FROTHINGHAM - REVISITED AND REJECTED: STANDING OF FEDERAL TAXPAYERS TO CHALLENGE ALLEGEDLY UNCONSTITUTIONAL EXPENDITURES OF FEDERAL FUNDS

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The utopian objective, a remedy for every wrong, is today nearer attainment. Many prospective litigants allegedly wronged in the past were denied their day in court because they lacked standing to sue. However, significant changes indicating a more responsive judicial policy have recently been instituted. Consequently, federal taxpayers, under some circumstances, may be granted standing to challenge allegedly unconstitutional federal expenditures.

At the outset, it must be noted that

> Standing is often used to describe the constitutional limitation of this Court to cases and controversies ... The Court has also developed a complementary rule of self-restraint.[1] (Emphasis added)

It is sometimes difficult to distinguish these constitutional limitations from the self-imposed judicial

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1. U.S. ex rel Chapman v. F.P.C., 345 U.S. 15 (1953).

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restraints. However, a new judicial policy has emerged to construe standing requirements liberally. Eventually this may mean conferring standing on a person adversely affected by governmental action, if that action is judicially reviewable.

What must a person show to invoke the power of the federal courts to contest governmental action? Generally, a suffered or threatened invasion of a personal "legal right" of the plaintiff is necessary, "as distinguished from the public's interest in the administration of law."[2] A "legal right" is one guaranteed by the Constitution. This theory leads to interesting speculations.

Suppose, though the prospect is most unlikely, that Congress passed a law establishing a national church financed entirely through voluntary contributions. There is no question of the law's unconstitutionality.[3] However, a judicial determination would be necessary to divest the law of its legal efficacy. The only circumstances under which a federal court can make that determination is to have a

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2. Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940); Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

3. "Congress shall make no law respecting an establishment of religion...." U.S. CONST. amend. I.

proper plaintiff come into court demanding it.[4] A proper plaintiff is one who has standing. If this law curtailed the free exercise of religion, any person so affected would be legally wronged and could bring the action. On the other hand, if the law was merely an expression of the public policy as viewed by the legislators, in no way directly infringing upon the exercise of religious beliefs, would any member of the public have standing? A legal wrong is present, since a constitutional limitation is exceeded, but who is deprived of a legal right? No one person suffers any differently from any other. Yet, based upon an accepted standard, this distinct injury must be shown before a party may maintain the suit.[5]

Secondly, suppose Congress passed a law raising the salaries of future Congressmen to an incredibly high level. What private individual has the power to seek judicial review of the legality of such legislative action? This article deals with taxpayer suits. Therefore, to avoid

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4. "The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, ..." U.S. CONST. Art. III, Sec. 2.

5. "The party who invokes the power (of the court) must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." (Emphasis added) Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

prematurely treating certain issues, assume that a federal taxpayer may have a sufficient interest in the moneys of the federal treasury. May the taxpayer maintain the suit? What legal wrong is he suffering, i.e., what constitutional right is infringed? Congress has a constitutional right to establish Congressional salaries and appropriate funds for the payment of these salaries.[6] There is no specific constitutional limitation regarding payment of exorbitant salaries.

In both hypothetical cases, under the theory that a personal legal wrong is necessary to challenge governmental action on the federal level, the prospective plaintiffs would not have standing. In the national religion case, Congress exceeds specific constitutional limitations, but no one could allege a direct injury, not shared in common with people generally. In the case of Congressional salaries, assuming taxpayers have a direct enough interest in federal treasury funds, a direct injury is threatened, but no specific constitutional limitation is exceeded.

Though generally applied, is the "legal wrong" criterion actually a constitutional limitation on the powers of the court, or is it a judicially imposed self-restraint? If it

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6. "The Senators and Representatives shall receive a compensation for their services, to be ascertained by Law, and paid out of the Treasury of the United States." U.S. CONST. Art. I, Sec. 6.

is a constitutional limitation, the court would be powe less to make exceptions, though it has apparently done so in the past, and would most likely do so in the above hypothetical instances. It has allowed a school to assert the constitutional rights of parents and children,[7] a nonresident of a state who was personally served to assert the rights of those who might not be so served,[8] and a taxpayer to assert the constitutional rights of New Jersey and New York.[9]

The federal taxpayer suit is one way in which the average American might be able to allege a direct injury. However, since 1923, the Supreme Court has precluded him from doing so. Frothingham v. Mellon[10] stood for one half century as a seemingly impenetrable bastion. This decision effectively prevented federal taxpayers, suing solely as taxpayers, from challenging the constitutionality of congressional appropriations. In 1968 the Court modified Frothingham in Flast v. Cohen.[11]

These two cases, and their relationship to each other,

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7. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

8. Wuchter v. Pizzutti, 276 U.S. 13 (1928). Here the long-arm statute did not provide for adequate notice to prospective defendants.

