North Dakota Law Review

Volume 80 | Number 4 Article 6

2004

Commentary: Labor Relations and Tribal Self-Governance

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LABOR RELATIONS AND TRIBAL SELF-GOVERNANCE

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STEVEN F. OLSON:[1] Professor Rice has suggested that I should go first, so thank you.

As was indicated may name is Steven Olson. I'm a partner of BlueDog, Olson and Small. We're a firm representing Indian tribes, tribal governments, and tribal enterprises, and virtually all of tribal endeavors.

We are proud of the fact that we don't work for the other side of the street. We represent only tribes and tribal interests, and have worked for tribal sovereignty throughout the existence of the firm and throughout the time that I've been in practice.

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1. Steven F. Olson graduated cum laude from the William Mitchell School of Law in 1992, and was admitted to practice in the State of Minnesota in October 1992. Before becoming involved in the practice of law, Mr. Olson founded and operated several successful business enterprises, and has extensive experience with entrepreneurial activity.

Steven practices in the areas of corporate law, government relations, gaming business law, gaming regulatory compliance, commercial transactions, construction law, tribal-state taxation issues, and environmental law as applicable to Indian tribes, with special emphasis on business transactions including financing transactions of all types, corporate issues and litigation. He has extensively represented tribes before various tribal, state and federal courts in litigation involving issues of sovereignty, sovereign immunity and administrative law, and has successfully defended tribal sovereignty and sovereign immunity before the Minnesota Court of Appeals, the Minnesota Supreme Court, federal district courts, the Eighth Circuit Court of Appeals, and in filings with the United States Supreme Court.

Mr. Olson has been instrumental in negotiating and closing several significant financial transactions that provided resources for tribal infrastructure, casino expansion, and water and sewer projects for various clients, and has negotiated various contracts on behalf of tribes that contained terms very favorable to the tribes. Among other accomplishments, Steven serves as pro bono counsel for immigrants seeking political asylum in the United States, and is an active member of Amnesty International.

In addition to bar association memberships with the Federal Bar Association, the Federal Indian Bar Association, the South Dakota Bar Association, the Minnesota Bar Association, and the Hennepin County Bar Association, Mr. Olson has been admitted to practice before the U.S. District Court for Minnesota, U.S. District Court for Wisconsin, the U.S. District Court for South Dakota, and the U.S. District Court of Iowa, as well as the United States Eighth Circuit Court of Appeals, the United States Supreme Court, and the Shakopee Mdewakanton Sioux (Dakota) Community Tribal Court, the Sisseton-Wahpeton Tribal Court, and the Forest County Potawatomi Community Tribal Court. Mr. Olson also serves as an Appellate Judge for the Lower Sioux Community Court of Appeals, and for the Prairie Island Community Court of Appeals.

This decision by the National Labor Relations Board, as the presenter has indicated, is wrong for a number of reasons. It appears to me to demonstrate a trend that is occurring both in the courts and in the federal executive branch to attempt to subject tribes, in the absence of express congressional consent in the form of legislation contemplating that the tribes would be subject to those laws, to what is referred to based on the Tuscarora Rule, to laws that are general in nature, and by their terms apply to all persons.

Ms. Singel is right, when you look at the *Tuscarora* case itself, it was not about a law of general applicability. That case was about a very specific law that applied to a very specific piece of, or very specific pieces of property in a taking that occurred under the Federal Power Act. So, the dicta really needs to be placed within that context.

That dicta has been seized upon by a vast number of courts. The Second, the Ninth, the Seventh, the Eleventh Circuits have all looked at *Tuscarora* and have determined that that is a rule that was set down by the Supreme Court. That rule has never been affirmed by the Supreme Court in any case.

Going back to the case that Ms. Singel was citing, the *National Labor Relations Board v. Pueblo of San Juan*, which was decided by the embodied panel of the Tenth Circuit in 2000, and then was heard *en banc* by the Tenth Circuit in 2002. The Tenth Circuit frequently appears to be out of sync with these other circuits, when in reality I would contend that it is these other circuits that are out of sync with the Tenth. The Tenth really has a grasp on fundamental concepts of sovereignty in Indian law and how they apply in a given set of circumstances, particularly with respect to the application of the federal statutes to Indian tribes.

