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Who Is Injured when Racially Discriminatory Private Schools are Tax-Exempt?

by Neal Devins

Allen v. Wright
(Docket No. 81-757)

Regan v. Wright
(Docket No. 81-970)

To be argued February 29, 1984

ISSUE

The decision in *Bob Jones University v. United States* did not quiet the controversy over tax exemptions for private schools. Instead, the Supreme Court's 1983 ruling that racially discriminatory private schools are not entitled to tax-exempt status merely paved the way for more intricate litigation contouring racial nondiscrimination enforcement standards. *Regan v. Wright* is a nationwide class action suit instituted by black parents and their schoolage children in an effort to force the Internal Revenue Service (IRS) to adopt more stringent nondiscrimination standards. The issue now before the Supreme Court, however, is a procedural one: whether this particular class has an interest in racial nondiscrimination which satisfies the "standing to sue" requirements.

Article III of the Constitution establishes the basics for the judicial power of federal courts and provides that the limited federal power extends only to certain qualified "case or controversies." Also, standing is an essential prerequisite to an article III case or controversy, and without it, the federal courts are constitutionally unable to act. The standing doctrine is premised on the fundamental separation of powers notion that legislative choices should be made by legislative machinery—not by the judiciary. In this way, standing prevents a plaintiff from using "a federal court as a forum in which to air generalized grievances about the conduct of government." (*Flast v. Cohen*, 392 U.S. 83, 105 (1968))

Regan v. Wright touches on three specific aspects of the standing doctrine. First, since the parents and children here have no interest in attending (and have not sought admission to) allegedly racially discriminatory private schools, *Regan* will determine whether a black

person suffers the requisite "direct and concrete injury" when the government grants tax-exempt status to racially discriminatory private schools. Second, since denial of tax-exempt status might not affect the policies of allegedly discriminatory private schools, *Regan* will determine whether the rights of blacks are vindicated merely by the government's "steering clear" of racially discriminatory institutions. Third, *Regan* will determine whether prudential separation of powers concerns should prevent the judiciary from imposing standards on a matter already addressed by the IRS.

FACTS

Regan v. Wright is an appeal by the secretary of treasury and parent of a child attending an allegedly discriminatory private school from a 1981 decision by the D.C. court of appeals. That decision gave black parents and schoolchildren an absolute right to challenge IRS policies governing the tax-exempt status of private schools. (*Wright v. Regan*, 656 F.2d 820 (1981))

The *Regan* lawsuit is a nationwide class action initiated in 1976 by black parents and schoolchildren seeking more expansive nondiscrimination enforcement standards to govern the tax-exempt status of private schools. In an effort to settle the case, the IRS proposed nondiscrimination enforcement standards in 1978 which—in accord with the relief sought in *Regan*—would have denied racial nondiscrimination through a numerical quota based on areawide black/white student population ratios. Congress, however, prohibited these procedures through appropriations riders to the Treasury Appropriations Act of 1980. In the meantime, the case was working its way through the D.C. district court. In November of 1978, that court held that plaintiffs lacked standing to sue. However, in June, 1981, the D.C. court of appeals reversed that decision. In May, 1983, (immediately following the Supreme Court's *Bob Jones University* decision), the Supreme Court agreed to review the appellate court decision.

The court of appeals decision adopted the position that the black parents and children, as members of the group subjected to discrimination, had standing to sue to enforce the government's constitutional obligation to steer clear of aiding institutions that practice racial discrimination. In support of this holding, plaintiffs in *Regan* argue that "just as government injures black schoolchildren when it operates a segregated system of education, it injures those children when it gives signifi-

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cant aid to private discriminatory schools, especially those organized or expanded concurrently with desegregation." (See, e.g., *Norwood v. Harrison*, 413 U.S. 455 (1973)) Consequently, the parents and children suing in this case contend that it is irrelevant that they have not been denied admission to any private school.

The government responds that the "right to be free of government aid to racial discrimination is an undifferentiated right common to all members of the public that will not support standing to sue treasury officials in an article III court." (See, e.g., *United States v. Richardson*, 418 U.S. 166 (1974)) This governmental position is superficially in accord with the Supreme Court's 1982 decision in *Valley Forge Christian College v. Americans United for Separation of Church and State* (102 S.Ct. 752 (1982)). According to the Court in *Valley Forge*, "the psychological consequences presumably produced by observation of conduct with which one disagrees" is not "an injury sufficient to confer standing under article III, even though the disagreement is phrased in constitutional terms." (102 S.Ct. at 765) The parents and children in this case refute this contention, arguing that they are especially harmed by the racially discriminatory conduct of government.

The appellate court decision also granted standing over the government's contention that the plaintiffs failed to stake a claim which could be adequately relieved. The government argued that adopting the proposed nondiscrimination standards might very well have the effect of private schools foregoing their tax-exempt status (rather than comply with the standards proposed). The government thus argued that *Regan* was quite similar to the situation faced by the Supreme Court in its 1976 decision, *Simon v. Eastern Kentucky Welfare Rights Organization* (426 U.S. 26 (1976)). *Eastern Kentucky* denied standing to indigents who complained they were being denied medical treatment by hospitals that were accorded tax-exempt status. The Supreme Court reasoned that it was "purely speculative" to think that a change in IRS guidelines would result in concomitant change in hospital policy.

Black plaintiffs in *Regan* respond to this argument by noting that their claim is not based on an allegation that current IRS policies effectively limit their rights to attend desegregated public schools. They instead suggest that the injury suffered is that their race is denigrated through government support of racial discrimination. Consequently, plaintiffs claim that effective nondiscrimination enforcement standards will relieve them of their government-imposed injury regardless of the effect of such procedures on the policies of private schools.