9. Helvering v. Gerhardt, 304 U.S. 405 (1938).

10. 262 U.S. 447 (1923).

11. 392 U.S. 83 (1968).

are the bulwark of this presentation. However, a treatment of the taxpayer suit primarily in no way isolates it from any other private suit to contest governmental action. This discussion involves the following:

1. The Frothingham v. Mellon Bastion
2. Post Frothingham Decisions
3. Flast and the Future
4. Conclusion

I. THE FROTHINGHAM BASTION

Notable commentators have consistently recommended re-evaluation of Frothingham v. Mellon and have encouraged the Court's reception of suits by taxpayers suing solely as taxpayers.[12] The Court re-examined the entire concept in Flast, and, while not expressly overruling Frothingham, corrected some patent deficiencies. The effects of these inevitable changes may be significant. The increasing pervasiveness of the federal government into economic and social institutions, with its expanding role and influence, must be subject to control. The taxpayer suit provides one means of asserting that control.

The Frothingham decision provides an immediate appreciation of the basic issues involved. Mrs. Frothingham, a

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12. See Davis, Standing to Challenge Governmental Action, 39 Minn. L. Rev. 352, 386-391 (1955); see also Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265 (1961).

federal taxpayer, sued the Secretary of the Treasury in a federal district court. Plaintiff challenged the constitutionality of using federal funds to make grants to the states under the Maternity Act.[13] This act was designed to promote the general welfare by reducing infant mortality.

Plaintiff alleged that the enactment of this legislation was beyond the powers granted to Congress by the Constitution. Mrs. Frothingham also asserted that she would be subjected to injury (i.e., greater taxation) by being required to pay her proportionate share of these payments. This, she claimed, was a taking of property without due process of law, in violation of the Fifth Amendment to the Constitution. Since the Supreme Court refused to grant standing to the plaintiff, the substantive merits were not litigated. The governmental use of federal funds was left unchallenged.

Was there a constitutional limitation on the Court that prevented it from granting standing to a taxpayer? Or conversely, did the Court have the power, but refuse to grant standing, merely as an exercise of judicial self-restraint?

Article III of the Constitution refers to the judicial power as extending to all cases and controversies arising

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13. Act of Nov. 23, 1921, Ch. 135, 42 Stat. 224 (repealed 1927).

under the Constitution or laws of the United States.[14] While the legislature is responsible for making the laws, and the executive for enforcing them, it is the function of the judiciary to interpret them. However, as previously pointed out, the judicial branch may not do so unless a law is properly brought before the court. Frothingham declared:

> The party who invokes the [court's] power must be able to show not only that the statute is invalid but that he has sustained ... some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally ... officials of the executive department ... are executing and will execute an act of Congress ... and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.[15] (Emphasis added)

However, under Marbury v. Madison,[16] the Court, when reviewing legislative acts, assumes a position of authority over the acts of Congress, though the Court's power to pass on the constitutional validity of an act of Congress only applies when the Court is disposing of a justiciable controversy.[17] If the issue is not justiciable, or the party does not have standing, the Court cannot entertain the case

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14. U.S. CONST. Art. III, Sec. 2.

15. Frothingham v. Mellon, supra note 5 at 488-489 (1923).

16. 5 U.S. (1 Cranch) 137 (1803).

17. Hayburn's Case, 2 U.S. (2 Dallas) 409 (1792).

because of its alleged constitutional limitations.

Therefore, if the Frothingham Court was bound by constitutional limitations, rather than by judicial self-restraint, it would be unable to entertain taxpayer suits on their substantive merits. If the Court had entertained taxpayer's suits on their merits before Frothingham, it would be impliedly acknowledging that the parties had standing. More significantly, it would strongly indicate that there was no constitutional limitation on the Court in Frothingham, but merely a restraint the Court imposed upon itself.

Taxpayer's suits had been accepted by the Court prior to the Frothingham decision. In pre-Frothingham cases the Court had assumed, but never passed on, the question of standing. Therefore, the Court distinguished these earlier cases in Frothingham, yet never overruled them.

> The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate.... But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury ... is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for appeal to the preventative powers of a court of equity ...
> [This] is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same ... in respect of every other appropriations act

> and statute whose administration requires the outlay of public moneys.... The bare suggestion of such a result with its attendant inconveniences, goes so far to sustain the conclusion we have reached, that a suit of this character cannot be maintained.[18] (Emphasis added)

Although some of the reasons advanced by the Court may have been valid in 1923, in some respects, they limp considerably in 1969. The assertion that a federal taxpayer's interest is remote or minute, while more reasonable a half-century ago, is anachronistic in light of today's tax structure. In many instances the pecuniary loss incurred by a federal taxpayer may be significanctly greater than that suffered as a municipal taxpayer. Taxes paid by some corporations, for example, cannot conceivably be classified as "minute" or "indeterminable:"

> General Motors pays a billion and a half to the Federal Government, and it pays no more than a tiny fraction of that amount to any municipality. The tax facts on which the Frothingham opinion was based have now turned right around backwards, but the law that was made lingers on, after its foundation has eroded away.[19]

Frothingham also points out that the plaintiff's injury, if suffered at all, is in the nature of a public wrong, and not necessarily unique to a specific taxpayer. At early common law, in nuisance cases, a complainant who had not

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18. Frothingham v. Mellon, supra note 5 at 486-487.