The Tenth Circuit in that case, and I would recommend that anyone who is a practitioner or who is interested in Indian law read the case because in that case, the Tenth Circuit said that they disputed the *Tuscarora* Rule and the existence of that rule all together. And they, to a certain extent, chided the other circuits for applying what is not really a rule of law in a way that doesn't exist in the federal context at the Supreme Court level.

They said that the Supreme Court in 1973, in *Mescalero Apache Tribe v. Jones*, implicitly rejected or overruled the *Tuscarora* dicta and restated the proposition that federal courts should tread lightly in the absence of express congressional consent. It comes to a question of whether or not a law abrogates tribal sovereign rights.

Now, I think that one can go further in criticizing the National Labor Relations Board's decision than even Ms. Singel has, because Congress must invoke an enumerated power in order to act. That's stated in

McCullough v. Maryland, by Justice Marshall who wrote the Marshall Trilogy that serves as the basis for much of Indian law today. *Marbury v. Madison* is another case that stands for that same proposition.

The powers must be expressly given in the Constitution before Congress can act. And that's *Martin v. Hunters' Lessee*. That's reaffirmed by the United States Supreme Court as recently as 1995 in *United States v. Lopez*. Or powers could be necessarily given by implication in order to exercise that expressly given power.

Congress is given only one power by the Constitution with respect to Indian tribes. That power is in the Indian Commerce Clause. The Indian Commerce Clause is found at Article 1, Section 8, Clause 3 of the Constitution, and it is one part of the commerce clause, the other two parts being what are referred to as the Foreign Commerce Clause and the Interstate Commerce Clause, which most of us are familiar with.

Congress has invoked the Indian Commerce Clause literally thousands of times to enact legislation that is specific to Indian tribes. In so doing it demonstrates and evinces a clear congressional intent.

It does that by considering in the process of enacting that legislation what impact the legislation will have on Indian tribes and what purpose is intended by the legislation. The Supreme Court has said that the exercise of the constitutional power that Congress invokes must be the limiting standard by which any enactment is construed. Now what relevance does all that have in the National Labor Relations Board decision. Well, there's a tension in this decision between the fundamental constitutional precepts that I just talked about and the *Tuscarora* Rule and its application in this circumstance.

Once again, the *Tuscarora* Rule stated in dicta that a general statute applying to all persons includes Indians. It's very important to note they said Indians not Indian tribes and their property interests. Now, that was derived from a line of cases that had to do with whether or not taxes applied to Indians in specific circumstances.

If you look back at what was relied on for support of that proposition in *Tuscarora*, it has nothing to do with powers of self-government exercised by Indian tribes as sovereign entities predating the existence of this Nation, and who derived their fundamental sovereignty from the fact that they were political entities that were here before the advent of the Europeans on this continent. So you put that in the context of fundamental constitutional principles and what you have, when you look at the National Labor Relations Act is a piece of legislation that was enacted in an exercise of Congress's interstate commerce power. The Act doesn't contemplate

Indian tribes at all. It doesn't mention Indian tribes. There's no mention of Indian tribes in any piece of legislative history at all.

If you go back to the separation of powers, which the Supreme Court reaffirmed in the *U.S. v. Lopez* case in 1995, and you put this in the context of the application of these laws in which Congress has not invoked the Indian Commerce Clause but has invoked only the Interstate Commerce Clause, one could easily conclude that the Second, Ninth, Seventh, and Eleventh Circuits have usurped legislative authority. They violated the Separation of Powers Doctrine. Because what they have done is stepped into the shoes of Congress and said that these rules that are contained in the National Labor Relations Act are going to apply to Indian tribes. Even though Congress never said that. They have taken the legislative authority of Congress, and they have determined the congressional silence constitutes congressional action. And that particular congressional silence constituting congressional action has been given its greatest expression in the second exception that was talked about by Ms. Singel a moment ago, where if there is some second exception to the *Tuscarora* Rule, that was articulated first in *Farris* and then is carried forward in *Coeur D'Alene*, the second exception goes to congressional action. If there's something in the legislative history that evinces a congressional intent to exclude tribes from the application of a law of general applicability, then tribes will not be subject to that law. That stands the principals of sovereignty right on its head and really works to abrogate tribal sovereignty by congressional silence. Something which the United States Supreme Court has repeatedly said cannot be done.

