University of Richmond Law Review

Volume 41
Issue 1 *Annual Survey 2006*

Article 2

11-1-2006

First Principles for Virginia's Fifth Century

Hon. Robert F. McDonnell
Attorney General of the Commonwealth of Virginia

FOREWORD

FIRST PRINCIPLES FOR VIRGINIA'S FIFTH CENTURY

The Honorable Robert F. McDonnell *

Because of Divine Providence, I am honored to serve as Attorney General of the Commonwealth of Virginia as we celebrate the 400th anniversary of Virginia. It is an incredibly exciting time to be Attorney General. Although I have only been in office for a few months, I am pleased that we have made significant progress toward protecting our children from sexually violent predators by passing Virginia's version of Jessica's Law, through tough mandatory sentencing and GPS tracking of all offenders,[1] strengthening the sex offender registry,[2] and toughening the standards for

---

* Attorney General of the Commonwealth of Virginia. B.A., University of Notre Dame; M.A., Boston University; M.P.A., Regent University; J.D., Regent University.

1. Under the terms of Jessica's Law, criminal penalties now include: (1) a mandatory sentence of twenty-five years to life for a first offense of rape, forcible sodomy and object sexual penetration in the commission of an abduction, or serious bodily injury to a child under the age of thirteen; and (2) mandatory life sentence for a second conviction. *See* Act of Apr. 19, 2006, ch. 853, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 18.2-48, -61, -67.1, -67.2, -370.3, 19.2-303 (Cum. Supp. 2006)).

Jessica's Law also provides a criminal penalty of mandatory three years of supervised probation as part of the sentence for offenders convicted of a serious sex offense with mandatory GPS monitoring, unsupervised court probation for life, and the enactment of provisions to prohibit sex offenders convicted of a Jessica's Law violation from working on school, day care, or other child minding properties and living in close proximity to schools and child day care centers (500 feet). *Id.*

2. Virginia law now has increased penalties for violations of the sex offender registry (including mandatory GPS tracking for violators of the registry), increased re-registration requirements for offenders convicted of registry violations, and improved procedures that shorten the timeframes for jails and prisons to notify the Virginia State Police of release or entry of a registered sex offender from their facilities. *See* Act of Apr. 19, 2006, ch. 857, 2006 Va. Acts ___ (codified as amended in scattered sections of Titles 2.2, 9.1, 16.1, 18.2, 19.2, 22.1, 23-2.2, 46.2, and 53.1 of the Virginia Code). The law also ensures that all registered sex offenders, not just those deemed sexually violent, will be on the public website. *Id.* State law also requires additional mandatory information from offenders on the regis-

civil commitment of sex offenders.[3] Moreover, the continuing war on terror, globalization, the Internet, as well as the nationalization and, in some cases, internationalization of criminal gangs, pose new public safety and legal issues that were unimaginable even a generation ago. The challenges of prosecuting criminals, preserving convictions on appeal, defending our laws from constitutional attack, representing state government agencies, and protecting our consumers, our children, as well as our seniors, have never been greater.[4]

Yet, as I confront the challenges of Virginia's Fifth Century, I am well aware of a great responsibility—preserving the First Principles of our constitutional system. As a successor to Edmund Randolph, who served as both the first Attorney General of the Commonwealth of Virginia and the first Attorney General of the United States, I have a responsibility to be a steward of those principles, and the principles of the justice system. Randolph's generation—which included Washington, Jefferson, Madison, Marshall, Mason, and Henry—established a constitutional system that secures the blessings of liberty while nourishing the free market capitalism that has given us more choice and more prosperity than any people in human history. At times, it is tempting to disregard these limits in order to find "an expedient solution to

---

try including mandatory work address, mandatory DNA sample, mandatory physical address, and mandatory new photo every two years. *Id.*

The new law also requires annual spot checks and mandatory monitoring of sex offenders on the registry and provides mechanisms to increase community awareness of sex offender registry (mandatory school notification, parental information at start of school, and mandatory child day care center notifications). *Id.*

3. Virginia is one of only sixteen states that allows for the Civil Commitment of Sexually Violent Predators ("SVP"). Since the passage and funding of the SVP law, *see* VA. CODE ANN. §§ 37.2-900 to -920 (Supp. 2006), Virginia has committed twenty-two individuals as SVPs.

Under the SVP law, there is an increase in the number and type of predicate sexual offenses screened for possible civil commitment, including: (1) kidnapping with intent to defile or rape; (2) aggravated sexual battery of any victim regardless of age; (3) carnal knowledge of a child; and, (4) attempts to commit rape, forcible sodomy, object sexual penetration, and aggravated sexual battery. *Id.* § 37.2-900 (Supp. 2006).

The law also designates the Static-99 as the screening instrument to determine eligibility for assessment as a SVP, *id.* § 37.2-904(B)(1) (Supp. 2006), and allows for a number of procedural changes to the SVP process including allowances for the Attorney General to seek a continuance for good cause shown. *Id.* § 37.2-906 (Supp. 2006).

