THE ESSENCE OF STANDING: THE BASIS OF A CONSTITUTIONAL RIGHT TO BE HEARD.

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The first formal pronouncement of the constitutional limitation of federal jurisdiction came with Justice Jay's denial of President Washington's request for an advisory opinion concerning the legal ramifications of the French Revolution.[1] The prohibition of advisory opinions was deemed implicit in the "case or controversy" wording of Article III. As the Court continued to encounter jurisdictional questions and challenges, specific aspects of case or controversy evolved. The multifarious tenets of this constitutional limitation, all of which were included in the concept of "justiciability," were expressed in terms of "ripeness,"[2] "collusive suits,"[3] "mootness,"[4] "political questions,"[5] and "standing."[6] Although the scope of this note encompasses only the problem of standing, this does not imply that the resolution of the standing problem was the only issue before the Court in the cases discussed herein. There has been considerable conceptual overlap in the application of the various limitations; often, when the Court encounters one particular aspect of the case or controversy problem, there are others present as well.

The requirement of standing has continually eluded precise definition and has occasionally engulfed the entire concept of justiciability.[7] The attempts of the Court to establish specific, objective criteria for the determination of standing have produced such tests as "private damage,"[8] "good faith pocketbook action,"[9] "invaded legal right,"[10] or "unique injury."[11] While each of these has been appropriate for the particular situation before the Court, none has proven capable of flexible application to diverse jurisdictional problems.

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[1] 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486 (H. P. Johnson ed. 1892). *See also* Muskrat v. United States, 219 U.S. 346, 354 (1911) (Congress could not expand case or controversy); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (federal judges will not act as commissioners).

[2] Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967); Poe v. Ullman, 367 U.S 497 (1961); Adler v. Board of Educ., 342 U.S. 485 (1952) (Frankfurter's dissent); United Pub. Workers of America v. Mitchell, 330 U.S. 75 (1947).

[3] Lord v. Veazie, 49 U.S. (8 Howe) 251 (1850). *But see* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

[4] *E.g.*, St. Pierre v. United States, 319 U.S. 41 (1943).

[5] Colegrove v. Green, 328 U.S. 549 (1946); Coleman v. Miller, 307 U.S. 433 (1939). *But see* Baker v. Carr, 369 U.S. 186 (1962).

[6] *E.g.*, Frothingham v. Mellon, 262 U.S. 447 (1923).

[7] *See, e.g.*, International Longshoremens' Union v. Boyd, 347 U.S. 222 (1954).

[8] Coleman v. Miller, 307 U.S. 433, 460 (1949).

[9] Doremus v. Board of Educ., 342 U.S. 429 (1952).

[10] Tennessee Power Co. v. TVA, 306 U.S. 118 (1939).

[11] *See* Frothingham v. Mellon, 262 U.S. 447 (1923); Doremus v. Board of Education, 330 U.S. 1 (1947).

Because the requirement of standing is a basic element of the Article III case or controversy limitation, it must necessarily be analyzed in terms of federalism and separation of powers. After *Marbury v. Madison*,[12] it was clear that the Supreme Court of the United States was unique among contemporary courts throughout the world, in that no other court possessed the power to declare acts of a national legislature void as unconstitutional.[13] Possessed of this power, the Court would have naturally been the object of much criticism and political attack were it able to decide issues free from constitutional inhibition.[14] In order for the Court to effectively exercise this awesome power, it was imperative that it act with extreme discretion and only when necessary for the resolution of actual controversies. Commenting upon the virtue of this limitation upon the American Judiciary, Alexis de Tocqueville remarked:

> I am inclined to believe this practice of the American courts [deciding law only in the context of cases] to be at once most favorable to liberty and to public order. If the judge could only attack the legislator openly and directly, he would sometimes be afraid to oppose him; and at other times, party spirit might encourage him to brave it at every turn. . . . But the American judge is brought into the political arena independently of his own will. He only judges the law because he is obliged to judge a case. The political question which he is called upon to resolve is connected with the interests of the parties, and he cannot refuse to decide it without a denial of justice.[15]

The Court is much less likely to arouse suspicion and distrust by insisting upon a "case" involving the adverse interests of parties prior to deciding controversies of political concern, than it would be if it decided any issue brought to its attention.[16] In light of the power of the Supreme Court, the ramifications of ignoring the limitations cannot be overstated. Should the Court fail to inquire into the interest of the litigants in the outcome, the Court would expose itself to the Hydra of collusive suits and the presentation of turbid issues by disinterested or semi-interested parties. This possibility is particularly frightening when applied to a Court whose decisions affect not only the litigants, but all society, and whose power encompasses the nullification of carefully prepared legislation which reflects the interests of a majority of the people. It was therefore imperative that the Court make careful inquiry into both the interest of the litigants and the nature of the controversy before assuming jurisdiction. The tests of standing evolved primarily

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[12] 5 U.S. (1 Cranch.) 137 (1803).
[13] A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 72-77 (Heffner ed. 1965).
[14] 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 110-11 (1926). *See* Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803).
[15] TOCQUEVILLE, *supra* note 13, at 76.
[16] 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 111 (1926).

for the purpose of ascertaining the interests of the plaintiff. Before an effective determination can be made as to the adequacy of the tests so established, it is necessary to examine the particular litigant qualifications which the Court attempted to reveal.