Now once again the National Labor Relations Board is part of the executive branch. Congress has not acted to extend the National Labor Relations Act to Indian tribes. So in this decision, one can easily argue that the executive branch has usurped the legislative role and has violated certain fundamental constitutional principles that must be adhered to in all circumstances when we look at the exercise of power by the federal government.

Where once again, as I indicated again before in *New Mexico v. Mescalero Apache Tribe*, the United States Supreme Court said, and this is a direct quote, "where Congress has not acted to abrogate tribal sovereignty, or tribal sovereign right to exclude others from their lands, tribes retain that right." Now if it you look back, the right to regulate has been defined in Supreme Court precedent as deriving a lesser incident of the broader property right that tribes exert, and the broader political right that tribes exert, and is an incident of sovereignty. Tribes possess the power to exclude. It's a power that states don't have. It's a power that the federal government doesn't have, except with respect to those who are non-citizens.

The tribal power to exclude from their lands any person they choose has been reaffirmed throughout the course of Supreme Court precedent dealing with Indian tribes and their sovereign rights. So if you put this in the context of Supreme Court precedent overall, and in the context of what it was that the National Labor Relations Board did here, really what they did was take the sovereign power to exclude, and the lesser power to regulate, from San Manuel without congressional action, and without clear judicial action. I would contend that there is a more fundamental flaw with this decision than just all of the points that Ms. Singel has made. And those are all very valid points. I would highly recommend that anyone who has an interest in this area of the law, and who has an interest in tribal economic development read this article. It is a very, very comprehensive treatment of the subject. Very exhaustive treatment of the case law, and a very thoughtful analysis. I would strongly recommend it. And the author has done an excellent job.

But what the National Labor Relations Board has done is clearly, in my mind, unconstitutional and will not withstand judicial review once the case gets to that point. If it ever does. We are still counsel on the case in an amicus rule, and we received notice two days ago that the National Labor Relations Board in the Washington office has once again taken jurisdiction of this case away from the regional office on the pretense that the tribe is attempting to re-litigate the jurisdictional issue. So I see this as part of a trend that's taking place both in the judicial branch of certain circuits, but also in the executive branch. I believe that trend is going to continue and I think that tribes need to look at ways in which, as Ms. Singel points out, they can act not just defensively but offensively as well.

One of the ways that you can do that, it seems to me, is to carefully select the fact patterns upon which you litigate, and try to create legislation for tribes that will give you the fact patterns that are going to be successful. We recently won a case involving the applicability of ERISA to a tribal gaming enterprise. One of the things that we had done in the course of representing this tribe was to create structures that closely integrated the tribal gaming enterprise with the tribal government so that this sort of distinction that's being drawn by the National Labor Relations Board would be much more difficult to apply. We married the two as closely as we could. We also created a very strong regulatory body and set of laws that govern the operation of that facility. We implemented various labor regulations that would apply to that as well. The tribal laws required that the individual officers of that corporation in order to have their compensation approved, or compensation increased, to have the approval of the board of directors. There is a doctrine out there in the context of ERISA that is

referred to as the De Facto Plan Doctrine, which essentially stands for the proposition that in those circumstances where an individual employee has been presented information by an employer that would lead them to believe that they are a participant in a benefit plan, the employer can't later withdraw those benefits and say there was no plan. In this particular case these executives had created plans, diverted gaming revenues to those plans claiming that they had been approved by the board of directors. That wasn't the case and the tribal appellate court, Judge Henry Butwell presiding, determined that these plans had not been approved by the board of directors as required.

The case initially went before the federal district court in 1995, and we had it sent back to the tribal court on the Exhaustion Doctrine, and went through the tribal process. The tribal trial court determined that this de facto doctrine did apply. Tribal appellate court reversed that, and then about nine months after that reversal, all the funds that were held in what is referred to as a rabbi trust had come back to the company and back to the tribe. The individual participants who claimed that they were beneficiaries of these plans sued in federal court the second time.

