The Historical Origins of the Patterns of Taxpayer Standing

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This article considers the historical source of the patterns of taxpayer standing. Standing for the municipal taxpayer was originally premised upon the idea that municipalities could raise taxes only for specific purposes, and thus that the taxes themselves would be invalid if the purposes for which they were raised were beyond the power of the local government. State courts seem to have been willing to come to the aid of local taxpayers to shield them from their tax obligations when municipalities sought to impose taxes for other purposes-and thus to enforce the limits the legislatures may have set upon the power of the municipalities. In some states, such procedures evolved into a standard mechanism for judicial review of municipal actions, sometimes even endorsed by state legislatures. Perhaps ironically, this evolution meant increasing judicial review of the legislative authority under which municipal actions, especially related to aid provided to the railroads through the issuance of bonds, were taken. Allowing taxpayer standing in such circumstances provided the state courts with a chance to interfere with such actions before such interference would defeat the expectations of the bondholders. The taxing powers of the state governments have never been so limited, and therefore nineteenth century state courts had less concrete means for acting upon taxpayers to challenge state projects.

Recent decisions of the Supreme Court of the United States seem to leave very little room for federal- and state-taxpayer standing to challenge government action in federal court, and although they seem willing to leave open the possibility that municipal-taxpayers will have standing. This article explores the historical bases of this pattern, which the Court has on several occasions observed but has never attempted to explain.¹

The pattern was most clearly observed in the Court’s dicta in Frothingham v. Mellon, in which the Court acknowledged that the lower federal courts had considered many municipal-taxpayer standing cases but had ordinarily refused to consider state or federal taxpayer standing. This dicta was based not upon any well-established doctrine,

¹ See text at [discussion of Frothingham]
but only upon its impressions regarding that pattern of the taxpayer standing cases that had actually been brought before it. The Court knew that it did not want to embrace federal-taxpayer standing, but was aware that it could not easily reject the possibility of taxpayer standing for all levels of government without repudiating the large group of its own cases in which municipal taxpayers had been allowed to challenge government actions based solely on their status as municipal taxpayers. It did not attempt in *Frothingham*—and has not attempted since—to consider why so many municipal taxpayer cases had come to its attention, and even received its blessing, while so few state or federal taxpayer cases had even been brought before it.

The Court’s impression was generally correct, that is, the federal courts had in fact considered, and reacted favorably to, many more taxpayer suits brought against local governments than against state governments. But the factors producing this pattern of cases have very little to do with the considerations that might be relevant if the modern court were to entirely rethink taxpayer standing for traditional article III purposes. Most of the taxpayer suits the Court had seen before *Frothingham* were originally brought in state courts and were seen by the Court only on writ of error to the higher state courts. Relatively few taxpayer suits against any level of government had actually been brought (and even fewer brought successfully) in the lower federal courts. The pattern observed by the *Frothingham* Court was therefore primarily the pattern found in state court cases, with only a small contribution from cases initiated in the federal courts, and that contribution was primarily a mimicking of the practices of state courts.

The prevalence of municipal standing suits in state court was the direct result of the early nineteenth century understanding of the nature of the power, especially the
taxing power, of municipal bodies. This taxing power was ordinarily a very limited power, specifically granted by state legislatures and acknowledged to be appropriately monitored by state courts. Often this legislative grant was expressly conditioned on the use to which the funds were to be put; and even if it was not, its exercise was constrained by the limited nature of the municipality’s power. If a municipal government did not exercise its taxing power consistently with the legislative grant under which it purported to act, including the use to which the tax revenues were to be put, its attempt to tax was a nullity. Frequently, if such taxes had already been paid, a judicially-ordered refund or other recovery (although not necessarily against the municipality itself) was permitted.

Neither the state governments nor the federal governments were subject to such sweeping restrictions on their taxing powers, especially early in the century. With far fewer substantive limitations on the taxing power of the state and federal government, there had been, at the time Frothingham was decided, far less litigation attempting to invoke those limitations in suits by taxpayers aimed at blocking the actions of the state or the federal government.

The patterns of taxpayer cases in federal court echoed those in state courts, partly as a result of the comfort of the bar and bench with these types of suits in state courts, and partly as a result of the niceties of federal court jurisdiction in the nineteenth century. The states and the federal government have (for various reasons not particularly germane to the core of article III standing) always been less amenable to suit in federal courts than have local governments. It should therefore not be surprising that at the time Frothingham was decided, there had been many more attempts to challenge the actions of local governments in federal court.
Part I sets out the modern understanding of taxpayer standing, and sets out in generalized form the way in which this pattern can be traced directly to the constraints on the powers of the various types of governments. Part II explores the earliest practices, in which taxpayer suits were actually suits in which the remedies available to taxpayers as taxpayers could be used to challenge not just the fact of a tax liability, but the purposes to which the funds to be raised were to be used. Part II considers the limited expansion of such litigation in the state courts against states themselves; Part III considers the even more limited extension of such litigation into the federal courts.

**Part I The Statement of the Modern Position in Frothingham.** As a matter of Supreme Court doctrine, the idea that the requirements of taxpayer standing should depend upon the level of government whose actions are challenged dates to the *Frothingham*, and its companion case, *Massachusetts v. Mellon*. In these cases, the Court refused to allow either the State of Massachusetts or a group of taxpayers resident in that state to challenge a federal conditional grant program. Although the opinion never used the word “standing,” the case has come to stand for the proposition that the federal courts, to some extent as a matter of judicial prudence but at the core as a matter of constitutional limitation, cannot entertain cases unless the parties seeking relief can show a “direct injury” that is not merely the burden shared “in some indefinite way in common with people generally.” In reaching this conclusion the Court observed that in

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2 The extent to which Supreme Court precedents reflect a constitutional limitation based on the “case or controversy” requirement is a matter of continuing discussion. See, e.g., Cass Sunstein, What’s Standing After Lujan? Of Citizen’s Suits, “Injuries” and Article III, 91 Mich L. Rev. 163 (1992); John A. Ferejohn & Larry D. Kramer, Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, 77 N.Y.L.U. Rev. 962 (2002). William A. Fletcher, The Structure of Standing, 98 Yale L. Rev. 221 (1988). Although some early cases can be read to inject a constitutional element into standing requirements, see Ann Woolhandler and Caleb Nelson, Does History Defeat Standing Doctrine? 102 Mich. L. Rev. 689 (2004), the possible differentiation of standing as a constitutional matter under Art III, and standing as a prudential matter for the federal courts had not occurred at the time *Frothingham* was decided.
some (but not all) prior federal cases, municipal taxpayers had been allowed to bring suit both in state and federal courts to challenge the ways in which local funds were expended.

The *Frothingham* Court felt the need to distinguish these cases, and therefore asserted that the relationship between the federal government and its taxpayers was different from the relationship between municipalities and their taxpayers. In what ways, exactly, the Court has never made clear. Although modern courts may not have generally appreciated it, this difference is not simply a matter of the magnitude of the taxes avoided and the complexity of the government budget involved, but is tied to the way in which the power to tax is defined and the manner in which the amount of the tax to be collected is determined. In many municipal jurisdictions, the power to levy taxes historically has been limited in two related ways: first, the municipality must justify a tax levy with an itemized budget that anticipates only projects for which it has the power to undertake, and, second, the municipality may only set the tax rate at the level necessary to raise the funds so committed by that budget. (A property tax levy, set by

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3 Massachusetts, the state involved in *Frothingham*, was also one that had well-established state and local taxpayers suits—largely as a result of an 1847 act of the legislature authorizing such suits. See, e.g., Knights v. Jackson, 260 U.S. 12, (1922) aff’g. on writ of error, 237 Mass. 493 (1921) (holding that the Massachusetts income tax and the sharing of the revenues created thereby with municipalities did not violate due process). See note --- below. It should seem unsurprising that the Court felt the need to distinguish its own behavior in the cases that arose from this procedure even if it was precedent for suits brought in Federal court.

4 New Hampshire practice may well have been typical in the late 18th and early 19th centuries. Incorporated towns were given specific authority by the legislature (indeed, the language of the statutes suggests they were in fact required) to levy taxes up to a certain amount for certain specific purposes, see, e.g., Act of June 18, 1789 (requiring a school tax of set amount; Act of Feb 27, 1786 (authorizing town taxes for highways). The direction to counties was less constrained, as they were allowed to levy to meet their reported expenses; in stark contrast, the state legislature simply directed that a tax “for the use of the state” be imposed. (Act of Jan. 9, 1795). The specificity expected of towns is discussed in Tucker v. Aiken, 7 N.H. 113 (1834)(holding that a town may use the surplus from one levy for the purposes of another authorized levy, if no particular levy exceeds the specific grant).
determining the rate necessary to impose upon a fixed assessment base in order to collect a fixed budgeted amount, classically has this feature.)

Under these constraints, if some budget items are stricken because they are illegal, then, at least in theory, less in total taxes can legally be collected from each taxpayer. This purpose-specific limit on the taxing power of local governments was not historically a limit on the taxing power of other governmental units. The taxing power of the federal government (and of most state governments) has never been thought to be tied to the issues to which the funds are to be used; and, furthermore, the taxes used by the federal government have virtually always been open-ended. Although at times during the period in question efforts were made to impose binding limits on the ways that the federal government could spend money, the federal government has never been required to declared how tax funds are to be spent before it can raise taxes, and it has never seriously to do so. The rates and base descriptions for federal taxes are set only with general revenue targets in mind, because the base is too subject to fluctuation to allow any fixed relationship between the rate and the total amount of tax collected. (Income taxes and excise taxes involve a rate set in advance, applied against an indeterminate base, and total collections due cannot be predicted in advance.) Although states and the federal

In the even more limited practice of Massachusetts, the various counties presented their budgets to the legislature for approval, and only then could taxes be laid to fund that budget. E.g., Acts and Resolves of Massachusetts 1841, ch. 54 (March 17, 1841).

5 The federal government does have the power to enact taxes that would not be open-ended, but it has not attempted to exercise this part of its taxing power in the last 150 years. Taxes that must be apportioned cannot be entirely open-ended, and the power of Congress to impose “direct taxes” is conditioned upon their apportionment by population. These taxes are perforce closed-ended, in that the total revenue goal must be established before it can be apportioned. The Congress has three times imposed taxes, in 1798, 1813 and 1863, that it acknowledged to be “direct taxes.” See generally Charlotte Crane, Why We Don’t Know the Meaning of Direct Tax,” (unpublished manuscript 2006). Although this tax cannot be “open-ended,” this constraint is not derived, as it is for other units, from a requirement that the purpose be declared before the tax is imposed.
government do sometimes earmark taxes, these designations are not required as a condition of the exercise of the taxing power, and are often not binding. This difference between closed-end municipal taxes and open-ended state and federal taxes sets the background for the distinction made by the Frothingham Court and that has eluded modern federal courts since.

There are other (frequently related) differences between municipal, on the one hand, and state and federal taxes, on the other, related to the sources of the power on which the various governments rely when they devise the instruments by which they are to be financed. As a historical matter, a municipal government ordinarily could only make those impositions upon its citizenry that the state legislature had specifically authorized it to make; any other imposition was beyond its power. State governments and

6 Congress is not required to state a purpose when it imposes a tax, but if it imposes a tax to be spent in a particular program, the tax will be invalid if the program is beyond its power, United States v. Butler, 297 U.S. 1 (1937). In a suit initiated by the government to collect the processing taxes enacted as part of the Agricultural Adjustment Acts of 1933, the Court held the entire program invalid, and, because of the close relationship of the tax to the program, refused to order that the tax be paid. Note that the form of the challenge to the underlying program differed from that used in the earliest cases only in that the enforcement mechanism used by the government was not a summary seizure, but the statutorily authorized filing of a suit to collect the tax.

The federal government seems to have learned its lesson from Butler, and rarely enacts a revenue-raising measure the validity of which is clearly tied to the validity of the program to be funded. Indeed, it appears to structure the use of such funds to avoid the Butler problem, by directing that the taxes be collected as if not earmarked, and then directing that an amount equal to the yield of the specific tax be deposited in the relevant fund.

The Supreme Court has not, , expressed any interest, at least since Butler, in limiting the purposes for which the federal government may raise taxes, see Helvering v. Davis, 301 U.S. 619 (rejecting on the merits (but acknowledging some procedural issues) a shareholder derivative suit seeking to block the payment by a corporation of taxes to fund Social Security). But see Justice Harlan’s dissent in Flast v. Cohen, 392 U.S. 83, 127 (1968).

Where taxes are not earmarked, those seeking to avoid payment on the grounds that a portion of the taxes will be used for unconstitutional programs have been unsuccessful in their efforts to have such claims heard. E.g., Bartley v. United States, 123 F.3d 466 (7th Cir. 1997), cert denied, 522 U.S. 1062 (1998)(a suit ostensibly brought as a class action for a refund of all taxes paid for expenditures not made in pursuance of Congress’ enumerated powers). Cf. Marshall Field & Co. v. Clark, 143 U.S. 649, 695 (U.S. 1892)(noting that even if the sugar bounty provisions of the McKinley Tariff of 1890 directing the use of the funds were unconstitutional, their invalidity would have no impact on the revenue raising aspects of the act).
the federal government were much more likely to have a far more general power to tax, including the ability to invent new tax instruments—subject to some restrictions, perhaps, but not limited to any particular revenue measures. There are clues that the *Frothingham* Court understood this difference in the language from the case that is frequently left out of the modern commentary on *Frothingham*:

> The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the [municipal] corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.7

This language must seem more than a bit cryptic to modern readers—after all, single shareholders cannot, under modern doctrine, easily challenge the acts of the corporations in which they have invested. What rights of shareholders, honored at the time that *Frothingham* was written, did the Court have in mind, and what do these rights add to the Court’s attempt to distinguish municipal from state taxpayers?

