



BY ROBERT A. LEVY

“Individuals, like states, cannot be commandeered to carry out federal regulatory programs.”

## Chairman’s Message Rights, Powers, Dual Sovereignty, and Federalism

As the Supreme Court’s 2010–2011 term ended, few if any pundits predicted the 9–0 decision in *Bond v. United States*—an obscure case, but with promising implications for individual liberty. Nor did court watchers anticipate that a decision of such gravity could be inspired by these bizarre facts:

Carol Bond discovered that her husband had impregnated her close friend. So Ms. Bond lathered toxic chemicals on her friend’s car and mailbox, causing minor burns. If you think Bond’s escapade should have been handled by local law enforcement authorities, you haven’t been following the Chemical Weapons Convention, effected by a 1998 statute banning nonpeaceful use of chemicals that “cause death, temporary incapacitation or permanent harm.”

Bond was indicted by the federal government but challenged the statute under the Tenth Amendment, which provides that “powers not delegated to the United States . . . are reserved to the States respectively, or to the people.” She argued that a law elastic enough to cover her chemical caper represented federal encroachment on state criminal law—neither necessary nor proper to execute the president’s and Senate’s treaty power.

An appellate court decided, however, that Bond did not have legal standing to assert a Tenth Amendment right. After all, she sought to vindicate her personal interests, not the state’s; no state was party to her lawsuit; and yet the Tenth Amendment is presumably about federal intrusion on state authority. Enter the Supreme Court, which unexpectedly transformed a tedious legal issue—standing to sue—into an energetic discourse on the meaning of federalism.

Many Americans believe federalism is synonymous with states’ rights. Indeed, states do have some rights under the Constitution. For example, the Supreme Court has barred the federal government from “commandeering” the states to enforce federal gun laws and waste disposal regulations. States’ rights are part of what federalism is about.

Others think of federalism as conferring state powers. That, too, is part of the story. But the Tenth Amendment confers no specific powers. It simply reserves to the states or the people all powers not granted to the national government. Whether a state can exercise a particular power depends on the state’s constitution and laws—the legal pact between the state and its own citizens.

Federalism goes beyond states’ rights and powers. Its essence is dual sovereignty—the Framers’ ingenious system of shared authority between federal and state governments with each sovereign checking the other. The purpose of that check is to shield individ-

uals from concentrations of power. Federalism is first and foremost a device to safeguard personal freedom. Justice Anthony Kennedy’s opinion in *Bond* put it this way: Federalism “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. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.”

All nine members of the Court agreed: “States are not the sole intended beneficiaries of federalism. . . . An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States. . . . Fidelity to the principles of federalism is not for the States alone to vindicate.” Justice Kennedy also reminded us that “state sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”

So Carol Bond will have her day in court to argue that her indictment for a local crime oversteps the federal government’s treaty powers. “The individual,” said the Supreme Court, “can assert injury from governmental action taken in excess of the authority that federalism defines.” That principle extends, of course, to other matters the Court will be considering—including various challenges to President Obama’s healthcare scheme now percolating through the appellate courts.

Here is the logic: (1) The federal government is precluded from commandeering the states to carry out federal regulatory programs. (2) States and the people are treated equivalently by the Tenth Amendment. (3) All current justices acknowledge that an overriding goal of the Tenth Amendment is to secure individual rights. Therefore, (4) individuals, like states, cannot be commandeered to carry out federal regulatory programs.

Those principles may not be reconcilable with a federal mandate ordering individuals to purchase medical insurance to implement President Obama’s healthcare agenda. In declaring the mandate unconstitutional, the U.S. Court of Appeals for the Eleventh Circuit pointedly noted that the Constitution’s “structural limitations are often discussed in terms of federalism, [but] their ultimate goal is the protection of individual liberty.” Stay tuned: The Supreme Court will have the final word, probably during its upcoming term.

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