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"Public Interest" Standing for the Federal Taxpayer: A Proposal

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"PUBLIC INTEREST" STANDING FOR THE FEDERAL TAXPAYER: A PROPOSAL

I. INTRODUCTION

During the depression years of the 1930's Congress established a number of new Federal administrative agencies and provided that persons "aggrieved" by the actions of these agencies could obtain judicial review.[1] The courts have commonly construed an "aggrieved party" to be one who has been personally injured by administrative action.[2] Recently, however, the aggrieved party concept has been substantially broadened. Parties who have not suffered personal damage have been granted standing to represent the "public interest."[3]

Public interest standing has been of limited use under the common law. The state and municipal taxpayer, suing on behalf of the citizenry at large, normally can test the validity of state and local government expenditures.[4] However, the federal taxpayer has no right to question Congressional spending.[5]

The purpose of this comment is to determine the applicability of public interest standing to the federal taxpayer. Pursuant to this purpose, public interest standing in relation to federal administrative agencies will first be examined. A discussion of state and local taxpayer suits is also included and will be followed by an examination of taxpayer standing at the federal level. Finally, the policies involved in public interest standing will be analyzed with a recommendation as to future treatment.

II. "PUBLIC INTEREST" STANDING AND THE FEDERAL AGENCIES

Statutes which created agencies before the Depression years did not provide for "aggrieved party" standing. Instead, the courts required that a protesting party have suffered a "legal wrong" from agency action before he could initiate judicial proceedings. This meant that a person had standing if an agency order violated one of his common law rights[6] or a right conferred by statute.[7] In addition, standing might be granted to an appellant asserting personal harm to an interest which Congress intended the regulatory agency to

1. *See, e.g.,* Securities and Exchange Act § 9(a), 48 Stat. 80 (1933), *as amended,* 15 U.S.C. § 77i(a) (1964); Federal Power Act § 313(b), 49 Stat. 860 (1935), *as amended,* 16 U.S.C. § 825-1(b) (1964); Natural Gas Act, § 19(b), 52 Stat. 831 (1938), *as amended,* 15 U.S.C. § 717r(b) (1964).

2. *See* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

3. *See* Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966).

4. *See* Crampton v. Zabriskie, 101 U.S. 601, 609 (1879).

5. Frothingham v. Mellon, 262 U.S. 447 (1922).

6. *See, e.g.,* F.H. Peavey Co. v. Union Pac. R.R., 176 F. 409, 416-18 (C.C.N.D. Mo. 1910), *modified sub nom.* ICC v. Diffenbaugh, 222 U.S. 42 (1911). In *Peavey,* a railroad was granted standing because of a violation of its right of freedom of contract. The ICC order which was challenged forbade railroad rebates to owners of grain elevators. *See also* Perkins v. Lukens Steel Co., 310 U.S. 113 (1939).

7. *See, e.g.,* Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1938); Alabama Power Co. v. Ickes, 302 U.S. 464 (1937); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

protect, even though that interest did not constitute a "legal right" of the appellant.[8] Since the power granted to the agency by Congress extended only to the industry over which the particular agency had control, non-members of that industry had no interest which the agency had to protect and therefore had no basis for standing.[9] Furthermore, absent an invasion of a legal right or a protected interest, no one had standing on the basis of financial injury suffered from agency action.

A substantial change in the concept of standing occurred when Congress passed the "aggrieved party" statutes.[10] In the 1940 case of *FCC v. Sanders Bros. Radio Station*[11] the Supreme Court held that petitioner's status as a competitor of a newly-licensed radio station rendered it a party "aggrieved" by the agency's licensing of the new station. Thus, the complaining litigant could appeal despite the fact that he could not qualify for standing under the previously developed rules. He had not suffered a violation of a "legal right," for no station possessed the right to remain free from competition.[12] Nor was the petitioner's competitive position an interest which Congress intended the agency to protect; the commission was not required to consider economic injury to competitors in deciding whether new licenses should be issued.[13] The Court justified its grant of standing by relying on the Congressional purpose in providing for judicial review of administrative action, noting that the legislature allowed court review in order to confine administrative agencies to their delegated powers. Since ultra vires administrative action often does not result in abridgment of "legal rights," Congressional intent would be frustrated by confining the right to appeal to those "legally" injured. Therefore, the Court assumed[14] that the legislature had intended to confer standing upon persons suffering economic injury, as a means of checking administrative power and insuring consideration of the public interest in agency decisions.[15]

The *Sanders* doctrine caused a shift in judicial focus. Previously, attention had been given only to the *private rights* of litigants protesting agency action. Now, however, if no *private right* had been infringed, the petitioner could attempt to convince the court that a *public right* was impaired because the questioned administrative action was not in the "public interest." As a prerequisite to presenting this argument, the litigant was merely required to show that he was economically damaged by the challenged agency decision. Thus, those who

8. *See, e.g.,* The Chicago Junction Case, 264 U.S. 258, 266-69 (1924).
9. *See, e.g.,* L. Singer & Sons v. Union Pac. Ry. Co., 311 U.S. 295 (1940).
10. Included within the concept of "aggrieved party" is a party "adversely affected." *See, e.g.,* Food, Drug, and Cosmetic Act § 701(f) 52 Stat. 1055 (1938); *as amended,* 21 U.S.C. 371(f) (1964), *interpreted in* Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953).
11. 309 U.S. 470 (1940).
12. *Id.* at 475.
13. *Id.* at 473-76.
14. There was no legislative history to guide the Court in interpreting the meaning of "persons aggrieved" in the Federal Communications Act § 402(b)(6), 48 Stat. 926 (1934), 47 U.S.C. § 402(b)(6) (1964).
15. 309 U.S. at 477.