THE QUALITIES SOUGHT IN AN ADVERSARY

An adversary's qualifications, as sought by the courts, are bifurcated into subjective and objective criteria. Subjectively, the requirements are interest and adversity:[17] interest in his own cause, adversity to the opposition. The necessity for this side of the qualification is clear; in deciding difficult constitutional issues, the Court is dependent upon the litigants for clarification of the issues and adequate presentation of both sides of the question. Absent the intense interest of the litigants, the Court would be left to decide constitutional issues without the requisite clarification, and would risk a faulty analysis of sensitive problems.[18]

The objective side of the bifurcation concerns the relative roles of the legislature and the judiciary in the legal process. The role of the legislature, generally, is to determine the best interest of society as a whole and, within the bounds of the Constitution, act accordingly. The courts, on the other hand, deal with the law in its application to specific situations and particular individuals. What may not be apparent to the legislature when the forest is viewed may be obvious when the judiciary examines a single tree. The Court, therefore, does not act as the general supervisor of the legislature, but rather views the after effect of the legislation and its functional application to specific problems. Succinctly stated, the legislature acts upon projected problems of general concern; the judiciary acts specifically and empirically. This dichotomy gives rise to the second requirement of litigant qualification — experience. In order for the court to gain the necessary insight into the challenged application of the statute, the litigant must have directly experienced the injustice complained of.[19] There are, however, instances in which the challenged legislation injures no individual directly, but is nonetheless in violation of the Constitution.[20] In such a case, were the court to stand unequivocally upon the requirement of personal experience, it would, in effect, be denying the power of the judiciary to entertain a challenge to the act, thereby tacitly acknowledging the existence of an area in which the legislature can act in derogation of the

[17] *See* Flast v. Cohen, 88 S. Ct. 1942 (1968); Baker v. Carr, 369 U.S. 186 (1962).
[18] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962).
[19] *See, e.g.*, Tileston v. Ullman, 318 U.S. 44 (1943); Frothingham v. Mellon, 262 U.S. 447 (1923).
[20] *E.g.*, Everson v. Board of Educ., 374 U.S. 203 (1963). *But see* Millard v. Roberts, 202 U.S. 291 (1905); Bradfield v. Roberts, 175 U.S. 291 (1899).

Constitution, uninhibited by judicial review.[21] Therefore, in order for the judiciary to act effectively as a check upon the acts of the legislature, the litigant requirement of experience can realistically be demanded only when the legislation challenged is of the nature that would normally produce such individual experience. In cases where the experience factor does not exist, the qualifications of a potential litigant must be measured solely in terms of the subjective criteria — interest and adversity.

Development of the Law of Taxpayer Standing

Admittedly, the concept of standing has never been articulated by the courts in the terms just discussed. However, an examination of the cases in which standing has been decided, and those in which it has not been mentioned, but was clearly an issue, reveals that the suggested doctrine has existed implicitly in the decisions of the Court since its first encounter with the problem.

Several significant suits have been allowed by the Supreme Court, in which citizens and taxpayers have challenged congressional activity. Two such suits were *Bradfield v. Roberts*[22] and *Millard v. Roberts*.[23] In both suits the plaintiffs were citizens and taxpayers of the District of Columbia, and in each of the cases this was the only status alleged as a basis for qualification. In *Bradfield*, plaintiff challenged the expenditure of tax funds to aid Providence Hospital, a predominantly religious organization, alleging a violation of the establishment clause of the first amendment. In *Millard*, plaintiff challenged the payment of tax funds to two railroad companies to aid in the construction of Union Station in Washington, D.C., alleging such action to be in excess of the enumerated powers of Congress, and therefore unconstitutional In both instances, the Court decided the case on the merits without any discussion of the standing issue.[24]

Neither of the plaintiffs in the aforementioned cases were directly injured by the allegedly unconstitutional activity of the Government. In fact, under no circumstances could it be said that the plaintiffs qualified under traditional tests of standing. Hence, it must either be assumed that the issue of standing was never discussed or that, for some undisclosed reason, the Court found that the plaintiffs were indeed

[21] To state that a check could exist in the veto power of the President would be to ignore one of the basic concepts of Madisonian Democracy — tyranny of the majority. The Constitution is the basic safeguard of the rights of minorities and as such must be protected by a non-political body capable of effective defense — in this case, the judiciary. *See* The Federalists Nos. 78-81 (A. Hamilton).

[22] 175 U.S. 429 (1899).

[23] 202 U.S. 429 (1905).

