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Recent Decisions: United States--Rights and Remedies of Taxpayers--Federal Standing [*Flast v. Cohen*, 392 U.S. 83 (1968)]

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Recent Decisions

UNITED STATES — RIGHTS AND REMEDIES OF TAXPAYERS — FEDERAL STANDING

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

Since the 1923 case of *Frothingham v. Mellon*[1] a litigant has not been permitted to challenge the constitutionality of a federal statute when his sole basis for standing was his status as a federal taxpayer. In June 1968, the 45 year old barrier of *Frothingham* was weakened by the case of *Flast v. Cohen*.[2] Appellant Flast, in challenging the constitutionality of the Elementary and Secondary Education Act,[3]

[1] 262 U.S. 447 (1923). In *Frothingham* petitioner, a federal taxpayer, sought to enjoin the enforcement of the Maternity Act of 1921, 42 Stat. 224, on the ground that the statute necessitated an unconstitutional increase in federal taxes, and thus any expenditure authorized by the statute deprived her of property without due process of law. In holding Mrs. Frothingham to be without standing to invoke the jurisdiction of the federal courts for purposes of challenging the constitutionality of that federal statute, the Court employed the *de minimis* doctrine, stating that because a federal taxpayer's stake in the coffers of the United States "is comparatively minute and indeterminable" such taxpayer cannot demonstrate the "direct injury necessary to invoke the Court's equity power." *Id.* at 487-88.

[2] 392 U.S. 83 (1968). Mrs. Flast and six other taxpayers (appellants) originally filed suit in the United States District Court for the Southern District of New York and, pursuant to the statutes which concern claims attacking the constitutionality of federal legislation, requested that a three judge court be convened to review the statute. 28 U.S.C. §§ 2282, 2284 (1964). The district court determined that a substantial federal question could be involved in appellants' claim and thus granted that preliminary motion. Flast v. Gardner, 267 F. Supp. 351 (S.D.N.Y. 1967). However, once the three judge panel was convened, the court (with Judge Frankel dissenting) held that appellant "taxpayers lacked standing to sue to prevent depletion of [the] federal treasury by expenditure of federal funds to religiously operated schools even though [the] litigation involved rights protected by [the] First Amendment." Flast v. Gardner, 271 F. Supp. 1 (S.D.N.Y. 1967). Since the appellants lacked standing to bring the action for injunction, according to the district court, it followed naturally "that there is thus no justiciable controversy and this court therefore lacks jurisdiction of the subject matter." *Id.* at 2. Under authority of the privilege granted in section 1253 of title 28 of the *United States Code*, which permits direct appeal to the Supreme Court from an order of a three judge district court denying an injunction, the appellants sought immediate redress and the Court noted probable jurisdiction. Flast v. Gardner, 389 U.S. 985 (1967).

Although the government argued that no substantial federal question was involved because the appellants' claim focused only on the expenditure programs in New York City, the Court in the instant case determined that the three judge court had been properly convened because there was a substantial federal question involved and thus there was jurisdiction for the Supreme Court to entertain a direct appeal. 28 U.S.C. § 1253 (1964). The test to be followed was couched in terms of whether the granting of an injunction by a three judge district court "would cast sufficient doubt on similar programs elsewhere [such] that confusion approaching paralysis would surround the challenged statute." Flast v. Cohen, 392 U.S. 83, 90 (1968).

[3] 20 U.S.C. §§ 241, 821 (Supp. 1967). Title I provides for federal money to be used by local educational agencies for the education of low-income families. If the

relied solely on her status as a federal taxpayer to provide a basis for standing. The Supreme Court, with one Justice dissenting, held that when the religion clauses of the first amendment are involved, *Frothingham* would no longer act as a jurisdictional bar to the commencement of a suit in federal court.

