Cases that Shaped the Federal Courts

Frothingham v. Mellon

1923

Justice George Sutherland

Federal Judicial Center
2020

Central Question

Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?

Historical Context

The Progressive Era was a major period of reform in the United States lasting roughly from 1890 to 1920. Although Progressives had a wide variety of goals, some of which were contradictory, many of their efforts were directed toward securing social welfare legislation in order to improve the lives of the working class and poor. Most reforms were enacted at the state and local levels; these included regulations limiting the rates railroads could charge farmers to ship their goods, prohibitions on child labor, restrictions on the number of hours women could be made to work, workers' compensation laws, and improvements to public transportation, schools, and parks.

A central theme of Progressive reform was maternalism—the notion that government should provide mothers and their children with special protection. While maternalism influenced many state reforms, it spurred action on the national level as well. President Theodore Roosevelt established the White House Conference on Child Welfare standards in 1909, which led to the creation of the United States Children's Bureau in 1912. The Bureau immediately made the study of infant and maternal mortality a high priority, and found that such mortality correlated strongly with poverty. Jeanette Rankin, the first woman to serve in Congress, proposed federal legislation to assist poor mothers in 1918, but it was not until 1920, when women's suffrage was secured nationwide by the Nineteenth Amendment, that the plan received significant political support.

Despite the Republican Party's lack of interest in the bill, newly elected President Warren G. Harding, who won office in part because of women's suffrage, favored it. In 1921, the measure was resubmitted to Congress by Senators Morris Sheppard and Horace Towner, a Democrat from Texas and a Republican from Iowa, respectively. The Sheppard-Towner Act, also known as the Maternity Act, passed Congress and was signed into law by Harding. It provided for the distribution of federal funds to participating states that cooperated with its measures to improve maternal and infant health. The Maternity Act, a precursor to the more expansive Social Security Act of 1935, was challenged in the *Frothingham* case as exceeding the constitutional powers of the federal government.

Legal Debates Before *Frothingham*

The *Frothingham* case addressed the issue of standing, a requirement that plaintiffs be the proper parties to bring the lawsuit in question. Generally speaking, standing exists if a

plaintiff has a sufficient stake in a case to make the matter adversarial. If a plaintiff is found to lack standing to bring suit, there is no genuine "case or controversy" before the court as Article III of the Constitution requires, and the matter will not be heard. Standing is therefore one element of justiciability—the determination of whether a particular matter is an appropriate one to be resolved by a court of law. At the time *Frothingham* came before the Supreme Court, the Court did not have a well-established body of precedent on the standing issue.

Prior to *Frothingham*, plaintiffs in several cases relied on their status as taxpayers to challenge the constitutionality of federal statutes. The courts ruled upon their lawsuits but did not explicitly address whether being taxpayers was enough to give the plaintiffs standing. In *Bradfield v. Roberts* (1899), for example, the taxpayer plaintiffs challenged a federal statute allocating funds to a hospital in the District of Columbia in exchange for treating patients referred by the D.C. government. Because the hospital was under the influence of the Roman Catholic Church, the plaintiffs alleged that the statute violated the First Amendment's ban on laws respecting the establishment of religion. The Supreme Court ruled on the merits of the dispute, finding that the hospital was not a religious institution and that the statute was valid, but made no specific finding regarding the plaintiffs' standing to sue.

Similarly, in *Millard v. Roberts* (1906), the Court heard a taxpayer challenge to a federal statute authorizing the payment to private railroad companies of tax revenues from the District of Columbia. In return, the railroads were required to cede certain property rights to accommodate the construction of Union Station. In concluding its opinion upholding the law, the Court stated, "We have assumed that appellant, as a taxpayer of the District of Columbia, can raise the questions we have considered, but we do not wish to be understood as so deciding." A year later, in *Wilson v. Shaw*, a taxpayer sued to prevent the United States from expending funds to build the Panama Canal. Once again, the Court ruled against the plaintiff, finding Congress to have acted well within its constitutional authority. The Court noted that it was not deciding whether the plaintiff had "a sufficient pecuniary interest in the subject matter," preferring to rule on the merits of the case. When the Court heard *Frothingham*, therefore, it had not yet ruled on the question of taxpayer standing.