[24] In both cases the Court stated that it would not discuss the issue of standing. *See* Bradfield v. Roberts, 175 U.S. 291, 300 (1899); Millard v. Roberts, 202 U.S. 429, 438 (1905). Both cases were decided in favor of the defendant.

qualified. An analysis of the cases suggests the latter. The cases had one factor in common, the wrong complained of would not have injured *any* individual to the extent necessary to qualify him to sue under traditional tests of standing. The unconstitutional expenditure of tax funds, in and of itself, injures only the public treasury, and harms no individual uniquely. However, to disallow the suit in either of the cases would have been to allow an allegedly unconstitutional act to go unchallenged for want of a "traditional" plaintiff. Caught between Scylla and Charybdis, it appears that the Court waived the requirement of experience and allowed the suit solely on the basis of the plaintiffs' adverseness and interest in the outcome.

Perhaps more significant was *Wilson v. Shaw*,[25] in which the plaintiff, suing in his capacity as a citizen and taxpayer sought to enjoin the Secretary of the Treasury from borrowing money, issuing bonds, and expending funds for construction of the Panama Canal. The claim was based upon the premise that the Government possessed the power neither to build upon land owned by another country nor to build railroads or canals anywhere. Although cognizant that an objection might be raised that the plaintiff did not show a sufficient pecuniary interest in the subject matter to grant him standing, the Court stated that it did not stop to pass upon the sufficiency of the objection, but preferred to decide the case on the merits.[26] Notwithstanding the Court's indication that its silence was not to be interpreted as a decision upon the validity of the objection, the acceptance of the case was a tacit recognition of standing. Since the Court was clearly aware that the plaintiff did not meet the traditional requisites, it must be assumed that the allowance of standing was based upon some other ground. An analysis of the case reveals that the situation was not unlike that in *Bradfield* and *Millard;* construction of a canal in a foreign country is very unlikely to produce the personal damage traditionally required of plaintiffs in order to qualify them to bring suit challenging governmental action. But, were the Court to insist upon the traditional requisite, the activity would go unchallenged for want of a qualified litigant. Thus, the Court once again chose to waive the requirement of experience and rely upon the adverse interest of the plaintiff as sufficient qualification to grant him standing.

The question then arises: If the requisite of experience can be waived when necessary, why is it discussed as if it were absolute? The answer would seem to lie in terms of practicality. The primary requisites — interest in the outcome and adversity — are subjective and can only be determined from the particular litigant's actions. The objective re-

[25] 204 U.S. 24 (1907).
[26] *Id.* at 31.

quirement of experience, on the other hand, necessarily presupposes the existence of interest and adversity. If an individual has received a unique injury from the challenged action, thus qualifying him under the requirement of experience, the court can be almost certain that he will qualify subjectively as well. Although strict adherence to this method of qualification is not a complete assurance that the litigant so qualified will always possess the subjective requisites, it is the only objective test available. However, when the act challenged is of the type which will not ordinarily produce such experience, the courts have either avoided the problem of explaining why standing was allowed by ignoring the question, as in *Wilson*, or have circumvented it with untenable arguments based upon the objective criteria of the more typical cases in which the plaintiff is qualified under the requirement of experience.

In *Frothingham v. Mellon*,[27] the Court found it necessary to explain several of its previous decisions in order to justify its holding that the plaintiff was not qualified. Mrs. Frothingham challenged the expenditure of tax funds under the Maternity Act,[28] alleging violation of the tenth amendment and consequently of the fifth amendment since the act deprived her of her property (tax money) without due process of law. The Court held that she lacked the requisite standing to bring the suit on the ground that she had not been directly injured by such expenditures. It would appear that the decision was based, at least in part, upon the proportion of plaintiff's interest in the federal treasury. The Court distinguished *Millard* and *Bradfield* on the basis that the interest of municipal taxpayers was more direct, thus qualifying them under the traditional concepts of standing.[29] This reasoning is wholly untenable. To state that the more direct relationship between a municipal taxpayer and the municipality gives him the requisite standing is not to determine standing, but to ignore it completely. The fact that a citizen is a taxpayer can in no way measure his interest in the outcome of the controversy or his adversity to the opposition. Taxpayers as a group are comprised of people of all backgrounds and political beliefs, people who are in favor of and people who are opposed to the challenged expenditure. In this context the status of a taxpayer has no conceivable relationship to standing to sue. On the other hand, the denial of Mrs. Frothingham's suit was fully consistent with allowance of municipal taxpayer suits. For in *Frothingham*, the statute was alleged to be in derogation of the rights of the several states. To allow Mrs. Frothingham to bring suit in the name of states' rights, would have

[27] 262 U.S. 447 (1923).
[28] Act of November 23, 1921, ch. 135, 42 Stat. 224.
[29] For an analysis of the traditional basis for standing, *see generally* Jaffee, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

resulted in an unnecessary waiver of the requirement of experience, due to the obvious presence of states, fully capable of bringing the suit on their own behalf.[30] The Court in *Frothingham* was clearly not faced with the situation presented in *Millard* and *Bradfield,* since there was no such alternative in those cases.

Since *Frothingham,* there have been several cases involving taxpayers challenging governmental action. Although a sustained analysis of each would prove superfluous, several are particularly noteworthy.