Appellant's main contention in *Flast* was that by allowing direct expenditures of federal money to religious and sectarian schools, titles I and II of the Act violated the establishment and free exercise clauses of the first amendment. As in *Frothingham*, the litigant's only claim to standing was her status as a federal taxpayer and an expenditure of federal money was sought to be enjoined. The government contended that the holding of *Frothingham* was a constitutional rule based on the separation of powers doctrine and that, under the circumstances of the instant case, the judiciary had no constitutional right to impair the federal legislature's taxing and spending power granted in article I, section 8 of the Constitution. Such constitutional rule, the government argued, was commanded by article III limitations on federal jurisdiction and thus no federal forum had authority under the Constitution to entertain the claims presented in the instant case. Appellant, on the other hand, contended that the rule announced in *Frothingham* was merely one of judicial self-restraint, grounded in policy considerations which are no longer relevant.[4] Since federal jurisdiction to entertain suits such as the instant one had always existed, the only question was whether it should now be exercised.

In refuting the government's separation of powers argument by holding that appellants did have standing as federal taxpayers,[5] the Supreme Court clarified the rule of *Frothingham* and expanded the concept of standing to make it possible for federal courts to hear taxpayer suits alleging congressional infringement of the establish-

plan of the local agency meets specific statutory criteria, its request for funds will be granted by the state agency, which receives federal payments subject to the broad supervisory power of the Federal Commissioner of Education. Title II establishes a similar program of federal grants for the acquisition of textbooks, library resources, and other printed instructional materials "for the use of children and teachers in public and private elementary and secondary schools." *Id.* § 821(a).

Appellants did not decry all federal expenditures under the Act. Rather, the focal point of their constitutional attack was that the statutory criteria permitted funds to be allocated to religious and sectarian schools in violation of the first amendment clauses which prohibit the establishment of religion by the government and guarantee its free exercise without governmental interference. The appellees in the instant case were the government officials charged with the administration and enforcement of the Act. 392 U.S. at 85-87.

[4] Brief for Appellant at 17, Flast v. Cohen, 392 U.S. 83 (1968).

[5] 392 U.S. at 88.

ment and free exercise clauses. Implicit in the Court's holding was the determination, not previously expressed, that in a case brought by a federal taxpayer, *qua* taxpayer, against the federal government concerning the latter's power to tax and spend, there is presented a "justiciable controversy" of which the federal courts may take cognizance.

Justiciability is a term of art that over the years has become a mixture of constitutional prohibition, required by article III, and judicial self-restraint, compelled by public policy.[6] Any absolute bar to the hearing of a case by a federal court must arise from the article III, section 2 requirement that the federal judicial power will extend only to "cases and controversies." The Supreme Court has narrowed the type of case which will fit into this category so that collusive suits,[7] moot cases,[8] advisory opinions,[9] and political questions[10] are all outside the scope of the judicial power. Beyond these situations, "cases and controversies" is not so clearly defined.

It is a prerequisite to the existence of a case or controversy that a court be able to determine the rights of the litigants,[11] and that

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[6] *See* Bickel, *The Supreme Court, 1960 Term, Foreward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Bochard, *Justiciability*, 4 U. CHI. L. REV. 1 (1936); Comment, *Threat of Enforcement — Prerequisite of a Justiciable Controversy*, 48 VA. L. REV. 922 (1962). *See generally* R. HARRIS, THE JUDICIAL POWER OF THE UNITED STATES ch. 1 (1940).

[7] Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339 (1892); Lord v. Veazie, 49 U.S. (8 How.) 251 (1850).

[8] A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961); United States v. Alaska S.S. Co., 253 U.S. 113 (1920); Commercial Cable Co. v. Burleson, 250 U.S. 360 (1919); Mills v. Green, 159 U.S. 651 (1895); California v. San Pablo & T. R.R., 149 U.S. 308 (1893); Singer Mfg. Co. v. Wright, 141 U.S. 696 (1891). *See* C. WRIGHT, FEDERAL COURTS § 12, at 33 (1963); Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125 (1946); Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. CHI. L. REV. 77 (1955); Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772 (1955).

[9] United States v. Fruehauf, 365 U.S. 146 (1961); Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928); Muskrat v. United States, 219 U.S. 346 (1911); United States v. Evans, 213 U.S. 297 (1909); Pelham v. Rose, 76 U.S. (9 Wall.) 103 (1868). *See* 5 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON 441 (1807); C. WRIGHT, *supra* note 8, at 34.

