

February 2, 2003

Dear Senator:

The Judicial Review Project at Stanford Law School is pleased to announce the publication of its report on Jay S. Bybee, a nominee for the U.S. Court of Appeals for the Ninth Circuit currently pending before the Senate Committee on the Judiciary. The enclosed report comprehensively examines the nominee's extensive writings on various issues of interest to the Committee and the general public. Compiled by law students at Stanford, this report is intended to provide decision-makers and other interested persons with an objective, unbiased look at the nominee. It attempts no argument regarding whether or not the nominee should be confirmed, and it seeks to characterize the nominee's views objectively through a review of his written works.

Concerned by the dearth of reliable, unbiased information on pending judicial nominees, the Judicial Review Project has endeavored to inform the debate surrounding confirmation of federal judicial nominees. This debate is often marked by angry rhetoric and partisan hyperbole. While partisanship certainly has its place, we believe that the debate surrounding a judicial nominee should at the very least be grounded in an understanding of the nominee's views. We hope that the enclosed report is useful to you in this important process.

Our methods in preparing this report were simple. A team of over thirty law students versed in constitutional issues examined over a dozen law review articles and other primary sources authored by the nominee. For each source, a concise and evenhanded summary was written, as well as issue paragraphs summarizing the nominee's views on important topics. Both the summaries and a compilation of these issue paragraphs are included in this report. As this is the first report of the Judicial Review Project, we welcome your suggestions for making reports on future nominees more useful.

The enclosed report is intended to be widely distributed to lawmakers, the media, and other interested parties. Dissemination of its contents, with attribution, is encouraged. Please contact us if you have any questions or would like further copies of the report.

Sincerely,

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KEY ISSUES

The following key issues are summarized below:

- Bybee argues for a conception of federalism that includes:
 - Strict limitations on the exercise of Congressional authority
 - A robust conception of states rights
 - Formal separation of powers, entrusting most enforcement duties to the executive branch
 - A judiciary that more actively polices Congressional incursions into states rights
- Bybee approaches constitutional interpretation from both originalist and textualist perspectives.
- Bybee would read both the Free Exercise and Establishment clauses of the First Amendment more narrowly than the Court's current interpretation.
- Bybee advocates for the repeal of the Seventeenth Amendment

Federalism / Separation of Powers

Limitations on Congressional Authority

- **Regulation of Crime**: Bybee argues that the constitutional power to define crime was granted exclusively to the states, and should not be exercised by Congress. He thinks *Lopez* did not go far enough in clarifying that the long-dormant domestic violence clause (Art. IV, §4) reserves the power to regulate crime *completely* to the states, unless they ask for assistance. Nor does he believe that the Congressional enforcement power granted in the Fourteenth Amendment conflicts with this reading. Bybee asserts that the relationship is more symbiotic; the Fourteenth Amendment protects citizens from states, while the Domestic Violence Clause protects states from citizens. ARTICLE: “INSURING DOMESTIC TRANQUILITY”
- **Regulation of Religious Freedom**: Bybee agrees with the Supreme Court that Congress overstepped its authority in passing the Religious Freedom Restoration Act (RFRA), which was declared unconstitutional. Bybee contends that the even if the First Amendment were incorporated under the Fourteenth (which he argues should not have been done), Congress has no right to pass laws about religion under §5 of the Fourteenth Amendment. Only the judiciary, he asserts, has the power to enforce the First Amendment. ARTICLE: “TAKING LIBERTIES WITH THE FIRST AMENDMENT”
- **Conditional Spending**: Bybee implies that conditional grants to states may be unconstitutional, and that the Court’s opinion allowing these grants in *South Dakota v. Dole* should be overturned. ARTICLE: “ULYSSES AT THE MAST.” He specifically addresses conditional funding for universities in the context of the *Bob Jones Univ. v. US* case. Bybee fears that government may improperly use financial leverage to achieve its public policy goals, thus undermining the autonomy of private, religious universities. EDITORIAL: “GOVERNMENT AID TO EDUCATION: PAYING THE FIDDLER”

Broad Scope of States’ Authority with Some Limitations

- **Tenth Amendment and Deference to States’ Rights**: Bybee argues that the Tenth Amendment should be reinterpreted to protect states’ rights from encroachments by Congress. He is critical of the Court’s opinions which allowed Congress to expand its powers under the Interstate Commerce Clause (Art. I §8), and argues for an extension of the *Lopez* doctrine to give states complete control in “family law, ordinary criminal law enforcement, and education.” Bybee believes that the Tenth Amendment is not simply about reserving power to the states, but is instead the very key to Constitutional Federalism. ARTICLE: “THE TENTH AMENDMENT AMONG THE SHADOWS”
- **Limiting State Power to Restrict Religious Freedom**: Bybee does support some limitations on state power. Using what he calls the “power theory” of the First Amendment, he attempts to create a bright line rule for evaluating whether restrictions on religious freedoms were properly enacted by states. Rather than evaluating the religious concerns of a specific plaintiff or group in a case, Bybee argues that the Court should instead ask whether the state would have the power to regulate all groups in that manner. Thus Bybee wants to shift the language of these analyses from discussing aspects of religion, to simply discussing concerns about federalism, the police power reserved to states, and permissible exercise of religion. ARTICLE: “COMMON GROUND: . . . A POWER THEORY OF THE FIRST AMENDMENT”
- **Limiting State Criminal Proceedings for Federal Officers**: Bybee believes that the original meaning of the constitution prohibits state criminal proceedings against federal officials who have not already been impeached by the House and convicted by the Senate. He acknowledges that his historical analysis conflicts with precedents in the Seventh, Ninth, and Eleventh circuits, as well as the First Congress who itself contradicted that theory in the Bribery Act of 1790. ARTICLE: “WHO EXECUTES THE EXECUTIONERS?”

Executive Authority

- Executive Enforcement Power: Bybee harshly criticizes Scalia's opinion in *Printz* as an attempt to replace the Court's traditional separation of powers doctrine with his own preference for a "unitary executive" theory (where the President is the only figure with the power to enforce laws and Congress may only assign the execution of laws to figures subordinate to the President). Bybee criticizes Scalia for undertaking such a radical revision of Court precedent in a way where few colleagues or commentators even perceived the change. He thinks that *Printz's* overruling of a state enforcement scheme for the Brady Act threatens other creative enforcement mechanisms like *qui tam* (where a private individual brings suit and the government receives part of the penalty). ARTICLE: "PRINTZ, THE UNITARY EXECUTIVE, AND THE FIRE IN THE TRASH CAN"
- Use of Advisory Committees: Bybee contends that the Federal Advisory Committee Act (FACA), which requires committees "utilized" by the President to open records and meetings to the public, is an unconstitutional encroachment by Congress on the power of the executive. He also criticizes the Supreme Court for sidestepping this difficult separation of powers issue in *Public Citizen v. U.S. Dept. of Justice*. Bybee instead endorses Justice Kennedy's concurrence, which would have declared the law unconstitutional. Bybee asserts that Congress may not regulate how the President uses outside committees that do not receive federal funding. ARTICLE: "ADVISING THE PRESIDENT: SEPARATION OF POWERS AND THE FACA"

Judicial Authority

- Policing Congress: Bybee argues that the Court is necessary to prevent Congress from usurping too many of the powers that were intended to be reserved to the states under the Tenth Amendment. He believes the process-based federalism advocated in *U.S. v. Darby* (which would call for the people to regulate Congress' usurpations of states' right by voting them out of office) is insufficient to protect state interests. ARTICLE: "THE TENTH AMENDMENT AMONG THE SHADOWS"
- Administrative Law Judges: Bybee criticizes the 1997 Louisiana Administrative Procedure Act (LAPA), which took control of administrative proceedings away from administrative law judges (ALJs) employed by specific agencies and consolidated those proceedings in a centralized group of ALJs employed by the Department of Civil Service. Bybee argues that this move was not only unwise from a policy standpoint, but unconstitutional as well. He asserts that it violates traditional notions of separation of powers by creating a de facto administrative court system that takes power away from the judiciary's existing authority. He also asserts that this act deprives the executive of its power to regulate through its agencies. ARTICLE: "AGENCY EXPERTISE, ALJ INDEPENDENCE, AND ADMINISTRATIVE COURTS"

Interpreting the Constitution

Incorporation

- First Amendment Rights: Though he acknowledges that the Supreme Court has applied the First Amendment to state actions, Bybee contends that this is incorrect because the Fourteenth Amendment should not be read to "incorporate" the First Amendment. He believes that the literal language of the First Amendment – which says that *Congress* shall make no law – makes clear the framers' intent not to apply this provision against state governments. He asserts that the First Amendment was intended to be largely "jurisdictional." ARTICLE: "TAKING LIBERTIES WITH THE FIRST AMENDMENT." Note, however, that in a 1986 REPORT TO THE ATTORNEY GENERAL, Bybee concedes the incorporation of the First Amendment under the Fourteenth.