Everson v. Board of Education[31] reached the Supreme Court on appeal from the Supreme Court of New Jersey. The plaintiff sued as a taxpayer to halt the expenditure of state tax funds for the bussing of school children to parochial schools. The expenditures were alleged to be in violation of the establishment clause of the first amendment. Without discussing standing, the Court, on the merits of the case, decided in favor of the defendant. It would be naive to assume that the Court would have overlooked a jurisdictional question as obvious as the issue of standing in *Everson,* especially after its decision in *Frothingham.*[32] What then was the basis for the Court's tacit grant of standing?[33] The answer lies in the nature of the activity. The plaintiff challenged an expenditure of public funds, an activity which would produce no qualified litigant in traditional terms because there would never be a direct, unique, personal injury. Thus, the Court was again faced with the alternative of allowing the suit or permitting the challenged action to escape review. The decision was clear — the Court waived the requirement of personal experience and allowed the suit on the basis of interest and adversity.

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[30] *See also* Hawke v. Smith, 253 U.S. 221 (1920). There a taxpayer was granted standing to assert the illegality of a referendum on the basis that the financial injury sustained by the state for the printing of ballots was sufficient to give him standing. If the relationship of a municipal taxpayer is unique and distinguishable from a federal taxpayer, it is difficult to see the same distinction between a federal and a state taxpayer. It is also interesting to note that the Court in *Frothingham* mentioned Wilson v. Shaw, 204 U.S. 24 (1907), but neither distinguished nor overruled it.

It should also be noted that the State of Massachusetts brought suit along with Mrs. Frothingham; the state suit was dismissed, however, on the ground that the Court did not have jurisdiction to hear such a case originally in the Supreme Court, but not before the Court looked as well to the substantive claim and found that the claim was without merit on the basis that the participation by the state in the plan was voluntary.

[31] 330 U.S. 1 (1947).

[32] It is also significant to note that Justice Frankfurter was on the Court at the time of *Everson.* After his famous opinion in Colegrove v. Green, 328 U.S. 549 (1946), and his concurring opinion in Coleman v. Miller, 307 U.S. 433 (1933), it cannot be assumed that the question of standing did not occur to Justice Frankfurter.

[33] The distinction here between a state taxpayer and a federal taxpayer is of little help in an analysis of standing, since the requirements are unrelated to either the amount or the source of the tax. *See* Jaffee, *Standing to Secure Judicial Review: Public Actions,* 74 HARV. L. REV. 1265, 1284 (1961).

In *School District of Abington Township, Pennsylvania v. Schemp*,[34] the Court allowed a suit brought by parents of school children challenging the constitutionality of Bible reading in public schools. The Court held the activity to be in violation of the first amendment in spite of the fact that the aggrieved parents could have had their children excused from the reading by sending a note to the school. If the objective test sought by the courts in the traditional cases is cast in terms of a legally cognizable injury or pecuniary loss, the allowance of the suit in this case would be difficult to reconcile. If however, the criterion sought is the broader test of direct experience, the plaintiffs here would clearly qualify. Although a legally cognizable injury would surely produce the desired experience, so also would attendance in a school where unconstitutional religious acts were taking place under the auspices of the state, in spite of the fact that there was no traditional injury inflicted.

Voter status was deemed to be enough to qualify a litigant to challenge state legislative apportionment in *Baker v. Carr*.[35] Justice Brennan defined the requirements of standing:

> Have the appellants 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? This is the gist of the question of standing. It is of course, a question of federal law.[36]

The Court went on to conclude that the fact that the plaintiffs were residents of counties which were numerically underrepresented, thus statistically diluting the effectiveness of their individual votes, was sufficient injury to grant them standing. While this holding enabled the Court to maintain superficial consistency with the traditional requisites of standing, the ultimate effect was to ignore the issue altogether. The fact that a person lives in a numerically underrepresented district cannot afford the assurance that the litigant possesses the subjective qualifications of interest and adversity insured by the traditional injury.

When a voter or citizen is aggrieved by malapportionment, whether as a result of conscious gerrymandering or fortuitous shifts of population as in *Baker*, the root of the injury is not numeric underrepresentation, but factional underrepresentation. Whether the factional conflict involved is rural-urban, Negro-white, or labor-management, the source of the injury is the underrepresentation of the interest group. Any given

[34] 374 U.S. 203 (1963). Several similar suits have been allowed by the Supreme Court. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (school prayers); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (religious instruction).
[35] 369 U.S. 186 (1962).
[36] *Id.* at 204.

voter can find himself physically located in a district where although his district is numerically overrepresented, his factional interests are in the distinct minority. The converse is also true. In short, the fact that a person resides in a numerically underrepresented district is not an effective test of his adversity to the status quo, since he could well profit politically from the malapportionment, considering his factional interests. In fact, the only immediately apparent situation where the numeric dilution of a particular district would have a direct effect on factional interests is where the factional interests are primarily dependent upon geographic location, as in the rural-urban conflict, and even in that situation, the connection is not sufficiently definitive to warrant the Court's reliance upon the objective test of vote dilution for the subjective qualification of litigants.

