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STANDING AND ADVERSENESS IN CHALLENGES OF TAX EXEMPTIONS FOR DISCRIMINATORY PRIVATE SCHOOLS

THOMAS MCCOY * and NEAL DEVINS **

INTRODUCTION

The issue of tax exemptions for segregated private schools is one that causes courts to abandon normal standards of judicial restraint. The federal courts, including the Supreme Court, seem unusually inclined to supply legislative judgments on this issue in the absence of congressional action and to ignore or revise judgments made by the legislature that the courts find unappealing. The question may appear to the courts to be a vestige of the Brown v. Board of Education era of “simple” segregation cases, thus calling forth the same judicial activism that produced otherwise inexplicable decisions. In a moment of judicial candor, Judge Skelley Wright has stated that judges:

should be more reluctant than we have been to fault the other agencies of government and also more hesitant about filling the void when, in our judgment, the elected branches of government should have acted and failed. [But there is] one important exception: the area of equal rights for disadvantaged minorities. As to that, I remain an uncompromising “activist.”

In any event, the Supreme Court and several lower federal courts in these tax-exemption cases have played fast and loose with two constitutional doctrines that define and limit the scope of judicial authority in our governmental structure. These doctrines, grounded in traditional Anglo-American notions about the role of the judiciary, are the

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requirements of standing\(^3\) and adverseness,\(^4\) which are essential pre­
requisites to the existence of a justiciable article III “case or contro­
versy.”\(^5\) The requirement of standing insures that the plaintiff has a 
personal stake in the controversy,\(^6\) and prevents him from employing 
“a federal court as a forum in which to air his generalized grievances 
about the conduct of government.”\(^7\) The related requirement of ad­
verseness assures that litigation between the parties is necessary and 
timely, and at the same time guarantees that the court 
will hear the best presentation that can be made for each side.\(^8\) The Supreme Court 
has stated unequivocally that the duty of every judicial tribunal:

3. Standing requires that the party seeking relief suffer injury in fact and that 
the interest sought to be protected be within the zone of interests protected by the 
constitutional provision invoked. Valley Forge Christian College v. Americans 
United for Separation of Church & State, 454 U.S. 464, 472-73 (1982); Gladstone, 
Realtors v. Bellwood, 441 U.S. 91, 99-100 (1979); Association of Data Processing 
Serv. Orgs. v. Camp, 397 U.S. 150, 152-53 (1970); L. Tribe, American Constitu­
tional Law § 3-17 (1978); Davis, The Liberalized Law of Standing, 37 U. Chi. L. 

4. The relationship between adverseness and standing is often confusing because 
the requirements substantially overlap in the evaluation of the plaintiff’s position in 
the case. Adverseness is the broader requirement in the sense that it encompasses both 
the plaintiff and the defendant. If either is not sufficiently interested in resisting the 
claims of the other, there is a lack of adverseness and thus a lack of the required case 
or controversy. Some judicial discussions of standing have implied that adverseness 
has become simply one element of standing. While this conclusion seems accurate 
with respect to the plaintiff’s role in a case, it overlooks the independent requirement 
of an adverse defendant. “[I]f one party agrees with the position taken by the other, 
there is no case or controversy within the meaning of article III.” L. Tribe, supra 
note 3, § 3-15. The requirement of adverseness recognizes that it takes at least two 
parties to create a genuine controversy. The adverseness requirement finds expression 
in a variety of forms. See id. §§ 3-9 to 3-16. The court may not issue advisory 
opinions. United States v. Fruehauf, 385 U.S. 146, 157 (1968); Muskrat v. United 
States, 219 U.S. 346, 361-62 (1911). The controversy must be ripe for judicial 
(1947). Changes in the positions of the parties or the lapse of time must not have 
made the case moot. Roe v. Wade, 410 U.S. 113, 125 (1973); Moore v. Ogilvie, 394 
U.S. 814, 816 (1969). See infra notes 87-88 and accompanying text. The discussion of 
adverseness in this Article focuses on several cases in which one party came to agree 
with the other party and, in some instances, took action to formally have the case 
declared moot before judicial review. See infra pt. II.

While presentation of a case in an adversary context is required in resisting the text of article 
III, it has been argued that standing is not a constitutional prerequisite. Id. § 3-18; 
Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?, 78 


to Stop the War, 418 U.S. 208, 223-24 (1974); L. Tribe, supra note 3, § 3-19; 
Brilmayer, Judicial Review, Justiciability and the Limits of the Common Law 

8. See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220-21 
(1974); Brilmayer, supra note 7, at 827. The adverseness requirement is grounded in
is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. . . . No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard. 9

Not surprisingly, many litigants dissatisfied with the results of the legislative process on the question of tax exemptions have encouraged the federal courts to ignore these basic restrictions on their power to supply or revise legislative judgments. Minority plaintiffs and civil rights activists, unhappy with a seemingly insufficient commitment by the Internal Revenue Service (IRS) to the goal of public school integration, have sought to use the courts to force the IRS to restrict the tax benefits previously available to racially discriminatory private schools. 10 More recently, some litigants have urged the courts to prohibit the Reagan administration's IRS from adopting less restrictive policies than those implemented by the IRS under previous administrations. 11

The inclination of the federal courts to ignore or casually dismiss standing and adverseness problems in their rush to address the merits of tax-exemption cases has left a jumble of confusing and contradictory precedents on the standing and adverseness issues. In what ostensibly is an attempt to remedy this situation, the Supreme Court recently heard oral argument specifically on the standing question in the tax-benefit case of Wright v. Regan. 12 Some doctrinal clarity on the issue, however belated, would be most welcome. But the history of judicial disregard for justiciability standards in these cases gives cause for skepticism about the Supreme Court's intentions in Wright, and

the fundamental separation of powers notion that legislative choices should be made by Congress rather than by the judiciary. Flast v. Cohen, 392 U.S. 83, 95-96 (1968); L. Tribe, supra note 3, § 3-7. It has been stated that standing is also designed to further the separation of powers notion. See Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 473-74 (1981); Sierra Club v. Morton, 405 U.S. 727, 753-54 (1972) (app. to opinion of Douglas, J., dissenting (quoting excerpts from oral argument of Solicitor Gen. Griswold)); A. Bickel, The Least Dangerous Branch 122-23 (1962). But see Flast v. Cohen, 392 U.S. 83, 100 (1968) (“The question [of standing] does not, by its own force, raise separation of powers problems . . . .”); Davis, supra note 3, at 469 (the law of standing should not be employed to limit the kinds of cases that may be reviewed by a court, but only to “decid[e] whether a particular interest asserted is deserving of judicial protection”); Parker & Stone, Standing and Public Law Remedies, 78 Colum. L. Rev. 771, 775 (1978) (standing is not related to the issue of balancing judicial, legislative and executive roles).

10. See infra notes 16-18 and accompanying text.
11. See infra note 115 and accompanying text.
increases the likelihood that that the outcome on the standing issue will be determined by the Court's desire to maintain control of the tax-exemption issue. If the Court chooses to defer to executive action within the guidelines it recently established in *Bob Jones University v. United States*, the Court will find no standing and thus avoid the burden of further litigation on the issue. If, on the other hand, the Court still distrusts the IRS and wishes to retain judicial control over the remaining political issues, it will find standing in *Wright*. In either case, the decision is more likely to evidence the Court's current stance on the merits of the tax-exemption question than to contribute to doctrinal clarity and consistency on the standing issue.

It is the underlying thesis of this Article that had the courts in this series of cases paid more attention to the fundamental doctrines that define and limit their role, they would have produced a more coherent and workable body of law to govern the issue of tax exemptions for racially discriminatory private schools. In addition, the decisions would not have resulted in contradictory precedents on the standing and adverseness issues in other types of cases in which the courts are less inclined to ignore traditional limits on their authority. The opportunity now exists in *Wright v. Regan* for the Supreme Court to reaffirm traditional standing notions or to justify the broader standing theories used by the lower courts in tax-exemption cases.

I. STANDING IN TAX-BENEFIT CASES

*Green v. Kennedy*, the first significant case concerning the tax treatment of discriminatory private schools, set the tone of judicial

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13. *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983). In *Bob Jones University*, the Court held that the Internal Revenue Code requires the IRS to deny tax exemptions to racially discriminatory schools. *Id.* at 2036.