Finally, the law requires Department of Corrections to do a national criminal background check prior to application of the Static-99 on all eligible offenders. *Id.* § 37.2-903(B)(i)(a) (Supp. 2006).

4. To that end, I am pleased that the General Assembly has increased the resources for my office as we endeavor to meet these challenges.

the crisis of the day."[5] The limits may seem outdated or too constraining for our twenty-first century world. Yet, the constitutional system developed by that great generation of Virginians "protects us from our own best intentions."[6] There are several overarching principles—the First Principles upon which the nation was founded and upon which our prosperity rests—that we must never forget.

First, "[i]n the compound republic of America, the power surrendered by the people, is first divided between two distinct governments."[7] The Constitution establishes "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[8] By dividing sovereignty between the national government and the states,[9] the Constitution ensured that: "a double security arises to the rights of the people. The different governments will control each other at the same time that each will be controlled by itself."[10] Thus, the "preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national

5. New York v. United States, 505 U.S. 144, 187 (1992).

6. *Id.*

7. THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., Signet Classic 2003). As early as 1767, John Dickinson suggested that sovereignty should be divided between the British Parliament and the Colonial Legislatures. *See* ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 75–76 (3d ed. 1963).

8. U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

9. Prior to the adoption of the Constitution, the thirteen states effectively were thirteen sovereign nations. *See* DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) ("[T]hese United Colonies are, and of Right ought to be Free and Independent States."). Each individual state retained the "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." *Id.* Indeed, the Articles of Confederation explicitly recognized that each state "retains its sovereignty, freedom, and independence . . . which is not by this confederation expressly delegated to the United States, in Congress assembled." ARTICLES OF CONFEDERATION art. II (U.S. 1777). In sum, before the ratification of the United States Constitution, the states were sovereign entities. *See* Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991).

10. THE FEDERALIST NO. 51 (James Madison), *supra* note 7, at 320; *see also* THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 7, at 176 ("Power being almost always the rival of power, the General Government will at all times stand ready to check the usurpations of the State Governments, and these will have the same disposition towards the General Government.").

government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[11]

This division of sovereignty between the states and the national government "is a defining feature of our Nation's constitutional blueprint."[12] The division of power between dual sovereigns, the states and the national government, is reflected in the founders brilliant enshrining of federalism in the Constitution's text,[13] as well as its structure.[14] As the Supreme Court noted, "[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[15]

Because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom,"[16] the Supreme Court of the United States has intervened to maintain the sovereign prerogatives of both the states and the national government. In order to preserve the sovereignty of the national government, the Court has prevented the states from imposing term limits on members of Congress[17] and instructing members of Congress as to how to vote on certain issues.[18] Similarly, it has invalidated state laws that infringe on the right to

---

11. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868).

12. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002).

13. *See* Printz v. United States, 521 U.S. 898, 918 (1997).

14. *See* Alden v. Maine, 527 U.S. 706, 714–15 (1999); *see also* U.S. CONST. amend. X ("The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people."). As the Supreme Court observed:

> The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

New York v. United States, 505 U.S. 144, 156–57 (1992). Moreover, the Tenth Amendment is not the exclusive textual source of protection for principles of federalism. *See Printz*, 521 U.S. at 924 n.13.

15. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). *See generally* J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. CAL. L. REV. 523 (2001).

16. United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

17. *See* U.S. Term Limits v. Thorton, 514 U.S. 779, 800–01 (1995).

18. Cook v. Gralike, 531 U.S. 510, 523–26 (2001).

travel,[19] that undermine the nation's foreign policy,[20] and that exempt a state from generally applicable regulations of interstate commerce.[21] Conversely, recognizing that "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere,"[22] and that "the erosion of state sovereignty is likely to occur a step at a time,"[23] the Supreme Court has declared that the national government may not compel the states to pass particular legislation,[24] to require state officials to enforce federal law,[25] to dictate the location of the state capitol,[26] or to regulate purely local matters.[27] Similarly, the Supreme Court has restricted Congress's power to enforce the Fourteenth Amendment,[28] and its ability to abrogate the states' sovereign immunity.[29] Indeed, in some circumstances, the states' sovereignty interest will preclude federal courts from enjoining on-going violations of federal law.[30]

Second, after sovereignty is divided between the states and the national government, "then the portion allotted to each subdivided among distinct and separate departments."[31] Moreover, the "Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' personally and through officers whom he appoints."[32] Thus, Congress may not interfere with the President's enforcement of the law.[33] Conversely, the President may not interfere with Congress's ability to legis-