The allowance of standing in *Baker v. Carr* was nonetheless justified since the challenged governmental action was clearly unlikely to produce the personal experience traditionally required. The Court, in essence, merely waived the requirement that the plaintiff personally experience the injustice complained of and relied rather upon his subjective interest in the outcome.

FLAST V. COHEN[37]

In the October, 1967 term, the Court again was confronted with a situation which could not be adapted to traditional concepts of standing, and again the necessities of the case dictated that the Court allow the challenge to be adjudicated. The Court granted taxpayer standing within the narrow confines of the case before it, but not without considerable difficulty in reconciling such action with the traditional bases of qualification.

The suit was brought by taxpayers and citizens to enjoin federal expenditures for the purchase of textbooks and other instructional materials to be used in parochial schools under Titles I and II of the Elementary and Secondary Education Act of 1965.[38] The expenditures were alleged to be in violation of the establishment and free exercise clauses of the first amendment. The action was brought initially before Judge Frankel in United States District Court for the Southern District of New York where the plaintiffs requested the convention of a three-judge court as provided in 28 U.S.C. §§ 2282, 2284 (1960). The Government moved to dismiss the complaint arguing that plaintiff lacked standing to sue. Judge Frankel regarded the question to be of sufficient merit to warrant convening the three-judge court. Holding

[37] 88 S. Ct. 1942 (1968).
[38] 79 Stat. 27, 20 U.S.C.A. 236-44, 331-332b, 821-27, 841-48, 861-70, 881-85 (Supp. 1967).

that the plaintiffs lacked standing, the three-judge court sustained the motion to dismiss; Judge Frankel dissented, casting down his gauntlet to the Supreme Court. The case reached the Court on direct appeal.[39]

At the outset, the Supreme Court faced a substantial dilemma since the only previous case to deal directly with *taxpayer* standing to secure judicial review of federal legislation had been *Frothingham*, which, as was noted, held that the taxpayer lacked standing. Indeed, all of the cases which had dealt with taxpayer standing had discussed it in terms of direct injury or pecuniary loss,[40] and the plaintiffs in *Flast* alleged standing only on the shifting sands of citizenship and taxation,[41] a status that clearly would not give rise to "traditional" injury. The particular expenditure challenged was directly injurious only to the Treasury Department, without unique effect upon the fisc of a particular individual or group. Thus, as there would be no one better qualified to bring the action, to deny standing to Mrs. Flast as a taxpayer and citizen would in turn deny any substantial probability of judicial review of the challenged legislation.[42] Chief Justice Warren, writing the opinion for the majority, first redefined standing in constitutional terms:[43]

> [I]n terms of Article III limitations of federal court jurisdiction, the question of standing is related *only* to whether the dispute

[39] On appeal the appellees also challenged the appellate jurisdiction of the Court on the basis that the three-judge court below had been improperly convened, making a direct appeal outside the jurisdiction of the Court. The Court, finding no merit in this contention, held that the court below was properly convened, and went on to the issue of standing.

[40] *E.g.*, Doremus v. Board of Educ., 342 U.S. 429 (1952); Frothingham v. Mellon, 262 U.S. 447 (1923).

[41] Plaintiff also alleged in the district court that she was a parent of a school child, but that issue was not considered on appeal; in the argument before the Supreme Court the plaintiff alleged only that they were citizens and taxpayers.

[42] It should be noted that the appellees argued against such a point, stating that there were in this case several available litigants who could have brought the suit challenging the unconstitutional action in the place of a taxpayer. They argued:

> The Act itself explicitly provides for judicial review when the appellee Commissioner of Education has dissapproved or suspended a State's plan or its participation in programs under Title I or Title II. . . . Thus, if the State failed to provide services for children attending sectarian schools or provided them less than their statutory due on the ground that such services would violate the First Amendment, and the Commissioner disapproved the State plan as not complying with the Act, the State would be able to secure judicial review of the constitutional limitations on its participation by proceeding in the court of appeals. Brief of the Appellee at 55, 56.

They also suggest other hypothetical alternatives, all equally obscure. The fact remains that although it is not inconceivable that there could exist a situation where a challenge could be raised by one other than a citizen or a taxpayer, the possibilities are such that the Court would be on tenuous ground were it to defer standing in expectation of a "better plaintiff."

Justice Harlan also makes reference to such a "better plaintiff" in his dissent. Inasmuch as he suggests no such plaintiff himself, it may be assumed that he refers to the type of hypothetical plaintiff suggested by the appellee.

[43] For a discussion of the arguments of whether the *Frothingham* bar to taxpayer standing was based upon constitutional mandate or judicial discretion, *see* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.10 (Supp. 1965).

> sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. . . . 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.[44] (emphasis original).