14. The Court's disposition in *Bob Jones University* of the issue of IRS authority to promulgate nondiscrimination enforcement standards suggests the likelihood of such an outcome. In unusually sweeping language, the Court recognized broad IRS authority to determine what activities are “at odds with the common community conscience” and thus not eligible for tax-exempt status under § 501(c)(3). 103 S. Ct. at 2029. The majority noted that “ever since the inception of the tax code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws.” *Id.* at 2031. Consequently, it would be consistent with *Bob Jones University* to permit the IRS to establish nondiscrimination enforcement standards. Speaking against this proposition, of course, is the long history of judicial activism on this issue. Yet, with its decision in *Bob Jones University*, perhaps the Supreme Court is now willing to cede jurisdiction on this matter to the other branches of government.

disdain for the doctrines of standing and adverseness that was to characterize this entire line of cases down to the Supreme Court's recent decision in *Bob Jones University*. In 1969, the Lawyers Committee for Civil Rights Under Law (Committee) filed a class action on behalf of black students and their parents in Mississippi. The Committee based this action on constitutional and statutory grounds, claiming that both the equal protection guarantee of the fifth amendment and section 501(c)(3) of the Internal Revenue Code prohibited the granting of tax exemptions to racially discriminatory schools. The District Court for the District of Columbia found that the plaintiffs' allegations raised potentially grave constitutional issues and issued a preliminary injunction preventing the IRS from granting tax-exempt status to such discriminatory private schools. This determination was predicated on the decision of the District Court for the Southern District of Mississippi in *Coffey v. State Educational Finance Commission*, in which state tuition grants to Mississippi children attending private segregated schools were held unconstitutional. The court in *Coffey* found that such a system of grants violates the equal protection clause of the fourteenth amendment because it "encourages, facilitates, and supports the establishment of a system of private schools operated on a racially segregated basis."

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16. *Id.*, at 1129. The Lawyers' Committee describes itself as a: private tax-exempt non-profit organization dedicated to securing total acceptance of the concept that all Americans are entitled to equal rights under law and that lawyers carry out their responsibilities to help solve serious modern problems through processes of the law. The Committee was formed in 1963 at the request of the President of the United States. Lawyers' Committee Press Release, January 13, 1982 at 1 (description of Committee in Press Release letterhead) [hereinafter cited as Press Release].

17. The due process clause of the fifth amendment, U.S. Const. amend. V, cl. 3, has been interpreted to contain a guarantee of equal protection that is functionally equivalent to that imposed on the states by the express language of the fourteenth amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).


19. *Green v. Kennedy*, 309 F. Supp. 1127, 1140 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 955 (1970). The court reasoned that such relief was proper because "the questions presented . . . are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor." *Id.* at 1132 (quoting *Ohio Oil Co. v. Conway*, 279 U.S. 813, 815 (1929)). Correlative to this, the court held that the plaintiff's interest outweighed any irreparable injury claimed by the IRS. *Id.* at 1138. Harm to defendants' interests was minimized because the injunction was directed only against the issuance of further ruling letters. Existing tax-exemption rulings were not affected by the injunction. In regard to future service rulings, "[t]he failure to issue a ruling letter does not preclude either exemption or deductibility." *Id.*


21. *Id.* at 1392.

22. *Id.* *Green*, unlike *Coffey*, did not involve outright tuition grants to students by the state. Instead, the government action at issue was the granting of tax exemptions to segregated schools and the related charitable deduction for contributions to
In deciding the issue of standing, the Green court did not address the plaintiffs’ assertion of taxpayer standing, but rather relied on Coffey to find that the plaintiffs had "standing to attack the constitutionality of statutory provisions which they claim [provide] an unconstitutional system of benefits and matching grants that fosters and supports a system of segregated private schools as an alternative available to white students seeking to avoid desegregated public schools." 23 Because the standing issue was never raised in the Coffey case, however, it is not an authoritative precedent. Thus, we are left with a naked assertion by the Green court that black school children and parents had standing to challenge the constitutionality of federal aid to segregated private schools.

It is difficult to square this flat assertion with any of the admittedly imprecise traditional standing doctrines. 24 The plaintiffs alleged no injury in the sense of a denial of an educational opportunity or a denial of federal financial aid. They had neither attempted to enter those schools. The court held "this difference to be only a difference of degree." 309 F. Supp. at 1134. But cf. Walz v. Tax Comm’r, 397 U.S. 664, 675 (1970) ("The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."); Devins, Tax Exemptions for Racially Discriminatory Private Schools: A Legislative Proposal, 20 Harv. J. on Legis. 153, 163-65 (1983) (asserting that tax exemptions might be treated as impermissible government aid under civil rights legislation, but not under the establishment clause). According to the Green court, tax benefits provided by the Internal Revenue Code result in substantial and significant support by the Government of segregated private schools. 309 F. Supp. at 1134. The court further found that "the lack of segregative purpose on the part of the Government does not avoid the constitutional issue if the Government action materially supports a program of school segregation." Id. at 1136. Curiously, the court suggested that the IRS was blameless for not having changed this policy of granting tax exemptions to discriminatory private schools. For the court, "[w]hat stops [the Commissioner of Internal Revenue] from extending disallowance to the schools . . . is not unawareness of the significance of deductions, but rather certain legal conclusions, including conclusions as to the scope of his authority under the Code." Id. at 1135. Apparently the court believed that the Commissioner should act only upon an explicit congressional directive or upon a binding court determination. In other words, the court envisioned a scheme whereby the judiciary—not the Service—would have primary authority in interpreting the meaning of the congressionally enacted Internal Revenue Code.

the aided segregated schools nor expressed any desire to attend these schools. Moreover, there was no allegation that similar federal financial aid was unavailable to the public schools that the plaintiffs attended. In short, the plaintiffs did not allege that they were the victims of unequal treatment in the distribution of the federal aid represented by the tax exemptions. In traditional standing terms, there was no "injury in fact." 25

A. Standing Based on Racial Denigration

The finding of standing in Green and the assumption that it existed in Coffey are apparently the beginnings of an emerging trend to find that black citizens in general have standing to challenge any governmental action or inaction thought to be in denigration of their race. 26 The next manifestation of this judicial sentiment is found in McGlotten v. Connally, 27 in which the District Court for the District of Columbia held that a black plaintiff had standing to challenge the constitutionality of the federal tax exemptions granted to nonprofit segregated private clubs. 28 The court upheld the plaintiff's standing on the grounds that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." 29 Having decided the standing issue on these grounds, the McGlotten court concluded that it did not have to address the plaintiff's claim of taxpayer standing. 30

28. Id. at 452.
30. Id. at 452 n.17. After deciding that the plaintiff had standing, the court held that, on one hand, racially discriminatory nonprofit private clubs were entitled to tax-exempt status, while on the other hand, racially discriminatory fraternal orders were not entitled to tax-exempt status. The court distinguished nonprofit private clubs from fraternal orders because a tax exemption for nonprofit private clubs was income defining:

Congress has determined that in a situation where individuals have banded together to provide recreational facilities on a mutual basis, it would be conceptually erroneous to impose a tax on the organization as a separate entity. . . . No income of the sort usually taxed has been generated; the money has simply been shifted from one pocket to another, both within the same pair of pants.

By 1973, this notion of standing based on denigration of race in civil rights cases had proved so appealing that it did not even provoke discussion when the Supreme Court implicitly accepted it in the case of Norwood v. Harrison.\textsuperscript{31} Black public school students and their parents challenged the constitutionality of a long-standing state program that distributed textbooks to all public and private schools in the state, including recently formed segregated private schools.\textsuperscript{32} The plaintiffs did not allege discriminatory motivation on the part of the state or any deprivation of the benefits of the state program. The cause of action was simply an attempt to enforce the state's fourteenth amendment obligation to "steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination."\textsuperscript{33} The three-judge district court, however, found that the plaintiffs had standing,\textsuperscript{34} offering no explanation beyond a casual citation to two Supreme Court cases that restated abstract principles of standing doctrine.\textsuperscript{35} Conspicuously absent was any suggestion that the plaintiffs were state taxpayers and might have standing as such to enjoin an allegedly unconstitutional state expenditure. On appeal, the Supreme Court proceeded directly to a holding for the plaintiffs on the merits\textsuperscript{36} without a mention of the standing problem so cavalierly disposed of by the court below.