The Case

Frothingham v. Mellon (the first named defendant was Secretary of the Treasury Andrew Mellon) involved a constitutional challenge to the Maternity Act of 1921. The plaintiff filed suit in the Supreme Court of the District of Columbia (the predecessor to the U.S. District Court for the District of Columbia) alleging that the Act—which provided

appropriations to states complying with its measures for protecting infant and maternal health—was an invasion by Congress of the right of local self-government reserved to the states by the Tenth Amendment. By spending taxpayer money in this unconstitutional manner, asserted the plaintiff, the statute would deprive her of property without due process of law. The court dismissed the plaintiff's complaint, and the Court of Appeals of the District of Columbia affirmed. An appeal to the Supreme Court followed.

The case was consolidated with *Massachusetts v. Mellon*, a challenge by the state of Massachusetts to the same statute, which the Supreme Court heard pursuant to its original jurisdiction over suits to which a state was a party. Like Frothingham, Massachusetts argued that the Act had invaded the powers of the state government. The state was faced with what it argued was an unconstitutional dilemma: "to yield to the Federal Government a part of its reserved rights or lose the share which it would otherwise be entitled to receive of the moneys appropriated." The Supreme Court ruled that the individual taxpayer and state challenges to the Maternity Act were sufficiently similar to be argued and decided together.

The Supreme Court's Ruling

The Supreme Court declined to reach the merits of the two challenges to the Maternity Act, instead ruling that both cases were to be dismissed for lack of jurisdiction. Beginning with the challenge by the state of Massachusetts, the Court held that the state had not presented a justiciable controversy—that is, a dispute appropriate for resolution before a court of law. Because Massachusetts was free to accept or reject the terms of the statute, and would not be affected in any way without its consent, its complaint was based on the mere enactment of the statute, which was not an injury cognizable in court. "[I]t is plain," Justice George Sutherland wrote for a unanimous Court, "that that question … is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power." The state could not act as *parens patriae* (as a parent) to protect its citizens from the statutes of the United States; with respect to those citizens' relationship with the federal government, "it is the United States, and not the State, which represents them as *parens patriae*."

Turning to Frothingham's challenge, the Court held that an individual lacked standing to challenge a federal statute as unconstitutional solely on the basis that the plaintiff was a taxpayer. A taxpayer, Sutherland's opinion explained, simply could not claim a significant and direct enough injury to establish standing to bring a lawsuit. The taxpayer's "interest in the moneys of the Treasury … is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the

preventive powers of a court of equity." In short, Sutherland wrote, the issue at hand was "essentially a matter of public and not of individual concern."

Aftermath and Legacy

In 1968, the Supreme Court narrowed the rule against taxpayer standing set forth in *Frothingham* when it decided *Flast v. Cohen*. The Court's opinion, written by Chief Justice Earl Warren, held that the rule was an exercise in judicial self-restraint but was not required by the Constitution. "The question whether a particular person is a proper party to maintain the action," wrote Warren, "does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government."

To determine whether a particular taxpayer had standing to bring an action against the federal government, the Court developed a two-prong test. The first depended on the type of legislation challenged. Only a statute that was itself an exercise of congressional spending power, and not incidental spending pursuant to a regulatory statute, could be challenged by a taxpayer. Second, the taxpayer would be required to show a connection between the constitutional violation alleged and their personal stake in the case.

In *Flast*, the plaintiffs met both prongs of the taxpayer standing test. The expenditures challenged (federal funds for religious schools) were made by Congress pursuant to its authority to spend for the general welfare. Further, the plaintiffs were deemed to have a sufficient stake in the case in terms of the First Amendment violations they had alleged, because their religious liberty would be violated if the government were permitted to spend funds to favor one religion over another or to support religion in general. The Establishment Clause was therefore, the Court found, intended to be a specific limit on the congressional spending power. The Court distinguished *Frothingham*, noting that the plaintiff there met the first prong of the test by challenging a spending program, but lacked a particular stake in the case, having alleged only that Congress had exceeded its general authority.

The Court later interpreted its holding in *Flast* narrowly when it decided *Valley Forge Christian College v. Americans United for Separation of Church and State* in 1982. *Valley Forge* was distinguishable from *Flast*, the Court ruled, because the governmental action involved was a grant of land under the Disposition of Property Clause, rather than the expenditure of money, and the action was taken by the Department of Health, Education, and Welfare, rather than by Congress. Some scholars criticized the distinctions between the two cases as artificial. In *Hein v. Freedom From Religion Foundation* (2007), the Court issued a plurality opinion limiting taxpayer standing to challenges to specific appropriations by Congress that allegedly violated the Establishment Clause.

Discussion Questions

- What is the rationale behind the requirement of standing—that is, that a plaintiff have a sufficient stake in a case to make it appropriate for resolution by a court?
- Should taxpayers generally be able to challenge federal spending programs in court? Why or why not?
- How did the Court's rationale for denying standing in *Massachusetts v. Mellon* differ from that in *Frothingham*?
- How do the concepts of standing and justiciability relate to one another?