19. Hearings on S. 2077 before the Senate Fiduciary Subcommittee on Constitutional Rights, 89th Cong., 2nd Sess. 493 (1966).

suffered a particular wrong that could be differentiated from that incurred by the public was without relief. Thus, this criterion also seems to find its basis in judicial policy, rather than in the constitutional competence of the court to entertain the suit.

The Court speaks of the "attendant inconveniences" and alludes to the multitude of similar suits. "Where would naked inconvenience stand in the hierarchy of democratic values?"[20] Also, changes in civil procedure have, and probably would, alleviate the anticipated docket crisis. States and municipalities, which overwhelmingly permit taxpayer suits, have not been plagued by an opening of the proverbial floodgates of litigation. Regardless, stating the rule in terms of convenience again reflects a policy of judicial self-restraint, not incapacity resulting from constitutional limitations.

Prior to Frothingham, taxpayer's suits were decided on their merits.[21] Though the cases were decided for the defendants, the Court impliedly recognized plaintiffs' standing.

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20. Brief for the appellants, Flast v. Gardner at 35 (1967)

21. See Wilson v. Shaw, 204 U.S. 24 (1907), where the plaintiff-taxpayer attempted to restrain the Secretary of the Treasury from paying money for the construction of the Panama Canal on the grounds that this exceeded the power of the government. See also Millard v. Roberts, 202 U.S. 429 (1906) where taxpayers sought to enjoin the Secretary of the Treasury from making

II. POST FROTHINGHAM DECISIONS

Following Frothingham, the federal courts were confronted with some recurring problems. The barrier had been raised against suits by a federal taxpayer contesting the constitutionality of federal statutes. When that issue was clearly presented, the courts found little difficulty applying Frothingham. However, a number of questions arose, warranting a brief treatment.

(1) What would result if the plaintiff demonstrated that he was harmed specifically, and did not suffer in common with people generally?

(2) Suppose the prospective litigant is a state taxpayer, who, after having been given standing by the state courts, applies to the Supreme Court. Should the taxpayer continue to have standing?

(3) Did the Federal Administrative Procedure Act[22] confer new standing on federal taxpayers?

(4) Were infringements of certain constitutional rights more important than others, so that standing would be conferred on the taxpayers in these cases only?

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allegedly unauthorized payments to railroads, claiming that this was a deprivation of property without due process of law. In Bradfield v. Roberts, 175 U.S.291 (1899) the plaintiff was allowed to sue the Secretary of the Treasury in an attempt to enjoin payments of funds to a sectarian hospital. Plaintiff asserted this was a violation of his First Amendment rights.

22. 60 Stat. 237, 5 U.S.C. Sec. 1001-1011 (1946).

(1) Demonstration of Specific Harm by Plaintiff:

The Frothingham doctrine has been applied liberally by the courts. Wheless v. Mellon[23] was a suit by a taxpayer to restrain enforcement of a statute providing for adjusted compensation for veterans of World War I. The court held the suit was not maintainable in the absence of a direct injury, one other than that suffered in common by people generally.

In Tennessee Power Co. v. T.V.A.[24] the Supreme Court enumerated the prerequisites for standing. In order for a plaintiff to contest the act of an agent of the government which is allegedly in violation of a legal right, the right must be one of property, arising out of contract, protected from tortious invasion, or founded on a statute which confers a privilege.[25] Damage or loss of income resulting from governmental action, which is not an invasion of this recognized legal right, is not in itself a source of legal rights in the absence of constitutional legislation recognizing it as such.[26]

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23. 10 F.2d 893 (D.C. Cir. 1926).

24. 306 U.S. 118 (1939).

25. Id. at 137.

26. Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); See also Stark v. Wickard, 321 U.S. 288 (1944); Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951).

In Protestants, Etc., United for Separation of Church and State v. U.S.[27] the plaintiffs sought a determination that Title II of the Elementary and Secondary Education Act[28] was unconstitutional. The act authorized the Commissioner of Education to make grants to states for the acquisition of published instructional materials for the use of children and teachers in public and private elementary and secondary schools. (The same act was to be later attacked in Flast v. Cohen.)[29] The court, applying the Frothingham rule, denied the plaintiffs' standing and dismissed the suit, in spite of plaintiffs' attempt to characterize themselves as something more than mere "taxpayers."[30]

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27. 266 F. Supp. 473 (S.D. Ohio 1967).