It appears from this line of standing holdings that to reach the merits of these cases the courts will accept substantial adverseness on the plaintiff's part as a substitute for the usual standing requirement of substantial injury. Because adverseness alone has never been thought sufficient to confer standing,\textsuperscript{37} the courts' acceptance of these cases on that basis constitutes an extraordinary exercise in judicial activism.

The core value embodied in traditional standing doctrine is a limitation of the role of the courts to protecting the rights of parties whose interests have actually been injured.\textsuperscript{38} The primary problem with the

\textsuperscript{31} 413 U.S. 455 (1973).
\textsuperscript{32} Id. at 457.
\textsuperscript{33} Id. at 467.
\textsuperscript{34} 340 F. Supp. 1003, 1007 (N.D. Miss. 1972), vacated and remanded, 413 U.S. 455 (1973).
\textsuperscript{35} Id. (citing Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970)).
\textsuperscript{36} 413 U.S. at 463-70.
\textsuperscript{37} "[T]hat concrete adverseness which sharpens the presentation of issues, . . . is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself," Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 486 (1982) (citation omitted) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
\textsuperscript{38} See supra notes 6-7 and accompanying text.
notion of standing based on denigration of race in civil rights cases thus lies in its potentially unlimited applicability. There is no inherent limitation in the denigration notion that confines it to cases raising constitutional claims. Racial discrimination by private employers in violation of applicable federal statutes denigrates the race as emphatically as discrimination by government agencies in violation of the fifth or fourteenth amendments. Does every black civil rights activist have standing to bring suit against a private employer, even though he has never applied for a job with the employer, simply because the discrimination denigrates his race? In addition, even if this peculiar form of standing is confined to constitutional claims, it is not limited to use by residents of the state whose actions are being challenged. Does a black activist group in New York City have standing to challenge discriminatory public housing regulations in California merely because the California regulations denigrate the race of its members? Under this theory, state discrimination or state aid to discriminatory private agencies would be subject to attack by any out-of-state black plaintiff who objected to the state program. Finally, there is nothing in the denigration concept that confines it to race and excludes other well-defined classes. For example, any woman might have standing to challenge the unequal distribution of athletic resources and opportunities at a state university on the ground that the discrimination "denigrates her sex," even if she has no interest in athletics and is not a student at the defendant university.

Even if the notion of standing based on denigration were limited to resident black plaintiffs bringing constitutional challenges to allegedly discriminatory state or federal action, it would remain inconsistent with the traditionally limited role of the courts in the operation of government. In *Jackson v. Dukakis*, for example, the First Circuit addressed the question that the Supreme Court overlooked in *Norwood v. Harrison* and denied standing to a black plaintiff seeking to challenge allegedly discriminatory hiring practices of state agencies in Boston. Although Mr. Jackson was a resident of Boston, the court held that he did not have a sufficient personal stake in the controversy to support standing because he had never applied for a job in any of the challenged agencies. A different result would have been reached under the denigration of race standard, however, because the racial discrimination would be viewed as a per se injury to all black citizens, and thus the plaintiff's lack of a personal stake in the controversy would be irrelevant.

39. 526 F.2d 64 (1st Cir. 1975).
40. See supra notes 31-36 and accompanying text.
41. 526 F.2d at 65-67.
42. *Id.* at 65. The claim that the plaintiff suffered emotional and psychological injury was rejected as conjecture. *Id.* at 65-66.
1. The Denigration Standard and Substantive Equal Protection

Possibly the best defense for the amorphous notion of standing based on racial denigration is that it is a jurisdictional analogue of the substantive equal protection doctrine that encourages courts to assume an unusually active role in preventing governmental discrimination against suspect classes. At least in its inception, the suspect-class doctrine was based on the view that a majority-dominated legislature could not be trusted to protect adequately the interests of insular political minorities, thus justifying an unusual level of judicial intervention in such cases. A standing doctrine that facilitates access to the courts for members of such a class would be a logical corollary of the substantive doctrine that facilitates judicial intervention on behalf of the members of the class. This view of the denigration notion would at least limit such standing to members of those few classes that the Supreme Court has classified as suspect for substantive equal protection purposes.

Lack of clarity in the Court’s definition of suspect classes, however, raises problems in using the suspect-class doctrine as a foundation for the denigration standard. Reverse race discrimination cases such as Regents of the University of California v. Bakke and reverse sex discrimination cases such as Craig v. Boren suggest that it is the basis of the classification (such as race or sex) rather than the political impotence of the disadvantaged class that justifies increased judicial activism. These characterizations of the suspect-class doctrine greatly weaken the suggested justification for the denigration basis for standing. Further, it is unclear which classes qualify as suspect, or more accurately, just how suspect certain classes are. For example, the question whether sex discrimination should receive strict judicial scru-

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47. 499 U.S. 190 (1976).
48. See Bakke, 438 U.S. at 289-91 (plurality opinion); Craig, 429 U.S. at 197-99.
tiny has never been adequately addressed by the Supreme Court, and is even less clear after several recent decisions.\textsuperscript{49} Thus, the applicability of the denigration standard would be similarly unclear. Finally, even with respect to black plaintiffs who are clearly members of a suspect class entitled to strict judicial scrutiny, standing based on denigration is not limited to individuals who are the victims of the legislative insensitivity. Thus, application of the denigration notion is subject to the traditional standing argument—that it would allow claims to be brought by minority class members who have not in fact been damaged by the legislature.\textsuperscript{50}

2. The Denigration Standard Compared to Standing in Establishment Clause Cases

The closest analogue to standing based on racial denigration is standing based on simple adverseness in some establishment clause cases. In \textit{Association of Data Processing Service Organizations v. Camp},\textsuperscript{51} the Supreme Court suggested in dictum that standing may arise from non-economic interests and that “[a] person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause . . . .”\textsuperscript{52} Although the case was not decided under the establishment clause, federal courts seized on this suggestion and applied it in actual establishment clause cases.\textsuperscript{53}

\textsuperscript{49} The Court came close to applying a strict scrutiny test in \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973) (plurality opinion), in which the four justices joining the plurality agreed that gender should be treated as a suspect classification. Id. at 682-88. Subsequent cases, however, have settled on an intermediate level of scrutiny. For gender-based classifications to be substantially related to the achievement of important government objectives, Califano v. Westcott, 443 U.S. 76, 89 (1979); Orr v. Orr, 440 U.S. 268, 279 (1979); Craig v. Boren, 429 U.S. 190, 197 (1976).

\textsuperscript{50} See supra notes 3-7 and accompanying text.

\textsuperscript{51} 397 U.S. 150 (1970).

\textsuperscript{52} Id. at 154.

\textsuperscript{53} See, e.g., \textit{Allen v. Hickel}, 424 F.2d 944, 947 (D.C. Cir. 1970) (plaintiff’s beneficial right in having park land maintained for public purposes is sufficient personal stake to bring establishment clause claim challenging religious use of the land); \textit{Anderson v. Salt Lake City Corp.}, 348 F. Supp. 1170, 1178 (D. Utah 1972) (plaintiffs’ standing upheld based on their “spiritual stake” in establishment clause values), rev’d on other grounds, 475 F.2d 29 (10th Cir.), cert. denied, 414 U.S. 879 (1973). The Supreme Court had accepted the concept of standing without particularized harm in establishment clause cases dealing with school prayer. \textit{School Dist. of Abington Township v. Schempp}, 374 U.S. 203, 224-25 (1963) (fact that plaintiff shows no coercion in school prayer case is not a defense to an establishment clause claim); \textit{Engel v. Vitale}, 370 U.S. 421, 430 (1962) (“The Establishment Clause . . . is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”); see \textit{Sutherland, Establishment According to Engel}, 76 Harv. L. Rev. 25, 26-27 (1962). However, the Court later rejected the generalized harm standard in \textit{Valley Forge Christian College
A constitutional challenge to tax benefits for private segregated schools is analogous to an establishment clause challenge to state support of religion and is unlike other equal protection cases because there is no allegation of any unequal treatment by the state. Plaintiffs attempt to stop certain institutions from receiving benefits that are otherwise available to similar institutions. Tax-benefit claims are in the nature of establishment claims because they allege that the state aid violates a constitutional prohibition against the "establishment of segregation." If, on the merits of the case, the court is inclined to assign an "establishment" meaning to the equal protection clause, it should not be surprising when the court constructs a basis for standing analogous to that used in these establishment clause cases. The court in McGlotten v. Connally drew this analogy expressly when it accepted simple adverseness as a basis for plaintiff's standing to challenge tax exemptions for segregated private clubs:

Just as "[a] person or family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and Free Exercise Clause," so a black American has standing to challenge a system of federal support and encouragement of segregated fraternal organizations.

