The Catholic Lawyer

Volume 7
Number 3 *Volume 7, Summer 1961, Number 3*

Article 4

July 2016

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QUIS CUSTODIET: DISESTABLISHMENT AND STANDING TO SUE

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IN A RECENT SURVEY of the work of the Supreme Court, a distinguished commentator observed: "The issue of state aid to religion has evoked a volume of literature which is perhaps disproportionate to its importance."[1] The literature to which he referred is equally applicable to federal aid to religion and is directed principally to issues of education. This was written shortly before the battle lines over federal aid to education began to take shape in anticipation of the legislative session of 1961. Since that time an enormous amount of material concerning sectarian schools and the public treasury has begun to flow. Even the newspapers of the nation have become preoccupied with the constitutional issue. In view of this plethora of material, a survey of the problem can hardly be justified. There remains, however, at least one significant aspect of the question which has not received sufficient attention, and it is of considerable practical significance at the present time. The question is who may litigate an allegedly unconstitutional expenditure of tax revenues, and this is a truly critical issue in the light of current proposals.

The background of the problem is well summarized in the classic case of *Frothingham v. Mellon*.[2] In that case Mrs. Frothingham, suing as a taxpayer, attempted to enjoin the Secretary of the Treasury from making any expenditures to carry out the federal Maternity Act. The court disposed of the case by finding a lack of jurisdiction, and did not reach the merits of the constitutional objections which the petitioner alleged vitiated the legislation. The court began by declaring: "The right of a taxpayer to enjoin the execution of a Federal appropriation act on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this court. In cases where it was presented, the question has either been allowed to pass sub silentio, or the determination of it expressly withheld."[3]

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[1] MCCLOSKEY, THE AMERICAN SUPREME COURT 250 (1960).
[2] 262 U.S. 447 (1923).
[3] *Id.* at 486.

Chief among the precedents to which the court adverted was *Bradfield v. Roberts,*[4] in which a taxpayer and resident of the District of Columbia sued to enjoin the Treasurer of the United States from paying any public funds to the directors of Providence Hospital, a corporation created under Act of Congress. It was alleged that this was a Catholic agency, and the grant to the hospital would violate the first amendment. The Supreme Court affirmed the action of the Circuit Court of Appeals in dismissing the bill. The Court was not unconscious of the issue of standing to sue. In the first sentence of the opinion we read: "Passing the various objections made to the maintenance of this suit on account of an 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 a resident of the District of Columbia. . . ."[5] Again in the closing sentence we find: "Without adverting to any other objections to the maintenance of this suit, it is plain that complainant wholly fails to set forth a cause of action. . . ."[6]

It is clear that the Court was correct when, in the *Frothingham* case, it said the issue of standing to sue had not been decided in the *Bradfield* case. In similar fashion, the Court had passed the same issue in *Millard v. Roberts,*[7] another suit to enjoin the Treasurer of the United States from expending tax revenues for an allegedly unconstitutional purpose, in this case the relocation of railroads in the District of Columbia. The Court said: "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."[8]

The same technique was used in *Wilson v. Shaw,*[9] an extraordinary attempt by a taxpayer to enjoin the Secretary of the Treasury from executing fiscal acts in aid of construction of the Panama Canal. The opinion recites:

> Many objections may be raised to the bill. Among them are these: Does plaintiff show sufficient pecuniary interest in the subject matter? Is not the suit really one against the government, which has not consented to be sued? . . . We do not stop to consider these or kindred objections; yet, passing them in silence must not be taken as even an implied ruling against their sufficiency. We prefer to rest our decision on the general scope of the bill.[10]

The bill was dismissed, and it is significant that this was the outcome in all those cases in which the issue of standing to sue was passed over in what can be described only as articulate silence.