[10] Coleman v. Miller, 307 U.S. 433 (1939); Commercial Trust Co. v. Miller, 262 U.S. 51 (1923); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); Luther v. Borden, 48 U.S. (7 How.) 1 (1849). *See* C. WRIGHT, *supra* note 8, § 14, at 40; Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925).

[11] In Muskrat v. United States, 219 U.S. 346 (1911), an act of Congress gave petitioner the power to institute a suit against the United States to test the constitutionality of previous statutes which had decreased the amount of land of each specified allottee. The act conferred jurisdiction on the Court of Claims to hear the case and to determine the validity of the statute, and provided for an appeal to the Supreme Court.

its findings will be final.[12] Relevant to taxpayers' suits in this respect is the awareness courts have of the necessity for granting much weight to final determinations made by the other two separate branches of the government.[13] It is much more essential to the existence of a case or controversy, however, that there be interested parties[14] asserting adverse[15] claims. These requirements constitute the doctrine of standing: a litigant has no status to invoke the jurisdiction of a federal court unless he is a party with a substantial interest in the outcome and has ascertainable rights which are sufficiently adverse to those of another litigant such that the federal court may take cognizance of their respective claims and make a final disposition of the controversy. While the doctrine has been followed more rigidly in actions at law, its application in equity suits has gradually been relaxed[16] — thus setting the stage for the Court's decision in the instant case. The preliminary test for standing announced in *Flast* was whether the plaintiff had such a "personal stake" in the outcome of the litigation that the adversary na-

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The Court declined jurisdiction on the ground that there was no controversy since there were no adverse legal interests between the government and those authorized to commence the suit. "The whole purpose of the law is to determine the constitutional validity of this class of legislation . . . in a proceeding . . . concerning which the only judgement required is to settle the doubtful character of the legislation in question." *Id.* at 361-62. The Court could not give any judgement as to the rights of the individual parties in the land, since no judgement beyond what the act authorizes can be given when jurisdiction is specially conferred by statute.

[12] The term "final" presupposes that there are matured (or sufficiently certain) claims of adverse parties over which a court has the power to adjudicate and thus arrive at an ultimate and conclusive determination concerning the rights and interests of those respective parties. *See* Wilshire Oil Co. v. United States, 295 U.S. 100 (1935); Abrams v. Van Schaick, 293 U.S. 188 (1934); *In re* Sanborn, 148 U.S. 222 (1893); Gordon v. United States, 117 U.S. 697 (1864); United States v. Ferreira, 54 U.S. (13 How.) 40 (1851); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

[13] *See* cases cited note 12 *supra.*

[14] *See* Florida v. Mellon, 273 U.S. 12 (1927); Texas v. ICC, 258 U.S. 158 (1922); Fairchild v. Hughes, 258 U.S. 126 (1922); Louisville & N.R.R. v. Finn, 235 U.S. 601 (1915); Tyler v. Judges of the Court of Registration, 179 U.S. 405 (1900).

[15] For an historical perspective on what constitutes adverse claims, see Pacific Steam Whaling Co. v. United States, 187 U.S. 447 (1903); Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339 (1892); Marye v. Parsons, 114 U.S. 325 (1884).

[16] Injunctions have frequently been allowed to restrain the enforcement of a statute before government officials have made any attempt to do so. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Truax v. Raich, 239 U.S. 33 (1915); *Ex parte* Young, 209 U.S. 123 (1908). *But see* Pennsylvania v. West Virginia, 162 U.S. 553, 605 (1923) (dissenting opinion). It is significant that when these suits have been entertained, the statute has generally been found to be unconstitutional. The distinction between such suits and test cases, over which jurisdiction is expressly disclaimed, is rather dim. *Cf.* Muskrat v. United States, 219 U.S. 346 (1911); United States v. Evans, 213 U.S. 297 (1909); Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339 (1892).

