To the Bag

Standing Up for Mrs. Bond

To the *Bag*:

In the Summer 2011 issue, Erwin Chemerinsky asserts (footnote 26, page 385) that "*United States v. Bond*, 131 S.Ct. 2355 (2011), found that taxpayers have standing to challenge federal government actions as violating the Tenth Amendment." Chemerinsky goes on to opine that the "implicit message is that the majority of the Court sees the Tenth Amendment, but not the Establishment Clause of the First Amendment, as protecting individual liberty."

In fact, however, Chemerinsky's premise – that *Bond v. United States* recognized taxpayer standing in a Tenth Amendment case – is simply wrong, and the "implicit message" he opines about is similarly suspect. Mrs. Bond brought the case to the Supreme Court after she was convicted under a federal chemical weapons law and while serving her sentence of imprisonment. She was not arguing, nor did anyone involved in the case (including her lawyer, Paul Clement; the lawyer who argued for the United States at the Court, Deputy Solicitor General, Michael Dreeben; or me, appointed by the Court to defend the judgment below when the United States decided not to do so) assert or argue, that taxpayer standing had anything to do with the issues in the case.

Bond v. United States is in fact a resounding victory for *broader* recognition of standing. In *Bond*, the Court made clear that the nature of a constitutional claim – whether based on the Bill of Rights, separation of powers principles, or federalism principles – does not

limit who has standing to bring such a claim. In general, as long as the person meets the traditional "Article III" requirements for standing, that is sufficient. In the Establishment Clause context, no one (to my knowledge) is contending that someone directly and uniquely affected by an alleged violation of that Clause (*e.g.*, one might imagine a case in which Mrs. Bond had been convicted and imprisoned under a federal law that made it a crime to fail to swear allegiance to a National Church), would lack standing to challenge the government's action. Instead, "taxpayer" standing is a very limited exception to the ordinary rules of standing, and it is an exception that the Court applies only in the Establishment Clause context, thus giving potentially more plaintiffs standing than would be the case for any other constitutional claim.

Indeed, Chemerinsky had it backwards in a sense, because *Bond v. United States* is a resounding victory for citizens who seek broader recognition of standing to bring constitutional claims against governments. For that reason, I would have expected Chemerinsky to praise rather than implicitly criticize *Bond v. United States*.

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Tragedy and Mercy in Puerto Rico

To the *Bag*:

Professor Stephen R. McAllister's account of *Kentucky v. Dennison* ("A *Marbury v. Madison* Moment On The Eve Of The Civil War," 14 Green Bag 2d 405), is an excellent read. However, his account of *Puerto Rico v. Branstad*, which overruled *Dennison*, is too summary.

What did the Governor of Iowa do when he was told by the Supreme Court he had to honor the request of the Governor of Puerto Rico to return Ronald M. Calder, the object of the extradition effort, to the Commonwealth to face trial on charges of murder and attempted murder, whatever the Governor's views were of its justice system? And, what happened to Calder upon his return? What