were personally injured by administrative action became "representatives of the public interest."[16]

The *Sanders* Court did not provide a broad availability of appeal; the class of persons permitted to initiate judicial review was initially limited by the facts of the *Sanders* case. *Sanders* involved personal material injury from direct competition. Presumably, the incentive derived from substantial and direct loss was thought necessary to assure energetic representation of the public interest. Thus, in subsequent cases involving station licensing by the Federal Communications Commission, standing was granted only to competing stations who alleged electrical interference[17] or substantial economic loss.[18]

The above restrictions severely limited the use of judicial review since administrative action often did not significantly and directly affect a competitor.[19] However, a gradual liberalization of the *Sanders* doctrine eventually brought such action within the purview of the judiciary.[20] In this process, judges have broadened the class of persons who may challenge administrative rulings by recognizing minimal personal injury as a basis for standing. Thus, by accepting the barest demonstration that competition may cause financial loss, the courts have allowed parties in one field of a regulated industry to protest administrative action in another field. In the broad area of communications, radio stations[21] and newspapers[22] have been termed "aggrieved" by television license grants. Furthermore, an electronics firm, engaged in neither broadcasting nor publishing, has been allowed to protest the license renewal of a local television station controlled by a rival manufacturer.[23]

The courts have also recognized that competitors in an industry outside the scope of the agency's power may nevertheless be affected by an administrative ruling. Two noteworthy cases exemplify a judicial acceptance of indirect competitive loss as a basis for standing. In *National Coal Ass'n v. FPC*,[24] an association of coal mine owners was permitted to appeal from a Federal Power Commission order authorizing construction of a gas pipeline. The court found that

16. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942).
17. FCC v. NBC (KOA), 319 U.S. 239 (1943).
18. *See, e.g.*, Metropolitan Television Co. v. United States, 221 F.2d 879 (D.C. Cir. 1955); National Anti-Vivisection Soc. v. FCC, 234 F. Supp. 696 (N.D. Ill. 1964). The FCC has taken the same view of *Sanders* in its decisions on standing before the Commission. *See, e.g.*, Northco Microwave, Inc., 5 P&F Radio Reg. 912 (FCC 1963).
19. Remote economic injury has been a common ground for denial of standing. *See, e.g.*, Panhandle Eastern Pipeline Co. v. FPC, 219 F.2d 729 (3d Cir.), *cert. denied*, 349 U.S. 945 (1955); United States Cane Sugar Refiner's Ass'n v. McNutt, 138 F.2d 116 (2d Cir. 1943).
20. *See* Associated Indus., Inc. v. Ickes, 134 F.2d 694 (2d Cir.); *vacated as moot*, 320 U.S. 707 (1943); National Coal Ass'n v. FPC, 191 F.2d 462 (D.C. Cir. 1951); Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959).
21. *See, e.g.*, Interstate Broadcasting Co. v. FCC, 285 F.2d 270 (D.C. Cir. 1960); Versluis Radio & Television, Inc., 9 P&F Radio Reg. 102 (FCC 1953).
22. *See* Clarksburg Publ. Co. v. FCC 225 F.2d 511 (D.C. Cir. 1955).
23. Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959).
24. 191 F.2d 462 (D.C. Cir. 1951).

the economic injury which might be sustained by the petitioners was sufficient to provide a basis for standing.[25] Similarly, in *City of Pittsburgh v. FPC*,[26] petroleum carriers were allowed to protest the abandonment of a natural gas pipeline because the pipeline owners might utilize it to transport petroleum in the future. This possibility of financial loss through an indirect competitor's action provided the appellant with grounds for standing.[27]

Judicial recognition of non-competitive loss has provided a basis for further extending standing to the consumer class.[28] The position of the consumer, who may suffer loss because of agency price-fixing, has been equated to that of the radio station in *Sanders;* the threat of financial loss qualified both parties to represent the public interest in agency decisions.[29] However, unlike the radio station, the possible economic loss to the consumer may be minimal[30] and need not be a direct consequence of the administrative action.[31]

The courts have apparently recognized that administrative action which affects the public interest may not cause direct personal damage. Accordingly, the personal injury requirement of the *Sanders* case has been lessened to ensure representation of the public interest in more agency decisions. Since parties other than direct competitors have been able to meet this lesser requirement, the class of petitioners who may obtain public interest standing has been broadened. Nevertheless, some writers have called for the complete abandonment of the personal injury restriction, reasoning that, since the only ground for allowing these suits was the potential injury to the public, the necessity of personal injury served no purpose.[32] These writers have commonly cited *United States ex rel. Chapman v. FPC*[33] with approval. In *Chapman* the Supreme Court, although unable to agree on the reasons for its decision,[34] granted the Secretary of Interior standing to contest an FPC order authorizing a private power company to construct a generating plant on public lands. The Secretary had alleged

25. This result may have rested on the fact that Congress, in passing the Natural Gas Act, required that the FPC consider the impact of its decisions on other sources of fuel supply. H.R. Rep. No. 1290, 77th Cong., 1st Sess. 3 (1941).

26. 237 F.2d 741 (D.C. Cir. 1956).

27. *Id.* at 747. *Accord,* Juarez Gas Co., S.A. v. FPC, 375 F.2d 595, 597 (D.C. Cir. 1967).

28. *See, e.g.,* California v. FPC, 353 F.2d 16 (9th Cir. 1965); Natural Gas Pipeline Co. of Am. v. FPC, 253 F.2d 3 (3d Cir. 1958); Public Serv. Comm'n v. FPC, 257 F.2d 717 (3d Cir. 1958), *aff'd sub nom.,* Atlantic Ref. Co. v. Public Serv. Comm'n, 360 U.S. 378 (1959).