In *Frothingham v. Mellon* the Court was not content to be silent, and declared flatly: "We have reached the conclusion that the cases must be disposed of for want of jurisdiction, without considering the merits of the constitutional questions."[11] The Court viewed the *Bradfield* case as one directed against the District of Columbia, and subject to the rule that resident taxpayers may sue to enjoin an illegal use of moneys of a municipal corporation, just as shareholders may sue a private corporation.[12] The Court went on to say:

> But the relation of a taxpayer of the United States to the Federal government is very different. His interest in the moneys

[4] 175 U.S. 291 (1899).
[5] *Id.* at 295.
[6] *Id.* at 300.
[7] 202 U.S. 429 (1906).
[8] *Id.* at 438.
[9] 204 U.S. 24 (1907).
[10] *Id.* at 31.
[11] 262 U.S. 447, 480 (1923).
[12] *Id.* at 486.

> of the Treasury – partly realized from taxation and partly from other sources – is shared with millions of others; is comparatively minute and undeterminable; and the effect upon future taxation of any payment out of funds so remote, fluctuating, and uncertain; that no basis is afforded for an appeal to the preventive powers of a court of equity.[13]

It is this doctrine to which the Court has consistently adhered, and which makes it clear that a taxpayer's suit to enjoin the execution of any federal legislation granting funds to church-related schools cannot be maintained. The same doctrine applies to the use of state tax revenues, but the exception in cases of smaller taxing units is still maintained. The distinction can be shown in two New Jersey cases, both raising first amendment questions. In the famous litigation over bus rides,[14] the public money involved came from township board of education revenues. While a state statute authorized local school boards to provide for transportation, the money came from local taxes. The suit was instituted by a taxpayer in the township, and his standing to raise the issue was not questioned by the Supreme Court.

On the other hand, in the *Doremus*[15] case, a taxpayer and a parent of a school child, were denied standing to sue to obtain a declaratory judgment that reading the Bible in the public schools was unconstitutional. The New Jersey Supreme Court was doubtful about the plaintiffs' standing and gave expression to these doubts: "Apparently the sole purpose and the only function of plaintiffs is that they shall assume the role of actors, so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute."[16] Nevertheless, the New Jersey court decided the case on its merits. But the United States Supreme Court again followed the *Mellon* rule and refused to render a decision on the substantive issues. It explained the *Everson* case this way: "But Everson showed appropriation or disbursement of school district funds occasioned solely by the activities complained of. This complaint does not."[17] It should be noted that the child of the plaintiff who sued as a parent had graduated from the school before the appeal was presented, hence only the plaintiffs' status as taxpayers could be used to establish qualification as proper parties. Although three members of the Supreme Court dissented from the refusal to hear the *Doremus* case, in their minority opinion they agreed that the case could not be heard if it involved a federal statute.[18] The Court was therefore unanimous in adhering to the *Mellon* case.

A few words should be said about two other first amendment cases, because they illustrate the limits of the doctrine of standing-to-sue and serve to demonstrate the impossibility of testing a federal aid-to-education bill directly. In the *McCollum*[19] case the Court found a violation of the Constitution in the teaching of religion on public school property. The suit was maintained by a mother of a child in the school. She purported to sue both as a parent and as a taxpayer. Her child elected not to attend religion classes. Writing for the Court, Mr. Justice Black summarily rejected the claim that the appellant lacked

[13] *Id.* at 487.

[14] Everson v. Board of Educ., 330 U.S. 1 (1947).

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

[16] Doremus v. Board of Educ., 5 N.J. 435, 439, 75 A.2d 880, 881 (1950).

[17] Doremus v. Board of Educ., 342 U.S. 429, 434 (1952).

[18] *Id.* at 435.

[19] McCollum v. Board of Educ., 333 U.S. 203 (1948).

standing to sue. In a concurring opinion, Mr. Justice Jackson wrote: "I think it is doubtful whether the facts of this case establish jurisdiction in this Court. . . ."[20] Mrs. McCollum alleged that her child was humiliated by being set apart when he declined to attend the religion classes. Apparently, to the majority of the Court this effect on the child was sufficient to provide standing to sue. In any event it should be noted that this case like the *Everson* case, involved a local school board. If the diversion of a measurable amount of tax funds could be shown to have been made, the taxpayer's standing would be beyond dispute.