Documents

"Will Save Babies"—"Unconstitutional," *The Boston Globe*, April 22, 1923

An April 1923 article in the Boston Globe *described the Maternity Act and the federal court challenges it had engendered. Apparent from the piece was the relative novelty of federal aid to the states in pursuit of various policy goals. While such legislative programs initially sparked fears of federal domination and the erosion of state sovereignty, they became increasingly common throughout the twentieth century, developing into a ubiquitous feature of the American regulatory landscape.*

What is all this fuss about the Sheppard-Towner Maternity act? …

It is heartily indorsed by some women's clubs.

It was indorsed by the Women's Joint Congressional Committee, composed of the representatives of 16 National organizations.

It is vigorously opposed by other women's clubs.

Mrs. Harriet A. Frothingham of Boston brought suit in the Supreme Court of the District of Columbia against the officials who administer the act. She sued as a State and Federal taxpayer to restrain public officials from spending money under it. She says if it is enforced she will be compelled to pay for advantages enjoyed by other States.…

It is a Federal law and must be accepted by the Legislatures of the several States. Here's where it gets all tangled up.

Opinion among lawmakers, Governors and Attorneys General is greatly divided. Some Legislatures are convinced that is a good thing to accept it. The Governors do not think so and withhold approval. Some are waiting to see what happens before they approve.

In other cases Governors have approved it and made provisions to comply with the law expecting incoming Legislatures to accept it. Other States have accepted it and yet join with Massachusetts in its fight to prove it unconstitutional. This is the case in Indiana, Kentucky and Virginia.…

Every State in the country is now watching the battle, and all eyes are on Massachusetts. With a broadside of legal talent, law and information, the State now follows the lead of Mrs. Harriet A. Frothingham and contests the constitutionality of the act in the Supreme Court.…

According to the State's attorneys, here is where the rub comes in. Legislation is becoming more common every year in Washington centered around "Federal Aid." This, they believe, is an effective means of inducing States to yield a portion of their sovereign rights for the consideration offered.

Large amounts of money are offered, the National Government matches the State Government and it looks like a good way to get something for nothing. If the tendency is not checked, they say, on the grounds of unconstitutionality, there is no limit to the amounts that they may expect to raise, or spend. They point to the Sterling-Towner Education bill as another sample of it.…

The burden of paying for the appropriation, according to the original bill of complaint, falls very unequally upon the different States.…

It has been estimated that 5.66 percent of internal revenue taxes are paid by the citizens of Massachusetts. If Massachusetts should accept the act, the return would be less than half the amount collected from its citizens. If Massachusetts should not accept the act, it would be taxed in order to carry it into effect in other States.

The bill of complaint further avers that the act is a usurpation of a power not granted to Congress by the Constitution and an attempted exercise of the power of local self-government reserved to the States.

Document Source: "'Will Save Babies'—'Unconstitutional': Sheppard-Towner Maternity Act Bitterly Fought By Some States and Welcomed by Others," *Boston Globe*, April 22, 1923, p. 67.

Supreme Court of the United States, Opinion in *Frothingham v. Mellon*, June 4, 1923

In two consolidated cases, Massachusetts v. Mellon *and* Frothingham v. Mellon*, the Supreme Court unanimously rejected constitutional challenges from the state of Massachusetts and an individual taxpayer to the Maternity Act of 1921. In both cases, the plaintiff was found to lack standing to sue. In the case of Massachusetts, the state had not been compelled to act against its will and had therefore suffered no injury. The state's general opposition to the statute was a political matter not appropriate for resolution in court. The individual taxpayer plaintiff likewise lacked a sufficient stake in the suit, having only a "minute and indeterminable" interest in the funds held in the federal treasury.*

Both cases challenge the constitutionality of the Act of November 23, 1921 … commonly called the Maternity Act. Briefly, it provides for an initial appropriation and thereafter annual appropriations for a period of five years, to be apportioned among such of the several States as shall accept and comply with its provisions, for the purpose of cooperating with them to reduce maternal and infant mortality and protect the health of mothers and infants.…

It is asserted that these appropriations are for purposes not national, but local to the States, and together with numerous similar appropriations constitute an effective means of

inducing the States to yield a portion of their sovereign rights.... In the *Massachusetts* case it is alleged that the plaintiff's rights and powers as a sovereign State and the rights of its citizens have been invaded and usurped by these expenditures and acts; and that, although the State has not accepted the act, its constitutional rights are infringed by the passage thereof and the imposition upon the State of an illegal and unconstitutional option either to yield to the Federal Government a part of its reserved rights or lose the share which it would otherwise be entitled to receive of the moneys appropriated. In the *Frothingham* case plaintiff alleges that the effect of the statute will be to take her property, under the guise of taxation, without due process of law.

