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I. INTRODUCTION

On June 10, 1968, the Supreme Court held in Flast v. Cohen, that a federal taxpayer had standing to challenge the constitutionality of a congressional appropriation when the challenge was grounded on a specific constitutional limitation of the Congressional power to tax and spend.

The plaintiffs, whose standing to sue was premised solely on the ground that they were citizens and taxpayers of the United States, alleged that the establishment of religion clause was being violated by expenditures of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965. Funds were being appropriated under the Education Act "to finance instruction of reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools." The Government had moved in the district court to have the complaint dismissed on the ground that the plaintiffs lacked standing to maintain the action. The Government's allegation was premised on the rule announced by the Supreme Court over four decades ago in Frothingham v. Mellon. In Frothingham the Court determined that a federal taxpayer did not have standing to challenge a Congressional appropriation because his portion of the expenditure "is comparatively minute and indeterminable... [so that]... no basis is afforded for an appeal to the preventive powers of a court of equity." The district court noted that the Frothingham opinion provided "powerful" support for the Government's contention. However, the court believed that the issue of standing presented by these plaintiffs was of such great importance that a three-judge court should be convened to decide the question.

1 392 U.S. 83 (1968).
2 It is the purpose of this article to establish that there exists no other specific constitutional limitation on the powers of Congress to tax and spend than the religious provisions of the first amendment. But see 82 HARV. L. REV. 95, 224-231 (1968) [hereinafter cited as 82 HARV. L. REV.].
3 79 Stat. 27 (1965).
6 262 U.S. 447 (1923).
7 Id. at 453.
9 Id. at 355.
The three-judge court, with Judge Frankel dissenting, held that the plaintiffs lacked standing to sue because the district court was bound to follow the Supreme Court's pronouncement in Frothingham. The plaintiffs made a direct appeal of the decision to the Supreme Court under the appropriate provision of the judicial code. The Supreme Court noted probable jurisdiction.

After determining that the three-judge court had been properly convened, the Court was faced with the problem of determining "whether Frothingham established a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self-restraint which was not constitutionally compelled." However, in order to determine the answer to that all-important question, the Court first had to determine what was meant by the term standing, a term which the Court called "one of the most amorphous [concepts] in the entire domain of public law."

The Court concluded that the concept of standing was an integral part of the doctrine of justiciability. The Court further concluded that the doctrine of justiciability placed both a constitutional and a non-constitutional limitation on the jurisdiction of the federal courts. The constitutional barrier is the requirement of article III, section 2 that federal courts only render opinions where the issues are presented in the form of a "case or controversy". The Court interpreted this clause of the Constitution to mean that: "Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through

10 Judge Frankel had written the decision which granted the plaintiffs the three-judge court to decide the issue of standing.
12 Under 28 U.S.C. § 1253 a direct appeal may be made to the Supreme Court from a district court "... from an order granting or denying... an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."
14 The Government contended that the three-judge court had been improperly impaneled for two reasons. First, the plaintiffs, only wanted to enjoin the operation of practices of the New York City School Board and 28 U.S.C. § 2282 requires that a plaintiff must seek to enjoin the entire statutory scheme before a three-judge court can be called. Second, a three-judge court should not have been convened because appellants questioned not the constitutionality of the Elementary and Secondary Education Act of 1965 but only its administration.
15 392 U.S. at 92.
16 Id. at 99.
the judicial process." The non-constitutional barrier is the self-imposed rule that the Court will avoid prematurely passing on constitutional questions. The Court had, thus, determined that the doctrine of justiciability was "a blend of constitutional requirements and policy considerations;" a short-hand expression for all the various reasons why cases sought to be adjudicated in federal courts have been held to be non-justiciable. Aside from standing, the Court stated that "no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion . . . [or] when the question sought to be adjudicated has been mooted by subsequent developments . . . ."

