



3-1-2000

States Are People Too

Suzanna Sherry

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

Recommended Citation

Suzanna Sherry, *States Are People Too*, 75 Notre Dame L. Rev. 1121 (2000).

Available at: <http://scholarship.law.nd.edu/ndlr/vol75/iss3/9>

This Essay is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

STATES ARE PEOPLE TOO

*Suzanna Sherry**

There is a joke making the rounds that purports to explain the Supreme Court's 1998–1999 Term, especially the three federalism cases decided on the last day: The Y2K bug hit the Court six months early, and the Court thought the year was 1900. Like most good jokes, this one has a kernel of truth. The Court's *fin de siècle* decisions—both sets of them—seem oddly focused on expanding the constitutional definition of personhood. At the end of the nineteenth century, corporations became people. At the end of the twentieth, it was states.

Americans have not always viewed corporations kindly. In the first half of the nineteenth century, they were feared and therefore legally limited. As Lawrence Friedman explains,

This typical, American fear was the source out of which the system of checks and balances had grown. It was fear of unbridled power, as possessed by large landholders and dynastic wealth, as well as by government. An influential segment of the public was willing to try many techniques to prevent concentration of authority and to offset the corrosive effect of money and power.¹

Statutes, constitutions, and common law doctrines limited corporate power, and courts strictly enforced the limitations.² Eventually, of course, the economic benefits of a corporate structure—and the inevitable tendency of any powerful institution to expand—led to a loosening of legal restraints.

But, as Friedman notes, the gradual rise in public acceptance of the corporate form was “neither painless nor noiseless.”³ Well into the 1870s, courts were still willing to police the excesses of corporate

* Earl R. Larson Professor of Civil Rights and Civil Liberties Law, University of Minnesota.

1 LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 171 (1973).

2 See generally *id.* at 166–78, 446–48; Gregory A. Mark, Note, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1448–55 (1987).

3 FRIEDMAN, *supra* note 1, at 171.

greed, whether by imposing liability for fraud or by enforcing legislative regulations despite constitutional challenges.⁴

After the Fourteenth Amendment was ratified, corporations began to challenge various state regulations as a violation of the Due Process and Equal Protection Clauses. One of the first courts to consider explicitly whether the Fourteenth Amendment's protections extended to corporations held that they did not. A careful reading of the Fourteenth Amendment led Circuit Judge (later Supreme Court Justice) William Woods to that conclusion:

Are corporations persons within the meaning of the same amendment? The word "person" occurs three times in the first section, in the following connections: "All persons born or naturalized in the United States"—"nor shall any state deprive any person of life, liberty or property," etc.—"nor" shall any state "deny to any person within its jurisdiction the equal protection of the laws." The complainants claim that this last clause applies to corporations—artificial persons. Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. If we adopt the construction claimed by complainants, we must hold that the word "person," where it occurs the third time in this section, has a wider and more comprehensive meaning than in the other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons. This construction of the section is strengthened by the history of the submission by Congress, and the adoption by the states of the 14th amendment, so fresh in all minds as to need no rehearsal. We are of opinion, therefore, that the ordinance of the city of New Orleans is not in violation of the provisions of the 14th amendment to the Constitution of the United States.⁵

Both the *Slaughterhouse Cases*⁶ in 1873 and *Munn v. Illinois*⁷ (and the other Granger cases) in 1877 made clear that the Fourteenth

4 On fraud suits, see FRIEDMAN, *supra* note 1, at 448–52.

5 *Insurance Co. v. New Orleans*, 13 F. Cas. 67, 68 (No. 7052) (C.C.D. La. 1870).

6 83 U.S. 36 (1873). For a good history of the case, see HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836–1937*, at 116–24 (1991).

7 94 U.S. 113 (1877); see also CHARLES FAIRMAN, *7 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864–88*, at 327–71 (1987).

Amendment did not significantly limit states' ability to regulate business practices, including those of corporations.