We have reached the conclusion that the cases must be disposed of for want of jurisdiction without considering the merits of the constitutional questions.

In the first case, the State of Massachusetts presents no justiciable controversy either in its own behalf or as the representative of its citizens. The appellant in the second suit has no such interest in the subject-matter, nor is any such injury inflicted or threatened, as will enable her to sue....

What, then, is the nature of the right of the State here asserted and how is it affected by this statute? Reduced to its simplest terms, it is alleged that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the States.... But what burden is imposed upon the States, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the States where they reside. Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power....

The attack upon the statute in the *Frothingham* case is, generally, the same, but this plaintiff alleges in addition that she is a taxpayer of the United States; and her contention, though not clear, seems to be that the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law.... The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not

inappropriate.… But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned.…

The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Document Source: *Frothingham v. Mellon*, 262 U.S. 447, 479–80, 482–83, 486–88 (1923).

Supreme Court of the United States, Opinion in *Flast v. Cohen*, June 10, 1968

In Flast*, the Supreme Court ruled that the bar against taxpayer standing created by* Frothingham *was not mandated by the Constitution. In certain cases, the Court noted, a taxpayer might have a sufficient stake in litigation to confer standing to sue. Whether standing existed in a given case was to depend on a two-factor test: whether the government action challenged was an exercise of the congressional spending power, and whether the plaintiff could show a significant nexus between their status as a taxpayer and the particular constitutional violation alleged.*

The Government has pressed upon us the view that *Frothingham* announced a constitutional rule, compelled by the Article III limitations on federal court jurisdiction and grounded in considerations of the doctrine of separation of powers. Appellants, however, insist that *Frothingham* expressed no more than a policy of judicial self-restraint which can be disregarded when compelling reasons for assuming jurisdiction over a taxpayer's suit exist. The opinion delivered in *Frothingham* can be read to support either position.…

Yet the concrete reasons given for denying standing to a federal taxpayer suggest that the Court's holding rests on something less than a constitutional foundation.…

As we understand it, the Government's position is that the constitutional scheme of separation of powers, and the deference owed by the federal judiciary to the other two branches of government within that scheme, present an absolute bar to taxpayer suits challenging the validity of federal spending programs. The Government views such suits as involving no more than the mere disagreement by the taxpayer "with the uses to which tax money is put." According to the Government, the resolution of such disagreements is committed to other branches of the Federal Government and not to the judiciary. Consequently, the Government contends that, under no circumstances, should standing be conferred on federal taxpayers to challenge a federal taxing or spending program. An analysis of the function served by standing limitations compels a rejection of the Government's position.… The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.… In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question.…

The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated.… A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case. Therefore, we find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs.….

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute.… Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the

powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing under the test we announce today. Their constitutional challenge is made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds. In addition, appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment. Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.... The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.

Document Source: *Flast v. Cohen*, 392 U.S. 83, 92–93, 98–101, 102–103, 104 (1968) (footnotes omitted).

J. Stanley Lemons, *The Journal of American History*, 1969

A 1969 article in the Journal of American History *set forth the history of the Maternity Act of 1921, pointing to it as an aspect of Progressivism that persisted into the generally more politically conservative 1920s. The piece also detailed the political opposition to the bill, including that of the American Medical Association. Ultimately, the act's controversial nature prevented it from becoming permanent, and it lapsed in 1929.*

Although the Children's Bureau had revealed high maternal and infant death rates and despite the modest character of the Sheppard-Towner bill, the measure was assailed as a threat to the very institutions of the nation. Because suffragists favored the bill, anti-suffragists opposed it. Extreme conservatives condemned the plan as part of a Bolshevist conspiracy against America. States rights advocates alleged that it threatened the integrity of the states. Finally, the bill was caught in the cross fire between the American Medical Association and a collection of quack medical cultists. Sheppard-Towner was one of the first pieces of federal legislation to catch the brunt of the AMA's new fear of state medicine. The arguments advanced by the opponents at the time of the original debate and passage of the measure were repeated when the proposal came up for renewal in 1926 and in 1929.