An additional clue about what the Court really had in mind in *Frothingham* lies in the cite that immediately follows the above quotation, to section 1580 of the fourth volume of the fifth edition of Dillon’s treatise on Municipal Corporations. This might seem to be just a reference to the proposition that powers of municipalities are limited to those granted by legislatures, and that courts must carefully enforce this limitation. But it also shows the connection between the limited powers of a municipality and the nature of municipal standing. It is a reference to the idea, clearly endorsed by Dillon, that any ultra vires act—of either a municipal or private corporation—is entirely void and subject to

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7 262 U.S. at 487.
challenge in court. The same ultra vires doctrine that (at least according to Dillon’s views of the world in the 1880’s) would support a shareholder action against a corporation would operate when an interest holder (that is, a taxpayer) in a municipal corporation objects that the municipal corporation is acting beyond the scope of its power.\(^8\)

To sum up this view, a municipality had the power to tax only when it acted in strict compliance with the terms by which the state legislature granted the power. Any deviation could render the tax void. Such deviations included the use of the funds for some purpose other than that included in the grant of taxing power. If the tax was void, and if it had not yet been collected, it should not be collected; if it had been collected, it must be repaid to the taxpayer. The interaction of this doctrine with the various limits on the jurisdiction of state and federal courts explains the pattern of taxpayer suits that had emerged by the time *Frothingham* was decided, and that has been (somewhat mindlessly) perpetuated since.

**Part I The Evolution of Taxpayer Suits in the State Courts**

Early nineteenth century cases reveal the close connection between the illegality of a municipal action, the illegality of the tax to be used to fund the action, and the taxpayer’s ability to invoke the power of the courts to challenge the action *as a taxpayer*. If an action was illegal, any tax earmarked to finance it would also be illegal, and therefore could not be collected. The earliest identified cases involved taxpayers who alleged that they had already paid a tax and were effect suing for a refund. Thus, for

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instance, in *Bergen v. Clark*, the taxpayer objected when his municipality (the territory of which straddled two counties) proposed to help fund a courthouse outside the county in which the taxpayer lived. As appears to have been common practice, the suit he brought was a trespass suit against the tax collector challenging the “seizure and sale” of his goods to satisfy the tax liability; the remedy formally sought was a return of the proceeds of the tax sale. The strategy was successful: the court held that the use to which the taxes were to be paid was illegal and the tax void, that the warrant under which the collector had acted was therefore also void, and thus that the taxpayer was entitled to his remedy in trespass, that is, to be repaid by the collector.

This dispute about the new municipal building for New Brunswick appears to have given rise to considerable litigation, some of which has played a role in the modern debates about taxpayer standing. The published opinion in *State v. Justices of Middlesex*, 1 N.J.L. 283 (1794), expounds upon the power of the New Jersey courts, following Coke and old English practices, to right any wrong brought to their attention. But when more closely examining the injuries alleged by those seeking to invoke the court’s power, the sanctity of the vote and the inevitability of the tax to be collected to fund the project loom large. In any event, the decision was reported to have been overruled. See 1 N.J. L. 294-95.

The Corporation of New Brunswick appears again as a respondent in 1 N.J.L. 450 (1795), in what may very well be another stage of the same controversy. Some have read this second case to allow a “public action” regardless of the nature of the injury asserted. See, e.g., Shouldn't Standing Be Closer to the Heart of Congressional Intent?, 49 Emory L.J. 1359, 1365 (2000); Cass Sunstein, What's Standing After Lujan? Of Citizen Suits, “Injuries,” And Article III, 91 Mich. L. Rev. 163, 173 (1992); Raoul Berger, Standing To Sue in Public Actions: Is It a Constitutional Requirement?, 78 Yale L.J. 816, 834-35 (1969). The case actually contains only the argument of counsel in opposition to the petition: “The court ought not to award a certiorari on the mere prayer of an individual, unless he will previously lay some cause before them tending to show that he is or may be affected by the operation of the by-law, and is, therefore, entitled to question its validity,” and the argument in support thereof: [The fact of an illegal act “coupled with the ground that the prosecutor has been injured by it” [supports the petition]; and the court’s conclusion to allow the case to proceed. If one reads the respondent’s language as asserting that the petitioner must have a “cause [of action]” in the sense of an otherwise actionable wrong, the court seems clearly to have rejected the argument, but the petitioners’ argument suggests that there was a claim of some injury to the “prosecutor,” (that is, the petitioner) was in fact alleged although it might not have been actionable at law.

Allowing the suits in courts, moreover, does not appear to have settled the issues, which appear to have still been contested before the New Jersey legislature in 1798. See *The Centinel of Freedom*, January 2,1798, p. 2.
Similarly, Stetson v. Kempton\textsuperscript{10} involved a Massachusetts taxpayer’s objection to his town’s plans to raise its own militia, a function which he asserted was constitutionally assigned to the state legislature. He brought a suit in trespass against the town collector, who had (or so the pleadings recited) seized and sold a cow under levy imposed to fund a local militia. The taxpayer won the case and received his refund by obtaining a ruling that the town had no authority to provide for its own defense, and therefore had no power to impose the tax.

In a similar vein, but substantially later era, in Goddin v. Crump,\textsuperscript{11} the Virginia taxpayer objected to the promise of city funds to support a canal company that wanted to operate a railroad. He brought suit through a petition for an injunction to stop the sale of a slave by the collector who had been seized to satisfy a tax imposed by the city of Richmond. He lost his challenge, presumably his slave was sold, and the railroad was funded.

These early cases demonstrate that municipal taxpayers were allowed to challenge their liability for the taxes that would fund public projects that they believed were illegal or unconstitutional, at least if they were willing to undergo the hassle of resisting a collection proceeding. Taxpayer standing was literally that, a taxpayer claiming that the action of the collector was illegitimate because the tax was illegitimate.\textsuperscript{12} The tax could

\textsuperscript{10} 13 Mass. 272 (1816). Joan Williams, The Invention of the Municipal Corporation: A Case Study in Legal Change, 34 Am. U. Law Rev. 3xx (1985) suggests that, at least in Massachusetts (and its spin-off jurisdiction, Connecticut), this limited view of municipal powers was novel in Stetson, and represented a part of a larger development in which Massachusetts towns became subject to the same legal constraints as chartered corporations. Regardless of whether this impulse to constrain towns was novel or traditional, it was well in place early in the century.

\textsuperscript{11} 35 Va. 120 (1837).

\textsuperscript{12}[Massachusetts] Such actions appear to have been the most common means of challenging any aspect of the administration of local taxes, see, e.g., Pease v. Whitney, 5 Mass. 380 (1809)(challenging the process
have been illegitimate for any number of reasons, both highly technical (like the failure to provide adequate notice of the election at which it was approved, or the failure of the assessors to file the necessary paperwork with the correct office) or, as is of interest here, because the project to which the funds would be dedicated was illegitimate. Such claims could be easily framed when local governments were empowered to raise taxes by which it was determined in which school district a nonresident landlord’s lands would be taxed), as well as challenges to the purposes for which taxes might be spent, see, e.g., Alden v. Rounseville, 48 Mass. 218 (1843) taxpayer unsuccessfully brought suit in trespass challenging school districts formed other than by geographic boundaries.

In Cushing v. Newburyport, 51 Mass. 508 (1845) a taxpayer, who had paid taxes under protest, then sought refund of taxes on grounds that town had no power to provide more education services than were required by state law.

In Massachusetts, such steps appear to have been made unnecessary by the enactment of a statute that expressly allowed groups of local taxpayers to challenge a municipal act. This provision was enacted in 1847, Acts and Resolves of Massachusetts 1847, ch. 37, and remains in effect, Ann. L. Mass. GL ch.40, sec. 53, along with a parallel provision enacted in 1937 allowing suits challenging state actions, Ann. L. Mass. GL ch. 29, sec. 63 See, e.g., Lowell v. Boston, 111 Mass. 454 (1873) (under authority of the first statute, enjoining issuance of bonds to provide loans to the Lowell mills, despite legislature’s grant of specific authority); Freeland v. Hastings, 92 Mass. 570 (1865)(upholding taxation to pay bounties to relieve locals from draft); Claflin v. Inhabitants of Hopkinton, 4 Gray 502 (1855)(enjoining the use of town funds to pay for uniforms for the local artillery company of the state militia); Tash v. Adams, 64 Mass. (10 Cush.) 252 (town had no authority to appropriate money to celebrate the anniversary of the surrender of Cornwallis). The history of the statutory provision and its relationship to the previously available route of forcing a seizure by collectors who would then be subject to trespass or replevin, is contained in Richards v. Treasurer & Receiver General, 319 Mass. 672 (1945).

Massachusetts courts appear to have treated this provision as granting an extraordinary procedure, which would not have been available under their general equitable power and which effectually preempted such equitable power as they might generally otherwise have. See, e.g., Baldwin v. Wilbraham, 140 Mass. 459 (1886) (holding that newly created lower Massachusetts courts with equitable powers nevertheless did not have the power to entertain taxpayer suits); Oliver Carlton v. City of Salem, 103 Mass. 141 (1866)(holding the statute did not apply where no attempt to raise taxes, and no residual common law action). Even with the clear legislative authority to entertain taxpayer suits, Massachusetts courts soon invoked other equitable grounds for denying the relief sought by complaining taxpayers, eg., Tash v. Adams, 64 Mass. (10 Cush.) 252(1852) (restraining any expenditures by the town of Natick in celebration of the defeat of Cornwallis but refusing on grounds of laches to act with respect to earlier expenditures relating to the anniversary of the founding of the town).

Although the statute might be read to include a presumption that all “taxable inhabitants” are presumed to have standing, modern Massachusetts courts have imposed their own standing limitation, see, e.g., Amory v. Assessors of Boston, 310 Mass. 199 (1941), and have further held that this statute cannot be used to challenge a tax, rather than an expenditure as unconstitutional, Tax Equity Alliance v. Commissioner, 423 Mass. 708 (1996)(declining to consider the constitutionality of the provisions of the Massachusetts income tax under which capital gains are taxed).

13 See, e.g., Burgess v. Pue, 2 Gill 11, 2 Gill 254 (Md. 1844)(in action for replevin of oxen, taxpayer complaints ranged from lack of legislative power to delegate taxing power to school board, to failure to properly elect collector, school board members, and failure of board clerk to produce required bond)
only when such taxes were conditioned upon the presentation and approval of a specific set of appropriated needs. In either case, the form of the action would be the same: a suit in the nature of a suit for refund because the tax was invalid and should never have been assessed or collected. When specific taxes could be only raised for specified purposes (and, as was often the case) were closed-ended, there was a direct relationship between any particular project and the challenger’s actual tax bill. In these cases, taxpayers used the remedies generally available for tax refunds, including suits in trespass and replevin, to challenge the actions for which the taxes would be expended.\textsuperscript{14} These taxpayer suits

\textsuperscript{14}[suits against the collector] The nature of the common law remedies available, even for those who had in fact already paid the tax, and whose challenges went directly to the validity of the tax, were not always certain. See, e.g., Henry v. Town of Chester, 15 Vt. 460 (1843) (allowing a suit in assumpsit against the collector for refund of a tax held to be entirely invalid because equalization procedures had not been followed, over the town’s objections that the payment was voluntary and that only this taxpayer’s excess resulting from the impropriety should be repaid); compare Weeks v. Milwaukee, 10 Wis. 241 (1860) (granting injunction of sale of lands for tax liability, but only to the extent of the excess resulting from the illegal components of the tax).

Such actions were allowed in federal courts against the federal government, see Loughborough v. Blake, 18 U.S. 317 (U.S. 1820) (suit against the collector challenging the imposition of the 1813 direct tax on those without a federal franchise because of their residence in the District of Columbia), but Congress invented so few new taxes before the Civil War that few federal cases of this form emerged. Although the suit against the collector remained an important remedy for federal taxpayers protesting their taxes, it seems not to have evolved as a means of challenging federal projects and policies.

E.g., Morford v. Unger, 8 Iowa 82 (1859) (successful suit in replevin challenging taxes resulting from annexation of farmland adjoining Muscatine) Replevin against the collector appears not to have been available in all states, however. Pennsylvania barred such actions, at least when the seized goods were still in the collectors’ hands, in 1799. Stiles v. Griffith 3 Yeates 8 (Penn. 1800) (“Replevin will not lie for goods seized for non-payment of the city water tax. To try validity of the tax, one must "bring trespass against the collector, and you may go into the inquiry. The court will not support this form of action in such a case, nor suffer such an abuse of their process. If one man may bring a replevin, where his goods have been taken for taxes, so may every other person, and thus the collection of all taxes might be evaded").

Kentucky eliminated replevin in the city courts in 1836 in those suits brought by “any person desire to try the validity of any such tax,” and such persons were directed to seek a writ of prohibition in the county court, Talbot v. Dent, 48 Ky. 526, 528 (Ky. 1849) (rejecting both an action for replevin and a simultaneously requested writ of prohibition (as contemplated by a recent state statute) to challenge the validity of the funding scheme for the Louisville and Frankfort Railroad).

Georgia in 1804 provided “.no replevin shall lie, or any judicial interference be had, or any levy or distress for taxes, .. but that the party injured be left to his own proper remedy in any Court of Law, which provision was interpreted by Georgia courts as a prohibition on any judicial interference with tax collection, see Yancey v. New Manchester Mfg. Co., 33 Ga. 622 (1863); Kenny v. Harwell, 42 Ga. 416 (1871); Cody v. Lennard, 45 Ga. 87 (1873). The statute remains in effect to this day, although Georgia courts have found numerous exceptions, including challenges to unconstitutional local taxes, see Vanover
challenging the substance of local government actions looked no different in form from any other suit for a refund of taxes. The “standing” of the plaintiff in the modern article III sense would have been clear in such cases, even though it would have never been necessary to make such an argument about “standing” to bring the action in state court. Thus the state courts allowed remedies which could effectively block the expenditure of tax revenues to be used for a purpose beyond the power of the taxing body.

