BYU Law Review

Volume 1982 | Issue 3 Article 9

9-1-1982

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Jamie D. Scott

Standing to Challenge the Tax-Exempt Status of Racially Discriminatory Private Schools: *Wright v. Regan*

After *Brown v. Board of Education*,[1] the most serious threat to racial integration in education was the sudden expansion of private school enrollment[2] and the establishment of new "segregation academies."[3] To combat that threat, the Supreme Court has consistently held that direct government financial assistance to discriminatory schools constitutes unlawful state action in violation of the equal protection clause.[4] The attack on federal government funding of discriminatory private schools has focused primarily on the tax exemptions granted to certain organizations,[5] and on the corresponding deductions given to taxpayers who contribute to those organizations.[6]

While from 1970 through 1981 the IRS followed a policy of not recognizing the tax-exempt status of racially discriminatory private schools,[7] its guidelines were often criticized as being too

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1. 347 U.S. 483 (1954) (state-mandated racial segregation in public schools violates the equal protection clause of the fourteenth amendment).

2. *See* Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973). Enrollment in Southern private schools is estimated to have increased from 25,000 in 1966 to 535,000 in 1972. *Id.* at 1441.

3. "Segregation academies" is a term used to describe those private schools organized or expanded for the sole purpose of avoiding integration and that have continued to operate in a racially discriminatory manner.

4. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455 (1973) (state prohibited from giving free textbooks to students attending racially discriminatory private schools).

5. I.R.C. § 501(c)(3) (1976) provides in relevant part: "The following organizations are [exempt from taxation] . . . : (3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, . . . literary, or educational purposes . . . ."

6. I.R.C. § 170(a) (1976) provides in relevant part: "There shall be allowed as a deduction any charitable contribution . . . made within the taxable year." I.R.C. § 170(c) provides in relevant part: "For purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of . . . [a] corporation, trust, or community chest, fund or foundation . . . [o]rganized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . ."

7. Until 1971 the IRS did not examine the discriminatory practices of private schools in making their determination as to whether the schools would be exempt from taxation. The impetus for the subsequent change was Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.*, Coit v. Green, 404 U.S. 997 (1971), a suit filed by black parents seeking to enjoin the Secretary of the Treasury from recognizing the tax-exempt status of racially discriminatory private schools in Mississippi. In granting the

lenient.[8] The criticism culminated in *Wright v. Regan*,[9] in which black parents filed a complaint requesting revocation of the tax-exempt status of certain segregated private schools. In *Wright* the United States Court of Appeals for the District of Columbia Circuit reversed the district court decision and held that the black parents involved had standing to enjoin the IRS from recognizing the tax-exempt status of certain racially segregated private schools.

I. THE *Wright* CASE

In *Wright* black parents from several states whose children attended public schools filed a complaint in the District Court for the District of Columbia[10] seeking injunctive relief on a nationwide basis. The parents, individually, on behalf of their minor children, and as representatives of a class, sued to enjoin the Secretary of the Treasury from recognizing the tax-exempt status of any private schools that have insubstantial minority en-

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permanent injunction, the *Green* court based its decision on statutory construction, thereby avoiding the question of whether the nonrecognition of tax-exempt status of such schools is constitutionally mandated. In response to the *Green* decision, the IRS promulgated regulations incorporating the requirements of the injunction. Rev. Rul. 71-447, 1971-2 C.B. 230. The guidelines were supplemented in 1972 and 1975. Rev. Proc. 72-54, 1972-2 C.B. 834 (publicity of nondiscriminatory policy required); Rev. Proc. 75-50, 1975-2 C.B. 587 (the school to bear the burden of showing it operated in accordance with nondiscriminatory policy). However, in January 1982 the Treasury Department announced that it intended to withdraw all pronouncements used in the past to revoke the tax-exempt status of discriminatory private schools. Memorandum for the United States, Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980), *cert. granted sub nom.*, Goldsboro Christian Schools v. United States, 102 S. Ct. 386 (1981).

8. Some charged that discriminatory schools could retain their tax exemptions by merely adopting a nondiscriminatory policy even though that policy was not actually practiced. *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 483 (1979) (Statement of Richard E. Larson) [hereinafter cited as *Hearings*]. Also, the Commissioner of the IRS agreed that the guidelines needed strengthening after schools adjudged discriminatory by federal courts continued to be treated as tax-exempt by the IRS. *Id.* at 5.

9. 656 F.2d 820 (D.C. Cir. 1981), *petitions for cert. filed sub nom.* Allen v. Wright, 50 U.S.L.W. 3353 (U.S. Oct. 20, 1981) (No. 81-757) and Regan v. Wright, 50 U.S.L.W. 3467 (U.S. Nov. 23, 1981) (No. 81-970). There are two petitions for certiori because both the government and the intervenor filed. *See infra* note 11.