The principal advocates of the theory that the Sheppard-Towner bill was a communist invention were the National Association Opposed to Woman Suffrage and its legacy, the Woman Patriots. For years, they had maintained that feminism and woman suffrage were the same as socialism and communism. Mary Kilbreth, a leading anti-suffragist, wrote Harding a six-page letter which condemned his signing of the bill. "It is not brought forward by the combined wisdom of all Americans, but by the propaganda of a self-interested bureau associated with the Feminist Bloc." "There are many loyal American men and women," she warned, "who believe that this bill, inspired by foreign experiments in Communism, and backed by the radical forces in this country, strikes at the heart of our American civilization.…" The Woman's Municipal League of Boston, the American Constitutional League, the Constitutional Liberty League of Massachusetts, and the Massachusetts Public Interests League agreed. Senator James Reed of Missouri echoed Kilbreth's words when he charged that the bill was communist inspired and that the standards drawn up by the Children's Bureau were made by crackpots.

Certain "medical liberty" organizations (they opposed any state regulation in medicine: vaccination, quarantine, the Wasserman test, licensing of doctors, hospitals, and medical schools) viewed the Sheppard-Towner Act as another brick in the wall being erected by the regular medical profession to eliminate all but orthodox practices. But the most significant opposition to the bill came from physicians who expressed themselves through the American Medical Association. The AMA had marched within the broad ranks of progressivism from 1900 to World War I and vigorously campaigned for pure food and drugs, protection of the public from medical quackery, a federal department of health, and the elevation of standards in medical practice and education. Nevertheless, the AMA had always been silent on other great health problems: slums and tenements, factory hazards, child labor, and the exploitation of women in sweatshops and dangerous trades.

The AMA first broke away from progressivism over the issue of compulsory health insurance; and after its house of delegates condemned health insurance in 1920, the association came to see the Sheppard-Towner Act as only another form of the same thing. State medical societies in Massachusetts, New York, Illinois, Ohio, and Indiana spearheaded the opposition to health insurance and the Sheppard-Towner proposal. In its attack on the Sheppard-Towner bill and other public health measures, the *Illinois Medical Journal*, official organ of the Illinois State Medical Society, declared: "Today Washington, D. C., is a hotbed of Bolshevism.… Where will it all end? We know where it ended in ruined Russia.… Can the people of America set up Bureaucratic Autocracy in Washington without a resulting industrial slavery?" The *Journal of the American Medical Association* launched its campaign against Sheppard-Towner on February 5, 1921, and it continued to oppose the

act until it was repealed. The 1922 AMA house of delegates condemned Sheppard-Towner as an "imported socialistic scheme." …

By and large, the Sheppard-Towner Act was well received by the state authorities. Forty-one states joined in 1922; and eventually, only Connecticut, Illinois, and Massachusetts remained aloof. In New Jersey, the legislature passed the enabling act over the governor's veto in 1922. In Washington, the governor was unalterably opposed, and only the election of a new chief executive allowed the state to join the program. Louisiana waited until 1924 to enter the program, and Vermont joined in 1926. Unexpected opposition kept Rhode Island out until 1925, and Maine and Kansas finally accepted in 1927.

In New York, Governor Nathan Miller, who had upset Alfred E. Smith in the Harding sweep of 1920, told the opening session of the 1922 legislature that he would veto any bill which would accept Sheppard-Towner. Twenty-eight women's organizations formed the Association for the Sheppard-Towner Act and worked to have New York appropriate $75,000 for the program. The Association circulated petitions, but Miller declared that he would not be influenced if every woman in the state signed. "The people … have no business to interfere with men in office." In keeping with Miller's mood, the legislature formally rejected the Sheppard-Towner Act. While deploring the financial drain of a maternity program, Miller signed a bill which appropriated $125,000 for a hog barn on the state fair grounds; and he approved of a twin barn for 1923. Kelley remarked: "It does not improve the outlook of a candidate for the governorship of New York to have 28 organizations of women experienced in working together know that swine shelters appeal to him more strongly than dying mothers and babies." Miller lost the next election to Al Smith, who pushed the Sheppard-Towner plan through the legislature in 1923. Smith credited the New York League of Women Voters for the passage of the bill.

The Connecticut legislature rejected Sheppard-Towner money on the grounds that it infringed on the rights of the state. The state appropriations committee declared that it was time to stop the federal aid process. This reason seemed hollow to Sheppard-Towner advocates when the same committee voted to accept a new federal aid program for an airplane squadron. Nevertheless, the legislature established a state program for maternity and infancy protection with an appropriation of $55,000. This sum was $12,000 less than would have been made available to the state under Sheppard-Towner. Furthermore, the appropriation was offset by a $30,720 cut in the funds for the Bureau of Child Welfare. This bureau, the major achievement of the Connecticut League of Women Voters in the 1921 legislature, was partially sacrificed to the states rights cause.