The court of appeals decision in *Regan* also held that judicial imposition of nondiscrimination enforcement standards would not violate the principle of separation of powers. Noting that a temporary injunction issued in

this case by the court of appeals prevented the Reagan administration from implementing its announced policy of granting tax-exempt status to racially discriminatory private schools, black plaintiffs stress that: "The history of this case makes plain that, unless the victims of unlawful government aid to private discrimination have standing to complain of the injury inflicted by such government aid, *Brown's* promise of equal opportunity is hollow."

In response to this argument, the government suggests that the courts lack authority to serve as "continuing monitors of the wisdom and soundness of executive action." For the government: "The questions of revenue enforcement policy raised by respondents' suit are properly a matter of public debate. By that means, the views of interested persons and organizations may be ventilated and taken into account." On this score, the government notes that congressional and public opposition to the IRS proposal in 1978 during the Carter presidency, was so severe that appropriations riders were passed to prohibit such strict standards.

Supreme Court resolution of *Regan* will involve the same issues presented to the appellate court: 1) whether plaintiffs have suffered a concrete injury; 2) whether meaningful relief can be granted, and 3) whether prudential separation of powers concerns will prohibit judicial imposition of enforcement standards.

BACKGROUND AND SIGNIFICANCE

Regan v. Wright is a significant case on a number of levels. Of foremost importance, if the Supreme Court grants standing, the judiciary will have authority to promulgate specific nondiscrimination enforcement standards for tax-exemption organizations. The *Bob Jones University* decision did not impose standards; it merely held that racially discriminatory private schools will not be afforded tax breaks.

To many observers, the possibility of judicial imposition of such standards is troublesome. They argue that IRS policy is properly based in Congress and the Executive branch. Although these popularly elected branches of government should abide by constitutional standards, matters of statutory tax policy should not be subject to judicial interference. In the specific context of tax-exemptions to racially discriminatory private schools, Congress—through the passage of appropriations riders—has explicitly indicated its disapproval of standards similar to those proffered by the plaintiffs in *Regan*.

Some critics also feel that judicial interposition on this matter is also problematic because Congress and the IRS are institutionally better equipped to make tax policy decisions. Finally, court-based policy decisions take a long time. The private school tax-exemption issue has been in the courts for fifteen years. And if standing is granted in this case, the issue will probably stay in the

courts for three to five more years.

All of this, of course, — the time and sensitivity involved in deciding such a case — should not prevent the courts from addressing an issue which is properly within their jurisdiction. In fact, profound changes which occur through Supreme Court decisions can and must take place in such troubled atmospheres.

Regan v. Wright is also significant outside of the tax-exemption context. If the claim of denigration of the race is accepted, blacks will be permitted a special entree into the courts when some government policy is at odds with the national value of racial nondiscrimination. Although blacks are especially interested in government nondiscrimination, this constitutional value is a right shared by the entire population. Fundamental separation of powers concerns (embodied in the standing doctrine) should not give way to the claims of special interest groups.

At the same time, blacks are considered the "injured party" in school desegregation lawsuits — and blacks are undeniably the realistically injured parties when schools are desegregated.

On a broad social level, a strong argument could be made that the numerical quota standards proffered by plaintiffs in *Regan* should become part of our tax laws. In many areas, private schools have served as a means for white children to avoid local desegregation. (The great majority of private schools, however, could not fairly be called "segregation academies.") Yet, it is not for the courts to interpose statutory standards which contradict the apparent will of Congress.

At this juncture, *Regan* does not call on the Supreme Court to develop or approve nondiscrimination enforcement standards. (The ability of courts to fashion a remedy is a component of the standing doctrine, however.) Yet, the Supreme Court is asked in *Regan* to grant blacks a special right to ensure that our government abides by a policy of racial nondiscrimination. On the one hand, blacks have been victimized by illegal segregation. On the other hand, none of the black plaintiffs in *Regan* have been directly or specifically victimized by any allegedly discriminatory private schools.

Striking this balance, with its myriad implications,

will make *Regan* a very important Supreme Court decision.

ARGUMENTS

For Black Plaintiffs

1. The government's grant of tangible financial aid to private, racially discriminatory schools formed or expanded in plaintiffs' communities at the initiation of public school desegregation infringes plaintiffs' personal rights to equal educational opportunity.
2. Whether or not any private schools change their policies as a consequence of government adoption of the proposed standards, the injury here should be redressed because the government has "steered clear" of aiding racial discrimination.

For the Government

1. Plaintiffs' allegation that the government provides tangible aid to racially discriminatory institutions establishes no "injury in fact," but only a generalized grievance with government policy.
2. Plaintiffs' allegation that the government interferes with their right to equal education opportunity is not redressable in court since the practices of private schools cannot be fairly traced to government action.
3. Prudential separation of powers concerns prohibit judicial action on this issue.

(W. Wayne Allen, a parent of a student attending an allegedly discriminatory private school, intervened in this case and made arguments identical to the government. Allen also suggested that the proposed standards were not a fair test for racial nondiscrimination.)

AMICUS ARGUMENTS

The NAACP filed an amicus brief in support of the plaintiffs which contained arguments identical to those of plaintiffs.

The United States Catholic Conference filed a brief in support of the government. This brief stressed prudential separation of powers limitations on judicial action and also urged that government benefits accorded private schools through tax-exempt status would be nullified should the proposed standards be adopted.