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Confusion in the Realm of Taxpayer Standing: The State of State Taxpayer Standing in the Eighth Circuit

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Notes

Confusion in the Realm of Taxpayer Standing: The State of State Taxpayer Standing in the Eighth Circuit

Tarsney v. O'Keefe[1]

I. INTRODUCTION

In *Tarsney v. O'Keefe*, the United States Court of Appeals for the Eighth Circuit dismissed a claim for lack of standing brought by Minnesota state taxpayers challenging a state program that provided abortions for indigent women. In so doing, the Eighth Circuit applied the holding of *Flast v. Cohen*,[2] the United States Supreme Court case that narrowly limited federal taxpayer standing. The Eighth Circuit, however, erred in relying on *Flast*, as that case applies only to federal taxpayer standing, not state taxpayers. The court should have interpreted and applied the holding of *Doremus v. Board of Education of Borough of Hawthorne*,[3] the leading Supreme Court case on the issue of state taxpayer standing, to determine whether the plaintiffs had standing to challenge the expenditure.

II. FACTS AND HOLDING

Forty-seven individual Minnesota taxpayers, most of whom belonged to pro-life religious groups, brought this action against the State of Minnesota, alleging that the use of state tax money to pay for abortions for low-income women violated taxpayers' constitutional rights.[4] Specifically, the plaintiffs alleged that the tax program violated the Free Exercise Clause of the First Amendment[5] and that the program unconstitutionally appropriated public funds

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1. 225 F.3d 929 (8th Cir. 2000).

2. 392 U.S. 83 (1968).

3. 342 U.S. 429 (1952).

4. *See Tarsney*, 225 F.3d at 932. The plaintiffs also named the Minnesota Department of Human Services and the Commissioner of Human Services as defendants. *Id.*

5. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The two Clauses are known as the Establishment Clause and the Free Exercise Clause, respectively. *See Tarsney*, 225 F.3d at 934. The United States Supreme Court applies these two Clauses to the states through the Fourteenth Amendment. *See id.* at 935.

for private purposes.[6] The plaintiffs sought an injunction prohibiting the state from funding abortions and a refund of the amount of their taxes that the state used to fund abortion services.[7]

The state parties moved to dismiss the complaint on the ground that the plaintiffs lacked standing.[8] They argued that taxpayer standing is not available to raise a claim under the Free Exercise Clause and that the plaintiffs had failed to allege standing on any other claims.[9] The plaintiffs argued in response that because taxpayers have standing to sue under the Establishment Clause, they also should have standing to sue under the Free Exercise Clause.[10] The district court concluded that the plaintiffs lacked taxpayer standing and granted the motion to dismiss.[11]

On appeal to the Eighth Circuit, the plaintiffs again alleged that the use of state funds for abortion services violated their Free Exercise Clause rights because they oppose the practice on religious grounds.[12] They urged the court to expand the holding of *Flast*, which recognized taxpayer standing to sue under the Establishment Clause, while leaving open the question whether such standing exists under the Free Exercise Clause.[13] They argued that the court should extend *Flast* to the Free Exercise Clause, because "no heirarchy (sic) of constitutional values" exists.[14]

The Eighth Circuit, in a two-to-one decision, disagreed.[15] The court held that while the Free Exercise Clause guarantees non-interference by the government with religious practices, the Clause differs from the Establishment Clause in that it does not specifically limit the government's spending power.[16] Therefore, the court held that taxpayers suffer no direct injury from the abortion

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6. *See Tarsney*, 225 F.3d at 933. The plaintiffs also challenged the validity of *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995), which held that state funding restrictions for abortion services violated a woman's right to privacy under the Minnesota constitution. *See Tarsney*, 225 F.3d at 933.

7. *See* Tarsney v. O'Keefe, 225 F.3d 929, 933 (8th Cir. 2000).

8. *See id.* at 934.

9. *See id.*

10. *See id.*

11. *See id.* The district court's decision is unpublished, and the current opinion does not give the details of the parties' arguments or the basis of the district court's conclusion. The Eighth Circuit, however, addressed the same issue in its opinion. *See id.*

12. *See id.*

13. *See id.* at 934-35. The plaintiffs also raised two other standing arguments for the first time on this appeal. *See id.* at 938-39. These arguments, however, are not relevant to this Note.

14. *Id.* at 934.

15. *See id.* at 938. Judge Diane E. Murphy wrote the opinion of the court, joined by Judge Gerald W. Heaney.

