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Taxpayer Suits and the Aggregation of Claims: The Vitiation of Flast by Snyder

In Flast v. Cohen, the Supreme Court held that under certain circumstances federal taxpayers have standing consistent with Article III to challenge the constitutionality of congressional spending programs. However, standing is only one of several federal jurisdictional requirements. Under both the federal question and diversity jurisdiction of the district courts there is an amount in controversy requirement of $10,000. If the jurisdictional amount is not met, even plaintiffs with unquestioned standing cannot proceed in federal court.

Kenneth Davis has said of Flast that "the narrow holding seems impregnable and seems destined to become a long-term cornerstone of the law of standing." However, a recent case concerning aggregation of claims to meet jurisdictional amount, Snyder v. Harris, vitiates the practical effect of the seemingly monumental Flast decision. If Flast is to be more than an illusion, Snyder must be circumvented, either legislatively or judicially.

I. Jurisdictional Amount, Aggregation and Class Actions.

In determining amount in controversy, judges must first decide the "viewpoint" from which the matter is to be valued. The great ma-

1. 592 U.S. 83 (1968).
2. The Court held that
   [A] taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.
392 U.S. at 105-06.
The majority of federal courts, adopting the "plaintiff-viewpoint," hold that the matter in controversy is the "value of the right" asserted to the plaintiff. The minority test, termed the "defendant-viewpoint," is that the matter in controversy is the "value of the right" asserted to either the plaintiff or defendant, whichever amount is greater. In many suits, a choice between viewpoints is not necessary, since the amounts are usually equal. But in some situations, as when a plaintiff with $9,000 in damages seeks to enjoin a $100,000 business as a nuisance, the choice of viewpoint will determine the existence of federal jurisdiction.

When there are multiple parties to a lawsuit, a second amount in controversy issue arises—whether aggregation of interests is to be allowed. When there is more than one plaintiff, the issue is governed by rules derived from the common law of joinder. In 1832, the Supreme Court held that joined plaintiffs could not aggregate "separate and distinct" claims in order to meet amount in controversy requirements. The rationale was that when parties, for their own convenience, joined to prosecute claims that could have been adjudicated individually, federal courts would be unduly expanding their jurisdiction if they entertained jointly claims which they could not hear separately. Aggregation was permitted only when the right involved was "undivided" or "common" to all joined plaintiffs. In such situations, since the interests of one plaintiff could not be adjudicated without determining the rights of others, the matter in controversy was clearly the combined interests of all plaintiffs and aggregation was permitted.

See generally 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 569 (Wright ed., 1961, 1969 Supp.) (hereinafter cited as BARRON & HOLTZOFF); 1 J. MOORE, FEDERAL PRACTICE ¶¶ 0.90-0.99 (hereinafter cited as MOORE); C. WRIGHT, FEDERAL COURTS § 86 (1963).

8. See 1 MOORE ¶ 0.91 [1] at 827 and cases cited at n.6 therein.
9. See Dibie, supra note 7.
10. See 1 MOORE ¶ 0.91 [1]; C. WRIGHT, supra note 7 § 34 at 100 and cases cited therein.
11. Of course, even after the viewpoint is chosen, problems may remain in precisely "valuing the right" asserted in a particular suit. See, e.g., McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936).
14. This was "permissive joinder."
15. For some of the problems in deciding when claims are common and undivided and when they are separate and distinct, see Note, Aggregation of Claims in Class Actions, supra note 12, at 1558-62.
16. This was "compulsory joinder."
17. See Note, supra note 12, at 1556.

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These aggregation rules were carried over from the joinder cases and applied by the courts to class actions brought under Rule 23 of the 1938 Federal Rules of Civil Procedure. Rule 23 allowed one or more of a group of persons interested in a matter to sue or be sued as representatives of the others. Under the Rule, three types of class actions could be brought. The three categories, which were based on the nature of the rights asserted by the plaintiffs,18 were designed both to define the situations amenable to class suits and to determine the effective scope of judgments in Rule 23 actions.19 In the first category, "true" class actions, the rights involved were common and undivided. In the second and third categories, "hybrid" and "spurious" class actions, the rights involved were separate and distinct. Using the joinder cases as precedent, the courts ruled that aggregation was permitted only in true class suits, since in that category alone were the claims common and undivided.20 Often, the courts omitted all reference to the old joinder classifications and instead used the terms true, hybrid, and spurious as the guiding terminology when deciding the aggregation issue in class actions.21 Thus, the rules governing aggregation and Rule 23 categorization became entwined.