Originalism vs. Textualism

- Legislative History: Bybee often uses "originalism" in his constitutional analysis, making references to legislative history and the framers' debates. He makes frequent use of the

arguments of both supporters and dissenters of the text/law in question. For an example see his discussion of the Seventeenth Amendment in “ULYSSES AT THE MAST”

- **Textualism:** Note in contrast, however, that his 1986 REPORT TO THE ATTORNEY GENERAL on the Free Exercise Clause is a primarily textual analysis that relies on history only where the words are ambiguous. Similarly, his opinion in “TAKING LIBERTIES WITH THE FIRST AMENDMENT” that the First Amendment should not be applied against states is based on a reading of the plain text of the Amendment – “*Congress shall make no law.*”

Religious Freedom

- **Limited Scope of Free Exercise Clause:** Bybee points to a quote in *Employment Division v. Smith* where the Court ruled that the Free Exercise Clause alone does not permit a person to violate an otherwise valid law simply because it conflicts with their religious beliefs. Noting that the opinion required some combination of the Free Exercise Clause and other constitutional protections, Bybee claims that the court was not in fact applying the First Amendment against the states. Instead, he claims that the Court was reading First Amendment type rights into the Due Process clause (a mode of interpretation, where the Court imputes substantive values to the Due Process Clause, known as “substantive due process”). ARTICLE: “SUBSTANTIVE DUE PROCESS AND FREE EXERCISE OF RELIGION”
- **Interpretation of Free Exercise Clause:** Bybee lays out a comprehensive scheme for how to look at Free Exercise claims. Much of this is the standard view of Free Exercise claims. One distinctive feature is the strict interpretation of the word “prohibition” to mean only absolute bans and not merely burdens on the exercise of religion. He claimed that the Supreme Court had never explicitly drawn a distinction between burdening and making practice impossible. It is also worth noting that he favors calculating the costs of a less restrictive alternative based on application to the individual plaintiff and not the public at large, thereby artificially inflating the costs. REPORT: REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE, AUGUST 13, 1986
- **Definition of Religion:** Bybee asserts that the word “religion” should mean the same thing for both Establishment Clause and Free Exercise Clause purposes. Under a bifurcated approach the single word “religion” is read differently in the two religion clauses. Bybee argues that this approach advantages non-traditional religions because they receive the protection of the Free Exercise Clause, but are not barred by the Establishment Clause from receiving government support. Bybee also clarifies that Free Exercise cases where one particular religion is disadvantaged could also be brought as Establishment Clause cases. REPORT: REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE, AUGUST 13, 1986
- **Public Religious Displays:** Bybee criticizes the Court’s establishment clause jurisprudence, claiming that cases like *Lemon* create the wrong incentive for communities who want to erect nativity scenes out of respect for the religious symbol’s significance. Bybee argues that the proponents of the nativity scene should not be required to play down its religious significance, while the opponents highlight that religious content. He asserts that these legal battles devalue Christmas as the important religious holiday it is. EDITORIAL: “GOVERNMENT SPONSORED NATIVITY SCENES: GETTING THE CHRIST OUT OF CHRISTMAS”

Repeal of the Seventeenth Amendment

- **Election, Instruction, and Recall of Senators:** Bybee argues for the repeal of 17th Amendment, which allowed for the direct election of Senators. He believes that state legislatures should elect Senators, and should be given the rights of instruction (to tell Senators how to vote) and recall (to remove Senators who ignore instructions). ARTICLE: “ULYSSES AT THE MAST: DEMOCRACY, FEDERALISM, AND THE SIRENS’ SONG OF THE SEVENTEENTH AMENDMENT”

Equal Protection

- **Discrimination Laws**: Bybee believes that the Fourteenth Amendment imposes no affirmative obligation on states to adopt antidiscrimination legislation. Nor does he believe it violates the Amendment for states to repeal laws that ban discrimination. ARTICLE: “THE EQUAL PROTECTION CLAUSE”
- **Pregnant Persons**: Bybee argues against the distinction that the Court draws between pregnant and non-pregnant person in order to uphold laws treating pregnant women differently. He believes that this standard is discriminatory, and advocates that the legal distinction should be eliminated. EDITORIAL: “COURTS, CONGRESS, AND ‘PREGNANT PERSONS’: THE LOGIC OF DISCRIMINATION”

ARTICLE SUMMARIES

Bybee's presents a political science and historical argument for why the 17th Amendment was wrongly enacted and, in his opinion, should be repealed. Bybee's asserts that the 17th Amendment was bad for America because it took away an essential check on the excesses of national government, and stripped the states of vital protections. He takes as its premise the idea that constitutional federalism is normatively good, and that state's rights are essential to maintaining the balance of democratic power. Bybee views local government and local decision-making as superior to decision making conducted on a national level. He argues that state legislatures should not only have the right to elect senators, but should be allowed to instruct them in as to how they should vote on legislation and confirmations and to repeal senators who act against their wishes. He also proposes limits on the number of terms a senator may serve. Throughout the article, Bybee makes the case that state legislators must be returned to their positions of power in order to allow states to operate as effective and necessary constraints on Congress, which he sees in keeping with the Founding's tradition of Federalism.

Bybee laments the fact that the 17th Amendment further alienated the states – who at the Founding had already sacrificed more in terms of their sovereignty than they received in return – from the national decision making process. He notes that the passage of this amendment subordinated the important system of constitutional federalism to a more “pure” democratic sentiment. He contends that since there was not an effective mechanism for ensuring accountability, this sacrifice ironically left citizens with less control over their Senators than before direct election.

This article is more of a historical and political science article than an article about legal doctrine, but Bybee's style of scholarship reflects an intense interest with the debates about drafting the Constitution, suggesting a strongly originalist perspective. Unusually, however, Bybee looks to dissenting voices at the Constitutional Convention to argue that the framers took too much power from the state legislatures in refusing to allow them the rights of Senatorial instruction, recall, and rotation. This is an unorthodox opinion in contradiction to the general view that ratification by the majority of states of the Constitution signaled a proper balance between state and federal power.

Bybee's reading of the Convention and the 17th Amendment is driven in large part by his firm belief in state's rights and a limited national government. However, he does not believe that the Supreme Court is the proper forum in which to protect state's rights. Rather, legislative and constitutional action is required. he proposes for the repeal of the 17th Amendment, the grating of recall authority to state legislatures, and limiting the terms Senators serve all reflect a commitment to federalism.

Bybee argues that the Constitution requires that federal officials not be subject to criminal prosecution until they have first been impeached by the House of Representatives and convicted by the Senate. He applies this general principle to the “President, Vice President and all civil officers” (which he interprets to include cabinet members, ambassadors, and judges) and asserts that, from the perspective of the Constitutional Drafters, the scope of “Treason, Bribery, or other high Crimes and Misdemeanors” would have been left principally to the states because the bulk of the criminal law resided with them at the time of the Founding. He finds support for his thesis about the order of proceedings in the Constitution’s language “Party convicted” (rather than more neutral language such as “officials” or “party impeached”), because it implies that impeachment must precede a state trial. In other words, if the party is acquitted in an impeachment hearing, the possibility of a state trial is foreclosed. Thus, to avoid the possibility that a state would convict only to have the Senate acquit, it makes logical sense that state criminal proceedings cannot come before an impeachment hearing. Bybee reads the impeachment clause of the Constitution to grant exclusive right of first conviction to Congress.

Bybee argues that if indictment were to precede impeachment, a single house of Congress would be able to remove a president from office without resorting to impeachment. Either the House or Senate could, for instance, declare the President in contempt, find an overzealous U.S. attorney to prosecute the case, and have the President subject to a jail sentence. Furthermore, under the Constitution, which provided that the person with the greatest number of electoral votes was elected President and the second-greatest number became Vice President, the President and Vice President were usually from different parties (a problem addressed by the 12th Amendment). Under this scheme, extremely political prosecutions are possible, whereby a state would indict and convict a sitting president in order to bring the vice president to power.

The few courts that have dealt with this issue have not adopted this analysis. The Seventh, Ninth, and Eleventh Circuits of the United States Court of Appeals have faced the prosecutions of federal judges, yet they found that the Constitution did not forbid the criminal trial from occurring first. Still, Bybee argues that the Constitution was meant to apply to the toughest scenario, prosecution of the President, especially since the drafters only added the Vice President and federal officers after debating the merits of the provision regarding the President. Additionally, there are critical distinctions between the President and the judiciary. Removal of the President eliminates an entire branch of government in a manner that would be more crippling than removing a federal judge from the judiciary. Moreover, because of the length of the term in service, criminal conviction of the President would effectively remove him from office, while a judge who was convicted but not impeached could still return to office if his sentence is less than life.

Bybee also attacks the arguments that the Courts of Appeals made when reaching their contrary results. First, the decisions stated that criminal charges are not barred by double jeopardy. However, such an interpretation makes little sense when the criminal prosecution comes first because any jail sentence would effectively remove a President

from office, making impeachment moot. Second, the courts stated that the First Congress did not require prior impeachment, as shown in the Bribery Act of 1790, which provided for the removal of federal judges based on a criminal conviction of bribery. In contrast, Bybee refuses to defer to the First Congress' interpretations, instead concluding that "neither the First Congress' temporal proximity to the Drafters, nor its efforts at interpretation are themselves a guarantee of Congress' correctness." Third, Bybee rejects the argument that to require impeachment before criminal conviction necessarily means that the President is above the law. He says that the Constitution merely specifies an ordering to the process, and if the House refuses to impeach or the Senate refuses to convict, then the President only escapes punishment while in office.

