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THE FLAST DECISION ON STANDING OF FEDERAL TAXPAYERS TO CHALLENGE GOVERNMENTAL ACTION: MIRAGE OR BREACH IN THE DIKE?

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Some legal scholars have been disturbed at the seeming casualness with which the United States Supreme Court in recent years has abandoned self-imposed limitations upon the Court's power.[1]

The philosophy of "judicial self-restraint" emphasizes the necessity for the Supreme Court and the lesser federal courts to refrain from deciding and to abstain from deciding constitutional questions unless decision is unavoidable.

There are many different rules which the Court has used to avoid passing upon constitutional arguments advanced by litigants; together, these rules constitute a "protective envelope" which must be opened before the judiciary will exercise its independent governmental power of judicial review. The "envelope" historically has included: refusal to issue advisory opinions;[2] refusal to make declaratory judgments;[3] affirmance without constitutional decision if an adequate state ground exists;[4] reversal upon statutory grounds rendering constitutional adjudication unnecessary;[5] refusal to pass upon "political" questions;[6] prohibition of feigned cases;[7] and dismissal without decision on the ground that the question is "insubstantial."[8] The "envelope" can be protective because it cushions and reduces the number of confrontations between federal and state power or between judicial and congressional-executive power and thus diminishes the practical likelihood of successful efforts to interfere with or cripple the Court.[9]

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1. *See, e.g.*, Kurland, *The Supreme Court Today*, 3 TRIAL 12 (April-May 1967).
2. *See* 3 JOHNSTON, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (1893); United States v. Fruehauf, 365 U.S. 146, 157 (1961).
3. *See* Muskrat v. United States, 219 U.S. 346, 362 (1911).
4. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).
5. *Cf.* Henry v. Mississippi, 379 U.S. 443 (1965).
6. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946).
7. *See* United States v. Johnson, 319 U.S. 302, 305 (1943).
8. *See* Zucht v. King, 260 U.S. 174, 176 (1922).
9. Self-restraint, as philosophically advanced, was originally a liberal dogma to prevent the Court from interfering with state and congressional programs in the economic sphere. With the passage of time, it has become increasingly associated with conservative critics of the Court's own activism.

As every student today knows, the United States Supreme Court in recent years has been more judicially active than judicially self-restrained. The "envelope" has been reduced.[10] Simultaneously, it seems, the critics of the Court have become stronger, and in 1968 opponents won their first victories.[11]

Formalistic barriers to decision of constitutional questions may be inconsistent with an "active" Court which is determined to keep the Constitution alive as a real check upon unconstitutional activity. Nevertheless, the Court must maintain its position of authority even though it lacks some standard techniques (public relations department; patronage; built-in constituency). To the extent that formalistic barriers limit the exercise of judicial authority, they may maintain the Court's position of authority by foreclosing the formation of an anti-Court majority in the other branches of government.

At the 1968 term, the Supreme Court was called upon to consider a key aspect of one of the most important formalistic barriers—the requirement of standing to sue. The aspect: does a federal taxpayer have standing to challenge congressional expenditures as unconstitutional?

In 1923, the Court held in *Frothingham v. Mellon*[12] that a federal taxpayer lacked standing to assert that the Maternity Act of 1921[13] was unconstitutional. The Court dismissed the taxpayer's suit for failure to allege enough "direct injury" to confer standing. It noted that a taxpayer's "interest in the moneys of the Treasury . . . is comparatively minute and indeterminable" and that "the effect upon future taxation, of any payment out of the [Treasury's] funds, . . . [is] remote, fluctuating and uncertain. . . ."[14] The dismissal for lack of standing made it unnecessary for the Court to pass upon the merits of the taxpayer's argument that the statute in question was unconstitutional because it exceeded the article I powers of the Congress and invaded the province reserved to the states under the tenth amendment.

Despite criticism, the *Frothingham* rule was not reversed.

In 1968, the question of taxpayer standing was very different

10. *E.g., compare* Baker v. Carr, 369 U.S. 186 (1962) *with* Colegrove v. Green, 328 U.S. 549 (1946).