29. Associated Indus. v. Ickes, 134 F.2d 694, 705 (2d Cir.), *vacated as moot,* 320 U.S. 707 (1943).

30. *See, e.g.,* Bebchick v. Public Util. Comm'n, 287 F.2d 337 (D.C. Cir. 1961).

31. *See, e.g.,* City of Pittsburgh v. FPC, 237 F.2d 741 (D.C. Cir. 1956), in which consumers as well as competitors were granted standing because of indirect injury. *See supra* notes 26, 27 and accompanying text.

32. L. Jaffe, Judicial Control of Administrative Action 527 (1965); Cahn, *Law in the Consumer Perspective,* 112 U. Pa. L. Rev. 1 (1963); *but see,* Davis, *"Judicial Control of Administrative Action:" A Review,* 66 Colum. L, Rev. 633, 667 (1966).

33. 345 U.S. 153 (1953).

34. The Court stated: "We hold that petitioners have standing. Differences of view, however, preclude a single opinion of the Court. . . . " *Id.* at 156.

no personal injury but argued that his statutory duties[35] constituted grounds for standing.

The apparent ground upon which standing was granted in the *Chapman* case has been made explicit in recent judicial decisions. In the past, if the public interest was affected by an administrative decision, the courts would grant standing to a privately injured party. Now, however, if no one is privately injured by the alleged agency action, standing will be granted to a party who demonstrates personal interest in the area affected by the administrative decision. Thus, a conservation group has been allowed to protest an agency order affecting the use of virgin land.[36] In that case the court stated:

> In order to insure that the Federal Power Commission will adequately protect the public interest in aesthetic, conservational and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be aggrieved parties. . . .[37]

Explicit standards to govern such grants of public interest standing have since been formulated.[38] The past record of the agency as the representative of the public, the nature of the "public rights" to be vindicated, and the financial ability of the petitioner to bear the cost of litigation have been suggested as relevant criteria.[39]

Public interest standing has thus evolved to provide broad availability of judicial review of administrative action. In this process, an unarticulated principle seems to have functioned. The courts have apparently relied on the conclusion that certain administrative actions will escape judicial review unless interested persons who have not suffered personal injury are recognized as

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35. The Secretary contended that it was his duty to act as marketing agent for publicly produced coal and to promote conservation and efficient utilization of natural resources. He alleged that because the FPC decision failed to take into account the latter considerations he was "aggrieved" by administrative action.

A similar argument was explicitly accepted in Washington Dep't of Game v. FPC, 207 F.2d 391 (9th Cir. 1953), *cert. denied,* 347 U.S. 936 (1954). In that case, the Washington State Departments of Game and Fisheries were permitted to challenge an FPC permit grant which allowed two dams to be built on a navigable state river. The petitioners contended that the questioned project would destroy fish which they were under a duty to protect.

36. Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966).

37. 354 F.2d at 616. Petitioners were also said to have suffered some economic injury, but the court did not regard this as a crucial factor. *Id. See also,* Lafayette Electronics Corp. v. United States, 345 F.2d 278 (2d Cir. 1965).

38. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1004-06 (D.C. Cir. 1966).

39. The court went on to say that agencies may formulate other reasonable rules to determine who will represent the public interest before the Commission. In City of San Antonio v. CAB, 374 F.2d 326 (D.C. Cir. 1967), an agency's rule for limiting the amount of petitioning parties was upheld. The city which sought standing was held to be similarly situated to several others of the sixty-five cities already in the proceeding. Its interests as well as those of the public as a whole were already wll represented. It seems, however, that the "reasonableness" of an agency's discretionary rules may be successfully attacked. *Cf.* Telephone Users Ass'n, Inc. v. FCC, 375 F.2d 923, 925 (D.C. Cir. 1967).

aggrieved parties. Thus, judges have seen fit to lessen the standing requirements in order to insure that the public interest will be considered in agency decisions.

III. Taxpayer Suits in the "Public Interest"

A. *State and Municipal Taxpayer Standing*

The early unrealistic approaches to public interest standing in the federal administrative agency cases are similarly found in the judicial treatment of state and municipal taxpayer suits.[40] Thus, many courts have insisted that a potential representative of the public interest have alleged that he is a contributor to the public treasury.[41] Although this requirement may be reasonable if the litigant is seeking to question government spending, it has been demanded when no apparent expenditure of funds is involved.[42] Other courts have granted standing to obviate future increases in tax burdens when it appeared that the net outcome of the suit would have no appreciable affect upon present or future levels of taxation.[43]

Perhaps the most popular judicial rationale for taxpayer standing is the analogy to the shareholder derivative suit.[44] A stockholder expends a certain amount of money to purchase shares in a corporation. When the shareholder's funds pass into the corporate treasury, a right to prevent illegality within the corporation attaches. At this point, the directors of the corporation are liable to the shareholder for subsequent wrongful actions.[45] Analogously, it has been argued that government officers are directors, and taxpayers are stockholders in the state or municipal corporation. When an individual's tax payments enter the government treasury, he has a right to enjoin subsequent illegal acts of the government.[46] However, this analogy appears to fail when it is considered that a shareholder's interest is based solely on voluntary stock ownership; in contrast, the taxpayer's interest arises compulsorily from residence within a jurisdiction.[47] Furthermore, the functions of government affect many aspects of every individual's existence, while corporate action touches only a shareholder's pocketbook.[48]

40. An excellent history of the taxpayer suit may be found in Comment, *Taxpayer's Suits: A Survey and Summary,* 69 Yale L.J. 895 (1960).