The holdings in establishment clause cases equating adverseness with standing, however, have proved to be weak support for the analogous development of racial denigration as a basis for standing in civil rights cases. First, the notion of standing without injury never gained universal acceptance in the establishment clause cases. In several cases, federal courts held that plaintiffs had no standing as non-taxpayers because they had shown no injury in fact. Second, the Supreme Court unequivocally rejected this approach to standing in the recent establishment clause case of Valley Forge Christian College v. Americans United for Separation of Church & State. The Court found that:

standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. "[T]hat concrete adverseness which sharpens the presentation of issues" . . . is the anticipated consequence of proceedings commenced by one who has been injured in
Thus, the notion of standing based on denigration of race now seems to be entirely without doctrinal support.

B. Taxpayer Standing

Instead of casually advancing the ill-defined notion of standing based on racial denigration, the court in Green should have relied on the established and more analytically defensible concept of taxpayer standing. In Flast v. Cohen, the Supreme Court articulated criteria for taxpayer standing that could easily cover the situation in Green and similar cases, given the obvious disposition of the courts to reach the merits of these cases. The result would have been a finding of standing on a sound theoretical basis with no more than minor modification of existing doctrine, rather than a finding based on the creation of an entirely new notion. Reliance on Flast in these cases would also be advantageous because the taxpayer standing doctrine has developed with significant limitations built into its very terms. In contrast, standing based on racial denigration seems to contain no inherent limits on its applicability, and no limits have yet been developed by the courts.

Generally, Flast taxpayer standing requires a finding of “a logical nexus between the status asserted and the claim sought to be adjudicated.” It is difficult to imagine a stronger logical nexus than that between taxpayer status and a claim that tax benefits are being used unconstitutionally to support racial segregation. More specifically, Flast requires that two criteria be met to support a finding of taxpayer standing. First, the taxpayer must be challenging an exercise of Congress’ taxing and spending power. An attack on “incidental expenditures of tax funds in the administration of an essentially regulatory statute” does not meet this requirement. Second, the taxpayer must allege that the expenditure violates a specific constitutional limitation on the taxing and spending power, and not simply that the expenditure is beyond the delegated power of Congress.

It seems obvious that the grant of tax benefits by the IRS pursuant to its interpretation of the Internal Revenue Code is an exercise of Congress’ taxing and spending power that meets the first Flast criterion. However, the Supreme Court’s recent decision in Valley Forge

58. Id. at 486 (citations omitted) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
60. See supra notes 38-42 and accompanying text.
61. 392 U.S. at 102.
62. Id.
63. Id.
64. Id. at 102-03.
Christian College v. Americans United for Separation of Church & State renders this point worthy of more than superficial inspection.

In Valley Forge, the Department of Health, Education and Welfare (HEW), acting pursuant to specific statutory authority, conveyed a piece of surplus federal land to a religious college at no cost to the school. The plaintiff taxpayers sued to enjoin the conveyance on the ground that it amounted to a transfer of federal financial resources to subsidize a religious institution in violation of the establishment clause. The Court held that the plaintiffs did not have standing as taxpayers to bring suit under the Flast doctrine. The Court distinguished Flast on the grounds that the conveyance in Valley Forge was an exercise of Congress' property clause power rather than Congress' taxing and spending power and the action was taken by HEW rather than by Congress directly.

A finding of taxpayer standing in tax-benefit cases, however, would not be subject even to the hypertechnical objections used by the Supreme Court in Valley Forge. The Internal Revenue Code pursuant to which the IRS acted is the ultimate exercise by Congress of its taxing power. The IRS is the administrative agency created by Congress to administer the taxing system, and the grant of tax benefits is the economic equivalent of an expenditure out of tax revenues pursuant to the spending power. In fact, the underlying substantive con-

66. Id. at 468.
67. Id. at 469.
68. Id. at 476-82.
69. Id. at 480. In dissent, Justice Brennan asserted that this distinction is spurious:
   It can make no constitutional difference in the case before us whether the
donation to the petitioner here was in the form of a cash grant to build a
facility . . . or in the nature of a gift of property including a facility already
built. . . . The complaint here is precisely that, although the property at
issue is actually being used for a sectarian purpose, the Government has not
received, nor demanded, full value payment. Whether undertaken pursuant
to the Property Clause or the Spending Clause, the breach of the Establish­
ment Clause, and the relationship of the taxpayer to that breach, is precisely
the same.
   Id. at 511-12 (Brennan, J., dissenting) (citation and footnotes omitted).
70. Id. at 479.
71. As an economic matter, a tax exemption would have to be entirely income­
defining to avoid being characterized as a subsidy. See Yale, Income Tax Deductions and Credits for Nonpublic Education: Toward a Fair Definition of Net Income, 16 Harv. J. on Legis. 91, 120-21 (1979). Stanley Surrey has labeled exemptions and other forms of indirect government assistance as tax expenditures which "serve ends . . . similar in nature to those served in the same or other areas by direct government expenditures . . . . The interplay is such that for any given program involving federal monetary assistance, the program may be structured to use the tax system to provide that assistance." Surrey, Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance, 84 Harv. L.
Institutional claim in tax-exemption cases is premised on the economic, political and constitutional equivalence between direct financial grants and "tax expenditures" in the form of tax exemptions. Furthermore, insofar as the Supreme Court's objections to taxpayer standing in Valley Forge grew out of a lack of sympathy for the merits of the plaintiffs' case, that factor is not present in tax-benefit cases, in which the courts from district court to Supreme Court have been eager to reach the merits of the claims presented.

Congress has rested income tax exemption on a number of distinct rationales [including] a lack of fit between the concept of "income" and the objectives of nonprofit organizations; their meager potential as sources of revenue; the nuisance of recordkeeping for groups that often operate informally and rely heavily on voluntary services; and the praiseworthy benevolent spirit animating such groups.


Courts have also recognized that tax exemptions are the economic equivalent of a government subsidy. The district court in McGlotten, for example, concluded that the granting of a tax exemption to a racially discriminatory fraternal order is federal aid under the Civil Rights Act of 1964. Id. at 461. Similarly, the District Court for the Eastern District of Wisconsin held that the granting of tax exemptions to organizations that discriminate on the basis of race was significant state action in violation of the fourteenth amendment. The court found that "tax exemptions . . . obviously encourage their activities, including racial discrimination, by providing indirect financial aid." Pitts v. Department of Revenue, 333 F. Supp. 662, 669 (E.D. Wis. 1971). The most recent explication of this view occurred in the Supreme Court's decision in Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983), in which the majority stated in its free-exercise analysis that "the governmental interest is in denying public support to racial discrimination in education." Id. at 2035 n.29 (emphasis added).