The federal district court, Judge Dodie presiding, sided with them and overruled our motion to dismiss. We appealed to the Eighth Circuit, and the Eighth Circuit determined that in these circumstances where there is a tension between a federal law and a tribal law, and the tribal law involves Indian gaming and the policies of Indian gaming are clear, to strengthen tribal self-government, and under the tribal law there could not be a plan unless it had been approved by the board of directors, then ERISA could not even apply to determine whether or not those benefits that are protected by ERISA would be protected in this case. [This was] the first case in the country where ERISA has not been applied to an Indian tribe in this context. But I think again part of the reason for that is because we had carefully laid the groundwork for this through a number of years, and had attempted to create both a legal and a factual context within which we could prevail. At the time that we went before the Eighth Circuit, we had framed the issues in a way that made it clear that if the Eighth Circuit decided this case in favor of protection of ERISA applying to these individual officers it would be defeating the purposes of IGRA, defeating the purposes of all of the tribal laws that had been enacted for the implementation of IGRA, and would be defeating federal Indian policy in the process.

I think if you can create factual contexts that set up that tension and clearly articulate those in the issues and maintain those issues throughout the litigation process, we stand a better chance of turning Indian law in a direction that it needs to go. And I think that that's the outgrowth for the

practitioner of the National Labor Relations Act or National Labor Relations Board's decision in *San Manuel.*

Thank you.

G. WILLIAM RICE:[2] Well, I asked Steve to go first because I had a sneaking suspicion that if I did I could do this. (Throws notes on table.)

First off I want to thank UND and the Law School, the Dean, my former colleagues up here, for the invite. It's an honor to be asked to come back, and I certainly appreciate the opportunity to come back and participate in this conference. Thank you.

And it was also a pleasure to hear the discussions this morning, particularly this last paper, because it does such a wonderful job of bringing substance and context to things that I was thinking about ten years ago when I was up here and I wrote a little piece for the Law Review. Basically it said what brother Steve said here, and that is that when we start talking about doing things to Indian tribes and tribal governments, we ought to tread real lightly. With that we had some explicit direction from Congress.

And part of that I don't want to rehash, I know we're running a little late and my time was up two minutes ago, but I'm going to take a little bit here anyway. This is such a wonderful context piece and theoretical piece that it's difficult to get up here and say anything other than go get em, you know. Because it does really lay out a lot of the thought processes. And of course Steve brought in the practitioner's viewpoint, so in a way it's kind of freed me to do what I guess, at least I think I do best, and that's kind of shoot off on a rocket to Pluto somewhere, gather up some moon dust, and think about a couple of weird things, and try to come back with a plan of bringing on something. So go with me on the thought experiment for a minute.

Let's take this rule that the National Labor Relations Board has and apply it to the University of North Dakota [UND]. Oh, my God. North

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2. G. William Rice is Associate Professor of Law and Co-Director of the Native American Law Center at the University of Tulsa College of Law. Professor Rice earned his J.D. at the University of Oklahoma. Prior to joining the faculty in 1995, he spent 18 years in private practice representing Indian tribes and entities. He also has served as Attorney General for the Sac and Fox Nation, Chief Justice for the Citizen Band Potowatomi Nation, and Assistant Chief and Chief Judge of his Tribe, the United Keetoowah Band. He has served as the official representative of the United Keetoowah Band and the Sac and Fox Nation, to the United Nations' Working Group on Indigenous Populations, and as representative of the Citizen Potowatomi Nation to the Working Group on the Draft Declaration of the Rights of Indigenous Peoples. Professor Rice, who has successfully argued before the United States Supreme Court, contributed to the latest revisions of the Handbook of Federal Indian Law. His teaching and writing interests include Indian and Indigenous law, with an emphasis on the protection and revitalization of the legal and political systems of Indian Tribes, Jurisprudence, and Constitutional Law.

Dakota just lost jurisdiction over its own law school. You had the audacity to hire somebody from somewhere else to come in and work here. So whatever the exception is in the NLRB that doesn't apply anymore because now it's no longer purely an intramural deal for North Dakota. You've got somebody not from North Dakota hired to work at UND, and the fact that they've been moving to North Dakota will be irrelevant, just like it was irrelevant that these employees moved in. I suspect to the tribal jurisdiction because of course if you live close to your work it makes a much shorter commute. So a lot of these folks moved to the reservation, right? Well, okay.

My tribe in Oklahoma now has jurisdiction over UND employees and the Tribe Owatoma Rights Ordinance applies to UND now. Silly? Of course not.