Application of Rule 23 categories to aggregation problems entailed implicit adoption of the "plaintiff-viewpoint" approach to jurisdictional amount, since the Rule focused on the nature of the rights and interests asserted by plaintiffs. That very focus, however, caused widespread dissatisfaction with Rule 23. The application of terms such as "common," "undivided," and "several" to rights in particular fact situations

18. Rule 23, as originally promulgated, provided in relevant part
   (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
   (1) joint or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
   (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
   (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.
often led to confusion, since the common law rule and rationale which underlay the terms were neither self-executing nor self-explanatory. As a result, both courts and commentators faced recurring problems in categorizing Rule 23 suits as true, hybrid, or spurious.\textsuperscript{22}

In an attempt to end the confusion, Rule 23 was amended in 1966.\textsuperscript{23} The amended rule categorizes cases that are appropriate for class treatment "functionally" rather than "conceptually."\textsuperscript{24} There is no reference to true, hybrid, or spurious actions, or to the nature of the rights asserted by the plaintiffs. The availability of the class action device is determined by situational factors such as the size of the class, the representativeness of the parties, the presence of common questions of law and fact, and the risks of denying class action status.\textsuperscript{25}


The case was variously characterized as a "class bill," 27 F. Supp. at 765, as "spurious," 108 F.2d at 55, and as "hybrid," 39 F. Supp. at 595. Finally, the Third Circuit said that "names are not important." 123 F.2d at 983.

For a description of the wanderings of the Deckert case, see Z. Chafee, Some Problems of Equity 263-89 (1950).


\textsuperscript{24} The language is Professor Wright's.

\textsuperscript{25} Rule 23 now provides, in relevant part:

(a) Prerequisites To Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
II. The Snyder Holding: “Workable Standards.”

The actions in Snyder v. Harris arose in the context of the 1966 amendment to Rule 23. The plaintiffs contended that the new Rule 23, by abolishing the old class action categories with their narrow focus on the “common” or “several” nature of the plaintiffs’ claims, also abolished the old aggregation principle for class actions, which had the same focus and which, through judicial decision, had made the abolished categorization determinative. They argued that the amended rule authorized aggregation of claims in every suit maintainable as a class action. In a 7-2 decision, the Supreme Court rejected that position.

Justice Black’s majority opinion held that “[t]he doctrine that separate and distinct claims could not be aggregated was never, and is not now, based on the categories of old Rule 23 or any rule of procedure.” Rather, the Court viewed the doctrine as based upon judicial construction, predating the 1938 Rules, of the language of the diversity jurisdiction statute. Under that statute, jurisdiction exists only when the “matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs.” Since an amendment to Rule 23 could

26. The decision actually involved two cases. The first, Snyder v. Harris, arose out of an action by a shareholder, on behalf of herself and all others similarly situated, against members of a company’s board of directors. She accused the named directors of selling their stock for amounts greatly in excess of its fair market value. Mrs. Snyder claimed that the excess represented a control premium, which should be distributed to the stockholders under Missouri law. The District Court, finding that Mrs. Snyder’s claim was only $8,740, dismissed the action for want of jurisdictional amount, refusing to let the claims of all stockholders constitute the amount in controversy. 268 F. Supp. 701 (E.D. Mo. 1967). If all the claims were aggregated, the amount in controversy would have been approximately $1,200,000. The Eighth Circuit affirmed the dismissal. 390 F.2d 204 (8th Cir. 1968).

In the companion case, Gas Service Company v. Coburn, a customer sued on behalf of himself and all others similarly situated to recover alleged overpayments made to a gas company. Coburn’s claim was only $7.81, but the aggregated claims of the class exceeded $10,000. 394 U.S. at 334. The gas company moved to dismiss for failure to satisfy the jurisdictional amount. The motion was denied, and the denial was affirmed on appeal. 389 F.2d 831 (10th Cir. 1968).


29. Id. The fact that the “joint”-“separate” distinction predated the 1938 rules is hardly open to question. See, e.g., Pinel v. Pinel, 240 U.S. 594 (1916).

not modify the diversity statute, Black concluded, it could not affect the settled aggregation doctrine.\textsuperscript{31}

The majority recognized that its decision would force lower courts to continue to decide whether class suits involved "joint and common" or "separate and distinct" claims, but it stated that

lower courts have developed \textit{largely workable standards} for determining when claims are joint and common, and therefore entitled to be aggregated, and when they are separate and distinct, and therefore not aggregable.\textsuperscript{32}

Moreover, Black continued, there are a number of federal jurisdictional grants that do not entail amount in controversy requirements.\textsuperscript{33} Unless a class suit involves traditionally aggregable claims or can be brought under these other statutes, he implied, it is probably best brought in state courts.

