Louisiana Law Review

Volume 29 | Number 2
The Work of the Louisiana Appellate Courts for the 1967-1968 Term: A Symposium
February 1969

Federal Jurisdiction - Taxpayer's Standing to Sue

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mand an extension of the *Levy* rationale to successions, and this writer hopes that the Supreme Court will recognize that such an extension would be very undesirable.

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FEDERAL JURISDICTION — TAXPAYER'S STANDING TO SUE

Plaintiffs sought to enjoin defendants from the allegedly unconstitutional expenditure of federal funds to finance certain instruction in religious schools, and to purchase textbooks and other instructional materials for use in these schools. Such expenditures, authorized by the Elementary and Secondary Education Act of 1965,[1] were alleged to be in contravention of the Establishment And Free Exercise Clause of the First Amendment.[2] Plaintiffs rested their standing to challenge the statute on the fact that each pays income taxes to the United States. Defendant's motion to dismiss for lack of standing to sue was sustained by a three-judge district court for the Western District of New York, one judge dissenting. On appeal to the United States Supreme Court, *held,* reversed, one justice dissenting. Federal taxpayers have standing to challenge an exercise of the congressional spending power alleged to be in violation of the establishment clause of the Constitution. *Flast v. Cohen,* 88 S. Ct. 1942 (1968).

It is a basic maxim of federal jurisdiction that "the constitutionality of an act of government can only be decided when raised as a justiciable issue."[3] Since "standing" is an aspect of justiciability,[4] a litigant may attack an act of Congress as unconstitutional only if he has standing to make the challenge.[5] Although the origins of this concept are unclear, it has been suggested that it is a policy of judicial self-limitation that can be traced back to a general reluctance of courts to interfere in the affairs of the king.[6] It has also been suggested that standing

1. 79 Stat. 27 (1965), 20 U.S.C. 821 (Supp. II, 1967).
2. U.S. CONST. amend. I.
3. Comment, 45 YALE L.J. 649, 650 (1936). *See also* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 13 (1963).
4. Flast v. Cohen, 88 S.Ct. 1942 (1968).
5. *E.g.,* Frothingham v. Mellon, 262 U.S. 447 (1923); Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 STAN. L. REV. 433 (1962).
6. Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338 (1923). Here the author argues that standing is part of a general tendency of courts of non-interference with what they consider "political" questions. He traces this back to the Talmud. This view was challenged in Weston, *Political Questions,* 38 HARV. L. REV. 296 (1925).

is intimately related to the doctrines of judicial review[7] and the separation of powers.[8]

The English first entertained a taxpayer's suit in 1829,[9] but it was not until 1847 that the first successful state taxpayer's action[10] in America was decided. Since then at least thirty-four states and most municipal jurisdictions[11] have allowed such suits. Only two states[12] specifically deny standing to state taxpayers. In recent years, therefore, there has been a trend to recognize a state taxpayer's standing in such suits. In fact, several states which formerly denied standing have reversed themselves.[13] Generally, the United States Supreme Court has entertained suits by state taxpayers attacking state expenditures.[14] However, in 1952,[15] the Court announced the important qualification that taxpayer's actions can meet the constitutional requirement of "case or controversy" only when it is a "good-faith pocketbook action."[16]

The issue of federal taxpayer's standing was squarely faced for the first time[17] by the Supreme Court in the leading case of *Forthingham v. Mellon.*[18] Mrs. Frothingham, alleging that she was a taxpayer of the United States, attacked the constitutionality of the Maternity Act of 1921[19] on the ground that it invaded an area reserved to the states by the Constitution. The act established a program in which federal grants were given to states that would undertake programs to reduce maternal and infant mortality. She complained that the effect of the act would be to increase her taxes and "thereby take her property without

7. Bickel, *The Supreme Court, 1960 Term—Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Corwin, *Judicial Review in Action*, 74 U. PA. L. REV. 639 (1926). *But see* Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 STAN. L. REV. 433 (1962).

8. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 12 (1963).