At some point, the state courts accepted a more straightforward approach to challenges made by taxpayers who did not want their taxes spent in what they claimed were illegitimate ways. These courts began to entertain petitions seeking to block the project by enjoining the taxes before they were collected, rather than waiting until after they were actually collected, or requiring a fictitious pleading that collection had begun. Eventually, some allowed suits before collection activities had been begun and even before specific tax warrants were issued. Given the small number of cases in this era that were actually reported at all, and the cryptic nature of many of the opinions of state courts even when they were reported, it seems unlikely that it is possible to pinpoint exactly when this change—from post-collection to pre-collection judicial interference—took place.

v. Davis, 27 Ga. 354 (1859)(holding that judicial interference was appropriate when a local tax for which there was no authority was levied).

15 Indeed, it is not always easy to tell from the reported case whether the form of proceeding and the allegations regarding tax liabilities therein was simply a convenient way to bring the challenge on the larger issues into court. For instance, the opinion in People ex rel. Groat v. Albany Common Pleas, 7 Wend. 485 (1832), recites that a member of the Shaker Society sought replevin against goods seized by a collector of a military fine; the court did not explain the taxpayer’s challenge, and merely held that the New York statute making replevin unavailable when goods were seized for taxes applied.

16 Note that under modern jurisprudence, this showing would not be enough to challenge a federal project funded by the income tax through the statutory provisions allowing refunds. See Bartley v. United States, 123 F.3d 466 (7th Cir. 1997), cert denied, 522 U.S. 1062 (1998), discussed in note xx above.
Many factors would have affected when the courts in any particular state would most likely have jumped across this divide and have begun to entertain pre-collection suits. In some states, the courts’ ability to respond to apprehensive taxpayers may have depended upon their willingness to provide equitable remedies, even when after-the-fact legal remedies had previously sufficed. The jump may therefore have first occurred in jurisdictions in which the remedies available to taxpayers who had already paid seemed particularly onerous or technical, and the challenged tax and program seemed particularly suspect. Or perhaps the leap first came in a jurisdiction in which the niceties of distinctions about law and equity were generally disparaged. (At law, in an action to recover taxes paid, the cow seized by the collector could be reclaimed, but only after considerable inconvenience for the cow; in equity with a court acting before seizure, the

17 Cases can be found in which the courts specifically framed the questions raised by taxpayer suits as a matter of their equitable jurisdiction, and concluded that equity could not be invoked. E.g., Williams v. Detroit, 2 Mich. 560 (Mich. 1853)(refusing to enjoin a special assessment challenged on various substantive and technical grounds, noting that equity should not be involved where the collector’s remedy is only against goods and chattels and not against land).

18 E.g., Burnet v. Corporation of Cincinnati, 3 Ohio 73 (Ohio 1827)(allowing a suit to enjoin the collection of a tax challenged as illegal because the ordinance had not been made “had not been made in accordance with the charter and ordinances” of the city where allowing the collection through the sale of land would either create a cloud on the title of that land, or would leave the taxpayer without a remedy that would restore his title).

19 Cf. Dean v. Madison, 9 Wis. 402 (1859)(allowing a suit to enjoin further proceedings after a tax sale, noting the abolition of separate courts of law and equity in Wisconsin).

Other courts simply asserted that the right to invoke the courts to block illegal action existed, without further elaboration, without even acknowledging the lack of precedent for their actions in their jurisdiction. Merrill v. Town of Plainfield, 45 N.H. 126 (1863) (suit for injunction to prevent indemnification of selectmen for legal costs in defending against charges of official misconduct: “And as the town by this vote undertook to appropriate money in a manner unauthorized by law, any person who is a tax-payer in town and liable to be assessed for any part of such sum, may properly interfere in the way these petitioners have done, to prevent its payment and misapplication”).

The Supreme Court of Michigan, in the case in which it deviated from its prior practice, simply distinguished the prior case on the ground that the feared action had not been sufficiently imminent, and justified the use of equitable power, asserting that “the unlawful act…would operate to depress the value of real property and discourage purchasers and threaten a large increase of future public charges” without commenting upon the standing question further, Curtenius v. Hoyt, 37 Mich. 583 (1877)(enjoining the issuance of bonds to fund a railroad), distinguishing Miller v. Grandy, 13 Mich. 540 (1865).
inconvenience to the cow and everyone else could be avoided.) Or it may have come in a jurisdiction where the judges had little patience with the use of trumped-up pleadings to invoke their power, and therefore sought to make the exercise of judicial power generally more transparent. (Who was going to object if the cow had never actually been seized? How many sheriffs really relished the thought of caring for the challenger’s cows while the suit was pursued? Since in most cases, the interests of all parties lay in expeditiously determining the legitimacy of the challenged government action, couldn’t the cow just stay in her own pasture? )

In other states, courts became comfortable entertaining writs of certiorari or mandamus to the bodies involved in assessing and levying taxes. This would have been an especially easy development in those jurisdictions in which a clear separation of

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20 E.g., Carroll & Beall v. Tuscaloosa, 12 Ala. 173 (1847)(holding certiorari to the state circuit court of the mayor’s determination of a tax due, and allowing a “trial on the merits” in that proceeding). But see People ex rel. Church, 15 Wend. 198, 210 (N.Y. 1836)(citing English precedent Rex v. Inhab. of Utoxeter, 2 Str., 932, (1732)to deny certiorari of the proceeding involving the entire tax assessment) King v. King, 2 Term. R. 234, a certiorari had been obtained to remove the assessments of the land tax in the tower division of the City of London, for the purpose of founding an application for an information against the Commissioners. (1788) Weaver v. Devendorf, 3 Denio 117 (N.Y. 1846)(acknowledging the possible propriety of an action by certiorari, but denying relief to minister claiming that he was not allowed the appropriate exemption, on grounds of official immunity.

21 One of the few early courts to acknowledge that it was breaking new ground in allowing citizen or taxpayer suits for mandamus and injunction against municipal actors simply stated that “we held that complainants who are, and are averred to be, citizens, voters and property holders, and tax payers, had such an interest and held such relations that they might file an information for a writ of mandamus to the county judge to enforce a public duty in which they and other citizens had an interest; and the same reason holds good for their being permitted to pray an injunction to prevent the doing some act detrimental to their interest and those of other citizens of the county.” Rice v. Smith, 9 Iowa 570 (1859). In this case, the challengers sought to enforce the results of a referendum regarding the location of the county courthouse, an outcome that the county judge, the object of the various orders sought, appears to have disapproved. Some other cases seem likely to involve the jump from traditional ex post remedies to ex ante remedies did not acknowledge their break with the prior authorities, e.g., Cowgill v. Long, 15 Ill. 202 (1853)(ultimately dissolving an injunction against the sale of seized property sought by taxpayers who opposed a tax to build a school on the ground that the vote therefore was not as required by the authorizing legislation, when the legislature later ratified the tax), as cited in Ottawa v. Walker, 21 Ill. 605 (Ill. 1859)(granting an injunction against the collection of taxes to fund a project outside the authority of the taxing body).
power between lower judicial bodies and local governments (especially counties) had not yet developed. All that would have been needed to move from the earliest taxpayer cases (involving the same procedures available to anyone who simply thought they had paid too much in taxes and sought a refund) to the later form (seeking to block a government project that was to be funded through taxes) was to convince a court that it was sensible to intervene and block the challenged municipal project before the cow was seized rather than waiting until after.\textsuperscript{22}

The leap would, however, have almost always have involved a willingness to use remedies based in equity, that is, injunctions\textsuperscript{23}, instead of the more traditional legal remedies in trespass or the legislatively outlined procedures for claiming a tax refund.\textsuperscript{24}

In at least one state, the legislature seems to have encouraged the leap by making suits in

\textsuperscript{22} Indiana courts seem to have found that the interest of taxpayers would suffice under the provisions that allowed a direct appeal from a order of the county board, which required “an affidavit, setting forth that he has an interest in the matter decided, and that he is aggrieved by such decision, alleging explicitly the nature of his interest,” Harlan v. Carroll, 13 Ind. 247 (1859)(upholding a jury verdict that an award of costs to the tax collector for publishing the delinquent taxpayer list was excessive). Lafayette v. Cox, 5 Ind. 38; Oliver v. Keightley, 24 Ind. 514; Harney v. Indianapolis, C. & D. R. Co., 32 Ind. 244 (1869). (“The citizen may not be able to protect himself in any other way. If this is not his remedy, he has none. The money drawn from him by taxation may be squandered by unlawful donations to forward all manner of visionary schemes; other contributions may be wrung from him from year to year and wasted in the same way, in defiance of laws carefully framed for his protection, and he would nevertheless be helpless. A more proper case for injunction cannot be well conceived than that in which a tax payer seeks to protect from lawless waste a public fund, which, when dissipated thus, the law will with strong hand compel him to replenish.”)

\textsuperscript{23} In some jurisdictions, however, a failure of equitable jurisdiction did not foreclose all facial challenges by citizens, since both certiorari (which would allow review of a proposed levy that took into consideration only the record created by the levying body only, in which the entire levy would fall and never be collected) and replevin against the collector would remain available. Clayton v. Lafargue, 23 Ark. 137 (Ark. 1861)

\textsuperscript{24} In some states, courts were comfortable with entertaining suits brought as writs for mandamus, writs of prohibition, and quo warranto proceedings, not all of which had historically been viewed as affording “equitable” as opposed to strictly “legal” remedies. Most of these remedies nevertheless required a showing of the inadequacy of other remedies, especially those in damages, and therefore required a litigant to make a showing similar to that associated with equitable remedies. See Duncan Townsite Co. v. Lane, 245 U.S. 308 (1917).
replevin difficult and suits for equitable relief easier. In many state courts, this meant showing that one of the traditional “heads of equity” was present, and that the taxpayer had “standing” to invoke equity. Such a move might be particularly compelling when the intended recipient of the funds would also have been able to seek through mandamus an order that the collector must collect the taxes to create the fund that was owed to him.

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25 Early Kentucky courts seemed reluctant to use their equitable powers to interfere with tax collection, see, e.g., Louisville v. Gwathmey & Gretsingher, 8 Ky. 554 (1819)(refusing to exercise equity to block unspecified challenge to tax on billiards, where wrong cannot be redressed by “the modes of redress afforded by courts of common law.” But as evidenced by Talbot v. Dent, 48 Ky. 526, 528 (Ky. 1849)(rejecting both an action for replevin and a simultaneously requested writ of prohibition to challenge the validity of the funding scheme for the Louisville and Frankfort Railroad), the Kentucky legislature in 1836 provided a special remedial provision for taxpayers in Louisville, denying the legal action of replevin, and granting instead the right to apply for a writ of prohibition to “try the validity of the tax in that mode of proceeding.” The court in Talbot acknowledged that the writ of prohibition (at common law available only to another court) would not have been available without the statutory provision.

26 The expression itself seems to have its origin in early equity practice, and was used both to describe the appropriateness of the petitioner’s invocation of the court’s power, and the merits of his claim. It covered not just ideas similar to that invoked by the use of the word “standing” in modern usage, e.g., Lucas v. McBlair, 12 G. & J. 1 (Md. Ct. App.1841) (public trustee under new lottery administration had “standing in court” to challenge acts of those previously authorized to engage in activities related to lotteries); but also the idea that the particular petitioner had adequate interest in a dispute that he, rather than some one else, could bring the suit, that the petitioner had the capacity to sue, Thomas v. Dakin, 22 Wend. 9 (N.Y.1839) (used in sense of capacity to sue) and that the petitioner had met whatever procedural prerequisites applied. Latham v. Edgerton, 9 Cow. 227 (1828) (“The parties are considered as having a standing in court only by force of the appeal; and although the subject-matter of the suit be one over which the court might have had original jurisdiction, yet, having been brought there by appeal, the subsequent acts of the parties are considered as compulsory, and not as intended voluntarily to confer jurisdiction upon the court. The Act creates a new mode of transferring suits originally commenced before justices of the peace to the Court of C. P. It confers a new and peculiar jurisdiction upon those courts, which vests only upon a strict compliance by the parties with all the requirements of the Act”).

In these contexts, the equitable notions of standing first took the perverse turn observed in Richard A. Epstein, Standing in Law & Equity: A Defense of Citizen and Taxpayer Suits, 6 Green Bag 2d 17 (2002); Richard A. Epstein, Standing and Spending - The Role of Legal and Equitable Principles, 4 Chap. L. Rev. 1 (2001), requiring that a taxpayer who could not bring a suit at law because of lack of specific injury nevertheless show some injury not shared by the general population. It is the municipal taxpayer’s ability to show that specific injury, in the form of a specific tax that should not be paid, that distinguished his position from that of other litigants.

27 E.g., Neal v. Saline County Court, 48 Mo. 390 (1871)(granting mandamus against county forcing the levy of a tax to fund bonds, despite the minor irregularity in their issuance); Stockton & V. R. Co. v. Common Council of Stockton, 41 Cal. 147 (1871)(granting mandamus to impose tax to fund railroad, as directed by state legislature); Louisville & N. R. Co. v. County Court of Davidson, 33 Tenn. 637 (1854)(mandamus against county forcing levy tax); Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County, 1 Ohio St. 77, 90 (Ohio 1852)(mandamus against county at behest of city and railroad to
There can be little doubt that the major catalyst for these judicial developments was the nineteenth century fight over the appropriateness of government support for privately-owned public improvements, most notably the state-chartered banks and the railroads. Beginning in the 1830’s, and continuing through the century, the courts were pushed to mediate between competing claims about the legitimate role of government in aid of private enterprise arguably invested with a public purpose. Courts were frequently asked to determine the legality of municipal commitments to provide aid to railroads and other private enterprises that had already been made by local governments in suits brought by those who had already relied upon those commitments.\(^{28}\) If taxpayer actions were allowed when the plans to be funded were first announced, the courts could consider the legality of the proposed action in the abstract, without having to be concerned with the effect of their decisions on those who had relied on the commitments made by local governments. Allowing such early challenges avoided the political difficulties inherent in later challenges, especially by those who had bought bonds the proceeds of which were to be paid to the railroads or other enterprise, and whose right to repayment depended in large part on the taxes being challenged. The evolution of the taxpayer action for a refund into the taxpayer suit for injunction undoubtedly allowed the courts to hear challenges before there had been such third party reliance.

