.<sup>80</sup>

Another key difference was the legal analysis the lawyers arguing the cases had to work with, including Professor Goldberg’s law-review article that criticized *Rincon* and other decisions as reflecting “a judicial misunderstanding of the underlying thrust of PL-280,” and which the Supreme Court cited repeatedly in *Bryan*.<sup>81</sup> Employing this analysis, these legal services attorneys altered the trajectory of the PL 280 case law. Their new jurisprudential framework yielded the tribe-favorable outcome in *Cabazon* when the next Indian gaming cases came into federal courts in the 1980s.

### III. THE LAWYERS AND PROFESSORS WHO CHANGED PL 280

The lawyers in the consolidated Ninth Circuit *Rincon* litigation worked for California Indian Legal Services (“CILS”) and the Native American Rights Fund (“NARF”), two preeminent non-profit legal services organizations for Indigenous

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AND CULTURE (1997); BRADLEY G. SHREVE, *RED POWER RISING: THE NATIONAL INDIAN YOUTH COUNCIL AND THE ORIGINS OF NATIVE ACTIVISM* (2011); PAUL CHAAT SMITH AND ROBERT ALLEN WARRIOR, *LIKE A HURRICANE: THE INDIAN MOVEMENT FROM ALCATRAZ TO WOUNDED KNEE* (1996); CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (2006); Troy Johnson, *The Occupation of Alcatraz Island: Roots of American Indian Activism*, 10 WICAZO SA REV. 63 (1994); Dana Hedgpeth, *The Week Hundreds of Native Americans Took Over D.C.’s Bureau of Indian Affairs*, WASH. POST (Jan. 24, 2021, 7:00 AM), <https://www.washingtonpost.com/history/2021/01/24/native-americans-occupied-bureau-indian-affairs-nixon/> [<https://perma.cc/YG64-5T7F>].

80. Roy, *supra* note 79, at 64; *see also* Reid Peyton Chambers, *Implementing the Federal Trust Responsibility to Indians after President Nixon’s 1970 Message to Congress on Indian Affairs: Reminiscences of Reid Peyton Chambers*, 53 TULSA L. REV. 395, 399–401 (2018) (discussing Nixon’s speech to Congress announcing end of termination policy and new self-determination policy). Franklin Ducheneaux, who served as Indian Affairs Counsel to the House Subcommittee on Indian Affairs from 1973 to 1977, has credited “a revolt in the Democratic caucus as the 93<sup>rd</sup> Congress began in January 1973” that “diffused power . . . into the subcommittees,” and Lloyd Meeds’s (D-WA) role as chairman of the House Indian Affairs Subcommittee, with passage of the Indian Self-Determination and Education Assistance Act and other 1970s legislation. Brewer & Cadue, *supra* note 5, at 27. According to Ducheneaux, “none of the things that happened in Indian legislation would have occurred had this revolution not taken place: the Self Determination and Educational Assistance Act, the Indian Child Welfare Act, the Indian Religious Freedom Act, all of those things.” *Id.* Ducheneaux added: “Of course, Nixon played some role, but in terms of the legislation moving, that requires effort from the legislature—not the administration.” *Id.* Professor Carole Goldberg has pointed out that although President Richard Nixon is often celebrated for advancing tribal interests through legislation and policy initiatives, including ending the termination policy and implementing one based on tribal self-determination that eventually yielded Indian gaming, his appointees to the Supreme Court “unleash[ed] a countercurrent” that has had “lasting harmful effects on tribal sovereignty” and “baleful effects on tribal self-determination.” Carole Goldberg, *President Nixon’s Indian Law Legacy: A Counterstory*, 63 UCLA L. REV. 1506, 1508, 1512–13 (2016).

81. Goldberg, *supra* note 18, at 581, 586–87; *see also infra* notes 157–206 and accompanying text (discussing *Bryan*).

people(s) that emerged in the late 1960s and early 1970s. CILS was one of many regional entities established during that time to serve an immense unmet need for legal services among Native Americans in different parts of the United States, including Washington, Wisconsin, South Dakota, New Mexico, Montana, Arizona, and Alaska.<sup>82</sup> During the *Rincon* litigation, a group of CILS attorneys left California and established NARF as the first national-level legal services organization for Native Americans. These CILS and NARF attorneys were luminaries in the field of federal Indian law, shaping doctrine through their work in the courts and legal academia over the ensuing decades.<sup>83</sup>

CILS started in the late 1960s as a project of California Rural Legal Assistance (“CRLA”), a legal and political advocacy group for low-income people in rural California funded by the Legal Services Program as part of President Lyndon Johnson’s administration’s War on Poverty.<sup>84</sup> Known mostly for its work with farmworkers, CRLA began in March 1966 after James Lorenz, its founding director, received a grant from the Office of Economic Opportunity and left the Los Angeles office of O’Melveny and Myers.<sup>85</sup> CRLA’s first board of trustees met at Loyola Law School in Los Angeles that May and included farmworker activists Cesar Chavez, Delores Huerta, and Larry Itliong, along with Cruz Reynoso, who went on to become CRLA’s first Latino director, the first Chicano Justice on the California Supreme Court, and later a professor at UCLA School of Law.<sup>86</sup> In the summer of 1966, CRLA established an administrative office in Los Angeles and field offices in rural areas of California, including Santa Rosa in Sonoma County, an area that is home to Pomo, Miwok, and Wappo peoples.<sup>87</sup>

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82. Roy, *supra* note 79, at 79–85 (discussing Seattle Legal Services’ Native American Division, Wisconsin Judicare, Dakota Plains Legal Services, DNA Legal Services, and other organizations).

83. See *infra* notes 365–67 and accompanying text.

84. Roy, *supra* note 79, at 59–64; see also *CILS History*, CAL. INDIAN LEGAL SERVS., <https://www.calindian.org/cils-history/> [<https://perma.cc/N7VL-WQTM>] (last visited Oct. 4, 2021); *Who We Are*, CAL. RURAL LEGAL ASSISTANCE, <https://crla.org/about-crla> [<https://perma.cc/T489-Z8VM>] (last visited Oct. 4, 2021). The Legal Services Program was established through the 1966 amendments to the Office of Economic Opportunity Act of 1964, which had created Community Action Programs as a way to organize communities to fight poverty. For a general discussion of the Office of Economic Opportunity’s work and these programs, including their decline in the 1970s, see ALYOSHA GOLDSTEIN, *POVERTY IN COMMON: THE POLITICS OF COMMUNITY ACTION DURING THE AMERICAN CENTURY* (2012) (discussing OEO projects in Native, Black, Mexican-American, and Puerto Rican communities); see also Roy, *supra* note 79, at 59–60 (discussing efforts to curb legal services programs and restrictions placed on their work by the Legal Services Corporation after 1974 that “seriously limit[ed] the social justice efforts launched in the 1960s”).

85. *Champion of the Rural Poor*, TIME (Dec. 15, 1967), [https://archive.crla.org/sites/all/files/timeline\\_images/pdf/TimeArticle.pdf](https://archive.crla.org/sites/all/files/timeline_images/pdf/TimeArticle.pdf) [<https://perma.cc/DK97-DSR3>].

86. *Id.*; see also Maria L. La Ganga, *Cruz Reynoso, California’s First Latino State Supreme Court Justice, Dies at 90*, L.A. TIMES (May 7, 2021, 10:11 PM), <https://www.latimes.com/obituaries/story/2021-05-07/cruz-reynoso-california-supreme-court-justice-died> [<https://perma.cc/7FWG-T8WY>].

87. Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1, 2 n.2 (1972).

George Duke, who came from the American Civil Liberties Union to open CRLA's Santa Rosa office, "created an 'Indian Division'" to deal specifically with "legal problems faced by Native Americans."<sup>88</sup> In 1967, Duke and David Risling, a Hoopa activist-organizer, incorporated CILS as a stand-alone entity, and Duke became CILS's first executive director.<sup>89</sup> CRLA-turned-CILS staff attorney (and later NARF attorney and Colorado Law School professor) Richard (Rick) Collins joined Duke in CILS's first office, a converted apartment building that overlooked People's Park in Berkeley, a recently created space resulting from late-1960s activism.<sup>90</sup>

In 1968, Duke brought on Monroe Price, a UCLA School of Law professor, as CILS's deputy director.<sup>91</sup> Price then hired Robert (Bob) Pelcyger, his Yale Law School friend who had been working for Dinebeina Nahiilna Be Agaditahe ("DNA") Legal Services on the Navajo Nation, to staff a Southern California CILS outpost at UCLA.<sup>92</sup> The CILS outpost was one of many activities Price started at UCLA that "comprised a wing of the law school that [the faculty] called Monroe, Inc[.]," which also included a project working with Navajo and Hopi people on the impacts of damming the Colorado River to create Lake Powell.<sup>93</sup>

The UCLA outpost soon developed into CILS's Escondido office, where CILS is headquartered today, and where David Getches, a 1967 University of Southern California School of Law graduate who eventually became a professor at and the dean of Colorado Law School, joined Pelcyger as co-directing attorney in late 1968.<sup>94</sup> George Forman clerked at the Escondido office in the summer of 1969

88. Roy, *supra* note 79, at 68–69.

89. *CILS History*, *supra* note 84.

90. Telephone Interview with Bruce Greene (Dec. 9, 2015) [hereinafter Greene 2015 Interview]; *see also* TOM DALZELL, *THE BATTLE FOR PEOPLE'S PARK: BERKELEY 1969* (2019) (discussing history of People's Park).

91. Roy, *supra* note 79, at 69, 189. According to historian Aurélie Roy, CILS "quickly became one of the most dynamic and critical Legal Services Program to the development of Indian rights beyond specific tribes [and] . . . [gave] birth to . . . the Native American Rights Fund[.]" and "[t]hus, it can be said that the excavation of Indian rights and their emergence on the national scene started with Duke's team in California." *Id.* at 87; *see also id.* at 189 (calling Duke "one of the most discreet 'fathers of Indian law'" because "this legal tribal sovereignty movement developed in large part on the shoulders of Duke's institutional work").

92. *Id.* at 76; Telephone Interview with Robert Pelcyger (Jan. 22, 2016) [hereinafter Pelcyger Interview]; Telephone Interview with Monroe Price (Nov. 5, 2015) [hereinafter Price Interview]. Price had arranged for Pelcyger to go first (temporarily) to DNA Legal Services until Price could bring him to UCLA. Pelcyger Interview, *supra*.

93. Charlie Firestone, *Reflections on My Time at UCLA Law*, 11 CAL. LEGAL HIST. 421, 421 (2016) (noting that the activities included the *UCLA-Alaska Law Review* and "the Indian project with Carole Goldberg"); *see also* Price Interview, *supra* note 92. For a discussion of the Lake Powell Research Project, *see* Gordon C. Jacoby, *Lake Powell Research Project: Hydrologic Research*, 3 HYDROLOGY & WATER RES. ARIZ. & SW. (1973), <https://repository.arizona.edu/handle/10150/300295> [<https://perma.cc/JK2R-753K>].

94. Roy, *supra* note 79, at 75–76; Pelcyger Interview, *supra* note 92. Between graduating law school and starting at CILS, Getches was an associate at Luce, Forward, Hamilton & Scripps LLP's San Diego office. Telephone Interview with Bruce Greene (Aug. 10, 2021) [hereinafter Greene 2021 Interview].

while a law student at UC Berkeley, then returned as a Reginald Heber Smith Community Law Fellow in 1970.<sup>95</sup> The next year, Forman and Pelcyger filed the Rincon cardroom lawsuit discussed above.

Meanwhile, Price, Getches, and others were working to expand CILS's work to a national level. The Ford Foundation, which had become increasingly involved in supporting civil-rights work in the 1960s, was looking to fund an entity for Native Americans like the NAACP Legal Defense Fund and Mexican American Legal Defense and Education Fund.<sup>96</sup> By the end of 1969, CILS "had gathered a steering committee composed of national Indian leaders, activists, and law professors[,]” including Vine Deloria, Jr., the executive director of the National Congress of American Indians; Fred Gabourie, a Seneca graduate of Southwestern Law School and attorney in Los Angeles who later became the first Indigenous state court judge in California; and David Risling, who had helped establish CILS.<sup>97</sup> In 1970, CILS implemented the Native American Rights Fund Project with money from the Ford Foundation.<sup>98</sup>

Initially based in CILS's Berkeley office, NARF separated from CILS, incorporated with an all-Native board of directors, and moved in the summer of 1971 to Boulder, Colorado.<sup>99</sup> Getches was NARF's first executive director.<sup>100</sup> John Echohawk and Bruce Greene accompanied him. Echohawk, NARF's first Native American attorney and current and long-time executive director, had been a clerk in the CILS Berkeley office in the summer of 1968 and returned as a Reginald Heber Smith Fellow in 1970 after graduating from the University of New Mexico School of Law.<sup>101</sup> Greene, a 1967 UC Hastings Law School graduate, had come to NARF

95. E-mail from George Forman to author (Feb. 9, 2020, 7:29 PM PST) (on file with author).

96. Price Interview, *supra* note 92; Greene 2021 Interview, *supra* note 94.

97. Roy, *supra* note 79, at 74, 128–29.

98. *About Us*, NATIVE AM. RTS. FUND, <https://www.narf.org/about-us/> [<https://perma.cc/T8MD-8KM4>] [hereinafter *NARF History*] (last visited Oct. 4, 2021); *see also* Brewer & Cadue, *supra* note 5, at 30. Monroe Price and David Getches prepared the funding proposal for the Ford Foundation, and Bob Pelcyger has credited Price “for playing ‘an instrumental role in the establishment of NARF’” and called him “the ‘father of NARF.’” Roy, *supra* note 79, at 189–90.

99. Roy, *supra* note 79, at 128; *NARF History*, *supra* note 98. The Ford Foundation grant required that the new entity “be validated by a major law school.” Vine Deloria, Jr., who graduated from the University of Colorado Law School in 1970, “strongly recommended Boulder as the location for [NARF]” and the law school’s dean “signed the paperwork which enabled NARF to establish its headquarters in town.” Roy, *supra* note 79, at 130–32; *see also* Brewer & Cadue, *supra* note 5, at 30.

100. Roy, *supra* note 79, at 191.

101. *See* Brewer & Cadue, *supra* note 5, at 30; John E. Echohawk, *Curriculum Vitae*, NATIVE AM. RTS. FUND, [http://www.narf.org/wordpress/wp-content/uploads/2015/01/echohawk\\_resume.pdf](http://www.narf.org/wordpress/wp-content/uploads/2015/01/echohawk_resume.pdf) [<https://perma.cc/999Q-K5CF>] (last visited Oct. 4, 2021). Echohawk was the first graduate of the American Indian Law Program at the University of New Mexico, which the Office of Equal Opportunity funded, and was a founding member of the American Indian Law Students Association while in law school. *See* Brewer & Cadue, *supra* note 5, at 21; John E. Echohawk, *Executive Director*, NATIVE AM. RTS. FUND, <https://www.narf.org/profiles/john-e-echohawk/> [<https://perma.cc/B389-TSTK>] (last visited Oct. 4, 2021).

in 1970 following a clerkship at the Federal Power Commission (now the Federal Energy Regulatory Commission) and a corporate practice in San Francisco.<sup>102</sup> Bob Pelcyger left CILS's Escondido office a few months later to join Getches, Echohawk, and Greene in Boulder.<sup>103</sup>

After moving to Boulder, NARF “maintain[ed] collaborations with Legal Services programs over the years,” including with CILS attorneys working on the consolidated *Rincon* litigation in the Ninth Circuit and the Leech Lake Reservation Legal Services Project in *Bryan v. Itasca County*.<sup>104</sup> According to Bruce Greene, CILS and NARF attorneys were in “constant communication” and shared thoughts and strategies such that it was “almost as if [they] were in the same office in many ways.”<sup>105</sup> Stephen Quesenberry, who worked at CILS, Seattle Legal Services Center, and Evergreen Legal Services in Washington state during the 1970s, similarly described coordination among legal services organizations that represented Indigenous people(s) across the United States, noting that the “group of lawyers was relatively small nationally.”<sup>106</sup>

After Bruce Greene returned to California to become CILS's executive director in 1972, he, George Forman, and other CILS attorneys continued working with Monroe Price and his newly hired colleague Reid Chambers, with whom Price co-taught a federal Indian law seminar.<sup>107</sup> Price and Chambers listed UCLA School of Law's address alongside CILS's name on court briefs they filed on CILS's behalf, including in the Pechanga zoning case discussed above, and “had a title on the door [of an office] that said ‘CILS.’”<sup>108</sup> Chambers also was of counsel for NARF and, after leaving UCLA to join the Department of the Interior in 1973, wrote the U.S. government briefs in the *Bryan* litigation.<sup>109</sup>

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102. Greene 2021 Interview, *supra* note 94; E-mail from Bruce Greene to author (Oct. 27, 2021, 1:01 PM PDT) (on file with author).

103. *Id.*

104. Roy, *supra* note 79, at 130; *see also* Brewer & Cadue, *supra* note 5, at 32 (John Echohawk discussing NARF work as co-counsel with Leech Lake Legal Services on *Bryan*); *supra* Part II (discussing *Rincon*); *infra* Part IV.B (discussing *Bryan*).

105. Greene 2021 Interview, *supra* note 94. During his time at NARF from 1974–1977, Greene directed the Indian Law Back-Up Center, a program NARF ran with funding from the Legal Services Corporation, and worked with attorneys at Dakota Plains Legal Services (in South Dakota), Evergreen Legal Services (in Washington), and Pine Tree Legal Services (in Maine), among others. *Id.* Part of Greene's work involved writing briefs “for [these] lawyers in the field who didn't have time to write briefs.” *Id.*

106. Telephone Interview with Stephen Quesenberry (Aug. 10, 2021) [hereinafter Quesenberry Interview].

107. Greene 2015 Interview, *supra* note 90. Chambers knew Bruce Greene from their time together as summer clerks at Pillsbury Winthrop's San Francisco office in 1966 and had put Greene in touch with David Getches at NARF. *Id.* Greene returned to NARF in 1974, then left NARF in 1977 to join Getches (who left NARF in 1976) in a private law practice. *Id.*

108. *Id.*; *see also supra* note 46 and accompanying text (discussing Pechanga case).

109. Telephone Interview with Reid Chambers (Sept. 25, 2015) [hereinafter Chambers Interview]; *see also infra* notes 172, 191–93 and accompanying text (discussing *Bryan* briefs).

In the fall of 1972, Carole Goldberg joined the UCLA School of Law faculty, becoming its second full-time woman faculty member.<sup>110</sup> She had been a student in a federal Indian law seminar Monroe Price taught at Stanford Law School in the fall of 1970 and was “amazed” and “fascinated” by how little had been written—including in judicial opinions—about what Congress intended regarding the scope of state jurisdiction under PL 280.<sup>111</sup> Impressed by her 100-page seminar paper on the topic, Price, who sat alongside Chambers on the appointments committee at UCLA, pushed for the school to hire Goldberg after she graduated.<sup>112</sup>

At UCLA, Goldberg continued her work from Stanford with Price, who authored and published the first federal Indian law casebook in 1973.<sup>113</sup> Goldberg wrote the section on PL 280.<sup>114</sup> Price encouraged Goldberg to publish her work—which he described as “a way of rethinking federal-state-Indian relations”—in a law review so that the NARF, CILS, and other attorneys litigating cases involving state and local government jurisdiction under PL 280 could cite it.<sup>115</sup>

In February 1975, the *UCLA Law Review* published Goldberg’s article, *Public Law 280: The Limits on State Jurisdiction Over Reservation Indians*, essentially a revision of her Stanford seminar paper.<sup>116</sup> The article focused on the extent to which Congress intended states to have criminal, as opposed to civil, jurisdiction under PL 280, as well as the (in)validity of various states’ processes for adopting PL 280 jurisdiction. Goldberg argued that Congress was homed in on, and the statute’s thrust was, *criminal* jurisdiction; civil jurisdiction was only an afterthought.<sup>117</sup> She also argued that whatever civil jurisdiction existed was at the state—not county or municipal—level, and that Congress did not expect tribal governments “to dissolve as independent entities [under] PL-280.”<sup>118</sup> While not intended as an advocacy piece, Goldberg’s article engaged with the arguments made by, and provided “raw material” for, the CILS, NARF, and other lawyers in the ongoing PL 280 cases, who used her analysis.<sup>119</sup>

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110. Interview with Carole Goldberg (Oct. 9, 2015) [hereinafter Goldberg October Interview].