Bybee does not find that the President should be immune from civil suits, although they can certainly pose serious problems similar to those posed by criminal prosecutions. However, there is nothing in the Constitution to suggest that civil suits should be stayed. By contrast, there is such language in the Constitution regarding criminal prosecutions, in the form of the impeachment clause. For this and other reasons elaborated above, Bybee concludes that the three cases dealing with federal judges are not compelling and that "the impeachment clauses give us ample cause for giving Congress the exclusive right of first conviction."

Bybee argues the Domestic Violence Clause, found in Article IV, Section 4 of the Constitution, has been overlooked in the recent debate over the federalization of crime. Bybee asserts that this clause expressly states that general criminal law enforcement is left to the states. Although the clause does not create an ironclad prohibition against federal criminal legislation, it requires Congress to justify federal infringement on state action against crime. Bybee marshals this evidence to lend credence to the Court's decision in *United States v. Lopez*, which held that the Gun-Free School Zones Act was beyond Congress's authority under the Commerce Clause. Bybee supports restraints on Congress's power to federalize crime, although he admits *Lopez* creates only a limited power to do so. Furthermore, Bybee concedes that the 10th Amendment, which merely reserves powers to the states, is off limited use here because it does not delineate what was delegated or reserved. Nonetheless, Bybee argues that there are constraints on the federal government, and the Court was right in *Lopez* to recognize these important limits.

Bybee begins his discussion by noting that the Constitution relied on the premise that the union of states chose to grant power in limited ways to a new national sovereign. The 10th Amendment explains that whatever power has not been delegated to the federal government has been reserved to the states or the people of the United States. The Domestic Violence Clause is representative of the Framers' express intent to reserve the right to regulate crime to the states. According to Bybee, the adoption of the Domestic Violence Clause provides states with an established means to request federal assistance to suppress domestic violence, and it also serves as a reassurance that states reserve the primary responsibility to ensure domestic tranquility within their borders, and that the federal government serves to insure it.

Bybee then discusses the Supreme Court's decision in *United States v. Lopez* as evidence that the Supreme Court's attempts to limit the federal government's power to enact criminal legislation and punish crimes still allows for a much broader scope than that intended by the framers of the Constitution. Further, because *Lopez* narrowly relies on the Commerce Clause in its reasoning, it does little to explain why Congress' power to federalize crime in other arenas, such as family law and education, is limited. That is, Bybee suggests *Lopez* could have gone further to constrain the federal government, and subsequent courts should carefully scrutinize similar cases to see if heightened limits on federal criminal powers are appropriate.

Bybee carefully recounting the drafting and ratification of the Constitution as relevant to a discussion of the Domestic Violence Clause. He notes that there were heated debates about how the 14th Amendment altered the authority of the federal government over domestic violence. Some suggest that the 14th Amendment effectively repealed the Domestic Violence, but Bybee disagrees and counters that the amendment and the clause are integrally linked, and equally necessary for balanced federalism. In his conception, the Domestic Violence Clause protects state governments from groups of their citizens, and the 14th Amendment protects groups of citizens from their state governments.

With his historical background established, Bybee returns to the clause itself. He reiterates its basic provisions: that it serves as a "procedure by which a state can request assistance from the federal government" and it also reserves the right to regulate

domestic violence to the states. Bybee argues that in order for the scope of Congress' powers to federalize crime to be defined and limited, a "[c]lear constitutional confirmation of the historic sovereignty of the states in the area of criminal law enforcement can come only from an express reservation of state authority over crime or (what is functionally the same) an express disabling of the United States." The court in *Lopez* attempted to take a step in this direction, but the distinction needs to be clearer. Bybee contends that the Domestic Violence Clause is the tool the courts should use to limit Congress' power to enact criminal legislation because it provides to states a promise of noninterference from the federal government.

Bybee takes the unorthodox position that the 1st Amendment should not apply to restrictions on speech and religion by state governments. Bybee argues that the 1st Amendment is distinct from the rest of the Bill of Rights in that it imposes a disability on Congress and leaves regulation of speech and especially religion to the states. Bybee contends because of the distinct position of the 1st Amendment in the Bill of Rights, Section 5 of the 14th Amendment should not be read to incorporate the 1st Amendment against the states. In the alternative, Bybee argues that even if the 1st Amendment is incorporated against the states, the federal Religious Freedom Restoration Act (RFRA) should be struck down as violative of federalism and separation of powers principles.

Bybee begins with the premise that the Constitution creates binary relationships, meaning that every affirmative power granted to one branch includes an implicit burden on another branch, and vice versa. While the 2nd through 8th Amendments include personal privileges and immunities, implying a disability against all branches of the federal government and the states, the 1st Amendment is an explicit congressional disability, implying a correlative affirmative power not only to the people, but also to the states and the federal judiciary. Bybee locates support for this view in the history of the framing of the 1st Amendment. The Framers engaged in very little debate about the content of freedom of expression and religion, presumably because they expected the states would deal with the issue. The Amendment was merely jurisdictional, Bybee argues, and therefore did not require consensus among the Framers regarding a theory or religious liberty or expression. According to Bybee, the 1st Amendment merely confirmed Congress' implicit lack of power over religion.

The bulk of the article is devoted to the issue of incorporation of the Bill of Rights against the states through Section 5 of the 14th Amendment. Because the 1st Amendment is fundamentally different from the rest of the Bill of Rights, Bybee argues that it should be treated differently, and not incorporated against the states. Upon passage of the 14th Amendment, Congress generally agreed that it would enforce the Bill of Rights against the states. Bybee believes Congress suffered from a broad-based misunderstanding of the implications of incorporating Privileges and Immunities against the states. There was little debate on the subject, which results in unclear congressional intent on the incorporation issue.

Those who argue for incorporation of the Bill of Rights against the states through Section 5 of the 14th Amendment point to a number of textual bases for incorporation, including the 14th Amendment Privileges and Immunities Clause or the Due Process Clause. The dominant view of the Privileges and Immunities Clause is that it operates as a mandate for substantive rights. The problem with this position, in Bybee's view, is that not everything in the Bill of Rights operates as a privilege and immunity, and yet people argue for incorporation of the entire Bill of Rights. Also, the states have an equal claim to a privilege or immunity against Congress with respect to the 1st Amendment, so this amendment should not be incorporated against the states. The other view of the Privileges and Immunities Clause is that it protects classes of people rather than classes of rights. Thus, incorporation would be by reference to state law, simply requiring that state-conferred rights must be applied evenly to classes of people. Under this view,

Congress could prohibit unequal state enforcement of a state's own 1st Amendment-like guarantees.

Supporters of incorporation also point to the Due Process Clause as a basis for incorporation. Absorption theorists argue that the Due Process Clause incorporates fundamental rights (some of which are enumerated in the Bill of Rights) against the states. This group argues that they needn't agree on the content of the 1st Amendment, so long as states provide and enforce 1st Amendment-type rights. Bybee counters that this argument applies only to exclusively personal rights, ignoring residual states rights or federalism concerns. Others argue for straight, jot-for-jot incorporation of the text of the Bill of Rights against the states. "As with the absorption theory, the incorporation theory must ignore the federalism and separation of powers concerns that motivated adoption of the 1st Amendment, and it ignores them with a vengeance."

Once the issue of incorporation has been resolved, the question remains what incorporation means in terms of congressional powers. Section 5 may establish judicial enforcement of Section 1, it may allow for remedial congressional enforcement of Section 1, or it may allow for independent congressional enforcement of Section 1. According to Bybee, Section 1 should actually be self-executing, since it simply forbids the enactment of certain laws, which could be struck down by courts without any response from Congress. Under that reading, Section 5 was meant to facilitate only Sections 2 and 3, not Section 1. But this reading has been contradicted by the Court and Congress, who equate Section 5 with the Necessary and Proper Clause of the Constitution. There are distinctions between the two, since the Necessary and Proper Clause gave the power to "execute," which is broader than the power to "enforce," which suggests that at the very least, a violation of Section 1 is a condition precedent to the use of Section 5 powers. Another reading sees a Congressional ability to act once the court has determined that there has been a Section 1 violation. This reading is "faithful to the text and structure of the Constitution, and has some support in the legislative history."

While Section 5 of the 14th Amendment should not be read to incorporate the 1st Amendment against the states, "incorporation is 'fait accompli.'" However, argues Bybee, even with incorporation, the RFRA should be struck down as unconstitutional. RFRA essentially applies strict scrutiny to facially neutral state laws that substantially burden the free exercise of religion. Congress claimed its power to pass RFRA under Section 5 of the 14th Amendment. This argument may be in line with a view of the 1st Amendment as protecting personal rights, but that view is "revisionist history," Bybee writes. No matter what the view of the 1st Amendment, it is within the power of the federal judiciary alone to enforce the modern 1st Amendment. *Employment Division v Smith*, the case that prompted enactment of RFRA, was actually the Court trying to restore the original state power with respect to the 1st Amendment. Claims Bybee, "[e]ffectively in *Smith*, the Court has declared it will not prescribe, within limits, the unique content of free exercise rights." Bybee's reading assures less interference with state laws and gives states a chance to protect religious liberty.