\(^{28}\) Much of this history can be found in Charles Fairman, Reconstruction and Reunion 1864-88, p. 1010-1116, Volume VI of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States.
This change in the procedural context in which the merits of the challenged governmental actions were heard gave the courts far more attractive choices for resolving the ultimate political issues. In such cases, it was not just a matter of where the cow would graze while the suit was pending, but whether bondholders would be left holding an empty bag when a determination was eventually made that the scheme was beyond the power of the local unit. In the railroad context, this meant entertaining suits to enjoin the issuance of municipal bonds to be funded by taxes that were alleged to be illegal because the issuing unit had no power to engage in the railroad project being funded. If such suits were not entertained, then courts would have to wait until after the bonds had been issued to hear complaints either from taxpayers hoping for refunds of taxes they viewed as illegal or from bondholders seeking judicial enforcement of their obligations. At that point, the court would be forced to be complicit in a repudiation that would harm not only the railroad in question, but also the individual investors who had relied on those commitments to raise taxes to pay on the bonds. In many situations, both challengers and defenders of projects clearly must have welcomed procedural innovations that allowed intervention before the commitments had actually been made.\textsuperscript{29} A populist-leaning jurist, moreover, would no longer have to worry about who held the bonds that would remain unfunded if he refused to implement the funding scheme for the railroads. Thus it was no coincidence that several of the most often cited early cases in the saga of the railroads and public purpose were brought (uncontroversially, apparently) as taxpayer’s suits seeking to block the issuance of bonds to fund the railroads in major cities.\textsuperscript{30} In this environment,

\textsuperscript{29}The opinion of Justice Stockton in Stokes v. County of Scott, 10 Iowa 166, 179 (Iowa 1859), suggests that this case may have been the first such “cross-over” case in Iowa.

\textsuperscript{30} Sharpless v. Mayor of Phila., 21 Pa. 147 (1853)(allowing “standing” but refusing to enjoin Philadelphia from the issuance of bonds to fund the purchase of railroad stock, where the state legislature had expressly
where the courts were sure to be drawn into the contentious political disputes at some point anyway, courts relaxed the terms on which taxpayers could bring their challenges to taxes and the specific projects they funded. Thus taxpayers were eventually allowed to bring challenges to projects claimed to be outside their cities’ power without requiring any recitations about or proof regarding the actual impact of the challenged actions on their individual taxes.

This easy access to courts to challenge municipal actions was at times controversial. But it seemed desirable to those judges who asserted the need for constraining government action, particularly action by local political subdivisions, in this

authorized the particular transaction at hand) Moers v. Reading, 21 Pa. 188 (similar, but no discussion standing); Baltimore v. Gill, 31 Md. 375 (1869); (taxpayer suit to enjoin issuance of bonds the proceeds of which would fund a railroad, through unspecified processes)(used the expression “standing in a court of law”; “In this State the Courts have always maintained with jealous vigilance the restraints and limitations imposed by law upon the exercise of power by municipal and other corporations; and have not hesitated to exercise their rightful jurisdiction for the purpose of restraining them within the limits of their lawful authority, and of protecting the citizen from the consequence of their unauthorized or illegal acts”); Cotten v. County Comm’rs of Leon County, 6 Fla. 610 (1856) appears to be similar in both its procedural and substantive aspects; Lane v. Schomp, 20 N.J. Eq. 82 (1869) involved the same procedure, but a much more particularized challenge to the process by which bonds to purchase railroad stock were authorized, and emphasizing that once the bonds are issued and in the hands of bona fide purchasers, the equities involved in a challenge would be different; Garrigus v. Board of Comm’rs, 39 Ind. 66 (1872) involved the same procedure, enjoining a county tax that was authorized to fund two railroads because the state statute authorizing such a tax required separate appropriations to be approved by the voters for each road separately; Foster v. Kenosha, 12 Wis. 616 (1860)(same, on ground that state legislature’s grant of taxing power to the city was beyond the power of the legislature under the state constitution). City of Lafayette v. Cox, 5 Ind. 38 (1854)

At least one commentator has agreed with the chief judge’s opinion in the Sharpless, that this was “the most important cause that has ever been in the court since the formation of the government.” James W. Ely, Railroads and American Law p. 23 (2001)

Stein v. Mayor, Aldermen, etc., of Mobile, 24 Ala. 591 (Ala. 1854) (taxpayer suit upholding power of Mobile to fund railroad)

Allison, &c. v. Louisville, Harrod's Creek & Westport Railway Co., 72 Ky (9 Bush) 247 (Ky.App. 1872)(taxpayer suit successfully enjoining funding railroad despite legislative ratification); compare Talbot v. Dent, 48 Ky. 526 (Ky. 1849)(taxpayer unsuccessfully sought replevin of slaves held by collector and writ of prohibition against future Louisville taxes to fund railroad)

Occasionally such claims could be adjudicated in defense of suits brought by taxing jurisdictions against taxpayers, e.g., see New Orleans v. De St. Romes, 9 La. Ann. 573, 578 (La. 1854)(especially the dissent by Buchanan). But many jurisdictions did not allow for such direct suits, see Charlotte Crane, Judicial Restraint and the Collector’s Suit for Taxes, and, if they did, such actions would involve considerable delay compared to the taxpayer’s suit.
era. The great treatise writer, Joseph Dillon himself, as a judge on the Iowa Supreme Court, had allowed such a suit in order to prevent “[d]isaster, the child of extravagance and debt, and dishonor, the unbidden companion of bankruptcy” that had and would continue to befall Iowa if its counties and cities could not be easily constrained by state courts. A few years later in 1872, in the first edition of his treatise, he advocated the taxpayer suit as a means for controlling the aberrant municipal corporations in all of the states:

To allow the taxable inhabitant to maintain a bill for an injunction, has the advantage of directness and simplicity, and notwithstanding its departure from technical principles, has the quite general, but not uniform approval of the courts in this country……[E]xperience has shown how liable these corporations are to be betrayed by those who have the temporary management of these concerns, [and thus] it would never do for the courts to hold that relief against illegal acts could only be had by an authorized suit brought by and in the name of the corporation.

In this first version of his treatise, Dillon acknowledged that not all jurisdictions would agree that the equity power of courts should be invoked to challenge the acts of municipal corporations. His starting point was the generally familiar notion that equity cannot be invoked where there is an adequate remedy at law. But he quickly moved to justifying judicial intervention, noting that because “the remedy by injunction … is often more efficacious than any other to restrain and correct municipal abuses, the spirit of the later cases is to favor a relaxation [of the ordinary rule].” After reviewing the law of England regarding the role of courts in constraining corporate powers in England, Dillon

31 Hanson v. Vernan, 27 Iowa 28 (1869)(holding that the state could not authorize local aid to the railroads because such aid would be “a coercive contribution in favor of private railway corporations, and violative, … of the general spirit of the Constitution as to the sacredness of private property” ). Taxpayers suits appear to have been well established in Iowa by the time Hanson was decided, see note xx below.
asserted that “the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers…has been affirmed or recognized in numerous cases in many of the states.” He then examined cases in Connecticut, Maryland and Illinois in which courts had allowed municipal taxpayers to invoke equity to avoid the illegal appropriation of municipal funds. But he had to acknowledge that New York courts had resisted such suits. He then went on to attempt to distinguish those suits in which a taxpayer should be able to block the levy of a tax which is clearly invalid, from those involving “mere errors and irregularities.”

Dillon bolstered his account of the taxpayer suit with several other legal analogies. First, as noted in the discussion of Frothingham above, he contended that municipal taxpayers should be able to challenge the ultra vires acts of municipal corporations, just as private corporate shareholders could. This justification was an imperfect one, however, for Dillon never distinguished between taxpayer suits against municipal corporations (which not so many years earlier had been juridical creatures very similar to private corporations) and counties (which at least in most states never bore much legal resemblance to private corporations). He also pointed out the apparent

33 Id at §731, p. 682.
34 Id at §737, p. 687. In this first edition version of his position, Dillon acknowledges that it is primarily because of the irremediable harm that can befall owners of real property as a result of clouds upon their title that such judicial interventions are necessary, and acknowledges the validity of the position that courts should not intervene to collect taxes for which the collection remedies include only seizure of personal property. Id. at §738, p. 688.
35 At the time the first treatise was written, the Canadian court had clearly supported a taxpayer suit against the mayor of Toronto, alleging misappropriation in connection with the city’s funding of a railroad, using the same theory that would allow shareholders to sue private corporations, Paterson v. Bowes, 4 Gr. 170 (1853). Dillon did not cite the case in his first treatise, but did in later versions. E.g., 5th ed., p. 2786 (1911); Paterson appears to have been only once cited by American courts, Pierce v. Hagans, 79 Ohio St. 9 (1908).
willingness of English courts to entertain suits to enjoin public acts that breached the trust relationship between political bodies and their subjects. This rhetorical move allowed an expansion of the type of municipal projects that could be challenged from those projects for which there was no specific legislative authority to those projects that in Dillon’s view the cities should not have been allowed to undertake, even if legislative authority appeared to have been granted.

In the later versions of his treatise, Dillon further supported his conclusions about the propriety of taxpayer suits with reference to the opinion of Associate Justice Field in *Crampton v. Zabriskie.*³⁶ In *Crampton*, the Supreme Court of the United States was asked to protect a judgment obtained in an earlier separate proceeding brought by taxpayers of a New Jersey county. These taxpayers had obtained a judgment (on certiorari from the county board) in a state court voiding a bond issued by the county to pay for land the county had purchased. The bonds were voided on the ground that their issuance violated the legislatively imposed restrictions on the city’s ability to incur debt. The “bond” (if it could ever have been called that) seems clearly to have been issued to avoid the legal constraints on the county’s budgeting process, for it was payable in only one year. Under this budgeting constraint, the county apparently was constrained by law not to operate under a budgeted deficit, that is, to commit to expenditures greater than the

³⁶ 101 U.S. 601 (1879). *Crampton* was not the first case to reach the Supreme Court in which taxpayers sought to enjoin the taxes necessary to pay railroad bonds. In *Ritchie v. Franklin County*, 89 U.S. 67 (1874), the Court affirmed the lower court dismissal of the suit, finding the challenged actions valid and not discussing the form of the action. Unlike *Crampton*, which was cited by the federal courts and has become an important part of the lore of standing, *Ritchie* seems to have been almost disregarded. But see Steven L. Winter, The Metaphor of Standing and the Problem of Self-Government, 60 Stan. L. Rev. 1371, 1419 (1988). The lack of attention to the case as precedent for taxpayer standing undoubtedly stems from the fact that early observers would not have considered the Court’s holding as necessarily involving a significant holding about the constitutional nature of the suit; an opinion based on what would now be denominated “hypothetical standing” would not have been noticed as other than a decision that no relief was warranted.
amount to be raised by taxes actually authorized, and the taxpayers argued that no taxes to fund this “bond” had been properly voted.\(^{37}\) All of the state courts had agreed that the prescribed budgeting procedures had not been followed and that therefore the “bond” was void. When the holder of the bond then sued at law in federal court for payment on the bond, another set of taxpayers sought to enjoin the bondholder’s suit—since the earlier judgment meant nothing if the bondholder could still sue in a federal court and be paid by the county.\(^{38}\) Justice Field allowed the intervention. It is unclear from what he wrote, however, whether his conclusions were premised on the fact that the taxpayers were only seeking to have the state court’s judgment given its due weight in the federal court proceeding, or whether he would have allowed the suit by the taxpayers even without the earlier state court judgment, and without the initiation of the suit in the federal court by the bondholder. Although Justice Field may have written broadly in the hope of establishing the case as precedent for suits brought as an initial matter in federal courts

\(^{37}\) The intended operation of this expenditure limitation is a bit unclear—it is possible that an expenditure could have been funded by a tax approved after the expenditure was made, so that all that was at stake was the timing of the expenditure in relation to the imposition of the tax that was to fund it. More details regarding the procedures that were ignored in the situation at issue in Crampton can be found in Halsted v. State, 41 N.J.L. 552 (N.J. 1879) (affirming the conviction of the chairman of the county board that had authorized the bonds). It seems clear that even this criminal case does not reveal all there was to know about the politics behind the purchase of the land funded by the bonds, see The Hudson County Freeholders: A Report from Director Halsted—Charges of Deception against County Clerk Braun, New York Times, Nov. 16, 1877, p. 2.

\(^{38}\) The bondholder took the position that the state court judgment did not bind him: first, because the bonds were actually issued after the date of the board action at which the writ of certiorari was targeted, and therefore any judgment on the certiorari proceeding could have only affected the resolutions to buy, and not the ultimate issuance of the bonds; second, because he was not a party to the early proceeding; and, third, the board did not pursue an appeal of the certiorari proceeding.

The taxpayers’ suit was brought as a separate action in equity, to block the bondholder’s action at law. The County was named only as a stakeholder in the taxpayers’ suit; it apparently had not sought to defend itself against the bondholder’s suit. See; Brief of Appellee Board of Chosenfreeholders of Hudson County, page 2; City and Suburban News, New York Times, Mar. 23, 1878, p. 8
by municipal taxpayers to enjoin municipal expenditures, *Crampton* clearly was not such a case. Nevertheless, it has been cited as if it had been ever since.