111. *Id.*

112. Chambers Interview, *supra* note 109; Goldberg October Interview, *supra* note 110; Price Interview, *supra* note 92. Price thought UCLA should play a more “public role” and that Goldberg’s scholarship could contribute to the field of federal Indian law, the faculty, the law school, and the University of California system by helping to reconceptualize the allocation of authority—and redefine the relationships—between tribes and states affected by PL 280. Price Interview, *supra* note 92.

113. MONROE E. PRICE, LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES 210–18 (1st ed. 1973).

114. *Id.*; *id.* at 210 n.1 (“This section was prepared with the assistance of Professor Carole Goldberg.”).

115. Price Interview, *supra* note 92.

116. Goldberg, *supra* note 18; *see also* Interview with Carole Goldberg (Sept. 24, 2015) [hereinafter Goldberg September Interview].

117. Goldberg, *supra* note 18, at 577–80.

118. *Id.* at 580–83.

119. Goldberg September Interview, *supra* note 116; *see also* Goldberg, *supra* note 18, at 578–80.

The Ninth Circuit Court of Appeals and U.S. Supreme Court relied on Goldberg's analysis to "defang" and "virtually repeal" (in the words of Reid Chambers) PL 280 in *Santa Rosa Band of Indians v. Kings County* and *Bryan v. Itasca County* in 1975 and 1976, respectively.<sup>120</sup> In addition to citing Goldberg's article multiple times, the Ninth Circuit and Supreme Court cited a *Hastings Law Journal* student note authored by Linda Cree, who had been a law clerk at CILS.<sup>121</sup> The Supreme Court also cited a 1973 *North Dakota Law Review* article by NARF attorneys Dan Israel and Thomas Smithson, who joined NARF in 1972 (from Colorado Rural Legal Services and Dakota Plains Legal Services, respectively) and worked on the *Bryan v. Itasca County* and other PL 280 litigation.<sup>122</sup>

Like Goldberg, the Ninth Circuit adopted an interpretation of PL 280 that placed tribal governments on a level equal to or above counties and municipalities. The Supreme Court, however, used Goldberg's, Cree's, and Israel and Smithson's analyses to go a step further. It held that PL 280 did not give *states* general civil-regulatory jurisdiction over Indian tribes and their citizens, thus providing the legal framework under which modern Indian gaming arose.<sup>123</sup>

There was no grand legal strategy. The legal services attorneys were just making whatever arguments they could to defend Indigenous rights against attacks by state and local governments. But their creative lawyering, alongside the emerging scholarship and a changed federal Indian policy driven by Indigenous activism, shifted the direction of the PL 280 jurisprudence and eventually yielded the result in *Cabazon*, thereby enabling Indian gaming as it exists today.

#### IV. TRAILERS AND TAXES: THE CASES WHERE PL 280 CHANGED

The attorneys—from CILS, NARF, and the U.S. government—in the Rincon cardroom and other cases discussed above challenged county and city jurisdiction with two arguments. First, the local governments' laws did not apply because they were not "laws of the state" under PL 280. Thus, whatever jurisdiction it gave to *states*, PL 280 did not grant *counties* jurisdiction in Indian country. Alternatively, the laws constituted encumbrances or regulations of Indian trust land

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120. Chambers Interview, *supra* note 109 (noting that he and others "really expected not to be able to defang PL 280 the way [the] courts did in *Santa Rosa* and *Bryan*" and calling Goldberg's article helpful for "virtually repealing" PL 280 by limiting it to criminal jurisdiction); Telephone Interview with George Forman (Sept. 18, 2015) [hereinafter Forman 2015 Interview] ("If you're looking for the difference between the *Rincon* case and the others [*Santa Rosa* and *Bryan*], I'd have to say it was Carole Goldberg's article in the interim."); *see also infra* notes 145–53, 197–98, 201 and accompanying text (discussing *Santa Rosa* and *Bryan*).

121. Linda Cree, Note, *The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit*, 25 HASTINGS L.J. 1451 (1974) (arguing against application of county and municipal laws, via PL 280, because they impeded reservation infrastructure and economic development); *see also* Forman 2015 Interview, *supra* note 120.

122. Daniel H. Israel & Thomas L. Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D. L. REV. 267 (1973) (arguing that PL 280 did not give states broad civil jurisdiction, including taxation powers, in Indian country); *see also* Greene 2021 Interview, *supra* note 94.

123. *See infra* notes 197–206 (discussing the Court's holding).

prohibited by PL 280.<sup>124</sup> These arguments had been unsuccessful in both federal and state courts in California, where the state and local governments were, according to Bruce Greene, “really us[ing] PL 280 as a club” to assert jurisdiction wherever they could.<sup>125</sup>

The next litigation these attorneys handled involved not just Indian trust land (to which the U.S. government holds formal title), but also federal government programs that county law, if applied, would frustrate or interfere with. Federalism principles thus figured more prominently. Moreover, these programs were part of a changed federal Indian policy that promoted tribal self-government and economic development, a reversal of the termination policy under which Congress passed laws like PL 280. These factors, together with the analyses in Professor Goldberg’s, Dan Israel and Thomas Smithson’s, and Linda Cree’s law-review scholarship, provided the CILS and NARF lawyers and the courts an opportunity to change the course of the PL 280 litigation. The cases in which they did so began while the consolidated *Rincon* litigation was on appeal to the Ninth Circuit. One case involved county efforts to regulate mobile homes on the Santa Rosa Rancheria in California; the other involved county efforts to tax mobile homes on reservations in Minnesota.

#### A. Land Use in California

In early 1973, Mark Barrios and Pete Baga, members of the Tachi-Yokut Tribe (also formerly called the Santa Rosa Band or the Santa Rosa Indian Community), received grants from the Bureau of Indian Affairs’ Housing Improvement Program to purchase mobile homes for their properties on the Santa Rosa Rancheria in California’s San Joaquin Valley.<sup>126</sup> The Indian Health Service, an agency within the Department of Health and Human Services (then the Department of Health, Education and Welfare), agreed to provide the homes with water and plumbing as part of a larger project to upgrade water and sanitation systems on California Indian reservations.<sup>127</sup> Kings County’s zoning laws, however, allowed trailers in agricultural zones—which included the Tribe’s reservation—only with a county permit, and for a maximum of two years.<sup>128</sup> The situation on the Santa Rosa Rancheria reflected a broader problem of inadequate reservation housing and

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124. These arguments were advanced by the attorneys for CILS, including George Forman and Lee Sclar (who along with George Duke and Rick Collins had authored CRLA’s amicus brief in *People v. Rhoades*, unsuccessfully challenging the applicability of a California land use law as a prohibited encumbrance under PL 280); for NARF, who filed an amicus brief in the Ninth Circuit with Monroe Price, Bob Pelcyger, and David Getches listed as counsel; and for the United States, which filed an amicus brief. See Opening Brief of Appellant at 9–27, *Rincon Band of Mission Indians v. Cnty. of San Diego*, No. 71-1927 (9th Cir. Feb. 1, 1972); Brief of Native Am. Rts. Fund as Amicus Curiae at 4–6, 9–10, *Rincon*, No. 71-1927 (9th Cir. Feb. 18, 1971); Brief for the United States as Amicus Curiae at 2–3, 10–12, *Rincon*, No. 71-1927 (9th Cir. Apr. 23, 1973); see also *supra* notes 38–50, 66–68 and accompanying text (discussing *Rhoades* and U.S. district court and Ninth Circuit litigation).

125. Greene 2015 Interview, *supra* note 90.

126. *Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655, 657 (9th Cir. 1975).

127. *Id.*

128. *Id.* at 657–58.

local governments acting under their zoning and building codes to frustrate tribal and federal efforts to improve it.<sup>129</sup>

After being told they needed to get approval from (and pay) the county in order to obtain utilities, water, and sanitation services, Barrios, Baga, and the Tribe filed suit in the U.S. District Court for the Eastern District of California. Their lawyer was George Forman, the CILS attorney who represented the Rincon Band of Luiseño Indians in its cardroom lawsuit against San Diego County. Significantly, the federal government was now directly involved in developing reservation housing and infrastructure—unlike the earlier Southern California cases in which federal district courts held that local government land use ordinances applied on reservations.<sup>130</sup>

Kings County's arguments were essentially the same as those that the local governments had made in the Agua Caliente, Pechanga, and Rincon cases, and Kings County cited Judge Turrentine's *Rincon* opinion in its briefs. First, the county ordinances were "laws of the state and within the contemplation of" PL 280 because counties are political subdivisions of the state that exercise the state's sovereignty within their boundaries.<sup>131</sup> Moreover, PL 280 was an assimilationist statute designed to terminate the federal trust relationship with Indian tribes and make their members "subject to the same [state and local] laws . . . as . . . other citizens of the United States" by granting California and other PL 280 states "full civil and criminal jurisdiction over Indian reservations."<sup>132</sup>

George Forman made the same arguments for the Tribe that he and his colleagues put forth in the consolidated *Rincon* litigation at the Ninth Circuit. First, under the federal Indian law canon of interpretation—a well-established principle requiring that ambiguities in treaties or federal statutes dealing with Indians be resolved in Indians' favor—PL 280 should be narrowly construed so as to "avoid

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129. See Cree, *supra* note 121, at 1473–75 (discussing a 1969 California state report on housing and sanitation conditions on Indian reservations showing that "only 7 to 14 percent of Indian housing was adequate and up to 90 percent of it was in need of repair or replacement[.]" and that "[i]n all, 87 percent of the homes surveyed were found not to be in conformance with minimum standards"); see also Chambers Interview, *supra* note 109 (explaining that "all of us [attorneys] were really concerned about how PL 280 would be implemented" and that there was a "great deal of fear about broad application of PL 280 and allowing . . . state and local zoning" on reservations, calling PL 280 a "tremendously dangerous statute that could be, and was being, used by states to have broad application of county zoning and building codes on reservations[.]" and describing the early 1970s California reservation zoning cases as the Tribes' attorneys "just playing defense" for largely low-income Indian communities against having middle-class state and county standards imposed on them).

130. See *supra* notes 46–49 and accompanying text (discussing *Ricci*, *Madrigal*, and *Agua Caliente* litigation).

131. Appellants' Opening Brief at 10, *Santa Rosa Band of Indians v. Kings Cnty.*, No. 74-1565 (9th Cir. Jul. 1, 1974) [hereinafter *Kings County Brief*].

132. *Id.* at 6–10, 13.

converting [it] into a termination statute.”<sup>133</sup> Second, the county ordinances were not “laws of the state” within the meaning of PL 280.<sup>134</sup> Third, Congress intended PL 280 to extend only state criminal jurisdiction and give Indians access to state courts for civil disputes, leaving “the remainder of tribal sovereignty” intact, including the authority to regulate on-reservation activities.<sup>135</sup> Fourth, whatever jurisdiction Congress gave PL 280 states came with “broad exceptions” against exercising that jurisdiction in a way that encumbered, taxed, or otherwise regulated Indian (federal) trust property in a manner inconsistent with federal laws or regulations.<sup>136</sup>

The Tribe’s arguments, including that allowing county jurisdiction would “impose upon Reservation Indians the new discriminatory restriction of being the only residents of the State of California unable to exercise the right of municipal self-government[.]” paralleled Professor Goldberg’s.<sup>137</sup> There was yet no law-review article to cite (it was still in draft form), but the Tribe’s lawyers were aware of and drew upon Goldberg’s work.<sup>138</sup> They also made a fifth argument based on federalism, or federal preemption—that allowing county regulation would interfere with federal policy and programs to provide housing for reservation Indians.<sup>139</sup>

In October 1973, U.S. District Court Judge Myron Donovan (M.D.) Crocker ruled for the Tribe based on this federal preemption argument. Because the county ordinances “conflict[ed] with the federal scheme for assisting . . . Indians and could result in a complete blockage . . . of federal benefits[.]” applying them would be “inconsistent” with the federal statutes and regulations authorizing the housing and infrastructure programs.<sup>140</sup> Thus no jurisdiction could exist even under PL 280. Crocker emphasized that the case involved a federally authorized and

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133. Respondents’ Brief at 26, *Santa Rosa Band of Indians v. Kings Cnty.*, No. 74-1565 (9th Cir. Oct. 3, 1974) [hereinafter *Santa Rosa Brief*]; see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02, at 119 (Nell Jessup Newton et al. eds., 2005) (discussing interpretive canon).

134. *Santa Rosa Brief*, *supra* note 133, at 27–33.

135. *Id.* at 26. Although their brief argued that Congress gave states only criminal and civil-adjudicatory (but not civil-regulatory) jurisdiction through PL 280, CILS attorneys George Forman and Bruce Greene were focused on federal preemption, not any civil/regulatory–criminal/prohibitory distinction, and generally understood PL 280 to give states general (including regulatory) civil jurisdiction. Interview with George Forman (Nov. 9, 2019) [hereinafter Forman 2019 Interview]; Greene 2015 Interview, *supra* note 90.

136. *Santa Rosa Brief*, *supra* note 133, at 24–25, 36.

137. *Id.* at 36.

138. Forman 2015 Interview, *supra* note 120; Greene 2015 Interview, *supra* note 90.

139. *Santa Rosa Brief*, *supra* note 133, at 8–17, 40.

140. *Santa Rosa Band of Indians v. Kings Cnty.*, No. F-836 Civ., at 5–7 (E.D. Cal. Oct. 12, 1973) (citing 28 U.S.C. § 1360(b), 25 U.S.C. § 13, and 42 U.S.C. § 2004(a)).

federally funded project on federal land,<sup>141</sup> but he suggested that the federal government should comply with county law “when . . . feasible.”<sup>142</sup>

Kings County appealed. The appellate briefing took place between July and October 1974, following the Ninth Circuit’s March 1974 dismissal of the consolidated *Rincon* litigation. In November 1975, the Ninth Circuit held that PL 280 did not give Kings County jurisdiction to enforce its zoning ordinance or building code on the Santa Rosa Rancheria.<sup>143</sup>

The appeals court, like Judge Crocker, emphasized that the lawsuit “involve[d] an attempt to regulate the use of Indian trust land.”<sup>144</sup> However, the appeals court used different reasoning and relied on Professor Goldberg’s and Linda Cree’s scholarship. Buttressing its (and their) analysis with the federal Indian law canon of interpretation requiring that ambiguous statutes be interpreted in Indians’ favor, the Ninth Circuit cited Goldberg’s article (fourteen times) and Cree’s student note (ten times) for three propositions.<sup>145</sup>

First, the court held that the county ordinances were not “civil laws of [the] State . . . that are of general application . . . within the State,” and thus were not within PL 280’s grant of jurisdiction.<sup>146</sup> PL 280 “subjected Indian country only to the civil laws of the state, and not to local regulation.”<sup>147</sup> Beyond the “immediate burden” the county ordinances would place on Barrios and Baga, the court emphasized the more general “devastating impact the county’s construction of the statute would have on tribal self-rule and economic development of reservation resources[.]”<sup>148</sup> Moreover, even if the ordinances were “laws of the State,” PL 280 expressly prohibited them because they encumbered Indian trust land and sought to regulate it in a manner inconsistent with federal law, namely the statutes that authorized the establishment of the Santa Rosa Rancheria and the Bureau of Indian Affairs and Indian Health Service to provide housing and sanitation services there and on other reservations.<sup>149</sup>

Second, when Congress passed PL 280, it was focused on criminal jurisdiction and gave “little, if any, thought” to subjecting reservation lands to local

141. *Id.* at 3 (emphasis added) (citations omitted) (citing U.S. Supreme Court authority and explaining that “[c]ourts have uniformly held that where Congress or a federal agency . . . has authorized and funded a construction project [ ] on *United States land*, the project is exempt from state or local regulations that would hinder [its] completion”).

142. *Id.* at 7, 16 (“[T]he policy considerations that prompted the enactment of P.L. 280 and principles of comity[] suggest that the federal government should comply with county ordinances and other local standards when at all feasible.”).

143. *Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655, 658 (9th Cir. 1975).

144. *Id.*

145. The court also cited Monroe Price’s textbook (parts other than the section Professor Goldberg is credited for) three times.

146. *Id.* at 659.

147. *Id.* at 661 (citing Goldberg, *supra* note 18, at 575–76; Cree, *supra* note 121, at 1458).

148. *Id.*

149. *Id.* at 664–68 (citing and discussing 28 U.S.C. § 1360(b), 25 U.S.C. § 1.4, 25 U.S.C. § 13 and 42 U.S.C. § 2004a, and the Indian Reorganization Act, 25 U.S.C. § 5108 (formerly cited as 25 U.S.C. § 465)).

ordinances.<sup>150</sup> The court rejected King County's argument that Congress intended a broad grant of jurisdiction through the statute's and its legislative history's "assimilationist . . . tone."<sup>151</sup> Third, interpreting PL 280 to give local governments jurisdiction would contravene the new federal Indian policy of self-government and economic development: "[S]ubjecting . . . reservation[s] to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities."<sup>152</sup> And, in language later used by the Supreme Court in *Bryan*, the Ninth Circuit cited Professor Goldberg for a fourth proposition—that Congress contemplated "the continued vitality and operation of . . . tribal government[s]" by including in PL 280 a provision that "[a]ny tribal ordinance . . . heretofore *or hereafter* adopted by any Indian tribe . . . shall, if not inconsistent with any applicable civil law of the State, be given full force."<sup>153</sup>

But the Ninth Circuit held only that *counties* lacked jurisdiction to regulate land use on Indian reservations; it interpreted PL 280 to grant California and other states general civil jurisdiction in Indian country.<sup>154</sup> A year later, the Supreme Court in *Bryan v. Itasca County*, citing the Ninth Circuit's *Santa Rosa* opinion and Goldberg's article repeatedly, took the interpretation of PL 280 a step further. It held not only that counties could not tax tribal members' mobile homes on reservations under PL 280, but that PL 280 did not give tax and other civil-regulatory jurisdiction to the *states*.<sup>155</sup> This holding subsequently evolved into the civil/regulatory–criminal/prohibitory distinction that figured so prominently in *Cabazon*.<sup>156</sup>

### B. Taxes in Minnesota and Nebraska

The *Bryan v. Itasca County* litigation started after Russell Bryan, a member of the Minnesota Chippewa Tribe living with his wife Helen and their five children on the Leech Lake Indian Reservation, received tax notices in the summer of 1972 from Itasca County assessing personal property taxes on their trailer home.<sup>157</sup> Ms.

150. *Id.* at 661–62 (citing Goldberg, *supra* note 18, at 536–37, and Cree, *supra* note 121, at 1463–69, 1488–89, and dismissing Kings County's reliance on the language about making Indians "full and equal citizens" emphasized in *Rincon Band of Mission Indians v. Cnty. of San Diego*, 324 F. Supp. 371, 373–76 (S.D. Cal. 1971)).

151. *Id.* at 661.

152. *Id.* at 663–64 (citing, *inter alia*, Goldberg, *supra* note 18, at 549–51; Cree, *supra* note 121, at 1471–75, 1487).

153. *Id.* at 663 (emphasis added) (quoting 28 U.S.C. § 1360(c) and citing Goldberg, *supra* note 18, at 582); *see also infra* note 204 and accompanying text.

154. In December 1974, during the *Santa Rosa* litigation, the United States, the Hoopa Valley Tribe, and the Hoopa Valley Housing Authority filed suit in the U.S. District Court for the Northern District of California to enjoin Humboldt County from enforcing its zoning and building codes on the Hoopa Valley Reservation. The district court enjoined the county from enforcing its laws in October 1976, and the Ninth Circuit upheld this decision in April 1980, finding that *Santa Rosa* was "squarely on point and therefore controlling." *United States v. Humboldt Cnty.*, 615 F.2d 1260, 1261 (9th Cir. 1980).

155. *See infra* note 197 and accompanying text.

156. *See Washburn, supra* note 5, at 959–64; *see also infra* Parts V and VI.