Based upon these conclusions, the Court was able to determine that the requirement that the plaintiff must have standing to sue focused upon the party who was bringing the action and not, as with the other requirements of the doctrine of justiciability, on the issues to be adjudicated. In other words, standing pertained to the problem of whether the plaintiff was the proper party to request an adjudication of a particular issue, not whether the issue itself was justiciable. The Court explained this distinction between standing and the other facets of the doctrine of justiciability by stating that while the plaintiff may be the proper party to bring the action, there may exist other grounds which concern the justiciability of the issues presented, such as political question, upon which a court could properly determine that the plaintiff's case was non-justiciable. The Court verbalized this position by stating that:

The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

Premised on this analysis of the concept of standing, the Court concluded that the question of whether the plaintiff was the proper party to maintain the action, did not of itself, "raise separation of powers problems related to improper judicial interference in areas

17 Id. at 97.
18 See Mr. Justice Brandeis' concurring opinion in Ashwander v. TVA, 297 U.S. 288, 346-48 (1936), for an excellent discussion of the development of rules by the Supreme Court, whereby the Court refuses to pass upon the merits of a case which is confessedly within its jurisdiction.
19 392 U.S. at 97.
20 Id. at 95.
21 Id. at 99. (emphasis added).
committed to other branches of the Federal Government.\footnote{22} If such a problem were to arise at all, it would be only because of the issues the plaintiff sought to have adjudicated.\footnote{23} Thus, the only constitutional barrier which standing places on the jurisdiction of the federal courts is concerned with whether the dispute sought to be adjudicated will be "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."\footnote{24} Viewed in this context, Frothingham must be thought of as an articulation of a policy that federal taxpayers are not the proper party to challenge the constitutionality of federal expenditures because they do not have a great enough personal stake in the outcome of the case to guarantee that the issues presented for the Court's determination will be those thought to be capable of resolution through the judicial process. The present Court, however, refused to agree with such a policy. It believed that under certain conditions,\footnote{25} "a taxpayer may have the requisite personal stake in the outcome..."\footnote{26} to make him the proper party to sue. The question which the Court then had to answer is when does a taxpayer possess such a personal stake?

The Court established two requirements which a taxpayer must meet before his status as a taxpayer would make him the proper party to challenge the constitutionality of a Congressional appropriation. First, the taxpayer must establish a logical connection between his status as a taxpayer and the type of legislative enactment attacked. The Court, therefore, concluded that a taxpayer would be the proper party to challenge the unconstitutionality of Congressional legislation where Congress' power to act is based on the taxing and spending clause "rather than an incidental expenditure in the administration of an essentially regulatory

\footnote{22} Id. at 100.
\footnote{23} It should, however, be noted that the doctrine of separation of powers may to some degree influence a court's determination as to whether or not the plaintiff has standing to sue. If it clearly appears that the issues presented for the court's determination are non-justiciable, a court may confuse the criteria which the Supreme Court has established in Flast for the determination of standing. See note 21, supra, and accompanying text. Such a court might, then, hold that the plaintiff does not have standing when what is really meant is that the issues presented by the plaintiff are non-justiciable.
\footnote{24} 392 U.S. at 95.
\footnote{25} As an example of a situation in which a taxpayer would have standing to sue, the Court stated that if Congress provided funds for the construction of churches for particular sects, it is obvious that a taxpayer would have standing to sue to enjoin the expenditure of federal funds for such a blatantly religious purpose.
\footnote{26} 392 U.S. at 101.
statute..."27 Second, the Court required that the taxpayer must establish a nexus between the first requirement and the precise nature of the constitutional infringement alleged. This requirement, the Court concluded, forced the taxpayer to prove:

... 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, § 8.28

The Court then applied this standard to the facts of the case at hand and determined that the plaintiffs had satisfied both requirements. First, their challenge was against a Congressional exercise of power under article I, section 8. Second, the challenge was premised on the establishment clause which was enacted to provide that the federal government would be completely secular, and must, thus, be considered to operate "... as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8."29

The Court then attempted to establish that Flast was distinguishable from Frothingham. It pointed out that in Frothingham the taxpayer’s claim had not been based on a violation of a specific constitutional limitation on the taxing and spending power of Congress. Instead, it was premised on the allegation that Congress had exceeded the general powers delegated to it by article I, section 8 by enacting the Maternity Act of 1921.30 However, the Court while attempting to distinguish the two cases, stated a proposition which is apparently incorrect:

[Whether the Constitution contains other specific limitations [on the Congressional power to tax and spend other than the religious provisions of the first amendment] 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.31

It is the contention of the author of this article that there exists no other specific limitation on the Congressional power to tax and spend than the first clause of the first amendment. In other words, a federal taxpayer qua taxpayer has standing to challenge a Congressional appropriation only when the alleged unconstitutionality of an expenditure is premised on a violation of the religious pro-