73. The plaintiffs in Valley Forge challenged congressional expenditures as violative of the establishment clause. Justice Brennan noted in his dissent: "Plainly hostile to the Framers' understanding of the Establishment Clause . . . the Court vents that hostility under the guise of standing 'to slam the courthouse door against plaintiffs who . . . are entitled to full consideration of their . . . claims on the merits.'" Valley Forge Christian College v. Americans United for Separation of Church & State, 454
The second requirement for taxpayer standing is that the plaintiffs allege that the challenged action violates a specific restriction on the exercise of the taxing and spending power.74 A finding of standing based on taxpayer status in Green would thus require a holding that the equal protection guarantee of the fifth amendment constitutes a specific limitation on Congress' taxing and spending power. In Flast, the Court assumed without explanation that the establishment clause of the first amendment constituted such a specific limitation.75 While the Court provided no reasoning to support or refine this conclusion, it may be argued that all analogous restrictions in the Bill of Rights, including the due process clause of the fifth amendment, would constitute specific limitations under Flast.76

It is clear that the equal protection guarantee of the fifth amendment77 protects individuals from inequality imposed by Congress in the exercise of its taxing78 and spending79 powers. Moreover, the substantive holding of the tax-exemption cases is that the fifth amendment specifically prohibits federal tax expenditures in support of segregation.80 Thus, it seems that the second Flast requirement is as easily met in Green as it was in Flast itself. Basing standing in Green on the plaintiffs' taxpayer status, therefore, would have avoided the creation of the insupportable notion of racial denigration and the subsequent contradictions in standing precedent that now exist.81

75. Id. at 104.
76. See id. at 114 (Douglas, J., concurring). The Supreme Court has not been helpful in detailing the content of the "specific limitation" requirement established in Flast. For example, the Court in United States v. Richardson, 418 U.S. 166 (1974), stated again without explanation that the statement and account clause of article I is not the sort of specific limitation contemplated by Flast. Id. at 175. One might suspect that this unsupported distinction reflects the Court's lack of sympathy for the plaintiff's attempt in Richardson to spotlight the covert expenditures of the CIA. No similar lack of sympathy can be expected to block the application of Flast in tax-benefit cases.
77. See supra note 17.
81. See supra notes 27-42 and accompanying text.
II. Mootness in Tax-Benefit Cases

A. Green and Revisions in IRS Procedures

Tax-benefit cases have been characterized by claims that changes in the positions of the parties eliminated the element of adverseness between the parties and, therefore, rendered their cases moot by the time they came before courts for review.\(^82\) Procedural changes made by the IRS and legislative responses in Congress thus have complicated judicial consideration of the substantive issue of the validity of tax exemptions for racially discriminatory private schools and have created new conflicts concerning the role of the judiciary in this politically charged area.

Two weeks after its order in *Green v. Kennedy*,\(^83\) the District Court for the District of Columbia granted a motion to intervene filed by a class of white parents and their children who attended racially discriminatory private schools in Mississippi.\(^84\) Prior to this motion, however, the IRS reversed its policy of granting tax exemptions to private schools that discriminate on the basis of race.\(^85\) The IRS, based on its changed position, attempted to withdraw and have the case declared moot. The district court, however, refused to hold the case moot and instead allowed the intervenors to bring the case to trial. In effect, the intervenors were permitted to continue to litigate on behalf of a position which the IRS had voluntarily abandoned in favor of the plaintiffs' position. The IRS promise to pursue its new policy in accordance with the plaintiffs' wishes (even if the intervenors succeeded in establishing the permissibility of the IRS's former position) makes it difficult to see what constituted the "case or controversy" at this point.\(^86\)

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82. See infra notes 87-88 and accompanying text.
86. Plaintiffs, however, believed that the Nixon IRS would be lax in its enforcement of the nondiscrimination requirement. This belief may have been well-founded. After speaking with IRS Commissioner Randolph Thrower, Mississippi Republican Party Chairman Clark Reed stated that "[if Mr.] Thrower sticks to his word . . . and is sincere in taking action only to offset more extreme court action, no
The district court's refusal to hold the case moot was, in part, based on the "doctrine that a defendant does not necessarily moot a case that is live in its inception by promising to conform to the plaintiffs' wishes." 87 A defendant may, however, make a case moot by conforming to plaintiffs' position provided there is little possibility of recurrence of the dispute. 88 The second reason for allowing the case between the IRS and the plaintiffs to proceed is more significant. According to the court, the plaintiffs were entitled to a decree that provided them more relief than that provided by the existing position of the IRS. 89 After the Service revised its policy to conform to the plaintiffs' position, the plaintiffs continued to oppose dismissal, suspecting that the Nixon IRS would be unacceptably lax in the enforcement of its newly adopted nondiscrimination requirement. 90 Apparently sharing this suspicion, the court devised detailed enforcement procedures for the IRS, thereby preempting the Service's usual rulemaking process. 91 Undeterred by the lack of an article III case or private school in Mississippi—or anywhere else I know of—will be without tax-exempt status for a single day." Both Sides in South Mistrust Nixon Actions on School Integration, N.Y. Times, July 16, 1970, at 22, col. 1.

87. Green v. Connally, 330 F. Supp. 1150, 1170 (D.D.C.), aff'd sub nom. Colt v. Green, 404 U.S. 997 (1971) (per curiam). The intervenors also claimed that the new IRS policy violated their first amendment freedom of association. The court specifically rejected their claim in its final disposition of the case. Id. at 1166-68. However, it conspicuously failed to rely on this new dispute between the intervenors and the IRS when it refused to find the case moot. With respect to this new controversy, the original plaintiffs were allied with the IRS against the intervenors.

88. Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Gray v. Sanders, 372 U.S. 368, 376 (1963); United States v. W.T. Grant Co., 345 U.S. 699, 633 (1953); Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672, 1682-85 (1970). In Consumers Union of United States v. Veterans Admin., 436 F.2d 1363 (2d Cir. 1971), a case relied on by the Green court, the Second Circuit held that a concession on the part of the federal government that its prior policies ran contrary to statutory requirements was in itself a sufficient guaranty that there was little chance of recurrence in that sort of dispute. Id. at 1365. The Court commonly refuses to hold moot cases in which the controversies presented are "capable of repetition, yet evading review." Roe v. Wade, 410 U.S. 113, 125 (1973) (quoting Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

89. 330 F. Supp. at 1170.

90. See supra note 86.

91. 330 F. Supp. at 1176. The basis for this judicial rulemaking was the court's underlying holding that, as a matter of statutory interpretation, discriminating educational institutions are not entitled to tax exemptions and their contributors are not entitled to charitable deductions. This determination was based on two distinct but interrelated rationales. First, the court drew a strong analogy between the law of charitable trusts and the sections of the Internal Revenue Code being interpreted. Id. at 1157-58. The court found that "[a]ll charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy." Id. at 1159. Because public policy is opposed to segregative practices, the court concluded that the Internal Revenue Code should not be read to authorize the grant of tax exemptions to discriminatory schools. Id. at 1164. Second, the court stated that congressional intent in federal tax law provisions must
controversy in this regard, the court imposed these procedures on the IRS by making permanent the preliminary injunction issued in *Green v. Kennedy*.82

The injunction issued in *Green v. Connally* did not, however, bring an end to the tax exemption controversy83 or even to the litigation between the parties.84 The Carter IRS, concerned by the fact that some private schools adjudicated as being discriminatory still retained their tax-exempt status,85 introduced a new proposed revenue procedure that provided a stricter standard for tax exemptions.86 The procedure would have denied tax-exempt status to private schools that: (I)

be construed not only in accord with the law of charitable trusts, but “in consonance with the Federal public policy against support for racial segregation of schools, public or private.” Id. at 1163.

82. Id. at 1179-80. *Green v. Connally* was summarily affirmed by the Supreme Court in *Coit v. Green*, 404 U.S. 897 (1971) (per curiam). However, the precedential value of the decision may be severely limited due to the IRS's nonadversarial role in the case. In fact, the Court explicitly noted in a subsequent decision: 

As a defendant in *Green*, the Service initially took the position that segregated private schools were entitled to tax-exempt status under § 501(c)(3),87 but it reversed its position while the case was on appeal to this Court. Thus, the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy.

87. Id. at 1179-80.

88. See *Green v. Connally*, 404 U.S. 897, 902 (1971) (per curiam). Justice Rehnquist made much of this footnote in his dissenting opinion to the Supreme Court's denial of certiorari in *Bob Jones University v. Simon*, 468 F. Supp. 890 (1979) (aff'd, 639 F.2d 147 (4th Cir. 1980)), and by Justice Rehnquist in his dissent from denial of certiorari in *Prince Edward School Found. v. United States*, 450 U.S. 944 (1981) (Rehnquist, J., dissenting). That case involved a private school in Virginia that had lost its tax-exempt status because it did not satisfy the Service's publication requirement. The school alleged that it had an open admissions policy, but that no black students ever sought admission. Justice Rehnquist claimed that the Court ought to decide *Prince Edward* because the statutory interpretation issue raised in *Green* had not been resolved in a definitive manner. The Court's recent decision in *Bob Jones University* did resolve the issue, however, by adopting the *Green* view that the tax-exemption provision of the Internal Revenue Code does not extend to institutions whose policies are in violation of fundamental public policy. 103 S. Ct. at 2029-31. Justice Rehnquist cast the only dissenting vote in the case. Id. at 3039.