I can't get up here and say something like that. But that's the rule that we're supposed to accept. Somebody from off the reservation or from another tribe or outside the Indian community gets hired and all of a sudden here they come in to protect their employee from the evil Indians that did nothing more than give them a job. Well, I thought of some remedies when Ms. Singel was proposing them, but my mind would go a little bit crazier I'd fire them. If we can't hire anybody but Indians, well, fire everybody else. Heck with you. Then it will be intramural purely. Right?

I know what it is to live in a place where I'm the guy that's got the job. Let's be real, you know. So sonny, and son-in-law, and nephew, and cousin, and grandpa, they all come to my house. Okay? Now, that's no big deal. That's just the way it is in the Indian community. I grew up like that. Whoever has got the job they fed everybody else. You share. That's the way it is. Okay?

It's no big deal. Nothing to brag about. Just life. Okay?

Until of course we got too much to share. Until more of our guys got jobs. Until we get too much money. Because what everybody has to understand in this context, what nobody talks about, whether it be sharing gaming proceeds, or whether it be who gets hired or the conditions under which they work, or whether they can organize, or anything of the others things they did at Tulsa, it's the context of 200 years of federal policy aimed at one or two things. You can bring it all down to description of the Indian community and enforced dependency on federal money. If you really get down to it, up until 1973 that was the federal policy, with a couple of glitches along the way where they actually agreed that maybe tribes ought to do something for themselves, namely the IRA, which lasted from about 1935 up until 1953. So we had about fifteen years in there where the idea was that tribes should rebuild their economic base and

rebuild their tribal governmental structures, which the United States had spent one hundred odd years, and probably more causalities out of West Point than any other war that the United States ever engaged in, trying to destroy Indian tribes and enforce dependency on the United States government.

And now we are faced with a situation where two things happened, and it's kind of interesting if you don't have gaming, if you don't do any economic development, if you succumb to the forces that have been levied against you for all of these years. In fact, if that generation of tribal leaders is still in your tribe who believe that the role of tribal leaders is to go tell the BIA what the people need, I grew up with those guys. That was their job. They went and they told the BIA or the Indian Health Service what those people needed, and that was the role of your chief, your governor, your chairman, whatever the title was.

We still have those guys hanging around and for tribes where those guys win, what we hear from the BIA is you've got to get moving. You've got to get active. You've got to get involved in economic development. You have to end up being self-govern[ed]. You have to get busy, guys. Okay?

How dare you sit back and say, oh, the trust responsibility requires the federal government to look after us, which is what we were taught for a hundred years. And on the other hand if you do economic development, if you do get out there and get active, if you are successful at it, they change the rules.

I mean tribes have not had successful economic development opportunities since the buffalo were killed, until gaming came along. And every time we tried to find one that worked the rules got changed.

We found one that worked. It was call bingo. I don't know anybody who wants to be the bingo tribe. Now we're the Pangolabango. I don't know any tribe that thinks that. But I know lots of tribes wanted to use bingo so that sonny could have a job. So that we could pave the road.

So we understand, what was term they used this morning, revenue sharing? We understand revenue sharing. We'd like to get the road to the reservation paved. We can buy the blacktop. We understand that, but if you have gaming and if you get successful, the rules change. We got successful and California tried to change the rules, and the Supreme Court said nope, you can't.

And that's *Cabazon*. The *Cabazon* decision says why can't the tribes do gaming. There is nothing preventing the tribes from doing gaming.

The interesting part is all this thought process about, you know, as long as the state law allows. Well, California is a 280 state. Congress has

explicitly made state law applicable to California. So of course, if the state law allowed it, because if it was criminally prohibitory that was the Public Law 280 rule. It's the state law of general application, and therefore it's illegal in the Indian country in a 280 state. If it's not criminally prohibitory, if it's only regulated, if it's allowed to be played by some people some time under some conditions, in other words, not like a bank robber, you can't go down and get your permit to rob a bank, then tribes can do it, and they can regulate it themselves because it's no longer a state law of general application. It's permitted under those circumstances. It is allowed, and that was the rule that came up in *Cabazon*. In other words, we won the war, for a minute. Right?