Justice Field’s opinion in *Crampton* (and the footnotes bolstered by it in Dillon’s later editions) suggest that suits by municipal taxpayers seeking to enjoin municipal expenditures and related taxes were commonplace in state courts by the 1880s. Indeed, in some states they were. The most common use was relatively mundane, under the framework of the much earlier cases, that is, simply to block an expenditure when the municipality clearly had no power either to spend the funds or to impose the taxes with which it was to be funded.

There were suits, however, in which the courts were willing to stretch a bit further. In some cases, even if the expenditure and its earmarked tax was of a sort generally authorized, but the project was unconstitutional for some other reason, the tax might also be ruled void. Thus, in *Riggsbee v. Durham*, the North Carolina Supreme Court held that when the state legislature had authorized a tax to be collected from all residents to be used to fund separate schools for blacks and whites, but the resulting

39 It appears that *Crampton* is best viewed as one in a line of (notorious) cases in which the Supreme Court indicated its willingness to second-guess the state supreme courts about their own state law. In some of these cases, the Court held, for the bondholders, that a change in state law (even when introduced as a matter of judicial interpretation) could violate the due process rights of the bondholders. See generally Barton H. Thompson, *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 Stan. L. Rev. 1373 (1992); Fairman, note -- above; James W. Ely, *Railroads and American Law* p. 24-30 (2001).

40 Not all courts and commentators were willing to gloss over the actual facts of *Crampton*. See, e.g., Scott v. Frazier, 258 F. 669 (D.N.D. 1919), aff’d and rev’d, 253 U.S. 243 (1920) (“This bill [of the intervening taxpayers] was, of course, ancillary, and jurisdiction of the federal court to entertain it rested upon its jurisdiction over the action brought by *Crampton*”)

41 Woodward v. Fruitvale Sanitary Dist., 99 Cal. 554 (Cal. 1893)(taxpayer action to challenge validity of irrigation district, no comment on nature of suit); Reynolds v. Waterville, 92 Me. 292, 308 (Me. 1898)(taxpayer challenge to funding arrangements for new municipal building, as violating debt limit; propriety of suit briefed, but not mentioned)
municipal action anticipated a town school only for whites, the tax itself could be enjoined. The lower court had held that the collection (and the building of the schools for both blacks and whites) could proceed as long as the terms of the purposes to which the tax would be put were changed to conform with the permitted purposes; the state Supreme Court held that no such judicial modification of the acts of the city could save the tax.  

The North Carolina Supreme Court clearly viewed the legitimacy of the tax as predicated on the legitimacy of the specific method of expenditures for which it had been raised, just as clearly as if there had been no general authority for the tax at all:

If the only purposes for which the taxes are to be levied and used, are condemned by the paramount law of the Constitution, and they cannot, when collected, be expended as the statute directs, why should they be raised at all? The moneys thus obtained, are but the means by which some supposed or real useful end is to be obtained; and if the proposed expenditure is forbidden, so must be the provision for raising the money to be thus used. The one is an inseparable incident of the other, and an essential and controlling element in the enactment.

... 

This [scheme] is forbidden by the constitution, and as the object in view cannot be accomplished by using the funds as directed, or for any other purpose under the statutory requirements, it clearly ought not to be taken from the tax-payers at all, because this is but a means of effecting an illegal end. ... [T]he statute itself directs an illegal and unauthorized disposition of the fund, and this the popular vote approves, and therefore the restraining order ought to have issued upon the facts shown.

The fact that to the nineteenth century legal mind, such ultra vires corporate acts were entirely void—and that the tax should fall entirely when its purpose is found to be illegal—should not surprise us. It seems likely to have been a well established doctrine, one that is more likely than not to be followed at least in some circumstances even today.

42 94 N.C. 800 (1886). Under the contemplated scheme, the funding of and maintainence of schools for blacks was to be left to the counties.

43 Id at 804, 806
The more significant aspect of Dillon’s position was that the state judicial power could be so easily invoked to thwart corporate actions even before they had commenced. It is this aspect of these cases that would provide the basis for taxpayer standing to challenge the acts of a municipal corporation. The role of Dillon’s view on the nature of municipal power in establishing the doctrine seems to have been significant.  

Not all state courts completely endorsed the position advocated by Dillon even after the position taken in his treatise was endorsed by the Supreme Court in Crampton. It certainly was not as automatic or inevitable as either Dillon or his successors in support of taxpayer actions would have us believe. Some courts limited Dillon’s approach, by

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Twiss, Benjamin. 1942. Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court. New York: Russell and Russell

45 Craft v. Jackson County Com'rs, 5 Kan. 518 1870 ( rejecting suit to enjoin honoring of claim by county for unspecified illegality: “The law seems to rely on the interests of the members of the board to protect the interests of the county. If this is not sufficient, the remedy may be found in the next election; or if the case is flagrant, a prosecution by the proper public officer may prove effective. To allow such citizen, on his own motion, in a case where his own interests are the same as that of every other person, to interfere with and litigate the acts of public officers, and compel them to a contest in the judicial tribunals of the county over each official act, would open the door to endless litigation, and a litigation over and about uncertain and contingent rights; for though the plaintiff is a tax-payer now, he may not be when the tax to pay these claims is levied.”)

Dodd v. Hartford, 25 Conn. 232 (1856) (refusing a taxpayer’s suit enjoin collection of sewer assessment, even when same court had accepted such a suit in other situations, holding the remedies adequate at law)

46 The case reported by one commentator, 59 Temple Law Quarterly at 952, (1986), as the “first known taxpayer’s action,” Adriance v. City of New York, 1 Barb. 19 (N.Y. Sup. Ct. 1847), was repudiated eleven years later in Doolittle v. Supervisors of Broome County, 18 N.Y. 155 (1858)(suit brought by 17 “residents and freeholders” of the affected area challenging the creation of a new town). The court did not waiver in its concern about the consequences of such unconstrained litigation:

If the action can be sustained, any tax-paying citizen may compel the public authorities to litigate, in the courts, the acts of any administrative board or officer in the state, and thus proceedings, which are intended to be summary and inexpensive, can only be perfected by the judgment of the court of final appeal. Every person may legally question the constitutional validity of an act of the legislature which affects his private rights; but if a citizen may maintain an action for such a purpose in respect to his rights as a voter and tax-payer, the courts may
requiring that the tax involved had actually been assessed or that some other collection activity had commenced. \(^{47}\) The logic here seems to have been that if some specific action had been taken against the challenging taxpayer, an injunction could be issued that prevented collection only from the challenging taxpayer. Such a limited injunction would not block the entire tax levy at the outset of the suit, and thus the pending suit would not entirely interfere with local finances. \(^{48}\) Some state courts would not act before the taxes regularly be called upon to revise all laws which may be passed. They may, at the instance of any tax-payer, be required to enjoin the comptroller from drawing warrants on the treasurer, and that officer from paying them, in every case where it may be conceived that the law authorizing the expenditure was passed without constitutional authority").

New York courts seem to have insisted that taxpayers seeking to challenge taxes do so by certiorari to the assessing bodies, see Swift v. Poughkeepsie, 37 N.Y. 511 (N.Y. 1868)(denying right to sue city for taxes already collected, where taxpayer challenged inclusion of property related to national banks: “The moment this court held and decided, that, in determining the question of the liability of the plaintiff to an assessment in respect to the stock held by him, the assessors were exercising a judicial function, and that the assessment was in effect a judgment, the conclusion followed that their determination could not in this form of action be upheaved. Conceding that the judgment they passed was erroneous, still, while it stood unreversed, it protected, not only them, but all who acted in supplementing and carrying out that judgment and availing themselves of its fruits; and the money thus obtained can no more be recovered back by action than can a suit be sustained and money recovered which has been collected upon the erroneous judgment of any court of competent jurisdiction. No suit to recover taxes erroneously assessed and paid over to a county or a municipal corporation has yet been sustained in this State, whatever may be the rule elsewhere.”) One author attributes this to the general position of the New York courts that certiorari is the only method for reviewing many decisions of various quasi-judicial bodies, and dates this position to Mooers v. Smedley, 6 Johns Ch. R 28 (1822)(wolf bounty), Harold Weintraub, Mandamus and Certiorari in New York from the Revolution to 1880: A Chapter in Legal History, 32 Fordham L. Rev. 744 (1963-1964);

Only after almost 15 more years passed did New York in 1872 enact a taxpayer-suit provision, An Act for the protection of taxpayers against the frauds, embezzlements and wrongful acts of public officers and agents" commonly called the Taxpayers Acts. See Osterhoudt v. Rigney, 98 N.Y. 222 (1885)(holding that even with the statute, actions of certain boards were tantamount to judicial proceedings and were not subject to collateral attack); Albany County v. Hooker, 204 N.Y. 1 (1912)(statutory taxpayer action not available to county seeking injunction of state highway construction).

New York still has a state “taxpayer suit” statute, NY CLS St Fin § 123-b, but, like Massachusetts, its courts have limited its scope to cases involving “a sufficient nexus to fiscal activities of the state” Rudder v Pataki, 93 N.Y.2d 273 (1999). Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801 (2003)(allowing challenge to agreement with tribe for the operation of a gambling casino)

\(^{47}\) E.g., Lovingston v. Wider, 53 Ill. 302 (1870) (no taxpayer suit permitted where challenge is to grant to police commissioners of power to issue debt, even though such grant clearly unconstitutional)

\(^{48}\) Miller v. Grandy, 13 Mich. 540 (1865) (disallowing suit, either as taxpayer suit or as suit in general public interest, to enjoin the reimbursement of privately paid enlistment bounties; “we feel confident that no case can be found which recognizes any propriety in enjoining the preliminary proceedings, in advance of the actual levy of a tax, on either personality or realty,” but after the assessment process has been completed, blocking a single taxpayer’s payment will not be so disruptive). Citing Grandy, Michigan courts resisted taxpayers suits and favored suits by public officers, e.g., Steffes v. Moran, 68 Mich. 291
in question were already assessed, and sometimes further insisted that the taxpayer have paid all but the specific portion affected by the challenge. Other state courts were even more reluctant, and therefore took more seriously the idea that no injunction should be available so long as there was an adequate remedy at law, and considered the older suit in trespass, or a statutory suit for refund, or the possibility of a suit challenging the government action brought a state attorney general or other public official as an adequate remedy. Some states struggled to differentiate the run-of-the-mill taxpayer

(1888)(refusing suit by taxpayer challenging appropriation of fees incurred by officer in connection with a legal proceeding as illegal), but more modern Michigan courts seem to allow them at least when the misuse of a specific fund is involved regardless of the taxpayer’s ability to show a special connection to that fund, e.g., Thomson v. Dearborn, 347 Mich. 365 (1957) (allowing taxpayer suit challenging the transfer of parking fines to the fund to pay municipal bonds, rather than use in city’s general funds). Mosher v. Romulus, 54 Mich. App. 65 (1974)(enjoining expenditures for private roads).

Such suits were clearly used in some jurisdictions in very similar circumstances, e.g. Moore v. Hoffman, 2 Cinc.Super.Ct.R. 453 (1873) (challenging the use of tax funds to entertain Horace Greeley at the Cincinnati Industrial Exposition citing Tash v. Adams, 64 Mass. (10 Cush.) 252(1852) (restraining any expenditures by the town of Natick in celebration of the defeat of Cornwallis).

Even as late as 1871, the Supreme Court of Mississippi could survey the decided cases and declare that equitable intervention in tax enforcement was exceptional, even when the tax in question was void, since “the wrong can be fully compensated at law.” Coulson v. Harris, 43 Miss. 728 (1871)(rejecting suit against liquor tax brought by holder of liquor license claiming contract clause violations). It appears that the majority in that court relied more on the pronouncements of the courts of other states than on the prior practice in Mississippi, e.g., Munson v. Minor, 22 Ill. 594, (1859) (refusing to enjoin tax premised on defective plat, stating that “if courts of equity were to entertain jurisdiction, and enjoin the collection of taxes in all cases in which mere informalities and irregularities have occurred …, it would lead to great delay in their collection, and tend seriously to embarrass every department of the government, whether of state, county, town or city, and would render the operation of the school system very precarious. While, if the party conceiving himself aggrieved, is left to his remedy at law, such inconveniences will not be felt). McBride v. Chicago, 22 Ill. 574 (1859) (similar, involving special assessment); Tinsley v. Caruthersville, 121 Mo., App. 142(1906) (refusing to enjoin the sale of a taxpayer's cow, on the grounds that the taxpayer's replevin action would be adequate remedy). In fact, Illinois courts early made a distinction between those situations in which there was no constitutional tax authority, in which a request for injunctive relief would be entertained, that those in which there was such authority, in which case the complaining taxpayer would be left to his remedies at law. Ottawa v. Walker, 21 Ill. 605 (1859)(allowing a challenge to the imposition of a tax by a township for a bridge when authority for such improvements had been granted exclusively to a city within the town).

Some courts, like those in Kansas, started out firmly against such actions, e.g., Burnes v. Atchison, 2 Kan. 454 (1864)(refusing to enjoin a local tax to pay interests on bonds used to fund the purchase of railroad stock, where there was an adequate remedy at law), and Wyandotte & Kansas City Bridge Co. v. Board of County Comm'trs, 10 Kan. 326 (1872)(refusing to act on existing toll bridge company’s suit to enjoin tax to fund building of a free bridge). Despite their earlier resolve, the Kansas courts seem to have eventually been willing to join the courts of other states in enjoining taxes that did not exactly meet the enabling authorities, Stewart v. Kansas Town Co., 50 Kan. 553 (1893).
complaint involving some technical flaw in the statute (for which the common law or statutory refund remedies would be adequate) from the more fundamental challenges to the exercise of power that would be more recognizable as the “taxpayer suits” of interest here for which an injunction against the entire project would be the more appropriate remedy. Still other state courts waited until their state legislatures acted to grant them authority to consider such suits,\(^{51}\) and some were willing to be constrained by limits included in such statutes, regardless of the scope of the actions they had previously allowed.\(^{52}\)

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\(^{51}\) For the practice in Massachusetts, see note \[30\] above, in New York, note \[56\] above

For the practice in Maine, see Clark v. Wardwell, 55 Maine 61 (1867)(under authority of statute, enjoining payment of bounty for soldiers due to flaw in notice of town meeting) Johnson v. Thorndike, 56 Maine 32 1868, Sct of 1864, ch. 239; Allen v; Inhabitants of Jay, 60 Maine 124 (1872)(allowing statutory (RSC 77 sec 5) taxpayer suit to enjoin loaning of funds to operator of sawmill in order to induce his move from Livermore Falls to Jay.)