An interesting sidelight on the *McCollum* case is that Mr. Justice Black, in summarily rejecting the objection raised to the petitioner's standing, cited only one case. The case which he chose was *Coleman v. Miller,*[21] in which a divided Court found that a group of Kansas legislators had standing to contest the action of the Secretary of State of Kansas in endorsing as approved a state resolution on the proposed Child Labor Amendment. Yet in that case Justice Black joined in an opinion by Justice Frankfurter asserting that the petitioners had no standing to sue. The point was expressed vigorously and bluntly:

> We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view cannot ask us to pass on it.[22]

The precedent of the *McCollum* case on the issue of standing appears to have been followed in *Zorach v. Clauson.*[23] In a footnote Mr. Justice Douglas recited: "No problem of this Court's jurisdiction is posed in this case since, unlike the appellants in *Doremus v. Board of Education,* . . . appellants here are parents of children currently attending schools subject to the released time program."[24] This point had gone largely, but not entirely, unnoticed in the New York courts. It is clear that although the *Zorach* case never went to trial, the New York courts decided it on the merits.[25] Only Judge Desmond was heard to complain about whether there were proper parties and he admitted that at least one earlier case[26] appeared to accept parents as per se proper parties. However, he suggested that the point should be re-examined.[27] Once again we have a case which is clearly distinguishable from any involving the use of public funds in private schools.

Although not involving issues of non-establishment, some of the litigation in the New Deal period is useful in demonstrating the notion of standing to sue as it affects the existence of a case or controversy. In *Tennessee Elec. Power Co. v. TVA*[28] the Supreme Court dismissed a bill to enjoin the T.V.A. from generating and selling electricity in competition with the appellants. Any injury they might suffer through

[20] *Id.* at 232.
[21] 307 U.S. 433 (1939).
[22] *Id.* at 467.
[23] 343 U.S. 306 (1952).
[24] *Id.* at 309 n.4.
[25] The petition was dismissed "on the merits as a matter of law." Zorach v. Clauson, 198 Misc. 631, 99 N.Y.S.2d 339 (Sup. Ct. 1950), *aff'd,* 278 App. Div. 573, 102 N.Y.S.2d 27 (2d Dep't), *aff'd,* 303 N.Y. 161, 100 N.E.2d 463 (1951).
[26] People *ex rel.* Lewis v. Graves, 245 N.Y. 195, 156 N.E. 663 (1927). See also Lewis v. Spalding, 193 Misc. 66, 85 N.Y.S.2d 682 (Sup. Ct. 1948), *appeal withdrawn,* 299 N.Y. 564, 85 N.E.2d 791 (1949).
[27] Zorach v. Clauson, 303 N.Y. 161, 176, 100 N.E.2d 463, 470 (1951).
[28] 306 U.S. 118 (1939). See also Alabama Power Co. v. Ickes, 302 U.S. 464, 478 (1938).

competition was not a basis for standing to sue. A taxpayer who seeks to enjoin a federal expenditure is even further removed from the potentiality of harm which can make him a qualified adverse party.[29]

On the other hand, a special tax tied to a regulatory scheme may be viewed as not truly a tax but merely a regulatory device. When this is so, the affected party has standing to sue. It was on this basis that the Agricultural Adjustment Act was successfully attacked.[30] Whether this precedent would still be followed[31] need not concern us, because the proposals for federal aid to education do not fit this pattern.