16. *See id.* at 936.

expenditure itself.[17] The court concluded that absent a more direct injury, i.e., a government expenditure that directly prevents an individual from exercising religious beliefs, a taxpayer has no standing to sue under the Free Exercise Clause.[18]

The dissent, authored by Judge Magill, agreed that the majority's argument was persuasive on the issue of *federal* taxpayer standing, but argued that *Doremus* was the controlling case for *state* taxpayer standing, not *Flast*.[19] Therefore, the dissent concluded that the majority should have decided the case under *Doremus* and chosen which interpretation of *Doremus* it would adopt: the measurable appropriation standard or the increased tax burden standard.[20]

III. LEGAL BACKGROUND

A. The General Rule of Standing

Standing is the threshold question for every lawsuit.[21] 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."[22] Because standing is a question of jurisdiction, a court must address standing "even if the parties fail to raise the issue . . . ."[23]

To establish standing, a plaintiff must prove three elements. First, the plaintiff must show a direct injury that is (a) "concrete and particularized,"[24] and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'"[25] Second, there must be a causal connection between the injury and the alleged illegal conduct.[26] Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision."[27]

Although some elements of standing express merely prudential considerations that are part of judicial self government,[28] in *Lujan v. Defenders*

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17. *See id.* at 938.
18. *See id.*
19. *See id.* at 940.
20. *See id.* at 939-42.
21. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230-31 (1990).
22. Baker v. Carr, 369 U.S. 186, 204 (1962).
23. United States v. Hayes, 515 U.S. 737, 742 (1995).
24. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
25. *Id.* (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).
26. *See id.*
27. *Id.* at 561.
28. *See, e.g.*, Massachusetts v. Mellon (Frothingham v. Mellon), 262 U.S. 447, 487 (1923) (denying general standing to federal taxpayers because of "attendant inconveniences" associated with allowing all citizens to challenge federal statutes).

of Wildlife,[29] Justice Scalia stated that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."[30] This case-or-controversy requirement serves to limit judicial power in two ways: (1) it limits judicial review to only those questions presented in an adversary context, and (2) it promotes the separation of powers by defining the role of the judiciary, thereby preventing that branch from intruding into the functions of other branches of government.[31] The injury-in-fact requirement of standing serves these power-limiting functions by (1) assuring "concrete adverseness" by requiring a "personal stake" in the outcome of the case,[32] and (2) promoting the separation of powers by restricting the availability of judicial review.[33]

A plaintiff usually has no problem meeting the standing threshold because a traditional case involves a plaintiff who alleges a direct economic or physical injury.[34] Difficulties arise, however, for plaintiffs outside the traditional class.[35] "Thus, standing may be difficult to establish if the plaintiff complains . . . not as an injured individual but as a member of some large group, such as taxpayers or citizens . . . ."[36]

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29. 504 U.S. 555 (1992).

30. *Id.* at 560. Article III of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another state;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

31. *See* Flast v. Cohen, 392 U.S. 83, 94-95 (1968). "Justiciability is the term of art employed to give expression to this dual limitation . . . ." *Id.* at 95.

32. Baker v. Carr, 369 U.S. 186, 204 (1962).

33. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3, at 55 (2d ed. 1994) ("The notion is that by restricting who may sue in federal court, standing limits what matters the judiciary will address and minimizes judicial review of the actions of the other branches of government.").

34. *See* Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93, 94 (1996).

35. *See id.*

36. *Id.*

B. Frothingham v. Mellon—*No Standing for Federal Taxpayers*

Taxpayer standing to challenge government expenditures began its turbulent journey in *Frothingham v. Mellon*.[37] In that case, Mrs. Frothingham challenged the constitutionality of the Federal Maternity Act, which appropriated federal tax dollars for the purpose of protecting the health of mothers and infants.[38] Frothingham alleged standing as a taxpayer of the United States, contending that the act would increase her tax burden, thereby depriving her of her property without due process of law.[39]

The United States Supreme Court denied Frothingham taxpayer standing and found that a federal taxpayer's interest in the federal treasury was "shared with millions of others," was "comparatively minute and indeterminable," and that any injury suffered by a federal taxpayer was therefore "remote, fluctuating and uncertain."[40] The Court concluded that to establish standing, a federal taxpayer "must be able to show, not only that the statute [was] invalid, but that he ha[d] sustained or [was] immediately in danger of sustaining some direct injury as the result of [the statute's] enforcement, and not merely that he suffer[ed] in some indefinite way in common with people generally."[41] The Court reasoned that to exercise its judicial power on such an injury as remote as a federal taxpayer's would be "not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly [the Court does] not possess."[42]

In dismissing the case, however, the Court distinguished federal taxpayers from municipal taxpayers.[43] The Court noted that the relationship between a municipal taxpayer and a municipality differs from that of the federal taxpayer and the federal government because it resembles "the peculiar relation of corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation."[44] Therefore, the Court held that "[t]he 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."[45]

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37. 262 U.S. 447 (1923).
38. *See id.* at 481.
39. *See id.* at 486.
40. *Id.* at 487.
41. *Id.* at 488.
42. *Id.* at 489.
43. *See id.* at 486-87.
44. *Id.* at 487.
45. *Id.* at 486. Several circuits have relied on this language to extend taxpayer standing to municipal taxpayers. *See* Cammack v. Waihee, 932 F.2d 765, 770-71 (9th Cir. 1991); District of Columbia Common Cause v. District of Columbia, 858 F.2d 1, 5 (D.C. Cir. 1988).

After *Frothingham*, then, "[f]ederal taxpayers could not, as a matter of law, show sufficient injury to have standing,"[46] while municipal taxpayers, because of their "peculiar relation" to the municipality, did have standing to challenge municipal expenditures in federal court.[47] Several years later, however, the Court would create an exception to this per se bar to federal taxpayer standing.