28. P.L. 89-10, Sec. 201 et seq., 20 U.S.C. Sec. 821-827.

29. 392 U.S. 83 (1968).

30. The court alluded to the argument made by the plaintiffs:
In the present case plaintiffs do not resist a tax or ask for the restraint of expenditures to save the taxpayer moneys. They seek the redress of a grievance, the use of public funds, resources and personnel ... to establish a sectarian religion and inhibit the plaintiffs' freedom of religion.... Plaintiffs have standing to bring this action into the federal court since they are being deprived of a civil right guaranteed to them by the First Amendment to the Constitution ... The plaintiffs have a constitutional right, personal in themselves, not to have to support, through their resources, the establishment of any church ... Protestants, Etc., United for Separation of Church and State v. U.S., supra note 27 at 476.

However, under exceptional circumstances, a plaintiff taxpayer has been granted standing. United States v. Butler[31] is an example.

The Agricultural Adjustment Act[32] sought to increase the prices of certain farm products by decreasing the supply through a payment of money to the growers of the crop who reduced their productivity. The money for these payments was to be exacted from those who first processed the crops. The government argued that these processors lacked standing to challenge the constitutionality of the statute since the tax, when collected, became a part of the federal treasury, and those from whom the tax was exacted had no more of an interest in the way the money in the federal treasury was spent than any other taxpayer.

The court distinguished this case from Frothingham. In this instance the processors who were being taxed contended that the tax was a step in an unauthorized plan, one of regulating agricultural production. Since the tax in this case was not an exertion of the taxing and spending power, the plaintiff had standing. Ironically, the Supreme Court reversed itself completely on this point in Flast.

In Duke Power Co. v. Greenwood County, S.C.[33] the court

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31. 297 U.S. 1 (1936).

32. 48 Stat. 31, 7 U.S.C. Sec. 601 et seq. (1933).

33. 12 F. Supp. 70 (W.D.S.C. 1935).

also distinguished the plaintiff from the plaintiff in Frothingham by indicating that when a party is subjected not only to the payment of income taxes, but also subjected to the payment of franchise and privilege taxes, his status as a taxpayer to the federal government differs essentially from that of the ordinary taxpayer and he has the right to maintain the suit.[34]

Thus the federal courts, as late as 1967, adhered strictly to Frothingham, allowing federal taxpayers to bring suit only when they could clearly distinguish the special injury of the plaintiff from the general injury complained of in Frothingham.

(2) Status of a State and Federal Taxpayer in the Federal Courts:

The overwhelming majority of state courts permit citizens and/or taxpayers to contest state and municipal expenditures, even if the issue is non-fiscal.[35] The effect of these cases is that "... one who has status as a member of the public has standing to challenge the administrative action."[36]

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34. Id. at 72.

35. For a comprehensive summary of the condition of state and municipal suits as of 1960, see Comment, Taxpayer's Suits - A Survey and Summary, 69 Yale 895 (1960).

36. 3 Davis, Administrative Law Treatise, 22.10 at 249 (1958). It appears that only one state, Kansas, denies standing to a municipal taxpayer to challenge a

Territories are in accord. In Reynolds v. Wade,[37] a taxpayer sued to restrain certain officials of the Territory of Alaska from making alleged unlawful expenditures of territorial funds, and from administering a territorial statute concerning publicly furnished transportation to non-public schools. The district court dismissed the action but the court of appeals reversed, holding that the taxpayer had such pecuniary interest as to entitle him to maintain the suit:

> The basis of the Mellon doctrine lies in the infinitesimal relationship between the Federal taxpayer and the Federal treasury. When we compare the interest of a Federal taxpayer, who is one of over one hundred and sixty million, with the interest of an Alaskan taxpayer with a population of less than 130,000, the distinction, though one of degree, is obvious. The rationale of the cases allowing taxpayers' actions against municipalities is clearly applicable in the Alaskan situation.[38] (Emphasis added)

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municipal expenditure. Asendorf v. Common School District No. 102, 175 Kan. 601, 266 P.2d 309 (1954). New York seems to be the only state clearly denying standing to a state taxpayer to challenge a state expenditure. St. Clair v. Yonkers Raceway, 13 N.Y. 2d 72, 192 N.E.2d 15 (1963). Although Professor Davis suggests otherwise, in Taxpayer's Suits - a Survey and Summary, supra note 35, the author is of the opinion that New Mexico also prohibits taxpayer suits.

37. 249 F.2d 73 (9th Cir. 1957).