10. When *Wright* was filed, the *Green v. Connally* case was reopened. 656 F.2d at 825; Disposition as Green v. Miller, 80-1 U.S. Tax Cas. (CCH) ¶ 9401 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980). Since common questions of law and fact were involved in *Green* and *Wright*, they were consolidated. 656 F.2d at 825. In both *Green* and *Wright* the nominal defendant, the Secretary of the Treasury, was replaced by subsequent holders of that office.

rollments, that serve desegregating public schools districts, and that either

> (a) were established or expanded . . . about the time the public school districts in which they are located . . . began desegregating;
> (b) have been determined in adversary judicial or administrative proceedings to be racially segregated; or
> (c) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems.[11]

The district court, without reaching the merits of the claim in *Wright,* dismissed the case, citing three grounds for its decision.[12] The first of these grounds was lack of standing. The court felt that the plaintiffs failed to meet four basic requirements of standing.

> First, the claimant must assert a distinct, palpable, and concrete injury. Second, this injury must be fairly traceable to defendant's actions. Third, there must be a sufficient degree of certainty that the relief requested will remove the injury. Fourth, there must exist a sufficient degree of concrete adverseness between the plaintiff and defendant. . . .[T]he parents of the 25 black public school children must satisfy each criteria to maintain this action. It is the conclusion of this Court that they satisfy none of the criteria.[13]

Second, the district court held that the plaintiffs' claim was barred by the doctrine of nonreviewability. In so holding, the

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11. Complaint at 3-4 (filed July 30, 1976), Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981), *petitions for cert. filed sub nom.* Allen v. Wright, 50 U.S.L.W. 3353 (U.S. Oct. 20, 1981) (No. 81-757) and Regan v. Wright, 50 U.S.L.W. 3467 (U.S. Nov. 23, 1981) (No. 81-970). Plaintiffs claim the defendant's conduct violates § 501(c)(3) of the Internal Revenue Code; section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-1; and the fifth and fourteenth amendments. *Id.* at 27. Soon after *Wright* was filed a third party was permitted to intervene as a defendant. 656 F.2d at 825. The intervenor was W. Wayne Allen, Chairman of the Board of Trustees of the Briarcrest School System in Memphis, Tennessee. It was alleged in the *Wright* complaint that Briarcrest Schools enjoyed tax-exempt status even though they were racially segregated. *Id.*

12. 480 F. Supp. 790 (D.D.C. 1979). Nevertheless, the district court refused to dismiss the *Green* component of the case and eventually ruled on the merits in favor of the plaintiffs. Green v. Miller, 80-1 U.S. Tax Cas. (CCH) ¶ 9401 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980). The conflicting outcomes of *Green* and *Wright* appear to be the result of a feeling by the district court that it was bound by the 1971 determination of standing under *Green v. Connally* as the law of the case. 656 F.2d at 840 (Tamm, J., dissenting).

13. 480 F. Supp. at 793.

court expressed concern that granting the relief would make the court a "shadow commissioner of Internal Revenue"[14] and that "any violation of the Constitution or federal law by a discriminating school should be remedied on a case-by-case basis through a lawsuit filed directly against the offending school."[15] Finally, the court felt that granting the relief requested would be contrary to the "intent and policy" of Congress as expressed in the Ashbrook and Dornan amendments.[16]

The district court's dismissal was reversed by the United States Court of Appeals for the District of Columbia Circuit.[17] The majority first rejected the lower court's conclusion on standing. In choosing between what it called "two divergent lines of Supreme Court decision,"[18] the court concluded that the line of precedent which "best fits the case before us"[19] "indicate[s] that black citizens have standing to complain against government action alleged to give aid or comfort to private schools practicing race discrimination in their communities."[20]

The court of appeals also held that the doctrine of nonreviewability was not a bar to the plaintiffs' claim. The court felt that adjudication of the claim "does not involve any arcane question of tax law; [it] . . . requires no entanglement with complex, technical . . . aspects of the Internal Revenue Code and its administration."[21] Finally, the court held that the Ashbrook and Dornan amendments were intended to prevent action by the IRS and had no effect on the courts.[22]

In a dissenting opinion, Judge Tamm criticized the majority's treatment of standing. He stated, "We are not required . . .

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14. *Id.* at 797.

15. *Id.* at 798.

16. *Id.* at 799. The Ashbrook and Dornan amendments were enacted in response to criticism of proposed guidelines that had been issued by the IRS after *Green* was reopened and *Wright* was filed. Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559 (1979). The Dornan amendment provides that no funds under the Act may be used to carry out the specific IRS proposals. *Id.* § 615. The Ashbrook amendment provides that no funds under the Act may be used for any new measures that would cause the loss of tax-exempt status by any private school. *Id.* § 103.

17. 656 F.2d 820 (D.C. Cir. 1981), *petitions for cert. filed sub nom.* Allen v. Wright 50 U.S.L.W. 3353 (U.S. Oct. 20, 1981) (No. 81-757) and Regan v. Wright, 50 U.S.L.W. 3467 (U.S. Nov. 23, 1981) (No. 81-970).