157. Washburn, *supra* note 5, at 919.

Bryan mailed the notices to the newly established office of the Leech Lake Reservation Legal Services Project (now Anishinaabe Legal Services), whose attorneys then filed a class-action lawsuit in Minnesota state court in August 1973, challenging the taxes against the Bryans and other Indians similarly situated. Because the Bryans had purchased the home with their own money, there was no federal government involvement like in *Santa Rosa*.<sup>158</sup>

The Legal Services Project attorneys argued that PL 280 gave states only criminal and limited civil jurisdiction, that the County's tax was not a "law of the state" applicable under PL 280, and that state power to tax reservation Indians and their property required express congressional authorization, which PL 280 did not give.<sup>159</sup> The argument about states' limited civil jurisdiction under PL 280 came essentially verbatim from the article NARF attorneys Dan Israel and Thomas Smithson had published in the *North Dakota Law Review* in January 1973.<sup>160</sup> PL 280 gave states "jurisdiction over *civil causes of action*" and provided that "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 [I]ndian country as they have elsewhere in the State[.]"<sup>161</sup> Thus "Congress never intended 'civil laws' to mean the entire array of state non-criminal laws, but, rather, . . . intended 'civil laws' to mean those laws which have to do with private rights and status[]" like "contract, tort, marriage, divorce, insanity, descent, etc."—not "laws declaring or implementing state sovereign powers, such as the power to tax, grant franchises, etc."<sup>162</sup>

The trial court rejected all of these arguments and ruled against the Bryans in December 1973, adopting an assimilationist view of PL 280 similar to the district courts in the Rincon, Pechanga, Cahuilla, and Agua Caliente cases from Southern California.<sup>163</sup> After the trial court's decision, Gerald (Jerry) Seck was hired as the director for the Legal Services Project office at Leech Lake.<sup>164</sup> Seck took over the *Bryan* litigation, "reached out to experts[.]" and brought on board Dan Israel from NARF.<sup>165</sup> Israel had been working with fellow NARF attorneys Bob Pelcyger, John

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158. *Id.* at 923–25.

159. Complaint, *Bryan v. Itasca Cnty.*, No. 25081 (Minn. 9th Jud. Dist. Dec. 8, 1973), reprinted in Appellant's Brief app. at A-1 to A-4, *Bryan v. Itasca Cnty.*, 228 N.W.2d 249 (Minn. 1975) (No. 44947); see also Washburn, *supra* note 5, at 925 (discussing arguments and the attorneys' "aggressive strategic choice" not to argue that the Bryans' mobile home was affixed to the land and thus real property expressly exempted from taxation under PL 280).

160. Israel & Smithson, *supra* note 122.

161. Petitioner's Brief at 9, *Bryan*, 228 N.W.2d 249 (No. 75-5027) (emphases in brief) (quoting 28 U.S.C. § 1360(a)).

162. *Id.* at 9–10. This language appears verbatim in Israel and Smithson's article. See Israel & Smithson, *supra* note 122, at 296.

163. See Washburn, *supra* note 5, at 926 (quoting Minn. 9th Jud. Dist. Memorandum at A-22 (Dec. 8, 1973)) ("[Minnesota District Judge James F. Murphy] noted that the Indians living on Leech Lake were citizens of Minnesota, that they had access to the [state] justice system and county services, and that as citizens they had the right to vote."); see also *supra* Part II (discussing *Rincon*, *Ricci*, *Madrigal* and *Agua Caliente* opinions).

164. Washburn, *supra* note 5, at 927.

165. *Id.* at 929.

Echohawk, and Yvonne Knight (a Ponca tribal member and apparently the first woman “to attend law school in order to pursue a career in Indian law”) on litigation in federal courts in Nebraska involving whether PL 280 authorized state income taxes on Indians living and working on reservations.<sup>166</sup>

Israel “helped Seck flesh out the legal arguments for an appeal.”<sup>167</sup> Minnesota had no appeals court then, so the case went directly to the Minnesota Supreme Court.<sup>168</sup> Three briefs were filed in support of the Bryans. Thomas Smithson (Israel’s law review article co-author), Israel, and Echohawk authored the Bryans’ brief.<sup>169</sup> Kent Tupper, who represented Dennis Morrison in the Grand Portage lottery case discussed above, and Bernie Becker, a former legal services attorney who had become a professor at the William Mitchell College of Law, wrote the Minnesota Chippewa Tribe’s brief.<sup>170</sup> The United States filed an amicus brief written mostly by Reid Chambers, who had left UCLA to become the associate solicitor for the Division of Indian Affairs at the Department of the Interior.<sup>171</sup> All three briefs focused on tax immunity and exemption, arguing that the taxes interfered with tribal sovereignty and treaty rights, and that PL 280 did not authorize taxation of reservation Indians or their property.<sup>172</sup>

While *Bryan* was on appeal, the federal district court in the Nebraska income-tax litigation that Israel was also working on—*Omaha Tribe of Indians v. Peters*—held that PL 280 gave states the authority to tax tribal members’ reservation income.<sup>173</sup> NARF attorneys Israel, Echohawk, and Knight had filed the lawsuit on behalf of the Omaha Tribe, Santee Sioux Tribe, and Winnebago Tribe following the Supreme Court’s March 1973 ruling in *McClanahan v. Arizona State Tax Commission* that Arizona could not tax the income of Rosalind McClanahan, a Navajo woman who lived and worked in the Navajo Nation.<sup>174</sup> The Tribes’ trial-court briefs focused on tax exemption, arguing that *McClanahan*’s holding applied

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166. Roy, *supra* note 79, at 27, 179; *see also Modern Day Warrior: NARF Attorney Yvonne Knight Retires*, NATIVE AM. RTS. FUND (Oct. 26, 2007), <https://www.narf.org/modern-day-warrior-narf-attorney-yvonne-knight-retires/> [<https://perma.cc/2FXR-NN69>]. The Nebraska income-tax litigation is discussed *infra* notes 173–78 and accompanying text.

167. Washburn, *supra* note 5, at 929.

168. *Id.* at 931.

169. *Id.* at 932 nn.74–75.

170. *Id.* at 932 n.76.

171. *Id.* at 932 n.79; *see also* Chambers, *supra* note 80, at 396–98.

172. *See* Appellant’s Brief, Amicus Curiae Brief of the Minn. Chippewa Tribe, and Brief for United States as Amicus Curiae, *Bryan v. Itasca Cnty.*, 228 N.W.2d 249 (Minn. 1975) (No. 75-5027).

173. *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).

174. 411 U.S. 164 (1973). Rick Collins, a former CRLA and CILS (and future NARF) attorney who served as the director of litigation for Dinebeiiina Nahiilna Be Agaditahe (DNA) Legal Services from 1971 to 1975, argued *McClanahan* before the Supreme Court. *See* Roy, *supra* note 79, at 4; *see also* Professor Richard B. Collins, *Resume*, UNIV. OF COLO. L. SCH., <https://lawweb.colorado.edu/files/vitae/collins.pdf> [<https://perma.cc/3EHU-S7YN>] (last visited Oct. 5, 2021). NARF filed an amicus brief, authored by John Echohawk, in support of Ms. McClanahan. *See* Brewer & Cadue, *supra* note 5, at 32.

on all reservations, including those in PL 280 states.<sup>175</sup> On appeal, the Nebraska Tribes' briefs, authored by Israel and Bob Pelcyger, added the argument (à la Israel's law-review article) that "those civil laws of [the] State" PL 280 said applied on reservations meant laws dealing with private rights, not states' general sovereign powers like "the unique power to raise revenue."<sup>176</sup>

Importantly, Israel and Pelcyger's appellate reply brief raised for the first time a "choice-of-law" argument: Congress, by providing that "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 in the State[.]" intended merely to clarify that state contract, tort, marriage, and other laws would be used in state court civil lawsuits involving reservation Indians (a personal-injury case arising on the reservation, for example).<sup>177</sup> The Eighth Circuit Court of Appeals rejected all of the Tribes' arguments, stating that it was "clear" that PL 280's "civil laws" language included "everything but 'criminal' laws."<sup>178</sup> However, this choice-of-law argument would be critical—and successful—when *Bryan* reached the U.S. Supreme Court.<sup>179</sup>

In March 1975, two months before the Eighth Circuit issued its *Peters* opinion, a unanimous Minnesota Supreme Court ruled against the Bryans, rejecting their argument that PL 280 was "a 'law and order' statute not intended to grant . . . sweeping powers to state and local governments."<sup>180</sup> Adopting an expansive view of PL 280's civil jurisdiction language and an assimilationist view of the statute, it "drew the bulk of its analysis . . . verbatim" from the U.S. district court opinion in *Peters*.<sup>181</sup> Quoting the *Peters* opinion, the Minnesota Supreme Court called PL 280 "a step intended to prepare the Indian tribes for . . . assimilation by making all state laws applicable to Indians and in Indian country except as those laws may contravene the provisions of the statute itself."<sup>182</sup> PL 280 was "a clear and express grant of power"—both criminal and civil jurisdiction, including the power to tax—that was "plenary except as . . . expressly limited by the statute."<sup>183</sup> Any

175. See Motion for Summary Judgment, *Peters*, 382 F. Supp. 421 (D. Neb. 1974) (No. 74-L-13).

176. Appellants' Opening Brief at 13–14, *Peters*, 516 F.2d 133 (8th Cir. 1974) (No. 74-1868) (quoting 28 U.S.C. § 1360(a)).

177. Appellants' Reply Brief at 3–4, *Peters*, 516 F.2d 133 (8th Cir. 1974) (No. 74-1868) (quoting 28 U.S.C. § 1360(a)).

178. *Peters*, 516 F.2d at 137 (holding that PL 280 "[gave] Nebraska's civil laws of general application the same force on Indian reservations as elsewhere in the state").

179. See *infra* notes 195–206 and accompanying text (discussing choice-of-law argument in *Bryan*).

180. *Bryan v. Itasca Cnty.*, 228 N.W.2d 249, 253–54 (Minn. 1975).

181. Washburn, *supra* note 5, at 934, 934 n.97.

182. *Bryan*, 228 N.W.2d at 254 (quoting *Omaha Tribe of Indians v. Peters*, 382 F. Supp. 421, 425 (D. Neb. 1974)).

183. *Id.* at 254–55 (quoting *Peters*, 382 F. Supp. at 424–27). Both courts described this interpretation as "strongly supported by the legislative history" of PL 280, which they said indicated PL 280 was drafted because:

[T]he Indians of several States ha[d] reached a stage of acculturation and development that ma[d]e[] desirable extension of States civil jurisdiction

other interpretation would require “read[ing] into [PL 280] something which simply is not there.”<sup>184</sup>

The U.S. Supreme Court granted review to hear the case on November 3, 1975, the same day the Ninth Circuit issued its opinion in the *Santa Rosa* case.<sup>185</sup> Dan Israel, Bernie Becker, and Jerry Seck wrote the Bryans’ brief.<sup>186</sup> Like the Eighth Circuit reply brief Israel filed in *Peters*, it argued that the Congress that passed PL 280 was “primarily concerned” with criminal jurisdiction.<sup>187</sup> Israel and his co-counsel again made the choice-of-law argument that Congress intended the “civil laws of [the] State” language in PL 280 to mean only that state laws would apply in state court lawsuits involving Indians, which PL 280 authorized.<sup>188</sup> Had Congress intended to give states tax authority in PL 280, Congress would have expressly done so like it did in laws passed around the same time as PL 280 that terminated particular tribes and clearly gave states tax jurisdiction over those Indians.<sup>189</sup> The Bryans’ Supreme Court brief also argued that PL 280 did not give counties any jurisdiction, citing the Ninth Circuit’s opinion in *Santa Rosa*.<sup>190</sup>

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to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.’

*Id.* at 255 (quoting *Peters*, 382 F. Supp. at 426) (both quoting U.S. Code Cong. & Admin. News, 2409, 2412 (1953)); *see also id.* (quoting *Peters*, 382 F. Supp. at 427) (“It was Congress’ goal that this legislation be a step toward the day when the federal trusteeship over Indians could be finally ended through the assimilation of the tribes into the mainstream of life of the affected states. There is no suggestion in either the legislative history of the Act, or in the language of the Act itself, that Congress intended that Indian tribes should derive the advantages of state law, while, at the same time, being shielded from its burdens.”) (internal citations omitted).

184. *Id.* at 255 (quoting *Peters*, 382 F. Supp. at 426). The court acknowledged that federal Indian policy had changed but wrote that it was “bound to interpret the statutes according to the intent of Congress at the time of passage of Public Law 280. If Congress today intends a different result, it can easily repeal or modify Public Law 280.” *Id.* at 254.

185. *Bryan v. Itasca Cnty.*, 423 U.S. 923 (1975).

186. Washburn, *supra* note 5, at 935.

187. Brief for Petitioner at 29–30, *Bryan*, 228 N.W.2d 249 (Minn. 1975) (No. 75-5027).

188. *Id.* at 29; *see also supra* notes 176–177 and accompanying text (discussing choice-of-law argument in *Peters*). In an April 4, 2007 phone interview with Professor Kevin Washburn, Israel said that a “‘light went on’ in his head late one evening in in the library” while doing research for the Bryans’ Supreme Court brief, and that “[i]t became clear to [him] that ‘Congress intended the civil portion of PL 280 to govern the *where* and *how* of disputes and not to grant general regulatory power.’” Washburn, *supra* note 5, at 935 (emphasis in Washburn article) (citing and quoting Interview with Dan Israel (Apr. 4, 2007)). As noted *supra* in notes 176–177 and the accompanying text, Israel and Bob Pelcyger made this argument in their appellate brief in *Peters*, filed almost a year before the Bryans’ Supreme Court brief.

189. Brief for Petitioner at 35, *Bryan*, 228 N.W.2d 249 (Minn. 1975) (No. 75-5027) (citing termination legislation for the Menominee Tribe, Ponca Tribe, and other tribes).

190. *Id.* at 46 (citing *Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655 (9th Cir. 1975)).

At the urging of Reid Chambers, the Department of Interior lawyer who had worked with NARF and California Indian Legal Services attorneys when he was a professor at UCLA, Interior Department Solicitor (general counsel) Kent Frizzell persuaded the U.S. Solicitor General to file an amicus brief, even though Frizzell thought that the Minnesota Supreme Court's interpretation of PL 280 was "probably correct."<sup>191</sup> Frizzell, however, agreed that the Bryans' position was also a reasonable one and thus that the United States should support it because of its fiduciary obligations to Indigenous peoples.<sup>192</sup> Like the Bryans' brief, the United States' brief argued that PL 280 dealt principally with criminal law, granted states civil jurisdiction only over "civil causes of action" (not tax jurisdiction), and gave counties no jurisdiction at all.<sup>193</sup> Both the Bryans' and the United States' briefs cited Professor Goldberg's recently published *UCLA Law Review* article.<sup>194</sup>

During oral argument, Bernie Becker used the choice-of-law argument to argue against state tax jurisdiction. According to Professor Kevin Washburn:

Becker . . . offered the Court a way out of reading PL 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 [PL 280] was merely intended, on the civil side, to create a forum for civil disputes.<sup>195</sup>

Washburn noted that "Becker's argument . . . dovetailed nicely with the leading scholarly work on Public Law 280," Goldberg's article.<sup>196</sup>

Relying on Goldberg's article, the Supreme Court unanimously held in April 1976 that PL 280 did not give states general civil-regulatory jurisdiction over

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191. Chambers, *supra* note 80, at 397, 405–07.

192. E-mail from Reid Chambers to author (Sep. 29, 2020, 9:41 AM PDT) (on file with author). Comparing the brief Frizzell authorized the United States to file in the Ninth Circuit consolidated *Rincon* litigation, see *supra* note 124 and accompanying text (discussing litigation and U.S. brief), Chambers wrote that "[i]t emphasized federal power and not the federal trust duty or tribal government authority as a limit on state power. [Frizzell] authorized this quaint brief [in *Rincon*] but became strongly committed to implementing the trust responsibility just a few years later as Solicitor at [the] Interior [Department . . .]" E-mail from Reid Chambers to author, *supra*.

193. Memorandum for the United States as Amicus Curiae at 7, 10–12, *Bryan*, 228 N.W.2d 249 (Minn. 1975) (No. 75-5027) (also citing the Ninth Circuit's *Santa Rosa* opinion).

194. Brief for Petitioner at 16, *Bryan*, 228 N.W.2d 249 (Minn. 1975) (No. 75-5027) (also citing Linda Cree's student note in the *Hastings Law Journal*); Memorandum for the United States at 10, 12, *Bryan*, 228 N.W.2d 249 (Minn. 1975) (No. 75-5027) (also citing the Ninth Circuit's *Santa Rosa* opinion). Listed among counsel on the United States amicus brief was Harry Sachse, who would eventually become law partners with Reid Chambers after they left their jobs as government attorneys. Chambers, *supra* note 80, at 395; see also *Proud Legacy*, SONOSKY LLP, <http://www.sonosky.com/about-legacy.html> [<https://perma.cc/W2FT-WC6K>] (last visited Oct. 5, 2021).

195. Washburn, *supra* note 5, at 940 (citing Transcript of Oral Argument, *Bryan v. Itasca Cnty.*, 423 U.S. 923 (1975)).

196. *Id.* at 932 n.146.

Indian tribes and their citizens' on-reservation activities.<sup>197</sup> Writing for the Court, Justice William J. Brennan, Jr. first cited Goldberg to emphasize that Congress, when passing PL 280, was focused predominantly on "lawlessness" and criminal jurisdiction.<sup>198</sup> Noting that Congress did not express a policy regarding civil jurisdiction or an intent to give states authority to tax reservation Indians or their property,<sup>199</sup> the Court invoked the federal Indian law canon of interpretation and adopted Dan Israel's and Bernie Becker's argument that PL 280's civil jurisdiction language was merely about choice of law in state-court lawsuits involving Indians, not a grant of civil-regulatory jurisdiction.<sup>200</sup>

The Court again cited Goldberg—along with the Ninth Circuit's *Santa Rosa* opinion, Linda Cree's student note, and a *California Law Review* student comment—to explain that "nothing in [PL 280's] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations.'"<sup>201</sup> That result, Justice Brennan wrote, was "possible . . . if tribal governments and reservation Indians were subordinated to the full panoply of civil

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197. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 387–92 (1976); *see also* Washburn, *supra* note 5, at 952 ("The Court . . . articulated Professor Goldberg's central thesis over several paragraphs and ultimately rejected 'the expansive reading of [PL 280] given by the Minnesota Supreme Court and urged by the State Attorney General.'"); *id.* at 953 ("The Court's opinion also accepted an argument raised in the [U.S.] Solicitor General's amicus brief, and credited in both contexts to Professor Goldberg, that a broad reading of [PL 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.'") (first citing Memorandum for the United States at 10, *Bryan*, 228 N.W.2d 249 (Minn. 1975) (No. 75-5027); and then citing *Bryan*, 426 U.S. at 388 n.14).

198. *Bryan*, 426 U.S. at 379–80 (citing Goldberg, *supra* note 18, at 541–42).

199. *Id.* at 381.

200. *Id.* at 381–84, 384 n.10 (citing Israel & Smithson, *supra* note 122, at 292, 296, and finding that based on "the sparse legislative history . . . , [28 U.S.C. § 1360(a) was] primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting such courts of the States to decide such disputes[,] and that the "those civil laws of [the] state" language "authorizes application by the state courts of their rules of decision to decide such disputes"). The Court pointed to PL 280's "express prohibition of any 'alienation, encumbrance, or taxation' of any trust property" in 28 U.S.C. § 1360(b), which it found to be "simply a reaffirmation of the existing Indian-Federal Government relationship in all respects save the conferral of state-court jurisdiction to adjudicate private civil causes of action involving Indians." *Id.* at 391.

