AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Individual Rights/Religion/Establishment

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Flast v. Cohen, 392 U.S. 83 (1968)

For most of American history, "taxpayer suits" were frowned on. Taxpayers could insist that their tax assessments were unconstitutional or illegal. In such cases, they could establish the standing necessary for a "case or controversy" under Article III by demonstrating a personal stake in the law, distinctive from other citizens who might not pay that particular tax or taxes at all. If they were successful, their tax payments were refunded. Taxpayers could not, however, challenge governmental expenditures simply because they were taxpayers. One reason for this practice was that governments rarely earmark taxes for specific expenditures. Hence, constitutional decision makers ruled that insufficient connections existed between the admittedly constitutional tax and the allegedly unconstitutional expenditure. More important, they also claimed, taxpayers do not suffer distinctive harms as taxpayers when governments spend money unconstitutionally. Should the federal government spend money when unconstitutionally procuring instruments for torture, for example, that decision equally affects all taxpayers and citizens. Standing, conventional accounts suggest, requires that plaintiffs demonstrate a particularized injury. In this view, the persons actually tortured are best positioned to develop the facts and arguments to present before courts and will benefit in a personal way from any favorable judicial order, unlike random taxpayers who happen to find their way into federal court. Such limitations on access to federal courts, strictly upheld, practically prevent all legal attacks on certain claimed constitutional wrongs. If the president fails to deliver a State of the Union address, no one suffers any particularized injury. Hence, no lawsuit may be brought.

Judicial attitudes toward the use of courts changed during the New Deal/Great Society Era. Most justices in the nineteenth and early twentieth century were not troubled by the standing limit on constitutional litigation. In their view, such alleged constitutional wrongs were political questions that could not be adjudicated by federal courts for a variety of reasons and were best resolved elsewhere. Frothingham v. Mellon *(1923), which held that a taxpayer could not challenge government expenditures under the Maternity Act of 1921, was the classic expression of this hostility to taxpayer standing. As* Baker v. Carr *(1962) suggested, however, many Warren Court justices were not fond of the procedural issues that had historically prevented various constitutional wrongs from being litigated. Supreme Court efforts to expand the scope of the Bill of Rights might bear little fruit if few persons met the constitutional standing requirements necessary to assert those rights.*

Flast v. Cohen *provided an occasion for expanding traditional standing doctrine. The Elementary and Secondary Education Act of 1965 authorized federal officials to provide educational assistance to low-income families. Some funds were dispensed to pay for education in sectarian and religious schools. Believing this practice violated the Establishment Clause of the First Amendment, Protestants and other Americans United for Separation of Church and State (now known simply as "Americans United") and other public interest groups sought to construct a lawsuit that would bar such federal expenditures. Seven families were recruited to serve as plaintiffs. Each maintained they had standing to bring the lawsuit solely because they were federal taxpayers and that their tax revenues were being spent unconstitutionally. They filed for an injunction against Secretary of Health, Education, and Welfare Wilbur J. Cohen. A divided three-judge district court panel dismissed the suit on the basis of* Frothingham. *Florance Flast and the other plaintiffs appealed directly to the Supreme Court.*

The Supreme Court by an 8-1 vote found that Flast and others had sufficient standing to bring the lawsuit. Chief Justice Warren's opinion found there was a sufficient connection between taxpayer status and the establishment clause to justify adjudicating the lawsuit. Taxpayer suits under the Flast *doctrine have been largely*

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limited to constitutional challenges under the Establishment Clause.[1] *Is this a fair interpretation of Chief Justice Warren's opinion? Would the judicial majority in* Flast *have extended the holding of that case to other areas of constitutional law? Does* Flast *suggest any limit on taxpayer standing?*

CHIEF JUSTICE WARREN delivered the opinion of the Court.

. . . For reasons explained at length below, we hold that appellants do have standing as federal taxpayers to maintain this action, and the judgment below must be reversed.

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This Court first faced squarely the question whether a litigant asserting only his status as a taxpayer has standing to maintain a suit in a federal court in *Frothingham* v. *Mellon* (1923), and that decision must be the starting point for analysis in this case. The taxpayer in *Frothingham* attacked as unconstitutional the Maternity Act of 1921, . . . which established a federal program of grants to those States which would undertake programs to reduce maternal and infant mortality. The taxpayer alleged that Congress, in enacting the challenged statute, had exceeded the powers delegated to it under Article I of the Constitution and had invaded the legislative province reserved to the several States by the Tenth Amendment. . . . The Court noted that a federal 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." . . . As a result, the Court ruled that the taxpayer had failed to allege the type of "direct injury" necessary to confer standing. . . .

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The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." . . . Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

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. . . [T]he Government's position is 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, present an absolute bar to taxpayer suits challenging the validity of federal spending programs. The Government views such suits as involving no more than the mere disagreement by the taxpayer "with the uses to which tax money is put." According to the Government, the resolution of such disagreements is committed to other branches of the Federal Government and not to the judiciary. Consequently, the Government contends that, under no circumstances, should standing be conferred on federal taxpayers to challenge a federal taxing or spending program. An analysis of the function served by standing limitations compels a rejection of the Government's position.