38. Id. at 76. The same result was reached for a Puerto Rican taxpayer in Buscaglia v. District Ct. of San Juan, 145 F.2d 274 (1st Cir. 1944), cert. denied 323 U.S. 793 (1945); a Hawaiian taxpayer in Lucas v. American Hawaiian E. & C. Co., 16 Haw. 80 (1904); and a District of Columbia taxpayer in Roberts v. Bradfield 12 App. D.C. 453 (1899).

However, when a person who has standing in the state court comes to the Supreme Court, there are no formulated rules to be applied in determining whether he has standing in the federal courts. In some cases the court does not deal with the question of standing but proceeds to the merits, thus following the state law on that question.[39] In other cases, the Court refuses to acknowledge the state's decision on standing and applies its own test. Doremus v. Board of Education[40] exemplifies this position.

In Doremus, the suit was brought to test the constitutionality of a New Jersey statute which provided for the reading of five verses of the Old Testament at the opening of each public school day. When the Supreme Court of New Jersey held that the statute did not violate the U.S. Constitution an appeal was taken to the U.S. Supreme Court. Appellants claimed standing on the ground that they were taxpayers. The Court dismissed the appeal for lack of jurisdiction since appellants could show no financial injury as a result of the operation of the statute. This dissent stated that, since the taxpayers provide the funds for the

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39. An example is the case of Everson v. Board of Education, 330 U.S. 1 (1947). This was a New Jersey local taxpayer suit to enjoin the expenditure of state money to provide for free transportation to Catholic parochial schools. The court did not consider the question of standing, but proceeded to decide the case on its substantive merits.

40. 342 U.S. 429 (1952).

operation of the school, they should have the right to show that these funds are being deflected from the educational program. Recognizing that the Frothingham rule would deprive complainants of standing to contest a federal statute, the dissenting opinion pointed out that states do have the right to grant standing for the purpose of contesting the validity of state statutes. The dissenting opinion also noted that there is nothing in the Constitution which demands that this right be repealed when the suit comes into federal courts.[41]

Cases like Doremus place the plaintiff in an insecure situation: "As it is, the litigant cannot know in advance whether the Supreme Court will take a strict position on the problem of standing ... or whether the court will simply ignore the rules it has invented for its own guidance...."[42]

(3) Impact of the Federal Administrative Procedure Act on the Standing of Federal Taxpayers:

Section 10(a) of the A.P.A. provides:

> Right of Review - Any person suffering a legal wrong because of any agency action, or adversely affected or aggrieved by such action

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41. Ten years later Justice Douglas, author of the dissenting opinion, again protested the expansion of the Frothingham doctrine into the state field by the Doremus case. See Public Affairs Press v. Rickover, 369 U.S. 111, 114 (1962)(concurring opinion); Engel v. Vitale, 370 U.S. 421, 437 (1962) (concurring opinion).

42. 3 Davis, Administrative Law Treatise, Sec. 22.17 at 291 (1958).

> within the meaning of any relevant statute, shall be entitled to judicial review thereof.[43]

The fundamental question is whether this section of the Act enlarged the class of persons who had standing to contest federal expenditures. One Federal District Court[44] and Professor Davis[45] answered this question in the affirmative. So also the legislative history of the act[46] shows that the Congressional intent was to give standing to anyone "adversely affected in fact," such as federal taxpayers.

However, the Supreme Court has impliedly adopted the contrary view, i.e., that section 10(a) was merely a codification of existing law as to standing. Indeed in Kansas

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43. 60 Stat. 243, 5 U.S.C. 1009(a) (1946).

44. The A.P.A. "broadened the scope of judicial review and it enlarged the class of persons who were given standing ...." American President Lines v. Federal Maritime Board, 112 F. Supp. 346, 349 (D.D.C. 1953).

45. "... to the extent that a taxpayer is denied standing to challenge administrative action in making an expenditure which adversely affects the taxpayer in fact, the Administrative Procedure Act is violated." 3 Davis, Administrative Law Treatise, 22.09 at 243 (1958). See also Davis, Judicial Control of Administrative Action: A Review, 66 Col. L. Rev. 635, 664-665 (1966).

46. The Committees of the Senate and House interpreted Section 10(a) of the A.P.A. as placing "adversely affected" in the same category as "legally wronged." It was their belief that "adversely affected" did not mean so affected within the meaning of any relevant statute. Doc No. 248, 79th Cong. 2d Sess. 212,276 (1946). A construction, however, emphasizing the separating comma, would indicate that only "legally wronged" is capable of standing alone.

City Power & Light Co. v. McKay[47] the court ruled that the "legal wrong" which is a prerequisite of standing under section 10(a) means such wrong as particular statutes and the courts have recognized as constituting grounds for judicial relief. This ruling has been repeatedly followed,[48] even as recently as two years ago.[49]

The Administrative Procedure Act, therefore, did not confer any additional rights upon federal taxpayers. The Judiciary, not the Legislature, was to eventually effectuate the change.