201. *Id.* at 388, 388 n.14 (citing *Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655, 662–63, 666–68 (9th Cir. 1975); Goldberg, *supra* note 18; Cree, *supra* note 121; Richard L. Perez, Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CAL. L. REV. 1261 (1971)) (other internal citations omitted). The Court also cited Goldberg's article when discounting the language in the House Report on PL 280 stating that "the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian county[.]" concluding that "not too much can be made of this unelaborated statement[.]" especially given Congress's focus on criminal jurisdiction. *Id.* at 388 n.13 (citing Goldberg, *supra* note 18, at 543).

regulatory powers, including taxation, of state and local governments.”<sup>202</sup> U.S. Indian policy had changed from assimilation to self-determination in the years since Congress passed PL 280, and PL 280 “was plainly not meant to effect total assimilation.”<sup>203</sup>

Not only was there “notably absent any conferral of state jurisdiction over the tribes themselves” in PL 280, the statute actually “contemplate[d] the continuing vitality of tribal government[s].”<sup>204</sup> Again invoking the Indian law canon of interpretation, Brennan wrote that if Congress “had intended to confer upon the States general civil regulatory powers, including taxation over reservation Indians, it would have expressly said so.”<sup>205</sup> The Court refused “to infer an intent to terminate . . . .”<sup>206</sup>

### C. The Scope and (Potential) Significance of Bryan

After it decided *Bryan*, the Supreme Court vacated the Eighth Circuit’s decision in *Peters* in June 1976, then denied review of the Ninth Circuit’s decision in *Santa Rosa* in January 1977.<sup>207</sup> The Court’s denying review in *Santa Rosa* suggested that *Bryan*’s holding that states lacked civil-regulatory jurisdiction on Indian reservations included not just tax jurisdiction but also states’ general regulatory powers, including zoning and land use laws.<sup>208</sup> Those state regulatory

202. *Id.* at 388.

203. *Id.* at 387–88. The Court also noted that the Indian Civil Rights Act of 1968 had amended PL 280 to require tribal consent for state jurisdiction, see *id.* at 386, and explained that the Court was “not obliged in ambiguous instances to strain to implement (an assimilationist) policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.” *Id.* at 389 n.14 (quoting *Santa Rosa*, 532 F.2d at 663).

204. *Id.* at 389 (citing 28 U.S.C. § 1360(c) (providing for the “full force and effect” of any tribal ordinances or customs “heretofore or hereafter adopted by an Indian tribe . . . if not inconsistent with any applicable civil law of the State”)).

205. *Id.* at 390.

206. *Id.* at 393 (citing and quoting *Mattz v. Arnett*, 412 U.S. 481, 504–05 (1973)).

207. *Omaha Tribe v. Peters*, 427 U.S. 902 (1976); *Santa Rosa Band of Indians v. Kings Cnty.*, 429 U.S. 1038 (1977). After the Ninth Circuit panel ruled against Kings County in November 1975, see *supra* notes 143–153 and accompanying text, the County filed a petition for rehearing en banc, and the State of California filed an amicus brief in support. *Petition for Rehearing In Banc, Santa Rosa Band of Indians v. Kings Cnty.*, No. 74-1565 (9th Cir. Dec. 16, 1975); *Brief of the State of California as Amici Curiae, Santa Rosa Band of Indians v. Kings Cnty.*, No. 74-1565 (9th Cir. Dec. 16, 1975). The Ninth Circuit denied the County’s petition in March 1976. *Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655 (9th Cir. 1976).

208. The Ninth Circuit held in *Santa Rosa* only that counties lack civil-regulatory jurisdiction in Indian country; it did not address state civil jurisdiction. See *supra* notes 146–154 and accompanying text. During oral argument in *Cabazon*, Justice Stevens questioned whether *Bryan* held that PL 280 lacked civil-regulatory jurisdiction over tribes, see *Transcript of Oral Argument* at 32, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (No. 85-1708) [hereinafter *Cabazon Transcript*], and Justice Rehnquist stated that “[a]ll *Bryan* held was that a tax statute couldn’t be applied in Itasca County.” *Id.* at 45.

powers also included the authority to regulate gambling.<sup>209</sup> But the Supreme Court did not clarify that PL 280 did not give states general civil-regulatory jurisdiction—including over gaming—until a decade later in *Cabazon*.<sup>210</sup>

In hindsight, *Bryan*'s holding is quite remarkable—as is its unanimity.<sup>211</sup> At least some Justices hesitantly joined the opinion. Justice Byron White, who had joined Justice William O. Douglas in his dissent from the Court's denial of certiorari in the Tulalip waste-disposal case,<sup>212</sup> wrote to Brennan: "I was the other way in this case but I shall acquiesce with a graveyard dissent."<sup>213</sup> Justice Lewis Powell stated that he was "following . . . White's capitulation to [Brennan's] persuasive powers!"<sup>214</sup>

209. Cf. Washburn, *supra* note 5, at 944 (noting that, during oral argument in *Bryan*, "[Bernie] Becker may have inadvertently foreshadowed the gaming controversy by noting that his argument would include 'certain other kinds of regulatory powers.' However, he quickly returned the argument to the narrow issue of taxes.").

210. As journalist Suzette Brewer has noted, although *Bryan* "received little notice in the mainstream media at the time, the decision had far-reaching implications for tribes across the country. But the impact of the historic case and its interpretation by the Court would not be felt in full force until almost a decade later." Brewer & Cadue, *supra* note 5, at 31–32; see also Washburn, *supra* note 5, at 950–51 (discussing coverage of the *Bryan* decision in the *Minneapolis Tribune*, *New York Times*, and *Saint Paul Pioneer Press*).

According to Franklin Ducheneaux:

[I]n the beginning, . . . *Bryan* . . . was kind of a low-flying case, not on anyone's radar until it hit the Supreme Court. But by the time the decision came down, everyone in Indian Country was aware and monitoring the case. And the states were certainly watching the case very closely because *Bryan* essentially truncated state jurisdiction. So the decision was kind of a surprise because it really plugged what had been a big hole in tribal sovereignty. The entire Indian bar was keeping up with it because it was a great victory. . . .

However, I sensed after *Bryan* came down that the tribes really weren't aware of [its] implications . . . until they began to experiment with economic development. . . . [I]nitially the tribes and their lawyers perhaps did not understand the long-term implications of that case in terms of other applications—like gaming.

Brewer & Cadue, *supra* note 5, at 32 (quoting Ducheneaux).

211. For a discussion of Justice Brennan's role in the Court's reaching a unanimous decision, see Washburn, *supra* note 5, at 954 (noting Justice Brennan's charm and that he "frequently labored to win over as many Justices as possible to strengthen the force of his majority opinions").

212. *Snohomish Cnty. v. Seattle Disposal Co.* 389 U.S. 1016 (1967) (Douglas, J. dissenting) (arguing that the Court should have granted review to overturn the Washington Supreme Court's decision holding that PL 280 did not give Snohomish County jurisdiction to regulate the landfill); see also *supra* notes 61–64 and accompanying text.

213. Washburn, *supra* note 5, at 955 (quoting 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)).

214. *Id.* (quoting 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)).

The Indian law canon of interpretation figured prominently in *Bryan*, allowing the Justices to read PL 280's civil jurisdiction language (providing that state "civil laws . . . of general application . . . shall have the same force and effect within . . . Indian country as they have elsewhere in the State") as not granting states general civil (regulatory) jurisdiction.<sup>215</sup> But this canon of interpretation applies only if a statute is found to be ambiguous.<sup>216</sup> Conveniently, the Justices had two sources to help them find that ambiguity: the choice-of-law argument in Israel & Smithson's law-review article, and Professor Goldberg's argument that PL 280 was primarily a criminal-jurisdiction statute.<sup>217</sup>

Congress of course could have drafted a more express grant of civil jurisdiction. However, the legislators who enacted PL 280 in 1953 seemingly intended to give states broad general civil jurisdiction—including civil-regulatory jurisdiction—on Indian reservations.<sup>218</sup> Every court before had so held, including the Minnesota Supreme Court in *Bryan* and the federal courts in the Nebraska income tax and early 1970s California cases.<sup>219</sup> Even in cases where tribes prevailed, the courts assumed Congress gave states broad civil jurisdiction but based their decisions on finding that one of PL 280's exceptions applied (as in the Tulalip landfill case) or that PL 280 did not give counties (as opposed to states) jurisdiction (as in *Santa Rosa*).<sup>220</sup> That understanding prevailed even among the lawyers who argued the cases for the tribes. But they did their jobs—the legal services attorneys

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215. 28 U.S.C. § 1360(a). For an examination of the Court's reliance on the Indian law canon of interpretation and willingness to look beyond congressional intent to reach a practical result consistent with post-enactment developments—namely, the repudiation of the termination policy—and federal Indian law principles, see Washburn, *supra* note 5, at 955–57 (discussing William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 374–375 (1990); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 431–32 (1993); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1165–68, 1179 (1990)). Professors Philip Frickey and William Eskridge have argued that the *Bryan* Court "ignore[d] [PL 280's] apparent textual meaning" and that "[o]n the face of the statute, Minnesota probably had the better argument." Eskridge & Frickey, *supra*, at 955.

216. See COHEN'S HANDBOOK, *supra* note 133, at 120 (discussing *Santa Rosa*).

217. See *supra* notes 197–198, 200–201, and accompanying text (discussing Justices citing Israel & Smithson and Goldberg articles).

218. If Congress did not intend for states to have broad civil-regulatory jurisdiction—encompassing tax and land-use jurisdiction—why did it include prohibitions against state laws alienating, encumbering, or taxing Indian property? See 28 U.S.C. § 1360(b); see also *supra* notes 30–31 and accompanying text (discussing PL 280 and §§ 1360(a)–(b)). Seven years after *Bryan*, Justice Brennan (along with Justice Thurgood Marshall) joined an opinion written by Justice Harry Blackmun calling the language in § 1360(b) a "seemingly absolute" grant of state civil jurisdiction. *Rice v. Rehner*, 463 U.S. 713, 742 (1983) (Blackmun, J., dissenting) (noting that "[d]espite this seemingly absolute language, the Court found nothing in the statute or its history 'remotely resembling an intention to confer general state civil regulatory control over Indian reservations'").

219. See *supra* notes 183–184 and accompanying text (discussing *Bryan* and *Peters*); see also Part II (discussing the California cases).

220. See *supra* notes 52–56, 146–147, 154 and accompanying text (discussing the Tulalip and *Santa Rosa* cases).

as zealous advocates and the U.S. attorneys as trustees—and convinced the Supreme Court to change course.

The different outcomes in *Bryan* and *Santa Rosa* disallowing state and county civil jurisdiction, on the one hand, and cases like *Peters*, *Rincon*, and *Agua Caliente* adopting an assimilationist view of PL 280 no doubt resulted from opposing judicial views about the statute (its intent, history, and ambiguity), the federal Indian law canon of interpretation, and, ultimately, U.S. Indian policy and Indigenous sovereignty. However, the impact of Goldberg’s, Smithson and Israel’s, and Linda Cree’s law-review scholarship—and the NARF, CILS, Anishinaabe Legal Services, and other attorneys’ lawyering—is obvious and substantial. By restricting the civil aspects of PL 280 to only court jurisdiction, they shifted the interpretation of PL 280 and helped shape the future of Indian gaming. They also substantially changed federal Indian law by limiting state jurisdiction over nearly one-fourth of the reservation-based tribal population and over half of federally recognized tribes in the lower 48 states.<sup>221</sup> Including Alaska increases the number to seventy percent of all federally recognized tribes.<sup>222</sup>

What if the *Bryan* Court had limited its holding to tax authority, instead of state regulatory authority generally? What if the Court had simply ruled, as the Bryans’ lawyers tried to argue, that the tax violated PL 280’s express jurisdictional prohibitions because it was a tax on real property?<sup>223</sup> What if the Court, like the Ninth Circuit in *Santa Rosa*, had said only that counties lacked jurisdiction under PL 280, but that PL 280 gave jurisdiction to states? Like with the “what if” reflective queries posed regarding the Rincon cardroom, Grand Portage lottery, and Tulalip landfill litigation above,<sup>224</sup> we can only speculate how things might have turned out differently, including in the next Indian gaming cases.

*Bryan*’s holding, interpreted broadly, was that PL 280 did not give states civil-regulatory jurisdiction on Indian reservations. But courts would have to determine whether different states’ gambling laws were civil, as opposed to criminal, in nature. In a series of cases involving bingo (and cardrooms), including *Cabazon*, courts would wrestle with this question but ultimately classify the state laws as civil—and thus find them inapplicable in Indian country.<sup>225</sup> These courts drew upon the language and framework from *Bryan* and other contemporaneous cases involving on-reservation cigarette and fireworks sales.

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221. CHAMPAGNE & GOLDBERG, *supra* note 27, at 14.

222. *Id.*

223. *Cf.* Washburn, *supra* note 5, at 954 (noting that the Court “ignored various attempts by the Bryans’ own attorneys to present a more cautious case, such as the principle applied only to taxes, or that the mobile home constituted federal trust property”). The Minnesota Supreme Court also rejected the Bryans’ attempt to raise this argument, because it was not raised in the complaint. *Bryan v. Itasca Cnty.*, 228 N.W.2d 249, 256 (Minn. 1975).

224. *See supra* Part II.

225. *See infra* Part VI.

## V. CIGARETTES AND FIREWORKS CASES: THE LINKS BACK TO GAMBLING

*Bryan* is often understood to be the jurisprudential source of the civil/regulatory–criminal/prohibitory distinction, under which state laws that regulate a particular activity do not apply through PL 280, whereas laws that prohibit that activity do. *Bryan*, however, did not explicitly make this distinction. The first court to expressly apply the civil/regulatory–criminal/prohibitory distinction was the Ninth Circuit, in a 1977 decision involving the sale of fireworks on the Puyallup Indian Reservation in Washington.<sup>226</sup> The Supreme Court did not adopt the distinction until 1987, in *Cabazon*. The *Cabazon* Court also applied an interest-balancing test—weighing the respective interests of tribal, state, and the federal governments to determine whether states can regulate on-reservation activities involving non-Indians—that developed through cigarette-tax litigation dating back to the 1960s.<sup>227</sup>

The fireworks and cigarette cases together thus yielded a two-part framework the Court used in *Cabazon*. This framework first looks at whether the state prohibits the activity in question as a matter of public policy. If so, PL 280 gives a state jurisdiction to prohibit that activity on Indian reservations. If a state only regulates the activity, however, it does not have jurisdiction under PL 280. But even if the state lacks jurisdiction under PL 280, it may nonetheless have jurisdiction under the interest-balancing test if its interests are deemed sufficient enough to outweigh the tribal and federal interests involved.<sup>228</sup>

### A. Cigarettes and Washington State: The Interest-Balancing Test

The cigarette tax litigation that gave rise to the interest-balancing test began in 1967, when Washington State Department of Revenue agents raided Leonard Tonasket’s store on the Colville Indian Reservation and arrested him for selling cigarettes without a Washington state license.<sup>229</sup> Mr. Tonasket, a Colville tribal citizen, sued in Washington state court, arguing that the state’s sales and cigarette tax laws did not apply. The trial court ruled that they did, because of PL 280.<sup>230</sup>

On appeal, a unanimous Washington Supreme Court in 1971 adopted an assimilationist view of PL 280 and held that it gave states broad criminal and civil jurisdiction, including “state regulatory powers over merchandising activities of Indians upon their reservations in the same fashion as pertains to merchandising activities of off-reservation citizens.”<sup>231</sup> Tonasket appealed to the U.S. Supreme

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226. United States v. Marceyes, 557 F.2d 1361 (9th Cir. 1977).

227. See *infra* Part V.A.

228. See *infra* Part IV.B.

229. Tonasket v. Washington, 488 P.2d 281, 282 (Wash. 1971) [hereinafter Tonasket I]. For a discussion of the Washington cigarette-tax litigation by the attorneys for Mr. Tonasket, the Colville Tribes, and other tribes involved, see PIRTLE, *supra* note 5, at 376–91; ALVIN J. ZIONTZ, A LAWYER IN INDIAN COUNTRY: A MEMOIR 138–39 (2009).

230. Tonasket I, 488 P.2d at 282–83.

231. Tonasket v. Washington, 525 P.2d 744, 748 (Wash. 1974) [hereinafter Tonasket II] (discussing *Tonasket I*); see also *Tonasket I*, 488 P.2d at 283–84, 286 (“We

Court, which in April 1973 sent the case back to the Washington high court to address the impact of the Supreme Court's March 1973 *McClanahan* ruling that prohibited state taxation of reservation Indians' income.<sup>232</sup> In 1974, the Washington Supreme Court again held that Washington's taxes applied because of PL 280.<sup>233</sup> Tonasket again appealed to the U.S. Supreme Court, which dismissed the appeal "for want of a substantial [federal] question" in February 1975—nine months before it granted review in *Bryan v. Itasca County*.<sup>234</sup>

In between the two Washington Supreme Court decisions, the Colville, Makah, and Lummi Tribes brought a federal court challenge against the same state taxes.<sup>235</sup> The United States filed a separate lawsuit on behalf of the Yakima Indian Nation.<sup>236</sup> The U.S. district court enjoined Washington's enforcement of the taxes in November 1973. Following a trial in 1977, it issued a consolidated decision in 1978, concluding that the state taxes did not apply because they interfered with tribal self-government and were preempted by the Tribes' tax ordinances.<sup>237</sup> Washington had initially argued (as it did in the *Tonasket* litigation) that the taxes applied because of PL 280 but abandoned this argument after the Supreme Court's 1976 decision in *Bryan*.<sup>238</sup>

Washington appealed the district court's decision directly to the U.S. Supreme Court.<sup>239</sup> In 1980, the Court held, in *Washington v. Confederated Tribes of the Colville Indian Reservation*, that the state taxes applied, but only to sales to non-

cannot conceive that it was the intent of Congress to extend to Indians only the protection and benefits of state laws, with none of their attendant duties and responsibilities, and we find no such intention expressed in the statute."); *Tonasket I*, 488 P.2d at 288 ("[W]hen Congress enacted [PL 280] . . . providing that . . . the civil laws of the state should apply to the Indians on the reservations the same as to others, it intended that the only exceptions to the operation of those laws should be those enumerated in the act.>").

232. *Tonasket v. Washington*, 411 U.S. 451 (1973) (also ordering the Washington court to determine whether Washington's state legislature had validly assumed jurisdiction under PL 280); *see also supra* notes 174–175 and accompanying text (discussing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973)). The propriety of various states—including Washington—adopting PL 280 jurisdiction was the subject of the second part of Professor Goldberg's *UCLA Law Review* article. *See supra* notes 110–120 and accompanying text.

233. *Tonasket II*, 525 P.2d at 753–54 (also finding valid the state's process for assuming PL 280 jurisdiction).

234. *Tonasket v. Washington*, 420 U.S. 915, 915 (1975). This was the second time the U.S. Supreme Court had dismissed an appeal of a PL 280 case from the Washington Supreme Court for want of a substantial federal question. *See supra* notes 50–60 and accompanying text (discussing *Snohomish Cnty. v. Seattle Disposal Co.*, 425 P.2d 22 (Wash. 1967)).

235. *See Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 139–40 (1980).

236. *Id.* at 139.

237. *Id.* at 140.

238. *Id.* at 142 n.8.

239. Direct appeal was possible because a three-judge panel issued the district court decision. 28 U.S.C. § 1253.

Indians and members of other tribes.<sup>240</sup> The *Colville* Court employed an interest-balancing test that weighs the respective tribal, federal, and state interests; the extent to which value is generated on the reservation; and the different governments' relative provision of services associated with a particular activity.<sup>241</sup>

The Supreme Court applied this same interest-balancing test—which evolved beyond tax cases to cover other situations where states (or counties) seek to regulate on-reservation activities involving non-Indians—seven years later in *Cabazon*, to find that California's interests were not sufficient to regulate Indian reservation gaming.<sup>242</sup> But the interest-balancing test comes into play only if, and after, a court determines there is no jurisdiction under PL 280. That determination is made based on the civil/regulatory–criminal/prohibitory distinction first applied in a 1977 Ninth Circuit case involving fireworks sales on the Puyallup Reservation in Washington.

### ***B. Puyallup Reservation Fireworks: The Civil/Criminal Distinction***

In June 1975, U.S. marshals raided several fireworks stands on the Puyallup Reservation near Seattle.<sup>243</sup> The Puyallup tribal members who owned and operated the stands were prosecuted and convicted under the Assimilative Crimes Act (“ACA”), which adopted—or assimilated—into federal criminal law state crimes committed on federal lands, including Indian reservations.<sup>244</sup> They appealed their conviction to the Ninth Circuit Court of Appeals. Applying what it called the “regulatory/prohibitory distinction,” the Ninth Circuit held in *United States v. Marcyes* that whether the ACA incorporated Washington state law against “possessing unmarked and unclassified and dangerous fireworks,” which was the basis for the federal charges, depended on whether Washington's fireworks law was

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240. *Colville*, 447 U.S. at 160. The Court had earlier ruled in *Moe v. Confederated Salish and Kootenai Tribes*, decided the same year and Term as *Bryan v. Itasca County* (*Moe* was argued January 20 and decided April 27; *Bryan* was argued April 20 and decided June 14), that states could tax cigarette sales to non-Indians and nonmember Indians where no tribal tax was imposed, because the legal incidence of the state taxes fell on the nonmember (non-Indian) purchasers. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481–83 (1976). The question in *Colville* was whether state taxes applied where there was also a tribal tax.