27 82 Harv. L. Rev., supra note 2, at 229-30.
28 392 U.S. at 102-3.
29 Id. at 104.
30 42 Stat. 224 (1921).
31 392 U.S. at 105.
visions of the first amendment. \(^{32}\) This proposition is based upon the conclusion that the religious provisions of the Constitution are preferred rights. \(^{33}\) They are so preferred that when they are alleged as being violated the taxpayer, merely alleging such a contention, has presented a dispute which will guarantee that "... the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." \(^{34}\)

An argument theoretically could be put forward that the second clause of the first amendment concerned with freedom of speech and press is just as preferred \(^{35}\) as is the first clause concerned with religious freedoms, so that a taxpayer would have standing to challenge a Congressional appropriation which violates freedom of speech and press. This allegation is incorrect. The Supreme Court has maintained that no law may be passed by a state or the federal government which breaches the \textit{wall} between church and state. \(^{36}\) However, the Court has not been as strict with its interpretation of the Government's right to abridge a citizen's freedom of speech and press. In fact, Mr. Justice Douglas maintains that the words in the first amendment, "Congress shall make no law ... abridging freedom of speech" have been interpreted by his brethren on the Court to mean: "Congress may make some laws that...

\(^{32}\) But see Henkin, The Supreme Court: 1967 Term—Foreward, 82 Harv. L. Rev. 63, 72-76 (1968), suggesting that there exists no other specific limitation on the Congressional power to tax and spend than that such spending must provide for the general welfare. However a student commentator writing in the same edition of the Harvard Law Review, 82 Harv. L. Rev., supra note 2, states that there exists other specific constitutional limitations on the congressional power to tax and spend than the religious provisions of the first amendment. A taxpayer, though, will not be accorded standing to challenge such federal expenditure, unless he can show "... that the particular taxing power abuse proscribed by the provision was historically feared as a significant instrument of majoritarian oppression ..." Id. at 231.

\(^{33}\) Mr. Justice Douglas has suggested that the religious provisions of the first amendment hold a dominant position in the myriad of rights granted to us by the Constitution. Thus, when alleging such rights, the requirements of standing are satisfied merely because such rights are alleged as being violated. Douglas, The Bill of Rights Is Not Enough, 38 N.Y.U. L. Rev. 206, 226-27 (1963) [hereinafter cited as Douglas].

\(^{34}\) 392 U.S. at 106.

\(^{35}\) In Kovacs v. Cooper, 336 U.S. 77, 88 (1949): Mr. Justice Reed speaks of "... the preferred position of freedom of speech in a society that cherishes liberty ... ."

abridge freedom of speech." Thus the second clause of the first amendment is not as preferred as the first so that even if the situation arose where a taxpayer could be considered as the proper party to challenge a violation of the freedom of speech, it is doubted that the Court would consider that the issues presented for adjudication were presented in an adversary context and in a form historically viewed as capable of judicial resolution.

It should be noted that the Flast exception is not a new doctrine. The foundation for it was laid almost seventy years ago by the Supreme Court's ruling in Bradfield v. Roberts. In Roberts, the

Douglas, supra note 33, at 217. A good example of the fact that freedom of speech is a conditional right is Mr. Justice Holmes' statement in Schenck v. United States, 249 U.S. 47 (1919), that even "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic... (freedom of speech) does not even protect a man from an injunction against uttering words that may have all the effects of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Id. at 55. (emphasis added).

Violations of one's freedom of speech normally arise when the defendant in a criminal action alleges that the law which he is charged with breaking abridges his freedom of speech. Dennis v. United States, 341 U.S. 494 (1951). Thus it is doubtful that an alleged violation of freedom of speech would ever arise pursuant to an enactment by Congress under the powers granted to it by the taxing and spending clause. As noted above the first requirement which a taxpayer must meet before he may be considered to have standing is that the legislation which is alleged to be unconstitutional must have been enacted pursuant to the taxing and spending power of Congress, not merely an appropriation pursuant to a regulatory enactment. See note 27, supra, and accompanying text.