The traditional view of Justice Jackson's 1943 opinion for the Court in *West Virginia State Board of Education v. Barnette* and Justice Scalia's controversial 1990 majority opinion in *Employment Division v. Smith* is that there is little common ground between Jackson's defense of the Free Speech Clause and Scalia's narrow reading of the same. Breaking with this tradition, Bybee argues that the two opinions do in fact share a common theme: a "power theory" of the 1st Amendment. Under a "power theory" reading of the 1st Amendment it is normatively different from the rest of the Bill of Rights because it serves as a potent, but limited, constraint on legislation. Such a theory employs the doctrine of separation of powers to create a binary choice between striking down laws completely or upholding them entirely. No exemptions are permitted under this schema. Simply put, if the power being exercised by the state is permitted by the Constitution, the law is upheld. If not, it is unconstitutional, not only as applied to the group which could be granted an exception, but to all religious groups, since a slight against one group is an infringement against all.

In order to legitimize the power theory, Bybee roots it in the common links between *Smith* and *Barnette*, which he argues emerge when each opinion is read in context. Read in context, Bybee posits that it becomes clear that Jackson and Scalia shared a devotion to the rule of law, and that each feared the Court's creation of ad hoc exemptions to those exercising their 1st Amendment rights. Bybee paints Jackson as wary of granting an ever-increasing number of exemptions to laws of general applicability, particularly the expanding exemptions granted in a number of Jehovah's Witness cases. This apprehension led him to search for an alternate ground on which to base the *Barnette* decision, which he finds in the "power theory." Bybee argues that Scalia employs a similar power theory in order to provide a doctrinal justification for the overbreadth doctrine, which Scalia favors.

The two issues addressed by the article are (1) what the 1st Amendment substantively requires or prohibits, (2) whether the effect of a violation should be an exemption for the group burdened by the law or a complete nullification of the law. The goal of Bybee's reading of this line of cases is to narrow and clarify the rules used to make these choices in the 1st Amendment arena. Bybee finds the 1st Amendment rationales proffered by the Court unconvincing, and looks elsewhere to justify the decisions. Unlike the 1st Amendment theories he rejects, the power theory adopted by Bybee and others looks to federalism, police power, and permissible exercise rather than the religious aspects of these cases to come out with a more consistent position on how they should be decided.

Bybee subjects the Bill of Rights to a close textual reading to locate the basis of this power theory. On the most general level, he reads the Constitution to distribute power by creating personal immunities and limiting the kinds of laws government can impose. Building off of this reading, which he posits Jackson and Scalia share, Bybee argues that the power theory focuses more on who is forbidden to interfere rather than what is forbidden. To bolster his claim that Jackson and Scalia share a separation of power theory that concentrates on "who" rather than "what", Bybee examines Jackson's decision in *Barnette*, which Jackson tries to distinguish from other Jehovah's Witness

cases. Jackson casts the issue as compelled speech, thereby avoiding the more contentious religious question, and instead focusing attention on the state's action in dictating speech of citizens. Especially given the historical moment of the 1940s, when the 1st Amendment guarantees were just being "incorporated" by the court, Jackson did not like the *ad hoc* nature of many of the 1st Amendment rulings coming out of the court. He preferred a more predictable and stable justification, which a theory rooted in a separation of powers argument is far more predictable. Scalia obviously has a much broader scope of precedent from which to draw when penning his 1st Amendment decisions, and the Court's doctrine has become more sophisticated and codified. Nonetheless, Bybee argues that in 1st Amendment cases, Scalia avoids his customary textual analysis and close readings, and employs separation of powers theory similar to Jackson's. Scalia is a passionate proponent of the overbreadth doctrine, and Bybee sees the power theory as fitting with Scalia's more general adherence to the theory of absorption rather than incorporation of the Bill of Rights.

Bybee's power theory conceptualization of the 1st Amendment is based on a view of separation of power and a narrow, textualist reading of the amendment. In this article, he attempts to enhance the salience of the power theory by tying it to parallels he identifies between Jackson in *Barnette* and Scalia in *Smith*. Bybee argues that the result is a 1st Amendment that is more faithful to the text and structure of the Constitution. It is also certainly stricter – allowed no exemptions for group's burden in their exercise of their free speech rights - than the current conception of the 1st Amendment.

Comment: Profits in Subrogation: an Insurer's Claim to be More than Indemnified, 1979. B.Y.U. L. Rev.145 (1979).

This article—a law review comment written while Bybee was a student at Brigham Young University—examines the state of the law on profits recovered in lawsuits for subrogated insurance claims. In these cases, an insurer successfully indemnifies itself against a claim paid to an insured party by suing the tortfeasor responsible for the insured's injury or loss. The first sections of the article objectively explain the major issue involved: When an insurance company's lawsuit against a tortfeasor yields a higher damage award than the amount paid to its policy holder, who keeps the difference? There are two ways this situation can occur. The first is that the total value of the insurance policy is less than the insured's actual damages, but the insurance company successfully sues the tortfeasor for the full amount of insured's damages. The second is that the insurer fully indemnifies the insured, but still recovers more than that amount in damages from the tortfeasor.

The article reviews relevant cases from both English and American courts to demonstrate how different courts have reached different conclusions. All courts have found that in the first type of case (policy paid out less than total damages), the insured must receive at least enough of the excess damage award to cover the remainder of its injury. However, courts do not agree on what to do once the insured has been fully indemnified and the insurer receives damages in excess of what would be necessary for its own indemnification. Most courts have ruled that the insurer could be entitled at least to interest on the amount of its compensatory damages (*i.e.* that this would not constitute unjust enrichment of the insurance company), but there has been disagreement on what to do beyond that, particularly with punitive damages received by the insurer.

Bybee examines *Urban Industries v. Thevis* in detail to demonstrate one way that a court could choose to handle the situation of subrogated profits. In this case “a major windfall was awarded to the insurers.” In this case, when the jury awarded full compensatory damages as well as sizable punitive damages to all plaintiffs (four insurers and United Industries), the insurers were permitted by the court to keep their damages, including the punitive damages, which essentially constituted a “profit” for the insurers.

In examining *Urban Industries*, Bybee argues that courts should adopt a flexible rule on profits from subrogated indemnity claims. He suggests that after the insured has been fully compensated for its losses (the first consideration of the court), the details of each specific case should determine who gets any remaining, mostly likely punitive, damages. If these damages went automatically to the insurer, he notes, the original injured party (the insured) would get no benefit from them, possibly creating an incentive for “the insured to forgo the insurance in the hopes of getting both compensatory and punitive damages.” If all such damages instead went to the insured, the insurer could end up bearing the full costs of litigation while the insured would benefit without incurring any costs. The insurer also might not even be able to raise the issue of punitive damages in some jurisdictions if the full award of such damages will in fact go to the insured. Bybee suggests this would allow the tortfeasor to avoid civil responsibility for his actions, since the insured might not choose to sue to recover punitive damages. The

tortfeasor would then pay no punitive damages, eliminating their effect as a deterrent and a punishment.

Since *United Industries* and other subjugation cases have involved relatively small sums of money, Bybee argues, “little is known about what effect larger subrogation recoveries might have on the behavior of insurance companies.” He notes that the possibility of recovering punitive damages could lead insurers to take on higher-risk businesses, in the hope that they could compensate for the added risk with subjugation profits. He also notes that an increase in the number of businesses taking out insurance against punitive damages claims could erode the deterrent effect of punitive damages, as payment of such damages would often become nothing more than a transfer between insurance companies.

Finally, Bybee argues that if insurers are permitted to profit from a flexible subjugation rule, they should have to “disgorge the benefits of the premiums either in the lawsuit settlement or through lower future rates.” He says that it would “seem proper to force insurers” to give back the benefits of premiums already paid to them in such cases, since they otherwise would have gained both the premiums and the subjugation awards. Bybee says that it would be useful for courts, legislatures and insurers to consider the issue of subjugation carefully since a significant potential exists for an increase in the number of subjugation suits.

Bybee scrutinizes Justice Scalia's inclusion of separation of powers reasoning in the majority opinion in *Printz v. United States*. By comparing Scalia to a pick-pocket creating a distraction while he pilfers, Bybee paints Scalia as a shrewd draftsman who managed to slip his own separation of powers theory, previously unsupported by the Court, into the majority opinion. The *Printz* court's anti-commandeering and substantially federalist rationale used to invalidate the Brady Act's requirement that local law enforcement agencies perform background checks is well known. However, Bybee draws attention to the alternative holding of *Printz*, based on Scalia's version of a separation of powers doctrine grounded in a unitary executive, which has largely escaped scrutiny from both the rest of the Court and academics. Bybee argues that the lack of attention paid to this strand of the majority opinion, found in Section III.B, belies the significance of Scalia's new twist on separation of powers, which Bybee suggests could wreck havoc on the Court's treatment of regulatory agencies.