From the outset, Massachusetts spawned most of the organized effort against the Sheppard-Towner plan. A state proposal for maternity and infancy protection had failed to pass three consecutive years, 1919, 1920, and 1921—the last time it received only two

positive votes in the legislature. The opposition of the medical profession had been particularly vigorous. One group of critics labelled the measure "The *beginning of Communism in Medicine*. A very unjust, unwise, iniquitous & socialistic bill." "Vicious, un-American, paternal." "It is a step toward Sovietism." When the legislature began consideration of an enabling act for Sheppard-Towner in 1922, the attorney general (an anti-suffragist who had ruled women off the ballot and out of the jury box in Massachusetts) issued an opinion that the Sheppard-Towner Act would misuse the tax money of Massachusetts and was unconstitutional because it violated the reserved rights of the states. The state filed a suit with the United States Supreme Court on behalf of its taxpayers to enjoin the law. Fearing that a state was ineligible to file a taxpayer's suit, Harriet Frothingham, president of the Woman Patriots, filed another suit in the Supreme Court of the District of Columbia. When this court dismissed her case and the United States Court of Appeals concurred, she appealed to the United States Supreme Court. United States Solicitor General James Beck considered the Sheppard-Towner Act to be unconstitutional and encouraged Massachusetts to pursue the case.

These suits seriously threatened the whole range of federal programs which provided either direct aid or matching grants. Ironically, at the very time that Massachusetts was challenging Sheppard-Towner for violating the Tenth Amendment, the state was accepting money under twenty-two other federal programs which extended from soil surveys, county agents, highway building, and state militia to the eradication of the white-pine rust and the European corn borer. Ten states and the Association of Land Grant Colleges filed counter-briefs. On June 5, 1923, the Supreme Court dismissed both suits for want of jurisdiction and without ruling on the constitutionality of the act.

Sheppard-Towner was considered a permanent law, but its appropriation was scheduled to cease automatically on June 30, 1927. Confident that the program was a success, its proponents moved in 1926 to have the authorization extended. The House of Representatives quickly voted a two-year extension by the healthy margin of 218 to 44, but opponents mobilized to stop the bill in the Senate. The foes included the American Medical Association, Woman Patriots, Massachusetts Public Interests League, Sentinels of the Republic, and the Daughters of the American Revolution. (In 1921, as a member of the WJCC, the DAR had supported the measure, but it was no longer espousing progressive causes.) The opposition was fresh from having recently beaten another progressive proposal—the federal child labor amendment. They echoed the usual cries: "socializing medicine," "nationalizing the children," and introducing "Bolshevism."

Senator Thomas A. Bayard of Delaware read into the *Congressional Record* a thirty-six page petition and letter from the Woman Patriots. It proported to show the Bolshevist origins of the entire progressive program for children, which included the Sheppard-Towner

Act, the Children's Bureau, child labor laws, and the child labor amendment. The petition traced an intricate web which joined the national women's organizations together in a conspiracy to sovietize the United States. It was a feminist-socialist-communist plot under the leadership of Florence Kelley Wishnieweski. She was described as "the ablest legislative general Communism has produced." The petition also denounced Jane Addams, Julia Lathrop, the women on both the Republican and Democratic National Committees, the constituent organizations of the WJCC (such as the Parent-Teachers Association, the League of Women Voters, and the Women's Christian Temperance Union), the Women's Bureau, the Children's Bureau, and the United States Department of Labor. Bayard mailed copies of this petition under his frank to all state officers of the DAR; after which, the president-general of the organization urged the defeat of Sheppard-Towner.

The bill was blocked in the Senate for nearly eight months, and proponents were forced to accept a compromise which extended the appropriations for two more years but repealed the law itself automatically on June 30, 1929. Supporters of the act hoped that a more progressive political climate would exist by 1929 and that the law would be restored. Efforts to preserve the maternity program were resumed in 1928. The WJCC and other organizations rallied behind a bill which was more liberal than Sheppard-Towner. It specified that the money would be spent in cooperation with the states, but did not require either acceptance by the state legislatures or matching funds. The American Medical Association, the Woman Patriots, and the Sentinels of the Republic led the opposition again. By now, the politicians were less concerned about a woman's voting bloc, and the conservative propensities of Congress had freer play. Although progressive women still lobbied for the bill, it languished in Congress. This time the President would not help. Herbert Hoover issued perfunctory formal statements which urged its enactment; and refusing to press the matter, he allowed the first federal social security law to lapse.