Oklahoma appears to have entered the Union with a statute, still codified as 62 Okl. St. § 373 (Lexis 2005), that authorized taxpayer suits only after steps had been taken similar to those required in qui tam and shareholder derivative suits, see Territory ex rel. Johnston v. Woolsey, 35 Okla. 545 (1913). This procedure was probably invoked in the Oklahoma trial courts in Wieman v. UpDegraff, 344 U.S. 183 (1952)(reversing on appeal from the state Supreme Court an injunction preventing the hiring of those refusing to take a state-mandated loyalty oath).

Arkansas arrived at taxpayers’ suits through a provision in its constitution of 1874, see Samples v. Grady, 207 Ark. 724, 182 S.W.2d 875, 877 (1944).

The failure of those advocating taxpayer suits to mention these legislative provisions seems blatant and shameless. See, e.g., Injunctions Against Municipal Aid Subscriptions, 6 S.L. Rev. (n.s.) 80, (“it may be affirmed as a general and well-established rule, of universal application, …property owners and tax-payers are entitled to the aid of an injunction to restrain the municipality from such unauthorized diversion of its money”, and citing, without distinguishing cases from Maine, West Virginia, Illinois, Indiana, and Michigan)
Despite the variation, Dillon’s position, both on the need to constrain municipal action and on the appropriate role of taxpayer suits in doing so, seems clearly to have become the majority position in the remaining years of the nineteenth century. The taxpayer suit remained a major instrument in the ongoing dispute about the nature of local governments and the scope of their powers, a battle that at times produced almost absurd positions. For instance, in *Knapp v. Kansas City*, the taxes imposed by the city had modestly exceeded the projects included in the city budget upon which the tax levy was based. The city council had voted to contribute the excess to the state national guard. At the behest of a taxpayer, the court enjoined the payment, and used the case as an opportunity to state its views about the untrustworthy nature of local government:

The city revenue is raised by taxation upon property within its jurisdiction, and can be used only for the objects and purposes contemplated by its charter. That instrument nowhere authorizes it to aid in the support of the militia, state or federal. If we concede the existence of this power, then we must also concede the power to maintain a standing army. If this power exists, then the city may ordain money out of its treasury to "assist in the maintenance" of an industrial exposition, or a Priest of Pallas display, or a musical jubilee for the amusement of the people, or a manufacturing establishment, or a bank, or a railway, or a bridge enterprise leading out of the city, and the like. All of these might be deemed expedient for the public welfare, yet none would contend that the charter has authorized the levy and

53 The cases reveal other contexts, besides the railroads, in which this dispute about municipal power were played out through taxpayer suits, including funding of recreational activities, Tash v. Adams, 64 Mass. (10 Cush.) 252(1852) (restraining any expenditures by the town of Natick in celebration of the defeat of Cornwallis); New London v. Brainard, 22 Conn. 552 (1853)(same, Fourth of July); entertaining public figures, Moore v. Hoffman, 2 Cinc.Super.Ct.R. 453 (1873) (challenging the use of tax funds to entertain Horace Greeley at the Cincinnati Industrial Exposition); helping favorite sons avoid the draft, Tyson v. School Directors of Halifax Township, 51 Pa. 9 (1866) (same, despite state legislature enabling act) Drake v. Phillips, 40 Ill. 388, 391(1866); Freeland v. Hastings, 92 Mass. 570 (1865) (same) Booth v. Woodbury, 32 Conn. 118 (same, upheld); Webster v. Harwinton, 32 Conn. 131 (1864)(same); Ferguson v. Landram, , 68 Ky. 230 (1868)(same).

Injunction against payment by town reimbursing those who paid volunteers so as to avoid military service
collection of taxes for any such purposes, or that the promotion of such objects are all within its spirit and scope.\textsuperscript{54}

By the turn of the century, virtually all of the treatise writers noted the availability of the taxpayer suit to enjoin municipal actions.\textsuperscript{55}

\section*{III. The Expansion of Taxpayer Standing to States in the State Courts}

Two additional developments had occurred by the time \textit{Frothingham} was decided in the 1920’s, one in the state courts and one in the federal courts. First, some state courts had begun to allow taxpayer challenges to state level actions. Again, it is not easy to identify any specific moment when or reason why state courts began allowing such a stretching of the doctrines that allowed their intervention. One contributing factor was the obvious spill-over from the cases involving municipal support for railroads and other public expenditures for arguably private purposes. A careful reading of these cases reveals that the courts were frequently asked to consider not only the municipal action itself, but acts of the legislature that authorized the municipal action. Thus, when the courts found the municipal action unwarranted, it was often because they found the state-level legislative action authorizing or ratifying it unwarranted. Although the courts

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\item \textsuperscript{54} 48 Mo. App. 485, 494 (1892)[emphasis added].
\item \textsuperscript{55} E.g., John Houston Merrill, The American and English Encyclopedia of Law, Vol X, p. 494. (1889) (Resident taxpayers have the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of a municipal corporation, or the illegal creation of a debt which they, in common with other property holders, may otherwise be compelled to pay.”); Thomas Carl. Spelling, A treatise on extraordinary relief in equity and at law, § 678, p. 541 (1893) ( Any tax-payer is a proper party plaintiff in an action to enjoin an illegal appropriation of corporate funds by a municipal corporation, or the illegal creation of a corporate debt. … Indeed, it may be state as a general rule that where an act is unauthorized by law, in other words is ultra vires, and calculated to impose additional burdens upon taxpayers, the latter may maintain injunction for its prevention Whether or not the danger of loss to the public treasury, and the consequent charge upon the taxpayers, constitutes irreparable injury…seems immaterial. The demoralization in public administration of municipal affairs, if no such right of interference were recognized, ought to justify… )
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may not have been asked to enjoin state level officials, state level decisions were nevertheless being reviewed and rejected.\textsuperscript{56}

A second factor contributing to the modest increase in cases challenging state actions in state courts was that, by the end of the nineteenth century, there were many more ways in which a state government could be seen as extending its taxing and spending efforts beyond those constitutionally allowed, since more constraints on state taxing and spending had been introduced into state constitutions. Especially in the early years of the nineteenth century, state taxes had generally been unlikely to be vulnerable even when states engaged in illegitimate projects, since the state’s taxing powers were largely unlimited. Few state taxes were required to be ear-marked in the way that municipal taxes historically had always been. Even if the tax had been ear-marked, the illegitimacy of the ear-marked project might not defeat the tax, since the state was ordinarily under no legal compulsion to ear-mark. And even if a tax were ear-marked, there were many fewer reasons that a tax might be invalid, since—at least at the beginning of the nineteenth century—most states had both full taxing power and a broad range of police powers, in contrast to the limited grants of taxing power given to most local governments. Thus a state taxpayer complaining about an expenditure would not have been able to designate the part of the taxes he was asked to pay that funded the challenged project.

By mid-century many states had adopted constitutional provisions that severely limited the previously unconstrained powers of state legislatures to tax.\textsuperscript{57} States were

\textsuperscript{56} E.g., Foster v. Kenosha, 12 Wis. 616 (1860)(enjoining levying of tax to pay scrip given for railroad stock, holding that state legislature’s grant of taxing power to the city was beyond the power of the legislature under the state constitution).
frequently required to impose only “uniform” taxes. Many state constitutions also included debt limitations imposed on the state itself. While uniformity provisions produced much litigation, they do not seem to have served as a catalyst for suits calling into question the projects to be funded by the state tax, rather than simple suits challenging the taxpayer’s own tax liability.58 In fact, the provisions themselves seem to have resulted not in challenges to state level actions, but in even more challenges to local taxes and programs. The reason lies in the responses of the states to the uniformity requirement and to the debt limitations. In some states, it was difficult to generate political support for uniform state-wide taxation of projects that produced strictly local benefits. In response, entirely new governmental units that would be subject to uniformity limitations only within their own boundaries were created. Similarly, new governmental units were created to avoid debt limitations, or new powers were delegated to pre-existing units. These units could then impose taxes only on the smaller region deemed benefited by the project. These lesser units—no longer just cities and counties, but irrigation districts and school districts—fit the early pattern of taxpayer suit.59 They, not the state that had recently delegated its functions to them, were the object of the suit.

57 [growth of textual state constitutional constraints and judicial doctrines] E.g., Susan Sterett, Serving the State: Constitutionalism and Social Spending, 1860s-1920s. 22 Law & Soc. Inquiry 311 (1997); Weismer, v. The Village of Douglas, 64 N.Y. 91 (1876) (suit by bondholder to collect interest, bonds issued to fund subscription in a private company held invalid, as state did not have power to delegate such power to village where no general benefit inuring to public)

58 One factor limiting the usefulness of this limit as a toehold for more broadanging challenges undoubtedly was that even a uniformity challenge might not mean a refund of taxes, since the court’s cure for the lack of uniformity was likely to be an elimination of the provisions that made the tax non-uniform.

59 Schultes v. Eberly, 82 Ala. 242, 247 (Ala. 1886)(taxpayer successfully sued for refund of tax paid to newly created school district, held to be unconstitutional delegation of state taxing power); Pattison v. Board of Supervisors of Yuba County, 13 Cal. 175, 181 (1859) (noting but not reaching the standing question, denying suit seeking block county purchase of railroad bonds, newly authorized by state which clearly could not so act itself, in support of railroad)
although the suit might well call into question the validity of the action of the state legislature.

By the middle of the nineteenth century, many state constitutions had also been amended to prevent the use of state funds for other than public purposes. Indeed, at one point, the Supreme Court, apparently expounding upon state constitutional law as if it were a matter of federal common law, held that no state could ever impose a tax if the funds were to be used for other than a “public use.” These limits did generate a fair amount of taxpayer litigation in which states or state officers were named and which seemed to be challenges aimed at the entire project funded, rather than just the taxpayer’s own liability.

It was nevertheless generally the case that the state courts were far less likely to intervene with state-level matters than with local matters. After all, the local governments were merely the agents of the state legislature, and the courts’ role was to make sure that the local governments followed not just the demands of the state

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60 WALLIS Many states have adopted the general proposition that taxes may not be imposed for private purposes, but relatively few, especially in more recent years, have actually held this to be a judiciable constraint, and the Supreme Court in Green v. Frazier, 253 U.S. 233 (1920) (on writ of error to the state supreme court, upholding various state enterprises), held that there was no federal due process violation inherent in the failure to enforce this limitation. Many states still have limitations on the degree to which they can incur debt, operate at a deficit, or maintain a budget greater than some benchmark.

There are some notable exceptions. The 1850 Michigan constitution for instance, directed that any “special taxes” be dedicated to specific purposes, and, because an inheritance tax was dedicated to the general fund, it was held to be void. Chambe v. Durfee, 100 Mich. 112 (1894) This same constitution provided, furthermore, that all taxes specify “the object to which it is to be applied.”

Occasionally, the powers of a state have been more specifically limited, and in those cases, courts have felt free to enjoin them. E.g., Markoe v. Hartranft, 15 Am. L. Reg. 487 (New series, 1867)(enjoining a Pennsylvania tax on national banks not structured in conformity with the provisions according to which Congress in an 1864 statute had consented to the taxation of such banks).

constitution but the commands of the state legislature. Taxpayer suits had become, at least in some states, the primary mode of securing judicial review of the actions of local units of government. In allowing such suits, state courts were merely participating in the development of state level administrative law. 62 This review, based as it frequently was on both the legislative and the constitutional limits on the powers of local government, was at least in part the natural exercise of the judicial obligation to enforce the will of the legislature. The state courts’ were far more likely to be deferential when the actions of their constitutional equals, the state legislatures, were challenged. 63

There may have been still other factors besides a sense of the difference in the relationship between the courts, the taxing body, and the source of the taxing body’s tax power governments that contributed to the overall pattern in the reported cases. As some courts noted, to the extent that the ability to bring a taxpayer suit was essentially about whether the equitable powers of state courts should be allowed to interfere with revenue collection, municipal taxes were more likely than state taxes to place clouds on real

62 [note to other modes of obtaining review of local units, e.g., certiorari in Iowa]
63 E.g., Jones v. Reed, 3 Wash. 57 (1891) (refusing relief to state taxpayers challenging the misappropriation of funds by the regents of the agricultural college, noting that while municipalities are entities of limited powers, states are sovereign, but not considering the statutory constraints on the state officers against whom the injunction was sought) (“This court untrammeled by precedent or authority in laying down a policy for this state, deems it safer to relegate the instituting of suits involving the disposition of the revenues of the state, where no private interests are involved,…to the attorney general”).

State-level taxpayer standing was rejected in Sutton v. Buie, 136 La. 234 (1914), but permitted by a badly divided court that did not address possible the grounds for reconciling the cases in Borden v. Louisiana State Bd. of Education, 168 La. 1005 (1929) (refusing to enjoin the use of state expenditures for the purchase of texts to be used by all school children, including those attending private religious schools, on the ground that the expenditure was not for public purpose and violated the fourteenth amendment), companion case affirmed without comment regarding jurisdiction, Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930).