90. See infra note 101 and accompanying text.

91. See *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 5 (1979) (statement of Jerome Kurtz, Comm'r of Internal Revenue) [hereinafter cited as *Hearings*].

had been held by a court or agency to be racially discriminatory or (2) had an insignificant number of minority students and were formed or substantially expanded at or about the time of desegregation of the public schools in the community. 97

Satisfied with existing procedures and critical of the severity of the new procedure, 98 Congress delayed implementation of the proposed IRS procedure by denying appropriations for its formulation or enforcement. Amendments to the Treasury Appropriations Act of 1980 99 provided that no funds available under the Act could be used to deny tax exemptions to private schools. 100 This legislation initially served as a stop-gap measure designed to prevent the Carter IRS from implementing its announced rule change. The administration took the position that it was bound by these appropriations amendments to con-

97. id. at 37,296-97. These standards were similar to the constitutional standards approved by the Supreme Court in Norwood v. Harrison, 413 U.S. 455 (1973), a case that prohibited the granting of state aid to private schools that discriminate on the basis of race. But unlike the Norwood standard, the proposed procedure numerically defined an “insignificant minority enrollment” and thus would have virtually established racial quotas for these schools. Suspect schools having a student body whose percentage of minority students is less than 20% of the minority school age population in the community served by the school would lose their tax-exempt status unless they could increase minority enrollment to at least the 20% level or make a compelling showing of good faith efforts to attract minority students. Good faith was defined as satisfaction of four of the following five criteria: (1) availability and granting of significant minority scholarships; (2) vigorous minority recruitment; (3) an increased percentage of minority enrollment; (4) employment of minority teachers or professional staff; and (5) other substantial evidence. Id. at 37,298. Additionally, the procedure did not distinguish between religious and nonreligious schools, even if the religious school granted preferences in admission to students of its faith. Id. at 37,298.

98. Following receipt of a record number of hostile comments, the IRS introduced a milder version of the procedure which, unlike the previous proposal, allowed consideration of special circumstances including the formation or expansion of religious schools whose denominational beliefs did not mandate racial discrimination. 44 Fed. Reg. 9451, 9453 (1979); see Wilson, An Overview of the I.R.S.’s Revised Proposed Revenue Procedure on Private Schools as Tax-Exempt Organizations, 57 Taxes 515, 515-16 (1979). This proposed procedure retained a numerically-based definition of “significant minority enrollment,” even though exceptions from this standard were granted in the event of “circumstances which limit the school’s ability to attract minority students.” 44 Fed. Reg. at 9453. This vestige of the quota element, coupled with fears of possible IRS domination over nonpublic education, led to severe criticism of the revised proposal. See Hearings, supra note 95, at 290-304 (statement of William B. Ball); id. at 971-83 (statement of Rep. Dornan); id. at 725-29 (statement of Sen. Hatch).

99. Pub. L. No. 96-74, 93 Stat. 559 (1979). These riders were annual appropriations measures which require yearly approval by Congress. For House legislative debates, see 125 Cong. Rec. 18,442-50 (1979) and id. at 18,812-16. For Senate debates, see id. at 22,922-28 and id. at 23,204-10.

100. The Dornan amendment, Pub. L. No. 96-74, § 615, 93 Stat. 559, 577 (1979), provided that “[n]one of the funds available under [the] Act may be used to carry out
tinue implementing the existing procedures. As a result, the original plaintiffs in Green v. Connally sought enforcement of the permanent injunction.101

The advenness of the parties again became the decisive issue in the case. The plaintiffs in Green sought, on statutory and constitutional grounds, to force the IRS to adopt procedures that were functionally equivalent to those proposed by the Carter IRS.102 Moreover, the Carter administration had announced that it would implement its proposed procedures as soon as the appropriations restrictions lapsed.103 Despite the apparent lack of advenness between the government and the civil rights plaintiffs, the district court allowed the case to proceed through trial because the case presented at least technically adverse parties. The administration's stated intention to conform to the appropriations restrictions,104 as well as its general duty to defend the constitutionality of congressional legislation,105 provided sufficient adverseness for the case to continue.

[the IRS proposals]." Id. The Ashbrook amendment, Pub. L. No. 96-74, § 103, 93 Stat. 559, 562 (1979), provided more generally that no funds may be used "to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools." Id.


103. The Carter IRS's refusal to repudiate its proposed revenue procedures was one of the factors leading to the 1980 re-enactment of the Ashbrook amendment. See 126 Cong. Rec. 22,167 (1980) ("The revenue procedures ... constitute ... an ever-present threat as long as the current administration remains in office.") (remarks of Rep. Ashbrook). Indeed, the government suggested to the court in a related case that those appropriations restrictions which presently bind the Executive "may be overcome only by a court ... either declaring the riders unconstitutional or, in the alternative, interpreting the riders narrowly, to permit the implementation of new, more stringent rules in this area." Response of Defendants to Second Supplemental Memorandum of Intervenor Wayne Allen in Support of Motion to Dismiss and Supplemental Memorandum in Support of Defendants' Motion to Dismiss at 9, Wright v. Miller, 480 F. Supp. 730 (D.D.C. 1979) [hereinafter cited as Response].

104. See Response, supra note 103, at 8. The administration considered the restrictions to be as binding as specific substantive legislation on the matter. See id.

105. The force of this obligation, however, is open to some question. On at least one occasion counsel for Congress appeared in the Supreme Court by authority of a
Based in part on the lackluster defense presented by the Carter Justice Department, the district court upheld the plaintiffs' claim in Green v. Miller. In June 1980, the court formally adopted the plaintiffs' statutory argument by characterizing as presumptively discriminatory Mississippi private schools that (1) had been adjudged to be racially discriminatory or (2) were established or expanded at the time of public school desegregation and could not demonstrate that they did not practice racial discrimination.

B. The Executive Branch Defers to the Courts—Bob Jones University v. United States

The laxity with which the Green court addressed the adverseness requirement was followed by similar Court action in Bob Jones University v. United States. In 1976, the IRS applied the then-existing revenue procedures to revoke Bob Jones University's tax exemption because the school employed racially discriminatory practices. The University promptly filed suit in federal court to establish its statutory and constitutional right to reinstatement of its tax exemption. In April 1981, the Court of Appeals for the Fourth Circuit rejected the University's contentions, holding that the Internal Revenue Code authorized the IRS to deny a tax exemption to institutions engaged in racial discrimination and that such denial did not violate the University's first amendment rights.

The Supreme Court granted certiorari in Bob Jones University and in Goldsboro Christian Schools v. United States, a companion case presenting identical issues. In 1982, however, the Reagan administration announced that "without further guidance from Congress, the Internal Revenue Service will no longer revoke or deny tax-exempt joint resolution to argue as amicus curiae in support of a statute under attack after the Solicitor General joined in two of the challenging party's arguments. See United States v. Lovett, 328 U.S. 303, 304 (1946).

106. No. 69-1355, slip op. (D.D.C. May 5, 1980). Not surprisingly, the IRS declined the opportunity to appeal this "technically adverse" decision.


110. 639 F.2d at 155.

status for . . . organizations on the grounds that they don’t conform with certain fundamental public policies.” On the same day, the Justice Department petitioned the Supreme Court to vacate as moot, in light of the new administration policy, the Bob Jones University and Goldsboro Schools cases.

Immediately following its reversal of the long-standing IRS policy, the administration became the object of a barrage of criticism from newspapers and civil rights groups. In the wake of such severe criticism, the President—in order to show his “unalterable opposition to racial discrimination in any form”—sent legislation to Congress that would have prohibited the granting of tax exemptions to racially discriminatory organizations. Congress, however, refused to enact the legislation claiming that its position was already well settled.

