Florida Law Review

Volume 21 | Issue 2 Article 10

September 1968

Constitutional Law: Taxpayer's Standing to Sue in Federal Courts

Stephen A. Scott

the extension of due process to proceedings, which are essentially criminal in nature, but which traditionally have been denied the safeguards of criminal proceedings.[35]

ROBERT F. WILLIAMS

CONSTITUTIONAL LAW: TAXPAYER'S STANDING TO SUE IN FEDERAL COURTS

Flast v. Cohen, 88 S. Ct. 1942 (1968)

Appellant sought an injunction to block the use of federal funds for financing guidance services and instruction and for purchasing educational materials for use in parochial schools. A three-judge federal court dismissed the complaint,[1] holding that appellant lacked standing. On direct appeal, the United States Supreme Court reversed and HELD, that federal taxpayers have standing to sue to prevent expenditures that exceed the limits imposed by the establishment clause of the first amendment upon Congress's taxing and spending power.[2] Judgment reversed, Justices Douglas, Stewart, and Fortas concurring separately, Justice Harlan dissenting.

In this, the first United States Supreme Court case that accords a federal taxpayer standing to sue to prevent the expenditure of federal funds for unconstitutional purposes,[3] the Court strikes down the bar to federal taxpayer suits that has stood unbreached since it was formulated in 1923 in *Frothingham v. Mellon*.[4] The future ramifications of this decision may be far-reaching indeed, for wherever an alleged violation of a specific constitutional limitation on the taxing and spending power conferred by article I, section 8, is accepted by the court, a taxpayer will have standing to challenge the action of Congress.[5]

---

35. In De Stefano v. Woods, 88 S. Ct. 2093 (1968), where the petitioner was convicted of criminal contempt and sentenced to one year, the Court held that it would not reverse state convictions for failure to grant jury trials where the trials began before May 20, 1968, the date of the *Bloom* and *Duncan* decisions. Thus, neither *Bloom* nor *Duncan* is to be applied retroactively.

1. Flast v. Gardner, 271 F. Supp. 1 (S.D.N.Y. 1967).

2. In a recent case attacking a similar act, a federal district court required dismissal, relying squarely upon Frothingham v. Mellon, 262 U.S. 447 (1923). Protestants & Other Americans United for Separation of Church & State v. United States, 266 F. Supp. 473 (S.D. Ohio 1967).

3. In three taxpayer suits prior to *Frothingham*, the Supreme Court accepted jurisdiction without directly examining the standing question. Wilson v. Shaw, 204 U.S. 24, 31 (1907); Millard v. Roberts, 202 U.S. 429, 438 (1906); Bradfield v. Roberts, 175 U.S. 291, 295 (1899).

4. 262 U.S. 447 (1923).

5. The Court suggests that other specific limitations besides the establishment clause may exist, but declines to determine them except in the "context of future cases." 88 S. Ct. at 1955 (1968).

In *Frothingham*, a taxpayer sought to prevent congressional expenditures, claiming that it had usurped powers reserved to the states by the tenth amendment. The effect, she urged, would be "to increase the burden of future taxation and thereby take her property without due process of law."[6] The Court disposed of this contention by noting that a taxpayer's interest in the money of the Treasury is "comparatively minute and indeterminable"[7] and that "the effect upon future taxation . . . [is] remote, fluctuating, and uncertain."[8] Therefore, it was held the type of "direct injury" necessary to confer standing had not been alleged.[9]

Frothingham's bar to federal taxpayer suits had not been overcome until this case. In the interim much debate had centered around whether taxpayer suits are constitutionally barred by article III, section 2, or whether the Court had enunciated a rule of judicial self-restraint.[10] The Court in the present case favors the latter posture, relying upon statements in *Frothingham* suggesting that the petitioner there was denied standing because of the small size of her tax bill and because the entertaining of that suit might lead to countless such suits "in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned."[11] These statements, the Court stated, suggest "pure policy considerations."[12]

While *Frothingham* denied a federal taxpayer standing to challenge the constitutionality of a federal appropriation, the Court at the same time recognized that municipal taxpayers may challenge the validity of municipal expenditures.[13]