(4) Possible Constitutional Rights to be Specially Protected.

On April 11, 1967, a bill was passed by the United States Senate[50] and forwarded to the House of Representatives, where it remained. Its purpose was, "to provide effective procedures for the enforcement of the establishment and free exercise clauses of the first amendment to the Constitution by providing for judicial review of the constitutionality of grants or loans under federal legislation."[51]

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47. 225 F.2d 924 (D.C. Cir. 1955), cert. denied, 350 U.S. 884 (1955). By denying certiorari, the Supreme Court adopted by silence the ruling of this court which clung to the Frothingham doctrine.

48. See, e.g., Duba v. Schuetzle, 303 F.2d 570 (8th Cir.1962)

49. Rural Electrification Admin. v. Northern States Power Co,, 373 F.2d 686 (8th Cir. 1967).

50. S 3, S. Rep. No. 85, 90th Cong., 1st Sess. (1967).

51. CCH Congressional Index, 90th Cong. at 2303.

Section 3(a) of the Bill provides:

> ... any citizen of the United States upon whose taxable income there was imposed an income tax under section 1 of the Internal Revenue Code of 1954 for the last preceding calendar or taxable year and who has paid any part of such income tax and who deems a loan or grant made under any of the Acts enumerated in section 1 to be inconsistent with the provisions relating to religion in the first amendment to the Constitution, may bring a civil action in the nature of an action for a declaratory judgment against the Federal officer making such a loan or grant. No additional showing of direct or indirect financial or other injury, actual or prospective, on the part of the plaintiff shall be required for the maintenance of any such action.[52]

In the case of Flast v. Gardner[53] (later designated Flast v. Cohen) the plaintiffs, citizens and taxpayers of the United States, sought to enjoin the expenditure of federal funds as provided in Title II of the Elementary and Secondary Education Act[54] on the same basis as the plaintiffs in Protestants, Etc., United for Separation of Church and State v. U.S.[55] They referred to the above cited Bill and claimed it gave them standing.[56]

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52. S 3, S. Rep. No. 85, 90th Cong., 1st Sess. (1967).

53. 267 F. Supp. 351 (S.D.N.Y. 1967).

54. Supra note 28.

55. Supra note 27.

56. Judge Frankel alludes to page 7 of the Bill:
Several cases are now pending which challenge the constitutionality of the Elementary and Secondary Act of 1965. The pendency of these cases may be cited by

Taking into account the work of the Senate and its Committee on this subject, and the alleged infringement of rights guaranteed by the First Amendment the court granted the motion to convene a three judge court, noting that "The general drift of First Amendment jurisprudence may plausibly be appraised as moving toward increasingly relaxed criteria for the achievement of standing to sue."[57]

When the case came before the three judge District Court,[58] the complaint was dismissed on the ground that plaintiffs did not have standing (relying on Frothingham). Citing Doremus the court refused the attempt to distinguish this case from Frothingham since this was not a "... good faith pocketbook action."[59]

Judge Frankel wrote an interesting and, perhaps, very influential dissent. He first asserted that the plaintiffs in this case should have standing because of the alleged

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opponents of judicial review as a substitute for legislation. The Committee feels, however, that if the question of standing is raised by the defendants in these cases, they will undoubtedly be successful under the present state of the law. 267 F. Supp. at 354 (1967).

57. Id. at 356. Citing Abington v. Schempp, 374 U.S. 203, 266 (1963); Dombrowski v. Pfister, 380 U.S. 479, 486-487 (1965); Reed Enterprises v. Corcoran, 354 F.2d 519, 523 (D.C. Cir. 1965).

58. 271 F. Supp. 1 (S.D.N.Y. 1967), Probable jurisdiction noted, 389 U.S. 895 (1967).

59. Id. at 3.

infringement of a particularly important right, one guaranteed under the Establishment Clause of the First Amendment.[60] He then distinguished the injury claimed by the plaintiff in Frothingham from the injury claimed here:

> There may be other personal interests like the one given by the Establishment Clause where a sharply identified and cherished liberty is infringed by the uses of federal funds. If so, these would be, as they should be, bases for standing in the federal court. The vital point remains that the present case, where such an interest is urged, differs on this ground from the generalized power of supervision claimed for the taxpayer in Frothingham.[61]

The infringement of the right granted by the First Amendment, therefore, and not the possibility of pecuniary loss, is the injury which should give the aggrieved party standing according to Judge Frankel and others.[62] What, then, is the effect of the Senate bill under discussion on the decision in this case? Judge Frankel, who relied on this proposed legislative enactment in the first Flast case, makes no mention of it in the second. The majority opinion,

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60. Judge Frankel alludes to the history of the Establishment Clause as reviewed in Everson v. Bd. of Education, 330 U.S. 1 (1947) and concludes:
It is sufficient to recall that both the majority and the dissenters in that case recognized, affirmed, and undertook to apply the vital First Amendment principles forbidding the support of churches through the exaction of taxes and tithes. 271 F. Supp. 1, 6.