The administration ultimately returned to the Supreme Court and requested that the Bob Jones case be decided.

113. See Bob Jones Univ., 103 S. Ct. at 3095 n.9.
115. Immediately subsequent to the Reagan policy shift, the Lawyer’s Committee sought to use Green as a vehicle to obtain an injunction preventing the Reagan administration from implementing its announced policy shifts. In papers filed before the district court, the Lawyer’s Committee argued “that the announced shift violates the court orders against IRS and Treasury in the Green case and that they are entitled to a further injunction to protect the relief they have already won.” Press Release, supra note 16, at 2. The Committee recognized that the Green decision was limited to the State of Mississippi, yet it believed that the issuance of a nationwide injunction would be proper because the court’s analysis in Green was not limited to the state of Mississippi. The district court properly denied this request, holding that its jurisdiction through Green was limited to the state of Mississippi. See Exemptions Bill Assaulted at Hearing, N.Y. Times, Feb. 5, 1982, at Al2, col. 1. The Lawyer’s Committee was also unsuccessful in its efforts to argue the Bob Jones University case before the Supreme Court by having the Green case joined with Bob Jones.
117. Id. “Also, on January 18, 1982, the Treasury Department announced that the Secretary of the Treasury has instructed the Commissioner of Internal Revenue not to act on any applications for tax-exempt status filed in response to the new Treasury policy announced on January 8, 1982, except in the cases of Bob Jones University and Goldsboro Christian Schools, Inc., until Congress has acted on the proposed legislation.” Staff of Joint Comm. on Taxation, 97th Cong., 2d Sess., Background Relating to the Effect of Racially Discriminatory Policies on the Tax-Exempt Status of Private Schools at 7 (Joint Comm. Print 1982).
The government argued, however, in accord with the plaintiffs’ position, that the IRS was statutorily required to grant tax exemptions to the schools. To provide some semblance of a case or controversy within the Court’s jurisdiction, the government suggested that the Court appoint “counsel adversary” to the schools on this underlying issue. The Court complied with this unorthodox request and appointed William T. Coleman, Jr. to argue the “government’s side” in these cases, thus permitting the case to proceed despite its clear inability to satisfy the adverseness requirement.

Judicial involvement in this case served simply to transfer to the Court the apparent responsibility for a politically controversial issue that was no longer ripe for judicial resolution. Ironically, the Reagan administration has rebuked the federal courts for engaging in precisely this type of judicial legislation. According to Attorney General William French Smith:

Responsibility for policy making in a democratic republic must reside in those who are directly accountable to the electorate. . . . When courts fail to exercise self-restraint and instead enter the political realms reserved to the elected branches, they subject themselves to the political pressure endemic to that arena and invite popular attack.

The Attorney General, not surprisingly, remained silent on the Court’s political activism in the matter of Bob Jones University’s tax exemption.

120. Administration Asks High Court to Settle School Exemption Issue, Wash. Post., Feb. 26, 1982, at A3, col. 4. “Counsel adversary” have been appointed by the Court in other cases. In Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955), the Court set forth the standard that it would use in the appointment of counsel adversary:

In view of the lack of genuine adversary proceedings at any stage in this litigation, the outcome of which could have far-reaching consequences on domestic relations throughout the United States, the Court invited specially qualified counsel “to appear and present oral argument, as amicus curiae, in support of the judgment below.”


122. See Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 47-48 (1971) (“[e]nfronted with the anomaly that both litigants desire precisely the same result, [the Court holds that there is] no case or controversy within the meaning of Article III . . . .”). The Court ultimately held that the IRS had properly revoked Bob Jones University’s tax-exempt status as a charitable institution, because its discriminatory actions were against public policy. Id. at 2032.

III. Wright v. Regan: The Analytical Defects of Green Return

The failure of Congress and the Executive to formulate a clear policy on the issue of tax exemptions, and the corresponding failure of the Supreme Court to establish and follow standards to govern standing and adverseness, have resulted in continuing litigation in this area. The most recent case in the tax-benefit line, Wright v. Regan, will provide the Court an opportunity to clarify its position on standing in tax-benefit cases as well as reveal its willingness to continue its trend of judicial activism.

Wright represents the efforts of black students and parents to impose Green v. Miller nondiscrimination enforcement standards on the IRS, but the litigation has thus far focused on the threshold issue of the court's constitutional power to decide the substantive issues. The District Court for the District of Columbia held in Wright v. Miller that plaintiffs were barred from bringing such an action because their generalized denigration of race theory was insufficient to create standing and because the plaintiffs and the IRS were not sufficiently adverse. The court of appeals, in Wright v. Regan, reversed the district court decision on both grounds, and the Supreme Court has granted certiorari on the standing issue.

A. Standing

Relying on traditional standing doctrine, the district court held that the plaintiffs in Wright did not assert a “distinct, palpable, and concrete injury” because they did not allege that any of the named schools had actually discriminated against any of the plaintiffs. A school can only discriminate against individuals by denying admission or by unfairly treating enrolled students. In holding that such a school does not interfere with the rights of the general public, the district court in effect rejected the racial denigration notion as a basis for standing. The court of appeals, however, reversed the lower court's decision and adopted the plaintiffs’ position that, as members of the

126. Id. at 793-97. In addition, the district court found that the doctrine of nonreviewability of administrative action prevented the court from reversing a decision of the Commissioner of the IRS, id. at 797-98, and that the Ashbrook and Dornan amendments functioned as substantive amendments precluding judicial intervention. Id. at 798-99.
128. Id. at 827-28.
130. 480 F. Supp. at 793.
131. See id. at 794.
group subjected to the discrimination, they had standing to sue to enforce the government's constitutional obligations to "steer clear" of giving significant aid to institutions that practice racial discrimina-

tion.132

The plaintiffs' reliance on the questionable notion of standing based on denigration of race leaves their status in the case open to vigorous attack. In its petition to the Supreme Court for certiorari in Wright, the government argues:

Respondents' asserted 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. . . . The fact that respondents may have an interest in a matter that they have sought to identify as a public issue, and that they may share certain attributes common to persons who may have suffered discrimination at the hands of private schools, is an insufficient ground upon which to conclude that they have been injured in fact by such discrimination or that the Secretary's allegedly illegal conduct has actually caused such discrimina-

This is precisely the position that the Supreme Court adopted in Valley Forge on the question of standing to bring establishment clause claims. According to the Court in Valley Forge, "the psychological consequence presumably produced by observation of conduct with which one disagrees [is not] an injury sufficient to confer standing under Art[icle] III, even though the disagreement is phrased in constitutional terms."134 Thus, it now seems that plaintiffs' standing in Wright can be saved only if the Court can create a distinction between their "establishment of segregation" claim and the establishment of religion claim in Valley Forge. Such a result is unwarranted and unlikely in light of the Court's narrow approach to the standing doctrine in Valley Forge. Had the plaintiffs and the court of appeals relied on Flast taxpayer standing doctrine, as suggested earlier,135 their prospects would not be so unsure.

132. 656 F.2d at 830. The court relied on the Supreme Court's decision in Norwood v. Harrison, 413 U.S. 455 (1973). As noted earlier, the Supreme Court seemed simply to assume the existence of standing in Norwood without any discussion of the issue. See supra text accompanying notes 31-36. Thus, the precedential value of Norwood on the standing issue is weak. Unlike the court in Wright, the Court of Appeals for the First Circuit, in Jackson v. Dukakis, 626 F.2d 64 (1st Cir. 1979), chose to ignore Norwood when it found no standing on facts similar to those in Norwood and Wright. Id. at 65. See supra notes 39-42 and accompanying text.


135. See supra pt. I(B).
B. Adverseness of Parties

Recognizing that "the named adversary parties in this action, the parents of the black public school children and the [IRS], seem closely allied in terms of the need to promulgate future guidelines," the district court held that the case-or-controversy requirement of article III was not met, and therefore, that plaintiffs could not justify their need for seeking a judicial remedy. This point was rejected by the court of appeals, which noted that the IRS had vigorously and successfully litigated the action in the lower court and that the participation of an intervenor assured that the issue would be adjudicated with the requisite adverseness.