C. Flast v. Cohen—*A Narrow Exception for Federal Taxpayer Standing*

Forty-five years after *Frothingham*, the Supreme Court slightly relaxed its rigid rule precluding general federal taxpayer standing in *Flast*.[48] In *Flast*, several federal taxpayers sued the federal government to enjoin a federal spending program that appropriated funds for the purchase of textbooks and other instructional material for use in parochial schools.[49] The plaintiffs alleged that the expenditure violated the Establishment Clause and the Free Exercise Clause of the First Amendment, and claimed standing to maintain the action solely on their status as federal taxpayers.[50] Relying on *Frothingham*, the federal district court dismissed the case holding that federal taxpayers do not have standing to challenge government expenditures.[51]

The Supreme Court reversed the judgment and held that *Frothingham* was not an absolute bar to taxpayer standing and that federal taxpayers may challenge the constitutionality of a federal spending program so long as "there is a logical nexus between that status asserted and the claim sought to be adjudicated."[52] The Court reasoned that only upon a showing of this nexus could the plaintiffs "demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements."[53]

In the case of federal taxpayer standing, this logical nexus has two aspects.[54] "First, the taxpayer must establish a logical link between [the taxpayer] status and the type of legislative enactment attacked."[55] To do this, a federal taxpayer must have alleged the unconstitutionality of a spending program arising under

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46. Hoohuli v. Ariyoshi, 741 F.2d 1169, 1178 (1984).

47. That is not to say that citizens can never sue as federal taxpayers. For example, federal taxpayers, even under *Frothingham*, may challenge taxes that are *earmarked* for an alleged unconstitutional purpose, and they may also challenge the assessment of their tax liability. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 2.13 (3d ed. 1999).

48. *See* Flast v. Cohen, 392 U.S. 83 (1968).

49. *See id.* at 85-86.

50. *See id.*

51. *See id.* at 88.

52. *Id.* at 102.

53. *Id.*

54. *See id.*

55. *Id.*

the Taxing and Spending Clause.[56] "Secondly, the taxpayer must establish a nexus between [the taxpayer] status and the precise nature of the constitutional infringement alleged."[57] This means that the taxpayer must have alleged that the expenditure violated a constitutional right that operates as a *specific limitation* upon the spending power of Congress conferred by Article I.[58] If a federal taxpayer plaintiff can establish both aspects of the logical nexus, "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."[59]

The *Flast* Court held that the taxpayer plaintiffs had established this dual logical nexus.[60] First, the plaintiffs challenged a legislative spending program that arose under the Taxing and Spending Clause.[61] Second, by alleging that the expenditure violated the Establishment Clause, the plaintiffs established a logical nexus between their status as taxpayers and the alleged constitutional violation.[62] The Court explained that the Establishment Clause prohibits the government from providing any support to religious institutions and that any government appropriation for religious purposes is a violation of the Clause.[63] Therefore, the Establishment Clause "operates as a specific constitutional limitation" upon the taxing and spending power of Congress.[64] Having established both aspects of the logical nexus, the Court held that the plaintiffs had standing to challenge the government expenditure based on their status as federal taxpayers.[65]

Flast's holding has three noteworthy implications. First, *Flast* did not overturn *Frothingham*, but merely created an exception to the general rule prohibiting federal taxpayer standing.[66] Second, *Flast* has proven to be a very

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56. *See id.* The Taxing and Spending Clause states: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1.

57. Flast v. Cohen, 392 U.S. 83, 102 (1968).

58. *See id.* at 102-04.

59. *Id.* at 103.

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.* at 103-04.

64. *Id.* at 104. The Court also noted that "[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause . . . was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103.

65. *See id.* at 105-06. Because the Court found that the plaintiffs had standing to sue under the Establishment Clause, they did not reach the issue of whether the taxpayers had standing to challenge the expenditure under the Free Exercise Clause. *See id.* at 104 n.25. While the Court conceded that taxing power can infringe on the Free Exercise Clause, it suggested that standing in such cases would extend not to all taxpayers, but only those taxpayers within a specific affected class. *See id.*

66. *See id.* at 104-05. The Court held that *Flast* and *Frothingham* were completely

narrow exception to *Frothingham*, and its holding may be limited to Establishment Clause claims.[67]

Finally, *Flast* spoke only to standing in the context of federal taxpayers and did not mention the status of taxpayers suing in other capacities. Subsequent case law indicates that *Frothingham*'s holding concerning municipal taxpayers survived the decision.[68] Thus, municipal taxpayers still may establish standing to challenge municipal expenditures based on non-Establishment Clause claims.[69] The question that has created the most confusion, however, and the question unanswered by *Frothingham* and *Flast*, is the status of state taxpayer standing in federal court.