61. Id. at 17.

62. See Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1293 (1961).

however, uses it as an indication of the Congressional intent that Frothingham is, and should continue to be, the law governing federal taxpayer suits.[63] The majority reasoned that Congress is aware of the standing limitation and feels that Congress must grant a statutory right of review to contest the alleged infringement or particular rights through particular acts, providing for particular expenditures, as the Senate is attempting to do here.

Flast was appealed directly to the Supreme Court. The decision of the lower court was reversed, thereby lowering the walls, but not expressly breaching the Frothingham bastion.

III. FLAST AND THE FUTURE

As previously pointed out, the Frothingham barrier was apparently not erected on a constitutional foundation under Article III, but was merely an exercise of judicial self-restraint. So also, the previously mentioned bases of the Frothingham doctrine, such as attendant inconveniences, minuteness, undeterminability of federal taxes, and inundation of federal courts, did suggest policy considerations, rather than a compelling constitutional mandate.

The jurisdiction of our federal courts is both defined, and limited by, Article III of the Constitution, which confines judicial power to "cases and controversies." Chief

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63. Flast v. Gardner, supra note 58.

Justice Warren, in Flast, pointed out that the concept of justiciability is not clearly defined and that the doctrine may be understood as a "blend of constitutional requirements and policy considerations."[64] There have been instances where the courts have refused to adjudicate questions which they deemed not justiciable. The presentation of strictly political questions,[65] questions subsequently mooted,[66] those wherein parties request an advisory opinion,[67] or when the plaintiff does not have standing to maintain the action,[68] have been found to be non-justiciable.

The government's unsuccessful position in Flast was that the taxpayer was bereft of any demonstrable interest, other than that he disagrees with the way in which his tax money is being spent.[69] The resolution of these differences, contended the government, is committed under our constitutional scheme of separation of powers to branches other than the judiciary. The position, essentially, was that there exists a constitutional bar to taxpayer suits seeking

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64. 392 U.S. 83, 97 (1968).

65. Commercial Trust Co. of N.J. v. Miller, 262 U.S. 51 (1923

66. California v. San Pablo & Tulare R.R., 149 U.S.308 (1893)

67. Muskrat v. U.S. 219 U.S. 346 (1911).

68. Frothingham v. Mellon, 262 U.S. 447 (1923).

69. Brief for Government, p.7, cited in Flast v. Cohen, 392 U.S. 83, 98 (1968).

to challenge the constitutionality of federal legislative enactments or subsequent appropriations; therefore, standing should not be conferred upon these taxpayers.

This concept of standing, as the concept of justiciability, is not one readily definable nor one free from policy considerations or constitutional limitations. It is one aspect of the doctrine of justiciability.

> ... The problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. Standing has been called one of the most amorphous [concepts] in the entire domain of public law. Some of the complexities peculiar to standing problems result because standing serves on occasion, as a shorthand expression for all the various elements of justiciability ....[70]

The emphasis, made in the question of standing, was in determining whether the party seeking to bring the suit has

> ... alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.[71]

Therefore, the initial concern for the court was whether the person seeking to bring the suit fulfills the requirement enunciated above and not necessarily whether or not the issue is deemed to be non-justiciable. The Chief Justice exemplified this concept by pointing out that the court may acknowledge a proper party as one having standing, yet

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70. Flast v. Cohen, 392 U.S. 83, 98-99 (1968).

71. Baker v. Carr, 369 U.S. 186, 204 (1962).

refuse to entertain the suit on its substantive merits because, for example, he seeks to present a strictly political question. In ruling on standing, however, the court looks to substantive issues.

The Court said that the problem of separation of powers and alleged interference by the judiciary into the realm of the other branches would not necessarily arise while the Court is seeking to ascertain whether a complainant is a proper party to bring the suit, but, conversely, could arise from the substantive issues the party seeks to litigate. The Chief Justice stated that

> It is for that reason that emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy," Baker v. Carr, supra at 204, and whether the dispute touches upon "the legal relations of parties having adverse legal interests." Aetna Life Insurance Co. v. Haworth, supra at 240-241.[72]

The Court found no constitutional bar to all taxpayer suits and held that whether a taxpayer had the necessary personal stake and interest, thereby permitting the Court to confer standing, was contingent upon the circumstances of each individual case. This would include those cases wherein a federal taxpayer is suing to challenge the constitutionality of a federal spending program.

In order for a taxpayer to demonstrate that he is a

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72. Flast v. Cohen, 393 U.S. 83, 101 (1968).

proper party to invoke the federal judicial power, "First the taxpayer must establish a logical link between that status and the type of legislative enactment attacked."[73] Therefore, the Court held, taxpayers will be deemed proper parties to challenge the constitutionality of federal taxing and spending programs.