9. Comment, 69 YALE L.J. 895 (1960).

10. Adriance v. Mayor of New York, 1 Barb. 19 (N.Y. 1847).

11. Comment, 69 YALE L.J. 895 (1960).

12. *Id.* at 901. These two states are New York and New Mexico.

13. *Id.* at 902. Louisiana falls into this group, having allowed taxpayer actions since 1929. Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655 (1929).

14. *E.g.*, Everson v. Board of Education, 330 U.S. 1 (1947).

15. Doremus v. Board of Education, 342 U.S. 429 (1952).

16. *Id.* at 434.

17. In three early cases, the Supreme Court entertained taxpayer suits challenging federal expenditures without ruling on the standing issue. Two of the cases, however, contained specific statements that the Court was not ruling that taxpayers had standing to challenge federal spending. Wilson v. Shaw, 204 U.S. 24 (1907); Millard v. Roberts, 202 U.S. 429 (1906); Bradfield v. Roberts, 175 U.S. 291 (1899).

18. 262 U.S. 447 (1923) (also cited as Massachusetts v. Mellon).

19. Maternity Act of 1921, ch. 135, 42 Stat. 224 (1921).

due process of law."[20] The Court refused to review the merits of the case, holding that Mrs. Frothingham lacked standing to sue. While recognizing that it had entertained municipal taxpayer's suits, the Court stated that the position of a federal taxpayer is far different in that the latter's interest in the federal treasury is shared by millions of others and therefore is "comparatively minute and indeterminable."[21] It was also noted that to allow such a suit would enable any federal taxpayer to challenge any federal expenditure—a prospect the Court seemed to fear.[22] Furthermore it was stated that the separation of powers doctrine of the Constitution limited the power of the Courts to review acts of Congress only when presented as a "justiciable issue." This requires that the defendant show he will sustain some direct injury as a result of the enforcement of the statute and "not merely that he suffers in some indefinite way in common with people generally."[23] The *Mellon* Court felt that to declare a federal statute unconstitutional in such a situation would be to assert an authority it did not possess.[24]

The question of whether *Frothingham* established a constitutional bar to taxpayer suits or whether it announced a rule of judicial self-limitation has been the subject of much debate.[25] The Court in the instant case has seemingly accepted the prevailing view that the decision was based on non-constitutional grounds.[26] Conceding that the opinion in *Frothingham* could be read to support either position, the majority asserted that standing focuses on the *party* who comes before a federal court and *not* on the *issues*. "In other words, when standing is placed in

20. Frothingham v. Mellon, 262 U.S. 447, 486 (1923).

21. *Id.* at 487. This argument has drawn much criticism from commentators. It is pointed out that General Motors Corporation may pay billions of dollars of taxes to the United States and virtually none to municipalities, yet it could bring a taxpayer's suit only against a municipality.

22. The validity of this argument is questionable. The experience of states and municipalities with taxpayer suits has shown that the judiciary can adequately handle such cases. *Cf.* Comment, 69 YALE L.J. 895 (1960).

23. Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

24. This decision has been defended in Note, 50 HARV. L. REV. 1276 (1937) and Comment, 69 YALE L.J. 895 (1960). Generally, however, present authorities have criticized both its reasoning and result. *E.g.*, K. DAVIS, ADMINISTRATIVE LAW § 22.09 (1958); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 13 (1963); Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Note, 37 HARV. L. REV. 750 (1929).

25. The best collection of arguments for both positions is contained in *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966).

26. In hearings conducted on a bill to legislatively provide standing for taxpayers to challenge federal grants to non-secular schools, the committee concluded: "Testimony at the hearings and the statements submitted to the subcommittee point out that the *Frothingham* decision was based on grounds other than purely constitutional ones." S. REP. No. 85, 90th Cong., 1st Sess. 7 (1967).

issue in a case, the question is whether the person whose standing is challenged is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable."[27] Since the emphasis is on the party involved, the Court reasoned that standing is a constitutional limitation only in that the plaintiff must have sufficient personal interest to insure a proper adversary proceeding. Article III of the Constitution does not prohibit taxpayer suits; it merely requires that such suits be brought in a form capable of judicial determination.