18. *Id.* at 828.

19. *Id.*

20. *Id.*

21. *Id.* at 837 (footnote omitted).

22. *Id.* at 835.

to choose among Supreme Court precedent as we would footwear . . . . Instead, we need only examine carefully the law of standing as it presently exists and properly apply that law to the case before us."[23] In concluding that these plaintiffs lacked standing, Judge Tamm was particularly disturbed that "*[n]owhere do the plaintiffs allege that they sought admission to these schools, that they were deterred from applying, or even that the schools engage in unlawful discrimination.*"[24]

II. ANALYSIS

Though recognition of standing by the court of appeals appears to have resulted from the court's zeal to supply a forum for the plaintiffs' cause, it is inconsistent with the current law of standing and with the policy considerations underlying that doctrine.

A. Current Law of Standing

There is much confusion over what constitutes the current law of standing. In an understatement, the district court in *Wright* noted that the "law of standing is so dynamic and expansive as to almost defy codification."[25] Yet there is at least one aspect of standing on which most commentators agree: Since 1975[26] the Burger Court has substantially raised the standing barriers for challenges to governmental action.[27] The new re-

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23. *Id.* at 838 (Tamm, J., dissenting).

24. *Id.* at 845 (emphasis in original).

25. 480 F. Supp. at 793.

26. From 1970 to 1974 standing was not a formidable barrier to challenge the legality of government action. Three important cases, Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970), Sierra Club v. Morton, 405 U.S. 727 (1972), and United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973), established the requirements during that era. In general these cases require merely that the plaintiff allege some injury in fact to himself. 412 U.S. at 686; 405 U.S. at 733; 397 U.S. at 152. Though the injury need not be economic, 405 U.S. at 738, it must be more than a generalized grievance against government conduct. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974); United States v. Richardson, 418 U.S. 166, 175 (1974).

27. *See generally* Berch, *Unchain the Courts—An Essay on the Role of the Federal Courts in the Vindication of Social Rights*, 1976 ARIZ. ST. L.J. 437; Comment, *The Impact of Policy On Federal Standing*, 45 FORDHAM L. REV. 515 (1976); Comment, *Standing To Sue In Federal Courts: The Elimination Of Preliminary Threshold Standing Inquiries*, 51 TUL. L. REV. 119 (1976); Comment, *The Supreme Court's Seeming Disposal of Quasi-Public Interest Litigation:* Simon v. Eastern Kentucky Welfare Rights Organization, 13 WAKE FOREST L. REV. 602 (1977).

quirements were enunciated in a 1975 case, *Warth v. Seldin*.[28] Justice Powell, writing for the majority, noted that the question of standing "involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise."[29]

The constitutional limitations are founded on the "case or controversy" requirement of article III.[30] The question is "whether the plaintiff has made out a 'case or controversy' between himself and the defendant."[31] This requires that the plaintiff allege both an actual or threatened injury in fact to himself and facts showing a causal connection between the injury and the defendant's conduct, such that granting the relief requested will redress the injury.[32] In applying this test to a particular set of facts, the Court has sometimes considered several rarely articulated policy considerations, which can be grouped into the following four categories: (1) the need for adverse parties to ensure full consideration of all relevant issues, (2) the concern that judicial administration would be burdened, (3) the concern that the principle of separation of powers would be violated, and (4) the availability of other avenues of redress.[33]

In *Warth v. Seldin* Justice Powell also mentioned two "prudential limitations" on the exercise of federal court jurisdiction.

> First, . . . when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant the exercise of jurisdiction. Second, . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.[34]

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28. 422 U.S. 490 (1975).

29. *Id.* at 498.

30. U.S. CONST. art. III § 2.

31. 422 U.S. at 498.

32. *Id.* at 498-99, 504. *See also* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Linda R. S. v. Richard D., 410 U.S. 614 (1973).

33. *See* United States v. Richardson, 418 U.S. 166, 188-89 (1974) (Powell, J., concurring). *See generally* Brilmayer, *The Jurisprudence Of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Scott, *Standing In The Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Comment, *The Impact of Policy on Federal Standing*, 45 FORDHAM L. REV. 515 (1976).