Secondly, the taxpayer must show that the legislation that he is challenging exceeds specific constitutional limitations on the exercise of the Congressional taxing and spending power. It will be insufficient, as it was in Frothingham, to allege that the legislation exceeds the general powers delegated to Congress.

The plaintiff in Frothingham was unsuccessful because she neglected to establish the second nexus, that is, that Congress has breached specific constitutional limitations upon its taxing and spending power. The Due Process Clause of the Fifth Amendment does not protect taxpayers against increased taxes, but the Establishment Clause of the First Amendment is deemed a specific limitation on the Congressional taxing and spending power.

While Justices Stewart and Fortas, in their concurring opinions, seem to confine their interpretation of the holding to the Establishment Clause, the majority indicated that other specific constitutional limitations may exist. If

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73. Id. at 102.

they do exist, taxpayers, suing solely as taxpayers, may be granted standing to invoke the federal judicial power.

Justice Harlan, in his dissent, takes the position that the majority has set up an artificial standard by which public actions may be entertained by the courts. He agrees with the Frothingham rule that a federal taxpayer has a far too minute and indeterminable interest in federal treasury funds. To grant this taxpayer standing would be to allow a party who has not been legally wronged to maintain an action, giving the court jurisdiction which it has no right to assume. Public actions have been maintained, but, as Justice Harlan points out, not without express legislative authorization.

IV. CONCLUSION

Has the Flast decision made any change in the original doctrine that a person must be "legally wronged" to contest governmental action? Did the Supreme Court actually overrule Frothingham, though not expressly stating so? What new problems await the court in light of the Flast decision? Any analysis must be framed in accordance with these questions to appreciate the importance of the new pronouncement.

Flast has decided that a federal taxpayer may have the requisite interest in the funds of the federal treasury to be directly injured through invalid appropriations of federal funds. The two criteria he must establish are that the

challenged expenditure is part of the taxing and spending power under Article I, Section 8 of the Constitution (thus showing the direct injury) and that there is a specific constitutional limitation on the way the money is spent which is being exceeded (thus showing the violation of a specific constitutional limitation). Since these already were the elements necessary before a person could be "legally wronged," the Flast case did not make any change in this area. The hypothetical instances involving the establishment of a national church and the increases of Congressional salaries could no more be challenged under Flast than they could be under Frothingham.

Frothingham held that a federal taxpayer did not have the requisite interest in the federal treasury funds to be directly hurt by the way they were spent. Flast held that a federal taxpayer may have that requisite interest. Although the court reserves the right to decide whether a prospective litigant-taxpayer will have standing, depending upon the circumstances of each case, it is clear that Frothingham's holding is impliedly, if not expressly, overruled. A taxpayer, alleging a "legal wrong" (the spending of federal funds in a way that exceeds specific constitutional limitations) has the requisite standing to sue. The theory that the Court's reluctance is based upon policy considerations is strengthened even more by its reluctance to expressly overrule Frothingham, since the Court wants to

have the option to refuse standing when it sees fit to do so.

Assuming that Flast will become the opening that taxpayer-litigants have been seeking, what problems will become manifested? Undoubtedly more suits challenging federal expenditures will be brought. There are those who oppose them, and with some logical reasoning.[74]

On the other hand, if the statutes authorizing these expenditures are actually in the twilight between being constitutional or unconstitutional, what better examination could there be than judicial determination as to their legality? Should we fear examination of allegedly unconstitutional statutes? One cannot erase a wrong by withdrawing it from scrutiny.

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74. Opponents of the private attorney general (one presenting the public viewpoint) characterize him as something less than guardian of our liberties. In the words of Professor Jaffe:

> They conclude that he either upsets the complex political balances achieved by an efficient and sensitive officialdom or - if government is bad - obscures the need for a systematic control which his spasmodic and capricious interventions will never provide. Jaffe, Standing to Secure Judicial Review: Public Actions 74 Harv. L. Rev. 1265, 1287 (1961).

Whether a taxpayer suit is actually a public action is a controversial question in itself. The opinion here is that the taxpayer suit is, unless otherwise stipulated by statute, strictly a private action, brought by a person wronged through governmental action. For a contrary viewpoint see Comment, Taxpayer's Suits: A Survey and Summary, 69 Yale L.J. 895, 906 (1960); the dissenting opinion of Justice Harlan in Flast v. Cohen, 392 U.S. 83, 116-120 (1968).

If the Court allows taxpayer suits alleging the infringement of constitutional rights other than those guaranteed by the First Amendment (and the opinion here is that it will), the judiciary will be doing what it has been established to do, i.e., effectuating a determination of constitutional issues. Rights of individuals should not shrink in direct proportion to the growth of this nation.