But by 1882 the judiciary's view of the scope of the Fourteenth Amendment was already changing. Another circuit judge disagreed with Judge Woods, holding that the Fourteenth Amendment *did* apply to corporations as well as to natural persons.⁸ Two years later, Francis Wharton published his influential *Commentaries on Law*, in which he characterized the Fourteenth Amendment as "destroy[ing] the power which had been assumed by state legislatures of interfering with private business."⁹

Then in 1886, the Supreme Court stepped into the breach. Without explanation and without hearing argument, the Court held that the Equal Protection Clause extended to corporations. In *Santa Clara County v. Southern Pacific Railroad Co.*,¹⁰ the Southern Pacific challenged a state tax levy on various grounds, including that it violated the Equal Protection Clause. According to the *United States Reports*,

Before argument, Mr. Chief Justice Waite said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person the equal protection of the laws, applies to these corporations. We are all of opinion that it does.¹¹

Justice Harlan eventually wrote the unanimous opinion invalidating the levy as a violation of California law; the Court ultimately did not reach the federal constitutional question. Three years later, in *Minneapolis & St. Louis Railway Co. v. Beckwith*,¹² the Court unanimously held that the Due Process Clause also applies to corporations, explaining only that "[i]t was so held" in *Santa Clara County*.¹³ At the

8 See *County of San Mateo v. Southern Pac. R.R. Co.*, 13 F. 722 (C.C.D. Cal. 1882).

9 FRANCIS WHARTON, *COMMENTARIES ON LAW, EMBRACING CHAPTERS ON THE NATURE, THE SOURCE, AND THE HISTORY OF LAW, ON INTERNATIONAL LAW, PUBLIC AND PRIVATE, AND ON CONSTITUTIONAL AND STATUTORY LAW* (1884), *quoted in* HOVENKAMP, *supra* note 6, at 95.

10 118 U.S. 394 (1886).

11 *Id.* at 396.

12 129 U.S. 26 (1889).

13 *Id.* at 28. An intervening case, *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888), held that corporations are *not* citizens within the meaning of the Privileges or Immunities Clause. The Court in *Pembina* also upheld the challenged state statute—which imposed special conditions on out-of-state corporations doing business in the state—against an equal protection challenge: "The state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corpora-

same time, the Court began developing the doctrine of substantive due process, which gave anti-regulatory content to the newly expanded Fourteenth Amendment protections.¹⁴ The 1880s and 1890s were, in the words of one historian, "the apogee" of the "classical model" of political economy.¹⁵

It is perhaps too late in the day to argue that *Santa Clara County* and *Beckwith* ought to be overruled, but it is important to note the sleight of hand by which corporations' status as persons was established. *Santa Clara County* gives no reasons or argument, and the determination that the Equal Protection Clause extends to corporations is surely dicta since the Court did not need to decide whether the tax in question violated the clause. Moreover, the Due Process Clause was never at issue in *Santa Clara County*, so it was disingenuous for the *Beckwith* Court to characterize the case as having held that the Due Process Clause also extends to corporations. And neither holding is particularly attentive to the language of the Amendment: as Judge Wood noted, extending protection to corporations requires that courts interpret the word "persons" differently for different clauses of the same amendment. (Indeed, corporations are still not entitled to claim the protections of the Privileges or Immunities Clause.¹⁶) Nevertheless, despite the paucity of reasoning, the irrelevance of the constitutional question to the holding in *Santa Clara County*, and *Beckwith's* inaccurate citation of *Santa Clara County* for a proposition never considered in that case, *Santa Clara County* and *Beckwith* are routinely cited as establishing that corporations are entitled to Fourteenth Amendment rights.¹⁷

tions of interstate or foreign commerce." *Id.* at 189. The Court also repeated, without citation, its earlier determination that "[u]nder the designation of person there is no doubt that a private corporation is included," noting that "corporations are merely associations of individuals united for a special purpose." *Id.*

14 See *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (striking down state insurance regulation as violation of Due Process Clause); *Mugler v. Kansas*, 123 U.S. 623 (1887) (upholding state liquor law but indicating that state police power was substantively limited by 14th Amendment). The state courts had been breathing substantive life into the Due Process Clause for some time. See, e.g., *Ritchie v. People*, 40 N.E. 454 (Ill. 1895); *In re Jacobs*, 98 N.Y. 98 (1885); *Godcharles v. Wigeman*, 6 A. 354 (Pa. 1886).

15 HOVENKAMP, *supra* note 6, at 13.

16 See *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656 (1981).

17 See, e.g., *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 574 (1949) (Jackson, J., concurring); *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897); *Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896). At least one commentator suggests that modern jurisprudence misinterprets *Santa Clara*

The result, according to a turn-of-the-century commentator, was to place corporations in "an almost impregnable constitutional position."¹⁸ "Impregnable," according to Webster's, means "unassailable," which is itself defined as "not liable to doubt, attack, or question." And after the trilogy of sovereign immunity cases from last term, states are certainly unassailable: they cannot be attacked or questioned by individuals in any court, even when they violate federal law.¹⁹

I will leave it to others in this Symposium to explain how thoroughly the Court's broad reading of the Eleventh Amendment combines with its narrow reading of Section 5 of the Fourteenth Amendment to protect the states from repercussions for violating federal law. What I find particularly fascinating about last term's cases is how the Court seems to portray states not just as impregnable, but as human.