175 U.S. 291 (1899).

There exists a divergence of opinion as to whether or not Roberts can be considered as precedent for the proposition stated in this article. In Frothingham, the Court stated that the case was not applicable to the problem of federal taxpayer suits because the case involved a taxpayer attempting to enjoin his municipality. 262 U.S. 447, 454 (1923). Further, a recent student commentator stated that Roberts was inapplicable to the Flast situation because "... the 'wall of separation' theory of the establishment clause... [had not yet]... crystallized as judicial norm." 46 Tex. L. Rev. 559, 563 n. 26 (1968) [hereinafter cited as 46 Tex.]. There appears, however, to be just as convincing authority stating that Roberts is precedent for the proposition stated in this article. 3 K. Davis, Administrative Law Treatise § 22.09 at 243 (1958); Hearings on S. 2907 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong. 2d Sess., at 65 (1966) [hereinafter cited as Hearings on S. 2907].
appellant brought suit as a citizen and taxpayer of the United States and a resident of the District of Columbia to prevent the defendant, the Treasurer of the United States, from making payments to the Providence Hospital of the District of Columbia. Such payments were to be made pursuant to an agreement between the hospital and the Surgeon General of the Army, whereby the Government was to erect a building on the grounds of the hospital for the care and treatment of minor contagious diseases. After completion, the building was to become the property of the hospital, provided two-thirds of its beds were reserved for the use of such poor patients as the Commissioners of the District, in their discretion, sent to the hospital. The Providence Hospital was a private hospital, staffed by nurses who were members of the Order of Sisters of Charity, an order of the Roman Catholic Church. The appellant-taxpayer thus charged that since the Hospital was run by nuns, it was a sectarian corporation and that payments by the Government to such a corporation were in violation of the establishment clause because public funds were "being used and pledged for the advancement and support of a private and sectarian corporation." However, the Court affirmed the decision of the Circuit Court of Appeals that the payments were permissible because the hospital was "a secular corporation being managed by people who hold to the doctrine of the Roman Catholic Church."

It should be noted, however, that the Court's decision to affirm was made on the merits of the issues presented by the parties and not on the threshold problem of whether the appellant-taxpayer had the requisite standing to challenge the appropriation. Further, the Court seemed to indicate that if the hospital had been found to have been a religious corporation, the appellant could have successfully challenged the agreement. Thus, the Roberts case would appear to be precedent for the proposition that freedom of religion is one of the most, if not the most, preferred rights granted to the people of the United States by their Constitution.

41 175 U.S. at 297.
42 Id. at 299.
43 Mr. Justice Peckman began the Court's opinion by stating that the Court would "...[pass over] the various objections made to the maintenance of this suit on account of the alleged defect of parties, and also in regard to the character in which the complainant sues, merely that of a citizen and taxpayer of the United States..." and that the case would be decided on the issue of whether or not the agreement between the Surgeon General and the Hospital violated the religious provisions of the first amendment. Id. at 295.
II. THE PREFERRED RIGHTS DOCTRINE

The belief that there exists a high impregnable wall between church and state, the slightest breach of which can not be tolerated, is one of the basic pillars upon which our Government is founded. This belief in a wholly secular form of government was the basis for the establishment clause. Further, even before the Constitutional Convention was convened, the antagonism against any linkage between church and state was prevalent among the Founding Fathers. One of the most illustrative statements of this desire by the Founding Fathers was the reply by James Madison, the architect of the first amendment, to a tax proposed by the Virginia Legislature in 1785 which was to provide funds to be paid to those who taught religion in the public schools. In his reply known as the Memorial and Remonstrance Against Religious Assessments, Mr. Madison concluded that:

The religion of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these convictions may dictate. This right is in its nature an unalienable right. . . . [Thus], in matters of Religion, no man's right [may be] abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

This belief in a totally secular form of government has persisted until today. As Mr. Justice Black concluded in Everson v. Board of Education, the establishment clause means that:

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48 2 Writings of James Madison 183–84 (Hunt ed. 1910) [hereinafter cited as Writings of Madison] (emphasis added).
49 The Hearings on S. 2907, supra note 40, at § 85. A bill to provide judicial review to determine the constitutionality of grants and loans under acts of Congress, is a good example of the fact that there still exists, in this nation, a very strong antagonism against any linkage between church and state. Many prominent lawyers, among them Mr. Leo Pfeffer, counsel for the plaintiffs in Flast, testified before the Senate Subcommittee on Constitutional Rights of the Judiciary Committee on the merits of S. 2907. Of the many statements made before the subcommittee concerning the meaning of the religious provisions of the first amendment, one of the most illustrative of the strong belief that the Government must be completely neutral in religious matters was a statement made by the subcommittee's chairman, the Honorable Sam Ervin Jr. (D-N.C.): “The Founding Fathers intended to outlaw forever the Congressional appropriation of funds for the direct or indirect support of any and all religious institutions and their activities.” Hearings on S. 2907, supra note 40, at 4.
50 330 U.S. 1 (1947).
Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. No tax in any amount large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion.