In a vigorous dissent, Justice Fortas maintained that the Court's decision was unfaithful to the spirit of the 1966 Amendment. Fortas reasoned that although the amount in controversy requirement was statutory, aggregation rules were court made and could be judicially modified. He criticized the majority for preserving standards that had been widely criticized as impractical and arbitrary.\textsuperscript{34} Moreover, Fortas warned, the majority's decision would affect class suits brought under the federal question jurisdictional statute, which contains "matter in controversy" language identical to that in the diversity statute involved in Snyder. Indeed, that conclusion is inescapable, since federal courts have always applied the same aggregation rule to federal question class suits as they have to those based on diversity jurisdiction.\textsuperscript{35}

\textsuperscript{31} 394 U.S. at 337-40.
\textsuperscript{32} 394 U.S. at 341 (emphasis added).
\textsuperscript{33} \textit{Id. See}, e.g., 28 U.S.C. \S\ 1343 (civil rights); 28 U.S.C. \S\ 1346 (United States as defendant). For the difficulties inherent in relying solely on such provisions, see Hague v. C.I.O., 307 U.S. 496 (1939), and note 60 infra.
\textsuperscript{34} 394 U.S. at 352. For a strong criticism of the old Rule 23 categories see Note, \textit{Federal Class Actions: A Suggested Revision of Rule 23}, 46 COLUM. L. REV. 818, 823-24, n.6 (1946):

\textit{Analyzed in terms of claims, the cases yield a curious pattern of inconsistency . . . . "Undivided interest," "single right," and other verbalisms are also employed. Like the shapeless pattern of the cases, they are based upon no rational principles or ascertainable policy considerations. See also, Kalven \& Rosenfeld, \textit{The Contemporary Function of the Class Suit}, 8 CHI. L. REV. 684, 707, n.73 (1941) ("accursed labels"); Z. CHAFFEE, \textit{Some Problems of Equity} 245-46 (1950) ("outworn categories"); Kaplan, \textit{Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)}, 81 HARV. L. REV. 356, 381 (1967).
\textsuperscript{35} \textit{See, e.g.}, Scott v. Frazier, 253 U.S. 243 (1920), p. 1584 infra.
III. Implications for Flast.

*Flast* was instituted in federal district court pursuant to the general federal question statute.\(^3\) It was clearly a class suit.\(^7\) However, neither Florence Flast, Albert Shanker, nor any of the other complainants could claim that their tax bill had been increased $10,000 by the Elementary and Secondary Education Act of 1965.\(^8\) If the jurisdictional amount was to be met, therefore, aggregation would have to be allowed. The issue, then, is whether, under the "workable standards" developed in taxpayer suits, *Flast* is the kind of suit in which the claims of the plaintiffs are aggregable. The *Flast* Court, however, did not confront the issue.\(^3\)

Prior to *Snyder*, lower federal courts, and the Supreme Court itself, held in a long line of decisions\(^4\) that taxpayer suits involve "separate and distinct" claims, which cannot be aggregated to meet federal amount in controversy requirements.\(^5\) The practical effect of

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36. Brief for Appellants before United States Supreme Court, Appendix at 5a. The original suit was entitled *Flast* v. Gardner, 267 F. Supp. 351 (S.D.N.Y. 1967). The plaintiffs were New York residents and federal taxpayers. They sought to challenge the constitutionality of those portions of the Elementary and Secondary Education Act of 1965 that provided for aid to parochial schools.

37. According to the first paragraph of the complaint, the suit was brought by the taxpayers "on their own behalf and on behalf of all others similarly situated." *Id.* at 5a. In the brief, appellants argued that the challenged disbursements "will surely have a substantial effect on the aggregate bill of all the taxpayers in whose behalf this class action has been brought." Brief for Appellants, at 28.

However, the record contains no evidence that a court, pursuant to Rule 23(c)(1), determined "by order" that the class action device was appropriate. See *Davis*, supra note 5, at 613. Presumably, this oversight can be attributed to the preliminary confusion over standing.

38. Professor Davis estimated that a New York taxpayer who paid $1000 in federal income tax "spent" about twelve cents on the challenged programs. *Id.* at 611.


Neither the complaint, the answer, nor the briefs in *Flast* confronted the aggregation problem. Although Fed. R. Civ. P. 12(b)(2) allows courts to raise jurisdictional issues sua sponte, that was never done in *Flast*.


See generally 2 BARRON & HOLTZOFF § 569; 3B MOORE ¶ 23.13.

