

# The Bell Rings for Liberty: Bond v. United States (June 16, 2011)

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On June 16, 2011, the U.S. Supreme Court issued one of the best and most important decisions ever on the principle of federalism. In the case **Bond v. United States (09-1227)**, the Court unanimously held that individuals, and not just the states, have standing to challenge federal laws as violations of state sovereignty under the Tenth Amendment. Justice Kennedy, often the “swing” judge on the Supreme Court, wrote the opinion. This decision shows that our high court is on the side of our Founders and values the most fundamental principle on which our nation was founded – individual liberty.

Those who understand the intent behind the Constitution to protect individual liberty take to heart what Thomas Jefferson wrote – “Every word of the Constitution decides a question between power and liberty.” And they know that most especially, the 28 words of the Tenth Amendment decide such a question.

The Tenth Amendment reads:

“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.”

The facts of this case are as follows: This case arises from a bitter personal dispute which lead to criminal acts and then a criminal prosecution. Petitioner Carol Anne Bond lived outside Philadelphia, PA. After discovering that her close friend was pregnant and that the father was in fact her own husband (Bond’s husband), Carol Anne sought revenge. She subjected her (“ex-”) friend to a campaign of harassing telephone calls and letters, acts that resulted in a minor criminal conviction on a state charge. But that didn’t stop her. She persisted in more hostile acts, placing caustic substances on objects the woman was likely to touch, including her mailbox, car door handle, and front doorknob. The victim suffered a minor burn on her hand and finally contacted federal investigators, who identified Bond as the perpetrator. Bond was indicted in the US District Court for the Eastern District of Pennsylvania for, among other offenses, two counts of violating §229. Section 229 forbids knowing possession or use of any chemical that “can cause death, temporary incapacitation or permanent harm to humans or animals” where not intended for a “peaceful purpose.” §§229(a); 229F(1); (7); (8).

In the District Court, Bond moved to dismiss the §229 charges, contending the statute was beyond Congress’ constitutional authority to enact. The District Court denied the motion. Bond entered a conditional plea of guilty, reserving the right to appeal the ruling on the validity of the statute. She was sentenced to six years in prison.

In the Court of Appeals for the Third Circuit, Bond renewed her challenge to the statute, citing, among other authorities, the Tenth Amendment to the Constitution.

The Court of Appeals asked for supplemental briefs on the question whether Bond had standing to raise the Tenth Amendment as a ground for invalidating a federal statute in the absence of a State's participation in the proceedings. In its supplemental brief in the Court of Appeals, the Government took the position that Bond did not have standing, and the Court of Appeals agreed. However, when Bond sought certiorari with the Supreme Court, the government advised the Court that it had changed its position and that, in its view, Bond does in fact have standing to challenge the constitutionality of §229 on Tenth Amendment grounds.

With respect to the Tenth Amendment, Bond asserted that the conduct with which she was charged is "local in nature" and "should be left to local authorities to prosecute." She alleged that congressional regulation of that conduct "signals a massive and unjustifiable expansion of federal law enforcement into state-regulated domain." [*Case record in No. 2:07-cr-00528-JG-1 (ED Pa.), Doc. 27, pp. 6, 19*]. The public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign, has been displaced by that of the federal government (which she claims is acting more like a 'national' government than a 'federal' government). In short, the law to which Bond is subject and the punishment she must face, might not have come about if the matter were left for the Commonwealth of Pennsylvania to decide.

Justice Kennedy's opinion began: "This case presents the question whether a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States." [Bond, pg. 4]

He went on to explain what federalism is, how it is intended to operate, and why it is crucial to our notions of ordered and individual liberty. His words should be read and appreciated just as he wrote them:

"The federal system rests on what might at first seem a counter-intuitive insight, that "freedom is enhanced by the creation of two governments, not one." *Alden v. Maine*, 527 U. S. 706, 758 (1999). The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.

The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, see *New York v. United States*, 505 U. S. 144 (1992), at 155–159, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States. See *United States v. Lopez*, 514 U. S. 549, 564 (1995). The unconstitutional action can cause concomitant (*existing or occurring together; happening at the same time*) injury to persons in individual cases.

Federalism has more than one dynamic. It is true that the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-à-vis one another. The allocation of powers in our federal

system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.