Document Source: J. Stanley Lemons, "The Sheppard-Towner Act: Progressivism in the 1920s," *Journal of American History* 55, no. 4 (March 1969): 779–85 (footnotes omitted).

Matthew A. Melone, *Pittsburgh Tax Review*, 2012

In a 2012 piece, Lehigh University business professor Matthew Melone criticized the Supreme Court's jurisprudence on standing that began with Frothingham. *The Court, he argued, had developed an overly restrictive definition of "case or controversy" as well as a practice of characterizing the alleged harm suffered by plaintiffs in an excessively narrow fashion. As a result, Melone asserted, many legitimate cases—particularly those in which the harm was small but widespread—had been excluded from judicial resolution.*

The notion that any harm that may befall taxpayers from the sovereign's improper spending or taxing decisions are not cognizable because they are "shared with millions of others" is symptomatic of the defects inherent in reading too much into the limitations imposed on the judiciary by Article III—and the defects are several. The Court's standing jurisprudence illustrates the dangers of straying too far from the Constitution's textual dictates. Consequently, the Court has elevated semantics to constitutional dimensions. The definition of the harm at issue often holds the key to the courthouse. Moreover, causation, an issue that goes to the merits of a dispute, has oftentimes morphed into a standing issue. Finally, the Court has elevated separation of powers of doctrine to such an extent that it too frequently has done a profound injustice to *Marbury v. Madison*.

Textually, Article III can reasonably be interpreted to preclude purely advisory actions by the judiciary and not much more. To define a "case" or "controversy" as simply a proceeding among parties with adverse interests would not strike a lay person as unwarranted. The fact that the alleged harm is shared by the plaintiff with many others does not eliminate or diminish the harm believed incurred by the aggrieved party. The law of equity has developed remedies to deal with diffuse harms—for example the class action and the derivative lawsuit. As evidenced by the Supreme Court's recent case, *Wal-Mart Stores, Inc. v. Dukes*, the entire class action apparatus is predicated upon a showing that the harms alleged are not particularized but shared in common. Professor Epstein borrows from tort law and Guido Calabresi in justification of standing limitations. A tort harm arising from a physical blow, he explains, is shared by many and those harmed can be thought of as forming concentric circles with the victim at the center. As the victims become further removed from the center the costs of administration are high, the amount of harm is diminished, and the marginal deterrence to the perpetrator is low. The objectives of the tort law are served by an action brought by the victim and further proceedings are not justified by the marginal benefit they may provide.

However, this rationale does not hold in situations where there is no victim at the center of the circle—particularly when the circle contains only one ring and everyone that is harmed is harmed in the same manner and to the same extent. In almost all disputes with the I.R.S. there will be a "victim" at the center of the circle. However, this is not so with pronouncements like Notice 2008-83. The victims reside on the circumference—all harmed in the same way. However, as Professor Epstein noted, "[i]t is not correct to say that 'no particular person is injured' … Rather, it is that a great many individuals are all injured by some small but perceptible amount. The task of courts of equity was to develop rules that allowed the amalgamation of small interests." One would be forgiven for concluding that the Court's standing jurisprudence has abandoned this principle entirely.

In enhancing the textual limitations of Article III, *Mellon* and its progeny have produced a bewildering trail of precedents that are highly dependent on the way in which the injury is framed, confuse the issue of causation with harm, and overindulge in the separation of powers. The *Mellon* Court framed the injury at issue as the taxpayer's "interest in moneys of the treasury" and on this score her injuries were, according to the Court, too remote and uncertain to be cognizable. However, the taxpayer's injuries could have been categorized as an infringement on her sensibilities regarding the power of the federal government in relation to the states. This case was decided well before Flast limited such claims to Establishment Clause violations.

The conflicting results in *Sierra Club* [*v. Morton*], *Lujan* [*v. Defenders of Wildlife*], and *SCRAP* [*United States v. Students Challenging Regulatory Agency Procedures*] turned on the fact that, unlike the plaintiffs in *Sierra Club* and *Lujan*, the plaintiffs in *SCRAP* showed that they made use of the natural resources in question. The harms suffered by the plaintiffs in all three cases could reasonably have been categorized more broadly as an interest in the preservation of the environment. Whether a person can show that they go hiking or visiting the habitats of endangered species should not have constitutional implications. After all, one does not have to visit the polar ice caps to be passionately concerned with the issue of global warming. More likely is that a person who is willing to undertake litigation on principal will be an effective adversary.