41. One early Supreme Court case, *Brown v. Trousdale*, 138 U.S. 389 (1891), allowed a state taxpayer to compute the total loss to all taxpayers for the purpose of establishing the amount in controversy. *Colvin v. City of Jacksonville*, 158 U.S. 456 (1895), attempted feebly to distinguish *Brown*, but since both cases involved diversity taxpayers' attempts to enjoin local bond issues, they appear indistinguishable. All subsequent cases in the Supreme Court have followed *Colvin*. A few cases have allowed taxpayers to aggregate the amounts involved to meet federal jurisdictional requirements where the sum was in excess of $30,000. *Barker v. Williams*, 264 F.2d 842 (D. Mass., 1959); *Spencer v. Board of Education*, 318 F.2d 199 (1st Cir. 1963).
these decisions, which require that the jurisdictional amount be met by each complainant, has been to keep taxpayer suits out of the original jurisdiction of the federal courts. 42

Particularly relevant is the Supreme Court's opinion in Scott v. Frazier. 43 In that case, a group of North Dakota taxpayers sued, on behalf of themselves and all others similarly situated, to enjoin the expenditure of state funds in implementation of a series of controversial statutes. 44 Alleging that the expenditures violated the Fourteenth Amendment's ban on spending public money for a private purpose, the plaintiffs attempted to proceed under general federal question jurisdiction. 45 In a short opinion, the Court noted that "there is no allegation that the loss or injury to any complainant amounts to the sum of $3,000. It is well settled that in such cases as this the amount in controversy must exceed the jurisdictional sum as to each complainant." 46 Consequently, the case was remanded to the District Court to be dismissed for want of jurisdiction.

Scott was held to be controlling over forty-five years later in Fuller v. Volk. 47 The plaintiffs in Fuller were New Jersey taxpayers who sought to enjoin the expenditure of state funds in support of school desegregation plans. The Third Circuit, defining the issue as "whether a taxpayer's suit is one in which the claims of the class may be aggregated," 48 Court have ignored the Brown holding. See note 40 supra.

Professor Moore has suggested that Brown stands for the proposition that aggregation is permissible where the plaintiff asserts a "public right" rather than a "personal right." 3B MOORE 23.12 at 2961. Such a distinction "would not seem possible... since all taxpayers' actions involve an assertion of private rights in order to protect, as the plaintiff sees them, public rights." Note, Taxpayers' Suits: A Survey and Summary, 69 YALr. 895, 920 n.146 (1960). Brown should be considered overruled, sub silentio, by Colvin and the later cases. Id.; 2 BARRON & HOLTZOFF § 509 (Supp. 1969 at 120 n.20); cf. Jaffe, Standing to Secure Judicial Review: Public Actions, 74 HARv. L. REV. 1265, 1281 n.78 (1961).

Even those who think that Brown was correctly decided concede that the case is cited in subsequent decisions only to distinguish it. Ilken & Sardell, supra note 7, at 17 n.65. Whatever effect is given to Brown, the Flast situation would seem to be controlled by Scott v. Frazier, 253 U.S. 243 (1920). See pp. 1585-87 infra.

42. See Note, Taxpayers' Suits: A Survey and Summary, supra note 41, at 920; Jaffe, supra note 41, at 1281.
43. 253 U.S. 243 (1920).
44. LAWS OF NORTH DAKOTA, ch. 147-48, 150-54 (1919). The legislation provided for state participation in the businesses of manufacturing and marketing farm products and of providing homes. The scheme provided for the appropriation of money and the creation of a state banking system, and authorized bond issues and taxes to finance the plan.
45. 253 U.S. at 244. There was no diversity of citizenship.
46. Id. The Court cited Wheless v. St. Louis, 180 U.S. 379 (1901), and Rogers v. Hennepin County, 239 U.S. 621 (1916), in support of this statement.
47. 253 U.S. at 243, 245 (1920). (The jurisdictional amount was first set at $500, Act of Sept. 24, 1789, ch. 20 § 11, 1 Stat. 78; increased to $2,000, Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552; increased to $3,000, Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1091; and finally increased to $10,000, Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415.)
carefully reviewed the Supreme Court precedents. The Court held that "the present action is controlled by Scott v. Frazier, thereby preventing the aggregation of claims."  

The "plaintiff-viewpoint" reasoning behind the Scott-Fuller line of cases focuses narrowly on the nature of the monetary claims of the taxpayer-complainants. Plaintiffs in suits such as Scott (or Flast) are complaining about the taking of their tax money to finance allegedly unconstitutional government programs. Since each plaintiff's claim is grounded in his individual tax liability, the aggregation decisions hold, the members of the class do not possess "undivided" interests in the suit. Rather, the interests are distinct and vary with the size of each tax bill. The right asserted is the one not to be taxed for unconstitutional programs; and, from the perspective of the plaintiff, the value of that right is only the amount of his disputed tax. 

The aggregation decisions, in other words, distinguish between the monetary interests of the plaintiffs and the constitutional principles they seek to vindicate. It does not matter whether a spending program is attacked as violating First or Fourteenth Amendment principles. The claims are grounded in each plaintiff's tax bill, and thus are "separate and distinct." The constitutional principle involved is common to all, but the rights by which the suit is brought are not. 