41. *See, e.g.,* Coyle v. Housing Auth. of City of Danbury, 151 Conn. 421, 198 A.2d 709 (1964); Daly v. Madison County, 378 Ill. 357, 38 N.E.2d 160 (1941); Chircop v. City of Pontiac, 363 Mich. 693, 110 N.W.2d 624 (1961); Loewen v. Shapiro, 389 Pa. 133, A.2d 525 (1957); Lyon v. Bateman, 119 Utah 434, 228 P.2d 818 (1951); Democrat Printing Co. v. Simmerman, 245 Wis. 406, 14 N.W.2d 428 (1944).

42. *See, e.g.,* Howard v. City of Boulder, 132 Colo. 401, 290 P.2d 237 (1955) (Taxpayer may compel method of electing councilmen.); N.Y. Alco. Bev. Control Law § 123 (Taxpayer may enjoin illegal or unlicensed manufacture of wine, beer or liquor.).

43. *See, e.g.,* Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915); Thompson v. City of Dearborn, 347 Mich. 365, 79 N.W.2d 841 (1956).

44. *See, e.g.,* Sherlock v. Village of Winnetka, 59 Ill. 389 (1871); Shipley v. Smith, 45 N.M. 23, 107 P.2d 1050 (1940); Land, Log & Lumber Co. v. McIntyre, 100 Wis. 245, 75 N.W. 964 (1898).

45. 4 J. Dillion, Municipal Corporations § 1579 (5th ed. 1911).

46. *Id.* §§ 1580, 1581.

47. *See* Note, 50 Harv. L. Rev. 1276, 1277 (1937).

48. *See generally* Comment, 2 Buffalo L. Rev. 140, 145-46 (1953).

The questionable reasoning in the judicial treatment of taxpayer standing may well be due to the historical context in which such suits arose. In the latter part of the nineteenth century the political scandals, epitomized by the "Tweed Ring," provided a catylyst for the taxpayer suit.[49] A need was recognized for some "between election" control of government expenditures.[50] The judiciary fulfilled this need by allowing the state and local taxpayers to protest questionable government spending.[51] Thus, as originally formulated, taxpayer standing was based on social policy rather than a traditional concept of standing.

While the noteriety, if not the actuality, of misuse of government funds has abated,[52] judges who have recently faced the standing issue have still allowed the taxpayer to sue.[53] The most reasonable explanation for modern taxpayer standing lies in judicial value judgments. Courts are balancing the interests of the public in questionable government expenditures against the lack of a traditional, personally injured plaintiff.[54] Apparently, the public interest has become the predominating value and, lacking a more directly affected plaintiff, judges have granted the taxpayer standing to represent the citizenry. As one court has stated:

> A holding that a citizen and taxpayer . . . cannot question the right of the city council to enter into such a vast undertaking [construction of a city power plant with tax revenues] . . . would practically result in a situation where no one would have a right to question the rights of the council's illegal act in so doing.[55]

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49. This historical background is stated in Ayers v. Lawrence, 59 N.Y. 192 (1874). That case dealt with a statute which authorized municipal taxpayer suits. [1872] N.Y. Sess. Laws ch. 161, *now* N.Y. Mun. Law § 51. Prior to the enactment of this statute, local taxpayers had been denied standing. Adriance v. Mayor of N.Y., 1 Barb. 19 (N.Y. Sup. Ct. 1874). Furthermore, state prosecutors could not recover from third parties who wrongfully appropriated municipal funds. People v. Ingersoll, 58 N.Y. 1 (1874); People v. Fields, 58 N.Y. 491 (1874).

50. Arguably, the taxpayer suit rather allows minorities, ineffective at the ballot box, to impede the functionings of elected representatives. *But see infra* notes 104, 105 and accompanying text.

51. The taxpayer was originally granted standing to sue "in the public interest." This fact is evident from the early cases which involved public debt financings, letting of public contracts and granting of public franchises and licenses. *See, e.g.,* Littler v. Jayne, 124 Ill. 123, 16 N.E. 374 (1888); Sanridge v. Village of Spring Lake, 112 Mich. 91, 70 N.W. 425 (1897); Lynn v. Polk, 76 Tenn. 121 (1881); Seymour v. City of Tacoma, 6 Wash. 138, 32 P. 1077 (1893).

52. Mass media tends to devote little space to local and state government affairs which are not sensational. Therefore, clandestine corruption may continue on a small scale without large exposure. *See* E. Hofstadter, The Age of Reform, 265-66 (1955). *See generally* J. Boyd, Above the Law (1968).

53. *See,* Iowa Mut. Tornado Ins. Ass'n v. Timmons, 252 Iowa 163, 105 N.W.2d 209, 216 (1960) (dictum); Vibberts v. Hart, 85 R.I. 35, 125 A.2d 193 (1956); Miller v. City of Pasco, 50 Wash. 2d 229, 310 P.2d 863 (1957).

54. *See,* Clapp v. Town of Jaffrey, 97 N.H. 456, 91 A.2d 464, 467 (1952); *cf.* Lien v. Northwestern Eng'r Co., 74 S.D. 476, 54 N.W.2d 472 (1952).

55. Abbott v. Iowa City, 224 Iowa 698, 277 N.W. 437, 439 (1938). *See also* Reiter v. Wallgreen, 28 Wash. 2d 872, 184 P.2d 571 (1947). In *Reiter,* the court held that a taxpayer must initially petition the attorney general to challenge a questioned expenditure or demonstrate that such a petition would be useless. The court went on to state: "We have never held that, in a proper case *where the attorney general refused to act to protect the public interest,* a taxpayer could not do so." *Id.* at 874, 184 P.2d at 573.