In *Everson v. Board of Education*[14] the Court granted standing to a state taxpayer who claimed that the first amendment, via the fourteenth, forbade state reimbursement of parents for bussing their children to sectarian schools. Although the Court rejected the claim, the issue of standing of the complaining taxpayer was never raised. The Court, however, in *Doremus v. Board of Education*, held that the appellant in *Everson* was properly, if tacitly, accorded such standing.[15] In *Doremus*, however, the failure to show the "requisite financial interest" resulted in dismissal because no true case or controversy was presented.[16] In both *Doremus* and *Everson* the federal judiciary allowed

6. 262 U.S. at 486 (1923).
7. *Id.* at 487.
8. *Id.* at 487.
9. *Id.* at 488.
10. Most commentators feel that *Frothingham* merely served as a rule of self-restraint. *See, e.g.*, sources cited by the Court, 88 S. Ct. at 1948 n.6 (1968).
11. *Id.* at 487. The problem of a flood of litigation has been mitigated by the adoption of the Federal Rules of Civil Procedure, where provision is made for class actions and joinder. FED. R. CIV. P. 18-23.
12. 88 S. Ct. at 1949 (1968).
13. 262 U.S. at 486 (1923).
14. 330 U.S. 1 (1947).
15. 342 U.S. 429, 434 (1952).
16. The defense that appellants lacked standing was raised, but was waived at pretrial conference so that constitutional issues could be determined. The Court noted this waiver and accepted jurisdiction without further discussion of the point. *Id.* at 433.

a *state* taxpayer to attack "a law respecting the establishment of religion."[17] This trend toward broader standing for state and local taxpayers has been widely followed by state courts.[18]

In the present case the Court sets out a new test for standing to assure that the plantiff is a proper and appropriate party to invoke the federal judicial power[19] that requires a federal taxpayer to demonstrate a two-pronged nexus between his asserted status and the claim sought to be adjudicated.[20] First, a logical link must be established between the taxpayer status and the type of legislation attacked.[21] Thus, a taxpayer *qua* taxpayer will be a proper party to question abuses of congressional power only under the taxing and spending clause of article I, section 8, of the Constitution. The Court specifically excludes incidental expenditures for the administration of an essentially regulatory statute.[22]

It is this first nexus that causes Mr. Justice Harlan to disagree most assertively with the majority. While he concedes that had Congress passed a tax for support of religion, there would be standing, he distinguishes that case from the instant one, where an expenditure is challenged.[23] He reasons that once tax payments are received, they become part of the general revenues and are indistinguishable from any other revenues therein.[24] Harlan concludes that where no such separate tax is involved a taxpayer cannot claim a refund, cannot prevent collection of existing debts, and cannot challenge the propriety of any particular level of taxation;[25] therefore, since his rights and interests are held in common with all other taxpayers, no personal interests are involved.[26]

To satisfy the Court's second requirement, the taxpayer must establish a logical connection between that status and the precise nature of the constitutional infringement alleged.[27] He must demonstrate that the challenged legislation somehow exceeds some specific limitation imposed upon the taxing and spending power, and not that the legislation is generally beyond Congress's delegated powers. It is only when both nexuses are shown that the

17. U. S. CONST. amend. I.

18. Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1266 (1960). In about forty states it is possible to test the legality of local official expenditures; in at least twenty-seven states the same is true of state expenditures, and in nine or more it may be possible to do so. Jaffe at 1280. Such suits have also been entertained by territorial courts, Reynolds v. Wade, 249 F.2d 73 (9th Cir. 1957), and by courts in the District of Columbia, (Bradfield v. Roberts, 175 U.S. 291 (1899); Jaffe at 1281.

19. 88 S. Ct. at 1953 (1968).

20. *Id.*

21. *Id.* at 1954.

22. *Id.*

23. 88 S. Ct. at 1967 (dissenting opinion).

24. *Id. See also* Steward Mach. Co. v. Davis, 301 U.S. 548, 585 (1937).

25. 88 S. Ct. at 1967 (dissenting opinion).