The most striking example is the Court's use of analogies between state sovereign immunity and individual rights. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*²⁰ (*College Savings Bank*), the Court considered the question of whether the state's commercial activities should be construed as a waiver of its sovereign immunity. In concluding that there was no waiver, Justice Scalia's majority opinion analogizes the waiver of sovereign immunity to "other constitutionally protected privileges,"²¹ including the Sixth Amendment right to counsel, the right to trial by jury protected by the Sixth Amendment in criminal cases and the Seventh Amendment in civil cases, and procedural due process.²²

County when it attributes to the case an intent to equate corporations with persons. See Mark, *supra* note 2, at 1463-64.

18 Arthur T. Hadley, *The Constitutional Position of Property in America*, 64 INDEP. 834, 836 (1908).

19 Accuracy compels me to note that under *Ex parte Young*, 209 U.S. 123 (1908), of course, states can be sued by individuals seeking prospective relief. But while such a suit might put an end to the ongoing federal violation, it does not provide a remedy for those who have been damaged. See *Alden v. Maine*, 119 S. Ct. 2240, 2294 n.43 (1999) (Souter, J., dissenting); see also *Edelman v. Jordan*, 415 U.S. 651, 691-92 (1974) (Marshall, J., dissenting) (stating that "[n]o other remedy [besides monetary penalties] can effectively deter states from the strong temptation" to save money by violating federal law).

20 119 S. Ct. 2219 (1999).

21 *Id.* at 2229.

22 See *id.* Justice Scalia explicitly mentions the right to a jury trial in criminal cases and then cites the following cases in support of his argument that constructive waivers are an anomaly: *Johnson v. Zerbst*, 304 U.S. 458 (1938) (right to counsel), *Aetna Insurance Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389 (1937) (right to jury trial in civil cases), and *Ohio Bell Telephone Co. v. Public Utility Commission*, 301 U.S. 292 (1937) (due process).

Justice Scalia also quotes an 1883 case holding that state sovereign immunity is “a *personal* privilege, which it may waive at pleasure.”²³ Although the case, *Clark v. Barnard*, is frequently cited for the proposition that states may waive their sovereign immunity and consent to suit, the Supreme Court has not quoted the “personal privilege” language since 1933—and the term “personal privilege” appears only twice in the Court’s sovereign immunity cases between *Clark* and 1933.²⁴

Justice Kennedy’s majority opinion in *Alden v. Maine*²⁵ similarly invokes individual constitutional rights. In response to an argument in Justice Souter’s dissent, Justice Kennedy argues that although state sovereign immunity is derived in part from common law, it is nonetheless a constitutional principle and as such unalterable by Congress. And like Justice Scalia, Justice Kennedy turns to individual rights as an example:

The text and the structure of the Constitution protect various rights and principles. Many of these, such as the right to trial by jury and the prohibition on unreasonable searches and seizures, derive from the common law. The common-law lineage of these rights does not mean they are defeasible by statute or remain mere common-law rights, however. They are, rather, constitutional rights, and form the fundamental law of the land.²⁶

And not only do states seem to have “rights”: even the doctrine of unconstitutional conditions plays a role in protecting states. Justice Scalia suggests that one of the problems with the doctrine of constructive waiver is that it makes giving up a constitutional right a condition for state participation in specified activities: “In the present case, . . . what Congress threatens if the State refuses to agree to its condition is . . . a sanction: exclusion of the State from otherwise permissible activity.”²⁷

These new persons also apparently have human emotions. Throughout *Alden*, Justice Kennedy worries about the potential affront to the “dignity” of states were individuals permitted to sue them. Kennedy writes that the Constitution “reserves to [the states] . . . the

23 *Id.* at 2226 (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)) (emphasis added).

24 *See* *Missouri v. Fiske*, 290 U.S. 18, 24 (1933); *Smith v. Reeves*, 178 U.S. 436, 441 (1900); *Reagan v. Farmers’ Loan & Trust Co.*, 154 U.S. 362, 392 (1894).

25 119 S. Ct. 2240 (1999).

26 *Id.* at 2256.