11. The Congress, in passing the 1968 Omnibus Crime Bill, 82 Stat. 197 (1968), rejected the Court's standards on interrogation and confessions of criminal suspects (*Miranda* rules) and the line-up rules. The nomination of Mr. Justice Fortas for the Chief Justiceship was subjected to unprecedented obstruction which inconvenienced the Court in the sense that Mr. Chief Justice Warren was compelled to delay retirement in order to maintain the Court at full numerical strength. In addition, a proposal to limit the habeas corpus jurisdiction of the Court was only narrowly defeated in the Senate.

12. 262 U.S. 447, 487 (1923).

13. Act of Nov. 23, 1921, ch. 135, 42 Stat. 224. The act established a program of federal grants to states which undertook programs to reduce maternal and infant mortality.

14. 262 U.S. at 487.

from what it had been in 1923 and the Court did decide differently. The barrier was dropped for the plaintiffs in *Flast v. Cohen*[15] as the Court held that taxpayers had standing to challenge the constitutionality of the sections of the Elementary and Secondary Eduction Act of 1965[16] which authorize federal funds for academic services and instruction in religiously operated schools. Nevertheless, the Court took great pains to maintain that "the result in *Frothingham* is consistent with the test of taxpayer standing announced today."[17]

The Court thus rejected the forthright elimination of a formalistic barrier which an active and politically-secure Court might have elected while at the same time it rejected the affirmance of a rigid bar to taxpayer suits which a self-restraint Court might have elected. The effort to "square a circle" may be commendable, but the result in *Flast* is disappointing and unlikely to endure.

Before analyzing and examining the specific decision and rationale in *Flast*, it may be useful to discuss generally the purpose of a "standing" requirement and to analyze the prime reason advanced in support of the standing requirement enunciated in *Frothingham*.

The constitutional function of a requirement of standing to sue may be to limit the activity of the Supreme Court and the lesser federal courts to the role assigned the Judiciary in article III of the Constitution. Under the Constitution, the Court may hear only "cases" or "controversies." If the plaintiff lacks "standing" there is neither a "case" nor a "controversy" and hence federal judicial action is unconstitutional. The constitutional requirement of standing, inextricably intertwined with the definition of "case or controversy," is reasonably narrow.

The public policy purpose of a requirement of standing may be to assure that the plaintiff will be sufficiently "interested" in the case or controversy to prepare thoroughly his presentation and arguments. It has usually been felt by federal courts that plaintiffs have such interest and incentive only if they have suffered a personal injury or invasion. Thus, it has been held that there is no justiciable controversy in an action by a citizen against a government officer complaining of alleged unlawful conduct, unless the citizen shows that such conduct invades or will invade a private substantive legally protected interest of the citizen-plaintiff.[18] The party must show enough of a personal stake in the *outcome* of the case or controversy "as to assure that concrete adverseness which sharpens the presenta-

15. 392 U.S. 83 (1968).
16. 79 Stat. 27, 20 U.S.C. §§ 241, 241e(a)(2), 821, 823(a)(3)(B) (Supp. II 1966).
17. 392 U.S. at 104.
18. Associated Industries v. Ickes, 134 F.2d 694, 702 (2d Cir. 1943).

tion of issues upon which the court so largely depends for illumination of difficult constitutional questions."[19] The public-policy requirement of standing, inextricably intertwined with subjective notions of motivational prerequisites to proper presentation of substantive issues, is broader than the constitutional requirement.

(Social scientists might perform an important service for the courts if they tested empirically the proposition that personal involvement resulting from adverseness produces illumination for a court—and the converse of that hypothesis. Certainly, the skill shown by many law students in moot court appellate arguments in which they have little or no outcome interest, and the low illumination of issues offered by some counsel in actual Supreme Court cases suggest that factors other than personal involvement may be more important.)

Specific rules on "standing" have been developed and evolved as extensions of the broader policy views. The Supreme Court in *Frothingham* implicitly held that if the plaintiff's "interest" is minute, he lacks standing. It found factually that the interest of federal taxpayers in federal funds was "minute."

Upon the basis of 1923 federal income taxes, it was relatively easy for the Court to conclude that the interest of any one federal taxpayer or any small group of federal taxpayers was minute and therefore insufficient to confer "standing."