ture of the proceedings would be virtually inevitable.[17] This followed logically from the prior judicial progression in equity cases. For there the purpose of the standing doctrine is to insure a clear presentation of the issues, and in terms of constitutional limitations the requirement of standing is related solely to whether particular litigation will involve adverse parties and be of a type historically viewed as capable of judicial resolution.[18] Therefore, to meet the minimal test for jurisdiction a litigant must have a personal stake in the outcome of the controversy,[19] and the dispute presented must touch upon the legal relations between parties having adverse legal interests.[20] In *Flast* the Court went on to declare that a federal taxpayer, *qua* taxpayer, could be heard in a federal court only if certain other strict requirements of standing were met.[21]

This conclusion was actually implicit in *Frothingham.* While the Supreme Court in that case stated that to hear taxpayers' suits "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess,"[22] the reasons for the decision rested squarely on grounds of public policy. The Court conceded that standing had previously been conferred on municipal taxpayers to sue in that capacity.[23] Yet from the *de minimis* reasoning of the Court, it appears that Mrs. Frothing-

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17 392 U.S. at 99, *quoting* Baker v. Carr, 369 U.S. 186, 204 (1962). The personal stake which assured an adversary character in the litigation in *Baker* was the weight to be given the petitioners' votes in public elections. The petitioners in *Baker* brought suit "on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who are similarly situated . . . ." *Id.* at 204-05.

18 392 U.S. at 101.

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

20 Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937). *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (concurring opinion); Lewis, *Constitutional Rights and the Misuse of "Standing"*, 14 STAN. L. REV. 433 (1962); text accompanying notes 13-14 *supra.*

21 For the specific requirements declared in the *Flast* case, see text accompanying notes 27-29 *infra.*

22 262 U.S. at 489.

23 *See, e.g.*, Bradfield v. Roberts, 175 U.S. 291 (1899). There, 24 years before *Frothingham*, the Court passed over the standing requirements of a petitioner who alleged that federal money was being spent in ways contrary to the establishment clause. Specifically involved was an act of Congress which appropriated $30,000 to the District of Columbia for purposes of establishing hospitals in that city. Under authority of the act, the Commissioners of the District of Columbia had contracted with a religious group to disperse a part of these federal funds to them so that they could build an addition to their hospital. Petitioner's basis for standing was his status as a "citizen and taxpayer of the United States and a resident of the District of Columbia." *Id.* at 295.

ham was denied standing simply because her tax bill was too small. In addition, the *Frothingham* Court mentioned the inconveniences of an onslaught of litigation, that is, "[i]f one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same . . . [in] every other appropriation act and statute."[24] When this 45-year-old case is considered in light of the constitutional requirements of a case or controversy, it appears that only for policy reasons was the petitioner in *Frothingham* denied standing.[25] Hence, the *Frothingham* standing restriction should be interpreted as one of judicial self-restraint, and not as a constitutional rule commanded by article III.[26] In short, the Court in *Frothingham* could have heard the case, since it met the case or controversy requirement of article III. By basing petitioner's dismissal on considerations of administrative convenience, the *Frothingham* Court held, in effect, that while its article III jurisdiction did extend to this type of suit, it would voluntarily refrain from hearing the case — a restraint which could be relaxed when the appropriate circumstances presented themselves.

Such circumstances were found in the instant case. With the separation of church and state at issue, the Supreme Court formulated a new test for taxpayer standing. This strict test involves a two-step process in which the taxpayer must show: (1) "a logical link between that [taxpayer] status and the type of legislative enactment attacked," and (2) "a nexus between that [taxpayer] status and the precise nature of the constitutional infringement alleged."[27] Under step one of this new rule, taxpayers are limited to making their allegations against the taxing and spending provisions granted Congress in article I, section 8 of the Constitution. An allegation as to incidental expenditures in the administration of essentially regulatory statutes, therefore, will not suffice.[28] By limiting the

[24] 262 U.S. at 487. The Court feared the spectre of taxpayer suits challenging every federal appropriation. "[*Frothingham*] was decided in 1923 at the time when judicial attacks upon social welfare legislation, child labor laws, . . . and so on, were frequent. The Court, while it invalidated a number of these laws, sought to exercise some degree of judicial restraint." S. REP. NO. 1403, 89th Cong., 2d Sess. 6-7 (1966).