But that is not its exclusive sphere of operation. Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York*, at pg. 181 (quoting *Coleman v. Thompson*, 501 U. S. 722, 759 (1991) (*Blackmun, J., dissenting*)).

Some of these liberties are of a political character. The federal structure allows local policies "more sensitive to the diverse needs of a heterogeneous society," permits "innovation and experimentation," enables greater citizen "involvement in democratic processes," and makes government "more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U. S. 452, 458 (1991).

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. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States.

Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. [*See ibid*]. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. [*See New York, supra, at 181*]. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

The recognition of an injured person's standing to object to a violation of a constitutional principle that allocates power within government is illustrated, in an analogous context, by cases in which individuals sustain discrete, justiciable (see below) injury from actions that transgress separation-of-powers limitations. Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well.

In the precedents of this Court, the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances. For example, the requirement that a bill enacted by Congress be presented to the President for signature before it can become law gives the President a check over Congress' exercise of legislative power. See: U. S. Constitution Article I, §7. Yet individuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable (see below) cases and controversies. In *INS v. Chadha*, 462 U. S. 919 (1983), it was an individual who successfully challenged the so-called legislative veto—a procedure that Congress used in an attempt to invalidate an executive determination without presenting the measure to the President. The procedure diminished the role of the Executive, but the challenger sought to protect not the prerogatives of the Presidency as such but rather his own right to avoid deportation under an invalid order. Chadha's challenge was sustained. A cardinal principle of separation of powers was vindicated at the insistence of an individual, indeed one who was not a citizen of the United States but who still was a person whose liberty was at risk.

Chadha is not unique in this respect. Compare *Clinton v. City of New York*, 524 U. S. 417, 433–436 (1998) (injured parties have standing to challenge Presidential line-item veto) with *Raines v. Byrd*, 521 U. S. 811, 829–830 (1997) (Congress Members do not); see also, e.g., *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. \_\_\_\_ (2010); *Plaut v. Spendthrift Farm, Inc.*, 514 U. S. 211 (1995); *Bowsher v. Synar*, 478 U. S. 714 (1986); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952); and *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935). If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable (See below) injury may object.

Just as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism. That claim need not depend on the vicarious assertion of a State's constitutional interests, even if a State's constitutional interests are also implicated. [Bond, pp. 11-15].

Justice Ruth Bader Ginsberg, joined by Justice Kennedy, wrote a concurring opinion. She wrote: " In this case, Bond argues that the statute under which she was charged, 18 U. S. C. §229, exceeds Congress' enumerated powers and violates the Tenth Amendment. In short, a law "beyond the power of Congress," for any reason, is "no law at all." *Nigro v. United States*, 276 U. S. 332, 341 (1928). The validity of Bond's conviction depends upon whether the Constitution permits Congress to enact statute §229. Her claim that it does not must be considered and decided on the merits." [Bond, pp. 18-19].

Freedom is being fought for in courtrooms all over the country and in the Supreme Court, and the Bond decision indeed was a glorious day. We hope "individual freedom" and "limited government" continue to be on the mind and in the hearts of the members of the Supreme Court and especially as they hear challenges to the

federal healthcare bill – the Patient Protection and Affordable Care Act, also known as “Obamacare.

Reference:

Bond v. United States, 564 U. S. \_\_\_\_ (2011). Retrieved at:  
<http://www.supremecourt.gov/opinions/10pdf/09-1227.pdf>

### **Current Justices of the Supreme Court**

<http://www.supremecourt.gov/about/biographies.aspx>

### **The Goldwater Institute is praising yesterday’s unanimous Supreme Court decision in Bond v. U.S.:**

Yesterday the U.S. Supreme Court issued one of the best and most important decisions ever on federalism. The Court unanimously held that not just states but individuals have standing to challenge federal laws as violations of state sovereignty under the 10th Amendment. This decision is as radical in the direction of liberty as the New Deal was radical in the direction of socialism. Click here to read the decision.

In short, freedom advocates like us just got a green light from the USSC to bring more cases under the 10th Amendment. This will have huge—positive—implications for freedom so long as the current constitution of the court holds.