The Scott-Fuller line of decisions deals only with state taxpayer suits. But the holdings are based on the nature of the rights asserted.


50. 351 F.2d at 328.

51. See Flast v. Cohen, 392 U.S. 83, 106 (1968). The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of those constitutional provisions which operate to constrict the exercise of the taxing and spending power.

52. For a similar analysis see Note, 80 U. Pa. L. Rev. 106, 109 (1931):

[T]he taxpayer's suits have caused little difficulty. Here the distinction between a principle common to all and a right common to all has been recognized. The citizen's constitutional guaranty is, in these cases, a principle common to all. But the rights against the person or persons violating this guaranty derive in no way from a common source. They are inherently distinct to the individual.

53. As in Flast.

54. As in Scott or Fuller.

55. As one court put it, [T]he taxpayer's interest is quite different from the public interest all citizens have in maintaining the integrity of the constitution. One is a property interest; the other is intangible and personal in its nature, having to do with political rights.

by taxpayer-plaintiffs, not on considerations of federalism. Thus, the rule that taxpayers present separate and distinct claims should apply to federal taxpayer suits, once standing is established.

There is nothing in the holding of Flast that avoids the effect of the Scott-Fuller line. Indeed, the majority opinion is particularly susceptible to Scott-Fuller reasoning. Justice Harlan's dissent notwithstanding, the majority in Flast does not simply grant standing for "public actions." A litigant attempting to invoke federal jurisdiction to challenge an expenditure must be more than a member of the public at large—he must be a taxpayer. There is standing to sue only when a plaintiff

[A]lleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being spent in violation of specific constitutional protections against such abuses of legislative power.

In short, Flast requires that plaintiffs have a property interest at stake; and one who has none—either because he is not a taxpayer or because a challenged program will not increase federal expenditures—has no standing to sue.

56. See Flast, 392 U.S. at 119-20 (dissenting opinion). The phrase, of course, is Professor Jaffe's, and is used to describe a court challenge to governmental action where the plaintiff need not allege that he is adversely affected by the program he seeks to have reviewed. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 460 (1965).

57. See Protestants & Other Americans United for Separation of Church and State v. Watson, 407 F.2d 1264 (D.C. Cir. 1968), where the cause was remanded to the District Court for a determination of whether the plaintiff organization was a taxpayer. If not, standing was to be denied.

It has been argued that the distinction is illusory, and that taxpayer suits have "functionally" become citizens' suits. Note, Taxpayers' Suits: A Survey and Summary, supra note 41, at 906. Compare Bittker, The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After Flast v. Cohen, 36 U. CHI. L. REV. 364 (1969), with Davis, The Case of the Real Taxpayer: A Reply to Professor Bittker, 36 U. CHI. L. REV. 375 (1969). While Professors Bittker and Davis disagree about the logic of limiting Flast's reach to actual taxpayers, both seem to recognize that the decision itself imposes such a limit. See also Davis, supra note 5, at 613.

58. 392 U.S. at 106.

59. See Essex County Welfare Bd. v. Cohen, 299 F. Supp. 176 (D. N.J. 1969), where standing was denied to a member of a welfare board to challenge congressional enactments curtailing aid to dependent children. The court held that:

Suing as a federal taxpayer, Lazaro cannot satisfy the nexus requirement without alleging an unconstitutional congressional expenditure. Instead he attacks a congressional enactment that, when effective, would restrict and delimit federal expenditures. Since he can claim no injury to his pocketbook by the statute, and there is no judicially cognizable right of a federal taxpayer to force Congress to add to his tax burden and undertake expenditures, Lazaro has no standing as a federal taxpayer . . . . The grounds on which he attacks the statute do not relate to his status as a taxpayer.

299 F. Supp. at 179.

The same result was reached in Triplett v. Tiemann, 302 F. Supp. 1239 (D. Neb. 1969),
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In sum, under the "workable standards" developed by the Scott-Fuller line of cases, federal taxpayer-plaintiffs present "separate and distinct" claims which cannot be aggregated to meet amount in controversy requirements. By preserving these standards, Snyder effectively blocks Flast-type suits based on both federal question and diversity jurisdiction. Since there are no other jurisdictional statutes under which taxpayer suits can be brought, Snyder has the effect of rendering the seemingly monumental Flast decision an illusion—federal taxpayers have standing to sue, but they cannot meet amount in controversy requirements.

IV. The Inapplicability of the Snyder Rationale.

That Snyder appears, sub silentio, to have foreclosed federal taxpayer suits is surprising. That result might be justified, however, if the policies behind the Snyder decision demanded it. Yet, on analysis, those reasons do not provide a satisfactory rationale for denying aggregation in federal taxpayer suits.