Several of the witnesses testifying before the House and Senate Committees on the federal aid-to-education proposals have suggested that if aid to church-related schools is included, Congress provide for a judicial test of the constitutional question.[32] From what has been said already it should be clear that Congress cannot do this. The lack of standing to sue goes to the existence of a case or controversy, and without a case or controversy *there is no judicial power.* The Court has predicated its refusal to hear taxpayers' suits not on a policy of abstention, but on an interpretation of Article III.[33]

The classic example of a congressional attempt to create a judicial case is found in *Muskrat v. United States.*[34] Congress by statute[35] expressly authorized two members of the Cherokee Indian tribe to sue the United States on their own behalf and on behalf of all other Cherokee citizens having a like interest. The purpose of the suits was to examine the constitutionality of certain legislation purporting to affect Cherokee property rights. Leaving no doubt concerning jurisdiction, the statute provided: "And jurisdiction is hereby conferred upon the court of claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits."[36]

The Court rejected the suits, denying it had a revisory power over the action of Congress. Only when rights of litigants in justiciable controversies come before the Court can an issue of constitutionality be properly framed. The Court held that the judicial power under the Constitution does

[29] Williams v. Riley, 280 U.S. 78 (1929). "The complainant must possess something more than a common concern for obedience to law." Western Pac. Cal. R.R. v. Southern Pac. Co., 284 U.S. 47, 51 (1931).

[30] United States v. Butler, 297 U.S. 1 (1936). "We conclude that the act is one regulating agricultural production; that the tax is a mere incident of such regulation and that the respondents have standing to challenge the validity of the exaction." *Id.* at 61.

[31] See United States v. Kahriger, 345 U.S. 22 (1953); United States v. Darby, 312 U.S. 100 (1940); Child Labor Tax Case, 259 U.S. 20 (1922); Hammer v. Dagenhart, 247 U.S. 251 (1918).

[32] See column by Anthony Lewis, N. Y. Times, March 29, 1961, p. 22, col. 6.

[33] Cases cited notes 15, 28, 29 *supra.* In Frothingham v. Mellon, 262 U.S. 447 (1923) the Court said:

"The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary, the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. . . . We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." *Id.* at 488. See U.S. CONST. art. III, §1.

[34] 219 U.S. 346 (1911).

[35] Act of March 1, 1907, ch. 2285, 34 Stat. 1015.

[36] *Ibid.*

not extend to any such congressional attempt to obtain a declaration of validity.[37]

Unless the *Muskrat* case is overruled, it seems impossible to obtain judicial review by any legislative clause purporting to authorize a suit. The rule of this case is completely in accord with the entire body of doctrine concerning cases and controversies,[38] and parties thereto, and the authority of the *Muskrat* opinion has never been doubted.[39]

Indeed, we may see the limits to which Congress can go in enlarging the jurisdiction of the courts if we look at the Federal Declaratory Judgment Act[40] and cases decided under it.[41] In the language of the Act itself, as well as in the cases, an actual controversy is required; and a controversy requires parties in the traditional sense. The only conclusion which can be drawn is that the current proposals for judicial review by legislative fiat will fail.[42]

What happens to constitutional considerations when Congress is considering legislation which cannot be tested in litigation? It is a paradox of historical development that the commanding position of the Supreme Court on issues of constitutionality, so much disputed at its origin,[43] has become so familiar that perplexity arises when the Court's power is inoperative. What should happen is what was clearly intended when the Constitution was written: the members of Congress and the President, joining in the legislative process, should make conscientious judgments *of their own* on the constitutional issues.

First let it be made clear that this is not an effort to renounce the Supreme Court. One spokesman has been reported as urg-

[37] "The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the Act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends." Muskrat v. United States, 219 U.S. 346, 361 (1911).

[38] The *Muskrat* case merely follows a precedent resulting from Hayburn's Case, 1 U.S. (2 Dall.) 8 n.1 (1792). Congress had authorized the Supreme Court to examine pension claims and some of the judges refused. The Act of Feb. 28, 1793 was passed, authorizing a suit to test the validity of non-judicial action by the judges. The story of this episode is recounted in I WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 69-83 (rev. ed. 1926). Willoughby claimed that the requirement of proper parties was a rule born not of constitutional necessity but of the Court's own "sense of propriety and necessity." I WILLOUGHBY, THE CONSTITUTION OF LAW OF THE UNITED STATES 12-13 (1910). He makes the point without citation of any authorities.