26. Personal rights or interests are not always free from invasion merely because an appropriate remedy is not at hand. Private litigants have often been granted standing as representatives of the public interest. *E.g.*, Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4 (1942); Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir.), *rev'd per curiam on other grounds*, 320 U.S. 707 (1943).

27. 88 S. Ct. at 1954.

taxpayer will have shown a taxpayer's stake in the outcome of the controversy and will be a proper party.[28]

In the instant case, the taxpayer-appellant challenged legislation enacted under the taxing and spending power (satisfying the first nexus) and alleged that the substantial expenditure[29] violated the establishment clause of the first amendment[30] (satisfying the second). She therefore had standing.

The new test for standing set out in the present case is consistent with the Court's prior decisions. The appellant in *Frothingham* did not allege that Congress had exceeded a specific limitation on its taxing and spending power, but merely claimed that it had exceeded its general powers under article 1, section 8; therefore standing would still be denied today.[31] In both *Everson* and *Doremus,* the Court would again grant standing under this new test since in both cases the taxpayer-appellants alleged that the challenged legislation exceeded the specific limitations on Congress's power under the first amendment.

The test is also in accord with that stated in *Baker v. Carr.*[32] Both require that the litigant have a "personal stake in the controversy,"[33] so that friendly, hypothetical, abstract, feigned, or collusive suits will not be heard.[34]

The fundamental aspect of standing is that it concerns only the party's right to be heard rather than the adjudication of the substantive issues. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues. . . ."[35] The question is "whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."[36]

Justiciability is broader in scope than standing and involves a dual limitation placed on the federal courts by the case and controversy doctrine.[37] This doctrine limits the federal judiciary to the consideration of issues presented in a form capable of being judicially resolved in an adversary

28. *Id.*

29. *Id.* at 1954 n.23, which states that almost $1 billion was appropriated to implement the Elementary and Secondary Education Act of 1965. The test established by the Court does not specifically require that the challenged appropriation be "substantial." However, by its inclusion in the text of the decision, the Court provides itself a basis for future changes in the test.

30. The Court expressed no views of the merits of the appellant's case. Proceedings in both the court below and in the Supreme Court were limited thus far solely to the question of standing. Flast v. Gardner, 271 F. Supp. 1 (S.D.N.Y. 1967); Flast v. Gardner, 267 F. Supp. 351 (S.D.N.Y. 1967).

31. 88 S. Ct. at 1955. A similar denial of standing would also be issued in a case such as Tennessee Elec. Power v. TVA, 306 U.S. 118 (1939), where only a tenth amendment violation was alleged.

32. 369 U.S. 186 (1962).

33. *Id.* at 204.

34. *E.g.,* cases cited by the Court, 88 S. Ct. at 1953.

35. 88 S. Ct. at 1952 *citing* Baker v. Carr, 369 U.S. 186, 204 (1962).

36. 88 S. Ct. at 1952.

37. *Id.* at 1950.

context (the standing aspect of justiciability) and, through a tripartite allocation of power,[38] assures that the courts will not encroach upon areas reserved to the other branches of government.[39] Separation of power questions are concerned only with the substantive issues raised. Although the justiciability of the issues raised is irrelevant to standing, these issues must nonetheless be considered to determine whether there exists a logical nexus between the status asserted and the claim sought to be adjudicated.[40]

In his dissent, Mr. Justice Harlan suggests solving the problem of standing raised in the instant case by permitting taxpayer suits to represent the public interest only if Congress authorizes such suits.[41] Although he admits that no such authorization has yet been passed, he asserts that Congress may do so at some future date.[42] The protection afforded the taxpayer under Harlan's solution is insufficient and is contrary to the basic judicial principle first set out in *Marbury v. Madison*[43] that the federal judiciary shall have the power to review the constitutionality of the acts of the other two branches of government without awaiting their permission to do so. Furthermore, should such standing be lacking, under the Constitution, Congress's action to confer it would be to no avail.[44]