241. *Colville*, 447 U.S. at 150–57; *see also id.* at 156–57 (explaining that tribes' interests are strongest when there is “value generated on the reservation by activities involving the [t]ribes and when the taxpayer is the recipient of tribal services;” conversely, states' interests are strongest when a tax “is directed at off-reservation value and when the taxpayer is the recipient of state services”). The test is often called the “*Bracker* interest-balancing test” because the Supreme Court also applied it later that Term in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–45 (1980).

242. *See infra* notes 250–51 and accompanying text (discussing *Cabazon*).

243. *United States v. Marcyes*, 557 F.2d 1361, 1363 (9th Cir. 1977).

244. 18 U.S.C. §§ 13, 1151–52.

prohibitory or merely regulatory.<sup>245</sup> If prohibitory, Washington's law would apply through the ACA; if only regulatory, it would not.<sup>246</sup>

The Ninth Circuit upheld the convictions, ruling that the Washington fireworks law was prohibitory and not regulatory because its intent and purpose was to prohibit the general possession, sale, or use of fireworks—as opposed to being “primarily a licensing law” with the purpose of regulating conduct and generating revenues.<sup>247</sup> Because the fireworks law was prohibitory, it was criminal in nature; therefore violating it constituted a (state) crime under the ACA. The Ninth Circuit's analysis—which looks at a state statute's (and the general statutory scheme's) overall purpose to determine whether it is prohibitory and therefore criminal in nature or regulatory and therefore civil—was then picked up by the courts in the Indian gaming cases, including *Cabazon*. They used it when deciding whether state bingo laws applied through PL 280, just as the Ninth Circuit used it to determine whether Washington's fireworks law applied through the ACA in *Marcy*.<sup>248</sup>

### C. Cigarettes, Fireworks, Gambling, and Economic Self-Determination

It is intriguing to contemplate a course of events in which the U.S. Supreme Court granted review in *Tonasket*, and its first case interpreting PL 280 involved cigarette sales to non-Indians instead of a county property tax on tribal members' mobile homes.<sup>249</sup> As things happened, the Court's 1987 decision in *Cabazon* relied on the (by then) well-established two-part framework developed through the trailer, cigarettes, and fireworks cases. The civil/regulatory–criminal/prohibitory distinction was critical for determining that because states allowed charitable organizations to operate bingo as a fund-raising activity, they did not prohibit bingo as a matter of public policy, and thus did not have jurisdiction under PL 280 to stop tribes from operating bingo games. But the interest-balancing dimension proved equally if not more important, especially at the Supreme Court, because federal policy developed in the 1980s to support tribes' bingo operations (as a way to fund tribal governments amidst federal funding cutbacks), thus tipping the balance in tribes' favor.<sup>250</sup>

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245. *Marcy*, 557 F.2d at 1363–64 (citing WASH. REV. CODE §§ 70.77.485, .540, .130).

246. *Id.* at 1364 (noting the “regulatory/prohibitory distinction” argued by the federal public defenders, and that “there is support for their contention in the case law; in *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383 (1944), the Supreme Court, in footnote 8, indicated that a strong argument exists that Congress did not intend to include the penal provisions of a state regulatory system within the ACA”).

247. *Id.*

248. *See infra* notes 309–10 and accompanying text.

249. *See* Chambers Interview, *supra* note 109 (discussing the *Tonasket* litigation and concern that the Court might issue a broad, unfavorable ruling regarding the application of PL 280).

250. *See infra* notes 286–99 and accompanying text. Tribes seem to prevail in interest-balancing cases only when the federal government is involved and federal and tribal interests align, such that the federal interests tip the balance against state jurisdiction. *Compare* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218–22 (1987) (finding no state jurisdiction over tribal bingo operations where there was significant federal

The links across the cigarette and fireworks and early Indian gaming cases are not just doctrinal but also economic. Selling cigarettes and fireworks were examples of enterprising and entrepreneurial things tribal governments and citizens were doing in the 1970s to promote economic development, develop reservation economies, and generate revenues to fund essential government functions and services—as the United States’ changed policy of Indian self-government (and self-sufficiency) encouraged. As developments in the courts, including the Supreme Court’s *Colville* holding that state taxes applied on sales to non-Indians, limited economic opportunities, tribal citizens and leaders began to explore other economic opportunities, including gambling.<sup>251</sup> As anthropologist Jessica Cattelino has written regarding the Seminole Tribe in Florida, “[c]igarettes set the stage for casinos.”<sup>252</sup>

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involvement, including funding for gaming projects and approval of tribal ordinances and management contracts), *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 *passim* (1983) (finding no state jurisdiction over non-Indian hunting and fishing on reservation where federal funding and support for resort complex and fish and game economy, including approving ordinances, stocking fish, and donating elk), *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 834, 841–42, 845–47 (1982) (finding no state tax jurisdiction over non-Indian construction company that built on-reservation school where comprehensive and detailed federal regulatory scheme for construction of Indian schools), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 137–38, 144–53 (1980) (finding no state gross receipts and fuel tax jurisdiction over non-Indian timber company operating on reservation where pervasive federal regulation of tribal roads and harvesting, sale, and management of timber), *with Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 *passim* (1989) (finding state tax jurisdiction over non-Indian petroleum company operating on reservation, absent express or implied congressional action to preempt state taxes), and *Washington v. Confederated Tribes of the Colville Rsrv.*, 447 U.S. 134, 138, 157–64 (1980) (finding state tax jurisdiction over cigarette sales to nonmembers where no federal involvement but only a congressional concern with fostering tribal self-government and economic development).

251. See AKINS & BAUER, *supra* note 5, at 308 (discussing Cabazon Band of Mission Indian’s smoke shop and liquor store, the Supreme Court’s *Colville* decision, and gambling and economic development efforts); Brewer & Cadue, *supra* note 5, at 38, 51 (Cabazon attorney Glenn Feldman discussing the relationship among the *Colville* decision, cigarette and alcohol sales, and gaming at Cabazon, explaining that “the idea of gaming was really the third try [following cigarette and alcohol sales] to find some mechanism to generate some revenue for the tribe”); LANE, *supra* note 5, at 36–37, 46–58 (discussing Cabazon smoke shop, liquor store, pharmaceutical joint-venture, and cardroom, explaining that “[t]he future of the cigarette venture, especially mail-order sales, awaited the decision of the Supreme Court in the *Colville* case”); Nicholas G. Rosenthal, *The Dawn of a New Day? Notes on Indian Gaming in Southern California*, in NATIVE PATHWAYS: AMERICAN INDIAN CULTURE AND ECONOMIC DEVELOPMENT IN THE TWENTIETH CENTURY 91, 93–95 (Brian Hosmer & Colleen O’Neill eds., 2004) [hereinafter Hosmer & O’Neill] (discussing campgrounds, orchards, prefabricated home manufacturing, and other economic development projects on the Rincon and other Southern California reservations in the 1970s, and how “tribes turned to offering various forms of gambling” in the 1980s); see also *Rice v. Rehner*, 678 F.2d 1340, 1342, 1349–52 (9th Cir. 1982) (remanding case to district court to determine, in light of *Colville*, whether Washington could impose state taxes on liquor sales to non-Indians and nonmember Indians at tribal retail outlets on the Muckleshoot and Tulalip reservations).

252. Jessica R. Cattelino, *Casino Roots: The Cultural Production of Twentieth-Century Seminole Economic Development*, in Hosmer & O’Neill, *supra* note 251, at 66, 81

## VI. GAMBLING AGAIN, BUT DIFFERENT THIS TIME

In 1977, some Puyallup tribal members and their partners began operating casinos on the Puyallup Reservation (the same reservation where tribal members' fireworks stands led to the *Marcy's* litigation discussed above), offering blackjack, poker, and dice games to "a clientele that included many non-Indians and some out-of-staters."<sup>253</sup> They were prosecuted under the Organized Crime Control Act ("OCCA"), a federal law that prohibits operating an "illegal gambling business"—defined in the statute as a gambling business that "is a violation of the law of a State or political subdivision in which it is conducted."<sup>254</sup>

Upholding their convictions in June 1980, the Ninth Circuit wrote in *United States v. Farris* that "Puyallup casinos in the Tacoma-Seattle area would flourish as mightily as those in . . . Las Vegas and Atlantic City[.]" that "Congress did not intend that Indians could freely engage in the large-scale gambling businesses that it forbade to all other citizens," and that "[c]asinos on Indian land would defeat or endanger the federal interests of protecting interstate commerce and preventing the takeover of legitimate organizations by organized crime."<sup>255</sup> Although the court held that Washington could not enforce its gambling laws against Puyallup tribal members on their reservation, it found the Puyallup defendants guilty because "Washington public policy prohibit[ed] the type of gambling business [they] conducted." Thus "their actions were a 'violation of the law of a State'" under the OCCA.<sup>256</sup>

A month before the Ninth Circuit's decision in *Farris*, a U.S. district court in Florida applied the civil/regulatory—criminal/prohibitory distinction in a case involving the Seminole Tribe's bingo hall.<sup>257</sup> It was the first federal court case involving tribal governments' (as opposed to individual tribal members') rights to conduct gaming on their reservations since the early 1970s *Rincon* litigation. Relying on the Supreme Court's decision in *Bryan* and the Ninth Circuit's opinions in *Farris*, *Marcy's*, and *Santa Rosa*, the courts in the Seminole litigation held that Florida's bingo laws did not apply on the Tribe's reservation.<sup>258</sup>

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(also noting that the Seminole Tribe opened its first smoke shops in 1976 "after hearing about efforts by other Native American tribes to open tax-free cigarette shops"); see also *Seminole Casino Hollywood*, *supra* note 2, at 1 (discussing Seminole Tribe smoke shop and bingo).

253. *United States v. Farris*, 624 F.2d 890, 892–93 (9th Cir. 1980); see also *Clinton*, *supra* note 4, at 34.

254. *Farris*, 624 F.2d at 892 (citing 18 U.S.C. § 1955). Washington did not have jurisdiction under PL 280 because it had assumed jurisdiction only over specific subject areas that did not include gambling. *Id.* at 894–95.

255. *Id.* at 894.

256. *Id.* at 895.

257. *Seminole Tribe of Fla. v. Butterworth*, 491 F. Supp. 1015, 1018–20 (S.D. Fla. 1980).

258. *Id.* at 1019–20 (first citing *Bryan v. Itasca Cnty.*, 426 U.S. 373, 383–84 (1976); then *United States v. Marcy's*, 557 F.2d 1361, 1364–65 (9th Cir. 1977)); *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 311–16 (5th Cir. 1981) (first citing *Bryan*, 426 U.S. at 383, 392; then *Farris*, 624 F.2d at 890; then *Marcy's*, 557 F.2d at 1364; and then *Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655 (9th Cir. 1975)).

The Seminole litigation was the first in a series of cases involving state and local governments' jurisdiction over bingo on Indian reservations that eventually yielded the Supreme Court's 1987 *Cabazon* decision and the 1988 Indian Gaming Regulatory Act.<sup>259</sup> Unlike in *Farris*, federal officials did not prosecute the people conducting the gambling. The federal government initially took a hands-off approach to Indian bingo, but the Interior Department was actively supporting it by the time *Cabazon* reached the Supreme Court.

#### A. Bingo in Florida and Wisconsin

The Seminole Tribe of Florida opened the first tribe-owned high-stakes bingo hall in December 1979, offering prizes of up to ten thousand dollars in a building next door to the smoke shop that the Tribe had opened two years earlier on its reservation near downtown Fort Lauderdale.<sup>260</sup> The Broward County sheriff, claiming jurisdiction under PL 280, threatened to arrest people at the bingo hall.<sup>261</sup> The Tribe sued in the U.S. District Court for the Southern District of Florida to stop him.<sup>262</sup> In May 1980, Judge Norman Roettger ruled that the sheriff lacked jurisdiction and enjoined him from enforcing Florida's bingo statute.<sup>263</sup>

Concluding that the sheriff's threats presented a justiciable controversy—contrary to the Ninth Circuit's 1974 ruling in what he called the “strikingly similar” *Rincon* case—and citing the Supreme Court's 1976 *Bryan* opinion for the proposition that PL 280 states lacked civil jurisdiction on Indian reservations, Judge Roettger focused on whether Florida's bingo statute “[w]as criminal/prohibitory or civil/regulatory.”<sup>264</sup> Roettger distinguished the Ninth Circuit's *Marcy* opinion in the Puyallup fireworks case, which he called “particularly helpful,” because Washington's laws prohibited “dangerous” fireworks; Florida, however, permitted and regulated charitable bingo.<sup>265</sup> Moreover, bingo was “largely a senior-citizen pastime” that “w[ould] be confined to Indian land.”<sup>266</sup> Roettger acknowledged that the question of whether Florida's bingo laws were civil or criminal was “a close

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259. Cf. MASON, *supra* note 5, at 46 (calling the Seminole case “[t]he first significant case establishing the right of tribes to conduct games of chance”).

260. Fletcher, *supra* note 5, at 255; *Seminole Casino Hollywood*, *supra* note 2, at 36; see also Clinton, *supra* note 4, at 28–29. For an account of the beginnings of the Seminole Tribe's bingo operation told by James Billie, the Tribe's chairman at the time, see Brewer & Cadue, *supra* note 5, at 34–35, 41, 44.

261. MASON, *supra* note 5, at 46–47. Florida had assumed PL 280 jurisdiction in 1962. CHAMPAGNE & GOLDBERG, *supra* note 27, at 16.

262. According to Seminole tribal chairman James Billie, “[t]he sheriff's office was coming out there and giving us a hard time.” Brewer & Cadue, *supra* note 5, at 41. Billie added:

The court battle started right at the beginning, the minute we opened the doors. That December, the sheriff tried to shut us down . . . . When the sheriff came onto the reservation, we just blocked him and took him to court. We filed [for] an injunction, and it worked. But I had to stand up in court and smile a bit.

*Id.* at 44.

263. *Butterworth*, 491 F. Supp. at 1020.

264. *Id.* at 1017–18, 1020.

265. *Id.* at 1018–20.

266. *Id.* at 1019.

one.”<sup>267</sup> But, citing *Bryan*, he concluded that he “must resolve [this] close question in favor of Indian sovereignty,” especially given PL 280’s ambiguous legislative history and the lack of congressional intent to undermine tribal sovereignty.<sup>268</sup>

In October 1981, the Fifth Circuit Court of Appeals agreed that the case “turn[ed] on the determination of whether Florida[’s] bingo [law] . . . is civil/regulatory or criminal/prohibitory in nature[,]” and that it “present[ed] a close and difficult question.”<sup>269</sup> The appeals court, however, relied on the Ninth Circuit’s opinions in not just *Marcy*, but also *Farris* (the Puyallup casino case decided after Judge Roettger’s opinion) and *Santa Rosa*, because they all “addressed similar Indian problems with the same or similar analysis.”<sup>270</sup> This analysis, the Fifth Circuit explained, considers whether the state prohibits the activity in question—there, bingo—as “against the public policy” or “merely regulate[s]” it.<sup>271</sup> Finding that Florida regulated bingo, whereas Washington’s intent and policy was to prohibit the fireworks in *Marcy* and casino games in *Farris*,<sup>272</sup> the court cited *Bryan*’s language about the Indian law canon of interpretation and held that PL 280 did not give Florida jurisdiction over the Seminole Tribe’s bingo operation.<sup>273</sup>

In between the district and appeals courts’ decisions in the Seminole case, Chief Judge Barbara Crabb of the U.S. District Court for the Western District of Wisconsin ruled in July 1981 that Wisconsin’s bingo laws did not apply on the

267. *Id.* at 1020.

268. *Id.* (citing *Bryan v. Itasca Cnty.*, 426 U.S. 373, 388 (1976)).

269. *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 311, 316 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

270. *Id.* at 311–13 (first citing *Bryan*, 426 U.S. at 383; then *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980); then *United States v. Humboldt Cnty.*, 615 F.2d 1260 (9th Cir. 1980); then *United States v. Marcy*, 557 F.2d 1361 (9th Cir. 1980); and then *Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655 (9th Cir. 1975)).

271. *Id.* at 313–14 (“The classification of the statute . . . requires a consideration of the public policy of the state on the issue of bingo and the intent of the legislature in enacting the bingo statute.”) (citing *Marcy*, 557 F.2d at 1364).

272. *Id.* at 315–16 (first citing *Marcy*, 557 F.2d at 1364; and then citing *Farris*, 624 F.2d at 890).

273. *Id.* at 316 (citing and quoting *Bryan*, 426 U.S. at 392). The dissenting judge argued that “Florida . . . prohibited, not regulated, the precise kind of bingo operation which the [Tribe] seeks to conduct,” and that “it is because such activity is prohibited in Florida that this business was started and is successful . . .” *Id.* at 317 (Roney, J., dissenting) (also arguing that “[i]f only Indians were involved, or if the effects of the bingo casino were shown to be confined to the reservation, the decisions relied upon by the Court might be applicable”).

For Seminole tribal chairman James Billie’s perspective on the Fifth Circuit oral argument, including the rapport between the judges and the Tribe’s attorney Marion Sibley (the cousin of a Fifth Circuit judge whose portrait hung on the wall of the courtroom), see Brewer & Cadue, *supra* note 5, at 48. According to Billie:

I could sense that [the judges] were going to go in our favor. I could feel it because Sibley was very articulate. . . . Sibley . . . was very expensive. But the idea was that you don’t go get a squirt gun to challenge a big ol’ shotgun. . . .

Sibley was exorbitant as hell, but boy was he brilliant, and look at where we are today for paying the bill.”

*Id.*

Oneida Nation of Wisconsin's reservation near Green Bay.<sup>274</sup> The Oneida bingo hall, although not high-stakes, was the first tribal bingo operation, having opened in September 1976.<sup>275</sup> Litigation over its legality did not begin until January 1981, when the Oneida Nation sued to stop Wisconsin state officials from interfering with the bingo operation.<sup>276</sup> Citing the district court's opinion in the "strikingly similar" Seminole case and the Ninth Circuit's opinion in *Marcy's*, Crabb concluded that Wisconsin's bingo laws were civil because Wisconsin, like Florida, allowed charities to operate bingo games, and regulated their frequency and prize money (while imposing criminal penalties for unauthorized games).<sup>277</sup> Crabb "admit[ted] to a certain uneasiness in reaching that conclusion," but pointed to *Bryan's* discussion of Congress's focus on criminal jurisdiction in PL 280, the Indian law canon of interpretation, and the "present federal policy encouraging tribal self-government" to support her holding.<sup>278</sup>

By the end of 1981, courts' use of the civil/regulatory–criminal/prohibitory distinction analysis to interpret and apply *Bryan's* holding was spreading. It next appeared the following year in the Ninth Circuit, which had punted on the Rincon cardroom case a decade earlier. This time around, the courts ruled that California counties lacked jurisdiction over tribes' bingo halls. And the Supreme Court agreed.

#### ***B. Back to California—and to the Supreme Court***

After meeting with leaders from the Seminole and Miccosukee Tribes in Florida and adopting a gaming ordinance in March 1979, the Cabazon Band of Mission Indians approved plans for a cardroom on its reservation in Riverside

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274. *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712, 720 (W.D. Wis. 1981).

275. For a history of the Oneida bingo operation, including the role grassroots Oneida women played in establishing it, see HOEFT, *supra* note 5, and Chantre Smith, *Blog 2: Oneida Women Took a Big Gamble and Oneida Won*, ONEIDA NATION OF WIS. (Mar. 14, 2017), <https://oneida-nsn.gov/blog/2017/3/14/blog-2-oneida-women-took-a-big-gamble-and-oneida-won/> [<https://perma.cc/B48W-ZLQS>]. For a discussion of the U.S. district-court litigation and the role Oneida tribal attorneys Jerry Hill and Francis Skenandore played along with Milt Rosenberg, the director of the recently established Indian Law Center at the University of Wisconsin Law School, see HOEFT, *supra* note 5, at 116–25.