In the minority of jurisdictions which normally deny standing to the state taxpayer, the personal injury requirement has been the predominating value.[56] Only in a few deviant cases, when the suing taxpayer has raised an important issue, have the courts overlooked the standing problem.[57] Generally, the taxpayer's injury is too insubstantial and indirect to constitute grounds for standing.[58]

B. *Federal Taxpayer Standing*

The right of the federal taxpayer to enjoin the execution of a federal appropriation act was initially decided by the 1923 Supreme Court case of *Frothingham v. Mellon*.[59] In that case, the plaintiff sought to question the constitutionality of the so-called "Maternity Act,"[60] a Congressional statute granting federal funds for the purpose of reducing maternal and infant mortality in the states. Petitioner alleged that since the illegal operation of the act would increase her future tax burden, she was deprived of her property without due process of law.[61] This issue was not litigated, however, as the taxpayer was denied standing. The court upheld its previous approval of local taxpayer standing based on the analogy to the shareholder derivative suit.[62] However, this analogy was held to be inapplicable to the federal taxpayer who, unlike the local taxpayer in relation to municipal expenditures, has a "comparatively minute and indeterminable" interest in federal spending.[63] Because of this token interest, the federal taxpayer could not demonstrate a direct personal injury. The court concluded that, lacking a personally aggrieved plaintiff, the "case or controversy" requirement of the Constitution[64] had not been fulfilled and the suit must therefore be dismissed.[65]

The *Frothingham* holding, approved in numerous cases,[66] has been limited on only two occasions. In one case,[67] a statute which explicitly stated that cer-

56. Only two states, New York and New Mexico, appear to squarely prohibit taxpayer's suits on the state level. Asplund v. Hannett, 31 N.M. 641, 249 P. 1074 (1926); Schiefflin v. Komfort, 212 N.Y. 520, 106 N.E. 675 (1914) (the mere payment of taxes in common with the public affords no basis for attacking the constitutionality of state acts).

57. *See, e.g.*, Miller v. Cooper, 56 N.M. 641, 244 P.2d 520 (1952); Kuhn v. Curran, 294 N.Y. 207, 61 N.E.2d 513 (1945); *Cf.*, Anderson v. Rice, 277 N.Y. 271, 14 N.E.2d 65 (1938); Cash v. Bates 301 N.Y. 258, 93 N.E.2d 835 (1950).

58. *See, e.g.*, Bull v. Stichman, 273 App. Div. 311, 78 N.Y.S.2d 279 (2d Dep't 1948), *aff'd*, 298 N.Y. 516, 80 N.E.2d 661, 300 N.Y. 460, 88 N.E.2d 325 (1949), where little weight was given to previous New York decisions which had not carefully considered the standing issue, *see supra* note 57 and the state taxpayer's suit was dismissed.

59. 262 U.S. 447 (1923).

60. 42 Stat. 224, c. 135 (1921).

61. 262 U.S. at 486.

62. *Id.*

63. *Id.* at 487.

64. U.S. Const. Art. III, § 2.

65. 262 U.S. at 489.

66. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) (dictum); Doremus v. Board of Educ., 342 U.S. 429 (1952) (dictum); United States v. Butler, 297 U.S. 1 (1936) (dictum); Williams v. Riley, 280 U.S. 78 (1929) (dictum); Laughlin v. Reynolds, 196 F.2d 863 (D.C. Cir. 1952); Elliot v. White, 23 F.2d 997 (D.C. Cir. 1928); Wheless v. Mellon 10 F.2d 893 (D.C. Cir. 1926); Gart v. Cole, 166 F. Supp. 129 (S.D.N.Y. 1958).

67. United States v. Butler, 297 U.S. 1 (1936).

tain taxes imposed upon processors of farm products would be used to fund a farm support program[68] was attacked. The plaintiff taxpayer was held to be directly affected by this tax because he was also a farm products processor whose specific tax dollar would be used in the questioned program.[69] In the second case, federal expenditures were found to be inseparably interwoven with allegedly illegal local action.[70] The court reasoned that because the federal taxpayer was directly and personally injured by the local occurrences, he could challenge that action and the legality of the federal expenditures.[71]

In the limiting situations above, the taxpayer was able to show a personal injury apart from his normal payment of taxes and thus fulfill the "case or controversy" requirement of the *Frothingham* case. However, if the petitioner wishes to rely only on his status as a taxpayer to obtain standing, he must show a "direct dollars-and-cents injury."[72] Apparently, this requirement may be fulfilled by contributing a large enough quantity of money to the relevant treasury. Thus, in *Everson v. Board of Educ.*,[73] a local taxpayer was found to have had a substantial enough interest in his city's spending to be personally injured by a questioned local expenditure. Despite the fact that a local rather than federal taxpayer was involved, the rationale of *Frothingham* was applicable since the Supreme Court's "case or controversy" requirement had to be met to obtain standing. The Court allowed the petitioner to protest his municipality's program for reimbursement of bus fares to parochial school children because his economic interests were directly affected by the spending of the local school board.[74]

Academicians have criticized the use of quantitative financial injury as a basis for allowing the local taxpayer a right to sue and denying standing to the federal taxpayer.[75] Professor Davis has reasoned that the large corporation's contribution to the federal treasury is proportionately greater than the the local taxpayer's contribution to the municipal treasury.[76] Since the corporation's economic interest in federal expenditures may thus be as directly affected as the local taxpayer's economic interests in municipal expenditures, the corporation should have standing to challenge Congressional spending.[77]