Thus for the entire life of this nation, the leaders have been preoccupied with the problem of how to maintain a complete neutrality between government and religion, so preoccupied that the religious provisions of the Constitution have become known as preferred rights.

Mr. Justice Douglas has considered the problem raised by these so-called preferred rights in relation to a taxpayer's standing to challenge an alleged violation of them. His conclusion was that:

First amendment rights are by nature of the constitutional command so preferred that taxpayers should be given standing to protect them, [but] that the more vague generalized rights of Due Process involved in other cases require that one who makes the challenge have a more specific, tangible interest at stake [before the Court will grant standing].

It is submitted, that the Supreme Court premised its decision in Flast upon this criteria. The Court speaks in terms of requiring that a specific constitutional limitation must be alleged before it can be considered that a taxpayer is the proper party to challenge the constitutionality of a Congressional expenditure. This is merely another way of stating that where the religious provisions of the first amendment are alleged as being violated, the basic obstacle to a federal taxpayer's standing to sue—the lack of a controversy thought capable of resolution through the judicial process—is overcome. However, where the taxpayer's claim is an alleged violation

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51 Id. at 15-16 (emphasis added).
52 The fact that the religious provisions of the first amendment have always been considered as preferred rights is shown by the fact that even during the period when Frothingham v. Mellon, was considered as foreclosing all possibility of federal taxpayer suits, many still held to the conviction that "... the rulings [of the Supreme Court] show dramatically how unlikely it is that any significant church-state issue will be denied a forum on the ground that none of the parties involved has standing to sue." 111 Cong. Rec. 6132 (1965) (remarks of Representative Cellers). Further note the testimony of Mr. Pfeffer before the Senate Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary wherein he stated that "... never has the Supreme Court ruled that a first amendment case will be dismissed for lack of standing in line with the reasoning of Frothingham." Hearings on S. 2907, supra note 40, at 58.
53 Douglas, supra note 33, at 226-27.
of the Constitution not premised on the religious provisions of the first amendment, he has not presented issues for the court's determination which overcome the limitation which the case or controversy clause places upon the jurisdiction of the federal courts. For a court to assume jurisdiction over his claim would be "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government. . . ."

The only explanation for this conflict is that the religious provisions of the first amendment are so preferred in our system of government that an alleged violation of these rights gives the taxpayer standing to sue even though no greater specific danger to the taxpayer is shown than that the act allegedly violates these provisions of the Constitution. However, where the alleged violation of the Constitution is not pursuant to the religious provisions of the first amendment, the taxpayer will be required to show a greater personal stake in the outcome of the case, than that Congress in its actions has exceeded the powers granted it by the Constitution. Only if the taxpayer can show a personal stake can he be considered as the proper party to challenge the constitutionality of the Congressional appropriation. Further, the only decisions which have been rendered since Flast v. Cohen that involved the issue of a taxpayer's standing to sue, Velvel v. Johnson, and Protestants and Other Americans United v. Watson, tend to bolster these conclusions.

55 Professor Davis has considered this problem in a recent article. Davis, Standing: Taxpayers and Others, 35 U. Cin. L. Rev. 601 (1968). His conclusion was that the plaintiffs, in Flast and similar situations are modern Madison. For just as Madison thought that an expenditure of three pence by the Government to religion was too great, (Writings of Madison, supra note 48, at 186), the present day Madisons, with the sanction of the Supreme Court, believe that an expenditure by Congress to aid religious activities which costs each taxpayer twelve cents (Professor Davis determined that the appropriations in question in the Flast case cost each taxpayer twelve cents, Id. at 611) is so grave a violation of the constitutional requirement that our Government be wholly secular that a taxpayer should be able to enjoin such governmental action.
56 287 F. Supp. 846 (D. Kan. 1968). It should be noted that the presiding judge was so preoccupied by the problems of political question, that the issue of standing was not as thoroughly nor as deeply discussed as it might have been if the suit had not been one that was so obviously beyond the jurisdiction of the courts because of the issues presented for determination. See note 23, supra.
The plaintiff in Velvel was Professor Lawrence K. Velvel of the University of Kansas Law School who has recently written an article on the possibility of challenging the Vietnamese War in the courts. Professor Velvel argued that the United States' presence in Vietnam is unconstitutional because Congress was specific-

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59 It is not the purpose of this article to become embroiled in the problems of one's ability to successfully challenge the Vietnamese War in the courts. Many authors have considered this problem. The most recent discussion of the topic appears in Schwartz and McCormack, The Justiciability of Legal Objections to the American Military Effort in Vietnam, 46 Texas L. Rev. 1033 (1968). However, the author does believe that he is compelled to make some perfunctory comments about standing and the War.