[39] Falling outside the ambit of the doctrine are cases in which the petitioner is a voter seeking to protect his franchise. Lesar v. Garnett, 258 U.S. 130 (1922).

[40] 28 U.S.C. §§ 2201-02 (1958), as amended, 28 U.S.C. § 2201 (Supp. I, 1960).

[41] *E.g.*, Aetna Life Ins. Co. v. Haworth, 300 U.S. 277 (1937).

[42] One method of raising the issue in a true case or controversy can be imagined. If an administrative officer (in the Department of Health, Welfare and Education or in the Treasury Department) refused to execute legislation authorizing payments to church-related schools, a school adversely affected could seek a mandatory injunction against the official. See National Radio School v. Marlin, 83 F. Supp. 169 (N.D. Ohio 1949). Even in this situation the officer cannot insist upon the unconstitutionality of the statute since no injury to him results from the alleged unconstitutionality. See Smith v. Indiana *ex rel.* Lewis, 191 U.S. 138 (1903). Note, *The Power of a State Officer to Raise a Constitutional Question*, 33 COLUM. L. REV. 1036 (1933). In any event, an attempt by Congress to create this situation by legislating that there be a refusal to pay in order to raise a case would fall with the rule of the *Muskrat* case.

[43] I WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 204-68 (rev. ed. 1926).

ing something in that vein, and has said: "There is no justification in surrendering democratic judgment to the Supreme Court on an issue as basic as this."[44] But if this were a justiciable issue in which proper parties could join in a genuine controversy, there can be no doubt that the Court's ruling would be determinative and could be upset only by constitutional amendment or subsequent reversal by the Court.

The constitutional imperatives concerning non-reviewable legislation are basically not different from those concerning reviewable legislation. Fidelity to the Constitution is a duty which is not exclusive. All three branches of the government are occupied by persons sworn to uphold and defend our basic law.[45] In any of its actions, the Congress is under obligation to respect constitutional limitations. The quantum of this duty is technically the same regardless of the possibility of judicial review. When the Supreme Court in the *Mellon* case decided it had no power to review, it was not freeing Congress from constitutional imperatives. Indeed, it is fair to say that the lack of opportunity for judicial review should serve to *emphasize* the duty of the legislature and the executive to respect the Constitution. When the Supreme Court decides issues concerning the constitutionality of legislation it is not asserting a power to control the Congress; it is merely performing the judicial function in a constitutional way.

The point which is being made is so fundamental as to seem obvious. Yet in recent years it has been somewhat obscured by at least two kinds of developments. One is the tendency to stretch the judicial power beyond the ordinary scope of true cases and controversies raised by proper parties.[46] The other is the defense of judicial review by neo-orthodox rationalizations.[47] Our earliest commentators on the Constitution did not misunderstand the situation. Rawle speaks *first* of the legislature's own obligation to respect the Constitution.[48] After declaring: "This is, therefore, the great restraint,"[49] he then speaks of judicial review as a second restraint, with the power of the electorate as a third restraint, operating only ultimately.

A full statement of this view can be found in Storey's *Commentaries:*

> The Constitution, contemplating the grant of limited powers, and distributing them among various functionaries, and the state governments, and their functionaries, being also clothed with limited powers, subordinate to those granted to the general government, whenever any question arises, as to the exercise of any power by any of these functionaries under the state, or federal government, it is of necessity, that such functionaries must, in the first instance, decide upon the constitutionality of the exercise of such power. It may arise in the course of the discharge of the functions of any one, or of all, of the great departments of government, the executive, the legislative, and the judicial. The officers of each of these departments are equally bound by their oaths of office to support the Constitution of the United States, and are therefore conscientiously bound to abstain from all acts,

[44] Jerome Nathanson, administrative leader of the New York Society for Ethical Culture as quoted in The New York Times, April 17, 1961, p. 26, col. 1.