In Snyder, Justice Black states two basic justifications for the where taxpayers challenged a state effort to reduce aid to school districts that had received federal assistance. See also Carlsbad Union School Dist. v. Rafferty, 300 F. Supp. 494 (S.D. Cal. 1969).

60. 28 U.S.C. § 1343, the general civil rights provision, has no amount in controversy requirement; but it applies only where state action is involved. Wheeldin v. Wheeler, 378 U.S. 647, 650 (1965).

28 U.S.C. § 1346, which authorizes suits against the United States for amounts less than $10,000, grants jurisdiction only in suits for monetary damages. Jurisdiction is not authorized where declaratory or equitable relief is sought. Wells v. United States, 280 F.2d 275 (9th Cir. 1960).

There would appear to be no other original jurisdictional statutes applicable.

61. Two post-Snyder cases have denied aggregation in suits involving state or local taxpayers. In Local 1497 Nat'l Fed'n of Fed. Employees v. City & County of Denver, 301 F. Supp. 1108 (D. Colo. 1969), the plaintiff federal employees sought relief against a local occupational tax. Noting that the tax required of each employee was only $2 a month, the Court dismissed the complaint for want of jurisdiction, refusing to aggregate the claims of federal employees as a class.

In Booth v. Lemont Mfg. Corp., 304 F. Supp. 235 (N.D. Ill. 1969), the plaintiff brought a taxpayers' class action against a sanitary district and certain corporations to which it had leased land, contending that the leases were unconstitutional. Citing Snyder, Fuller, and Scott, the court dismissed the case, noting that "taxpayers' claims relating to property rights may not be aggregated." Id. at 237 (emphasis in original).

No court has yet denied aggregation in a federal taxpayers' suit. But, in Richardson v. Sokol, 409 F.2d 3 (3d Cir.), cert. denied, 396 U.S. 949 (1969), it was found that a taxpayer's challenge to the Central Intelligence Agency Act of 1949 did not meet amount in controversy requirements. The court based its ruling on the fact that no actual expenditures were being challenged, but noted that

In point of fact even if the appropriations themselves were challenged, there is substantial doubt whether appellant could invoke the federal question jurisdiction of the district court. 1 Moore's Federal Practice, Para. 0.91 [11], 2d ed. 1964.

409 F.2d at 5 n.3. In the relevant portion of his work, Professor Moore maintains that the plaintiff-viewpoint test is proper in approaching amount in controversy problems.
traditional aggregation rule. The first is the fear that allowing aggregation in diversity cases could clutter up federal courts with minor controversies involving questions of state law. That justification, however, is clearly inapplicable to Flast-type suits. Even critics of the Flast decision recognize that the issues raised by federal taxpayer suits are national in scope. Indeed, by limiting standing to those who challenge congressional spending on constitutional grounds, the Court in Flast foreclosed suits presenting purely local issues.

Justice Black's second justification for the traditional aggregation rule is that it helps maintain a reasonable workload in federal courts by excluding trivial lawsuits. Fear of a sharp increase in litigation was, of course, a reason for the Court's rejection of federal taxpayer suits in Frothingham v. Mellon. The Flast Court was well aware of "the fear expressed in Frothingham that allowing one taxpayer to sue would inundate the federal courts with countless similar suits." The majority opinion meets such fears in two ways. First, the Court states that the availability of joinder and class actions under the Federal Rules mitigates the possibility of redundant suits. Second, the restricted grant of standing in Flast implicitly limits taxpayers' access to the federal courts. A taxpayer is not granted standing "to air his generalized grievances about conduct of government or the allocation of power in the Federal system." The taxpayer plaintiff must allege that substantial expenditures made under the taxing and

62. 394 U.S. at 340.
63. Justice Harlan, for example, argued that decisions about such matters were constitutionally entrusted to Congress and the President, not to Article III courts. 392 U.S. at 130-33 (dissenting opinion). See also Davis, Standing to Challenge Governmental Action, 39 Minn. L. Rev. 353, 391 (1955) ("those who support the Frothingham doctrine assert that Congress should be the sole judge of the manner in which taxpayers' money is spent.")
64. 394 U.S. at 397.
65. 262 U.S. 447, 487 (1923): 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 whose administration requires the outlay of public money, and whose validity may be questioned.
In the years between the Frothingham and Flast decisions, the fear of opening the "floodgates of litigation" was seen as the principal argument for continuing to deny standing to federal taxpayers. Davis, supra note 63, at 390-91.
66. 392 U.S. at 94.
68. FED. R. CIV. P. 23.
69. 392 U.S. at 94. See also Judge Frankel's dissent below, where he notes that federal courts have learned in recent years to cope effectively with "huge litigations" and "redundant actions." Flast v. Gardner, 271 F. Supp. 1, 17 (S.D.N.Y. 1967) (dissenting opinion). Cf. Davis, supra note 5, at 634.
70. 392 U.S. at 106.
71. Id. at 108.
Taxpayer Suits and Aggregation of Claims

spending power of Congress\(^72\) violate a specific constitutional limitation on that power.\(^73\)