Obvious changes have occurred since 1923. For example: In 1940, the annual federal government expenditures in the administrative budget were 9,062 millions of dollars;[20] in 1968, the estimated expenditures totalled 169,856 millions of dollars.[21] In 1923, the gross public debt of the federal government amounted to $200 per capita;[22] in 1966, it was $1,725 per capita.[23] In 1940, the individual federal income tax paid per capita of total population was $11[24] ($99 average per return filed); in 1965 (preliminary figures), the federal income tax per capita was $255 ($735 per tax return filed).[25] Corporations paid 2.55 billions of dollars in federal taxes in 1940 and 26.54 billions of dollars in 1964.[26]

The federal taxpayer's interest in any given program may still not be "significant," but it is certainly not "minute." As one commentator observed: "When the Federal Government undertakes

19. *See* Baker v. Carr, 369 U.S. 186, 204 (1962).
20. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS, COLONIAL TIMES TO 1957, Series Y254-257 (1960).
21. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, Table No. 538 (1960).
22. BUREAU OF THE CENSUS, *supra* note 20, at Series Y368-379.
23. BUREAU OF THE CENSUS, *supra* note 21, at Table No. 566.
24. BUREAU OF THE CENSUS, *supra* note 20, at Series Y302-311.
25. BUREAU OF THE CENSUS, *supra* note 21, at Table No. 554.
26. BUREAU OF THE CENSUS, *supra* note 20, at Series Y280-291.

a program involving expenditure of ten billion dollars, the General Motors portion is about two hundred million dollars—hardly a 'minute' sum in an absolute sense."[27]

Mathematics, however, does not preordain results in constitutional adjudication. While the federal taxpayer can no longer be said to have only a "minute" interest in public expenditures of the federal government, it may be contended that he still does not have a "requisite personal stake" in any specific expenditure.

The *Frothingham* rule was not followed by state courts when they decided the question whether state and local taxpayers could bring suits in the state courts raising questions of public concern. Quite the contrary. The majority state rule is that "a citizen and resident of the state . . . is capable of presenting to the courts his petition for the enforcement by officials of their mandatory duties."[28] In 1960, taxpayer suits were available to challenge state action in at least 34 state jurisdictions and to challenge municipal action in virtually every jurisdiction.[29] There are limitations upon state taxpayer suits, but they are selective rather than blanket denials. For example, a taxpayer who merely wishes to gain a forum to debate a political question or a taxpayer who seems to be an officious intermeddler may be denied standing. Thus, in state cases, taxpayers were denied standing to prevent a police commissioner from discontinuing a police station;[30] to challenge the legality of the organization of a school district;[31] to obtain a declaration of the right of a school superintendent to use funds he might never receive.[32]

The state decisions on standing of taxpayer-citizens should not be automatically carried over to the federal courts because of differences in the nature of federal and state responsibilities (chiefly as to foreign and defense affairs). Nevertheless, the "uniformly adverse reaction of the state courts" to the *Frothingham* rule, is, in Professor Davis' words, "most impressive."[33]

Evidently, the arguments in favor of giving at least some standing to sue to federal taxpayers were "most impressive" to all but one of the Justices (Harlan, J.) in the *Flast* case. They rejected the "Government's position . . . that the constitutional scheme of separation of powers, and the deference owed by the federal judiciary to the other two branches of government within that scheme,

27. Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 387 (1955).
28. Andresen v. Rice, 277 N.Y. 271, 281, 14 N.E.2d 65, 69 (1938).
29. *See* cases collected at Note, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L. J. 895, n. 7, 900-02 n. 30-34 (1960). In 1929, only 19 states allowed state taxpayer suits and 4 did not allow them. Annot., 58 A.L.R. 588 (1929).
30. Phillips v. Ober, 197 Md. 167, 78 A.2d 630 (1951).
31. Kirts v. Board of County Commissioners, 168 Kans. 739, 215 P.2d 642 (1950).
32. Lyon v. Bateman, 119 Utah 434, 228 P.2d 818 (1951).
33. 3 K. DAVIS, ADMINISTRATION LAW TREATISE 245, § 22.09 (1958).

presents an absolute bar to taxpayer suits challenging the validity of federal spending programs."[34] The Chief Justice declared for the court: "[W]e hold that a taxpayer will have standing consistent with article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power."[35]

The "most impressive" argument of all to some of the Justices may have been the assertion that

> the result of the *Frothingham* doctrine is to refuse to kill the argument that many of our major spending programs are unconstitutional, even though no one has standing to raise the constitutional issue. If taxpayers' suits to challenge such programs should be discouraged, perhaps the sound way to discourage them would be by deciding on the merits of the constitutional issue that Congress has a full power under the Constitution to tax and to spend to provide for the public welfare.[36]

Certainly, the specific holding that Messrs. Flast et al. have standing to assert the unconstitutionality of federal aid to parochial school students makes it likely that *Board of Education v. Allen*,[37] decided the same day, will be applied to hold such aid constitutional. Thus, the constitutional *qua* political objection to federal education aid may be laid to rest.