Bybee suggests that the Court allowed Scalia to give his own version of separation of powers, which he first expressed in his dissent in *Morrison v. Olson*, significant – and perhaps unwarranted – weight in *Printz*. Section III.B of *Printz*, which lays out Scalia's separation of powers theory, consists of only one paragraph and a single footnote in the entire opinion. Bybee argues that Scalia essentially snuck this section into the opinion and suggests that the 'brazen' act may be in part due to the later affirmation of Scalia's dissent in *Morrison*. In addition to criticizing Scalia's tactics in including his marginalized position as an auxiliary and accepted argument, Bybee paints the content of Section III.B as considerably infirm. He highlights several aspects of Scalia's argument he finds questionable. First, Bybee criticizes Scalia's failure to provide any authority to support his separation of powers argument. Section III.B does not refer to any cases, cites none of the traditional separation of power opinions, and invokes an unusual and unpersuasive collection of infrequently used sources, which the Court cites generally and without page numbers. Second, the Court's rhetoric repeats almost verbatim portions of Scalia's dissent in *Morrison*, including the direct repetition of Scalia's distinctive reference to the "equilibrium of powers." Third, not only does Scalia repeat the language of his opinion in *Morrison*, but the *Printz* court repeats the theory Scalia developed in *Morrison* that the President alone has constitutionally granted executive power to enforce of all federal of laws, and that Congress may assign the execution of laws only to officials subordinate to the President. Moreover, Scalia goes beyond the generally accepted theory of the Court and calls for the strict policing of not just "aggrandizement" by one branch of the government, but also for "encroachment." Bybee argues that by elusive use of obscure sources and quoting himself in support of himself, Scalia rewrote a substantial element of the Court's separation of powers jurisprudence.

If Section III.B of *Printz* is more than mere dicta – and Bybee suggests that there is reason to believe it is – Bybee argues it could undercut the traditional leniency toward state (as opposed to private) enforcement of federal law. Under *Printz* it appears that only voluntary state enforcement of federal law leaves the unitary President intact and will survive scrutiny because the arrangement is truly cooperative and does thus does not

erode the President's power. As Bybee's argument suggests, all other enforcement schemes are implicitly invalid if the language of IIIB is applied.

The impact of Scalia's departure from the Court's earlier separation of powers in his opinion in *Printz* remains to be seen, but Bybee suggests its effects could be significant. Bybee argues that if any set of facts provided a particularly strong case for Court approval of enforcement outside the executive branch, *Printz* was it. By rejecting the claim in *Printz*, which stemmed from a creative scheme involving the states, the Court presages significant trouble for other schemes involving non-governmental enforcement, including *qui tam* actions (brought under statute that allows private person to sue for a penalty, part of which the government or specified public institution will receive). In particular, Bybee's reading of *Printz* calls into question *Humphrey's Executor v. United States*, which carved out an exception to normal separation of powers doctrine to allow the Federal Trade Commission to limit the President's removal power. *Printz* seems to eliminate this exception for the regulatory agencies. Bybee points to a recent Fifth Circuit case, *Riley v. St. Luke's Episcopal Hospital*, in which the dissent cited Section III.B in holding that the *qui tam* provision violated Article II of the Constitution. Bybee implies that this is only the beginning of the impact of Scalia's potent theory of the unitary executive found in Section III.B of *Printz*.

This case note focuses on a union-related election finance decision by a lower court: *FEC v. National Education Association*. At issue in the case reviewed is whether the National Education Association violated federal campaign rules through the use of a “reverse checkoff.” Reverse checkoffs require individuals to check a box if they do *not* want their annual dues used in part for political purposes. The district court held that this violated federal campaign law by placing the burden of dissenting on the individual.

After an extensive review of past Supreme Court decisions focused on election-related funding restrictions, Bybee criticizes the court’s decision as an “unprecedented” decision that “will effect labor’s ability to fund its political activities, and because of the inherently political nature of public sector collective bargaining, public sector labor unions will be particularly affected.”

Bybee suggests that the decision is inconsistent with prevailing 1st Amendment doctrine. First, he argues that *Abood v. Detroit Board of Education* and *International Association of Machinists v. Street* sanction an approach whereby the onus is on the dissenting association member to opt out if the member disagrees with an association’s political activities. Second, Bybee asserts that the right of unions to associate will be damaged if they are required to adopt opt-in policies – that opt-in policies give “complete effect to the minority’s viewpoint at the expense of the majority’s rights of association and speech.”

Bybee also argues that prohibiting reverse checkoffs creates bad public policy. In particular, he suggests that by requiring unions to adopt opt-in policies, the court presents unions with a free rider problem, in which members will refuse to check a box in order to save money, while still gaining from the political activity of unions.

In this article, Bybee examines *Romer v. Evans* in light of the preceding Equal Protection cases of *Hunter* and its progeny. He undergoes this analysis on the theory that the Supreme Court glanced over the decisions in an attempt to ignore the more significant concerns and ramifications implicit in the decision. As a result, the true meaning of *Romer* remains hazy, which doesn't really serve anyone's interests all that well. The premise of the argument is that "If [Colorado's] Amendment 2 violates the Equal Protection Clause, it does so because, under the Court's jurisprudence, homosexuals are entitled to strict or heightened scrutiny. Whether, however, homosexuals are entitled to strict or heightened scrutiny is the one thing the Court could not bear to ask, much less answer."

Structurally, he reaches this result by going through the differing strands of fourteenth amendment jurisprudence. While due process is a procedural and more fixed standard, equal protection is a much more relative inquiry. While the facts in *Romer* are troublesome due to a blatant singling out of homosexuals for worse treatment, procedurally the process should be permissible unless those it targets are in fact entitled to separate, ideologically based protection. Bybee worries about the lack of clarity and precedential value of the *Romer* decision, saying that "The Court's opinion eschews familiar equal protection principles and ignores the Court's prior discussions of homosexual conduct, substituting sweeping platitudes for plain talk." The purpose of the article is to show the implications of the decision reached under the rubric of existing precedent, despite the courts failure to address those implications. In Bybee's opinion, the decision has nothing to base itself on when looking at procedure and can only be saved if a protected group is being singled out.

After discussing distinctions between due process and equal protection, Bybee sets up the *Hunter* line of cases. Within equal protection cases, he separates out penalty cases as opposed to self-government cases, deeming the latter more difficult to justify constitutionally since there is no explicit Constitutional mandate to control how states choose to govern themselves, but only an implied one that draws from interpretation and contextual analysis. As a result, these cases are concerns not about direct restrictions of rights but more "preservative" concerns, ie. questions about the right to have certain rights.

The distinction he draws from *Hunter* is that the problem in that case was not that procedurally the state was required to provide equal housing regardless of race, but that in providing housing it could not single out a protected (discrete and insular) minority class for an extra burden while helping everyone else. If there had been no equal housing law there at all, Bybee argues, the state would not have been required to have one. He then draws on the dissent in *Reitman* to fortify his case. That case dealt with a California referendum to alter an equal housing law. That dissent seems to hinge onto a special feature of referenda as constitutional changes in the states which have them. In this analysis, referenda just nullify former laws so there's no conflict between the new law and older contradictory laws which remain on the books, since the referendum is a *de facto* repeal of all contradictory former legislation. Referenda, in this way can limit the scope of an individual equal protection law without violating the Equal Protection clause

of the Fourteenth amendment, otherwise, once any protective legislation was enacted it would be irrevocable despite any changes in the enacting state, which is problematic. "The Equal Protection Clause does not require a minimum baseline of protection, but it does require that whatever protection a state affords must be provided on an equal basis." In *Romer* "limitations exist, however, because the substance of the laws treats individuals differently, not because the process is unfair."

In conclusion, Bybee does not feel that the result in *Romer* was wrong in light of *Hunter* and its progeny, only that its reasoning was disingenuous, and possibly harmfully so, due to a lack of clarity. Due to these cases, the process would have been okay for Bybee, leaving the singling out as the only other justification for *Romer's* result. All in all, he decries the political choice the court made in avoiding the discussion and feels that all have been done a disservice in their refusal to tackle the truly difficult issue in *Romer*: whether or not homosexuality is justifiably considered a suspect classification.

Bybee “argues that courts, in attempting to avoid difficult constitutional questions, have misread FACA (the Federal Advisory Committee Act). Properly construed, FACA violates separation of powers by limiting the terms on which the President can acquire information from non-governmental committees.” The article is divided into three parts: (1) Historical discussion of the President’s use of advisory committees, (2) analysis of *Public Citizen v. United States Department of Justice*, and (3) discussion of the difficult separation of powers issues.

Passed in 1972, FACA established guidelines for the creation and purpose of advisory committees. The controversial element of the Act is the requirement of all committees “utilized” by the President to open meetings and records to the public. Bybee does not dispute Congress’ ability to prescribe consultations with the President or to place restrictions on committees that receive federal funding—his concern lies with FACA’s application to the narrow field of outside committees that do not receive federal funds.

Bybee contends that the President does have the power to consult with outside advisors without having to publicize the advisor’s findings, and that FACA unconstitutionally violates separation of powers between the executive and the judiciary. Bybee faults the only Supreme Court opinion on this issue – *Public Citizen v. United States Department of Justice* – for narrowly addressing FACA (he criticizes the opinion for its reading of the word “utilized” in the statute) in order to avoid the separation of powers tensions. He is harsh in his criticism: “The net result is that the executive ceded territory, not to Congress, but to the Court... What the Court did has left Congress less sure of what it must say in order to have the Court take it seriously.”