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68. Agricultural Adjustment Act, c. 25, 48 Stat. 31, § 9 (1933).
69. *But see* Cain v. United States, 211 F.2d 375 (5th Cir. 1954) where the court apparently rejected the "specifically earmarked" distinction holding it to be no extension of the power of Congress. Note, 2 U.C.L.A. L. Rev. 29 (1954).
70. Franklin Township v. Tugwell, 85 F.2d 208 (D.C. Cir. 1936).
71. For a different conception of this case, *see* Note, 50 Harv. L. Rev. 1276, 1280 (1937).
72. Doremus v. Board of Educ., 342 U.S. 429, 434 (1952).
73. 330 U.S. 1 (1947).
74. Although the Supreme Court failed to expressly deal with the standing question in *Everson,* its position on that case was expressed in Doremus v. Board of Educ., 342 U.S. at 434.
75. *See* 3 K.C. Davis, Administrative Law Treatise, § 22.09, at 244 (1958); L. Jaffe, *supra* note 32, at 484.
76. 3 K.C. Davis, *supra* note 75.
77. Professor Davis theorizes that General Motors, which pays in the vicinity of a

Notwithstanding this demonstrated anomaly, the courts have refused to recognize the economic injury of the federal taxpayer as the requisite personal injury which has traditionally been needed to bring suit.[78] However, the purpose of requiring a showing of personal injury is to assure a concrete adverseness;[79] when the litigant has been able to demonstrate such adverseness without personal injury, the Court has granted standing. For example, in *Baker v. Carr*[80] the appellants were voters who sought to determine the constitutionality of the voting district apportionment of certain counties in Tennessee. The litigants did not plead a direct personal injury, apparently because their votes were in fact being counted toward election of a Congressional representative. They could show only a "disadvantage to themselves as individuals"[81] because their votes were not being given the same weight as others. Nevertheless, the Court concluded that the appellants had demonstrated a "personal stake in the outcome of the controversy"[82] which assured that adverse parties were involved in litigation. The Court went on to note that these litigants were suing on their own behalf and on behalf of "those similarly situated."[83] Thus, having found the requisite "adverseness," the Court accepted what was, in effect, a suit on behalf of the public interest.

In the treatment of public interest suits in the federal agency area, personal injury was explicitly rejected as a *sine qua non* for standing. Circuit Judge Frank, in *Associated Indus., Inc. v. Ickes*,[84] found that the required "controversy" existed when a government officer's action was attacked as a violation of his statutory powers.[85] Therefore, Congress could constitutionally authorize an individual who has suffered no personal injury to challenge the action of a federal agency.[86] Similarly, in the taxpayer cases, it could be reasoned that a "controversy" exists when a government expenditure is attacked as a violation of the Constitution.[87] In this manner, a court could allow an individual to challenge the constitutionality of the expenditure.

Since there is no constitutional requirement of personal injury, the *Frothingham* principle appears to be a rule of policy rather than a rule of law.[88] The policies operative in the federal agency cases have caused the Court to abandon

billion dollars in taxes yearly, makes a two per cent pro rata contribution to each federal expenditure. *Id.*

78. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

79. *Cf.* School District of Abington v. Schempp, 374 U.S. 203 (1963); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); NAACP v. Button, 371 U.S. 415 (1962); NAACP v. Alabama, 357 U.S. 449 (1958); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

80. 369 U.S. 186 (1962).

81. *Id.* at 206.

82. *Id.* at 204.

83. *Id.* at 207.

84. 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

85. 134 F.2d at 704.

86. *Id.*

87. L. Jaffe, *supra* note 32, at 498.

88. *See* 3 K.C. Davis, *supra* note 75, at 243; L. Jaffe, *supra* note 32; S. Rep. No. 85, 90th Cong., 1st Sess. 4 (1967); *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 2, 492-501 (1966) (statements

personal injury as a requirement for standing in that area.[89] The final consideration therefore is whether the policies operative in the taxpayer cases require the use of personal injury as a basis for standing.

IV. Considerations of Policy

By allowing a litigant who has suffered no personal injury to challenge federal agency action, the courts have substantially broadened the possibility of judicial review of administrative decisions. As a result, the affected agency is required to expend more energy and attention in litigating appeals. Furthermore, by thus allowing the courts to pass on administrative policy changes more regularly, a commission's capacity to plan for new events is inhibited.[90] Thus, flexibility in the administrative agencies is sacrificed. However, the courts will grant standing only when the latter considerations are outweighed by the public importance of the issue raised by the petitioner.[91] Similarly, in the state and local taxpayer cases, the courts have often granted standing only if the issue raised was significant,[92] and only if the case was proper for judicial intervention.[93] Concededly, there are areas of the law where no one has standing because the subject is one entrusted to the final authority of government branches other than the judiciary.[94]

Notwithstanding the fact that the above limitations could be operative in federal taxpayer standing, some judges have suggested that such a right to sue would result in a proliferation of litigation and inundation of the federal courts.[95] However, financial deterrents to potential litigants,[96] the use of class actions,[97] and the power to stay or consolidate redundant actions[98] mitigate the force of

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of Profs. Davis, Griswold & Freund); 111 Cong. Rec. 6131-32 (1965) (remarks of Rep. E. Cellar).

89. *See* Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966); Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); *see also supra* notes 31-38 and accompanying text.

90. Shapiro, *The Supreme Court and Government Planning: Judicial Review and Policy Formulation,* 35 Geo. Wash. L. Rev. 329, 339 (1966). *See* M. Bernstein, Regulating Business by Independent Commission 93-96 (1955); Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards,* 75 Harv. L. Rev. 863 (1962). *But see* Reich, *The Law of the Planned Society,* 75 Yale L.J. 1227, 1248-55 (1966).

91. *See,* Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965).

92. *See, e.g.,* Kuhn v. Curran, 294 N.Y. 207, 61 N.E.2d 513 (1945); *see also* Miller v. Cooper, 56 N.M. 641, 244 P.2d 520 (1952).

93. *See supra* note 54 and cases cited therein.

94. These areas of "non-justiciability" are normally termed "political questions" by the courts. However, whether an issue is "political" is itself a question of law for which nebulous standards apparently exist. *See* Frank, *Political Questions,* in Supreme Court and Supreme Law 36-43 (E. Cahn, ed. 1954); *see also infra* notes 116, 117 and accompanying text.