D. Doremus v. Board of Education of Borough of Hawthorne —*Opening the Door for State Taxpayers?*

Sixteen years prior to *Flast*, in *Doremus*, the Supreme Court, addressed the question whether state taxpayers, based on their taxpayer status, could challenge a state expenditure in federal court. *Doremus* has created confusion among the lower courts. The only thing that courts have unanimously agreed upon after *Doremus*, is that *Doremus*, not *Flast*, controls the issue of state taxpayer standing in federal court.[70]

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consistent because Mrs. Frothingham's "constitutional attack was not based on an allegation that Congress . . . had breached a specific limitation upon its taxing and spending power." *Id.* at 105. Therefore, Mrs. Frothingham failed to establish the second aspect of the logical nexus. *See id.*

67. *See* Bowen v. Kendrick, 487 U.S. 589, 618 (1988) ("[W]e have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing . . . ."); Colo. Taxpayers Union, Inc. v. Romer, 963 F.2d 1394, 1399 (10th Cir. 1992) ("[T]he Court has indicated that *Flast* applies only to cases in which a federal taxpayer challenges a congressional appropriation . . . that allegedly violates the Establishment Clause of the First Amendment."); Minn. Fed'n of Teachers v. Randall, 891 F.2d 1354, 1358 (8th Cir. 1989) ("We believe that taxpayer standing was created to specifically permit the airing of establishment claims . . . ."); Taub v. Kentucky, 842 F.2d 912, 916 (6th Cir.), *cert. denied*, 488 U.S. 870 (1988) ("*Flast v. Cohen* appears to create a fairly narrow exception to the [rule against taxpayer standing], and may apply only to Establishment Clause cases . . . .").

68. *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 613 (1989) (holding that municipal taxpayers may have standing to challenge a municipal expenditure in federal court outside the context of the Establishment Clause).

69. *See id.*

70. *See* Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 793 (9th Cir. 1999) (en banc) (noting in a state taxpayer case that *Doremus* "controls the requirements for taxpayer standing in this case"); Bd. of Educ. v. N.Y. State Teachers Ret. Sys., 60 F.3d 106, 110 (2d Cir. 1995) (indicating that *Doremus* controls taxpayer standing); *Romer*, 963 F.2d at 1399 (holding that *Flast* applies only to "federal taxpayer standing issues, not questions relating to standing for state taxpayers"); *Randall*, 891 F.2d at 1356-58

The plaintiffs in *Doremus* sued in federal court as state taxpayers, challenging a New Jersey statute that provided for the reading of the Old Testament at the opening of each public school day.[71] The plaintiffs alleged that the statute violated the Establishment Clause.[72] The state of New Jersey moved to dismiss, arguing that the plaintiffs failed to establish standing.[73]

The Supreme Court granted the state's motion to dismiss holding that state taxpayers may challenge a state expenditure only if they bring a "good-faith pocketbook action."[74] The Court concluded that the plaintiffs did not meet this standard because they failed to show that "the statute add[ed] cost to the school expenses or varie[d] by more than an incomputable scintilla the economy of the day's work."[75]

In making this decision, however, the *Doremus* Court did not clearly define the "good-faith pocketbook" test. As a result, the decision has created much confusion in the lower courts. The critical question left partially unanswered by the Court was whether it intended to treat state taxpayers more like federal or municipal taxpayers for the purpose of standing in federal court. On the one hand, *Doremus* suggests that there is no distinction between federal and state taxpayers.[76] The Court stated:

> [W]e reiterate what [*Frothingham*] said of a federal statute as equally true when a state act is assailed: 'The party who invokes the 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 a result of its enforcement, and not merely that he suffers in come [sic] indefinite way in common with people generally.'[77]

As unambiguous as this language seems in favor of treating state taxpayers like federal taxpayers, the *Doremus* Court also suggested that state taxpayers, like municipal taxpayers, could have general standing.[78] The Court noted that

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(applying *Doremus* to a state taxpayer's claim); *Taub*, 842 F.2d at 918 ("[I]n those cases where violation of the Establishment Clause is not alleged . . . a state taxpayer must . . . meet the 'good-faith pocketbook' requirement of *Doremus*."); Hoohuli v. Ariyoshi, 741 F.2d 1169, 1179 (9th Cir. 1984) ("*Flast* does not appear to have affected the availability of standing for state taxpayers challenging state statutes.").

71. *See* Doremus v. Bd. of Educ. of Borough of Hawthorne, 342 U.S. 429, 430 (1952).

72. *See id.*

73. *See id.* at 433.

74. *Id.* at 434.

75. *Id.* at 431, 434.

76. *See id.* at 433-34.

77. *Id.* at 434 (quoting Massachusetts v. Mellon (Frothingham v. Mellon), 262 U.S. 447, 488 (1923)).