[45] U.S. CONST. art. II, § 1; art. VI.

[46] See a discussion of some aspects of this question in FREUND, ON UNDERSTANDING THE SUPREME COURT 82-116 (1951).

[47] *E.g.*, BLACK, THE PEOPLE AND THE COURT (1960). In this study of judicial review the Supreme Court is said to exercise a "legitimating" function. Presumably government action can be viewed as legitimate only when it qualifies for Court approval.

[48] RAWLE, A VIEW OF THE CONSTITUTION 284 (2d ed. 1829).

[49] *Id.* at 284-85.

> which are inconsistent with it. Whenever, therefore, they are required to act in a case, not hitherto settled by any proper authority, these functionaries must, in the first instance, decide, each for himself, whether, consistently with the Constitution, the act can be done. If, for instance, the President is required to do any act, he is not only authorized, but required, to decide for himself, whether, consistently with his constitutional duties, he can do the act. So, if a proposition be before Congress, every member of the legislative body is bound to examine, and decide for himself, whether the bill or resolution is within the constitutional reach of the legislative powers confided to Congress. And in many cases the decisions of the executive and legislative departments, thus made, become final and conclusive, being from their very nature and character incapable of revision.[50]

A question remains concerning the role judicial precedents should play in the judgment which the Congress and the President must make for themselves. Should they seek an answer to this question: "What would the Supreme Court decide concerning the constitutionality of this bill if the question were now before the Court as a justiciable issue?" Or should they instead ask what is their own private judgment on the question of constitutionality (after an examination of court decisions and other sources of enlightenment)?[51] These two different ways of framing the issue may have critical consequences on the substantive answer which emerges. This is particularly true where the Court itself has been sharply divided, as is true in the recent non-establishment cases. Different members of Congress and different Presidents may feel varying degrees of obligation to try to give the same answer the Court might give. It is probably correct to say that the commanding role which the Court has come to occupy in the formation of public opinion on constitutional questions transcends its technical jurisdiction over cases and controversies. But a proper reading of the Constitution and various historical examples can be used to sustain the right (indeed, the duty) of the Congress and the President to make independent judgments. At least this much is clear – the constitutional issues surrounding proposed legislation should not be reduced to merely political issues, for politics in the legislative halls should operate only within the range of measures and counter-measures which Congress can honorably declare do not violate the fundamental law of the land.

[50] I STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 374 (1st ed. 1833).

[51] Jefferson took an unequivocal position. "The second question, whether the judges are invested with exclusive authority to decide on the constitutionality of a law, has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the constitution which has given that power to them more than to the executive or legislative branches. Questions of property, of character and of crime being ascribed to the judges, through a definite course of legal proceeding, laws involving such questions belong, of course, to them; and as they decide on them ultimately and without appeal, they of course decide for themselves. The constitutional validity of the law or laws again prescribing executive action, and to be administered by that branch ultimately and without appeal, the executive must decide for themselves also, whether, under the constitution, they are valid or not. So also as to laws governing the proceedings of the legislature, that body must judge for itself the constitutionality of the law, and equally without appeal or control from its co-ordinate branches. And, in general, that branch which is to act ultimately, and without appeal, on any law, is the rightful expositor of the validity of the law, uncontrolled by the opinions of the other co-ordinate authorities. It may be said that contradictory decisions may arise in such case, and produce inconvenience. This is possible, and is a necessary failing in all human proceedings. Yet the prudence of the public functionaries and authority of public opinion, will generally produce accommodation." VI THE WRITINGS OF THOMAS JEFFERSON 461-62 (Washington ed. 1854).