95. Trepidation was originally expressed in Frothingham v. Mellon, 262 U.S. 447, 487 (1923): "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same . . . in respect of every other appropriation act and statute. . . ."

96. For a determination of permanent and possible cost in federal court, see Fed. R. Civ. P. 30(g)(1), (2), 30(d), 37(a), (c), 41(d), 42(a), 45(b), (c), 53(d), 55(b)(1), 56(g), 58, 65(c), 68, 73(c), (d), (e), (f), 75(e), (j), 4(c).

97. *Id.* 23.

98. *Id.* 62(h), 42(a) respectively.

this contention. Furthermore, the fact that many people may sue upon a right has never been held to present an obstacle to suit.[99]

Some commentators have attempted to minimize the need for federal taxpayer standing as opposed to state and local taxpayer standing.[100] These writers suggest that federal spending, because it is of national significance, is susceptable to pressures of public exposure and criticism.[101] On the other hand, state and local expenditures are likely to be unpublicized and quickly forgotten.[102] Therefore, the state and local taxpayer must have standing to insure the proper channeling of his government's spending. However, this argument lacks validity in terms of a Congressman's constituency. If a proposed expenditure of questionable Constitutionality appeals to the majority of his voters, the respective Congressman is likely to support it.[103]

The most persuasive arguments against taxpayer standing involve personal motives and legislative flexibility. The litigating taxpayer, rather than seeking to uphold the "public interest," may be interested only in personal publicity, partisan political objectives, or delay of unwanted projects.[104] On any spectrum of values, these motives would not be adequate reasons for impeding the legislative process.[105] A further consideration is that the bulk of federal expenditures involves defense and foreign affairs.[106] Review of such spending may be particularly inappropriate because of a lack of judicial familiarity in these areas[107] and substantial problems of obtaining necessary documentation and information.[108]

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99. *Cf.* Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Brown v. Board of Educ., 347 U.S. 483 (1954).

100. *See,* H.M. Hart & H. Wechsler, The Federal Courts and the Federal System 166 (1953); Comment, 18 Ill. L. Rev. 204 (1924).

101. For an analysis of the extensive press coverage in Washington, D.C., *see* D. Cater, The Fourth Branch of Government (1959).

102. *See supra* note 52 and accompanying text.

103. In 1961, the late President Kennedy stated that proposed legislation to aid parochial schools raised a "serious constitutional question." N.Y. Times, March 9, 1961, at 16, col. 3. In 1965, Congress authorized the use of federal funds to finance guidance services and instruction in basic academic subjects in religiously operated schools. Funds were further appropriated for the purchase of textbooks and other instructional materials for use in such schools. Elementary and Secondary Education Act of 1965, tits. I, II, 20 U.S.C. §§ 241a-1e, 821-27 (Supp. 1. 1965).

104. Professor Davis submits that such "crackpots and officious intermeddlers" have not and would not overrun the courts. 3 K.C. Davis, *supra* note 75, at 254.

105. The Supreme Court appears to regard personal motivation as irrelevant. "[I]t would not matter that their dominant inducement to action was more religious than mercenary." Doremus v. Board of Educ., 342 U.S. 429 at 434 (1952). *But see* Pauling v. McNamara, 331 F.2d 796 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 933 (1964). The court significantly mentioned its feeling that the petitioner, Linus Pauling, was merely seeking personal publicity and denied him standing. 331 F.2d at 798.

106. For the fiscal year 1967, receipts totaled $115,794,051,984. Funds appropriated to the President for "Military" expenses were $849,959,911 and for "Denfense Department" expenses $68,913,073,246. The World Almanac 858 (1968). Foreign Aid expenditures for fiscal 1966 amounted to $4,535,000,000. *Id.* at 556.

107. *Cf.* United States v. Reynolds, 345 U.S. 1 (1935); Republic of China v. National Union Fire Ins. Co., 142 F. Supp. 551 (D. Md. 1956).

108. On the other hand, the sovereign immunity defense would not seem to be a bar. The taxpayer suit normally names certain public officials in charge of the relevant expendi-

Thus, a "blanket" right to challenge federal expenditures would be neither practical nor advisable. One writer has suggested that when the litigation involves a "clear-cut" issue in which everyone has a legitimate interest, the court should grant the taxpayer standing to sue.[109] This method would require the petitioner to convince the court that a so-called "public-right" is involved and that it is generally in the public interest to uphold that right.[110] However, under the weight of criticism based on the need for quick effectuation of federal spending programs,[111] the proposal has apparently been abandoned.[112]

V. Conclusion

The apparent solution to granting taxpayer standing on the federal level lies in a controlled use of judicial discretion. Specific rules for determining and limiting the type of federal spending which may be challenged should be formulated. In addition, definite standards for ascertaining whether a particular taxpayer is best qualified to represent the public interest in questionable government expenditures should be developed.

Pursuant to the necessities suggested above, it is first submitted that federal taxpayer standing be confined to cases which involve a justiciable Constitutional abridgment of public rights. This suggestion finds support in the facts of the recent case of *Flast v. Gardner*.[113] In that case, federal taxpayers sued to enjoin federal expenditures in aid of parochial schools.[114] The public's right to be free from government violations of the First Amendment's Establishment Clause[115] was thereby put in issue. This fact makes the case justiciable and provides basis for granting standing to a representative of the public interest.