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. . . The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. 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 upon which the court so largely depends for illumination of difficult constitutional questions." . . . In other words, when standing is placed in issue in a case, 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. Thus, a party may have standing in a particular case, but the federal court may

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[1] See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* (1982); *Hein v. Freedom from Religion Foundation* (2007).

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nevertheless decline to pass on the merits of the case because, for example, it presents a political question. . . . So stated, the standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits . . . or those which are feigned or collusive in nature. . . .

When the emphasis in the standing problem is placed on whether the person invoking a federal court's jurisdiction is a proper party to maintain the action, the weakness of the Government's argument in this case becomes apparent. The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. . . . A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case. Therefore, we find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs. There remains, however, the problem of determining the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest that impart the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer *qua* taxpayer consistent with the constitutional limitations of Article III.

. . . [O]ur decisions establish that, in ruling on standing, it is both appropriate and necessary to . . . determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. . . . Whether such individuals have standing to maintain that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, 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. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, 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 generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing under the test we announce today. Their constitutional challenge is made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds. In addition, appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment. Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." . . .

The allegations of the taxpayer in *Frothingham v. Mellon* . . . were quite different from those made in this case, and the result in *Frothingham* is consistent with the test of taxpayer standing announced today. The taxpayer in *Frothingham* attacked a federal spending program and she, therefore, established the first nexus required. However, she lacked standing because her constitutional attack was not based on an allegation that Congress, in enacting the Maternity Act of 1921, had breached a specific limitation upon its taxing and spending power. The taxpayer in *Frothingham* alleged essentially that Congress, by enacting the challenged statute, had exceeded the general powers delegated to it by Art. I, § 8, and that Congress had thereby invaded the legislative province reserved to the States by the Tenth Amendment. To be sure, Mrs. Frothingham made the additional allegation that her tax liability would be increased as a

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result of the allegedly unconstitutional enactment, and she framed that allegation in terms of a deprivation of property without due process of law. However, the Due Process Clause of the Fifth Amendment does not protect taxpayers against increases in tax liability, and the taxpayer in *Frothingham* failed to make any additional claim that the harm she alleged resulted from a breach by Congress of the specific constitutional limitations imposed upon an exercise of the taxing and spending power. . . .

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JUSTICE DOUGLAS, concurring.

. . . It would . . . be the part of wisdom . . . to be rid of *Frothingham* here and now.

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Taxpayers can be vigilant private attorneys general. Their stake in the outcome of litigation may be *de minimis* by financial standards, yet very great when measured by a particular constitutional mandate. My Brother HARLAN's opinion reflects the British, not the American, tradition of constitutionalism. We have a written Constitution; and it is full of "thou shalt nots" directed at Congress and the President as well as at the courts. And the role of the federal courts is not only to serve as referee between the States and the center but also to protect the individual against prohibited conduct by the other two branches of the Federal Government.

There has long been a school of thought here that the less the judiciary does, the better. It is often said that judicial intrusion should be infrequent, since it is "always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors"; that the effect of a participation by the judiciary in these processes is "to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.". . .

The late Edmond Cahn, who opposed that view, stated my philosophy. He emphasized the importance of the role that the federal judiciary was designed to play in guarding basic rights against majoritarian control. . . .

The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. If the judiciary were to become a super-legislative group sitting in judgment on the affairs of people, the situation would be intolerable. But where wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors.

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We have a Constitution designed to keep government out of private domains. But the fences have often been broken down; and *Frothingham* denied effective machinery to restore them. The Constitution even with the judicial gloss it has acquired plainly is not adequate to protect the individual against the growing bureaucracy in the Legislative and Executive Branches. He faces a formidable opponent in government, even when he is endowed with funds and with courage. The individual is almost certain to be plowed under, unless he has a well-organized active political group to speak for him. The church is one. The press is another. The union is a third. But if a powerful sponsor is lacking, individual liberty withers—in spite of glowing opinions and resounding constitutional phrases.

I would not be niggardly therefore in giving private attorneys general standing to sue. I would certainly not wait for Congress to give its blessing to our deciding cases clearly within our Article III jurisdiction. To wait for a sign from Congress is to allow important constitutional questions to go undecided and personal liberty unprotected.

There need be no inundation of the federal courts if taxpayers' suits are allowed. There is a wise judicial discretion that usually can distinguish between the frivolous question and the substantial question, between cases ripe for decision and cases that need prior administrative processing, and the like. When the judiciary is no longer "a great rock" in the storm, as Lord Sankey once put it, when the courts are niggardly in the use of their power and reach great issues only timidly and reluctantly, the force of the Constitution in the life of the Nation is greatly weakened.

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JUSTICE STEWART, concurring.