Butler v. Ellerbe, 44 S.C. 256() (dissent, who would support taxpayer standing cited only Crampton!)
estate, and thus were more likely to warrant interference by equity.\textsuperscript{64} In some states, specific legislation granted courts supervisory roles over municipal bodies at the behest of taxpayers, and if these courts considered these statutes their only source of authority for such suits, they were unlikely to consider suits, including suits against state-level bodies and officials, not specified in the statutes.\textsuperscript{65} Finally, to the extent that taxpayer suits were generated as much by taxpayer aversion to taxes as to the projects being funded, local taxes generally remained a much higher burden on most taxpayers and thus a more likely target of attack.\textsuperscript{66}

IV The Spillover of Municipal Standing Cases into the Federal Courts

The second pre-\textit{Frothingham} development was that the federal courts began to hear taxpayer suits. Again, it is difficult to pinpoint exactly when this first occurred. Judging from the importance given the case by Dillon, and the fact that it—and almost no other federal case, earlier or later—is as pervasively cited by both state and federal courts, \textit{Crampton v. Zabriskie} may well have been a turning point.\textsuperscript{67} Even though it had not actually involved a municipal taxpayer bringing an initial suit against a municipality in federal court, the case was soon cited as if it had. Nor is it easy to reach firm

\textsuperscript{64} Floyd v. Gilbreath, 27 Ark. 675 (1872)(refusing to grant an injunction against execution on tax specifically imposed for building county buildings and for certain officers' fees, even where levy was clearly not authorized, because remedies at law, including both certiori on the record, and replevin against the collector, were deemed adequate, but the dissent noting that municipal taxes more likely to involve real estate, and therefore more likely to involve irreparable injury).

\textsuperscript{65} E.g., Hutchinson v. Skinner, 21 Misc. 729 (N.Y. Sup. Ct. 1897).(refusing to enjoin state board of education when only basis for suit was N. Y. Taxpayer Acts)

\textsuperscript{66} In 1850, local taxes were more than double state taxes, and increased to almost 5 times state level taxes by 1900. See estimates in John Legler, Richard Sylla and John J. Wallis, U.S. City Finances and the Growth of Government, 1850-1902, 48 J. Ec. History, 347, 355 (1988)

\textsuperscript{67} See, e.g., Asplund v. Hannett, 31 N.M. 641 (1926), citing \textit{Crampton} as having been the basis for the New Mexico court’s earlier acceptance of municipal taxpayer standing in Laughlin v. County Commissioners, 3 N.M. 420 (1885).
conclusions about how well accepted the practice actually was. Even after Crampton, the federal courts did not entertain very many requests that took the form of a taxpayer challenge, and granted relief in only a small handful. 68

Generalizations about the reactions of the federal courts to taxpayer suits to challenge the government programs in the period between the Civil War and Frothingham are complicated by developments relating to other types of cases involving state tax administration. Among the most vexing were the cases in which state taxpayers sought to have the federal courts compel state and local officers to honor their debts and especially to accept state-backed notes in payment for state taxes. 69 Such claims were made under the contract clause, that is, the claim was that the state had issued notes with a promise that the notes could be tendered in payment of state and local taxes, and this promise could not be revoked under the contract clause. One of these scenarios, that arising in Virginia, 70 resulted in virtually every mode of litigation imaginable, including

68 It is clear furthermore, that the Supreme Court was aware of the state court actions and undoubtedly was troubled by the possibility of their proliferation. See, e.g., Knights v. Jackson, 260 U.S. 12 (1922)(on writ of error from petition for mandamus against state treasurer, affirming the decision of the state court (which “waiv[ed] questions of procedure”) in its holding that the Massachusetts income tax and the mechanism by which the revenue raised was shared did not violate due process); Hawke v. Smith, 253 U.S. 221 (1920) (taxpayer suit filed in state court against Ohio Secretary of State to enjoin funding of state-wide referendum on proposed 18th amendment, on ground that U.S. Constitution required legislative ratification); cf. Fairchild v. Hughes, 258 U.S. 126 (1922)(unsuccessful suit filed by New York resident in local District of Columbia courts, as, among other things, a federal taxpayer, seeking injunction against implementation of the not-yet ratified 19th amendment) and Leser v. Garnett, 258 U.S. 130 (1922) (unsuccessful suit filed under special Maryland statute relating to voting to strike female names from voter registration on grounds that 19th amendment did not bind Maryland when Maryland internal laws provided for male suffrage only)

69 E.g., Louisiana v. Jumel, 107 U.S. 711 (1883) and New Hampshire v. Louisiana, 108 U.S. 76 (1883) (denying original jurisdiction in a case in which N.H. had purported to sue on behalf of its citizens who held Louisiana bonds)

70 Virginia in 1871 had refunded its debt with bonds the coupons on which were to be acceptable in payment of state and local taxes. Less than a year later, the Virginia legislature passed legislation attempting to repeal this provision, only to have the Supreme Court rule that such legislation was violative of the Contract Clause. Virginia spent the next 20 years trying to make it difficult to use the coupons to pay taxes, including by taxing the use of the coupons, by requiring special proof that that the coupons were not fraudulent, by requiring payment in some other medium while the right to present the coupons was established. These cases are known collectively as the “Virginia Coupon Cases.” The story of these cases
suits in mandamus to compel collectors to accept state-issued paper for taxes, trespass suits against collectors who had refused to accept paper and had proceeded to levy against taxpayers, suits seeking injunctions against collectors who were about to levy despite the tender of paper to tax pay taxes, and habeas petitions by collectors found in contempt for proceeding with levies after rejecting tenders of paper even after federal courts had held that they had an obligation to accept paper. Like *Crampton*, these cases presented difficult problems involving the nature of federal jurisdiction not just in cases initially filed to establish the litigants’ rights, but in cases in which actions were taken by other legal actors deliberately to undermine those rights in other fora. Here, the Supreme Court found itself protecting its earlier rulings establishing rights protected by the contract clause against the deliberate and repeated efforts of the state courts and the state legislature to undermine them. In this series of cases, the federal courts seemed willing to allow state taxpayers (who sought not so much to avoid taxes as to be permitted to pay them with the state-issued notes) unprecedented access to federal courts. But a close examination of these cases reveals that unless the state in question clearly was acting in defiance of established federal precedent, the Supreme Court was reluctant to allow the lower federal courts to intervene. And even when the state was acting inconsistently with established precedent, the Court was careful only to allow those who were in a position to allege specific personal harm to proceed. The Court’s willingness to intervene, as it had been in *Crampton*, had more to do with the issues associated with the contract clause, the full faith and credit clause, and the supremacy clause than with the issues we associate

is told in Charles Fairman, Reconstruction and Reunion 1864-88, Oliver Wendell Holmes Devise Vol II, p. 715-724.
with standing. Thus, in *Marye v. Parsons*, the Supreme Court held that mere purchasers of state notes, who feared the value of these notes was declining because of the tactics of the state to make it difficult to present them in payment of taxes but who had not yet attempted to use the notes to pay their own taxes, were not entitled to an injunction requiring the acceptance of the notes. The Court used language resembling that it would use in a modern standing decision:

> there must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to person or property. All questions of law arising in such cases are judicially determinable. The present is not a case of that description.

A close look at the cases most frequently cited for the proposition that municipal taxpayer standing *in federal courts* was well-established before *Frothingham* reveals considerably less than a well-established practice. The Supreme Court appears to have considered several cases in which procedures resembling taxpayer suits were used, but none involve strictly municipal taxpayers successfully challenging the actions of their local governments in the regular article III courts. The lower federal courts did

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71 114 U.S. 325 (1885). In this case, the holders of the paper had sought an injunction against both state and city officials.

72 These cases involve fact patterns that are not clearly precedent as taxpayer suits because first, in none of them was the requested relief granted, and second, they were suits instigated in the District of Columbia and therefore involving courts and governmental units with very different baseline relationships. Although the existing courts in the District were determined to be Article III courts, their jurisdiction especially in this time period was acknowledged to be greater than those of the federal courts in the states. This derived at least in part from the fact that, on the formation of the District, the federal circuit court was given the same jurisdiction as had been granted the state courts in Maryland, from which the District had been severed. Thus the District courts were acknowledged to have different powers over government officials found within the district, and in *O’Donoghue v. United States*, 289 U.S. 516 (1933) were acknowledged to have been exercising power broader than that strictly contemplated in Art. III. See Jeffrey B. Morris, *Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit*, p. 25-27 (2001).

Thus the courts in the District were in a position more similar to the courts of the several states with respect to taxpayer suits. In *Wilson v. Shaw*, 204 U.S. 24 (1907), a suit was brought in local courts in the District
consider at least a handful of taxpayer suits against local governments that took the regular form of taxpayer suits, and relief was granted in a few. The lower court cases were much more likely, however, to make reference to the practice as if it were well-

of Columbia to enjoin payments toward the construction of the Panama Canal. The Court, noting that the suit was one in equity, essentially held that, given the extent to which the work of building the canal was already covered by treaty, no injunction at the behest of an individual “who does not disclose the amount of his interest.” In Millard v. Roberts, 202 U.S. 429 (1906), the Court again denied relief, this time to a taxpayer in the District of Columbia, who had sued hoping to bar a scheme of taxation to fund improvements for the railroad line within the district. Similarly, in Bradfield v. Roberts, 175 U.S. 291 (1899), the Court again preferred to announce that it would not in any event grant the requested injunction against the funding of a federally-charter hospital run by a religious order, without deciding the propriety of the nature of the action.

The cases cited in Wilson further reveal the precarious nature of the suit: the only other federal cases cited besides Crampton involved attempts to use the courts’ powers to enjoin government action when the plaintiff was more than just a taxpayer and arguably had sufficient interest to have sought a strictly legal remedies (Pennoyer v. McConnaughy, 140 U.S. 1 (1891)(a land claimant sought to enjoin the governor of Oregon from selling the land he claimed) and Louisiana Board v. McComb, 92 U.S. 531 (1875)( in diversity, a bondholder successfully sought to enforce a state debt limit). The Supreme Court appears not to have had considered a case which presented an opportunity to expressly confirm the implications of Crampton v. Zabriskie before Frothingham.

There were a number of cases that reached the Supreme Court from the lower federal courts in which those subject to special assessments sought to bring their challenges in federal court, e.g., Wheless v. St. Louis, 180 U.S. 379 (1901) (taxpayer suit challenging special assessment where procedural flaws rendered assessment void); Ogden City v. Armstrong, 168 U.S. 224 (1897) (same), but these cases appear to have been defeated on other grounds going to subject matter jurisdiction, including amount in controversy. In one much older case, that seems not to have been cited as relevant precedent, a suit for injunction was entertained, but relief not granted. Carroll v. Safford, 44 U.S. 441 (1850)(allowing suit by purchaser of Michigan land from federal government, seeking to enjoin a local official from selling the land for state and local property taxes, when a tax imposed before the purchase would be in violation of federal law).

73 These cases include Ottumwa v. City Water Supply Co., 119 F. 315 (8th Cir. 1902) (suit by Maine citizen owning taxable property in Iowa city, challenging financing arrangements for new city water system)(used aggregate approach to amount in controversy); The Liberty Bell, 23 F. 843 (E.D. La. 1885)(enjoining expenditures by New Orleans for accommodations for the loan by Philadelphia of the Liberty Bell, and, apparently, of a boondoggle to Philadelphia for the civic leaders of New Orleans); Davenport v. Buffington, 97 F. 234 (D. Col. 1897)(upholding the standing, in territorial courts, of a non-Indian resident of a town located within Indian territory to challenge the sale of lands once owned by the controlling tribe but dedicated as a park, citing both the fact that taxes would need to be collected to replace the sold land, and that under the prior arrangements, the land was held in trust for the residents of the town).

There were a number of other cases that involve underlying fact patterns similar to those in the standard taxpayer suit, but which did not proceed cleanly as such suits and therefore would not have been attractive as precedent for the practice. Quinton v. Equitable Inv. Co., 196 F. 314 (9th Cir. 1912)(taxpayers could not bring suit to enjoin bondholders from bringing an action at law on irrigation district bonds claimed to have been illegally issued, suit dismissed for various reasons going to lack of equitable jurisdiction); Miller v. Perris Irrigation Dist., 92 F. 263 (S.D. Cal. 1899)(permitting suit to challenge executions against land to be sold to satisfy bond obligations of an irrigation district); Skirving v. National L. Ins. Co., 59 F. 742 (8th Cir. 1894)(refusing to enjoin, at taxpayer’s behest, the execution of a judgment in favor of holder of school bonds; nature of jurisdiction and amount in controversy questioned, but not ruled upon);
established, only to conclude that it was not appropriately invoked in the case at hand.\textsuperscript{74}

And, even when taxpayer standing was permitted, the federal courts tended to take a conservative approach regarding the exercise of their equitable power. The taxpayer was likely, for instance, to be required to prove that he had paid, or had offered to pay, the amount attributable to the illegal aspect of the tax.\textsuperscript{75} Or he was required to meet a relatively high burden in satisfying one of the other predicates to equitable jurisdiction, for instance, that there be no available adequate remedy at law.\textsuperscript{76} None of these cases

\textsuperscript{74} For most of the relevant time period, the federal courts were likely to have chosen the path of least resistance in dismissing a taxpayer challenge, often assuming what has since been labeled “hypothetical standing.” The modern Supreme Court has roundly discouraged the practice, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998). See generally Joan Steinman, After Steel Co.: “Hypothetical Jurisdiction” in the Federal Appellate Courts, 58 Wash. & Lee L. Rev. 855 (2001).