In addition to allowing the public access to the courts in a proper situation, the above suggestion mitigates one of the major policy considerations against taxpayer standing. It may be argued that expenditures for defense and foreign affairs should not be reviewed because they may be based on secret government information and documentation. Since the rule herein suggested would not require a judicial inquiry into the government's reasons for passing particular legislation, disclosure of such evidence would not be required. The

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tures as defendants. The fact that the suit is against the officials rather than the government itself has been held sufficient to defeat the defense. *See, e.g.*, White Eagle Oil & Refining Co. v. Gunderson, 48 S.D. 608, 205 N.W. 614 (1925).

109. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 304 (1961).

110. L. Jaffe, *supra* note 32, at 490.

111. *See* Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 Sup. Ct. Rev. 15, 16.

112. L. Jaffe, *supra* note 32, at 497.

113. 271 F. Supp. 1 (S.D.N.Y. 1967), *prob. juris. noted*, 389 U.S. 895 (1967). The district court denied standing, interpreting *Frothingham* to mean that the federal taxpayer has no right to sue in that capacity.

114. The legislation which was challenged was the Elementary and Secondary Education Act of 1965, tits. I, II, 20 U.S.C. §§ 241a-1e, 821-27 (Supp. I, 1965).

115. U.S. Const., amend. I: "Congress shall make no law respecting an establishment of religion. . . . ."

actual effect of the statute by which the questioned expenditures were authorized would be the only consideration before the court.

The suggested rule would also preclude judicial entrance into the realm of non-justiciable "political questions." Such questions are not justiciable because they require the courts to review legislative or executive policy which has caused individual injury. For example, in *Pauling v. McNamara*,[116] petitioners were denied standing to enjoin the Secretary of Defense and members of the Atomic Energy Commission from detonating radiation-producing nuclear weapons. Although a personal injury to the appellants from radiation contamination could be shown, the court held that the questioned activities must be left to the final authority of the executive and legislative branches of the government.[117] Thus, absent the abridgment of a constitutional right, the court refused to pass on the policy involved in the testing of nuclear weapons. Accordingly, the policy involved in a questioned federal expenditure should not be challenged unless a constitutional right of the public is abridged.

Having determined that a justiciable public right is in issue, the court should further decide whether the litigant who is seeking standing is the best representative of the public interest. To this end, the traditional desire for "adverseness" should not be abandoned. Adverseness is best achieved when standing is granted to a person who has the greatest "personal stake"[118] in the outcome of the litigation. This principle is illustrated by the factual situation in *Doremus v. Board of Educ.*[119] In that case, a state's requirement that the Bible be read in public schools was challenged. A state taxpayer, suing in that capacity alone, could not show as great a personal stake in the outcome of the litigation as could a child or parent of a child in the public school system.[120] A student in the schools has a greater personal stake because, in having to participate in the questioned activity, he is personally injured. In contrast, in the previously discussed *Flast* case, since no one is personally injured by the questioned government expenditures, the taxpayer has the greatest personal interest in the outcome of the suit. His concern for the constitutional use of his and other members of the public's tax dollar assures "adverseness" in the litigation.

Adverseness may be further guaranteed by alluding to the recent developments in the federal administrative agency area. For example, in the *Scenic Hudson*[121] case, a conservation group was granted standing to represent the public interest in "aesthetic, conservational and recreational" aspects of power

116. 331 F.2d 796 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 933 (1964).
117. 331 F.2d at 801.
118. Baker v. Carr, 369 U.S. 186, 204 (1962).
119. 342 U.S. 429 (1952).
120. A petitioning parent was denied standing because her child had graduated before the case reached the Supreme Court. Since she no longer had a "personal stake" in the outcome of the controversy, adverseness was lacking.
121. Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

development because of their "special" interest in these areas.[122] Similarly, the federal taxpayer may be required to show a special interest in the issue placed before the court. This may necessitate good faith membership with an organization which has shown concern in the area of dispute. Besides further guaranteeing the taxpayer's "adverseness," such a showing would assure the public of a concerned and qualified representative and act as a deterrent to the frivolous suit.

The suggested requirements for federal taxpayer standing discussed above will to a large extent prevent the suit brought for personal rather than public motives. To further buttress this purpose, it may be advisable to adopt a financial deterrent. Specifically, a litigant may be required to post a bond sufficient to cover assessable costs and fees, unless a court is shown that the litigant is financially unable to do so.[123] Since a plaintiff's willingness to bear the cost of litigation manifests confidence in the soundness of his legal argument, this requirement will further assure adequate representation of the public interest.

A view of the history of Supreme Court decisions reveals that speedy and efficient handling of the docket was effectuated only by strict adherence to judicially developed standing rules. However, the pressing importance of a right to sue for the federal taxpayer may induce its legislative enactment.[124] Such legislation may be drafted with limitations as to the type of Congressional spending which may attacked. However, the statute may not limit or define the type of federal taxpayer who can sue. Thus, adequate representation of the public interest will not be assured and excessive and extraneous litigation may be protracted in the federal courts. Since the law of standing is inextricably involved in the "Justice delayed is justice denied" maxim of the judiciary, it is submitted that rules should be developed by the judiciary within the guidelines suggested above.

CHARLES A. ZIELINSKI

122. 354 F.2d at 616.

123. Six states which allow the taxpayer suit require such petitioner, in some circumstances, to perform this duty. Ariz. Rev. Stat. Ann. §§ 11-642, 35-213 (1956); Ark. Stat. Ann. § 84-1613 (1949); Cal. Civ. Proc. Code Ann. § 5266 (1954); Ill. Rev. Stat. ch. 102 §§ 14, 16 (1957); N.Y. Mun. Law § 51; Ohio Rev. Code Ann. §§ 309.12-.13, 733.59 (1954).

124. The Senate has passed a bill that will allow a taxpayer to challenge federal expenditures which allegedly violate the First Amendment. S. 3 90th Cong., 1st Sess.; S. Rep. No. 85, 90th Cong., 1st Sess. 4-7 (1967).