However, minimizing the number of situations in which the constitutionality of governmental activity is affirmed *sub judice* by holding that no one has standing to attack constitutionality could not have been an important policy objective of the Court in *Flast*. The majority had no sooner announced that a taxpayer may have standing to challenge congressional expenditure than it essayed to develop a "test" of taxpayer standing which would bar taxpayer suits which do not raise first amendment issues.

> [1] A taxpayer will be a proper party to allege the unconstitutionality *only* of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. [2] The taxpayer must show that the challenged enactment exceeds *specific* constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is

34. 392 U.S. at 98.
35. 392 U.S. at 105-106.
36. Davis, *supra*, note 27, at 391.
37. 392 U.S. 236 (1968). In this case, the Court affirmed a decision that a New York State statute requiring local public school authorities to lend textbooks free of charge to all students in grades seven to twelve, including private and parochial schools, was constitutional and violated neither the establishment nor the free exercise clause.

> *generally* beyond the powers delegated to Congress by Art. I, § 8.[38]

The Court declared that the first amendment's prohibition of laws "respecting the establishment of religion" was a *specific* limitation upon the congressional taxing and spending power. It implied that there are no other *specific* limitations[39] (e.g. ninth amendment, tenth amendment) although the majority opinion did purport to leave open the question whether "the Constitution contains other specific limitations."[40]

The viability of this specific limitation vs. general limitation rule is central to evaluation of the decision. The dissenting Justice and one of the concurring Justices found the distinction uncompelling.

Mr. Justice Douglas, concurring, voiced doubt "that the test it lays down is a durable one . . . I think, . . . that it will suffer erosion."[41] Mr. Justice Harlan, dissenting, noted that the specific-general test is not "in any sense a measurement of any plaintiff's interest in the outcome of any suit."[42] He asserted that the majority's standard for the determination of standing and its criteria for satisfying that standard "are entirely unrelated." Mr. Justice Harlan contended that neither logic nor history properly permit the conclusion that the establishment clause of the first amendment is a "specific" limitation while the tenth amendment and the due process clause of the fifth amendment are only "general" limitations: "The difficulty, with which the Court never comes to grips, is that taxpayers' suits under the establishment clause are not in these circumstances meaningfully different from other public actions."[43]

In defense of the Court's test, it should be noted that it does provide *a* limitation which will prevent a disgruntled taxpayer from employing "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System."[44] It does provide *a* test which can prevent the possibility that a day will come when

> the halls of Congress and of the state legislatures would become with regularity only Act I of any contest to enact legislation involving public officials in its enforcement or

38. 392 U.S. at 102-103 (emphasis added).
39. *Cf.* "There is no reason to suggest, and no basis in the logic of this decision for implying, that there may be other types of congressional expenditures which may be attacked by a litigant solely on the basis of his status as a taxpayer." 392 U.S. at 115 (Fortas, J., concurring).
40. 392 U.S. at 105.
41. 392 U.S. at 107.
42. 392 U.S. at 121.
43. 392 U.S. at 128.
44. 392 U.S. at 106.

> application. Act II would, with the usual brief interlude, follow in the courts. . . . Relaxation of standards of standing would be . . . substantial movement toward constituting the Supreme Court the Council of Revision that the Constitutional Convention decided it should not be. . . .[45]

There are *other* tests, however, which would also meet these negative objectives. Professors Davis and Jaffe have discussed some of them in detail.[46]

It is arguable that the Court, in its desire verbally to reaffirm the *Frothingham* decision, has confused a standing requirement with a point of substantive law. Is not the Court really saying that federal taxpayers have *standing* to challenge any congressional expenditures but that substantively the Court will only declare unconstitutional those provisions which exceed *specific* constitutional limitations? Such a formulation would have the advantage of greater logic: there is little merit to the position that a federal taxpayer's standing to sue is a function of the degree of specificity or lack of generality of the constitutional clause upon which he rests his allegations of unconstitutionality.

