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Standing to Challenge Another's Tax Benefits: Abortion Rights Mobilization Revisited

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I. Introduction

I.R.C. § 501(c)(3)[1] prohibits tax-exempt charities from engaging in political campaign activity.[2] There have been allegations that the Catholic Church has engaged in such activity by supporting candidates for public office who oppose abortion, and

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 Portions of this paper are based on earlier papers presented to the Tax Forum and at a Practicing Law Institute program.

1. Citations to "I.R.C." refer to the Internal Revenue Code of 1986, as amended. Citations to "Treas. Reg." refer to the Treasury Regulations promulgated under it. References to the "Code" are intended to mean the Internal Revenue Code of 1986, as amended, unless the context clearly otherwise requires.

2. A detailed discussion of this prohibition is beyond the scope of this paper. The following articles are helpful: Chisolm, Exempt Organization Advocacy: Matching the Rules to the Rationale, 63 IND. L.J. 201 (1988); West, The Free Exercise Clause and the Internal Revenue Code's Restrictions on the Political Activity of Tax-Exempt Organizations, 21 WAKE FOREST L. REV. 395 (1986); Caron & Dessingue, I.R.C. 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions, 2 J. LAW & POL. 169 (1985); Whaley, Political Activities of Section 501(c)(3) Organizations, 29 S. CALIF. TAX. INST. 195 (1977); Note, Political Speech of Charitable Organizations Under the Internal Revenue Code, 41 U. CHI. L. REV. 352 (1974); Garrett, Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations, 59 GEO. L.J. 561 (1971); Hauptman, Tax-Exempt Private Educational Institutions: A Survey of the Prohibition Against Influencing Legislation and Intervening in Political Matters, 37 BROOKLYN L. REV. 107 (1970); Note, Regulating the Political Activities of Foundations, 83 HARV. L. REV. 1843 (1970); Note, Political Activity and Tax-Exempt Organizations Before and After the Tax Reform Act of 1969, 38 GEO. WASH. L. REV. 1114 (1969); Note, The Sierra Club: Political Activity and Tax Exempt Charitable Status, 55 GEO. L.J. 1128 (1966-1967); Note, The Revenue Code and a Charity's Politics, 73 YALE L.J. 661 (1964); Clark, The Limitation on Political Activities: A Discordant Note in the Law of Charities, 46 VA. L. REV. 439 (1960). See also the discussions in Cummings, Political Expenditures, TAX MGMT. (BNA) No. 231-3rd (1988); 1 R. DESIDERIO & S. TAYLOR, PLANNING TAX-EXEMPT ORGANIZATIONS ch. 13 ("Action Organizations"), and §§ 25.06, 27.12, 27.13, and 32.08 (1987); B. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS ch. 14 ("Political Activities") (5th ed. 1987).

by opposing "pro-choice" candidates. The Internal Revenue Service appears to have taken no action on these allegations.[3] At least one private group has.

In the early 1980's, 29 organizations and individuals — led by an organization called Abortion Rights Mobilization, Inc. — brought suit against the Secretary of the Treasury, the Commissioner of Internal Revenue, and two Catholic organizations, in the Southern District of New York, seeking revocation of the Catholic Church's tax-exempt status under I.R.C. § 501(c)(3). All of the plaintiffs were pro-choice and all of them opposed the alleged activities of the Catholic Church in lobbying and participating in political campaigns on behalf of candidates supporting the Church's anti-abortion views and in opposition to candidates with contrary views. The complaint alleged that the IRS had declined to enforce, against the Catholic Church, the Code's prohibition against political campaign activity by I.R.C. § 501(c)(3) organizations, while enforcing it regularly as to other such organizations. Plaintiffs asked for relief under both the equal-protection and the establishment clauses of the Constitution.[4]

After extensive litigation,[5] the Second Circuit Court of Appeals in 1989 dis-

3. Because the IRS is prohibited, by I.R.C. § 6103(a), from making disclosure of tax returns and tax return information, it is possible that the IRS is indeed pursuing the issue but without the public having knowledge of its activities. References in this paper to the "IRS" or the "Service" are intended to mean the Internal Revenue Service.