The Court also said that it is still necessary to consider the substantive issue.[28] Only by so doing can it be determined whether the party's relationship to the issue is such that a logical nexus exists between the status asserted and the claim sought to be adjudicated. Thus a federal taxpayer will be deemed to have standing if he can meet two requirements. First, he must allege that the statute attacked is an exercise of the congressional taxing and spending powers.[29] This will establish a necessary link between the status of taxpayer and the type of enactment attacked. Secondly, he must assert that a specific constitutional limitation was infringed.[30] The Court, therefore, indicated that it is *relationship* between the party and issue which determines standing rather than the issue itself. Since the taxpayers in *Flast* challenged a federal spending program as a violation of the establishment clause of the first amendment, the relationship was such that the test for standing was clearly met. *Frothingham* was distinguished on the ground that there the plaintiff failed to allege that a specific constitutional limitation was breached.[31] The Court refused to say whether the Constitution contains any other specific limitations on the spending power, but clearly indicated that if additional limitations are found, a federal taxpayer will have standing to challenge federal taxing or spending that exceeds those limits. Then, and only then, can the Court be certain that the issues will be contested in an adversary manner consistent with Article III of the Constitution. The effect of this is to limit taxpayers' actions to contesting only those expenditures which are specifically *prohibited* by the Constitution. Although the United States system of government is traditionally thought of as one of delegated powers, the Court seems

27. Flast v. Cohen, 88 S.Ct. 1942, 1952 (1968).
28. *Id.* at 1953.
29. *Id.* at 1954.
30. *Id.*
31. *Id.* at 1955.

to say that regarding the spending and taxing power, only those things specifically *denied* may be contested.

The concurring and dissenting opinions in *Flast* indicate the diverse thought on the subject. Two members[32] of the Court would allow standing to a taxpayer to challenge expenditure of federal funds only on the ground that it violates the establishment clause. They reasoned that the founders placed it there as an explicit prohibition on spending and taxing in aid of religion and it, therefore, deserves special protection. Justice Douglas,[33] on the other hand, felt that the Court should have gone further and overruled *Frothingham* completely. He reasoned that this would enable the courts to better fulfill their role of protecting the individual against any prohibited conduct by the federal government. In his dissenting opinion Justice Harlan indicated that although he did not fully agree with the reasoning and premises of *Frothingham,* he felt the result was correct[34] for different reasons. He thus argued that the plaintiffs in *Flast* should have been denied standing.[35]

The Supreme Court's conclusion in *Flast* that the doctrine of standing announced in *Frothingham* was based on non-constitutional grounds appears to be sound. This is supported by several cases[36] in which the Court upheld the right of Congress to grant standing to "aggrieved persons" seeking review of administrative orders. If standing were a constitutional requirement, there is little doubt that it could not be granted by an act of Congress. It should be noted that a bill to allow taxpayers standing to challenge federal aid to non-public schools had passed the Senate,[37] and was being studied by a committee of the House of Representatives[38] when the instant case was decided. The effect of this on the Court cannot, of course, be measured, but

32. Justices Stewart and Fortas. *Id.* at 1960.

33. *Id.* at 1956.

34. Justice Harlan seems to feel that unrestricted public actions might allow too much authority in the courts. *Cf.* Statement by Dean Griswold of Harvard, *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 89th Cong., 2d Sess. 496-97 (1966).

35. Justice Harlan contended that "the United States holds its general funds, not as a stakeholder or trustee for those who have paid its imposts, but as a surrogate for the population at large. Any rights of a taxpayer with respect to the purposes for which those funds are expended are thus subsumed in, and extinguished by, the common rights of all citizens." Flast v. Cohen, 88 S.Ct. 1942, 1962 (1968).

36. Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir. 1943).

37. S. 3, 90th Cong., 1st Sess. (1967).

38. 114 CONG. REC. D349 (daily ed. March 24, 1968).

one may assume that it did not wish to clash with the legislative branch of the federal government.