Even as restated, the specific-general limitation distinction seems questionable. It may open the Court to the necessity to render substantive decisions in new areas—areas which involve great complexity and present difficult problems. Amendment I is scarcely the only specific limitation upon congressional spending authority. As Mr. Justice Harlan observed, it is difficult to justify a system may very well attempt to carry the Constitution overseas with an argument that the due process clause is also a "specific" limitation. Ethnic groups might, for example, urge that it is unconstitutional for the United States to treat England more kindly than Italy, to treat Ireland more kindly than Greece or Poland.[47]

The dissenting judge in the three-judge lower court consideration of the *Flast* case[48] urged that *Frothingham* could be distinguished to grant standing to the plaintiffs in this litigation. Under the broadened federal taxpayer locus Judge Frankel proposed (his proposed test was *not* adopted by the Court), he contended that cases such as *Pauling v. McElroy*[49] and *Pauling v. McNamara*[50]

45. Brown, *Quis Custodiet Ipsos Custodes?—The School Prayer Cases*, THE SUPREME COURT REV. 1, 15-16 (1963).

46. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 22.09-22.10 (1958 and Supp. 1965); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961).

47. Support would be found by combining Bolling v. Sharpe, 347 U.S. 497 (1954) and Reid v. Covert, 354 U.S. 1 (1957).

48. Flast v. Gardner, 271 F.Supp. 1, 4 (S.D.N.Y. 1967) (Frankel, J., dissenting).

49. 278 F.2d 252 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 835 (1960).

50. 331 F.2d 796 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 933 (1964).

would come out no differently. Under the specific - general test enunciated by the Supreme Court it is quite arguable that these cases *could* come out differently. It is arguable that few interests are more specific than a taxpayer's interest in protecting his bones from disintegration from the effect of Strontium-90 introduced into the atmosphere during nuclear tests, and few limitations more specific than the fifth amendment's prohibition against deprivation of life.

Opinions may differ whether a grant of standing to federal taxpayers in cases such as these would or would not deprive the State Department, Defense Department, and Congress of needed flexibility in the conduct of American external relations. In any event, the issue should be faced squarely rather than in the guise of deciding whether the supremacy clause, which includes treaties, is a "specific" or a "general" limitation upon the article I, section 8 taxing and spending power.

It seems clear that the Court's approach has raised several problems which might have been avoided if the Court had clearly overruled *Frothingham* and held that federal taxpayers have standing *except* where the subject matter of the litigation "is one confided to the final authority of branches other than the judiciary"[51] and *except* where the subject is a "political question." Although matters formerly thought inappropriate for adjudication as "political questions" are now considered appropriate,[52] the idea of a "political question" limitation on taxpayer-citizen suits is appealing. It is certainly more germane to the role of the federal courts than a general constitutional clause limitation.

It may be easier to understand, if not approve, the *Flast* decision if one notes that almost any other test for taxpayer suits would have required the Supreme Court to overrule *Frothingham* and hold that federal taxpayers have standing *except where*. . . . A majority of the Court may have felt that at a moment when anti-Court sentiment in the nation is strong, it would be folly to strike openly at one of the remaining components of the Court's protective envelope of restrictive rules. Accordingly, the majority affirmed *Frothingham* but minimized the negative force of that case by holding it inapplicable where a *specific* limitation is advanced as the argument against constitutionality. It thus introduced an element of new and needed flexibility without opening itself to its critics on an additional count of "changing the law."

Ironically, it is the critics of the present Court who might

51. 271 F. Supp. 1 at 12.
52. *Compare* Baker v. Carr, 369 U.S. 186 (1962) *with* Colegrove v. Green, 328 U.C. 549 (1946).

find *Flast* the most useful if persons of their view were ever able to secure a majority of the Justices. It seems possible that a Supreme Court composed of a majority of members whose philosophical orientation is different from that of the present majority might classify the tenth amendment as a specific limitation upon congressional spending power and thereupon proceed to alter radically the federal-state balance achieved in the last few decades. To the extent that "specific" and "general" are definable subjectively, the erosion of federal requirements on standing to sue in *Flast v. Cohen* does move the Court closer to becoming a Council of Revision.