It would indeed be surprising if the implications of the instant decision were not greatly developed in future cases. The Court suggested that by following the *Frothingham* rationale no taxpayer as such could question a federal appropriation for the building of a cathedral for some particular sect.[45] But now if the appropriation is assailed by persons of different religion or no religion, then other factors besides, or possibly instead of, federal taxpayer status may have weight on the standing question.[46] Perhaps the vital interest of a citizen in the establishment issue, quite aside from his status as a taxpayer, would be sufficient basis for standing.[47]

Although the instant decision was limited in scope to giving standing to taxpayers suing to enjoin federal expenditures that violated the specific limitations of the establishment clause of the first amendment, the door was

38. Separation of powers questions are not clearly resolved even today. For example, even after standing could be had under the holding of the present case, it is uncertain how the Court would view a challenge to federal tax exemptions, such as the status of the rental value of a home furnished to a minister. INT. REV. CODE of 1954, §107. The same uncertainty would arise as to the church exemption on unrelated business income. INT. REV. CODE of 1954, §511. Would the Court consider the exemption as a positive legislative act that is subject to judicial review or would it be seen as a failure to legislate, thus preventing the Court from intruding into the area reserved to the Congress? *See Church-State: A Legal Survey 1966-68*, 43 NOTRE DAME LAW. 684, 735 (1968).

39. 88 S. Ct. at 1950.

40. *Id.* at 1953.

41. *Id.* at 1969 (dissenting opinion); *see* Oklahoma v. United States Civil Service Comm'n 330 U.S. 127, 137-39 (1947).

42. Authorization of federal tax payers to sue was discussed but rejected during debate on the challenged act. 111 CONG. REC. 5973, 6132, 7316-18 (1965).

43. 6 U. S. (1 Cranch) 137 (1803).

44. Muskrat v. United States, 219 U.S. 346 (1911).

45. 88 S. Ct. at 1951 n.17.

46. 88 S. Ct. at 1952; *cf.* Harmon v. Brucker, 355 U.S. 579 (1958).

47. 88 S. Ct. at 1960 (concurring opinion).

left open to grant standing in taxpayer suits that challenge the constiutionality of other appropriations under other clauses.[48] It is possible that there are other first amendment freedoms that may be interpreted as specific limitations on the taxing and spending power as well. The most obvious of these is probably the free exercise of religion clause, which was also alleged in the instant case to be a specific limitation.[49] It is likely that tax exemptions to churches will be challenged soon, and while the litigant will rely upon the instant decision he will probably allege both religious clauses in his complaint.[50]

Other first amendment freedoms might operate as specific limitations as well. If Congress were to appropriate money to establish an Office of Government Censorship, the freedom of speech and freedom of press clauses might be used to give a taxpayer standing.

It is presently unclear whether the specific type of limitation required in the new standing test can be found elsewhere in the Constitution. It is, however, a familiar principle that the whole of the first amendment occupies a "preferred position" in our constitutional firmament.[51] This position of preference may lead the Court to conclude that constitutional limitations other than those found in the first amendment are either unrelated to taxing and spending or regulatory in nature; in either event they would fall outside the requirements of the test. The Court's leaving the door open for future expansion of the test, however, is a reflection of first amendment jurisprudence and is interpreted as a move toward increasingly relaxed criteria for the achievement of standing to sue.[52]

STEPHEN A. SCOTT

48. 88 S. Ct. at 1955.

49. Mr. Justice Harlan, in his dissent, asserts that for the purpose of the standing doctrine he can see no meaningful distinction between two religion clauses, 88 S. Ct. at 1964 n.10. The implication here is that the purpose of the tenth amendment is only to provide for a division of power between the federal and state governments and not as a specific limitation on congressional powers intended to protect individual rights.

50. The Court pointed out that the free exercise clause can be invoked only by a particular class of taxpapers. *Id., citing* Murdock v. Pennsylvania, 319 U.S. 105 (1943). A further problem will need to be bridged when a tax exemption is challenged: Is an exemption sufficient indirect support of a church as to be analogous to an expenditure for a church? That is to say: Is an exemption a law in respect of religion?

51. Prince v. Massachusetts, 321 U.S. 158, 164, 167 (1944).

52. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965); School Dist. v. Schempp, 374 U.S. 203, 266 n.30 (1963) (concurring opinion).