276. HOEFT, *supra* note 5, at 120. After the Wisconsin attorney general issued a formal opinion in January 1980 stating that the Oneida Nation had to comply with state law, and the district attorney (referencing the attorney general's opinion) and county sheriff wrote letters to the Oneida Nation stating that state law applied and threatening enforcement, the Oneida Nation filed suit in January 1981. *Id.* at 112. In February 1978, Tom Fredericks, a lawyer in the U.S. Interior Department's Office of the Solicitor who previously was an attorney for and director of the Native American Rights Fund, had opined in a letter to Representative Robert Cornell—who was also a Catholic priest and had voiced concerns about Oneida bingo's impact on Catholic churches' bingo—that Wisconsin's bingo law did not apply on the Oneida reservation because of *Bryan*. *Id.* at 91–92.

277. *Oneida*, 518 F. Supp. at 714, 718–19 (first citing *Marcy's*, 557 F.2d at 1364; and then citing *Seminole Tribe of Fla. v. Butterworth*, 491 F. Supp. 1015, 1019–20 (S.D. Fla. 1980)).

278. *Id.* at 719–20 (citing and quoting *Bryan*, 426 U.S. at 379, 388–89, 392). Crabb also rejected Wisconsin's argument that it had jurisdiction independent of PL 280 under the interest-balancing test. *Id.* at 714.

County, California.<sup>279</sup> The Cabazon Card Casino opened in a double-wide trailer on October 15, 1980, offering the same games as the hundreds of poker rooms operating outside Indian reservations in California, including in Riverside County.<sup>280</sup> Police in riot gear from the neighboring City of Indio raided the cardroom three days later.<sup>281</sup>

The Cabazon Band sued the city in the U.S. District Court for the Central District of California on October 22.<sup>282</sup> Cabazon's lawyer was Glenn Feldman, who during most of the *Cabazon* litigation worked at the same firm that had represented Leonard Tonasket and the Colville and other tribes involved in the Washington cigarette-tax litigation discussed above.<sup>283</sup> After issuing a temporary injunction in November 1980 that prevented the city from enforcing its laws on the Cabazon Reservation, Judge Laughlin E. Waters ruled in favor of the city in May 1981 but stayed his opinion pending an appeal, thus allowing the cardroom to remain open.<sup>284</sup> In December 1982, the Ninth Circuit overturned Judge Waters's ruling because the cardroom was not within Indio's city limits. In February 1983, Riverside County sheriff deputies raided the Cabazon operation, which had expanded to include bingo, setting off another round of litigation that eventually reached the U.S. Supreme Court.<sup>285</sup>

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279. LANE, *supra* note 5, at 45–46, 51–52. The Cabazon Band separately adopted a bingo ordinance in February 1980 and a cardroom ordinance in May 1980. MASON, *supra* note 5, at 48; ROSSUM, *supra* note 4, at 10.

280. In the year and a half before the Tribe converted the trailer “into a small poker room with probably six or eight or 10 tables,” it housed the Tribe's cigarette and alcohol sales operations. Brewer & Caudue, *supra* note 5, at 38. Before the trailer, according to the Tribe's attorney Glenn Feldman, “[t]here was nothing on the reservation. Nothing at all.” *Id.* at 23 (adding that when he first started working for the Tribe in 1979, “their tribal office was a small motel room in a pretty dumpy motel in the City of Indio, a few miles from the reservation”). Under the leadership of recently elected Chairman Art Welmas, who Feldman described as “a tough old guy” and “a tough old cuss,” the Cabazon Band “subscribed to the ‘use it or lose it’ theory of tribal sovereignty.”

They just decided that, after a failed cigarette-sales business and a failed mail-order liquor business, if the state of California permits poker rooms and if the City of Indio could decide whether or not to have a poker room, then the tribe ought to be able to decide for itself whether or not to have a poker room on the reservation.

*Id.* at 51 (quoting Feldman).

281. *Id.* at 44; LANE, *supra* note 5, at 61–62; ROSSUM, *supra* note 4, at 10.

282. ROSSUM, *supra* note 4, at 11.

283. E-mail from Glenn Feldman to author (Aug. 27, 2021, 12:13 PM PST) (on file with author); see also PIRTLE, *supra* note 5, at 264–67, 373–74; ZIONTZ, *supra* note 229, at 138–40; *supra* Part V.B (discussing *Tonasket* and *Colville* litigation).

284. Telephone Interview with Glenn Feldman (Oct. 27, 2015).

285. According to Glenn Feldman, “as soon as the Ninth Circuit decision became final, probably 30 days after the decision came down, Riverside County came in and did exactly the same thing [the City of Indio had] with their own SWAT team and raided the Cabazon[] casino one night . . .” Brewer & Cadue, *supra* note 5, at 51. For a discussion of the Cabazon cardroom operation and litigation and the courts' unpublished opinions, see LANE, *supra* note 5, at 61–67; MASON, *supra* note 5, at 48–49; ROSSUM, *supra* note 4, at 10–13; see also AKIN & BAUER, *supra* note 5, at 308–09.

Meanwhile, in April 1981, the Barona Band of Mission Indians enacted an ordinance authorizing bingo on its reservation in San Diego County. After the county sheriff threatened arrests that June, the Tribe filed suit in the U.S. District Court for the Southern District of California to prevent the county from enforcing its bingo ordinance.<sup>286</sup> Judge Judith Keep ruled in favor of the county in March 1982, and the Tribe appealed to the Ninth Circuit, which reversed the lower court in December.<sup>287</sup>

Presented with the same facts as the *Rincon* case eight years before (except that the Barona games were bingo rather than poker), the Ninth Circuit this time found that the sheriff's threats made for a justiciable controversy.<sup>288</sup> Following the courts in the Seminole and Oneida cases, and noting that they drew their analysis from the Ninth Circuit's opinions in *Marcy* and *Farris* (the Puyallup fireworks and casino cases), the *Barona* court held that San Diego County did not have jurisdiction, because California did not prohibit bingo as a matter of public policy but merely regulated it (as a moneymaking venture for charities).<sup>289</sup> Like the courts in the Seminole and Oneida cases, the *Barona* court invoked the Indian law canon of interpretation and the federal Indian policy encouraging tribal self-government, which it found enforcing state and local bingo laws would contravene—especially because the Barona bingo operation's purpose was to generate revenue for tribal government “‘programs to promote the health, education and general welfare’ of the Barona Tribe.”<sup>290</sup>

By 1983, when the Cabazon litigation resumed, Indian bingo had expanded outside California, Florida, and Wisconsin to Washington (including on the Puyallup Reservation), Arizona, Minnesota, North Carolina, and Maine.<sup>291</sup> In California, tribes operating bingo included the Morongo Band of Mission Indians in Riverside County near the Cabazon Reservation, the Tachi-Yokut Tribe in the Central Valley (involved in the early 1970s zoning case discussed above), the Bishop Paiute Tribe in the Owens Valley, the Santa Ynez Band of Chumash Indians near Santa Barbara, and the San Manuel Band of Serrano Indians near San

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286. *Barona Grp. of Capitan Grande Mission Indians v. Duffy*, 694 F.2d 1185, 1187 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).

287. *Id.* at 1186.

288. *Id.* at 1187 n.1.

289. *Id.* at 1188–90.

290. *Id.* at 1189–90 (quoting Barona ordinance). The court also held that because Barona's bingo games were not contrary to California public policy, they also did not violate the Organized Crime Control Act. *Id.* at 1190 (citing *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980)).

291. Carla DeDominicis, *Betting on Indian Rights*, 3 CAL. LAW., Sep. 1983, at 29. For a description of how bingo spread across Indian Country through the “Moccasin Telegraph,” with tribal leaders talking to one another at conferences about other tribes operating bingo to raise revenues, then “go[ing] back home and start[ing] things up” on their reservations, see Brewer & Cadue, *supra* note 5, at 41 (quoting Franklin Ducheneaux).

Bernardino.<sup>292</sup> Significantly, the federal government supported these tribal bingo operations and viewed gambling “as a growth industry of Indian reservations.”<sup>293</sup>

In March 1983, the Interior Department issued a policy directive stating that tribal bingo and similar gambling operations “should be protected and enhanced,” consistent with President Ronald Reagan’s January 1983 Indian policy statement encouraging tribal economic development and self-government.<sup>294</sup> The Reagan administration’s support was tied to “the pronounced retreat of federal funding directed toward Indian Country in [the 1980s,]”<sup>295</sup> which left tribal governments “desperate for sources of revenue to make up for that loss.”<sup>296</sup> State and local governments also suffered from funding cuts, and some states—including California in 1984—“turned to revenue from state lotteries” to fill fiscal gaps.<sup>297</sup> Ironically, federal support for Indian gaming and California’s own lottery operation proved critical in the ongoing bingo litigation and the Supreme Court’s application of the interest-balancing test in *Cabazon* particularly—a federal Indian law reflection of Professor Derrick Bell’s “interest-convergence” thesis that judicial decisions favor Black people to the extent that their interests align with interests of majority whites.<sup>298</sup> As Kevin Washburn has noted, “Indian gaming might never have received the blessing of the Supreme Court without the strong support of the Bureau and the Secretary.”<sup>299</sup>

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292. DeDominicis, *supra* note 291, at 29. According to a contemporaneous source, at least half of the federally recognized tribes in California, and over a third nationwide, were “interested in” or “seriously considering” bingo operations. *Id.*

293. *Id.* at 30 (quoting Bureau of Indian Affairs information specialist).

294. See *Cabazon Band of Mission Indians v. Riverside Cnty.*, 783 F.2d 900, 904–05 (9th Cir. 1986) (discussing policy directive and statement). The policy directive stated that DOI would “strongly oppose” any proposed legislation that “would subject Indian individuals, Indian organizations, and tribal governments to state laws with regard to licensing, regulation or prohibition of gambling on Indian reservations . . . . Such a proposal is inconsistent with the President’s Indian Policy Statement of January 24, 1983.” *Id.* at 905 (quoting directive).

295. Randall K.Q. Akee et al., *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSPS. 185, 189–90 (2015) [<https://perma.cc/L3EJ-NF9Y>] (noting also that federal funding “decreased dramatically in the 1980s on a per capita basis (per service-eligible Indian), and did not keep pace with national per capita nondefense spending thereafter”). Calculated in 2014 dollars, federal spending on major Indian programs decreased from \$10,000 per capita in 1980, to \$6,000 in 1983, and almost \$4,000 by 1987. *Id.* at 190.

296. Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99, 111 (2010).

297. *Id.*

298. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

299. Kevin K. Washburn, *Agency Conflict and Culture: Federal Implementation of the Indian Gaming Regulatory Act by the National Indian Gaming Commission, the Bureau of Indian Affairs, and the Department of Justice*, 42 ARIZ. ST. L.J. 303, 308 (2010) [hereinafter Washburn, *Agency Conflict*].

Thus Reagan's "drastic cuts" in social programs were a "major impetus for the quick spread" of gambling both in and outside of Indian country.<sup>300</sup> By 1984, "some eighty Indian tribes" were conducting "some form of gaming, primarily bingo," and "twenty to twenty-five" tribes had "'high-stakes' operations with unlimited jackpots."<sup>301</sup> However, this "mini-explosion of tribal high stakes bingo and pull-tab operations" resulted in a "harsh non-Indian backlash that was politically reflected in the Congress," where meetings to draft legislation on Indian gaming started in the late spring of 1983 and the first legislation was introduced in November 1983.<sup>302</sup> This backlash in Congress reflected efforts by state and local government officials, the commercial- and charitable-gaming industries, and "churches and others opposed to gambling on moral grounds" to "exert[] political pressure against Indian gambling."<sup>303</sup> Some of the strongest state and local government opposition to Indian gaming came from California.<sup>304</sup>

After Riverside County sheriffs raided the Cabazon bingo operation in February 1983, the Tribe again sued in federal court. Judge Laughlin Waters, who was assigned the case because he heard the Tribe's earlier lawsuit against the City of Indio, immediately enjoined the county from enforcing its laws.<sup>305</sup> Meanwhile, the Morongo Band authorized bingo on its reservation in April 1983. In May, Morongo's lawyers—former California Indian Legal Services attorneys Barbara Karshmer and George Forman (who had worked on the Rincon cardroom and Santa Rosa trailer cases in the 1970s)—asked Waters for a similar injunction against

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300. Ducheneaux, *supra* note 296, at 110. According to Franklin Ducheneaux, who served as the House Interior and Insular Affairs Committee's Indian Affairs Counsel from 1977 to 1990, states "turned to gambling, to state lotteries. Right after Reagan's policies became implemented, . . . there was a growth of state lotteries. State after state turned to state lotteries for revenue purposes." Brewer & Cadue, *supra* note 5, at 41. Comparing the situation of tribes, Ducheneaux stated:

Well, if the states were hurting, the tribes were hurting even more because they were solely dependent upon [federal] government programs for the most part. They were what were called "grant tribes." . . . Indian tribes were desperate. They needed funding and they began to turn to bingo and card games. So they were out there experimenting with bingo just to raise a little revenue.

*Id.*

301. Ducheneaux, *supra* note 296, at 99, 112–13 (quoting congressional testimony of John Fritz, Deputy Assistant Secretary – Indian Affairs of the Department of the Interior). For a summary of the "flood of litigation" that followed this "explosion" of gaming in Indian country, see Clinton, *supra* note 4, at 32–33, 32 n.74.

302. Ducheneaux, *supra* note 296, at 111, 115.

303. *Id.* at 123–24.

304. *See id.* at 129 (noting "there was strong opposition to Indian gaming coming from the State of California" and discussing opposition from San Diego and Riverside county officials, including San Diego County Sheriff John Duffy, "the defendant in the *Barona* case"); *see also id.* at 141 (calling Tony Coelho (D-CA) "[t]he primary opponent of Indian gaming on the House Committee [on Interior and Insular Affairs]" and adding that "[i]n this opposition, Coelho was primarily representing the interests of the horse racing industry of California").

305. ROSSUM, *supra* note 4, at 13–14, 16. Waters issued a temporary restraining order on February 24 and a preliminary injunction on May 6. *Id.* at 16.

Riverside County, which he granted.<sup>306</sup> Waters consolidated the Cabazon and Morongo cases in October 1983, and California intervened the following month.<sup>307</sup> In December 1984, Waters issued summary judgment in favor of the Tribes, which Riverside County and California appealed to the Ninth Circuit.<sup>308</sup>

When it upheld Judge Waters's ruling in February 1986, the Ninth Circuit stated that it was simply following its earlier decision in the "factually and legally indistinguishable" *Barona* case, which had already determined that California's bingo laws were regulatory.<sup>309</sup> The Ninth Circuit also rejected California's argument that it had jurisdiction under the interest-balancing test, calling the state's interest "commendable" but "weak" because it allowed and regulated charitable bingo.<sup>310</sup> The federal government's interest, however, strongly favored the Tribes' bingo operations, evinced by the Interior Department's March 1983 policy directive and general support of bingo as means of tribal economic development, self-sufficiency, and self-determination.<sup>311</sup> Moreover, the bingo games were "the major source of employment for tribal members" and the Tribes' "sole source" of revenues to fund government operations and services.<sup>312</sup>

In June 1986, the Supreme Court, which had earlier denied review in the Rincon cardroom and Seminole and Barona bingo cases, decided to hear the Cabazon case.<sup>313</sup> The Court's grant of certiorari "had a profound effect on" proposed Indian gaming legislation pending in Congress, putting "tribes and their congressional proponents . . . in a much weaker negotiating position."<sup>314</sup> According to people involved in congressional negotiations, "the general expectation of parties

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306. *Id.* at 16. Morongo requested the injunction on May 16; Waters granted it on May 20. *Id.*

307. *Id.*; see also MASON, *supra* note 5, at 49; DeDominicis, *supra* note 291, at 29–30 (also noting that the United States declined Judge Waters's invitation to intervene).

308. ROSSUM, *supra* note 4, at 17.

309. *Cabazon Band of Mission Indians v. Riverside Cnty.*, 783 F.2d 900, 902–03 (9th Cir. 1986) (first citing *Barona Grp. of Capitan Grande Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982); then citing *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392 (1976); and then citing *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 311, 316 (5th Cir. 1981)). Like in *Barona*, the Ninth Circuit also found that the Organized Crime Control Act did not give California jurisdiction. *Id.* at 903.

310. *Id.* at 904 (noting also that California criminalized only the operation of, but not public participation in, bingo games).

311. *Id.* at 904–05 (discussing policy directive and statement); see also MASON, *supra* note 5, at 57–58 (discussing policy statement).

312. *Cabazon*, 783 F.2d at 905. The court also rejected California's arguments that the tribes were only "marketing an exemption" from otherwise applicable state laws and that bingo was not a "tribal tradition," noting that they were engaged "in the traditional government function of raising revenue." *Id.* at 905–06.

313. *Duffy v. Barona Grp. of Capitan Grande Mission Indians*, 461 U.S. 929 (1983); *Butterworth v. Seminole Tribe of Fla.*, 455 U.S. 1020 (1982); *Cnty. of San Diego v. Rincon Band of Mission Indians*, 419 U.S. 1008 (1974).

314. Ducheneaux, *supra* note 296, at 149–51.

on both sides of the Indian gaming issue” was that the Supreme Court would reverse the Ninth Circuit’s decision.<sup>315</sup>

Particular concern existed because of the Court’s 1983 decision in *Rice v. Rehner*, a 6–3 opinion authored by Justice Sandra Day O’Connor holding that states—California particularly—could regulate alcohol sales on reservations.<sup>316</sup> The *Rice* Court found that the general rule (applied in *Bryan*) requiring an express congressional grant of state jurisdiction over tribes’ and tribal members’ on-reservation activities did not apply because there was no “tradition of [tribal] self-government” in the area of alcohol regulation.<sup>317</sup> Employing the interest-balancing

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315. *Id.* at 150; *see also* Virginia W. Boylan, *Reflections on IGRA 20 Years After Enactment*, 42 ARIZ. ST. L.J. 1, 4 (2010) (“[M]ost observers believed that the state arguments would prevail.”). According to Franklin Ducheneaux,

In the minds of a lot of Indian people, and even the opposition, we knew the only reason the Court would take this case . . . was to overrule not only *Cabazon*, but also to overturn *Seminole v. Butterworth* and *Barona* while they were at it. We knew that. The Indian Bar knew it. The other side knew it. They became very, very arrogant and obstinate, the other side. They knew they had the damn thing won. It was very disheartening for all of us.

Brewer & Cadue, *supra* note 5, at 63. Ducheneaux added that “there was a general pessimism” among attorneys working for tribes, and that he and “a lot of other people” thought that *Cabazon* and *Morongo* would lose. *Id.*

Glenn Feldman recounted that when he learned the Court had agreed to hear the case, he “was not feeling very happy about it” because to him,

and to most people on both sides, the reason they were taking it was to reverse the Ninth Circuit decision. The tribe also felt it was going to be reversed. We had been winning, but I think everybody felt in their heart of hearts that the reason the Court took the case was to reverse it.

*Id.* at 53. Feldman added that “when the Supreme Court announced it was going to hear the case, I think everybody in Indian Country believed that they were taking the case to reverse the Ninth Circuit to rule against the tribe. That was certainly the conventional wisdom.” *Id.* at 60.

316. 463 U.S. 713, 726 (1983).