When read strictly, these requirements effectively prevent the overburdening of federal courts with taxpayer suits.\(^74\) Perhaps most important is the requirement that expenditures violate a “specific” constitutional limitation on the taxing and spending power. In *Flast*, the Court ruled that the Establishment Clause is such a limitation,\(^75\) leaving open the question of whether others even exist.\(^76\) To date, no court has discerned the requisite specificity in any provision other than the Establishment Clause.\(^77\) Instead, the specificity requirement has been employed to deny standing to taxpayers challenging expenditures for the war in Vietnam,\(^78\) the Demonstration Cities program,\(^79\) and OEO legal aid services.\(^80\) Each suit was held to involve merely “generalized” allegations of unconstitutionality.

The requirements that expenditures be substantial and that they be made pursuant to the taxing and spending power provide further safeguards against the undue proliferation of federal taxpayer suits. For example, the District of Columbia Circuit has expressed doubt that expenditures for a commemorative Christmas stamp are substantial enough to warrant standing under *Flast*.\(^81\) And the Tenth Circuit has held, in dismissing a taxpayer suit, that expenditures for the Vietnam War are made pursuant to the powers “to raise and support Armies” and “to provide and maintain a Navy” rather than the taxing and spending power.\(^82\)

Furthermore, to the extent that *Flast* will increase the workload of

72. Id. at 102.
73. Id. at 102-03.
74. It has been suggested that the *Flast* limitations are nonsensical and should be loosened. Davis, supra note 5, at 608. If such a loosening were to occur, *Flast* would certainly represent a greater burden on the federal workload than it now does. However, that event would seem unlikely, since, of the Justices, only Justice Douglas seems to favor the “public action” concept. 392 U.S. at 114 (concurring opinion). Moreover, any relaxation of the *Flast* standards would necessarily entail a recognition by the Court of the probable effect on federal judicial workloads.
75. 392 U.S. at 103-05.
76. Id. at 105.
77. See Protestants and Other Americans United for Separation of Church and State v. Watson, 407 F.2d 1264 (D.C. Cir. 1968), in which the court apparently felt that *Flast* is limited to situations in which a violation of the Establishment Clause is alleged.
81. Protestants and Other Americans United for Separation of Church and State v. Watson, 407 F.2d 1264, 1265 n.1 (D.C. Cir. 1968). The case was remanded for a determination of the “substantiality” of the expenditures.
federal courts in spite of these restrictions, that result was foreseen by the Court in its opinion.83

There are additional reasons why the amount in controversy requirement should not be applied to Flast-type suits. Court-made rules concerning aggregation should serve the general objectives behind the amount in controversy requirement. In establishing $10,000 as the jurisdictional amount, Congress implicitly decided that suits involving lesser sums were either unimportant or better left to the original jurisdiction of state courts.84 Yet, neither of those judgments is applicable to federal taxpayer suits.

Federal courts are clearly the most appropriate forum for Flast-type actions. Moreover, in such suits the dollar amount of an individual plaintiff's claims is hardly a proper measure of the importance of the issues involved. Taxpayers in Flast-type suits are, in Justice Douglas' words, "private attorneys general."85 Even though standing in Flast is based on "pocketbook interest," perhaps for historical reasons, the real motivation of the individual plaintiffs is not their personal financial stakes in the action.86 Rather, they are attempting to assert the public's interest in keeping Congress within constitutional bounds.87 Since the interest asserted is necessarily, under the limits of Flast, a matter of important public policy and is not personal in a narrow monetary sense, it is inappropriate to measure "importance" solely in personal financial terms. As long as substantial federal expenditures and serious constitutional questions are involved, the public's interest is certainly important enough to justify federal jurisdiction.