It is submitted that a desirable result was reached in the *Flast* case, but the reasoning of the majority appears to be defective in that it is circular. The test formulated is that a litigant will have standing when he has sufficient interest to insure an adversary proceeding. "This does not, of course, resolve the standing problem; it merely restates it."[39] Furthermore, the goal desired by the Supreme Court is that each suit that reaches the Court will be adequately contested, but the criteria that a litigant must establish a logical nexus between his status and his claim does not insure such a dispute. When the practical effect of the Court's test is considered, it is difficult to see how the plaintiff's interest in his suit is either diminished or intensified by relying on a *specific* limitation on the spending power rather than an allegation that Congress has *generally* exceeded its authority. In commenting on taxpayers' suits, Professor Jaffe stated:

> "There is little risk that the Court will not be adequately briefed. A citizen or taxpayer sufficiently concerned to bring a lawsuit in which he does not have a monetary concern is for that reason likely to take seriously the presentation of the lawsuit."[40]

The ultimate justification for allowing a taxpayer standing is that it will allow adjudication on an important constitutional issue. Although the present suit may cause some inconvenience,[41] a different decision would have allowed a program of doubtful constitutional validity to continue uncontested—an intolerable situation in a nation which considers its Bill of Rights guarantees to be almost sacred. It has been suggested[42] that the Supreme Court should move cautiously in liberalizing standing requirements. This is certainly sound advice, yet the experience of municipalities and states[43] illustrates that taxpayers' suits may

39. Flast v. Cohen, 88 S.Ct. 1942, 1963 (1968) (dissenting opinion of Justice Harlan).

40. Statement of Professor Jaffe, *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 449 (1966).

41. *See* the testimony of Mr. Ellenbogen, Assistant Counsel for the Department of Health, Education and Welfare, in which the difficulties of administering a program of federal grants subject to suit were discussed. *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 8 (1966).

42. Comment, 34 N.Y.U. L. REV. 141 (1960).

43. Comment, 69 YALE L.J. 895 (1960). *See also* Note, 50 HARV. L. REV. 1276 (1937).

quite adequately be handled by the judiciary. It is submitted that a further erosion of the taxpayer standing rule would allow the Court greater freedom in protecting the individual's fundamental constitutional rights without abrogating other traditional judicial limitations.

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LEASE OF A MOVABLE: HOW THE PUBLIC POLICY OF LOUISIANA AFFECTS THE VALIDITY AND INTERPRETATION OF EXCULPATORY CLAUSES

Plaintiff, a tree-cutter, rented an aluminum extension ladder from the American Rent All Company of Baton Rouge, Louisiana. He signed a printed lease contract containing an exculpatory clause.[1] Plaintiff, while working, climbed to the top of the extended section of the ladder; it telescoped, causing him to fall and sustain severe injuries. *Held,* the exculpatory clause in the rental agreement between plaintiff and American Rent All Company completely relieved the lessor and its insurer from all liability. Such a stipulation is not contrary to the public policy of Louisiana. The court did not consider whether the ladder was defective or whether the plaintiff was negligent in using the ladder.[2] *Celestin v. Employers Mut. Liab. Ins. Co.,* 387 F.2d 539 (5th Cir. 1968).

The Civil Code of Louisiana contains an entire section devoted to the obligations and rights of the lessor. These obligations of the lessor are made part of every contract of lease by operation of law.[3] However, these expressed statutory obligations of the

1. Celestin v. Employers Mut. Liab. Ins. Co., 387 F.2d 539 (5th Cir. 1968): "The lessor makes no warranty of any kind on said equipment and the lessee agrees to immediately return any leased equipment which develops indication of defect or improper working condition: that the lessee agrees to use said equipment entirely at his own risk, to be liable for any damage to persons or property resulting directly or indirectly from the use thereof and the lessee further agrees to protect and save harmless the lessor, its agents, servants and employees from any and all liability resulting from the operation or use of the above rented equipment . . . "

2. *Id.* at 539-40. Under the instructions given the jury in the trial court, the general verdict rendered for the defendant did not disclose whether the jury found (1) that the exculpatory clause completely absolved the defendant, (2) that the ladder was defective, or (3) that the plantiff used it negligently.

3. LA. CIV. CODE arts. 2692-2699. Article 2695 states: "The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same."