Public Citizen involved a significant challenge to the Act through the ABA’s Standing Committee on the Federal Judiciary. The Department of Justice had received advice from the ABA for many years, and the confidentiality of that counsel survived Supreme Court scrutiny through a very narrow interpretation of FACA. Justice Kennedy wrote in a concurrence, which Bybee supports, that he would have declared FACA unconstitutional, but the majority chose not to go to that length. Instead it held that “Congress ‘probably’ did not intend FACA to apply to the Standing Committee or other private organizations such as the NAACP or the American Legion.” Bybee is greatly frustrated by the Court’s willingness to avoid the difficult constitutional issues: “Congress invited conflict with the executive, and the Court simply refused to arbitrate. The Court’s contrived construction of FACA did nothing to define the boundaries of Congress.”

By avoiding these issues, the Supreme Court has permitted Congress to restrict presidential consultation with potential advisors; however, this power is limited because after *Public Citizen* and *Association of American Physicians and Surgeons*, it is unclear what exactly constitutes as a committee “utilized” by the President under FACA. Bybee asserts that Congress solely has the power to promote or refuse to fund such interactions between various non-governmental organizations and the President.

In the fourth and final section of the article, Bybee examines the separation of powers issues presented by FACA. To summarize, he divides the issue into three different scenarios. First, Congress can prescribe consultations when the President is acting in his Take Care Clause responsibilities; however, it cannot make that advice binding without violating the President's enumerated powers under the Take Care Clause. Second, Congress can place "some restrictions" on federally-funded advisory committees formed by the President. Here, the President's Take Care responsibilities and Congress' Spending Clause power are both in play. Third, Congress cannot regulate the use of outside committees that do not receive federal funding. Congress does not have the power under the Spending Clause, and "it is beyond the scope of the Necessary and Proper Clause because it interferes with the judgment reposed in the President by the Constitution without appreciably fulfilling Congress' own duty to facilitate the execution of the law.

Bybee argues that the cornerstones of parental rights in Supreme Court jurisprudence are not as powerful or as compelling as others suggest. Specifically, he argues that the decisions in *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Wisconsin v. Yoder* fail to hold Constitution water. He then goes on to offer explanations of why the cases endure, and finds that they endure to large extent because we like the results.

Bybee begins by exploring the constitutional framework and historical background of the Supreme Court's decision in *Yoder*, in which the court held that Amish parents had the right to withdraw their children from public school despite a state statute requiring attendance at school from ages seven to sixteen. The Supreme Court held that the state's important interest had to be balanced against the interest protected by the Free Exercise Clause and the traditional interest of parents with respect to the religious upbringing of their children so long as they prepare them for additional obligations. Bybee argues that *Yoder* should not be viewed as a pure free exercise of religion case, but as a somewhat narrow ruling articulating parental rights concerning their children's religious education. Specifically, he argues that it is an example of the court cobbling together substantive due process rights in order to enforce justice in a particular case. He sees *Yoder* as a species of the substantive due process line of cases including *Meyer* and *Pierce*, cases which held that parents have a substantive due process right to direct their children's education *vis-a-vis* English-only laws and non-public school education.

Bybee begins the article by explaining the underlying facts of *Singer v. Wadman*. Plaintiff Singer and his wife, on the basis of their religious beliefs, refused to send their children to public school and did not allow state supervision of their home-schooling efforts, in violation of Utah law. The trial court did not accept Singer's argument that the Utah law was unconstitutional under *Yoder*, since it compelled action in violation of his religious beliefs. The Court distinguished *Yoder*, stating that "the only decisions in which we held that the 1st Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as...the right of parents...to direct the education of their children." Thus, *Yoder* survives, but as a hybrid of a substantive due process right and a 1st Amendment free exercise right. Bybee attempts to define what exactly is left of the Court's decision in *Yoder*.

Bybee first examines the social forces that surrounded the creation of the laws later struck down as unconstitutional in *Meyer* and *Pierce*. He asserts that the laws were based on the contemporary power of populism, political reform, nativism, and the desire to "Americanize" schools. Bybee argues that the laws deliberately placed heavy burdens on parochial schools, but that the Supreme Court "ignored the claims of infringement of religious liberty and resorted to the reasoning of substantive due process to recognize a parental right to direct children's education."

Bybee also argues that parental rights and free exercise claims were closely connected in the 1920s, since the Court considered free exercise rights a subset of substantive due process rights. According to Bybee, the *Meyer* and *Pierce* cases did not give any additional form to the 1st Amendment because they were decided as substantive

due process cases. He argues that the *Meyer* and *Pierce* decisions were not founded on constitutional rules or standards, but that they were based on economic philosophy, political theory, and common sense. The Court did not hold that 1st Amendment rights could be held against the states, but that 1st Amendment-type freedoms could be protected as a liberty under the Due Process Clause. Thus, when deciding *Meyer*, the Court did not choose between a substantive due process right and a 1st Amendment claim, but rather between two substantive due process rights.

Bybee concludes that *Yoder* follows in the substantive due process tradition of *Meyer* and *Pierce*. While *Yoder* looks like a formal free exercise case, the free exercise rights are a part of a larger set of substantive due process rights, much like *Meyer* and *Pierce*. He states that *Yoder* fails to give any additional form to the 1st Amendment, even though the Supreme Court reviewed it during the period of incorporation of the 1st Amendment.

Bybee claims that *Yoder* is not a free exercise case. He stipulates that though the Court paid lip service to the free exercise clause, it had neither a theory nor a standard for judging free exercise claims. Specifically, although the Court said that the Wisconsin law at issue in *Yoder* forced the Amish to choose between either abandoning their belief that worldly learning would bring about their assimilation or migrating elsewhere was “precisely the kind of objective danger to the free exercise of religion that the 1st Amendment was designed to prevent,” the Court failed to articulate any useful standard for deciding future cases. Furthermore, *Yoder* cannot be a free exercise case because it would leave the door open for even children to seek exemption from compulsory education, even where their religious choices were contrary to those of their parents.

Finally, Bybee argues that *Yoder* is not a pure parental rights case—there are cases which have held that claims based on parental rights to direct the education of their children, considered independent of religious free exercise concerns, are subject to rational basis scrutiny. But, while he would not characterize *Yoder* as a pure parental rights case, he argues that it articulates the right of parents to direct their children’s religious education. This would place *Yoder* within the *Meyer* and *Pierce* tradition while not giving it broader implications for the Free Exercise Clause.

During the late 1990's, the Louisiana legislature amended the Louisiana Administrative Procedure Act (LAPA) to shift control of administrative proceedings away from administrative law judges (ALJs) employed by agencies to ALJs employed centrally by the state Department of Civil Service. Under the revised LAPA, agencies can not fire ALJs nor can they overturn or even appeal adverse ALJ rulings. In this article Bybee contends that, while increasing the decisional independence of ALJs, the legislature's changes produce an administrative regime that is both ineffective and unconstitutional. According to Bybee, the creation of a Division of Administrative Law strips state regulatory agencies of their ability to act via agency controlled adjudication. Bybee concludes that, without this power or a clear ability to appeal adverse rulings made by independent ALJs, agencies will be drastically impeded in their mission of promulgating and enforcing regulation.

Bybee begins his critique of Louisiana's revised APA by detailing the history of regulatory agencies and ALJs at the federal level and among the various states. Bybee's key contention is that, given the broad authority of executive agencies, the legal structure of the agency is highly determinative of the agency's efficacy. Until the 1960's, Bybee states, executive agencies existed as either expert, politically independent, collegial commissions like the Interstate Commerce Commission (ICC) or as politically accountable bodies with a single agency head like the Occupational Safety & Health Administration (OHS). Each form had its relative merits. Recently, Bybee continues, federal and state governments have tried to combine the disparate agency archetypes to produce agencies that are both politically accountable and yet still independent enough to make expert, rather than popular, decisions.

Within the general framework of agency design, Bybee believes that ALJs may function as either: (1) judicial law clerks, (2) initial fact-finders subject to appeal within the agency, and (3) administrative courts entitled to deference for their own expertise. Comparing the two extreme models: at the "law clerk" end of the spectrum, an ALJ forms an initial opinion about how the agency should proceed in a particular enforcement action, but the agency is not bound to follow that opinion or defer to that opinion in any way. Conversely, in the administrative court model, ALJs function as autonomous courts whose opinions must be followed by the agency with the same level of finality as a district court ruling.

The Louisiana amendments challenged by Bybee centralize the hiring of ALJs and, in Bybee's opinion, move Louisiana into an administrative court model for the use of ALJs by agencies. Under the revised statutes, the Division of Administrative Law – a new division within the state Department of Civil Service – hires ALJs and governs how ALJs handle administrative cases. Bybee argues that this centralized process may fail to hire judges with the unique expertise to handle the arcane and highly specialized matters that come before any given agency. However, Bybee is not overly concerned with centralization alone because other states have successfully implemented centralized hiring systems. Furthermore, Bybee admits that limiting the ability of an agency to fire an ALJ frees ALJs to offer opinions contrary to the agency administration.