I join the judgment and opinion of the Court, which I understand to hold only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment. Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution. . . .

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JUSTICE FORTAS, concurring.

I would confine the ruling in this case to the proposition that a taxpayer may maintain a suit to challenge the validity of a federal expenditure on the ground that the expenditure violates the Establishment Clause. . . .

JUSTICE HARLAN, dissenting.

The problems presented by this case are narrow and relatively abstract, but the principles by which they must be resolved involve nothing less than the proper functioning of the federal courts, and so run to the roots of our constitutional system. The nub of my view is that the end result of *Frothingham v. Mellon* . . . was correct, even though, like others, I do not subscribe to all of its reasoning and premises. Although I therefore agree with certain of the conclusions reached today by the Court, I cannot accept the standing doctrine that it substitutes for *Frothingham*, for it seems to me that this new doctrine rests on premises that do not withstand analysis. Accordingly, I respectfully dissent.

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. . . [T]he United States holds its general funds, not as stakeholder or trustee for those who have paid its imposts, but as 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. . . .

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It is surely clear that a plaintiff's interest in the outcome of a suit in which he challenges the constitutionality of a federal expenditure is not made greater or smaller by the unconnected fact that the expenditure is, or is not, "incidental" to an "essentially regulatory" program. . . .

Presumably the Court does not believe that regulatory programs are necessarily less destructive of First Amendment rights, or that regulatory programs are necessarily less prodigal of public funds than are grants-in-aid, for both these general propositions are demonstrably false. . . . Apparently the Court has repudiated the emphasis in *Frothingham* upon the amount of the plaintiff's tax bill, only to substitute an equally irrelevant emphasis upon the form of the challenged expenditure.

The Court's second criterion is similarly unrelated to its standard for the determination of standing. The intensity of a plaintiff's interest in a suit is not measured, even obliquely, by the fact that the constitutional provision under which he claims is, or is not, a "specific limitation" upon Congress' spending powers. . . . I am quite unable to understand how, if a taxpayer believes that a given public expenditure is unconstitutional, and if he seeks to vindicate that belief in a federal court, his interest in the suit can be said necessarily to vary according to the constitutional provision under which he states his claim.

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Although the Court does not altogether explain its position, the essence of its reasoning is evidently that a taxpayer's claim under the Establishment Clause is "not merely one of ultra vires," but

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one which instead asserts "an abridgment of individual religious liberty" and a "governmental infringement of individual rights protected by the Constitution.". . .

The difficulties with this position are several. First, we have recently been reminded that the historical purposes of the religious clauses of the First Amendment are significantly more obscure and complex than this Court has heretofore acknowledged. . . . In particular, I have not found, and the opinion of the Court has not adduced, historical evidence that properly permits the Court to distinguish, as it has here, among the Establishment Clause, the Tenth Amendment, and the Due Process Clause of the Fifth Amendment as limitations upon Congress' taxing and spending powers.

The Court's position is equally precarious if it is assumed that its premise is that the Establishment Clause is in some uncertain fashion a more "specific" limitation upon Congress' powers than are the various other constitutional commands. . . .

Even if it is assumed that such distinctions may properly be drawn, it does not follow that federal taxpayers hold any "personal constitutional right" such that they may each contest the validity under the Establishment Clause of all federal expenditures. . . . [A]ppellants challenge an expenditure, not a tax. Where no such tax is involved, a taxpayer's complaint can consist only of an allegation that public funds have been, or shortly will be, expended for purposes inconsistent with the Constitution. The taxpayer cannot ask the return of any portion of his previous tax payments, cannot prevent the collection of any existing tax debt, and cannot demand an adjudication of the propriety of any particular level of taxation. His tax payments are received for the general purposes of the United States, and are, upon proper receipt, lost in the general revenues. . . . The interests he represents, and the rights he espouses, are, as they are in all public actions, those held in common by all citizens. To describe those rights and interests as personal, and to intimate that they are in some unspecified fashion to be differentiated from those of the general public, reduces constitutional standing to a word game played by secret rules.

It seems to me clear that public actions, whatever the constitutional provisions on which they are premised, may involve important hazards for the continued effectiveness of the federal judiciary. . . . There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government. It is not, I submit, enough to say that the present members of the Court would not seize these opportunities for abuse, for such actions would, even without conscious abuse, go far toward the final transformation of this Court into the Council of Revision which, despite Madison's support, was rejected by the Constitutional Convention. I do not doubt that there must be "some effectual power in the government to restrain or correct the infractions" of the Constitution's several commands, but neither can I suppose that such power resides only in the federal courts. . . .

. . . This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits. . . . Any hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President. I appreciate that this Court does not ordinarily await the mandate of other branches of the Government, but it seems to me that the extraordinary character of public actions, and of the mischievous, if not dangerous, consequences they involve for the proper functioning of our constitutional system, and in particular of the federal courts, makes such judicial forbearance the part of wisdom. . . .

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