34. 422 U.S. at 499 (citations omitted). Since these are prudential limitations, the courts are not bound to them in all cases. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106 (1976) (doctor permitted to assert the constitutional rights of patients); NAACP v. Alabama, 357 U.S. 449 (1958) (association permitted to assert the rights of its members). *See also* Flast v. Cohen, 392 U.S. 83 (1968) (federal taxpayer permitted to challenge

However, where Congress has specifically provided for judicial review of governmental action, the prudential considerations are limited to the question of "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[35]

The prudential limitations appear to be satisfied in the *Wright* case. Since the complaint was brought under section 10 of the Administrative Procedure Act,[36] which provides for judicial review of certain agency actions, the plaintiffs needed only to satisfy the more lenient zone-of-interest limitation.[37] They satisfied that requirement because their interest in being free from governmental support of educational segregation appears to be within the "zone of interests" to be protected by section 501(c)(3) of the Internal Revenue Code and the equal protection guarantee of the fifth amendment.[38] However, the provision for judicial review under the Administrative Procedure Act has no effect on the constitutional limitations on standing.[39]

B. *The Injury-in-Fact Requirement*

The first constitutional limitation on standing is the requirement that there be an actual or threatened injury in fact to the plaintiff. Although "injury in fact" is an extremely vague requirement, it is clear that it has two aspects. First, the plaintiff must allege in the complaint that he personally has suffered some actual or threatened injury.[40] Second, the injury must be

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government expenditure as a violation of first amendment).

35. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. at 153. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. at 39 n.19.

36. Complaint, *supra* note 11, at 4.

37. 5 U.S.C. § 702 (1976). The statute provides in relevant part: "A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.*

38. It does not appear that the zone-of-interest test was ever intended to be applied very strictly. One commentator has noted that "[a]s a constraint on judicial access, the zone-of-interest formulation is largely worthless." Comment, *Standing To Sue In Federal Courts: The Elimination of Preliminary Threshold Standing Inquiries,* 51 TUL. L. REV. 119, 122 (1976).

39. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 n.22 (1976). In *Eastern Kentucky,* as in *Wright,* the plaintiff alleged standing under § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976). Nevertheless, the constitutional standing requirements remained.

40. *See* O'Shea v. Littleton, 414 U.S. 488, 494-95 (1974); Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

to a cognizable interest that warrants the exercise of federal court jurisdiction.[41] Injuries to cognizable interests include, but are not limited to, economic, aesthetic, conservational, and recreational values.[42] Also, since the purpose of the requirement is to "distinguish a person with a direct stake in the outcome . . . from a person with a mere interest in the problem,"[43] an "[a]bstract injury is not enough."[44]

The injury claimed by the plaintiffs in *Wright* was not a discriminatory denial of admission to a private school, for they claimed no interest in enrolling their children in any school named in the complaint. Instead, the complaint alleged the following injury:

> As a consequence of the grant of federal tax benefits to racially segregated private schools, . . . plaintiffs . . . suffer serious, substantial and irreparable injury . . . . Specifically, the grant of federal tax exemptions to such schools . . . injures plaintiffs in that it:
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> (a) constitutes tangible federal financial aid . . . for racially segregated educational institutions, and
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> (b) fosters and encourages the organization, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts and thereby interferes with the efforts of federal courts, HEW and local school authorities to desegregate public school districts which have been operating racially dual school systems.[45]

The court of appeals interpreted the allegations in the complaint as follows: "[Plaintiffs] assail only government action. The sole injury they claim is the denigration they suffer as black parents and schoolchildren when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth."[46]

This interpretation indicates that the court felt the complaint adequately alleged the manner in which the plaintiffs had been injured. However, notwithstanding the court's interpreta-

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41. *See* 405 U.S. at 734-35.

42. *See id.* at 738.

43. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973).

44. O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

45. Complaint, *supra* note 11, at 26.

46. 656 F.2d at 827.

tion, the complaint raises serious doubts as to whether it is sufficient to satisfy the first requisite for injury in fact—that the plaintiff allege that he personally has suffered some actual or threatened injury. The complaint did not state what injury had been suffered by the plaintiffs. It merely contended that the plaintiffs had been injured as a result of the allegedly illegal government conduct. But the necessity that an injury be alleged requires more than the bare statement, "I have been injured"; the complaint must specify the manner in which the plaintiff has been injured.[47] In this respect, the allegations closely resemble those that were held to be deficient in *Sierra Club v. Morton.*[48] In that case the plaintiff sued to enjoin a recreational development in a National Forest. The Sierra Club's complaint alleged that "[i]ts interests would be vitally affected by the [development] and would be aggrieved by [the] acts of the defendants."[49] Nevertheless, the complaint was deficient because the plaintiff "failed to allege that it or its members would be affected in any of their activities . . . by the . . . development."[50] Thus, as in *Sierra Club,* the complaint in *Wright* is deficient because it failed to specify the manner in which the plaintiffs had been injured by the conduct of the defendant.