Velvel v. Johnson is similar to cases such as Luftig v. McNamara, 373 F.2d 684 (D.C. Cir. 1967), aff'd 252 F. Supp. 819 (D.D.C. 1966), in that the plaintiff was challenging the constitutionality of the War. This is not permissible; if not on grounds of standing, then most certainly on grounds that the issue presented for adjudication is one of political question. The only possible situation in which a plaintiff may have standing (his claim may still be barred by political question) to challenge the present "war" in the Far East is if he claims that he is a Conscientious Objector to a particular war under the definition given the term by the Court in United States v. Seeger, 380 U.S. 163 (1965). In this situation the plaintiff would be the proper party to sue since, by basing his claim on the religious provisions of the first amendment, he has guaranteed that the constitutional issue will be presented in a form traditionally thought capable of resolution by the judicial process.

The Court, however, has recently denied certiorari in a case where the plaintiff claimed that under United States v. Seeger one could be a Conscientious Objector to a particular war. United States v. Kurki, 255 F. Supp. 161 (E.D. Wis. 1966), aff'd 384 F.2d 905 (7th Cir. 1967), cert. denied, 390 U.S. 926 (1968). On the other hand, the National Conference of Catholic Bishops, recently held in Washington, D.C., has endorsed the argument that a person, on the grounds of conscience, can be opposed to one war and not to all. N.Y. Times, Nov. 15, 1968, at 18, col. 1. Thus, whether or not the denial of certiorari, which was rendered before the prelates had spoken, ends the possibility of being able to be declared a Conscientious Objector to a particular war must wait now for further consideration by the Supreme Court.

It must be reiterated, though, that conscientious objection to a particular war is the only possible method by which one may challenge the war in Vietnam. The approach adopted by Professor Velvel can not succeed. If the Court were to allow such a claim it would most assuredly be adopting a position of a super legislature over the other branches of the Federal Government. This is a stature which the Founding Fathers did not believe the Court should ever assume. Brown, Quis Custodiet Ipsos Custdem?—The School Prayer Cases, in 1963: The Supreme Court Review, (P. Kurland ed. 1963).
ally given the power to declare war and that the President, without a declaration of war, is conducting a war against the Vietnamese people. Professor Velvel argued that he had standing under *Flast* because:

Congress, by providing funds to support the executive's unconstitutional actions in Vietnam, has violated a specific limitation upon its power to tax and spend (granting money to the President to declare a war without a declaration of war) and not simply gone beyond its general powers under Art. I, § 8.60

The United States District Court for the District of Kansas, however, refused to accept Professor Velvel's argument.61 Pertaining to standing, the court declared that the plaintiff had not stated a case within the rule established by *Flast*. The court concluded that the plaintiff had failed to present a claim that the court could consider as one that could be resolved by the judicial process:

Plaintiff asks this Court to determine that a state of war exists between the United States and the Government of North Vietnam. This Court has neither the precedent, the capacity, the facility, nor the inclination to indulge in such an endeavor. . . . It is not the function of the judiciary to entertain private litigation, even by a citizen (and taxpayer) which challenges the legality, the wisdom, or the propriety of the President, as Commander in Chief, in sending our armed forces abroad or to any particular region and keeping them there.62

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60 Velvel, supra note 58, at 503.