Bybee's primary complaint is with sections of the revised Administrative Procedures Act that strip agencies of their ability to overrule or appeal adverse ALJ rulings. Section 992B(2) of the LAPA states, "in an adjudication commenced by the division, the administrative law judge shall issue the final decision or order, whether or not on rehearing, and the agency shall have no authority to override such decision or order." Not only is an agency unable to override the ALJ's ruling, an agency is furthermore prohibited from filing an appeal to a state district court due to a 1997 LAPA amendment which specifically confers the right to appeal an ALJ ruling only to "people" and not agencies.

Bybee argues that, for good reason, no other state so thoroughly binds agencies to the holdings of ALJs. It is a longstanding principal of administrative law that an agency may act either by a rulemaking or by adjudication before an ALJ whose opinion the agency can either overturn itself or appeal with various levels of deference. As a result of these revisions, Louisiana agencies no longer have the ability to refine their regulations through the process of agency controlled enforcement action.

Bybee concludes that stripping agencies of their ability to regulate via adjudication is practically unwise and also unconstitutional. From a practical perspective, Bybee finds the revised LAPA is problematic in a number of ways. First, it will lead to policy-making conflicts between the agency and the ALJ. Bybee believes that agencies rather than ALJs should be the final arbiters of policy. However, where ALJs have the final say in enforcement actions, disputes between ALJs and agency insiders could lead, Bybee says, to regulatory chaos. Second, Bybee predicts that the changes will produce more regulations and less flexibility because agencies will over-regulate to prevent ALJs from departing from the agency's regulatory intent. Third, Bybee argues that the new LAPA will decrease the number of enforcement actions because agencies are risk averse to going before ALJs whose decisions cannot be appealed. Fourth, Bybee contends, agencies will be more likely to settle cases, because the agencies assume the full risk of an adverse decision from which there is no appeal. Fifth, because ALJs are now centrally hired and do not need to have any agency specific expertise, Bybee states that administrative rulings will essentially be less knowledgeable and less consistent with the public interest than if ALJs were agency insiders.

Although Bybee spends little time discussing the constitutionality of the revisions, they are problematical to him because they challenge the traditional separation of powers. Bybee argues that the new system creates a *de facto* administrative court system. Creating a new court system underneath the existing courts takes away power from the judiciary. Furthermore, Bybee continues, the revised LAPA deprives the executive of its authority. Originally, the executive branch, *vis a vis* its agencies, controlled ALJs and the entirety of the regulatory process. With the new ALJ system, the executive no longer has the full spectrum of its pre-amendment powers. These separation of power issues form the crux of Bybee's constitutional complaint.

Bybee argues that the Constitution explains the powers of the federal government, but does not affirmatively describe states' powers. The 10th Amendment is the closest explanation given to states' powers. Bybee believes that courts must provide strict enforcement, "and even reinterpretation," of the Constitution's substantive provisions (like the Commerce Clause) to protect states' rights from encroachments by Congress.

Bybee begins his essay describing Plato's Allegory of the Cave. Like Plato's prisoners in a dark cave that could only see shadows rather than people, Bybee argues that courts can only see shadows of state's rights hinted in the 10th Amendment, rather than finding residual state powers listed in the Constitution.

Bybee then traces a line of Supreme Court decisions regarding the 10th Amendment that he sees as evidencing the slowly eroding state sovereignty. He begins with *United States v. Darby*, in which the Court declared that the 10th Amendment was merely a truism. Bybee suggests that the Court tried to fix this mistake through narrowly reapplying the 10th Amendment in cases such as *National League of Cities v. Usery*, *New York v. United States*, *Printz v. United States*, and *Alden v. Maine*. Despite this reassertion of the 10th Amendment, Bybee dismisses these cases as "much ado about almost nothing." Bybee argues that all these cases distract us from the larger problem with federalism. The 10th Amendment is not about reserving power to states so they can administer themselves (as was the basis in *New York*), but rather is central to the notion of constitutional federalism, which is a division of authority over the people between the states and federal government.

If the "Court wishes to preserve constitutional federalism," it must "re-conceive the 10th Amendment." In order to find states' rights in the "shadow" of the 10th Amendment, courts should look closely at the limits of federal government power. Bybee distinguishes *United States v. Lopez* as a promising approach toward limiting federal government power. Under Bybee's interpretation of *Lopez*, the 10th Amendment should be read to give states plenary power over regulating guns in school. Bybee suggests that similar logic would extend *Lopez* to read the 10th Amendment as also including "family law, ordinary criminal law enforcement, and education."

Bybee also argues that the Court's decisions affecting the 10th Amendment have overlooked where the people fit into federalism. The Amendment reserves the rights not covered by the Constitution to the people or states. The people can reserve those powers to themselves by limiting state power through states constitutions. Thus, if a power is ceded to the federal government, it necessarily cannot be reserved to the people. The expansion of federal powers under the Commerce Clause, to the extent that the Congress is unfettered ultimately deprives the people of any powers.

Bybee then argues that the process-based federalism favored in *Darby* is bound to fail. The Court concluded that the people, through the political process, were better able to limit federal encroachment on state power than the courts. Bybee first argues that the Constitution precludes such an abandonment of duty. If the political process were sufficient, the Constitution would have given Congress all power to determine federal authority. Bybee also argues that the 17th Amendment, having popularly elected Senators, undermines the efficacy of process-based federalism. Whereas the state's

elected officials were represented in the Senate (they selected Senators), the 17th Amendment removed this last safeguard. Lastly, Bybee counters the argument that recent legislation by Congress voluntarily ceding authority to states indicates that process-based federalism works. He disparages this view by analogizing it to the specious argument that because no muggings occurred today the police may be disbanded.

Bybee concludes by emphasizing the intent of the 10th Amendment. He argues the 10th Amendment would not exist if federal power were to be unbounded. Therefore, unchecked expansion of federal authority using the Commerce Clause must be treated dubiously. Bybee explores other provisions in the Constitution that reflect state powers, including the right of states to determine their structure, wages of state employees, criminal sanctions, and some aspects of commerce. These provisions are minor, however, when compared to the express powers granted the federal government. By limiting those powers, the Court may protect the spirit of the 10th Amendment and leave the states with powers.

SUNSTONE EDITORIALS

The following are summaries of editorial articles Bybee wrote for the Sunstone Magazine. “The mission of the Sunstone Foundation is to sponsor open forums of Mormon thought and experience. Under the motto, ‘Faith Seeking Understanding,’ we examine and express the rich spiritual, intellectual, social and artistic qualities of Mormon history and contemporary life. We encourage humanitarian service, honest inquiry, and responsible interchange of ideas that is respectful of all people and what they hold sacred.” – www.sunstoneonline.com/index.asp

"The legal intractability of pornography"- Bybee discusses the complexities of Court jurisprudence and pornography, especially the "community standards" prong of the Miller obscenity test. He deems this prong practically overshadowed by the other two prongs, and consequently more a theoretical realization of differences between communities than a practical restraint on its dissemination. He ends by advocating the community to reinforce its own standards through morality to control pornography rather than relying on the legal standards to do so.

"The lawyer's conflict"- In this column, Bybee comments on the lawyer's duty to his or her client in reference to the moral obligation to the truth. He looks historically to the principles underlying the need for adversarial advocacy of positions, on the assumption that truth will ultimately prevail. Yet the historical system has changed from the old ideology, and consequently he feels attorneys and clients must remember their duty to the truth even in the face of their own self-interests.

"Solemn promises under seal"- Notions of "covenants under seal" are both related to and an intrinsic part of religious life. Legal ideas of integrity and trustworthiness are interesting and relevant ways of dealing with these issues. Understanding of legal concepts has given him insight into core concepts of his religion as well.

"The Supreme Court and the Religion Clauses: 1981-82"- Bybee discusses rulings from the period in question which impact religion. He describes the court as "fragmented" and comments on ideological shifts (with the addition of Justice O'Connor on the right, and Blackmun leaning leftward), as well as a number of sharply contested 5-4 decisions generally, though near unanimity on decisions in the religion area. He laments the uncertainty that comes from the fact that 3 of the 5 cases did not reach the merits and thus have no First Amendment principles to be followed in the situations raised. He feels that *Widmar* has made some contribution to First Amendment jurisprudence since it "clearly classifies religious activity as protected speech," though he continues to see a need for refinement of other standards associated with the holding.

"The Supreme Court and the Religion Clauses: 1982-83 term"- Same schema as above. He comments on the legislative veto schema struck down in *Chadha* as well. Basically they're pretty objective statements of the holdings. He ends with some analysis on their significance. He finds the meaning of *Bob Jones* unclear since it does not really go to the question of whether sincerity of belief trumps other government justifications. He is also very wary of the coercive power of spending conditions. He wants the court to stick more closely to the *Lemon* test in justifying religion decisions, and feels that *Mueller* may signify a softening in attitudes toward sectarian education.