But, even assuming that the appellate court properly interpreted the complaint, the second requisite for injury in fact must still be satisfied: The denigration suffered must be a cognizable injury warranting the exercise of federal court jurisdiction. As previously mentioned, the test is whether the plaintiffs have a direct stake in the outcome or merely an interest in the problem. Application of the test does not provide a clear solution for the plaintiffs in *Wright.* From a subjective point of view, the denigration may result in the plaintiffs having more than a mere interest in the problem. But if it is viewed subjectively, standing can never be denied because any person who expends the time and money to file a suit surely has more than a mere interest in the problem. Thus, in a practical sense, an objective test is more useful. Objectively, the denigration alleged in *Wright* does not appear to be a very significant injury. The complaint seems to imply that the tax exemptions cause the plaintiffs to be treated

47. *See* O'Shea v. Littleton, 414 U.S. 488, 494-95 (1974); Sierra Club v. Morton, 405 U.S. 727, 734-36 (1972).

48. 405 U.S. 727 (1972).

49. *Id.* at 735 n.8.

50. *Id.* at 735.

as persons of lesser worth. Though this may be true, the plaintiffs cited no specific instances of this result to themselves or others. Nevertheless, the court of appeals felt that the denigration suffered by the plaintiffs was a cognizable rather than an abstract injury. In making that conclusion the court relied on three Supreme Court cases, *Norwood v. Harrison*,[51] *Gilmore v. City of Montgomery*,[52] and *Coit v. Green*.[53]

Norwood and *Gilmore* involved successful attacks by black parents on direct state and local aid to discriminatory private schools.[54] However, for several reasons reliance on *Norwood* and *Gilmore* is misplaced. First, standing was not challenged in either case. Since standing is jurisdictional, it is true that the Court could have raised the issue sua sponte, and in *Gilmore* the Court did allude to standing in a footnote.[55] But to decide a standing case by pointing to past decisions, where under similar facts the merits were decided without further analysis of the current requirements of the doctrine, does not clarify the issue. It merely compounds the confusion.

Second, while in *Norwood* and *Gilmore* direct aid was challenged, the *Wright* plaintiffs challenge tax exemptions. The appellate court failed to recognize the Supreme Court's earlier reluctance to allow standing to sue the IRS over someone else's tax liability. In a concurring opinion in *Simon v. Eastern Kentucky Welfare Rights Organization*,[56] Justice Stewart commented that he could not imagine a case, outside the first amendment area, "where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else."[57]

Finally, the facts of *Norwood* and *Gilmore* are distinguishable from *Wright*. In both cases the plaintiffs had been parties to prior desegregation orders in which they had already alleged and

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51. 413 U.S. 455 (1973).

52. 417 U.S. 556 (1974).

53. 404 U.S. 997 (1971), *aff'g mem.* Green v. Connally, 330 F. Supp. 1150 (D.D.C.).

54. In *Norwood* the state was prohibited from supplying free textbooks to children attending discriminatory private schools. 413 U.S. at 463-68. In *Gilmore* the city was prohibited from permitting discriminatory schools to have exclusive use of public recreational facilities. 417 U.S. at 565-74.

55. 417 U.S. at 570 n.10. While the Court did not question the plaintiffs' standing to challenge exclusive use of city facilities by discriminatory schools, it stated that "it is not clear that every nonexclusive use of city facilities . . . would result in cognizable injury to these plaintiffs." *Id.*

56. 426 U.S. 26 (1976).

57. *Id.* at 46 (Stewart, J., concurring).

proved that the state in *Norwood* and the city in *Gilmore* had themselves directly practiced racial discrimination.[58] In *Wright* the defendant's involvement extended only to racial segregation and, as already noted, only through the indirect route of tax exemptions. The Supreme Court in *Gilmore* expressed doubt as to whether a more indirect involvement in racial discrimination would be a cognizable injury.[59] Moreover, since the complaint in *Wright* only refers to racial segregation, it appears that the plaintiffs were only concerned with the composition of the student body, without regard to actual discrimination, religious beliefs, or any other factors.[60]

Coit v. Green[61] was the final case relied on by the appellate court. Like the other cases cited, *Coit v. Green* was not a standing case. Although it is true that the facts of *Coit v. Green* were similar to *Wright*,[62] the Supreme Court affirmed *Coit v. Green* in 1971, before the recent barriers to standing were raised, and affirmed without opinion. Furthermore, the Supreme Court cast doubt on the precedential value of *Coit v. Green* in 1973 when it noted that while the IRS was originally a defendant in the case, the Commissioner reversed his position[63] before the Supreme Court affirmance.[64] "Thus, the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy."[65]

The court of appeals gave no further support for its conclusion that the denigration suffered by the plaintiffs in *Wright* was a cognizable rather than an abstract injury. The support given is

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58. 417 U.S. at 570 n.10.

59. *Id.* For text of Court's remarks *see supra* note 55.

60. Brief for the Federal Appellees at 8 n.6, Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981), *petitions for cert. filed sub nom.*, Allen v. Wright, 50 U.S.L.W. 3353 (U.S. Oct. 20, 1981) (No. 81-757) and Regan v. Wright 50 U.S.L.W. 3467 (U.S. Nov. 23, 1981) (No. 81-970). While the complaint appears to be concerned only with segregation, it is possible that the plaintiffs were actually attacking discrimination by using segregation as one factor which would give rise to a presumption that the school discriminates. It appears that the presumption would be rebuttable unless the school was established or expanded about the same time public schools in the community began desegregating. *See* Complaint, *supra* note 11, at 3-4.