78. *See id.*

it had "found a justiciable controversy" when a state taxpayer "showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of."[79] This language suggests that a state taxpayer may have general standing to sue in a state taxpayer capacity so long as she can show a "measurable appropriation" of state money towards an allegedly illegal cause.[80]

Not surprisingly, *Doremus* has created a split among the federal circuit courts. Several circuits have relied on *Doremus*'s reference to *Frothingham* to conclude that state taxpayers, like federal taxpayers, can not challenge state government expenditures based upon a mere government appropriation of state funds.[81] Instead, the "good-faith pocketbook" standard requires that state taxpayers show a "direct and particular financial interest,"[82] such as a "monetary loss due to the allegedly unlawful activity's effect on his tax liability."[83] Absent such a showing, state taxpayers in these circuits will not be able to establish the requisite direct injury necessary to maintain standing.[84]

This rationale, which likens state with federal taxpayers for the purpose of standing, extends beyond the Article III separation of powers concern. Courts taking this position have held that in addition to Article III concerns, state taxpayer cases also raise "an especially compelling federalism concern that dictates careful attention to the threshold case or controversy requirement of standing."[85] These courts are concerned that "[u]nnecessary or abstract decisions by federal courts in cases where there is no case or controversy could unduly constrict experimental state welfare legislation and undermine local self-determination."[86] They reason, then, that the "mere allegation of federal

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79. *Id.* The Court referred to the case of *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947), when making this statement. The plaintiff in *Everson* sued as a state taxpayer challenging a state statute that used school-district funds to provide transportation to parochial schools. *See id.* at 3. While the plaintiff lost the case, the plaintiff lost on the merits, not for a lack of standing. *See id.* at 18.

80. *See, e.g.*, Hoohuli v. Ariyoshi, 741 F.2d 1169, 1180 (9th Cir. 1983).

81. *See* Bd. of Educ. v. N.Y. State Teachers Ret. Sys., 60 F.3d 106, 110 (2d Cir. 1995) ("State taxpayers, like federal taxpayers, do not have standing to challenge the actions of state government simply because they pay taxes to the state."); Colo. Taxpayers Union, Inc. v. Romer, 963 F.2d 1394, 1402 (10th Cir. 1992) ("Supreme Court jurisprudence indicates that state taxpayers must be likened to federal taxpayers."); Taub v. Kentucky, 842 F.2d 912, 918 (6th Cir. 1988) ("We conclude that the requirements for federal taxpayer standing announced in *Frothingham* control the issue of state taxpayer standing . . . .").

82. *Bd. of Educ.*, 60 F.3d at 110.

83. *Romer*, 963 F.2d at 1402.

84. *See id.*; *Bd. of Educ.*, 60 F.3d at 110; *Taub*, 842 F.2d at 918.

85. *Romer*, 963 F.2d at 1403; *see also Taub*, 842 F.2d at 919 ("Considerations of federalism should signal the same caution in these circumstances as concern for preservation of the proper separation of powers in an 'all federal' action.").

86. *Romer*, 963 F.2d at 1403.

constitutional violations cannot be allowed to clothe a state governmental decisionmaking process with the ill-fitting garments of federal court scrutiny."[87] Such reasoning has lead these courts to conclude that:

> The 'direct injury' requirement for standing that has flourished since *Frothingham* and *Doremus* and that defines the appropriate litigants in a state taxpayer case proves yet again the wisdom of the Framers of the Constitution when they tied federal court jurisdiction to the "case or controversy" requirement and its attendant standing . . . doctrines.[88]

The Ninth Circuit has taken a markedly different view from the other circuits by interpreting the *Doremus* "good-faith pocketbook" standard to require neither a showing of injury apart from general taxpayers, nor a showing of an increased tax burden.[89] Instead, the Ninth Circuit has held that a state taxpayer has standing to challenge a state expenditure in federal court if "[t]he pleadings set forth with specificity amounts of money appropriated and spent for allegedly unlawful purposes."[90] The court relied on the "measurable appropriation" language in *Doremus*, and *Everson v. Board of Education of Ewing Township*,[91] a case cited therein,[92] in reaching this conclusion.[93] The court reasoned:

> The difference between state taxpayer standing and federal taxpayer standing at the time of *Doremus*, then, was essentially one of economic relativity. Federal taxpayers could not, as a matter of law, show sufficient injury to have standing after *Frothingham*. State taxpayers could still maintain taxpayer suits if their pleadings were sufficient. They were sufficient if they set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity.[94]

This interpretation, then, "does not require that the taxpayer prove that her tax burden will be lightened by elimination of the questioned expenditure."[95]

The Supreme Court later clarified the holding of *Doremus* in *ASARCO, Inc. v. Kadish*,[96] although it did not expressly address the conflict among the lower courts, nor did it expressly overrule any cases. The plaintiffs in *ASARCO* sued as state taxpayers in federal court, challenging an Arizona mineral lease statute

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87. *Id.*
88. *Id.*
89. *See* Hoohuli v. Ariyoshi, 741 F.2d 1169, 1180 (9th Cir. 1984).
90. *Id.*
91. 330 U.S. 1 (1947).
92. *See supra* note 79 and accompanying text.
93. *See Hoohuli*, 741 F.2d at 1178.
94. *Id.*
95. *See* Cammack v. Waihee, 932 F.2d 765, 769 (9th Cir. 1991).
96. 490 U.S. 605 (1989).