Here is our favorite passage:

“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.” We will put this precedent to work immediately when we file our opening brief in the Obamacare lawsuit Monday, and also in our defense of Save Our Secret Ballot against the NLRB challenge, and many more cases to come.

**Applying the Bond decision to a case challenging Obama’s eligibility**, one would have to be criminally charged or be compelled to pay money under a statute passed by Congress when Obama was President. One would argue that under Article I, Section 7, Clause 2, laws passed by Congress need the action or inaction of the President (the veto power) before they are allowed to become laws. This requirement satisfies separation of powers and checks and balances doctrine. One would argue that Congress passed the charging statute, with the President’s action or inaction. One would argue that a legitimate President must satisfy the eligibility requirements of Article II, Section 1, Clause 5, which contains the “natural born Citizen” clause. Then one would argue that the law is not valid because it never was presented to a legitimate President for consideration under Article I, Section 7, Clause 2, arguing that Obama is not a legitimate President because he does not meet the requirements of the “natural born Citizen” clause. Hence, one would argue that separation of powers and checks and balances have been violated. Obama’s

eligibility to be President under the “natural born Citizen” clause would be the basis for the attack against the charging statute. Since the office of the President is a constitutional office, the de facto officer doctrine (that we should treat Obama as the President by fact even though he is not by law) should not be an obstacle to this argument.

Support for this argument is found in the Court’s explanation of how a litigant can file an action under a separation of powers argument. The Court said:

“In the precedents of this Court, the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances. For example, the requirement that a bill enacted by Congress be presented to the President for signature before it can become law gives the President a check over Congress’ exercise of legislative power. See U. S. Constitution, Article I, §7. Yet individuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases (see below) and controversies. *In INS v. Chadha*, 462 U. S. 919 (1983), it was an individual who successfully challenged the so-called legislative veto—a procedure that Congress used in an attempt to invalidate an executive determination without presenting the measure to the President. The procedure diminished the role of the Executive, but the challenger sought to protect not the prerogatives of the Presidency as such but rather his own right to avoid deportation under an invalid order. Chadha’s challenge was sustained. A cardinal principle of separation of powers was vindicated at the insistence of an individual, indeed one who was not a citizen of the United States but who still was a person whose liberty was at risk.”

It is important to understand that the Court is willing to grant standing in these situations because the litigant can show that he or she has otherwise suffered “justiciable injury.” In the Bond case, the injury was the real potential for criminal conviction, incarceration, and the loss of liberty such government action brings.

But the Bond Court also cautioned so that its decision is not misinterpreted. It said:

“An individual who challenges federal action on these grounds is, of course, subject to the Article III requirements, as well as prudential rules, applicable to all litigants and claims. Individuals have “no standing to complain simply that their Government is violating the law.” *Allen v. Wright*, 468 U. S. 737, 755 (1984). It is not enough that a litigant “suffers in some indefinite way in common with people generally.” *Frothingham v. Mellon*, 262 U. S. 447, 488 (1923) (*decided with Massachusetts v. Mellon*). If, in connection with the claim being asserted, a litigant who commences suit fails to show actual or imminent harm that is concrete and particular, fairly traceable to the conduct complained of, and likely to be redressed by a favorable decision, the Federal Judiciary cannot hear the claim. *Lujan*, 504 U. S., at 560–561. These requirements must be satisfied before an individual may assert a constitutional claim; and in some instances, the result may be that a State is the only entity capable of demonstrating the requisite injury.

In this case, however, where the litigant is a party to an otherwise justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of our Government.”

The Court also said that the ultimate issue of the statute's validity turns in part on whether the law can be deemed "'necessary and proper for carrying into Execution'" the President's Article II, §2 Treaty Power and that the Court expressed no view on the merits of that argument which the Court of Appeals would address on remand.

So, in a Bond-like case, the law is attacked as invalid because Congress did not have constitutional power to pass it (relying on principles of federalism). In an Obama case, the law is attacked because it was never submitted to a legitimate President (relying on separation of powers and checks and balances principles). In both cases, the charging law is being attacked as unconstitutional. In both cases, the challenger, under threat of criminal indictment or having to pay money, being the basis of a threat to his or her individual constitutional rights, should have standing to attack the statute.