"Government aid to education: paying the fiddler"- Bybee discusses *Bob Jones University v. US* and worries about unconstitutional conditions. He is concerned about the government using financial "leverage" (in the form of tax exemptions, credits, or other funding to universities) to advance public policy goals. He finds conditioning spending on conformity with governmental goals is dangerous and coercive, since the government seldom lines out all policies before passing out the money. Bybee fears that once universities become used to having the funding, taking the funds away becomes much more coercive than if given pending the condition in the first place. He also is very concerned about changes in government attitudes and policies after funding has been dispersed and push that is made to make minority attitudes conform to the government's attitudes on the topics it uses as conditions. He is concerned that private university autonomy

may over time be undermined due to this sort of conditional spending (despite the current protection given to BYU).

"Government sponsored nativity scenes: getting Christ out of Christmas"- Bybee takes on the establishment clause cases regarding crèches in public places. He takes issue with the Supreme Court's test (*Lemon*) and the perverse incentives it creates for cities which desire to put up nativity scenes out of respect for them as religious symbols. The fact that the only way they are considered permissible is when they are considered void of spiritual meaning incenses Bybee as a religious person. Those who wish to forbid nativity displays must play up their religiousness, while those who truly believe must claim not to deem them religious at all, lest they be removed for Establishment Clause violation. Bybee feels that all the legal wrangling devalues Christmas as the important religious festival that it is.

"Courts, Congress, and "Pregnant Persons": The logic of discrimination"- Bybee discusses the distinction the court draws in sex discrimination cases between pregnant and nonpregnant persons as justification to uphold laws which discriminate on the basis of pregnancy. He is upset at the line which the court draws, finding it clearly one which is discriminatory, though his analysis looks at it from the male perspective and that in discriminating against their pregnant wives the state is depriving men of benefits they should receive. Since Title VII does protect pregnant women (thanks to legislative amendment) it is now only wives of male employees who are discriminated against which just reinforces the inappropriateness of the division. In conclusion he advocates that the court should abandon the distinction between pregnant and nonpregnant persons and prohibit discrimination on such basis.

"Freedom of reconsideration"- Bybee discusses the legal trend toward holding psychiatrists liable for failure to warn about dangerous patients, drawing on *Tarasoff* and the Reagan assassination attempt. He feels that the standards are too strong for what is admittedly an inexact field of inquiry, study of the human psyche. As a discipline which is full of uncertainty almost by definition, Bybee sees it as unjust to expect practitioners to go on hunches and warn indiscriminately when there is even the risk of danger from a patient. He feels that holding psychiatry to such a strict standard will chill patients in using psychiatric care at all and worsen the quality of what care is ultimately received. Consequently, Bybee feels the changing standards are doing society as a whole a major disservice and should not be further expanded.

"On the construction of the family: from status to contract"- Bybee looks to the theories of Bruce Hafen and advocates his view on the appropriate legal place for the family. The theory discusses a modern trend toward more individualistic views of the family as a source of rights for individuals (tending toward a contract model) as opposed to a duty based Status obligation on its members. He deems it negative socially to remove the duty construct solely in favor of the individual rights one. The fear is that the significance of family bonds is being undermined and analogized to a simple "contract to associate" rather than a solemn duty imposed from God or cultural factors. If the two become unbalanced, the concern is that society will begin slouching toward anarchy or totalitarianism, both of which are clearly unappealing to the author and to be avoided at all costs.

**REPORT TO THE ATTORNEY GENERAL:
RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE**

Jay S. Bybee Report to the Attorney General: Religious Liberty under the Free Exercise Clause August 13, 1986

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. Amend. I.

Bybee’s discussion of the Free Exercise Clause starts with a historic analysis of the Framers’ writings as well as the Free Exercise Clause’s that existed in many state constitutions. The purpose of this seems to be to emphasize how important the Framers thought the protections given by the clause were as well as the pervasive belief that such protections were necessary. However, Bybee emphasizes the fact that the Constitution is law and therefore should be interpreted in the same way as other laws. First, the text should be examined by itself; only if a term invites more than one interpretation should history and intent be examined.

Textual Analysis and Definition

With that in mind, Bybee then analyzes the Clause word by word. For part of the Clause he does not find it necessary to look at the history or intent of the First Amendment. He points out that despite the fact that “Congress” is probably the least ambiguous of the word in the Clause, it should be read broadly to mean any state action to reflect the incorporation of the Free Exercise Clause protections under the Fourteenth Amendment. Next, he examines “prohibiting” and contrasts it with the use of “abridging” in the Free Speech and Press Clauses. Bybee reads “prohibiting” narrowly to ban only laws that effectively forbid or prevent the free exercise of religion and not merely burden it. Bybee explains that when the state imposes some penalty for exercising religion, it takes away religionists’ freedom, but when religious exercise is merely burdened, religionists can, if they so choose, still exercise their religion. In examining “free exercise” he points out that it must reach beyond mere advocacy of belief or else it would be made redundant by the Free Speech and Press Clauses.

Bybee has a harder time defining what constitutes “religion.” First he refutes the argument that the word “religion” means different things in the Free Exercise and Establishment Clauses. He says that the protection for religion comes from a belief that there is a distinction between the duty owed to “God and Caesar” and that the government should not interfere with religious duty unless it infringes on another’s rights. He goes on to define religion broadly as “a system of beliefs, whether personally or institutionally held, prompted by the acceptance of transcendent realities or acknowledging extratemporal actions.” These beliefs must be sincerely held to be protected. He clarifies that the Free Exercise Clause is not neutral between religion and non-religion; it clearly favors religion. Bybee suggests that the Clause may sometimes require religious exceptions to generally applicable laws.

Methods of Examining Free Exercise Clause Claims

Bybee then analyzes different methods for examining Free Exercise Clause claims. This is used to lead into his approach, which synthesizes elements from all of the methods. He uses the methods more like steps in a process, rather than separately examining each. The first method discussed is the belief/action dichotomy; this method was used in early cases and has since been discarded. However, Bybee says it is still useful in highlighting the settled proposition that the state has no valid reason for regulating religious belief, whereas it may regulate religious action in some cases. This method will catch blatant state actions, such as outlawing of a particular sect or belief as well, as more indirect methods like compelled oaths.

If a law does not fail under the belief/action step, the next step would be to measure it under the neutrality theory. Neutrality concerns itself with the treatment of groups equally. Its three step analysis is akin to the analysis that takes place in civil rights cases. First, the law is examined for facial discrimination. A facially discriminatory law will almost surely fail because very rarely will the state have a valid reason for the distinction. Second, a court undertakes an examination of the legislative intent. In Bybee's opinion even where a facially neutral law clearly has a non-neutral intent it should be considered on a case-by-case basis because it is possible "that the passage of time has effectively erased the memory and significance of the legislature's improper religious motivation." Third, a law's actual effects are examined to see if it disproportionately burdens a religious practice. If it passes both the belief/action and neutrality analyses and there is a burden on religion, it then goes on to the more complex balancing test.

Balancing is the most complex of the steps as it involves weighing the plaintiff's interest in free exercise against the state's interest in regulating the religious action. In Bybee's view, the initial burden on the plaintiff is twofold: one, to show that the belief is sincerely held, and two, to show that the state has prohibited the free exercise of that belief. He insists that the inquiry into the sincerity of belief will not force the court to weigh the validity and importance of the belief. Rather, it will only require the plaintiff to explain the source and nature of the religious duty. Bybee holds the plaintiff responsible for showing how government action has prohibited free exercise and not simply burdened it. He notes that the plaintiff does not have to prove that the exercise that the state has prohibited is central or fundamental to the plaintiff's religion. Once the plaintiff meets these requirements the burden is shifted to the government. The requirements on the state are also twofold: one, it must have a compelling state interest, and two, this must be the least restrictive alternative for achieving that interest. A threshold issue is the state's ability to put forward its compelling interest with particularity and not just in general terms. The state must also demonstrate some consistency in pursuing this goal: if it cannot, the strength of the state's asserted interest is questionable. Further, the state's goal should be a reasonable one and the restriction has to be logically linked to the achievement of that goal. Once these threshold issues have been examined the court can move on to an examination of the interest itself. Bybee believes that there are only three categories of permissible interests and gives some examples: (1) to prevent manifest danger to the existence of the state (military draft and ability to tax), (2) to protect public peace, safety, and order (nuisance laws, laws

regulating solicitation and proselytizing, and traffic laws), and (3) to protect the religious liberty of others.

Notably he does not find the interests in public morality or in promoting the general welfare to be compelling state interests. If the state cannot assert one of Bybee's enumerated interests or if the link to the restriction is faulty then its defense fails.

Even if the state can assert a valid interest it still has to prove that the restriction is the least restrictive alternative for achieving that interest. The plaintiff would be required to identify a less restrictive alternative to achieving the state's interest. It would then be up to the state to show that the proposed solution will either be unreasonably costly, ineffective, or that it is unnecessary to alleviate the prohibition on free exercise. Bybee favors analyzing the cost of a less restrictive alternative as applied only to the individual plaintiff, rather than the populace as a whole, which would exaggerate the cost. Only if the state can prove it has a compelling interest served by a restriction, which is the least restrictive alternative, can it justify a prohibition on the free exercise of a religious belief.