



State and Local Government

by Caroline Johnson Levine

The Tenth Amendment Reserves Power to the States

“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.”¹ The U.S. Constitution recognized that the federal government cannot be as efficient and responsive to pertinent issues particular to each state, county, and municipality, and that state and local governments should be entitled to legislate accordingly. Therefore, federalism provides necessary divisions of power between federal and local governments. “As James Madison explained, the constitutional process in our ‘compound republic’ keeps power ‘divided between two distinct governments.’”² Consequently, a recent U.S. Supreme Court ruling in *Bond v. U.S.*, 572 U.S. —, 134 S.Ct. 2077 (2014), clarified that

enough doses, potentially lethal.¹⁵ Bond proceeded to place the chemicals on objects that she knew Haynes would come in contact with, including Haynes’s car door and mailbox. Haynes was able to easily spot and avoid contact with the chemicals on 23 of Bond’s 24 attempted assaults. The final chemical attack resulted in Haynes receiving a minor burn on her thumb, which was relieved with water.

Haynes repeatedly reported Bond’s chemical attacks to local law enforcement, and postal inspectors placed surveillance cameras around Haynes’ home. “The cameras caught Bond opening Haynes’s mailbox, stealing an envelope, and stuffing potassium dichromate inside the muffler of Haynes’s car.”¹⁶ Federal prosecutors charged Bond “with two counts

“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.” —Justice John Roberts

***Bond v. U.S.*, 572 U.S. —, 134 S. Ct. 2077, 2086 (2014)**

the U.S. Constitution did not grant unlimited power to the federal government and that many legal matters should be decided by the states. More specifically, the Supreme Court was required to address “whether the [federal Chemical Weapons Convention] Implementation Act also reaches a purely local crime.”³

The intersection of the Act and the principles of federalism begin with a highly personal and local dispute. Carole Bond’s husband and her friend, Myrlinda Haynes, conducted an adulterous affair. Upon discovering that Haynes was pregnant, Bond became determined to enact revenge upon Haynes. Bond began tormenting Haynes with “a campaign of harassing telephone calls and letters, acts that resulted in a criminal conviction on a minor [Pennsylvania] state charge.”⁴ Subsequent to Bond’s conviction, she continued in her harassment efforts against Haynes by exposing Haynes to toxic chemical substances.

Bond was employed as a microbiologist and “stole a quantity of 10-chloro-10H-phenoxarsine (an arsenic-based compound) from her employer ... [and] also ordered a vial of potassium dichromate (a chemical commonly used in printing photographs or cleaning laboratory equipment) on Amazon.com. Both chemicals are toxic to humans and, in high

of possessing and using a chemical weapon in violation of [the Chemical Weapons Convention Implementation Act, 18 U.S.C.] section 229(a).”⁷ Bond pled guilty and received a six-year prison sentence.

The Convention on Chemical Weapons is an international treaty between 190 countries to prevent the horrors of chemical warfare and was ratified by the United States in 1997. To further the ends of the treaty, the U.S. Congress enacted the Chemical Weapons Convention Implementation Act in 1998. “The Act makes it a federal crime for a person to use and possess any chemical weapon, and it punishes violators with severe penalties. It is a statute that, like the Convention it implements, deals with crimes of deadly seriousness.”⁸ However, the Supreme Court found that Bond’s case involved “a purely local crime: an amateur attempt by a jilted wife to injure” Haynes.⁹

Bond appealed her conviction, arguing that the Act violated the Tenth Amendment to the U.S. Constitution. In Bond’s first appeal, the Supreme Court was required to answer whether Bond lacked standing and also consider whether “Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States.”¹⁰ The court held that an individual “who seeks to initiate or continue proceed-

Caroline Johnson Levine is the chair of the Federal Bar Association’s State and Local Government Relations Section and is an appointed member of The Federal Lawyer Editorial Board. She is also the vice chair of the Florida Bar’s Committee on Professionalism and is an appointed member of the Senior Lawyers Committee. She has been appointed by the Florida Bar Board of Governors to the Supreme Court Commission on Professionalism. This article was submitted on behalf of the FBA State and Local Government Section; for more information about this section, please visit www.fedbar.org.

ings in federal court must demonstrate, among other requirements, both standing to obtain relief requested¹¹ and in addition, an ‘ongoing interest in the dispute’ on the part of the opposing party that is sufficient to establish ‘concrete adverseness.’¹² The court found that Bond met Article III’s requirement for standing, as her conviction “satisfies the case-or-controversy requirement, because the incarceration ... constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction.”¹³

The court also addressed legal arguments asserting that only a State, and not an individual, can raise a Tenth Amendment challenge. The court noted that the principles of federalism and separation of powers provide that an individual can challenge the constitutionality of a Congressional act. Importantly, federalism provides that the “allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.”¹⁴ Further, federalism “secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.”¹⁵