Of course, state taxpayers challenging the constitutionality of state laws may also be acting as "private attorneys general." But, even when such suits involve important federal questions, the state courts are an appropriate original forum. Leaving such suits to state courts avoids state-federal friction88 and allows state court judges to interpret state statutes.89 The workload of the federal district courts is thus not increased, while direct appeal and certiorari to the Supreme Court remain available for the litigant raising federal questions. Consequently, al-

83. See p. 1588 supra.
85. 392 U.S. at 108-09 (concurring opinion).
86. The costs of litigation outweigh the effect of the challenged program on any plaintiff's tax bill. See note 58 supra.
87. 392 U.S. at, 108 (concurring opinion).
88. See Note, Taxpayers' Suits: A Survey and Summary, supra note 41, at 921.
though the traditional aggregation doctrine should be held inapplicable in federal taxpayer suits, its continued application to state taxpayer suits can be defended.\(^9\)

V. The Proper Aggregation Principle for Federal Taxpayer Suits.

Many commentators had hoped that the 1966 Amendment of Rule 23 would provide an opportunity to abandon the traditional aggregation doctrine.\(^9\) Consequently, the Court's opinion in *Snyder* has come under heavy attack. The decision is criticized for preserving in the context of aggregation questions the same confusing standards that the 1966 Amendment was intended to abolish for class actions.\(^9\) This Note suggests further grounds for criticism of *Snyder*. In the *Flast* situation, the traditional aggregation doctrine furthers neither the policies articulated by Justice Black nor those voiced by Congress when it established a jurisdictional amount. In addition, the role of plaintiffs as private attorneys general in federal taxpayer suits makes a focus on the dollar amount of each individual's claim conceptually inappropriate.

Professor Wright has suggested that *Snyder* be circumvented by a congressional amendment of the diversity jurisdiction statute defining the amount in controversy as the aggregated claims of the class in Rule 23 actions.\(^9\) Whatever the merits of that proposal, it would not mitigate the effect of *Snyder* on *Flast*-type actions, which are brought under general federal question jurisdiction. In order to preserve the effect of *Flast*, Congress should define the amount in controversy in federal taxpayer suits as the aggregated claims of all plaintiffs.\(^9\)

If such legislative action is not forthcoming, the courts should ex-

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90. Although at some cost in consistency, considering the "private attorney general" nature of the plaintiffs in both types of suits. See p. 1592 infra.
91. See Frankel, supra note 7; Bangs, supra note 7; Kaplan, supra note 34, at 399-400; Note, 43 Tulane L. Rev. 360 (1969); Note, 52 Minn. L. Rev. 509, 514-15 (1967). But see Note, Aggregation of Claims in Class Actions, 68 Colum. L. Rev. 1554 (1968).
93. Wright, supra note 92, at 184. See also, Note, The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 212 (1969). Cf. Currie, supra note 7, at 297-98, where it is suggested that all amount in controversy requirements be abolished.
94. Much of the argument above would support entirely abolishing the amount in controversy requirement in taxpayer suits. See generally, Currie, supra note 7, at 297-98. This proposal has not been explored, however, because of the standing requirement of "substantial" expenditures in *Flast*. That requirement renders hypothetical any discussion of setting the jurisdictional amount below a "substantial" sum.
clude Flast-type suits from the effect of Snyder. Snyder might be overruled and aggregation allowed in all class actions brought under Rule 23, but that seems unlikely. Or, the courts might repudiate Scott and Fuller and hold that all taxpayer suits involve common and undivided claims. Such a course, however, would extend the original jurisdiction of the federal courts to state as well as federal taxpayer suits. Congress might, of course, appropriately allow aggregation of claims in state taxpayer suits brought in federal courts. But since the traditional aggregation doctrine, as applied to state taxpayer suits, is consistent with the objectives of the jurisdictional amount requirement, and since there would be some effect on the federal workload, such a judgment is better left to Congress than the courts.

The simplest solution would be for the courts to adopt a modified "defendant-viewpoint" and to hold, as a matter of policy, that federal taxpayer suits meet amount in controversy requirements whenever a spending program involving more than $10,000 is challenged. This approach would involve a departure from the "workable standards" of the past. But, at least as applied to federal taxpayer suits, those standards are inappropriate and clearly antagonistic to the spirit of Flast v. Cohen.

95. There is some authority for such a course in the analogous area of derivative suits by stockholders, which are treated as true class suits. See 3B Moore ¶ 23.1.21 and cases cited therein. The taxpayer has been likened to a stockholder, suing to prevent "ultra vires" acts by the government. See Doremus v. Bd. of Ed., 242 U.S. 439, 436 (1917) (Douglas, J., dissenting opinion). Cf. 2 Barron & Holtzoff § 559 n.38 (Supp. 1969). See also Brown v. Trousdale, 138 U.S. 389 (1891).

96. See p. 1578 supra. This solution, unlike one based on the plaintiff-viewpoint, avoids artificial manipulation of the "joint and common" and "separate and distinct" classifications. Under the plaintiff-viewpoint, federal and state taxpayer suits could be distinguished only by arbitrarily labeling the claims "joint and common" in the former and "separate and distinct" in the latter.

97. This approach could rationally distinguish state taxpayer suits, because of the appropriateness of the state courts. See pp. 1590-91 supra.

98. This, of course, implies no opinion about how "substantial" expenditures must be to satisfy the standing requirement. See p. 1589 supra.