317. *Id.* at 726, 731. Even if the rule did apply, Congress, according to the majority, “authorized, rather than pre-empted, state regulation over Indian liquor transactions.” *Id.* at 726 (citing 18 U.S.C. § 1161); *see also id.* at 733–34 (quoting *Rehner v. Rice*, 678 F.2d 1340, 1352 (9th Cir. 1982) (Goodwin, J., dissenting) (“Congress did not intend to make tribal members ‘super citizens’ who could trade in a traditionally regulated substance free from all but self-imposed regulations.”)). The three dissenting Justices—Harry Blackmun, joined by William Brennan and Thurgood Marshall—cited *Bryan* for the proposition that express congressional language was required for state regulatory authority over tribes or tribal citizens, noting its absence from the statute at issue. *Id.* at 742 (Blackmun, J., dissenting). They criticized the majority for “argu[ing] to a result that it strongly fe[lt] desirable and good[.]” calling the decision “activism in which this Court should not indulge.” *Id.* at 744. Like the dissenting Justices, the Ninth Circuit had pointed to the rule in *Bryan* that “grants of state jurisdiction over reservation Indians must be express, not implied,” *Rice*, 678 F.2d at 1344 (citing *Bryan v. Itasca Cnty.*, 426 U.S. 373, 390 (1976)), and ruled that states lacked “regulatory jurisdiction to license liquor transactions or distribute liquor in Indian country.” *Id.* at 1349. In addition to California’s efforts to regulate alcohol sales by Pala tribal member

test, the Court minimized tribes' interest based on its finding that there was no tradition of tribal sovereignty (but rather congressional divestment of tribes' inherent authority) regarding alcohol regulation.<sup>318</sup> States' interests, however, were especially significant because on-reservation liquor distribution could have impacts outside reservation boundaries.<sup>319</sup> There was concern that the Supreme Court would similarly find that the states had jurisdiction over gambling on reservations.<sup>320</sup>

California and seven other states (including Minnesota, Washington, and Wisconsin) argued that there was no basis in *Bryan* or PL 280 for the civil/regulatory–criminal/prohibitory distinction (which they also said was unworkable in practice), that California law prohibited bingo, and that California had jurisdiction under the interest-balancing test.<sup>321</sup> Cabazon, Morongo, and 69 other tribes as amici (including the Seminole Tribe of Florida, the Oneida Indian Nation of Wisconsin, and the Baron, Rincon, and Santa Rosa Bands, as well as the Puyallup Tribe, Colville Tribes, and Tulalip Tribes) argued against state jurisdiction.<sup>322</sup> Although the U.S. Solicitor General contemplated filing a brief, the

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Eve Rehner at her store on the Pala Reservation, the Ninth Circuit litigation involved Washington's efforts to tax alcohol sales at tribal retail liquor stores on the Muckleshoot and Tulalip reservations. *Id.* at 1342. The district court had ruled against state taxation (and enjoined Washington from seizing liquor en route to the reservations), but the Ninth Circuit remanded for reconsideration in light of the Supreme Court's 1980 decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*. *Id.* at 1349–50.

318. *Rice*, 463 U.S. at 722–25.

319. *Id.* at 724–25.

320. See Ducheneaux, *supra* note 296, at 114–15, 150 (discussing concern that the Court “would fashion a new theory of Indian law as it did in . . . *Rice* . . . and overturn the favorable decisions of the lower court [in *Cabazon*]”). According to Stephen Quesenberry, the former CILS attorney who argued *Rice v. Rehner* before the Supreme Court, lawyers and tribal advocates reading O'Connor's opinion in *Rice* thought she was really writing about Indian gaming and were concerned that an increasingly conservative Court was “going to kill us in *Cabazon*.” Quesenberry Interview, *supra* note 106.

321. The other states were amici curiae Arizona, Nevada, New Mexico, Washington, Wisconsin, and Connecticut. See ROSSUM, *supra* note 4, at 105 (discussing state briefs). Twenty states had joined amicus briefs in support of California's petition for certiorari. *Id.* at 88–89. For a discussion of California's certiorari and merits briefs, see *id.* 84–88, 92–95, and 116–18.

322. NARF, CILS, and Evergreen Legal Services filed a brief on behalf of 44 tribes. See Amici Curiae Brief of Chehalis Indian Tribe, Keweenaw Bay Indian Community, Santa Ynez Band of Mission Indians and Other Federally Recognized Indian Tribes in Support of Appellees, No. 85-1708, *California v. Cabazon Band of Mission Indians*. Former NARF attorneys Tom Fredericks and Bob Pelcyger co-authored an amicus brief for 12 tribes, the National Congress of American Indians, and the Inter-Tribal Council of Nevada. Brief Amici Curiae of Pueblo of Laguna, Agua Caliente Band of Mission Indians, Chemehuevi Indian Tribe, Gila River Indian Community, Inter-Tribal Council of Nevada, Inc., Miccosukee Tribe of Indians of Florida, National Congress of American Indians, Poarch Band of Creek Indians, Puyallup Tribe of Indians, Red Lake Band of Chippewa Indians, Sac & Fox Tribe of Indians, Seneca Nation of Indians, and Shoshone and Northern Arapahoe Tribes of the Wind River Reservation, No. 85-1708, *California v. Cabazon Band of Mission Indians*. The Cabazon and Morongo brief and the eight different tribal amici briefs are discussed in ROSSUM, *supra* note 4, at 105–15. For a discussion of the Cabazon and Morongo Bands' brief opposing certiorari, see *id.* at 89–92.

federal government ultimately took no position. The Department of Justice's Criminal Division "strongly opposed" Indian gaming, believing it violated federal criminal laws, but the Interior Department supported the Cabazon Band and other tribes.<sup>323</sup> Critically, because the United States did not file a brief, "the Bureau's actions in support of Indian gaming was the primary evidence of keen federal interest."<sup>324</sup>

At oral argument, California Deputy Attorney General Roderick Walston—who had argued for state jurisdiction in Indian country dating back to the 1960s—claimed that the federal government's failure to file a brief "sp[oke] volumes" about the "pronounced ambivalence" of the government and highlighted the divergence between the Interior Department supporting, and the Justice Department opposing, proposed Indian gaming legislation in Congress (and Indian gaming generally).<sup>325</sup> Calling *Rice* a "very analogous" case, Walston asserted that "states, not Indian tribes have traditionally regulated gaming[,] and therefore "tribal sovereignty [wa]s not implicated."<sup>326</sup> Tribes had an interest in the revenues, but not the activity of high-stakes bingo; and it was the tribes' activities, "not their revenue raising interest," that determined "whether the principle of tribal sovereignty" applied.<sup>327</sup> The interest balancing therefore favored states, especially because no value was generated on the reservation. The games' value derived solely from marketing them to non-Indians without restrictions that applied under state law—

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323. Washburn, *Agency Conflict*, *supra* note 299, at 311–12 (citing an interview with Charles Fried) ("When the Solicitor General [Charles Fried] informed a group of federal officials convened to discuss the case that he was leaning toward the Criminal Division's position, representatives of Interior reportedly told him that he might as well send the FBI to arrest the Secretary of the Interior: if Indian gaming was a criminal enterprise, then the Secretary had clearly aided and abetted it. At this point, . . . Fried decided it would be prudent for the United States to take no position in the case."). For an account of this meeting told by Michael Cox, a former CILS attorney who was the minority counsel to the Senate Indian Affairs Committee (then called the Senate Select Committee on Indian Affairs), see Brewer & Cadue, *supra* note 5, at 54; *see also id.* at 29 (discussing Cox's time as a CILS attorney). According to Cox, "Had the government participated, it would, in fact have participated on the side of the state of California because the lawyers in the Solicitor General's office basically were of the view that they thought California had the better arguments in this case." *Id.* at 54.

324. Washburn, *Agency Conflict*, *supra* note 299, at 308.

325. *Cabazon Transcript*, *supra* note 208, at 9–11; *see also* Brewer & Cadue, *supra* note 5, at 55 (quoting Ross Swimmer, the Assistant Secretary of Indian Affairs at the time, about his first meeting with the Department of Justice and Victoria Toensing, Deputy Assistant Attorney General, Criminal Division, and Toensing's telling him: "This Indian gaming must be stopped in its tracks. We all know what happens when gambling comes in. We'll have organized crime."); Ducheneaux, *supra* note 296, at 112, 130–31 (discussing tension between Interior and Justice Departments regarding Indian gaming and legislation, generally, and quoting Justice Department attorney Victoria Toensing's statement to Congress that "[i]f the Department of Justice had its druthers, it would not have any gambling whatsoever [on Indian reservations] and I think everyone knows that. That is no secret.").

326. *Cabazon Transcript*, *supra* note 208, at 4, 25.

327. *Id.* at 13–14 (citing *Rice* and stating that "[h]igh stakes gambling has never played a part of Indian historical development. It is not indigenous to tribal culture or customs. It is not a traditional Indian practice.").

just like the cigarette sales in *Colville*, which Walston cited.<sup>328</sup> Walston also argued that the games were “wholly unregulated”—ignoring tribal regulation—and thus presented a “serious risk of infiltration by organized criminal elements.”<sup>329</sup>

Glenn Feldman, who won a coin toss with George Forman to decide who would argue for the Cabazon and Morongo Bands,<sup>330</sup> highlighted “the extent of federal support [for] and involvement” with tribes’ gaming activities and emphasized that tribes were using gaming revenues to fund essential—and previously unavailable—government services on their reservations, consistent with federal government policies.<sup>331</sup> In a line that Forman described as “one for the ages,”<sup>332</sup> Feldman told the Justices:

Indian tribes are governments, and like all governments they have to have a source of revenue in order to function. Now, most tribes do not have a natural resource base. The Cabazon and Morongo Bands have reservations out in the middle of the desert, and until there is a commercial market for sand or sagebrush they do not have any sort of natural resources to generate tribal income.<sup>333</sup>

Comparing *Colville*, where the Court found that the tribes “were not providing what was called value generated on the reservation[,]” Feldman argued that Cabazon, Morongo, and other tribes were offering “recreational services, plain and simple.”<sup>334</sup> The tribes’ facilities and amenities—“creature comforts”—attracted people to their bingo games, not just the prize money that was higher than what California allowed at charitable bingo games.<sup>335</sup> Feldman also argued that the tribes’ governmental interest in raising revenues included an interest in operating effective, efficient, and honest games, noting that tribes were “very effective in regulating” gaming and that both Congress and the Ninth Circuit had concluded there was no evidence of organized-crime involvement in Indian gaming operations, including in California.<sup>336</sup>

Writing for a six-Justice majority in the Court’s February 1987 decision, Justice Byron White applied the civil/regulatory–criminal/prohibitory distinction from the Ninth and Fifth Circuits’ opinions in the Cabazon, Barona, and Seminole cases (which in turn drew upon the Ninth Circuit’s opinion in *Marcy*, the Puyallup fireworks case),<sup>337</sup> explaining that the “shorthand test” was whether the activity in

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328. *Id.* at 4, 18 (stating that the games’ value essentially “derives from restrictions that the state places against its own non-Indian citizens”); *id.* at 22–23 (“One of the strong factors that supports state jurisdiction here is the fact that the cases are intended to attract non-Indians to come on the reservation to play the games.”); *id.* at 54 (discussing *Colville*).

329. *Id.* at 4.

330. See Forman 2019 Interview, *supra* note 135.

331. *Cabazon Transcript*, *supra* note 208, at 51–52.

332. E-mail from George Forman to the author (Aug. 8, 2020) (on file with author).

333. *Cabazon Transcript*, *supra* note 208, at 36.

334. *Id.* at 30.

335. *Id.* at 39.

336. *Id.* at 40–41, 50–51.

337. See *supra* notes 270, 289, 309 and accompanying text.

question was against the state's "public policy."<sup>338</sup> White conceded that "an argument of some weight" could be made that California's bingo laws were prohibitory but concluded that California did not have a public policy against gambling.<sup>339</sup> Indeed, California permitted "a substantial amount of gambling activity": in addition to charity bingo and cardrooms, the state allowed horse-race betting and "promote[d] gambling through its . . . lottery."<sup>340</sup> Thus PL 280 did not give California jurisdiction to regulate the bingo or cardroom operations at Cabazon and Morongo.<sup>341</sup>

Conducting the interest-balancing test "in light of traditional notions of sovereignty" and the United States' "'overriding goal[s]' of encouraging tribal self-sufficiency and economic development[.]" White pointed to the federal government's "approval and active promotion" of Indian bingo.<sup>342</sup> That support included financing (through Interior, Housing and Urban Development, and Health and Human Services Department grants and loans) tribes' bingo facilities, approving tribes' bingo ordinances (including the Cabazon and Morongo laws), and reviewing and approving management contracts with non-Indian casino operators (and issuing guidelines therefor).<sup>343</sup> White emphasized these policies' "particular relevance" because the Cabazon and Morongo gaming operations were the Tribes' only revenue source for their governments, writing that "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."<sup>344</sup> White pointed out that the Tribes' interests "obviously parallel[ed] the federal interests."<sup>345</sup> The only interest California asserted was in protecting against organized crime, but White found it was insufficient to justify state jurisdiction given the "compelling" federal and tribal interests at stake.<sup>346</sup>

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338. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209–10 (1987); Washburn, *supra* note 5, at 954–55 (characterizing the *Cabazon* opinion as "affirming the broadest interpretation of the Court's holding in *Bryan*"). Kevin Washburn noted that Justice White had written a "graveyard dissent" questioning the Court's unanimous *Bryan* decision, which he had reluctantly joined. *Id.* Justice White had also joined Justice William O. Douglas in his dissent from the Court's denial of certiorari in the Tulalip waste-disposal site case, arguing that the Court should have granted review to overturn the Washington Supreme Court's decision holding that PL 280 did not give Snohomish County jurisdiction to regulate the landfill. *See supra* notes 61–64 and accompanying text.

339. *Cabazon*, 480 U.S. at 210.

340. *Id.* at 211.

341. The Court also rejected California's argument that it had jurisdiction under the Organized Crime Control Act, noting that it gave the federal government—not states—jurisdiction over unlawful gambling. *Id.* at 213–14.

342. *Id.* at 216–18.

343. *Id.* at 217–18.

344. *Id.* at 218–19.

345. *Id.* at 219.

346. *Id.* at 220–22 (rejecting California's arguments that the tribes were "merely marketing an exemption" from state gambling laws"). In their dissenting opinion, Justices Stevens, O'Connor, and Scalia argued that California had jurisdiction to enforce its gambling laws on the reservations unless Congress explicitly said otherwise, and criticized the

Many lawyers who were involved with and saw the *Cabazon* argument credit Glenn Feldman's oral argument with swaying the Justices in favor of the Tribes.<sup>347</sup> According to Patricia Zell, who served for 25 years on the U.S. Senate Committee on Indian Affairs (including as Democratic Staff Director and Chief Counsel) and saw "a lot of Supreme Court arguments" during her time in the Senate, Feldman "had complete command of the room and the justices" and was "unflappable" and "masterful."<sup>348</sup> Zell said that she has "never seen" an argument like Feldman's.<sup>349</sup> Feldman himself was surprised (pleasantly, of course) by the result—and especially that Chief Justice William Rehnquist, who Feldman described as "no friend to Indian tribes or Indian Country during his time on the bench," ruled in the Tribes' favor.<sup>350</sup> Feldman also told a story about an attorney in the Solicitor General's Office who said "he was more surprised by the *Cabazon* [Band] winning this case than he had been by the ruling in any other case he had seen in the Supreme Court. He was absolutely convinced that the court was going to reverse, and when we won, he was just flabbergasted."<sup>351</sup> According to Feldman, "that was a pretty common response."<sup>352</sup>

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majority's reasoning they contended "would require exemptions [from state law] for cockfighting, tattoo parlors, nude dancing, houses of prostitution, and other illegal but profitable enterprises." *Id.* at 222 (Stevens, J., dissenting). During oral argument, Justice Stevens asked Glenn Feldman about prostitution, wondering how his argument about the civil/regulatory–criminal/prohibitory distinction would apply on a reservation in a state that permitted and regulated (but did not prohibit) prostitution. *Cabazon Transcript*, *supra* note 208, at 32–33. Feldman artfully responded that prostitution "could go forward subject to federal and tribal regulation" but emphasized that "there has got to be an element of common sense provided here. Indian tribes are under the direct control and supervision of the Secretary of the Interior, and the Secretary is not going to allow outrageous activities on the reservation." *Id.* at 33. Stevens was perhaps thinking about the example of the Moapa Band of Paiute Indians, which had enacted an ordinance permitting houses of prostitution on the Moapa Reservation in Clark County, Nevada and brought an unsuccessful court challenge after the United States Secretary of the Interior rescinded the ordinance. *See Moapa Band of Paiute Indians v. United States Dep't of Interior*, 747 F.2d 563 (9th Cir. 1984).

347. *See* Quesenberry Interview, *supra* note 106 (calling Feldman's oral argument "one of the best I've ever seen" and opining that although oral arguments usually do not make a difference, Feldman's did); *see also* Forman 2019 Interview, *supra* note 135.

348. Brewer & Cadue, *supra* note 5, at 57–59 (quoting Zell); *see also id.* at 58 ("Somehow he made the justices feel at ease. The atmosphere he created verbally was like you were in his living room, having an interesting discussion among colleagues, peers."); *id.* at 59 ("He was comfortable, he made everybody else comfortable, and the confidence he exuded really carried the day in terms of the justices' receptivity to the merits of what he was saying."); *see also* Patricia Zell (*Arapaho/Navajo*), UNIV. OF ARIZ. NATIVE NATIONS INST., <https://nni.arizona.edu/people/associates/iac-members/patricia-zell> [<https://perma.cc/A7Q4-L8D9>] (last visited Oct. 10, 2021).

349. Brewer & Cadue, *supra* note 5, at 57 ("I've never seen a Glenn Feldman in the Supreme Court before or since."); *see also id.* at 59 ("I've never seen anything like it.").

350. *Id.* at 61 (quoting Feldman, stating that Rehnquist's joining the majority "was the biggest surprise of all"); *see also id.* at 59 (Feldman stating that "the *Cabazon* case could have gone either way" and that "at that time it wasn't all that clear-cut, even in 1986, what impact *Bryan* would have").

351. *Id.* at 61 (quoting Feldman).

352. *Id.*

After the Supreme Court's *Cabazon* decision, congressional efforts to pass legislation regarding Indian gaming that had been ongoing since 1983 gained momentum, with Indian tribes' position strengthened.<sup>353</sup> On October 17, 1988, Congress passed IGRA, which established the governing framework for Indian gaming today.<sup>354</sup> In the years since, Indian gaming has grown from annual revenues of approximately \$500 million to over \$34 billion and profoundly impacted Indian Country and the United States.<sup>355</sup>

### CONCLUSION

Scholars including Kevin Washburn have written about IGRA's relationship to *Cabazon* and *Bryan*, IGRA's legislative history, and recurring

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353. MASON, *supra* note 5, at 54, 60 (quoting congressional actors' statements that "the impetus for congressional action came from the federal court decisions" and that "[f]ollowing the Supreme Court's ruling in . . . *Cabazon* . . . [.] there was little choice except for Congress to enact laws regulating gaming on Indian lands"); *see also* ROSSUM, *supra* note 4, at 149–50, 153 (discussing "Congress's multiyear search for a regulatory scheme for Indian gaming" and calling IGRA "the culmination of five years of congressional efforts"); Clinton, *supra* note 4, at 52 (describing *Cabazon* and IGRA as "parallel federal judicial and legislative responses to Indian gaming progressing relatively independent of one another"); Ducheneaux, *supra* note 296, at 154 (noting that, after *Cabazon*, "the legislative momentum and strength shifted away from the state-gaming industry position to the tribal government position"). For discussions of the relationship between the *Cabazon* litigation and the legislation that became IGRA by people involved, *see* Brewer & Cadue, *supra* note 5, at 49–51, 55–57, 60, 63–65, 68–72.

354. Pub L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–21 and 18 U.S.C. §§ 1166–68). Importantly, IGRA's framework allows for slot machines and table games (roulette and craps), which IGRA categorizes as Class II games, whereas *Cabazon* involved only bingo and card (poker and blackjack) games, which are Class III games. *See* Clinton, *supra* note 4, at 91–93. When asked during oral argument whether tribes "could open casino gambling on the reservation[.]" Feldman responded:

The answer to that is clearly no. . . . [T]he use or possession of certain mechanical gambling devices is a federal offense. That relates primarily to slot machines, roulette wheels, wheels of fortune. So in no instance could those activities take place on an Indian reservation. They would be immediately in violation of federal law.

*Cabazon Transcript*, *supra* note 208, at 29; *see also* Brewer & Cadue, *supra* note 5, at 72 (quoting Glenn Feldman) ("[K]eep in mind, at that time, there was no Class III. It was all Class II. We were talking about bingo and poker. We were not talking about, and I'm not sure anybody could have imagined at that time, what Class III gaming would turn out to be 20 years later. We were talking about high-stakes bingo, poker, and other card games."). The requirement that tribes enter into compacts with states to conduct Class III games, or "Vegas-style" gaming, resulted in the next Indian gaming case to reach the Supreme Court, which ruled in 1996 that Congress lacked the authority to abrogate state sovereign immunity and allow tribes to sue states in federal court for failure to negotiate such compacts in good faith. *See Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996).