Therefore, an individual can raise an objection to federal laws that “upset the constitutional balance between the National Government and the States,” as federalism does not provide a “matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism.”¹⁶ The Supreme Court held that Bond had standing to challenge her federal conviction, and it reversed and remanded the case to allow the U.S. Court of Appeals for the Third Circuit to address whether the Act “can be deemed ‘necessary and proper for carrying into Execution’ the President’s Article II, § 2 Treaty Power, *see* U.S. Const. Art I, § 8, cl. 18.”¹⁷

Bond argued, in her first and second appeals, that her particular crimes should be punished by the state of Pennsylvania and that the federal Act is an overexpansion into a state’s governing powers. The Supreme Court asserted that the “States have broad authority to enact legislation for the public good—what we have often called a ‘police power.’”¹⁸ Because the federal government does not have the same authority, it “can exercise only the powers granted to it”¹⁹ and issue all necessary and proper laws to execute the Constitution’s enumerated powers.²⁰ The court noted that the “Government frequently defends federal criminal legislation on the ground that the legislation is authorized pursuant to Congress’s power to regulate interstate commerce.”²¹ However, in Bond’s case, the government intentionally disavowed any interstate commerce argument. Further, the court found that a local crime “cannot be made an offence against the United States, unless it has some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.”²²

The Supreme Court analyzed the intended reach of the Act, which provided a “comprehensive ban on chemical weapons...[and] arose in response to war crimes and acts of terrorism.”²³ However, the court found that “the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare.” Nor would “Bond’s feud-driven act of spreading irritating chemicals on Haynes’s door knob and mailbox ... suggest that a chemical weapon was deployed in Norristown, Pennsylvania.”²⁴

More importantly, the Supreme Court required that the Act “must be read consistent with principles of federalism inherent in our constitutional structure.”²⁵ The court enters into any federal and state conflict with the presumption that “federal statutes do not abrogate state sovereign immunity,”²⁶ impose obligations on the States pursuant to section 5 of the Fourteenth Amendment,²⁷ or preempt state law.²⁸ Further, because the United States’ “constitutional structure leaves local criminal activity pri-

marily to the states, [the court has] generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.”²⁹ Therefore, in order to find that a federal statute overrides the “usual constitutional balance of federal and state powers,”³⁰ the statute must be explicit in its intent to abrogate state authority.

Analyzing the language and intent of the Act, the Supreme Court was “reluctant to conclude that Congress meant to punish Bond’s crime with a federal prosecution for a chemical weapons attack,” and the court refused to “transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults.”³¹ In *Bond*, the Supreme Court ruled that the principles of federalism provide that “the Constitution’s division of responsibility between sovereigns [means] leaving the prosecution of purely local crimes to the States.”³² ◉

Endnotes

¹U.S. Const. amend. X.

²*Bond v. U.S.*, 572 U.S. —, 134 S. Ct. 2077, 2093 (2014).

³*Id.* at 2083.

⁴*Bond v. U.S.*, 564 U.S. —, 131 S. Ct. 2355, 2360 (2011).

⁵*Bond v. U.S.*, 134 S. Ct. at 2085.

⁶*Id.*

⁷*Id.*

⁸*Id.* at 2083.

⁹*Id.*

¹⁰*Bond v. U.S.*, 131 S. Ct. at 2360.

¹¹*Id.* at 2361, citing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992).

¹²*Id.* at 2361, quoting, *Camreta v. Greene*, 563 U.S. —, 131 S. Ct. 2020, 2028, 179 L.Ed.2d 1118 (2011) (internal quotation marks omitted).

¹³*Id.* at 2362, quoting, *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L.Ed.2d. 43 (1998).

¹⁴*Id.* at 2364.

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.* at 2367.

¹⁸*Bond v. U.S.*, 134 S. Ct. at 2086; *see also United States v. Lopez*, 514 U.S. 549, 567, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995).

¹⁹*Id.*, quoting, *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819).

²⁰U.S. Const. Art I, § 8, cl. 18.

²¹*Bond v. U.S.*, 134 S. Ct. at 2086.

²²*United States v. Fox*, 95 U.S. 670, 672, 24 L.Ed. 538 (1878).

²³*Bond v. U.S.*, 134 S. Ct. at 2087.

²⁴*Id.* at 2090-2091.

²⁵*Id.* at 2088.

²⁶*Id.*; *see also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243, 105 S. Ct. 3142, 87 L.Ed.2d 171 (1985).

²⁷*Id.*; *see also Penhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16-17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

²⁸*Id.*; *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L.Ed. 1447 (1947).

²⁹*Id.* at 2083.

³⁰*Id.* at 2089.; *see also Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L.Ed.2d 410 (1991).

³¹*Id.* at 2092.

³²*Id.* at 2087.