27 *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2231 (1999).

dignity and essential attributes” of primary sovereigns,²⁸ and that they “retain the dignity, though not the full authority, of sovereignty.”²⁹ He notes that immunity is “central to sovereign dignity”³⁰ and that immunity from suit is necessary “to preserve the dignity of the States.”³¹ Congress, too, must consider the states’ feelings: it must “respect” states and “accord States the esteem due to them.”³² (The self-esteem movement seems to have no bounds!) Thus, allowing Congress to subject the states to private suits is “neither becoming nor convenient,”³³ for it “denigrates” the sovereignty of the states.³⁴ Not since extending the language of the Fourteenth Amendment to corporations has the Court so anthropomorphized an abstract entity.

Most intriguing of all, states are entitled to what can only be called autonomy and freedom from enforced conformity. In *Alden*, Justice Kennedy warns against giving Congress the power to “commandeer” a state’s political machinery “against its will”³⁵—bringing to mind nothing so much as an independent toddler dragged along by a determined parent. In *College Savings Bank*, Justice Scalia decries Justice Breyer’s comparison of the majority’s ruling to the discredited *Lochner* case.³⁶ Scalia notes that the distinctive feature of *Lochner* and its progeny was “that it sought to impose a particular economic philosophy on the Constitution.”³⁷ And he accuses Breyer of wanting to resurrect *Lochner* by allowing waivers if a state engages in commercial—as opposed to sovereign—activities: “Justice Breyer’s dissent . . . believes that States should not enjoy the normal constitutional protections of sovereign immunity when they step out of their proper economic role to engage in (we are sure Mr. Herbert Spencer would be shocked) ‘ordinary commercial ventures.’”³⁸

Justice Scalia’s language here echoes countless cases in which the Supreme Court struck down discriminatory laws that confined women to traditional roles. Again and again the Court has cautioned that

28 *College Sav. Bank*, 119 S.Ct. at 2247.

29 *Id.*

30 *Id.*

31 *Id.* at 2264.

32 *Id.* at 2268; *see also id.* at 2263 (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)) (stating that the principle of sovereign immunity “accords the States the respect owed to them”).

33 *Id.* at 2263 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

34 *Id.* at 2264.

35 *Id.*

36 *College Sav. Bank*, 119 S. Ct. at 2238 (Breyer, J., dissenting) (discussing *Lochner v. New York*, 198 U.S. 45 (1905)).

37 *Id.* at 2233.

38 *Id.*

states could not enact legislation based on "fixed notions concerning the roles and abilities of males and females."³⁹ As early as 1979 the Court held that discriminatory "statutes cannot be validated on the basis of the State's preference for an allocation of family responsibilities under which the wife plays a dependent role."⁴⁰ Some of the scholarly literature on gay rights exhibits a similar focus on role conformity. One scholar suggests that statutes that "confine, normalize, and functionalize identities" violate the right of privacy by "direct[ing] a life's development along a particular avenue."⁴¹ In accusing Justice Breyer of wanting to limit states to their traditional roles, then, Justice Scalia seems to view states as having the attributes of autonomous personhood.

This personification of states echoes the personification of corporations. One author describes the personification of the corporation as "vital" because it "defines, encourages and legitimates the corporation as an *autonomous, creative, self-directed* economic being," and "captures *rights, ultimately even constitutional rights*, for corporations."⁴² The language of *Alden* and *College Savings Bank* projects the same attributes onto states.

And like the Court's foray into personhood at the end of the nineteenth century, this one, too, is divorced from the constitutional language. The Eleventh Amendment, as even the majority concedes, says nothing about suits by citizens of other states, and nothing about suits in state court.⁴³ Moreover, by using the phrase "shall not be *construed* to extend," rather than the simpler "shall not extend," the

39 *United States v. Virginia*, 518 U.S. 515, 541 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)); see also *Miller v. Albright*, 523 U.S. 420, 469 (1998) (Ginsburg, J., dissenting) (quoting *United States v. Virginia*, 518 U.S. at 591, and *Hogan*, 458 U.S. at 725). The fact that Justice Scalia dissented in *United States v. Virginia* suggests that it is more permissible to confine women to certain roles than to confine states.

40 *Ott v. Ott*, 440 U.S. 268, 269 (1979).

41 Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784, 788 (1989).

42 Mark, *supra* note 2, at 1443 (emphasis added).

43 On what the language might mean as a historical matter, see, for example, MARTIN REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 192-93 (2d ed. 1990), William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983), Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988), Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989), William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989), Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989), James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 COR-

Amendment suggests that it is meant to limit only judicial, not congressional, action.⁴⁴ The Court's extended historical argument in *Alden*—which is largely irrelevant to the *Alden* question and is soundly trounced on the *Seminole Tribe* question by Justice Souter's historical dissents in both cases—ultimately reduces to little more than the *ipse dixit* of *Santa Clara County*: the majority simply “does not wish to hear argument” on whether the Eleventh Amendment means more than it says.