The point is that with Obama, one charged with a criminal offense or compelled to pay some money because of a law passed by Congress and allowed to pass into law by the action or inaction of Obama, acting as the President, would have standing to challenge the constitutionality of the law based on the law lacking the action or inaction of a legitimate President which is needed under Article I, Section 7, Clause 2 of the Constitution for laws to be passed. The standing argument would be made in the context of separation of powers and checks and balances.

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Emphasis added.

## **justiciable**

*Capable of being decided by a court.*

Not all cases brought before courts are accepted for their review. The U.S. Constitution limits the federal courts to hearing nine classes of cases or controversies, and, in the twentieth century, the Supreme Court has added further restrictions. State courts also have rules requiring matters brought before them to be justiciable.

Before agreeing to hear a case, a court first examines its justiciability. This preliminary review does not address the actual merits of the case, but instead applies a number of tests based on judicial doctrines. At their simplest, the tests concern (1) the plaintiff, (2) the adversity between the parties, (3) the substance of the issues in the case, and (4) the timing of the case. For a case to be heard, it must survive this review. In practice, courts have broad power to apply their tests: they commonly emphasize whichever factors they deem important. This irregularity has made the analysis of justiciability a difficult task for lawyers, scholars, and the courts themselves.

Behind the tests for justiciability are a number of legal doctrines. The Supreme Court has declared that the doctrines have both constitutional and prudential components: some parts are required by the Constitution, according to the Court's interpretation of Article III, and some are based on what the Court considers prudent [Judicial Administration](#). This distinction has important consequences for the limits of judicial power. Congress has the authority to pass laws that override only the prudential limits of [Judicial Review](#); it cannot pass laws that override constitutional limits. Thus, the Supreme Court has insulated the federal courts from congressional influence in some but not all areas of justiciability.

Among the most complex justiciability doctrines is standing, which covers the plaintiff. Standing focuses on the party, not on the issues he wishes to have adjudicated (*Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947). A claimant said to have standing has been found by the court to have the right to a trial. To reach such a determination, the court uses several general rules. These rules require that the claimant has suffered an actual or threatened injury; that the case alleges a sufficient connection (or nexus) between the injury and the defendant's action; that the injury can be redressed by a favorable decision; and that the plaintiff neither brings a generalized grievance nor represents a third party. In addition, separate rules govern taxpayers, organizations, legislators, and government entities.

The question of justiciability also involves the legal relationship of the parties in the case, as well as the substance of their dispute. To be found justiciable, the case must involve parties who have an adversary controversy between them. Moreover, the issues in the controversy must be "real and substantial," and therefore more than mere generalized interests common to the public at large. A related rule forbids the federal courts to issue ADVISORY OPINIONS. Dating from the late eighteenth century, it holds that they must decline to rule on merely hypothetical or abstract questions. In addition, they are restricted from taking cases that address purely POLITICAL QUESTIONS, which are beyond management by the judiciary. Certain state courts do issue advisory opinions on legal questions.

The fourth concern of tests for justiciability, the timing of the case, is evaluated under the concepts of [Ripeness](#) and mootness. The ripeness doctrine holds that a case is justiciable if "the harm asserted has matured sufficiently to warrant judicial intervention" (*Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 [1975]). The mootness doctrine prevents a court from addressing issues that are hypothetical or dead. A case may become moot because of a change in law or in the status of the litigants. Most commonly, it is held to be moot because the court is presented with a fact or event that renders the alleged wrong no longer existent. For example, in 1952 the Supreme Court refused to review a state court decision in a case challenging Bible reading in the public schools. The child behind the suit had already graduated, and the parents and taxpayers who brought the suit could show no financial injury (*Doremus v. Board of Education*, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475). However, the Court did agree to hear the landmark [Abortion](#) case *ROE V. WADE*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), even though the plaintiff was no longer pregnant. The Court gave as its reason the length of a woman's gestation period (nine months), which is too short to permit appellate review.

One reason justiciability is complex is that it is replete with numerous arcane rules and exceptions. Another is that courts apply it on an ad hoc basis, inconsistently choosing to emphasize one element of its tests over another. This fact has led legal scholars to despair of ever reaching a unified analysis of justiciability. Some have taken the cynical view that courts will find a case justiciable when they want to hear it, and refuse to find it justiciable when they do not wish to hear it.