Many of these cases involved unsuccessful government contractors, whose standing might rest either on taxpayer standing or as disappointed bidders (contrary to modern intuitions about article III standing, those only claiming the latter status were frequently thought to be less entitled to proceed, given the other (likely statutory) remedies available to them): Downing v. Ross, 1 App. D.C. 251 (1893)(allowing a disappointed competitor to proceed with taxpayer’s suit challenging the bidding procedure for government contract, but denying relief); e.g., B. F. Cummins Co. v. Burleson, 40 App. D.C. 500 ((1913)(the standing of a disappointed bidder for a post office contract questioned, where challenge was to the exercise of executive discretion, and not obvious illegality); Dewey Hotel Co. v. United States Electric Lighting Co., 17 App. D.C. 356 (1901)(although assuming that municipal taxpayer standing exists, denying any equitable standing for a challenge to contractual arrangements whereby a competitor will be given access to public rights-of–way); Colorado Paving Co. v. Murphy, 78 F. 28 (D. Col. 1897)(acknowledging taxpayer standing, but denying standing to a competitor claiming to have been the lowest bidder on a municipal contract).

\textsuperscript{75} For instance, in such cases the taxpayer might be required to tender the unchallenged part of his tax before he could challenge any other part, e.g., National Bank v. Kimball, 103 U.S. 732 (1880)(on appeal from the federal courts, in a challenge that the state tax unconstitutionally interfered with a national bank); Northern Pacific Railroad v. Clark, 153 U.S. 252 (1894)(certified question to the Supreme Court); State Railroad Tax Cases, 92 U.S. 575 (1876) (on appeal from the federal courts, in a challenge to a specific tax liability based on lack of uniformity as required by the state constitution); Railroad & Tel. Cos. v. Board of Equalizers, 85 F. 302 (C.C.D. Tenn. 1897)(in challenge to assessments as nonuniform granting injunction only against revised assessment and ordering payment of remainder). Such requirements would not be necessary, however, under many state statutes allowing such suits, see, e.g., Norwood v. Baker, 172 U.S. 269 (1898)(on appeal from the federal courts, upholding an injunction against a special assessment as an illegitimate use of the taxing power, where an Ohio state law specifically allowed such challenges)

\textsuperscript{76} Dows v. City of Chicago, 78 U.S. (11 Wall.) 108 (1871)(on appeal from the federal courts, refusing to enjoin a tax on national bank shares claimed to be non-uniform in violation of state constitution) In Dows the court stated

The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law. And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action
involve a successful action brought in federal court against a state or the federal government, and certainly none of them endorsed the idea that one’s mere status as potential taxpayer sufficed to challenge a project or policy not directly tied to the tax in question.\footnote{77}

There are some easy explanations—other than the standing requirement itself—for why there are so few taxpayer suits in federal courts both before and after \textit{Frothingham} even though the courts seemed willing to refer to the practice as routine. First, there was no general federal question jurisdiction in the federal trial courts until 1875, so there was no obvious basis for bringing suits in federal courts challenging state actions as contrary to the federal Constitution. There was diversity jurisdiction—but only against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action. We see no ground for the interposition of a court of equity which would not equally justify such interference in any case of threatened invasion of real or personal property.

Thus the taxpayer would be required to show the equitable grounds for his suit, including the lack of adequate legal remedy because, for instance, the risk of a multiplicity of suits (in general, a requirement that the legality of the tax be obvious on its face) or some special irreparable injury. Shelton v. Platt, 139 U.S. 591 (1891)(in challenge of corporation to state tax on unspecified constitutional grounds injunction denied). E.g., Singer Sewing Machine Co. v. Benedict, 229 U.S. 481, 488 (1913) (holding that federal courts will not enjoin the collection of unconstitutional state taxes where the taxpayer "[has] a plain, adequate and complete remedy" at law); Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U.S. 276 (1909)(challenging in federal court a city’s imposition of a fee not contemplated in the contract with the city); Milwaukee v. Koeffler, 116 U.S. 219 (1886) (on appeal from federal courts, after removal from state court refusing to enjoin a personal property tax imposed on one claiming to be a nonresident based on assertions of illegality as to the assessment against that any particular taxpayer) citing Hannewinkle v. Georgetown, 82 U.S. (15 Wall.) 547 (1873)(on appeal from the D.C. courts, refusing to intervene to block a tax sale for a special assessment ); In some circumstances, however, it would appear that the fact that title to real estate (rather than fungible personal property) was enough to invoke equity. See, e.g., Dillon, 1st ed. at § 737, n. 1, (observing the possibility in the course of discussing an 1864 North Carolina case).

\footnote{77 Cf. O’Brien v. Carney, 6 F. Supp. 761 (D. Mass. 1934)(rejecting a challenge by an unsuccessful bidder to the bidding process used by the Federal Emergency Relief Administration, and asserting that “if there has been a breach of a public duty by a state officer, a taxpayer has no standing to enjoin the officer without showing that he will suffer peculiar injury not suffered by the public at large…The same rule must a fortiori apply to federal officers,” with no elaboration).}
rarely would a typical taxpayer suit against a local municipality or state involve diverse parties.\textsuperscript{78} In both types of cases, the jurisdictional amount requirements were likely to preclude most actions,\textsuperscript{79} at least once it became settled doctrine that the claims of the challenging taxpayers could not be aggregated.\textsuperscript{80}

The uncertain status of state sovereign immunity was also likely to have limited the attempts taxpayers made to invoke federal court jurisdiction to constrain state projects. Although the Court ultimately determined that suits against state officers were

\textsuperscript{78} It was possible, see, e.g., Goedgen v. Manitowac County, 10 F. Cas. 525 (Wis. 1870)(granting taxpayer injunction against issuance of bonds to be funded by property taxes, where technical flaws in meeting, where, judging by amount of property held by aliens and amount to be funded, it was likely that they would be required to pay more than the jurisdictional amount, $500); Ottumwa v. City Water Supply Co., 119 F. 315 (8th Cir. 1902) (suit by Maine citizen owning taxable property in Iowa city, challenging financing arrangements for new city water system). Note that to the extent that such cases were uncontroversial, the special relationship involved must be limited to the fiscal relationships, and taxpayer standing distinguished from citizen standing or voter standing.

And the efforts of the Commercial Branch Bank of Cleveland to challenge the 1852 bank tax imposed by Ohio in federal court in diversity were innovative, and for the most part apparently successful, see Dodge v. Woolsey, 59 U.S. 331 (1855)(allowing shareholder suit to proceed in diversity) and Deschler v. Dodge, 57 U.S. 622 (1853)(allowing suit in replevin by assignee, frustrating both the Ohio prohibition on replevin for property in state hands and the anti-assignment provisions of the diversity statute), despite the fact that they prompted strong dissents. The Court may have taken a more permissive view of its jurisdiction because the actions of Ohio officers seemed to fly in the face of its decision in Piqua State Bank v. Knoop, 57 U.S. 369 (1854) holding that the taxes in question violated the contract clause, since the general banking law had provided for a state share of six percent which in the courts view was not subject to change by the legislature.

\textsuperscript{79} E.g., Risley v. Utica, 168 F. 737 (C.C.D.N.Y. 1909) (no jurisdiction for challenge under state and federal constitutions to operation of water works, for which plaintiff was taxed but received no benefit)

\textsuperscript{80} See, e.g., Scott v. Frazier, 253 U.S. 243 (1916)(denying aggregation of claims in challenge to taxes to fund various state-owned enterprises because such enterprises were beyond the proper power of the state) compare Green v. Frazier, 253 U.S. 233 (1916)(reaching the merits of the same controversy on writ of error to the state supreme court); Rogers v. Hennepin County, 239 U.S. 621 (1916)(denying jurisdiction for lack of threshold amount, on a challenge to a tax for lack of uniformity and arbitrariness, even when the nature of the associational interest related to the tax challenged, aggregation was not permitted); Walter v. Northeastern R. Co., 147 U.S. 370 (U.S. 1893) (denying aggregation of claims of taxpayer who faced tax liabilities in multiple jurisdictions in North Dakota); Northern P. R. Co. v. Walker, 148 U.S. 391 (U.S. 1893)(same, South Carolina);

The development of this position was not straightforward. Compare Ottumwa v. City Water Supply Co., 119 F. 315 (8th Cir. 1902) (suit by Maine citizen owning taxable property in Iowa city, challenging financing arrangements for new city water system, but used aggregate approach to amount in controversy) with Elliott v. Board of Trustees, 53 F.2d 845(5th 1931)(taxpayer suit to enjoin bonds to fund high school, jurisdictional amount not satisfied, following Ogden City v. Armstrong, 168 U.S. 224(1897).
not barred by the eleventh amendment, its holdings from after the Civil War until the turn of the century were far from predictable.\footnote{Compare Louisiana. v. Jumel, 107 U.S. 711 (1883)(refusing to mandamus state officers at the behest of bondholders, observing that “the courts, when a State cannot be sued, [cannot] set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State”) with Marye v. Parsons, 114 U.S. 325, 330 (1885)( dissent of Justice Bradley, from allowance of suits by holders of coupons issued by Va. seeking to use such coupons to pay taxes, without regard to extent that suits sought specific performance against state). Cf. In re Ayres, 123 U.S. 443  (1887)(holding that state officers who continued to attempt to collect taxes in the face of a federal court injunction premised on the idea that the collection efforts violated the contracts clause were not a party to the contract in question, and therefore could not be held in contempt)}

Finally, the taxpayer’s chance of actually obtaining an injunction from the federal courts to avoid state taxes—which was the remedy most early taxpayer suits ultimately sought, whether the challenge was directly to the tax or to the uses to which the tax would be put—was probably far less than his chance of getting most state courts to issue a similar injunction, even when standing in the technical sense would not have been an issue.\footnote{Attempts to bring suits in federal courts for injunctions against any local administrators, tax or other, appear to have been rare enough prior to the court’s decision in Borden's Condensed Milk Co. v. Baker, 177 F. 906 (3d Cir. 1910), that the court in that case discussed at length, without citing much authority on point, the question whether a federal court could entertain a such bill in equity, when a state court would not have entertained such a suit because a writ of certiorari to the state supreme court would have been viewed as an adequate legal remedy. Criticizing Ewing v. St. Louis, 72 U.S. 413 (1866) (denying injunction that would interfere with the administrative proceedings related to condemnation of land for streets) BY FIELD, who later is willing to go with Dillon!!! which had said in dicta that federal court could not grant relief if state court would not.} Federal law had prohibited suits for injunctions of \textit{federal} taxes since 1867.\footnote{Section 10 of the act of March 2d, 1867, c. 169, 14 Stat. 475 provided explicitly and unequivocally: “no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.” The federal courts seem to have been very reluctant to find exceptions to this blanket proscription of their power, see, e.g., Snyder v. Marks, 109 U.S. 189 (1883), and cases cited therein.} Although the Supreme Court did indicate that injunctions would, in the appropriate case, lie against state tax enforcement, the federal courts (unlike those in many states) retained a firm distinction between law and equity well into the twentieth century,\footnote{See, e.g., Lindsay v. First Nat'l Bank of Shreveport, 156 U.S. 485 (1895) (holding that state taxpayer, a national bank, could not seek review of local tax assessments through a suit filed in the legal side of a federal court, despite a state statute allowing review of tax assessments “before the courts of justice in any procedure which the constitution and laws may permit”, on the grounds that the suit in effect sought to}
standards invoked when such equitable relief was sought appears to have been relatively high. If taxpayers seeking to challenge specific assessments made against them because the taxes themselves were illegal were discouraged from looking to the federal courts, no doubt taxpayers unable to point to any particular tax liability actually asserted against them but seeking nevertheless to challenge a government program because they feared the taxes they would have to pay would also have sought a friendlier forum in the state courts.

The statute imposing a constraint on actions in federal courts seeking to enjoin state taxes was not enacted until 1937 with the Tax Injunction Act, which divested the federal courts of jurisdiction over any suit in which the challenger could be seen as requesting that a state or local tax be enjoined unless the state provided no remedy. But the Tax Injunction Act has generally been viewed as codifying what had been the traditional position of the federal courts regarding the propriety of invoking federal equity powers to interfere with state revenue raising efforts, and was enacted in response to a

enjoin the collection of taxes; the Court’s decision leaves it unclear whether such a suit, properly filed, could have been brought) [this case needs to be further explored]

85 Shelton v. Platt, 139 U.S. 591 (1891)(denying an injunction against a Tennessee license tax asserted to be imposed in violation of the commerce clause where there was an adequate remedy at law),; but see In re Tyler, 149 U.S. 164 (U.S. 1893)(upholding the contempt charge against a sheriff who had continued to collect taxes despite federal circuit court injunction, where railroad property was already in the custody of a federal receiver, “It has been repeatedly and uniformly held by this court that in a proper case for equity interposition an injunction will lie to restrain the seizure of property in the collection of taxes imposed in contravention of the Constitution of the United States”). Not all courts were willing to take such leaps, even after many others had done so.

86 Act of August 21, 1937, 50 Stat. 738, enacted as an amendment to § 24 of the Judicial Code, 28 U. S. C. § 41 (1). ("no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state").
relatively new and troubling breakdown of the prior practice.\textsuperscript{87} Thus those cases that most closely fit the traditional pattern of taxpayer suits in state courts—because the taxpayer sought to avoid the tax that would be necessitated by the challenged action—were not likely to be brought in federal court until well into the twentieth century, and, after 1937, appeared to be expressly forbidden.\textsuperscript{88} When the Supreme Court’s sensed at the time of \textit{Frothingham} that there were more actions in federal courts involving municipal taxpayers than state taxpayers, it was observing a pattern that had developed in the states themselves and was simply repeated, in perhaps a more exaggerated way, in the federal courts.

\textsuperscript{87} The Supreme Court in \textit{Great Lakes Dredge \\& Dock Co. v. Huffman}, 319 U.S. 293 (1943) indicated its view that this act reflected the prior practice of the federal courts, citing \textit{Matthews v. Rodgers}, 284 U.S. 521 (1932).

\textsuperscript{88} For an account of the effect of these bars on the development of taxpayer standing in the twentieth century, see \textit{Note, Taxpayer Standing to Litigate}, 61 Geo. L.J. 747, 771-778 (1973).