61 The court not only refused to agree with Professor Velvel, but what may be of more importance, the court determined that for a taxpayer to have standing, the suit must have been brought specifically for the purpose of challenging a federal taxing or spending program. Further, the court seems to be implying that the trial judge may look behind the facts stated in the complaint to determine that the suit was brought for another purpose, and if it were, he should dismiss it. Such a holding is incorrect. The court is confusing standing, which is concerned with whether the plaintiff is the proper party to sue, with the other concepts involved in the doctrine of justiciability, which are concerned with the nature of the issues presented. A plaintiff may be the proper party to maintain the suit, but for other reasons the suit still may not be justiciable. Thus, the fact that the suit was not brought specifically to challenge the constitutionality of a congressional expenditure, provided the challenged expenditure was enacted pursuant to the taxing and spending clause, and not as an expenditure in the administration of an essentially regulatory statute, does not mean that the plaintiff lacks standing. It may, however, mean that for other reasons, such as political question, the suit is nonjusticiable. *See United States v. Sisson*, 37 U.S.L.W. 2301 (D. Mass. 1968).

The Federal District Court of Kansas by this decision has accepted Mr. Justice Douglas' criteria for the determination of when a federal taxpayer has standing to sue. The court states that Professor Velvel does not have standing to challenge the constitutionality of the war because the federal courts are not the proper place to challenge the wisdom of the actions of a co-equal branch of the Government. However, the Supreme Court by its decision in *Flast* will permit the District Court for the Southern District of New York to determine the propriety of federal aid to education. There exists no other reason for the difference in these decisions except the paramount importance which our society places on maintaining strict neutrality of government in religious matters.

That the preferred position of the religious provisions of the first amendment provide the only basis upon which to permit a taxpayer standing to sue is shown by the decision of the Court of Appeals for the District of Columbia in the *Watson* case. In that case the plaintiffs sued to enjoin the then Postmaster General of the United States, W. Marvin Watson, from issuing a commemorative Christmas postage stamp of allegedly religious character because of its Madonna motif. The plaintiffs claimed that the issuance of such a stamp was religious propaganda, thus a violation of the establishment clause. The United States District Court for the District of Columbia had dismissed the suit on the ground that the plaintiffs lacked standing to sue under *Frothingham v. Mellon*. The Court of Appeals decided to hold its decision in abeyance until after the Supreme Court had rendered a decision in *Flast v. Cohen*. However, once the Court had handed down its decision in *Flast*, the Court of Appeals "felt constrained to hold that at least two of the appellants, as taxpayers, had shown that they possessed the requisite standing to challenge the expenditure."\(^6\)

Judge Tamm, writing for the court, stated that the Supreme Court had held in *Flast* that the *Frothingham* rule was now limited "... to cases where taxpayers failed to allege a specific constitutional provision restricting an otherwise proper exercise of the taxing and spending powers of Congress."\(^6\) Since in the present case the taxpayers had alleged that the issuing of the stamps was a violation of the establishment clause of the first amendment, "they have made the requisite showing of standing in the light of *Flast* and therefore must be given an opportunity to be heard on the merits."\(^5\) Most importantly the court held that in order to estab-

\(^6\) 37 U.S.L.W. 2280 (1968).
\(^5\) Id. at 2280.
\(^6\) Id. at 2281.
lish standing, a taxpayer must show that the alleged expenditure "exceed[ed] the limits imposed by the establishment clause of the first amendment on the taxing and spending powers in Article I." Thus the court in the Watson case is clearly equating the establishment clause with specific constitutional limitation, and precluding the possibility that other specific limitations on the power of Congress to tax and spend can be found in the words of the Constitution.

III. NEED FOR UTILIZING THE DOCTRINE

The reason why the Court has now undertaken to grant an exception to Frothingham which it could have granted many years ago is the present need to determine the constitutionality of federal aid to non-secular schools. In the last few years the President, with the approval of Congress, has developed programs of federal aid to education. These programs included aid to parochial schools. The question, therefore, arose whether or not federal aid to such non-secular institutions is constitutional in light of what the Supreme Court had declared to be the limits of governmental action within the bounds of the religious provisions of the first amendment as delineated by decisions where state taxpayers challenged state appropriations which aided parochial schools as violative of the first amendment. The first case where this issue arose was Everson v. Board of Education. In Everson the Court ruled that a New Jersey plan for bussing children to school including those attending parochial schools was constitutional. The Court, however, concluded that the religious provision of the first amendment:

... requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so

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66 Id. at 228
67 See notes 39-43, supra, and accompanying text.
68 The most recent case involving the problem of state action which might violate the religious provisions of the first amendment is Epperson v. Arkansas, 37 U.S.L.W. 4017 (1968). In this case the Court held that an Arkansas law which prohibited the teaching of evolution in public schools was unconstitutional because it was a violation of both freedom of religion and freedom of speech. Pertaining to the religious provisions of the first amendment the Court stated that the "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. ... The first amendment mandates governmental neutrality between religion and nonreligion." Id. at 4019. See also McCollum v. Board of Education, 333 U. S. 203 (1948); Engel v. Vitale, 370 U.S. 421 (1962); and Abbington School District v. Schempp, 374 U.S. 203 (1963).
as to handicap religions than it is to favor them . . . . [Thus] . . . the first amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.\textsuperscript{70}

Since \textit{Everson}, then, there has existed a \textit{wall} between church and state which neither a state government nor the federal government could violate. While a state or local taxpayer could and often did challenge local actions as violative of the first amendment,\textsuperscript{71} a federal taxpayer, because of the barrier created by \textit{Frothingham}, could not test the constitutionality of a federal enactment which allegedly violated the first amendment.\textsuperscript{72} Professor Jaffe called this situation a "crowning paradox"\textsuperscript{73} and concluded that such a disparity must be resolved by the Court. In other words, the Court was urged to either overrule \textit{Everson} or \textit{Frothingham} because of the inconsistency created by the diverse rulings in these cases.\textsuperscript{74}

Some members of Congress tried to save the Court from having to make that decision; however a bill to provide "for judicial review to determine the constitutionality of grants or loans (to non-secular institutions under acts of Congress)"\textsuperscript{75} died in committee. The need to determine whether federal aid to education, which in part was given to non-secular institutions, breached the wall between church and state still existed. At this point, however, the only branch of the Federal Government which could aid those who wanted a determination of this vital constitutional issue was the Supreme Court.

Faced with this problem, the Court in \textit{Flast} decided to "undertake a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayers suits."\textsuperscript{76} As mentioned above, this investigation lead the Court to a conclusion which it had reached almost seven decades ago, namely, that where the taxpayer's challenge is premised on the

\textsuperscript{70} Id. at 18. (emphasis added).
\textsuperscript{71} In fact, on the same day the Court rendered its opinion in \textit{Flast} it also decided a case involving a challenge to an enactment of the New York State Legislature which was alleged to violate the religious provisions of the first amendment because it permitted all school children, whether they attended public or parochial schools, to borrow books at no cost from the state. Board of Education v. Allen, 392 U.S. 236 (1968).
\textsuperscript{72} \textit{Hearings on S. 2907, supra} note 40, at 153.
\textsuperscript{73} L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459 (1965).
\textsuperscript{75} \textit{Hearings on S. 2907, supra} note 40.
\textsuperscript{76} 392 at 94.
preferred rights granted him by the religious provision of the first amendment, he has a great enough personal stake in the outcome of the suit "to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." This is true even though there exists no greater specific damage to the plaintiff than that the enactment allegedly violates his rights to have a completely secular government.

Until Congress began appropriating funds to non-secular institutions, as part of the overall program of federal aid to education, there existed no need to invoke the doctrine of preferred rights. However, once such programs went into operation, a direct challenge to the most preferred rights granted to the people of the United States by the Constitution existed. With all other avenues of settlement to this problem closed, the Supreme Court believed it had to resolve this challenge to a taxpayer's paramount right to have his government be completely neutral in religious matters.⁷⁸

IV. CONCLUSION

The Court's decision in Flast v. Cohen is not as broad as it appears upon first reading. The rule of Frothingham v. Mellon is as viable today as it was on June 9, 1968. The Court has merely grafted on to Frothingham a constitutionally possible and needed exception. The basis was provided by the overwhelming importance which our society places on the neutrality of the Government in religious matters. The need arose because of Congress' failure to grant standing to challenge congressional appropriations which, in part, are given to non-secular institutions, and thus may violate the mandate of neutrality between church and state. Therefore, it is submitted, as Mr. Justice Fortas contends in his concurring opinion in Flast, that:

[T]here is no reason to suggest, and no basis in the logic of this decision for implying, that there may be other types of congressional expenditures which may be attacked by a litigant solely on the basis of his status as a taxpayer.⁷⁹

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⁷⁷ Id. at 106.

⁷⁸ The Honorable Sam Ervin Jr. (D-N.C.) has stated that "... the church-state provisions of our Constitution are a fundamental covenant of Government, so fundamental that every citizen has an interest in their enforcement and so fundamental that the country will want the Court to settle issues of this kind. ..." Hearings on S. 2907, supra note 40, at 6.