because it "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes."[97] In dismissing the claim, the Court held that "we have likened state taxpayers to federal taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise."[98] The Court further held that because education in Arizona was not funded solely through the trust funds at issue, that it was "pure speculation whether the lawsuit would result in any actual tax relief for respondents."[99] The Court then concluded that because the possibility of pecuniary relief was so "remote, fluctuating, and uncertain," the plaintiffs had failed to establish the direct injury necessary for standing.[100]

ASARCO, while seemingly a definitive resolution of the conflict among the circuit courts, has not received much attention. The Ninth Circuit, which adopted the "measurable appropriation" standard, continues to recognize it as the test for taxpayer standing.[101] Two years after the *ASARCO* decision, the Ninth Circuit held that to establish standing a state taxpayer does not have to "prove that her tax burden will be lightened by the elimination of the expenditure."[102]

The Eighth Circuit also continues to recognize a form of the "measurable appropriation" test.[103] However, taxpayer standing in the Eighth Circuit is anything but clear.

E. The State of State Taxpayer Standing in the Eighth Circuit

It is unclear exactly how the Eighth Circuit has interpreted *Doremus*. After *Minnesota Federation of Teachers v. Randall*,[104] it appears that the court adopted the measurable appropriation standard of the Ninth Circuit.[105] *Randall* was an action brought by a state taxpayer who contested the use of prayer in public schools. The district court interpreted *Doremus* to require proof of an increased

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97. *Id.* at 614.

98. *Id.* at 613-14 (citing Doremus v. Bd. of Educ. of Borough of Hawthorne, 342 U.S. 429, 434 (1952)).

99. *Id.* at 614.

100. *Id.* (quoting Massachusetts v. Mellon (Frothingham v. Mellon), 262 U.S. 447, 487 (1923)).

101. *See* Cammack v. Waihee, 932 F.2d 765, 769-71 (9th Cir. 1991).

102. *Id.* at 769.

103. *See* Minn. Fed'n of Teachers v. Randall, 891 F.2d 1354,1356-58 (8th Cir. 1989). However, it is not clear exactly where the Eighth Circuit stands on the issue of taxpayer standing. *See* discussion *infra* Part III.E.

104. 891 F.2d 1354 (8th Cir. 1989).

105. *See id.* at 1356-58. Indeed, other circuits have interpreted the Eighth Circuit as adopting this standard. *See* Colo. Taxpayers Union, Inc. v. Romer, 963 F.2d 1394, 1400 (10th Cir. 1992) (stating that "[t]he Eighth Circuit . . . agreed with the Ninth Circuit's approach to state taxpayer standing"); *Cammack*, 932 F.2d at 769 (citing the Eighth Circuit as following the Ninth's Circuit approach).

tax burden and dismissed the plaintiff's case for lack of standing because he failed to show an increase in his tax bill.[105] The Eighth Circuit reversed, holding that "*Doremus* . . . clearly indicated that an increase in the plaintiff's tax burden was only *one* way injury could be shown . . . . [T]he Court believed that direct expenditures would also suffice."[107] The Eighth Circuit held that state taxpayers are not required "to show an increase in their tax burdens to allege sufficient injury . . . only . . . that there has been a disbursement of tax money in potential violation of constitutional guarantees."[108]

Randall, however, was a case involving the Establishment Clause, and it is unclear whether the Eighth Circuit will expand its holding beyond this area. The court suggested that its holding applies only to Establishment Clause claims when it stated, "[w]e believe that taxpayer standing was created to specifically permit the airing of establishment claims . . . ."[109] Furthermore, this holding is consistent with those circuits that have expressly rejected the measurable appropriation standard, because those courts do not require a state taxpayer to show an increased tax burden when alleging an Establishment Clause violation.[110] Therefore, because the court has only applied its holding to Establishment Clause claims, and because no circuit appears to require a showing of an increased tax bill when the Establishment Clause is at issue, it is unclear whether the Eighth Circuit will extend its measurable appropriation standard to non-Establishment Clause claims.

IV. THE INSTANT DECISION

A. The Majority

In *Tarsney*, the Eighth Circuit considered whether state taxpayers had standing to bring a Free Exercise[111] claim challenging Minnesota's use of state funds to provide abortions for indigent women.[112] In so doing, the court examined whether the holding of *Flast* would support taxpayer standing for Free Exercise claims as well as Establishment Clause claims.[113]

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106. *See Randall*, 891 F.2d at 1356.

107. *Id.* at 1357 (emphasis added).

108. *Id.* at 1358.

109. *Id.*

110. *See* Colo. Taxpayers Union, Inc. v. Romer, 963 F.2d 1394, 1401 (10th Cir. 1992) (requiring a showing of an increased tax burden only "where an Establishment Clause violation is not asserted"); Taub v. Kentucky, 842 F.2d 912, 917 (6th Cir. 1988) (noting the "distinctive treatment of standing when the Establishment Clause is involved").

111. *See supra* text accompanying note 5.

112. *See* Tarsney v. O'Keefe, 225 F.3d 929, 932 (8th Cir. 2000).