61. 404 U.S. 997 (1971), *aff'g mem.* Green v. Connally, 330 F. Supp. 1150 (D.D.C.). This is the original affirmance of the case that was reopened and consolidated with *Wright*.

62. *See supra* note 7.

63. *Id.*

64. IRS News Release (July 10, 1970) *reprinted in Hearings, supra* note 8, at 10; 656 F.2d at 823.

65. Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974).

less than convincing. Viewing the injury alleged objectively rather than subjectively, it appears that the plaintiffs in *Wright* merely had an interest in the problem rather than a direct stake in the outcome. Thus, their injury did not warrant the exercise of federal court jurisdiction. The plaintiffs, therefore, failed both the allegation and cognizable injury tests of the injury in fact requirement.

C. The Causal Connection Requirement

The second article III requirement for standing is that there be a showing that the injury alleged was caused by the defendant's conduct, such that granting the relief requested will redress the injury. The appellate court's conclusion that this requirement was satisfied appears to be sound. The court conducted its analysis by distinguishing *Simon v. Eastern Kentucky Welfare Rights Organization.*[66] In *Eastern Kentucky,* the Supreme Court denied standing to indigents challenging the validity of a revenue ruling that recognized the tax-exempt status of hospitals even though they provided only free emergency room treatment to those unable to pay. Although the plaintiffs could show they had been denied hospital service, there was no standing to sue since they could not show that the denial of service resulted from the ruling that was being challenged.[67] As a result, it was "purely speculative" whether granting the relief requested would make the desired services available to the plaintiffs.[68]

The *Wright* case does not suffer from the *Eastern Kentucky* infirmity. The plaintiffs directly challenge the tax exemptions as causing harm by their mere existence. There is no question that withdrawal of the tax exemptions would redress that injury. Therefore, the court of appeals was correct in its view that *Eastern Kentucky* did not require dismissal of the complaint, for the causal connection absent in *Eastern Kentucky* was present in *Wright.*

D. The Policy Considerations

In deciding that the plaintiffs in *Wright* had standing to sue, the court of appeals failed to address any policy considera-

66. 426 U.S. 26 (1976).
67. *Id.* at 42-43.
68. *Id.* at 42.

tions underlying the doctrine of standing. By this failure, the court ignored the Supreme Court's warning that "[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . ."[69] "The 'many subtle pressures' which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours."[70] What are these policy considerations? This question is difficult to answer because they are rarely articulated. However, as previously mentioned, those suggested by various commentators[71] can be grouped into the following four categories: (1) the need for adverse parties to ensure full consideration of all relevant issues, (2) the concern that judicial administration would be burdened, (3) the concern that the principle of separation of powers would be violated, and (4) the availability of other avenues of redress.

1. Adverse parties

Since the Supreme Court has no independent information-gathering capabilities, it has often emphasized the need for truly adverse parties to ensure full consideration of all relevant issues.[72] The *Wright* case is a good example of the potential dangers of deciding a case in which the parties are not truly adverse. There are two adversity-of-interest problems in allowing the plaintiffs in *Wright* to sue the IRS. First, the interests of the plaintiff and the IRS are closely aligned. If the plaintiffs were to prevail on the merits, not only would the IRS suffer no detriment, but federal government revenues would actually increase. Moreover, soon after *Wright* was filed the IRS proposed guidelines closely resembling the relief requested.[73] Second, the par-

69. Poe v. Ullman, 367 U.S. 497, 508 (1961).

70. Flast v. Cohen, 392 U.S. 83, 97 (1968).

71. *See generally* Brilmayer, *supra* note 33; Scott, *supra* note 33; Comment, *supra* note 33.

72. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221-22 (1974); United States v. Richardson, 418 U.S. 166, 191 (1974) (Powell, J., concurring); Flast v. Cohen, 392 U.S. 83, 100 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962).

73. The first version of the proposed procedures, Proposed Revenue Proc., 43 Fed. Reg. 37296 (1978), would have created an almost irrebuttable presumption that a school discriminated if it had either been adjudicated discriminatory or had been formed or substantially expanded at about the same time as the public schools in the area were desegregated, unless the current enrollment included a minimum level of minority students. *Id.* § 3.03. Because public response to the guidelines was so critical, they were revised. Proposed Revenue Proc., 44 Fed. Reg. 9451 (1979). Implementation of either

ties who really had a stake in the outcome, the schools whose tax benefits were being challenged, were not original parties to the suit. Of course the schools could have intervened, as one did, to protect their interests, but that is not what the law requires. The plaintiff must sue his adversary—not sue his friend and let his adversary intervene.