We have got an economic development plan that works. And in fact, it was talked about as the new buffalo. And what happens? Congress rides to the rescue of the poor states that these Indians are abusing. The states come in and say we are willing to allow federal courts to talk to us and to tell us that we've misbehaved in the compacting process, as long as the states or the tribes have to compact with us to do gaming in Class III. We want a compact between the state and the tribes, and we will give up our ability to not be sued in order to be a participant in the regulatory process of gaming in Indian country. And Congress bought it.

A few years later what do we have? Federal courts say they gave it up, but now we gave it back. Tribes are again finding a way to take away the process. And what we have going on here in the National Labor Relations Board, in my way of thinking, is simply an extension of that process. It's not always the frontal attack that destroys the ability of Indian people to exercise true self-determination. It's often the administrative agency. It's often not the casino that's charged or that's attacked, but the ability of the tribe to control the employees of the casino that's attacked, which is exactly what's going on here. Okay?

Now part of the reason for that is the federal policy of colonialism. It has always been here, always been with us. It's this dependency that's enforced. It's the destructive elements that are pushed onto Indian tribes all flow to this same level if we get too successful.

If we get too successful, we're not Indians any more. If we're too successful, we ought not to have reservations any more. If we're too successful, we ought not to have any rights any more. We ought not to have any treaties any more.

And folks, I think that that's the unstated agenda here. But that's an agenda that we ought to take a hard, cold look at and see what the roots of that agenda are. Because I'll simply say to you that self-determination, sovereignty, that we all talk about, is not self-determination as we know it

here in the United States. When we talk about self-determination most of the time we're talking about the Indian Self-Determination Act. Right? And that my friends is a glorified program management tool. And that's all that it is.

Self-determination in the international sense goes like this—Indian tribes have the right to self-determination. Everyone would agree with that. Even here in the United States, Congress would get up, and in fact has several times in statutes saying Indian tribes have a right to self-determination. They don't follow it up with the second sentence that the United States Nations uses. By virtue of that right, they freely determine their political status, and freely pursue their economic, social, and cultural development. The key word is freely. It doesn't give you a right to be successful, it does not guarantee that you will successfully develop your economy or your society or your culture, but it gives you the right to make mistakes necessary to move forward with what's best for your people in your own views. Things like this National Labor Relations Act decision get in the way of that. One, it is an intrusion all by itself into our capability to freely structure our political status, [to] freely determine what that is. Should there even be unions on the reservation? That's certainly a tribal call. Should there be organized labor? Should there be right-to-work, should there be all kinds of things, ERISA plans? All of those are tribal self-determination. Every time some outside entity puts the tribe in the dilemma of you must do this or you can't do that, and then on the other side you usually get something else the same way, so that you're caught between, you've got to give up something regardless. That is an impact on self-determination. That is an impact on sovereignty.

The National Labor Relations Board's own position, and I'll just try to wrap this up, simply by being here it doesn't have to be a matter of if it's intramural or extramural or some other kind of mural. Okay? So I think that we end up being faced by decisions like this with those dilemmas. What do we do?

We have gone to great lengths to try and keep, let me put this nicely, bad guys out of the casinos. Most tribes that I know of don't want bad guys in their casinos, or in their investors, or in their money.

Congress has gone to great lengths to make sure that that does not happen. They have given us great help, and I for one am very glad to have an inside track to the FBI files, so that we can do background checks on people we don't know. Now I know uncle, but I don't know this guy from Chicago. Okay? And I know who uncle is tied to. I don't know who this guy from Chicago is tied to. Okay? So I am glad to have those kinds of in-roads.

On the other hand, whether or not I do slot machines or table games or paper bingo, that ought to be something that I get to decide. That ought to be something I don't have to ask anybody. The state doesn't ask me, why should I ask them? Does the state have to come and ask the tribe if the state employs some Indians or some Indians live in the state? Do the tribal rules apply to North Dakota because UND had the audacity to hire some Indians? Which I praise them for, by the way.

But oftentimes, if you reverse the role and you apply these rules backwards, okay, if you turn the rule upside down, if you will, and try and bring it down and lay it back down on the ground, you can see that the fallacies exist. And I think this is exactly what your paper has pointed out. If you turn this rule upside down and lay it back down and apply it to the state, everybody would believe [it] to be absurd. And I think you've done a wonderful job of pointing that out, and in lots nicer language than I used.

Thank you, very much.