[25] The chief motivating factor behind the *Flast* decision may well have been the Court's recognition of the patent obsolescence of the policy considerations which underlie *Frothingham*. *See generally* Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353 (1955); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

[26] For the policy considerations that led the Supreme Court to confer standing in *Flast*, see notes 32-35 *infra* & accompanying text.

[27] 392 U.S. at 102.

[28] *Id.* at 102.

number of statutes which could possibly come under attack, this first requirement necessarily limits the amount of potential future litigation.

The greatest restriction on taxpayer standing under the *Flast* rule, however, comes in step two. "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 [article I, section 8.]"[29] It is this second criterion which allows the appellant in the instant case to remain in court, while at the same time it would require dismissal in *Frothingham*. The distinction is that the appellant in *Flast* alleged that Congress overstepped a specific limitation imposed on its article I, section 8 powers to tax and spend, while Mrs. Frothingham merely alleged that by enacting the Maternity Act of 1921[30] Congress had exceeded its general taxing and spending power. The key is in the specificity of the alleged congressional encroachment. If a limitation is expressly and specifically enunciated in the Constitution, the litigant may possibly establish a nexus between that constitutional provision and the nature of the alleged constitutional infringement. Hence, it must be kept in mind that *Frothingham* is still valid for the proposition that when a taxpayer, *qua* taxpayer, seeks to enjoin a federal expenditure, he will not be conferred standing if the infringement is alleged to be merely contrary to the due process clause of the fifth amendment or some other general limitation on congressional powers. Petitioner's mistake in *Frothingham* was the failure to allege that Congress had contravened a specific constitutional limitation in passing the Maternity Act of 1921. There is no specific constitutional prohibition against Congress's power to spend money to reduce infant mortality. There is such a specific limitation against its passing laws "respecting an Establishment of Religion, or prohibiting the Free Exercise thereof."[31]

The reasoning behind the Court's decision to confer standing on appellant in the instant case is, in part, attributable to the importance of the alleged first amendment infringement. Traditionally, the "preferred position" of the first amendment freedoms, especially those dealt with in the religion clauses, have motivated the

[29] *Id.* at 102-03 (emphasis added).

[30] *See* note 1 *supra.*

[31] U.S. CONST. amend. I.

federal courts to hear and decide church-state cases.[32] The Supreme Court's interest in taxpayer suits in first amendment areas has been increased not only because of the vital importance felt to be inherent in the religion clause, but also because of the marked increase in federal aid to education. These factors may well have added to the motivation the Court felt in conferring standing in *Flast*. With this increased activity of the federal government in the area of aid to religious institutions,[33] the Court in *Flast* finally recognized the necessity of allowing a federal forum for aggrieved federal taxpayers to litigate federal church-state issues. It seems a bit incongruous that the doors of federal courts have long been open to state and local taxpayers to enjoin a school district, city, or township from spending tax money in an unconstitutional manner,[34] and yet have remained shut to federal taxpayers seeking to challenge federal expenditures on similar grounds.[35]

Sensitivity to the need of a federal forum for federal taxpayers

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[32] In comparatively recent times the church-state issue on a state and local level has frequently come before the Court. The cases have been decided with little or no mention of standing. *See* Abington Township v. Schempp, 374 U.S. 203 (1963) (prayer in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (prayer in public schools); Zorach v. Clauson, 343 U.S. 306 (1952) (releas-time practice in public school); McCollum v. Board of Educ., 333 U.S. 203 (1948) (release-time practice in public school); Everson v. Board of Educ., 330 U.S. 1 (1947) (expenditure of tax funds to offset expense of children riding public transportation to parochial schools).