The absence of adversity of interest in *Wright* causes serious problems. Were standing granted, important constitutional questions would arise in deciding the merits of the case. One such issue would be whether the IRS can withdraw tax-exempt status from a school in which discrimination is religiously motivated.[74] That issue may not be adequately resolved in a suit in which the IRS instead of the school involved is the defendant.

2. *Burdens on judicial administration*

The number of civil cases terminated in federal district courts has risen from about 62,000 in 1960 to over 143,000 in 1979.[75] This increase in the quantity of cases litigated has been called "near runaway inflation."[76] Because of this problem, when ruling on standing to sue, the courts should consider the burden from the increased caseload that results when the meaning of "cognizable injury" is expanded—a burden that must be borne not only by the judicial system, but also by other litigants whose participation in that system is delayed.

If the *Wright* plaintiffs were granted standing to sue, their central argument on the merits would be that tax exemptions to discriminatory schools represent an unlawful government subsidy in support of private discrimination.[77] This theory presents some potential problems. Professors Bittker and Kaufman have noted that in broad terms the subsidy label can be placed on

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proposal was prevented by the Ashbrook and Dornan amendments. *See supra* note 16.

74. About 80% of all private schools are affiliated with some religion. *See Hearings, supra* note 8, at 252 (statement of Jerome Kurtz). For differing views on the issue, see *id.* at 288, 293-98 (statement of William B. Ball); Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229, 258-75 (1979); Note, *The Internal Revenue Service's Treatment of Religiously Motivated Racial Discrimination by Tax Exempt Organizations*, 54 NOTRE DAME LAW. 925, 943-44 (1979). *But see Hearings, supra* note 8, at 273-74 (statement of Bernard Wolfman).

75. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617, 618 n.6.

76. *Id.* at 617.

77. *See* Complaint, *supra* note 11, at 25-26.

any tax benefit that deviates from a pure measure of net income, i.e., gross income less the expenses incurred in generating it.[78] Since every taxpayer is the recipient of some tax benefits beyond those items necessary to compute a pure net income,[79] all taxpayers are "subsidized" by the federal government. If the plaintiffs in *Wright* have standing to challenge the tax exemptions of private schools, then others have standing to challenge any other subsidy that supports racial discrimination. Further, gender-based and other kinds of discrimination could be attacked. Of course, this burden on judicial administration would be only temporary if the *Wright* plaintiffs lost on the merits. However, if the plaintiffs prevailed on the merits, then the potential would exist for the tax laws to be used to challenge private discrimination through a claim that various tax benefits represent an unlawful government subsidy (state action) in support of the private discrimination.[80] This new weapon would scramble the administration of the tax laws since, for example, one party could sue the IRS for the revocation of a discriminatory taxpayer's zero bracket amount. Furthermore, if the only injury required for standing was the denigration suffered by the plaintiff from the government subsidy, then the potential burden of these cases on the overloaded judiciary would become significant.

One possible criticism of this discussion is that it takes the *Wright* case to its logical extremity. Admittedly, just because tax exemptions might be considered state action in cases like *Wright* does not mean that less pervasive tax benefits would constitute state action in other cases. However, since no determination has been made as to which tax benefits are state action and which are not, consideration of the full potential of the bur-

78. *See* Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51, 63-65 (1972).

79. These tax benefits include, but are not limited to, itemized deductions (*e.g.*, interest, charitable contributions, medical expenses, and taxes), credits (*e.g.*, earned income credit, investment tax credit, and energy credit), the zero bracket amount for those who do not itemize, and the long-term capital gain deduction.

80. In addition to claiming that the current regulations violate the fifth amendment, the plaintiffs in *Wright* contend that the regulations are inconsistent with § 501(c)(3) of the Internal Revenue Code. The theory is that before a school can qualify as a tax-exempt educational institution under the code, it must also be charitable. Since charitable organizations do not operate in contravention of public policy and racial discrimination is against public policy, organizations that discriminate are not charitable and thus not tax exempt. Since the questions of what constitutes public policy and what actions contravene it are infinite, the recognition of standing for citizens to make that type of claim has the potential to place significant burdens on the judiciary.

den on the judiciary is useful.

3. Separation of powers

Theoretically, our government consists of three coequal branches. It is the function of the legislature to make the laws, the executive to enforce the laws, and the judiciary to interpret the laws. "Congress and the executive can be checked by the judiciary when they exceed their powers, but the judiciary is unique among the three branches in that it is the judge of its own power."[81] "Relaxation of standing requirements is directly related to the expansion of judicial power."[82] It is inescapable that expansion of judicial power through relaxation of standing requirements can project the courts into matters reserved for the other branches. *Wright* is one such example of the courts' intrusion into matters reserved for Congress and the IRS.