There is an irony in the Court's repetition of its personification follies. The roots of its twentieth-century Eleventh Amendment jurisprudence lie in two cases that were decided during the heyday of the nineteenth-century age of the corporation and that straddle the divide between hesitant and full-throated battle against regulation of the new corporate persons. The changes of the 1880s and 1890s represent a Court in transition, and as it changed, so did the Court's nascent Eleventh Amendment jurisprudence.

Two Justices whose terms were almost consecutive illustrate the changes. Justice Bradley, appointed in 1870 and sitting until 1892, clung to the old vision of *Munn*, complaining bitterly when the Court in 1890 struck down rate legislation similar to that it had upheld in 1877.⁴⁵ Justice Peckham, appointed in 1895, embraced the change and indeed lambasted *Munn* even when he was a New York Court of Appeals judge.⁴⁶ And these differences are reflected in the Eleventh Amendment opinions authored by each Justice. Justice Bradley wrote the majority opinion in *Hans v. Louisiana*,⁴⁷ which seemingly immunized the states from lawsuits brought to challenge the constitutionality of their actions. But as the *Lochner* Court found itself stymied by states evading judicial review of regulatory legislation, it was Justice Peckham who wrote into the doctrine the saving loophole: in 1908, a year before he died, Justice Peckham wrote the majority opinion in *Ex parte Young*,⁴⁸ allowing plaintiffs—including, as in *Young* itself, corpo-

NELL L. REV. 1269 (1998), and Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

44 For an elaboration of this argument, see Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976).

45 See *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418, 461–66 (1890) (Bradley, J., dissenting).

46 See *People v. Budd*, 117 N.Y. 1, 34–71 (1889).

47 134 U.S. 1 (1890) (holding that the 11th Amendment bars suits against states even by their own citizens).

48 209 U.S. 123 (1908) (holding that suit against state officer for injunctive relief is not suit against state for purposes of 11th Amendment).

rations—to sue state officials to enjoin the enforcement of unconstitutional laws.

But today the personifiers have switched sides. It is Justice Bradley's opinion in *Hans* that gives the most comfort to those who would protect the states from assaults on their dignity, and *Ex parte Young* that frustrates them. Indeed, the majority in *Alden* and *College Savings Bank* have lately been cutting back on *Young*, holding it inapplicable in various situations.⁴⁹

And Justice Kennedy's majority opinion in *Alden* is an eerie echo of Justice Harlan's dissent in *Young*. In that dissent, Justice Harlan argued that a suit against a state officer was equivalent to a suit against the state. He condemned the majority's rule because it would "enable the subordinate Federal courts to supervise and control the official action of the states as if they were 'dependencies' or provinces."⁵⁰ Justice Kennedy voiced similar sentiments, cautioning Congress that "it may not treat these sovereign entities as mere prefectures or corporations."⁵¹

Finally, there is the question of trust. Justice Harlan trusted the states and pleaded with his colleagues to do so also. "Too little consequence," he wrote, "has been attached to the fact that the courts of the states are under an obligation equally strong with that resting upon the courts of the Union to respect and enforce the provisions of the Federal Constitution."⁵² Because of the states' obligations, Justice Harlan believed that "[w]e must assume—a decent respect for the States requires us to assume—that the state courts will enforce every right secured by the Constitution."⁵³ But when the sovereign state of Maine refused to honor federal statutory rights and its courts refused to enforce them, Justice Kennedy took Justice Harlan's trust one step further. Using astoundingly similar language, he wrote,

We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."⁵⁴

Justice Harlan did not prevail in *Ex parte Young*, and the majority's doctrine eventually formed a vital part of federal courts' success-

49 See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 74-75 (1996).

50 209 U.S. at 175 (Harlan, J., dissenting).

51 *Alden v. Maine*, 119 S. Ct. 2240, 2268 (1999).

52 *Young*, 209 U.S. at 176 (Harlan, J., dissenting).

53 *Id.*

54 *Alden*, 119 S. Ct. at 2266.

ful efforts to force states to obey the Constitution during the second half of the twentieth century. Almost everyone now believes that Justice Harlan was wrong in 1908.⁵⁵ I hope it will not take another century for the Court to see that the majority was wrong in 1999.

⁵⁵ Even Justices O'Connor, Scalia, and Thomas, who joined the majority in the 1999 cases, sprang to the defense of *Ex parte Young* when Justice Kennedy and Chief Justice Rehnquist wanted to recast it as a balancing test. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 291-92 (1997).

NOTRE DAME LAW REVIEW