113. *See id.*

The court distinguished Establishment Clause claims from Free Exercise Clause claims for purposes of taxpayer standing. The court held that when "the government spends public money in violation of the Establishment Clause, a taxpayer suffers a direct injury because the government is improperly promoting religion."[114] Therefore, the Establishment Clause "operates as a specific limitation on Congress' taxing and spending power" and taxpayers have standing to sue under the Clause.[115]

The Free Exercise Clause, on the other hand, is "not analyzed in the same way for purposes of taxpayer standing."[116] When the government appropriates funds, it does not violate the Free Exercise Clause "unless the expenditure directly prevents an individual from exercising religious beliefs."[117] Thus, the "injury does not arise from the expenditure itself, but from the resulting limitation on religious exercise."[118] Therefore, the Eighth Circuit concluded that the "Free Exercise Clause does not operate as a specific limitation on the taxing and spending power of Congress which the Supreme Court discussed in *Flast*, and taxpayers do not have standing to bring claims under it unless they can show direct injury."[119]

B. The Dissent

In his dissent, Judge Magill argued that while the majority's analysis of *Flast* was persuasive, "the majority erred when it focused its attention on *Flast*"[120] as controlling the outcome of the case. Judge Magill stated that "[t]he downfall of the majority's analysis began when it examined what is clearly a case of state taxpayer standing under a line of cases that deal only with federal taxpayer standing."[121] Judge Magill stated that "the test that *Flast* announced only applies to federal taxpayer cases; in other words, cases against the federal government."[122] Moreover, Judge Magill noted that every court that has considered the issue of state taxpayer standing, including the Eighth Circuit, has held that *Doremus*, and not *Flast*, controls the issue of state taxpayer standing in federal court.[123]

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114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 940.
121. *Id.*
122. *Id.*
123. *See id.*

Judge Magill noted that, while the circuits have adopted *Doremus* as the controlling case on state taxpayer standing, they disagree on its application.[124] Furthermore, Judge Magill asserted that, while the Eighth Circuit has adopted the measurable appropriation standard of the Ninth Circuit in Establishment Clause cases,[125] the Eighth Circuit has left it unclear whether it will apply that standard to non-Establishment Clause claims.[126] Judge Magill stated that it was possible that the Eighth Circuit would instead adopt the increased tax burden standard[127] for non-Establishment Clause claims.[128]

Judge Magill noted that, even though the parties had mistakenly relied on *Flast* in their arguments, that "ignorance of the parties should not carry over to this court."[129] Therefore, he concluded that "[b]y conflating federal and state taxpayer standing, the majority [] failed to discuss the difficult issues of state taxpayer standing raised in [the] appeal."[130]

V. COMMENT

A. The Majority Is in Error

In *Tarsney*, the Eighth Circuit applied the logic of *Flast* to deny standing to state taxpayers bringing a Free Exercise Clause claim.[131] The majority, as the dissent concedes,[132] correctly determined that *Flast* does not grant standing to Free Exercise claims because the Clause simply "does not operate as a specific limitation on the taxing and spending power of Congress which the Supreme Court discussed in *Flast* . . . ."[133] The dissent, however, correctly noted that the majority was in error, because *Doremus*, and not *Flast*, is controlling on the issue of state taxpayer standing in federal court.[134]

The Supreme Court did not intend for *Flast* to apply to state taxpayer standing because its holding was limited to federal expenditures that arise under the Taxing and Spending Clause.[135] As the dissent in *Tarsney* correctly noted,

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124. *See id.*

125. *See* discussion *supra* Part III.D.

126. *See* Tarsney v. O'Keefe, 225 F.3d 929, 942 (8th Cir. 2000).

127. *See* discussion *supra* Part III.D.

128. *See Tarsney*, 225 F.3d at 942.

129. *Id.*

130. *Id.*

131. *See id.* at 936.

132. *See id.* at 939 (commenting that the majority's analysis was "persuasive if this case involved federal taxpayer standing").

133. *Id.* at 936.

134. *See id.* at 940.

135. *See* Flast v. Cohen, 392 U.S. 83, 102 (1968); *see also supra* note 70 (citing cases that hold that *Doremus*, not *Flast*, controls the issue of state taxpayer standing in federal court).

the federal courts that have considered the issue of state taxpayer standing have all applied *Doremus*.[136] Indeed, the Supreme Court, in *ASARCO*, used *Doremus*, not *Flast*, to dismiss a non-Establishment Clause claim brought by state taxpayers.[137] Therefore, the *Tarsney* court was in error in applying *Flast* to a state taxpayer suit and should have established that *Doremus* controlled the issue.

After establishing that *Doremus* controlled, the *Tarsney* court then should have addressed the more difficult question of which *Doremus* interpretation to apply to non-Establishment Clause claims: the measurable appropriation standard[138] (which it has seemingly adopted), or the increased tax burden standard.[139] After the Supreme Court's holding in *ASARCO*, it appears that the court is obligated to choose the latter.[140] The *ASARCO* Court unambiguously held that state taxpayers may not establish state taxpayer standing absent a showing of a direct injury, i.e., a pecuniary loss.[141] Therefore, the lower courts that have continued to follow the measurable appropriation standard subsequent to *ASARCO* are in error.