This analysis appears to be unimpeachable. The Court, however, then goes on to discuss under what circumstances a federal taxpayer will be "deemed to have the personal stake and interest that imparts 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."[45] The Court stated the requisites in terms of "nexus":

> 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 legislation 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.
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> . . . 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 party to invoke a federal court's jurisdiction.[46]

This portion of the Court's opinion is perplexing. Although the Court set out to determine when a taxpayer would be *deemed* to possess the requisite personal interest in the outcome of the case, it ends up establishing two tests that have nothing at all to do with plaintiff's interest, but rather concern the type of legislation challenged. This seems singularly inapposite until one considers the Court's conclusions in relation to the requirements of standing previously suggested. The fundamental requirements are: (1) the plaintiff must possess a personal interest in the outcome of the case and adversity to the opposing side; and (2) the plaintiff must have personally experienced the injustice complained of, but only when the legislation is the type that will ordinarily produce

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[44] 88 S. Ct. 1942, 1952 (1948).
[45] *Id.* at 1953.
[46] *Id.* at 1954.

such unique experience. The nexuses set by the Court as requisites of taxpayer standing *qua* taxpayer to challenge governmental action could well be interpreted as pointing to instances in which the requirement of personal experience can be waived. First, the taxpayer must challenge the taxing and spending power of Congress. As has already been illustrated, this type of legislation is the type which is least likely to injure any individual directly; thus, it could conceivably exceed constitutional limitations and never produce the traditional plaintiff. This nexus is also the logical link between a taxpayer and a litigated action; other activities should properly be challenged by a citizen *qua* citizen.[47] The second requirement — that the challenged expenditure be specifically limited by the Constitution — is particularly confusing. It is difficult to see how the first amendment is any more of a specific limitation than is the fifth or the tenth or the fourteenth, unless the specific limitation referred to is the establishment clause of the first amendment.[48] In most other cases involving expenditures made in derogation of the Bill of Rights, the violation would naturally offend specific individuals or groups.

The typical establishment clause violation, however, injures no individual or group directly, but theoretically injures society as a whole. For instance, were Congress to pass an act authorizing the establishment of a fund to be used specifically for the purpose of purchasing all of the land, leases, and mortgages of the Baptist Church, with the expressed purpose of religious suppression, the act would clearly violate the free exercise clause of the first amendment. The act would, however, produce a plethora of potential litigants, all possessed of the

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[47] Although the terms "citizen" and "taxpayer" are used almost interchangeably — indicating that the suit in question might be brought by a general representative of the public — and, depending upon the situation, one will be more appropriate than the other. In cases involving the general expenditure of tax funds, the plaintiff will allege that he is a taxpayer; in other cases the allegation of citizenship should provide the logical link between the litigant and the particular activity challenged.

[48] Although there is some language in the opinion which would suggest that the only specific limitation referred to by the Chief Justice is the establishment clause of the first amendment, it appears clear that he envisions other specific limitations upon the spending power. He stated:

> We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8. Whether the Constitution contains other specific limitations can be determined only in the context of future cases. However, *whenever such specific limitations are found,* we believe a taxpayer will have clear stake as a taxpayer in assuring that they are not breached by Congress. Consequently, we hold that *a taxpayer will have standing* consistent with Article III to invoke federal judicial power *when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.* . . . Under such circumstances, we feel confident that the questions will be framed with necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor . . . . 88 S. Ct. at 1955. (emphasis added).

requisite experience to qualify as a traditional plaintiff. It is difficult to believe that the Court in such a case would allow a suit by a taxpayer who is not a member of the aggrieved group; yet, under the requirement set forth in *Flast* he would meet both of the requisite nexuses, assuming that the free exercise clause of the first amendment would be interpreted as a specific limitation upon the taxing and spending power. But to contend that the decision can be interpreted as meaning that the establishment clause *is* a specific limitation of the taxing and spending power, and the free exercise clause *is not,* would be to confound even the most imaginative student. It is also difficult to see why expenditures exceeding general constitutional limitations should not be proper subjects of taxpayer litigations as well.

The most obvious problem with the requirements set forth by the Court in *Flast* is the absence of any mention of the real interest of the plaintiff. The Court stated that the taxpayer would be deemed to have standing if the case met the two nexuses. Are we to assume then that anyone who pays taxes could have qualified to bring the suit in the place of Mrs. Flast? The fact that someone pays taxes can in no way test their view toward any specific expenditure, particularly an expenditure such as that challenged in *Flast.* Hence, it would appear that the Court, in establishing these criteria for taxpayer standing, has avoided the most critical issue of all — that of litigant interest and adversity.

The difficulty encountered by the Court in finding a satisfactory solution to the problem at hand was undoubtedly the result of having for generations delineated standing solely in terms of personal damage. The Court was unable to allow standing in this case on that basis, and apparently feared that if it based the criteria in this case upon the subjective requirements of interest and adversity, it would subsequently be inundated with taxpayer suits.

Several of the other members of the Court were concerned with the scope of the majority opinion. In his concurring opinion Justice Douglas remarked:

> While I have joined the opinion of the Court, I do not think that the test it lays down is a durable one for the reasons stated by my Brother Harlan. I think, therefore, that it will suffer erosion and in time result in the demise of Frothingham v. Mellon . . . .[49]

Mr. Justice Douglas went on to state that the Court should freely allow taxpayers to challenge allegedly unconstitutional activity:

> I would not be niggardly therefore in giving private attor-

[49] 88 S. Ct. at 1956. The Court distinguished *Frothingham* on the basis that Mrs. Frothingham could not have met the requirements set forth in *Flast,* and therefore could not have qualified to challenge govermental action under the new test.