19. *See* Saenz v. Roe, 526 U.S. 489, 498–507 (1999).
20. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–74 (2000).
21. *See* Reno v. Condon, 528 U.S. 141, 151 (2000).
22. Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).
23. South Carolina v. Baker, 485 U.S. 505, 533 (1988) (O'Connor, J., dissenting).
24. *See* New York v. United States, 505 U.S. 144, 162 (1992).
25. Printz v. United States, 521 U.S. 898, 935 (1997).
26. Coyle v. Smith, 221 U.S. 559, 579 (1911).
27. *See* United States v. Morrison, 529 U.S. 598, 617–19 (2000); United States v. Lopez, 514 U.S. 549, 561 n.3 (1995); *cf.* Gonzales v. Oregon, 126 S. Ct. 904, 925 (2006) (holding that the United States Attorney General may not shift "authority from the States to the Federal Government to define general standards of medical practice in every locality").
28. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
29. *See* Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996).
30. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 286–87 (1997).
31. THE FEDERALIST NO. 51 (James Madison), *supra* note 7, at 320.
32. Printz v. United States, 521 U.S. 898, 922 (quoting U.S. CONST. art II, § 3).
33. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 947 (1983).

late.[34] Of course, the judiciary, through the practice of judicial review, ensures the national government remains one of enumerated, hence limited, powers.[35] Yet, even with judicial review, there are limits. For example, the meaning of a statute turns on "the provisions of our laws rather than the principal concerns of our legislators."[36] Similarly, the courts acknowledge that they are not "omni-competent" and, thus, cannot micromanage government departments.[37]

Third, in addition to these structural limits, both the Virginia and national constitutions contain textual limits on the powers of government.[38] Many regard the Virginia Declaration of Rights and the Federal Bill of Rights as *creating limits* on government. Yet, like James Madison, I regard the Bill of Rights not as creating limits, but merely as *confirming* limits that already exist. In other words, even if the Virginia Declaration of Rights and the national Bill of Rights did not exist, the Virginia government and the national government would be incapable of establishing a church, punishing the free exercise of religions, abridging the freedom of speech, confiscating fire arms, and so forth.[39] Moreover, various provisions of the Fourteenth Amendment restrict

---

34. Clinton v. New York, 524 U.S. 417, 447–49 (1998).

35. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

36. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998).

37. People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 536 (7th Cir. 1997) ("The conceit that [courts are competent to decide every issue] belongs to a myth of the legal profession's omnicompetence that was exploded long ago.").

38. *See* U.S. CONST. amend. I–X; VA. CONST. art. I.

39. Many assert that the U.S. Constitution represents a delegation of power while the state constitutions represent a limitation on power. The highest court of New York observed:

> The Federal Constitution is one of delegated powers and specified authority; all powers not delegated to the United States or prohibited to the States are reserved to the States or to the people. Great significance accordingly is properly attached to rights guaranteed and interests protected by express provision of the Federal Constitution. By contrast, because it is not required that our State Constitution contain a complete declaration of all powers and authority of the State, the references which do appear touch on subjects and concerns with less attention to any hierarchy of values . . . .

Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 366 n.5 (N.Y. 1982) (citation omitted); *see also* Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 785 (Md. 1983).

While I agree that the national government has no authority that is not expressly delegated in the Constitution, I disagree with the notion that a state government is limited only by the state and federal constitutions. There are some objectives that no government—or at least no government that is republican in form—can ever pursue regardless of what the Constitution may or may not say.

the states while empowering the national government to protect civil liberties. Both the Equal Protection Clause and Privileges or Immunities Clause impose substantive restrictions on the states.[40] Moreover, although the Bill of Rights originally did not apply to the states,[41] the Due Process Clause incorporates most of the provisions of the Bill of Rights.[42] Additionally, Section Five of the Fourteenth Amendment gives Congress the authority to enact legislation that enforces the substantive guarantees of the Fourteenth Amendment against the states.[43] Consequently, if the states have engaged in conduct that violates the Fourteenth Amendment, then Congress can take remedial action to correct the violation and to prevent future violations.[44]

In sum, as I relish the privilege and confront the challenges of being Attorney General at the dawn of Virginia's Fifth Century, I will remember the First Principles—Dual Sovereignty, Separation of Powers, and Limited Government. Although I have a responsibility to fight crimes, protect consumers, defend our statutes, and represent all agencies of the commonwealth, my overarching responsibility is to the Virginia and national constitutions.

---

40. *See* Johnson v. California, 543 U.S. 499, 506 n.1 (2005) (Equal Protection); Saenz v. Roe, 526 U.S. 489, 501–04 (1999) (Privileges or Immunities).

41. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

42. *See* 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 308–09 (4th ed. 2000) (listing cases and specific provisions of the Bill of Rights); *cf.* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 1–4 (1986) (arguing that the Privileges or Immunities Clause incorporates all provisions of the Bill of Rights).

43. *See* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

44. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80–81 (2000). For example, because "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (citation omitted), one way of enforcing the Fourteenth Amendment is to abrogate the states' sovereign immunity. If Congress is enforcing the Fourteenth Amendment, then it may abrogate the states' sovereign immunity. *See* Tennessee v. Lane, 541 U.S. 509, 518 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003); Bd. of Trustees v. Garrett, 531 U.S. 356, 364 (2001); *Kimel*, 528 U.S. at 80; Alden v. Maine, 527 U.S. 706, 756 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 637 (1999); Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996).

***