Similarly, the Court refused to recognize an injury due to federal support for racially segregated educational institutions because the plaintiffs failed to show that they were personally visited with discrimination. A more expansive view of the interests at stake—freedom from government complicity in racial discrimination—does not seem particularly unreasonable. Professor Sunstein makes this point forcefully with the landmark Regents of the University of California v. Bakke case. Bakke was denied admission to the University of California at Davis medical school and alleged that the affirmative action admissions program at the school was unconstitutional. Had the Court framed the injury as the denial of admission to the medical school, standing would not have been maintained under the *Simon* [*v. Eastern Kentucky Welfare Rights Organization*] and [*Allen v.*] *Wright* line of reasoning because the plaintiff could not show he would have been admitted but for the affirmative action program. However, when the harm is categorized as the denial of an equal opportunity for admission, the standing issue vanishes.

A narrow framing of the harm also tends to confuse the issue of causation with standing. For example, in *Simon*, *Wright*, and *Linda R.S.* [*v. Richard D.*], the Court denied standing because the plaintiffs could not show that, in the absence of the government actions that were the subject of challenge, hospitals would have provided care, private schools would have been integrated, or a father would have paid child support, respectively.

Likewise, in *Arizona Christian School Tuition Organization* [*v. Winn*], standing was denied because, according to the Court, the spending decisions of the parents, and not the government scheme under which such decisions were made, resulted in the harms alleged. Had the Court chosen to frame the harms more broadly, as it did in *Bakke*, then the effect of intervening actions by third parties would no longer be relevant—at least with respect to standing.

The Court's standing jurisprudence has been informed by separation of powers doctrine. However, much of the Court's reasoning in this respect is not persuasive. The question of when the boundary between the branches has been breached comes into its sharpest focus with statutory invitations to the courthouse. *Lujan* has probably been the Court's most forceful answer to this question. "To permit Congress to convert the undifferentiated public interest … into an 'individual right' vindicable by the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" The counter-intuitiveness of this statement is palpable. If Congress has the power, under the Commerce Clause, the Necessary and Proper Clause, the Civil War Amendments, or other source of authority to create a legal right, then it seems logical that it can set in place a mechanism to vindicate such rights. It is one thing to assert, on prudential grounds, that Congress should not create a private cause of action, but it is quite another to assert that it cannot.

Article III provides no direct textual assistance in this regard and the terms "cases" and "controversies" can, quite appropriately, be interpreted to mean an adversarial proceeding with real harms at stake. So long as it acts pursuant to one or more of its enumerated powers, precisely what real harms are cognizable is a matter for Congress to determine. Indirectly, broad congressional power to create cognizable causes of action can be inferred by the language of the Constitution. Article III vests considerable power in Congress over the judicial branch. Article III provides that the federal judiciary shall have jurisdiction over "all" cases or controversies involving federal law but not over "all" other cases enumerated. Congress could, therefore, exercise its power under the Necessary and Proper Clause to determine which, if any, of such cases could be heard by the federal courts. Congress was also given express power to determine the structure of the federal court system itself. Moreover, in contrast to Articles I and II, noticeably missing from Article III is any expressed mechanism for the judiciary to police itself—a task left to Congress. Professor Akhil Amar argues persuasively that the judicial branch was not listed last among the branches in the Constitution by coincidence.

How, if Congress so provides, is a claim that an action of a federal agency or a state government violates federal law not a "case" or "controversy"? For that matter, the same question can be posed about alleged violations of the Constitution itself. The Court's

"Take Care" Clause or federalism justifications for limiting congressional power in this respect are unconvincing. The "Take Care" Clause not only grants power to the Executive, it imposes upon him a duty—"he *shall* take Care that the Laws be *faithfully* executed." Separation of powers does not vest in the executive branch the constitutional authority to violate the law. A similar criticism can be made of the Court's insistence that the *Flast* exception applies only to the spending and taxing decisions of Congress. To the extent that *Flast* conceded that the Establishment Clause protected an interest important enough to justify such an exception, it is difficult to ascertain a principled reason why those interests are left at the mercy of executive action. Similarly, the Supremacy Clause is an express limitation on the scope of federalism. Whatever retained powers reside in the states, such powers do not extend to violations of federal law. The Court's standing jurisprudence, contrary to its assertions, does not show fealty to *Marbury v. Madison*. Instead, it has often been an abdication of *Marbury*.

Document Source: Matthew A. Melone, "A Leg to Stand On: Is There a Legal and Prudential Solution to the Problem of Taxpayer Standing in the Federal Tax Context?," *Pittsburgh Tax Review* 9, no. 2 (Spring 2012): 138–41, 143–44 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?