As mentioned in Judge Frankel's dissent to the lower court's opinion in *Flast*: "[I]t should be enough to note the familiar principle that the whole of the First Amendment occupies a 'preferred position' [*Prince* v. *Commonwealth*, 321 U.S. 158 (1944)] in our constitutional firmament and is most notably and singularly in the domain of the personal liberties entitled to judicial protection." Flast v. Gardner, 271 F. Supp. 1, 6 n.5 (S.D.N.Y. 1967). *See* Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 17-22 (1961).

[33] In fiscal year 1967, over $5 billion was appropriated for federal projects which included aid to religious institutions. *See* S. REP. NO. 85, 90th Cong., 1st Sess. 7-15 (1967).

[34] *See* cases cited in notes 23 & 32 *supra*. The decision in *Flast* represents a long overdue recognition of the progress which states have made in hearing taxpayer suits. In 1929 a collection of cases showed that 19 states allowed taxpayers to challenge state expenditures, and only four specifically did not. Annot., 58 A.L.R. 588 (1929). In 1955 at least 32 states allowed suits and not one clearly denied the right. Davis, *supra* note 25, at 388. *See* Note, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895 (1960).

[35] It had been said that judicial review is available for every aspect of the Bill of Rights except the establishment clause of the first amendment. *See* S. REP. NO. 1403, *supra* note 24 at 7. Significantly, during these same Senate discussions, it was reasoned that "because . . . a municipal taxpayer has standing, and because that rule is clearly sound, a federal taxpayer should now *a fortiori* have standing." *Hearings on S. 2097 Before the Subcommittee on Constitutional Rights of Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 493 (1966). Professor Kenneth Culp Davis stated that current tax factors are so different from those of 1923 that if the same reasoning were applied today as was in *Frothingham*, an opposite result would be reached. *Id.*

seeking to preserve allegedly infringed first amendment rights has not been the exclusive province of the Supreme Court. Congress, apparently equally mindful of possible first amendment encroachment by federal spending, has had under consideration a bill which would extend federal jurisdiction into the same area to which *Flast* is addressed.[36] Many of the goals for which this legislation was proposed are accomplished by the decision in *Flast*. In the face of congressional inaction the Court decided this specific question, while leaving for possible congressional resolution other pressing issues concerning taxpayers' standing.

The holding and policy considerations of *Flast* pertain strictly to the establishment and free exercise clauses of the first amendment.[37] By limiting the qualifications of taxpayer-litigants to the double-nexus test, the Court has reduced the number of potential taxpayer cases. Under this device federal taxpayers have standing to question only those federal expenditures which would allegedly infringe specific individual rights embodied in the first amendment religion clauses. The onslaught of suits to challenge every federal expenditure law feared by the Court in *Frothingham* may well have been averted.[38] The words of Mr. Justice Fortas in his concurring opinion serve as a caveat to potential litigants: "The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause."[39]

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[36] The purpose of the bill, S.3, 90th Cong., 1st Sess. (1967), is "to provide effective procedures for the enforcement of the establishment and free exercise clauses of the first amendment . . . ." S. REP. NO. 85, *supra* note 33, at 1. Section 3(a) of the bill provides that a citizen-taxpayer may bring on behalf of himself or all taxpayers a declaratory judgment action against the federal officer making a loan or grant deemed to be inconsistent with the establishment clause of the Constitution. *Id.* at 25. The bill goes beyond *Flast*, however, by providing in section 3(b) that "any *citizen* of the United States" may also seek declaratory relief against a federal officer making a loan or grant when such action is deemed to be contrary to the Constitution's religion clauses. *Id.* (emphasis added). Its authors envisioned that the class of plaintiffs suing pursuant to the bill would be individual and corporate federal taxpayers and citizens of the United States. *Id.* at 1. This is consistent with the suggestion of Mr. Justice Fortas in his concurring opinion in *Flast* that infringement of one's first amendment rights may provide a sufficient interest to confer standing. 392 U.S. at 115-16.

[37] The specific issue to which the Court addressed itself was "whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment." *Id.* at 85.

[38] The "floodgates" feared in *Frothingham* were challenges to every expenditure from wheat parties to foreign aid. *See* note 24 *supra* & accompanying text.

[39] 392 U.S. at 116 (concurring opinion).