355. Washburn, *supra* note 5, at 921 n.10 (estimating \$500 million in annual revenues in 1988); NIGC Press Release, *supra* note 1 (estimating \$34.6 billion in annual revenues in 2019, the latest year for which data are available).

disputes around IGRA and Indian gaming generally.<sup>356</sup> This Article provides a more nuanced doctrinal account of how the civil/regulatory–criminal/prohibitory distinction developed from *Bryan* to *Cabazon* and, more importantly, illustrates *Bryan*’s significance by examining the case law’s trend in the opposite direction in the Rincon cardroom, Grand Portage lottery, and other pre-*Bryan* PL 280 cases. Moreover, it shows how *Bryan*’s interpretation of PL 280 and outcome—and, as a result, Indian gaming jurisprudence and history—were shaped through creative lawyering by attorneys using timely legal scholarship to make arguments at the behest and on behalf of Indigenous people(s) who were asserting their sovereignty against state and local government efforts to curtail it. This Article also highlights the extent to which *Bryan* (although it was a unanimous decision) and especially *Cabazon* (and its interpretation of *Bryan*) were close calls that could have gone either way.<sup>357</sup>

The overlapping connections across legal scholars and their work, the legal services organizations and attorneys who used it, tribal leaders and grassroots activists who pushed the U.S. government to change to an Indian policy promoting self-government and economic development highlight not only the roles of Indigenous sovereignty and ingenuity, but also the theme of contingency. These events occurred not only during a time of activism that changed federal Indian policy, but also during a window of time when legal services organizations serving Indigenous people(s) had just come into existence. Without these legal services organizations, *Bryan* and the cases leading up to it may never have happened.<sup>358</sup> It is not hard to imagine a scenario, absent these interventions, under which courts

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356. Washburn, *supra* note 5, at 921, 959–64; Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L. REV. 285 (2004); Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427 (2001); see also MASON, *supra* note 5, at 46–69; LIGHT & RAND, *supra* note 5, at 3–16; Clinton, *supra* note 4, at 41–97; Ducheneaux, *supra* note 296; G. William Rice, *Some Thoughts on the Future of Indian Gaming*, 42 ARIZ. ST. L.J. 219 (2010); Santoni, *supra* note 5, at 395–404; Skibine, *supra* note 4, at 273–300. For a discussion of IGRA’s legislative history by Congressional staffers who were involved, see *The Enactment of Indian Gaming Regulatory Act Session 1*, UNIV. OF NEV., L.V. SCH. OF LAW (Dec. 14, 2020), <https://law.unlv.edu/indian-nations-gaming-and-governance-program> [<https://perma.cc/2JC4-P3F6>].

357. See Brewer & Cadue, *supra* note 5, at 59 (Glenn Feldman discussing the relationship between *Bryan* and *Cabazon* and stating “at that time it wasn’t all that clear-cut, even in 1986, what impact *Bryan* would have. I mean, the *Cabazon* case could have gone either way. Let’s face it”); see also *id.* (Feldman discussing the Justices’ position during *Cabazon* oral argument that *Bryan* was “just a tax case”); *Cabazon Transcript*, *supra* note 208, at 32, 45 (Justices Stevens and Rehnquist questioning extent of *Bryan*’s holding); *supra* notes 210–215 and accompanying text (discussing same).

358. See Forman 2019 Interview, *supra* note 135 (explaining that before the existence of CILS and other legal services organizations, few if any lawyers were representing Indigenous people(s) in cases challenging state or local government jurisdiction under PL 280); Quesenberry Interview, *supra* note 106 (discussing same and noting that most private attorneys representing Indigenous tribes at the time worked almost exclusively on claims cases where there was potential to recover attorney fees); see also Charles Wilkinson, *Foreword to ZIONTZ*, *supra* note 229, at x (noting that in the early 1960s, “poverty-stricken tribes could rarely afford lawyers in private practice, and federal legal services programs for dispossessed peoples did not yet exist”).

continued to stifle tribes' gaming efforts and sovereignty more generally by allowing state jurisdiction.

Today, the Rincon Band of Luiseño Indians owns Harrah's Resort Southern California, which generates revenues to fund government services and contributes some \$350 million in annual economic output to the regional economy.<sup>359</sup> The Grand Portage Band operates the Grand Portage Lodge and Casino, which began as a partnership with the Radisson Hotel Corporation in the 1970s.<sup>360</sup> The Seminole Tribe of Florida owns seven casinos on its reservations, some operating under the Hard Rock International brand that the Tribe bought in 2007. Like other tribes, the Seminole Tribe is expanding its gaming enterprises off-reservation and internationally.<sup>361</sup> The Oneida Nation of Wisconsin owns and operates the Oneida Casino as well as other tribal enterprises (including a Radisson hotel and conference

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359. *Government*, RINCON BAND OF LUISEÑO INDIANS, <https://rinconnsn.gov/government/> [<https://perma.cc/FGQ6-6UHH>] (last visited Oct. 10, 2021); *New Study Shows the Rincon Tribe Drives Regional Economy*, RINCON BAND OF LUISEÑO INDIANS, <https://rinconnsn.gov/small-tribe-huge-impact/> [<https://perma.cc/VPP3-LPD8>] (last visited Oct. 10, 2021).

360. *See About Grand Portage Lodge & Casino: Our Heritage*, GRAND PORTAGE LODGE & CASINO, <https://www.grandportage.com/index.php/misc/about/our-heritage> [<https://perma.cc/AGS6-BU63>] (last visited Oct. 10, 2021).

361. In January 2020, the Seminole Tribe was the runner-up for a license to open a casino in Athens, Greece, which instead went to Mohegan Gaming & Entertainment, an entity of the Mohegan Tribe in Connecticut that owns and operates casinos in South Korea and across the United States, including in Las Vegas. *See Mohegan Advances, Hard Rock Denied in Process to Build a Casino in Greece*, NATIVE BUS. MAG. (Jan. 14, 2020), <https://www.nativebusinessmag.com/mohegan-advances-hard-rock-denied-in-process-to-build-a-casino-in-greece/> [<https://perma.cc/GSK5-6LQ5>]; *Mohegan-Led Consortium Offers 150 Million Euros for Greek Casino License*, REUTERS (Oct. 8, 2020), <https://www.reuters.com/article/us-greece-hellenikon-mohegan-gaming/mohegan-led-consortium-offers-150-million-euros-for-greek-casino-licence-idUSKBN26T1GQ?il=0> [<https://perma.cc/NP6T-CXVP>]; *Mohegan Sun Poised to Operate Virgin Casino in Vegas*, AP NEWS (Oct. 8, 2020), <https://apnews.com/article/business-new-york-nevada-new-york-city-richard-branson-e94488c3e66658a666c790806d1d32bd> [<https://perma.cc/G5TW-74ZM>]; *see also* Devin O'Connor, *Mohegan Gaming Announces Japan Integrated Resort Bid in Nagasaki*, CASINO.ORG (Jan. 28, 2021), <https://www.casino.org/news/mohegan-gaming-announces-japan-integrated-resort-bid-in-nagasaki/> [<https://perma.cc/Y328-Q229>]; Eric Gibbs, *The Race to Control Nagasaki's Casino Resort Heats Up*, GAMBLING NEWS (June 24, 2021), <https://www.gamblingnews.com/news/the-race-to-control-nagasakis-casino-resort-heats-up/> [<https://perma.cc/M9K7-3967>]; Kevin Hogan & Andrew Masse, *Mohegan Sun Casino Marks 25th Anniversary*, WFSB (last visited Oct. 12, 2021), [https://www.wfsb.com/news/mohegan-sun-casino-marks-25th-anniversary/article\\_9acb6772-2bce-11ec-84e3-3bd781dae43a.html?utm\\_medium=social&utm\\_source=email&utm\\_campaign=user-share](https://www.wfsb.com/news/mohegan-sun-casino-marks-25th-anniversary/article_9acb6772-2bce-11ec-84e3-3bd781dae43a.html?utm_medium=social&utm_source=email&utm_campaign=user-share) [<https://perma.cc/7QK8-39X2>]. The San Manuel Band of Serrano Indians recently purchased the Palms Casino in Las Vegas. *See* Mike Shoro & Richard N. Velotta, *San Manuel Tribe Buying Palms in Las Vegas for \$650M*, LAS VEGAS REV. J. (May 4, 2021), <https://www.reviewjournal.com/business/casinos-gaming/san-manuel-tribe-buying-palms-in-las-vegas-for-650m-2346100/> [<https://perma.cc/M8W5-EH2D>]. The Poarch Band of Creek Indians (whose reservation is in Alabama) owns and operates resort casinos in Pennsylvania, Aruba, and Curaçao. *See* WIND CREEK HOSP., <https://windcreek.com/hospitality> [<https://perma.cc/N44A-4N6W>] (Oct. 10, 2021).

center connected to the casino), and is the third-largest employer in the greater Green Bay area.<sup>362</sup> The Cabazon and Morongo Tribes operate, respectively, the Fantasy Springs Resort Casino and Morongo Casino, Resort & Spa, two of the largest casinos in California.<sup>363</sup> Robert Martin, who was the Morongo chairman during the *Cabazon* litigation and retired in June 2021 after three decades on the Morongo Tribal Council, described how gaming “helped lift the Morongo tribe out of ‘generations of crushing poverty and neglect’ and [made them] into an ‘economic and cultural powerhouse.’”<sup>364</sup>

CILS and NARF continue, along with other legal services organizations like Anishinabe Legal Services and DNA People’s Legal Services, to represent Indigenous people(s) in state, federal, and international judicial forums. Their attorneys, former and current, have continued to shape federal Indian law through their work as practitioners (including in private practice and government) and in the legal academy. The former CILS and NARF attorneys and professors at the center of this Article’s history were some of the foundational scholars of federal Indian law, credited with developing the field as an academic discipline.<sup>365</sup> The changes

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362. See 2019 *Greater Green Bay Factbook*, ISSUU (Dec. 19, 2019), <https://issuu.com/greatergbchamber/docs/factbook2019issuu> [<https://perma.cc/M99Y-KAMC>]; ONEIDA, <https://oneida-nsn.gov> [<https://perma.cc/8KGG-8Y4V>] (last visited Aug. 24, 2021).

363. See FANTASY SPRINGS RESORT CASINO, <https://www.fantasyspringsresort.com> [<https://perma.cc/44NH-G82L>] (last visited Aug. 24, 2021); MORONGO CASINO RESORT & SPA, <https://www.morongocasinosort.com> [<https://perma.cc/A2BB-J7JY>] (last visited Aug. 24, 2021).

364. Amanda Ulrich, *Morongo Tribal Chairman Retires After Three Decades on Council; New Head of Tribe Elected*, DESERT SUN (June 29, 2021), <https://www.desertsun.com/story/news/2021/06/29/morongo-tribal-chairman-retires-after-three-decades-council/7797135002/> [<https://perma.cc/549F-V98H>] (quoting press release).

365. See Roy, *supra* note 79, at 189–93 (discussing Monroe Price and David Getches, along with Ralph Johnson at the University of Washington School of Law, and their contributions to the field). As noted, Monroe Price authored the first federal Indian law casebook, to which Carole Goldberg was also a contributor. See *supra* notes 111–114. Goldberg, who retired from UCLA in 2018, is widely recognized as one of the preeminent federal Indian law scholars, particularly regarding PL 280. Throughout the 1970s, Goldberg and Price worked on revising and producing what became the 1982 edition of the *Cohen Handbook of Federal Indian Law* (the leading treatise in the field), alongside editor-in-chief Rennard Strickland (also the first Native American dean of a U.S. law school), Reid Chambers, Rick Collins, David Getches, Bob Pelcyger, and others. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW IX (1982 ed.); Roy, *supra* note 79, at 181–88; see also Goldberg October Interview, *supra* note 110. Former NARF attorney and University of Colorado Law School professor Charles Wilkinson was the managing editor. Roy, *supra* note 79, at 181. Wilkinson and Getches were co-authors of the second federal Indian law casebook, first published in 1979 and now in its seventh edition. See FEDERAL INDIAN LAW: CASES AND MATERIALS (David H. Getches et al. eds., 7th ed. 2017). Getches joined the Colorado law school faculty in 1979 and served as the school’s dean from 2003 until his passing in 2011. David Getches, UNIV. OF COLO. L. SCH., <https://www.colorado.edu/law/david-getches> [<https://perma.cc/6BYE-YSMM>] (last visited Oct. 10, 2021). Wilkinson was a NARF staff attorney from 1971 to 1975, left to join the University of Oregon law faculty in 1979, and

they helped bring about in legal academia include not only programs (and specializations) in federal Indian law at law schools across the United States;<sup>366</sup> they also include clinical programs providing student legal services for Indian tribes like the San Manuel Band of Mission Indians Tribal Legal Development Clinic at UCLA, one of several entities the San Manuel Band has funded with its gaming revenues.<sup>367</sup> Indian gaming and revenues have also changed the legal industry, with law firms of all sizes (including several AmLaw 100 firms) operating Indian law practices and legal services organizations, including CILS, developing a private-advocacy component representing tribes for fees.<sup>368</sup>

Indian gaming has phenomenally increased tribes' political and economic power and provided revenues for healthcare, housing, education, land reacquisitions, and other government programs.<sup>369</sup> However, not all tribes have benefitted, or benefitted equally, from Indian gaming.<sup>370</sup> Another impact of Indian gaming, ironically, has been states' increasing reliance on gaming revenues to fund government operations after seeing the strategy work for tribes. Every state besides Hawaii and Utah now operates or allows some form of gambling. Twenty-five states

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then joined the Colorado law faculty in 1987. See Hank Lacey, *Charles Wilkinson, Beloved Longtime CU Law Professor, Marks 50 Years as Leading "Law of the West" Practitioner, Scholar and Teacher*, LAW WK. COLO., <https://lawweekcolorado.com/article/charles-wilkinson-beloved-longtime-cu-law-professor-marks-50-years-as-leading-law-of-the-west-practitioner-scholar-and-teacher/> [<https://perma.cc/BZ8U-UNJQ>] (last visited Oct. 10, 2021). After leaving CILS for DNA Legal Services in 1971, Rick Collins joined NARF as a staff attorney in 1975 and then the Colorado law faculty in 1982. See Richard B. Collins, UNIV. OF COLO. L. SCH., <https://lawweb.colorado.edu/profiles/profile.jsp?id=12> [<https://perma.cc/TPR9-KSAY>] (last visited Oct. 10, 2021).

366. For a discussion of the development of federal Indian law in U.S. law schools, see Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M. L. REV. 153 (1996); see also G. William Rice, *There and Back Again—An Indian Hobbit's Holiday: Indians Teaching Indian Law*, 26 N.M. L. REV. 169 (1996).

367. *San Manuel Awards \$1.3 Million to UCLA LAW for Tribal Justice Clinic*, UCLA L. (Oct. 3, 2019), <https://law.ucla.edu/news/san-manuel-awards-13-million-ucla-law-tribal-justice-clinic> [<https://perma.cc/QGX5-BATT>]. The San Manuel Band also funded the UCLA School of Law's Native Nations Law and Policy Institute and the Tribal Learning Community and Education Exchange, which are also part of Professor Goldberg's legacy at the school. *Native Nations Law & Policy Center*, UCLA LAW, <https://law.ucla.edu/academics/centers/native-nations-law-policy-center> [<https://perma.cc/UY2H-Q2ZS>] (last visited Oct. 28, 2021); *Tribal Learning Community & Educational Exchange*, UCLA LAW, <https://law.ucla.edu/academics/centers/native-nations-law-policy-center/tribal-learning-community-educational-exchange> [<https://perma.cc/TP9Q-RPMQ>] (last visited Oct. 28, 2021).

368. Quesenberry Interview, *supra* note 106 (stating that Indian gaming "changed the whole legal regime").

369. For tribal leaders' and citizens' discussions of poverty and reservation conditions before gaming, and the significant changes brought about by gaming, see Brewer & Cadue, *supra* note 5, at 20–24.

370. For a discussion of the modern stereotype of the "rich casino Indian" and how the politics around Indian casinos have reshaped tribal-state-local government relations, see JEFF CORNTASSEL & RICHARD C. WITMER, *FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD* 1, 4–6 (2008).

have commercial casinos that they and local governments tax.<sup>371</sup> When IGRA passed in 1988, only two states did.

With government finances devastated by the COVID pandemic—especially those of tribal, local, and state governments most dependent on gaming, tourism, and the hospitality economy<sup>372</sup>—disputes between tribes and states over gaming and other revenues likely will continue. Litigation between tribes in California, Oklahoma, and South Dakota and those states over revenue-sharing and other aspects of tribes' casino operations that are governed by tribal-state compacts that IGRA mandated reflect this reality.<sup>373</sup> This Article provides context for understanding these disputes as not just about money (and government revenues) but also sovereignty, and that they predate, and indeed yielded, IGRA.

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371. AGA Survey, *supra* note 1, at 3.

372. See Matthew Gregg & Casey Lozar, *One Year Into COVID-19, Pandemic's Negative Effects Persist in Indian Country*, FED. RESERVE BANK OF MINNEAPOLIS (May 19, 2021), <https://www.minneapolisfed.org/article/2021/one-year-into-covid-19-pandemics-negative-effects-persist-in-indian-country> [<https://perma.cc/KU4U-TK47>]; see also Simon Romero & Jack Healy, *Tribal Nations Face Most Severe Crisis in Decades as the Coronavirus Closes Casinos*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/11/us/coronavirus-native-americans-indian-country.html>; Emily Badger & Quoc Trung Bui, *The Recession Is About to Slam Cities. Not Just the Blue-State Ones.*, N.Y. TIMES (Nov. 26, 2020), <https://www.nytimes.com/2020/08/17/upshot/pandemic-recession-cities-fiscal-shortfall.html>; Katherine Sayre, *In Las Vegas, Coronavirus Job Losses Could Double Those of 2007–09 Recession*, WALL ST. J. (Apr. 9, 2020), <https://www.wsj.com/articles/in-las-vegas-coronavirus-job-losses-could-double-those-of-2007-09-recession-11586433601>.

373. Asha Glover, *Justices End SD's Attempts to Tax Sales at Tribal Casino*, LEXIS LAW360 (May 26, 2020, 6:42 PM), <https://www.law360.com/articles/1276684/justices-end-sd-s-attempts-to-tax-sales-at-tribal-casino> (litigation between South Dakota and Flandreau Santee Sioux Tribe); Joyce Hanson, *Tribes Sue California Over Gaming Compact Negotiations*, LEXIS LAW360 (Aug. 14, 2020), <https://www.law360.com/articles/1301229/tribes-sue-calif-over-gaming-compact-negotiations> (lawsuits filed by multiple California tribes over failed compact negotiations); Randy Krehbiel, *Gov. Stitt Says Nontribal Casinos Would Mean More Money for State*, TULSA WORLD (Feb. 29, 2020), [https://www.tulsaworld.com/news/gov-stitt-says-nontribal-casinos-would-mean-more-money-for/article\\_61da7e2a-0f17-5091-9d14-5af4771a5159.html](https://www.tulsaworld.com/news/gov-stitt-says-nontribal-casinos-would-mean-more-money-for/article_61da7e2a-0f17-5091-9d14-5af4771a5159.html) [<https://perma.cc/T7GM-4JP9>] (disputes over Oklahoma tribal-state compacts); Ken Miller, *Federal Judge: Oklahoma Gaming Accords Renewed Jan. 1*, WASH. POST (July 28, 2020), [https://www.washingtonpost.com/business/federal-judge-oklahoma-tribal-gaming-accords-renewed-jan-1/2020/07/28/b3130444-d0f2-11ea-826b-cc394d824e35\\_story.html](https://www.washingtonpost.com/business/federal-judge-oklahoma-tribal-gaming-accords-renewed-jan-1/2020/07/28/b3130444-d0f2-11ea-826b-cc394d824e35_story.html) [<https://perma.cc/DY8X-XLGG>] (same).