B. The Supreme Court Should Reconsider Its Current Taxpayer Standing Classifications

Although *ASARCO* is binding precedent for lower courts, that decision is not necessarily correct. The core problem is the Court's differential treatment between state and municipal taxpayers. One justification for the differential treatment is the difference in "economic relativity" between state taxpayers and the state, and municipal taxpayers and the municipality.[142] But it is hard to justify this distinction considering the population disparities between states and municipalities. For instance, New York City alone has over sixteen times the population of the entire state of Wyoming.[143] If economic relativity is the rationale for distinguishing municipal taxpayers from state and federal taxpayers,

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136. *See* Tarsney v. O'Keefe, 225 F.3d 929, 940 (8th Cir. 2000).

137. *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 613-14 (1989).

138. *See* discussion *supra* Part III.D.

139. *See* discussion *supra* Part III.D.

140. *See* Colo. Taxpayers Union, Inc. v. Romer, 963 F.2d 1394, 1402 (10th Cir. 1992) ("After reviewing the reasoning in *ASARCO*, we conclude that we must reject the Ninth Circuit's formulation of state taxpayer standing because it equates state taxpayers with municipal taxpayers for standing purposes.").

141. *See ASARCO*, 490 U.S. at 613-14.

142. *See, e.g.*, Hoohuli v. Ariyoshi, 741 F.2d 1169, 1178 (9th Cir. 1989).

143. According to an estimate by the U.S. Census Bureau, New York had a 1999 population of 8,712,600, while Wyoming had a population of 479,602. United States Government, *Population Estimates*, *available at* http://www.census.gov/population/www/estimates/popest.html.

it is hard to classify a New York City citizen's injury as direct, while classifying a Wyoming citizen's injury as "remote, fluctuating and uncertain."[144]

Recent developments in federalism also make it difficult to square the Court's differential treatment between state and municipal taxpayers. Some lower courts have held that federalism concerns warrant restricting state taxpayer standing in federal courts to prevent federal courts from undermining state welfare legislation and local self-determination.[145] The Supreme Court, however, has not traditionally afforded this same protection from the federal government to municipalities.[146] The Court has traditionally "predicated the constitutional status of local governments entirely on the theory that a local government is merely an administrative arm of the state, utterly lacking in autonomy . . . ."[147]

More recently, however, the Supreme Court "has treated localities as active, locally responsive governments, not just administrative arms of the state."[148] The Court increasingly has started to recognize municipal autonomy in several different contexts.[149] It has recognized that "locally accountable governmental units are significant in practice and desirable in theory."[150] This has "led it to affirm the representative nature of local governments, the operational independence of local governments from their states, and the important role local governments play in making law and policy."[151] Therefore, because of this increasing recognition of municipal autonomy, the Court should not now distinguish municipal taxpayer standing from state taxpayer standing on the grounds of federalism.

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144. ASARCO, Inc. v. Kadish, 490 U.S. 605, 614 (1989) (citing Massachusetts v. Mellon (Frothingham v. Mellon), 262 U.S. 447, 487 (1923)).

145. *See Romer*, 963 F.2d at 1403.

146. *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 99 (1990).

147. Briffault, *supra* note 146, at 85; *see also* Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907) (holding that "[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them").

148. Briffault, *supra* note 146, at 85; *see also* Avery v. Midland County, 390 U.S. 474, 481 (1968) ("In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens.").

149. *See, e.g.*, Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974) (the Court, applying the rational basis standard of review, gives great deference to a municipal zoning ordinance restricting land use to family residents); *Avery*, 390 U.S. at 479-81 (holding that the Equal Protection Clause applies to municipalities because municipalities are governments that have autonomous decision making authority on behalf of local residents).

150. Briffault, *supra* note 146, at 99.

151. Briffault, *supra* note 146, at 99.

The Court should reconsider its taxpayer standing classifications. If economic relativity truly is the Court's rationale for the distinction, it is inconceivable that all state taxpayers have a remote and fluctuating economic relationship with the state treasury, while all municipal taxpayers have a direct and immediate interest with their local treasury. Furthermore, if federalism concerns are behind the Court's rationale for the distinction, it no longer follows that those same concerns do not also apply to local governments. The Court, therefore, should abrogate this distinction and either allow both state and municipal taxpayer standing upon a showing of a measurable government appropriation or deny standing to taxpayers altogether. The Court needs to make a change, either way, because logic no longer supports the Court's current classification.

VI. CONCLUSION

Taxpayer standing has caused much confusion among the courts. The Supreme Court's application of different and unclear standards to different classes of taxpayers is hard to reconcile and has resulted in inconsistent decisions among the lower courts. The Eighth Circuit has not escaped this confusion. By applying *Flast* to a state taxpayer case, the Eighth Circuit missed an opportunity to set the record straight. Instead, the Eighth Circuit should have applied *Doremus* to the present case, followed the precedent set by *ASARCO*, and dismissed the case for lack of standing. While the outcome would have been the same, the court's erroneous path in reaching this outcome unfortunately has added more confusion to an area of the law that is already plagued with uncertainty.

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