> neys 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.[50]

Dissenting, Mr. Justice Harlan expressed concern that the opinion would ultimately affect the separation of powers:

> 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. . . . I do not doubt that there must be 'some effectual power in the government to restrain or correct the infractions' (citation omitted) of the Constitution's several commands, but neither can I suppose that such power resides only in the federal courts. We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.[51]

The concern of Mr. Justice Harlan would be well founded were the opinion taken at face value. The test laid down by the Court is certainly not a durable one and the "precarious opening" through which the Court found its way to decide this case would undoubtedly create substantial difficulty when subjected to future analysis. If, however, the case is analyzed with reference to fundamental concepts here suggested, the projected direction of the Court may be less uncertain.

Related Decisions in the October 1967 Term

It is difficult to project the Court's action in *Flast* unless the decision is viewed in the context of related areas and other significant decisions of the Court this past term. In the recent past, the Court has demonstrated a tendency to lower traditional jurisdictional barriers to litigation. This liberalization, manifested in several decisions of the October 1967 term, affected areas which are directly related to the issues of taxpayer and citizen standing.

In 1934, in *McNally v. Hill*,[52] the Court set forth certain restrictions regarding habeas corpus applications from prisoners serving consecutive sentences. The Court held that a prisoner serving consecutive

[50] *Id.* at 1958.
[51] *Id.* at 1968.
[52] 293 U.S. 131 (1934).

sentences could not challenge the sentence that he was serving where another sentence, which he had yet to serve, would preclude the granting of his immediate release from custody. In 1960, the Court in *Parker v. Ellis*,[53] relying upon *McNally*, held that a petitioner released during the course of the appeal could not qualify to litigate his request for habeas corpus. In a per curiam opinion, the Court stated that "the case has thus become moot, and the Court is without jurisdiction to deal with the merits of the petitioner's claim."[54]

In the last term, the Court expressly overruled both *McNally* and *Parker*. In *Peyton v. Rowe*,[55] the Court held that a prisoner serving consecutive sentences was in custody under any one of them and could therefore obtain habeas corpus relief, overruling *McNally*. The Court in *Carafas v. LaVallee*[56] held that the fact that a petitioner was released during the course of his appeal would not bar him from obtaining the Writ, expressly overruling *Parker*. In *Walker v. Wainwright*,[57] it was held that a prisoner could challenge *via* habeas corpus, a sentence which had not yet commenced.[58]

In the area of fourth amendment standing, *Simmons v. United States*,[59] while expanding the application of the exclusionary doctrine enunciated in *Weeks v. United States*[60] and *Mapp v. Ohio*,[61] suggests that the Court is now willing to reconsider the application of fourth amendment standing to include any person incriminated by the illegally seized evidence.[62] The Court stated in a footnote to the opinion:

> It has been suggested that the adoption of a police-deterrent rationale for the exclusionary rule . . . logically dictates that a defendant should be able to object to the admission against him of *any* unconstitutionally seized evidence. . . . How-

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[53] 362 U.S. 574 (1960).
[54] *Id.* at 575.
[55] 88 S. Ct. 1549 (1968).
[56] 88 S. Ct. 1556 (1968).
[57] 88 S. Ct. 962 (1968).
[58] The Supreme Court had previously lowered such a barrier in Jones v. Cunningham, 371 U.S. 236 (1963). There, petitioner, who was on parole, was allowed to invoke habeas corpus to test the constitutionality of the original sentence. In the text of the opinion the Court states:

> Habeas corpus has also been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service.

In Footnote 11 under this statement the Court cites "*e.g. ex parte Fabiani*, 105 F. Supp. 139 (D.C.E.D. Pa. 1952)," which, as far as this writer can ascertain, stands as the sole authority for the proposition that habeas corpus can be granted to determine the validity of a draft notice prior to the actual induction of the draftee. This could perhaps be an indication that the Court is willing to uphold *Fabiani*.
[59] 88 S. Ct. 967 (1968).
[60] 232 U.S. 382 (1914).
[61] *See* Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342 (1967); Note, *Standing to Object to an Unlawful Search and Seizure*, 1965 WASH. U.L.Q. 488.
[62] 367 U.S. 643 (1961).

> ever, that argument is not advanced in this case, and we do not consider it.[63]

Although it should not be assumed that this statement evidences an intent to extend the exclusionary rule to all cases, it is nonetheless in line with the Court's trend toward more liberal allowance of constitutional challenges.

Although it is not directly related to the concept of citizen and taxpayer standing, the area of standing to assert private constitutional claims may be said to evidence a future trend in citizen and taxpayer suits. As a general rule, the litigant in private suits lacks the standing to assert the unconstitutionality of an action unless he can demonstrate that the challenged action is unconstitutional as applied to him.[64] There have been several significant decisions, however, where the Court has allowed the litigant to base his claim of unconstitutionality on the rights of third persons.