The IRS is charged with the duty of enforcing the Internal Revenue Code. To give guidance to taxpayers, it promulgates treasury regulations, revenue rulings, and revenue procedures. The IRS interpretation of the code can be attacked either by congressional amendment of the code or by judicial action. The courts may be called on to give their interpretation of the code in the context of a suit between a taxpayer, who is litigating his own tax liability, and the IRS. When acting within that context, the court is performing its proper role of interpreting the law as applied to a particular set of facts. However, in *Wright* the court was asked to promulgate a more stringent regulation for tax-exempt schools because the plaintiffs were dissatisfied with the IRS regulations. The court may be capable of drafting a new, more stringent regulation, but to do so usurps the authority given to Congress and the IRS. Moreover, such interference with the other branches is not "in the long run beneficial to either,"[83] and dilutes the respect of the citizenry for the government.[84]

4. Other available remedies

It is often argued that the courts should exercise self-re-

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81. Smith, *Urging Judicial Restraint*, 68 A.B.A. J. 59, 60 (1982).

82. United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

83. *Id.*

84. *See* Smith, *supra* note 81. "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." *Id.* at 60.

straint because they are the anti-majoritarian element in an otherwise democratic form of government.[85] However, the courts were insulated from the electorate precisely to enable the judiciary vigorously to protect those important interests of the minority that would otherwise be ignored by the majority. Therefore, if a party has an important interest to protect, and his only recourse is through the courts, then it is arguable that the other policy factors should be accorded less weight.

The plaintiffs in *Wright* seek to protect an interest in providing their children with a racially integrated public school education. The importance of that interest is indisputable. However, a suit against the IRS to revoke the tax-exempt status of certain segregated private schools is not their only recourse. In addition to recourse through the political process, the plaintiffs have another remedy through the courts.

Every private nonsectarian school that discriminates on the basis of race is in violation of 42 U.S.C. section 1981.[86] The question of whether the same rule applies to religiously motivated discrimination has never been resolved. The reason the *Wright* plaintiffs preferred to sue the IRS instead of each school under section 1981 is probably that suing the IRS presented fewer tactical problems, rather than because they actually felt denigrated by the tax exemptions. Under section 1981

> [s]tanding would have been available only to those applicants who were denied admission to a particular private school, and the defendant class could have been composed of only those schools that actually denied admission to any member of the plaintiff class. In addition, relief would have been available only on a case-by-case basis, and to prevail, separate proof of each school's discriminatory practices would have been necessary.[87]

Further, the IRS may be less likely to assert freedom of religion

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85. *See, e.g.*, United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring); Comment, *supra* note 33, at 519.

86. Runyan v. McCrary, 427 U.S. 160 (1976). 42 U.S.C. § 1981 (1976) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

87. Note, *The Judicial Role In Attacking Racial Discrimination In Tax-Exempt Private Schools*, 93 HARV. L. REV. 378, 385 n.40 (1979).

as a defense than the individual schools. Despite the tactical problems involved in a section 1981 action, these difficulties are not the equivalent of having no other available remedy. By merely applying to a discriminatory school and being denied admittance, the plaintiffs in *Wright* could file a suit which not only would remedy the denigration they suffer from such a school existing in their community, but also would protect their interest in racially integrated public school education.

In addition, there are some distinct advantages offered by a section 1981 action.[88] First, it is likely to have a greater effect on the real harm: racial discrimination. Under a section 1981 action, a school can be enjoined from future discrimination or ultimately shut down, while a withdrawal of tax-exempt status may actually foster continued discrimination in those schools that are able and willing to operate without the tax exemptions.[89] Second, a section 1981 action provides the proper forum with the proper parties for full consideration of the validity of religiously motivated discrimination.

III. Conclusion

Article III of the Constitution limits the jurisdiction of federal courts to "cases or controversies." The case or controversy requirement has been interpreted to require both an injury in fact and a causal connection between the injury and the defendant's conduct. If, as the appellate court assumed, the injury alleged by the plaintiffs in *Wright* was the denigration suffered from government support of segregated schools through tax exemptions, that injury does not appear to warrant federal court jurisdiction.

But the constitutional requirements of standing should not be applied without considering the policy factors underlying the doctrine. Although there is a strong public policy against racial discrimination, legal recognition of the injury alleged in *Wright* (1) would not provide the adverse parties needed to ensure full consideration of all relevant issues, (2) would potentially increase the administrative burdens on the judiciary, (3) would

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88. *See generally* Note, *supra* note 74, at 947-49.

89. The threat of revoking tax exemptions has been the most common method of coercing schools into eliminating discrimination. Once the tax exemptions are revoked, that threat is lost. If a discriminatory school can continue to operate without tax exemptions, there is no reason to believe it would do so in a nondiscriminatory manner.

place a strain on separation of powers, and (4) would not constitute the plaintiffs' only avenue of redress. In light of the constitutional standing requirements and the underlying policy considerations, the Court of Appeals for the District of Columbia Circuit erroneously held that the plaintiffs in *Wright* had standing to sue.

Jamie D. Scott