The court of appeals position on the parties' adverseness is supported by two additional points. Based on the standard employed in Green v. Miller, the Carter administration was at least technically adverse to the civil rights plaintiffs. Moreover, any possible alliance between plaintiffs and defendants had dissipated by the time the court of appeals heard oral arguments in Wright, due to President Reagan's election and the consequent shift in Treasury policies on this matter.

C. Political Considerations and Bob Jones University

Had the Supreme Court refused to hear the Bob Jones University case, attention would have focused on Wright v. Regan, a case in which adverseness is clear and in which the plaintiffs' standing could be asserted on taxpayer grounds. The government argues in Wright that the plaintiffs lack standing, not only because their theory of racial denigration is invalid, but also because "the appropriate forum for such a debate concerning the correctness of Treasury policy is in the Congress pursuant to the exercise of its oversight of the Department of the Treasury and not in the courts." If the Supreme Court accepts this argument and holds that the plaintiffs in Wright are without standing, it will be guilty of the ultimate irony. The Court will have extended its jurisdiction unnecessarily to reach an issue raised in the moot case of Bob Jones University while refusing jurisdiction over the same issue when presented by truly adverse parties in Wright.

A refusal by the Court to hear Bob Jones University would have caused the policy issue to revert initially to the political arena. The Reagan administration would have been confronted with the question

137. Id. at 797.
138. 656 F.2d at 828.
139. See supra notes 102-05 and accompanying text.
140. See supra notes 112-13 and accompanying text.
whether to pursue its announced intention to revise IRS policies and allow the grant of an exemption to Bob Jones University.\textsuperscript{142} If the IRS had decided to grant the exemption, Congress would have been forced to decide whether to allow such a course of action or to statutorily reverse the IRS policy decision. If Congress chose not to reverse such a decision by the IRS, the stage would have been set for a constitutional challenge to what would then be clearly defined congressional and executive policy. The Wright suit, presenting parties clearly adverse to the Reagan administration on the issue, would have provided an appropriate vehicle for a judicial determination of the constitutional question.

When the Court was asked by the Reagan administration to hear Bob Jones University, it should have responded as the Court responded in 1793 to a request from Secretary of State Jefferson for an advisory opinion on certain policy questions confronting President Washington’s administration. On August 8, 1793, Chief Justice Jay wrote to President Washington:

\begin{quote}
We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.\textsuperscript{143}
\end{quote}

IV. LEGISLATIVE DEFERENCE AND THE FUTURE OF JUDICIAL CONTROL OVER THE TAX-EXEMPTION ISSUE

After a few stirring attempts to assert control over the course of national policy with respect to tax benefits for private segregated schools, Congress seems finally to have surrendered. Recent congressional inactivity on the issue has allowed the courts to assume the legislative policy initiative.

On one hand, Congress failed to respond to the policy shift by the Reagan administration by declining to amend the Internal Revenue Code to clearly prohibit the granting of such tax exemptions and refusing even to ratify a concurrent resolution stating that “current Federal law clearly authorizes and requires the Internal Revenue

\textsuperscript{142} The administration, however, could have delayed this decision for some time due to the Court of Appeals’ issuance of a temporary injunction in Wright. This injunction prohibits the IRS from granting tax exemptions to racially discriminatory schools until final resolution of Wright. Wright v. Regan, No. 80-1124 (D.C. Cir. Feb. 18, 1982) (order granting injunction).

Service to deny tax-exempt status . . . to private schools that discriminate on the basis of race.” 144 This congressional inertia was due, in part, to the fact that the Court of Appeals for the District of Columbia had issued an injunction prohibiting the granting of tax exemptions to racially discriminatory private schools pending final determination of Wright v. Regan. 145 In addition, President Reagan had announced that for an indefinite period of time, he would not permit the IRS to grant tax exemptions to racially discriminatory schools. 146

On the other hand, Congress also refused to re-enact the amendments that had previously limited the scope of IRS enforcement of the racial nondiscrimination requirement. 147 Congress’ failure to re-enact these measures can be attributed to two factors. First, the Reagan Treasury Department withdrew the Carter administration proposal that had spurred the initial passage and later reaffirmation of these amendments. 148 Second, Congress wished to wait for the Supreme Court’s forthcoming decision in Bob Jones University rather than take the lead on the tax-exemption issue. 149

Congressman Dornan reintroduced the amendments claiming that “as a result of [Wright v. Regan] the way has been paved for a possible ruling . . . which would implement significant parts of the . . . procedures forbidden by my amendment and which may threaten the tax-exempt status of every private and religious school in the Nation.” 150 Despite the fact that Congressman Dornan’s words were no less valid than they were in the three prior years in which his amendment was passed, the House of Representatives declined to re-enact this measure. The sentiment in Congress had shifted to a belief that the tax-exemption issue had become a sensitive constitutional one that was beyond the scope of the legislature. 151

Thus, not only are the courts overly inclined to assume legislative responsibility for the issue of tax benefits for segregated schools, but

145. See supra note 142.
146. See supra note 117.
148. See supra note 117.
150. See infra note 151.
("Congress ought not interject itself at this time in an issue that is currently pending in the courts."); id. (remarks of Rep. Rangel) ("this very sensitive constitutional question is presently before the U.S. Supreme Court [and members of Congress who want to enact the Dornan amendment] are extending this question beyond the scope of this Congress."); id. at H8617 (remarks of Rep. Matsui) ("Members of this body should wait until the Court resolves this matter . . . ."); id. at H8618 (remarks of Rep. Fazio) ("I think the House would not want to go on record at this time as anticipating a Supreme Court decision.").
like the executive branch in *Bob Jones University*, Congress now seems content to defer to the legislative judgment of the courts on this politically sensitive subject. The Supreme Court’s recent decision in *Bob Jones University* only encourages this tendency of Congress to avoid the issues by relying on an activist judiciary. The Court disposed of the lingering statutory interpretation question by holding that the tax-exemption provisions of the Internal Revenue Code do not extend to institutions whose practices violate a fundamental public policy against racial discrimination. The political respite that this decision provides for Congress and the Executive may prove only temporary, however, because the decision merely establishes that tax-exempt schools cannot explicitly maintain racially discriminatory policies. How the IRS ought to implement this nondiscrimination requirement is an issue that has yet to be resolved in a definitive manner.

**Conclusion**

The IRS has reinstated the procedures in force prior to the Reagan administration’s policy swing in favor of Bob Jones University. These are essentially the 1975 enforcement procedures adopted by the IRS in response to the *Green v. Connally* decision and preserved from proposed change by congressional action in 1978. The core of the plaintiffs’ claim in the pending *Wright v. Regan* lawsuit, however, is that these procedures do not go far enough toward establishing presumptions against suspect schools. Thus, a grant of standing in *Wright* may ultimately result in a set of detailed procedures for IRS enforcement of the provision that the Supreme Court wrote into the Internal Revenue Code in *Bob Jones University*. Such a result would run counter to the strongly expressed wishes of Congress and the Executive on the matter and would surely elicit a sincere outcry against judicial activism from both branches. More importantly, a finding of standing in *Wright*

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152 Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2030-31 (1983). The Court, in unusually sweeping language, stated that “[c]haritable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. . . . The institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.” *Id.* at 2028-29 (footnote omitted). Bob Jones University was not entitled to tax-exempt status under this standard because “an educational institution engaging in practices affirmatively at odds with [the government’s] declared position on racial discrimination cannot be seen as exercising a ‘beneficial and stabilizing influence in community life.’” *Id.* at 2032 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970)). For a discussion of the *Bob Jones University* case, see Galvin & Devins, A *Tax Policy Analysis of Bob Jones University v. United States*, 36 Vand. L. Rev. 1353 (1983).
based on racial denigration would authoritatively enshrine this anomalous and open-ended notion in the already murky body that controls standing to sue. Yet, the history of judicial activism and congressional and executive abdication of responsibility on the issue of tax exemptions clearly encourages such continued judicial activism. Congress and the Executive may yet discover that they have paid an unacceptably high price for the convenience of passing a politically sensitive subject to a judiciary that has been all too willing to supply the requisite political judgment.