In *Barrows v. Jackson*,[65] which is probably the leading case in this area, a white defendant who was sued for breaching a racially restrictive covenant, was allowed to assert the rights of Negroes as a defense. In allowing the defense, the Court gave significant weight to the fact that "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court."[66] The Court also noted, with a parenthetical rejection of a constitutional basis for the *jus tertii* rule, that:

> Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, *which is only a rule of practice*, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.[67] (emphasis added)

The court permitted a similar claim in *NAACP v. Alabama*.[68] There, in order to resist an order by the state court to produce its membership lists, the NAACP was allowed to assert the constitutional rights of its members to freedom of speech and association. In *Griswold v. Connecticut*[69] a doctor and a director of a planned parenthood league were

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[63] 88 S. Ct. 967, 974 n.12 (1968). The police deterrent rule referred to was set forth in Linkletter v. Walker, 381 U.S. 618 (1965), where the Court, in deciding whether Mapp v. Ohio, 367 U.S. 643 (1961), was to be applied retroactively, stated that the reason for the exclusionary rule was not to protect the rights of the defendant, but to deter the police from making further illegal searches, and therefore had no retroactive effect.

[64] *See* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).

[65] 346 U.S. 249 (1953).

[66] *Id.* at 257.

[67] *Id.* at 257.

[68] 357 U.S. 499 (1958).

[69] 381 U.S. 479 (1965).

permitted to defend against criminal prosecution for violation of the Connecticut anti-contraceptive statute on the basis of their patients' rights of privacy and association. Although the Court did not suggest in any of the above-mentioned cases what the criteria would be for future allowances of such assertions, underlying each of the cases is one common factor — it would have been impracticable for the persons whose rights were being protected to stand in their own defense.[70] The Negro purchasers in *Barrows* were not parties to the suit and probably could not have been made parties. Were the members of the NAACP or the patients in the *Griswold* case to have asserted their rights on their own behalf, the very right that was sought to be protected would have in effect been violated by the commencement of the litigation.[71]

The line of cases adopting the *Barrows* reasoning contribute significantly to the projection of the future application of citizen or taxpayer standing to challenge unconstitutional action. The Court appears to be moving toward a delineation of a concept which has been implicit in its decisions for some time and which was stated by Chief Justice Warren in *Reynolds v. Sims*:[72] "[A] denial of Constitutionally protected rights demands judicial protection; our oath and our office require no less of us . . . ."[73] Although this statement was not addressed to the standing problem, it is nonetheless a valid enunication of the Court's tacit policy in the area of standing.

It is not difficult to project areas in which an expansion of taxpayer and citizen standing might be expected, particularly when viewed in terms of the broad scope of the Court's policy to allow persons other than the aggrieved party to challenge alleged constitutional violations in cases where either the party whose rights are violated is unlikely to assert them himself, or where no such aggrieved individual is likely to exist. To date, the Court has allowed the rights of injured individuals to be defended only by the individuals themselves or by persons seeking personal relief from a related injury. However, it would seem that the Court's interest should be in assuring that a constitutional wrong find judicial redress, rather than insisting that the particular party bringing the suit be seeking personal reparations.

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[70] *See* Sedler, *supra* note 60, at 627-28. Professor Sedler concludes that there are four factors which the Court takes into consideration in determining the scope of standing to assert the rights of others: (1) the interest of the assailant, (2) the nature of the right asserted, (3) the relationship between the assailant and third parties, and (4) the practibility of assertion of such rights by third parties in an independent action — and that a decision to grant or to deny standing in a given case will depend on the relative presence or absense of the various factors. The last is termed "probably the most significant of the four factors."

[71] *See* Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 360 (1967).

[72] 377 U.S. 533 (1964).

[73] *Id.* at 566.

Why then should issues like those presented in *Barrows* or *Griswold* have to await arrival of the "traditional plaintiff" in order for the courts to act? Provided the citizen seeking to challenge the action possesses the requisite interest and adversity, should this not be a proper subject for a citizen suit? The alternative to granting this added area of jurisdiction is to allow a significant number of grievances and unconstitutional activities to go judicially unnoticed, not for the want of a person who is sufficiently injured in the traditional sense, but for want of such a person who might practically be expected to bring the action on his own behalf.

One may say without fear of contradiction that the right of the citizen to raise his voice against unconstitutional action lies deep in the fundamental premises of the Republic. That the Court has thus far responded to necessities by exhibiting a willingness to involve itself in critical issues, uninhibited by traditonal ramparts, is an affirmation of the viability of our constitutionalism. Perhaps more than any other single factor, this involvement by the judiciary has distinguished the American system. In the words of Justice Story:

> The most delicate, and, at the same time, the proudest attribute of American jurisprudence is the right of its judicial tribunals to decide questions of constitutional law. In other governments, these questions cannot be entertained or decided by courts of justice; and, therefore, whatever may be the theory of the constitution, the legislative authority is practically omnipotent, and there is no means of contesting the legality or justice of a law, but by an appeal to arms.[74]

[74] J. STORY, STORY'S MISCELLANEOUS WRITINGS 428 (1835).