Supreme Court Limits Exception to Taxpayers’ Lack of Standing to Dispute the Expenditure of Tax Funds

Federal tax cases, in contrast to state tax cases, rarely involve constitutional issues. When they do, a threshold issue is who has standing to raise the constitutional issue. Generally, taxpayers do not have standing to complain that their taxes are being spent in ways that they think violates the Constitution. However, since 1968, the Supreme Court has recognized one exception to that lack of standing: complaints that tax funds are being spent to establish a religion in violation of the First Amendment. *Flast v. Cohen*, 392 U.S. 83 (1968). Recently, the Supreme Court limited that exception to not apply to a tax credit. *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011).

**Standing**

The history of limiting standing of a taxpayer to dispute the expenditure of tax funds on constitutional grounds began with *Frothingham v. Mellon*, 262 U.S. 447 (1923). In that case, Massachusetts attacked the use of tax funds under the Sheppard-Towner Maternity Act, the first major federal social welfare program in the United States, signed by President Warren G. Harding in 1921 and creating a Board of Maternity and Infant Hygiene. In addition, Mrs. Harriet A. Frothingham of Boston sued as a taxpayer complaining of the use of her tax monies for this unconstitutional purpose. The cases were consolidated in the Supreme Court.

Justice Sutherland, writing for a unanimous Court, ruled in 1923 that a taxpayer did not have standing to contest on due process grounds her taxation for allegedly unconstitutional purposes (in this case, to make federal appropriations intended to improve the health of mothers and children). The taxpayer did not seek return of any particular amount of tax paid, but rather complained vaguely that her taxes must have somehow been increased by the illegal government spending. The Court rejected the right of a taxpayer to sue on these grounds due to (1) the vague and uncertain relationship of the alleged illegality to damage to the taxpayer (i.e., not rising to the level of a legally cognizable damage) and (2) the practical reason that the pool of potential plaintiffs would be virtually limitless (all taxpayers), thus providing an unlimited number of plaintiffs, which (3) would effectively put the courts in the business of reviewing every act of Congress spending money, upsetting the constitutional balance that precludes the courts from considering the acts of other branches outside of a valid case or controversy.

One case was able to sidestep *Frothingham*. *United States v. Butler*, 297 U.S. 1 (1936) ruled unconstitutional the Agricultural Adjustment Act, a major New Deal program that...
involved a tax on crop processors, and an appropriation of the taxes raised to pay farmers price supports. The Court ruled the tax was only incidental of a regulatory scheme, and so was not a tax at all—therefore, the plaintiff had standing.

_Flast v. Cohen_ created a major exception for complaints under the establishment clause in 1968. Plaintiffs complained of the use of federal funds under the 1965 education act to pay expenses in church schools. The opinion observed that there was controversy about the grounds of _Flast_: was it based on a constitutional preclusion of the power of courts or on judicial discretion? The opinion effectively ruled it was the latter, stating:

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.

The method discerned by Chief Justice Warren was to ask whether the taxpayer’s complaint was based on a limitation on the taxing and spending power itself, as contrasted with a general claim that the government had exceeded its powers. The latter was the claim in _Frothingham_, that the federal government was infringing on state territory by meddling in women’s and children’s health; whereas it was implicit in the Constitution that religion was not to be established by taxing and spending. The opinion left open the possibility that other parts of the Constitution also limited the taxing and spending powers.

_Winn_

In 2011, the Court substantially limited the reach of _Flast_ by refusing to apply it to a state tax credit that was allowed solely for contributions to funds providing tuition scholarships to private schools. The majority opinion differentiated _Flast_ on the basis that a tax credit did not literally involve the state’s spending of dollars actually paid into the treasury by the plaintiff taxpayers. Therefore, by analogy to the federal system, the taxing and spending power was not implicated and the plaintiffs did not have standing by virtue of being taxpayers. The dissent pointed out the total lack of economic distinction between tax expenditures through credits and deductions for religious purposes and state spending. The key to the distinction, if there is one, appears to be that the state does not select the religious recipient of payments.

_The Future_

If a tax credit is not spending for purposes of the taxing and spending clause of the United States Constitution, then the logical extension of the _Winn_ ruling would seem to be that a federal tax credit could be allowed for religious donations (but not other charitable donations, which would still be deductible) and no taxpayer would have standing under _Flast v. Cohen_ to protest that the credit violated the Establishment Clause.

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