4. The facts are more fully developed in the first of the reported decisions in the litigation, Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y. 1982).

5. The entire lengthy string citation to the reported decisions in the Abortion Rights Mobilization litigation is: Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y. 1982); certification denied by Abortion Rights Mobilization, Inc. v. Regan, 552 F. Supp. 364 (S.D.N.Y. 1982); Abortion Rights Mobilization, Inc. v. Regan, 603 F.

(continued...)

missed the case and denied standing to the last remaining plaintiffs;[6] the Supreme Court denied certiorari on April 30, 1990.[7] The next day, the president of Abortion Rights Mobilization, Lawrence Lader, was quoted as saying, "I just don't know how you'd come up with a plaintiff to fit the Court's definition of standing."[8] This paper suggests that Mr. Lader may have been wrong, and that the Second Circuit's 1989 opinion in ARM perhaps may be better understood as setting forth a road map for, rather than as posing an insuperable obstacle to, obtaining standing.

Permitting third-parties to have standing to challenge tax-exempt status might dramatically change the pace of the development of the law in some areas. This paper (in part II, p. 4, below) first briefly mentions a few of the restrictions imposed on I.R.C. § 501(c)(3) organizations, focussing on fields in which the IRS has been less than vigorous in applying or seeking to elaborate the scope of such restrictions. This identifies several areas in which third-party challenges to tax exemptions might accel-

5. (...continued)
Supp. 970 (S.D.N.Y. 1985); Abortion Rights Mobilization, Inc. v. Baker, 1985 WL 2032 (July 15, 1985); Abortion Rights Mobilization, Inc. v. Baker, 110 F.R.D. 337 (S.D.N.Y. 1986); aff'd, In re United States Catholic Conference, 824 F.2d 156 (2d Cir. 1987); cert. granted, United States Catholic Conference v. Abortion Rights Mobilization, Inc., 484 U.S. 975 (1987); rev'd, United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988); In re United States Catholic Conference, 885 F.2d 1020 (2d Cir. 1989); cert. denied, Abortion Rights Mobilization, Inc. v. United States Catholic Conference, ___ U.S. ___, 110 S. Ct. 1946 (1990).

6. In re United States Catholic Conference, 885 F.2d 1020 (2d Cir. 1989) (hereinafter cited as "ARM").

7. Abortion Rights Mobilization, Inc. v. United States Catholic Conference, ___ U.S. ___, 110 S. Ct. 1946 (1990).

8. N.Y. Times, May 1, 1990, at A18, cols. 4-5.

erate changes in the law. It next (in part III, p. 14 below) provides an overview of the law of standing, before turning (in part IV, p. 21 below) to a discussion of the Abortion Rights Mobilization case. An analysis of other relevant precedents is then provided (in part V, p. 28 below). After suggesting (in part VI, p. 44 below) several methods for achieving standing in light of the ARM decision, a few final comments and conclusions are set forth (in part VII, p. 46 below).

II. Restrictions on Activities of I.R.C. § 501(c)(3) Entities

The tax law imposes various restrictions on organizations described in I.R.C. § 501(c)(3). Some of these appear on the face of the statute; others have been engrafted by courts or the Service. The IRS has been fairly vigilant in enforcing some of these restrictions.[9] Others, however, appear to have been given less, or uneven, attention. The discussion here centers on several examples of the latter group, because — if third-parties *could* achieve standing to challenge tax-exempt status — it seems likely that they would force further judicial examination of these sometimes-less-scrutinized restrictions.

The Code on its face permits an organization to qualify under I.R.C. § 501(c)(3) only if

> "no substantial part of [its] activities . . . is carrying on propaganda, or otherwise attempting to influence legislation . . . and [it] does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office."

9. For example, I.R.C. § 501(c)(3) proscribes private inurement, stating that an organization will qualify only if "no part of . . . [its] net earnings . . . inures to the benefit of any private shareholder or individual." The IRS frequently enforces this prohibition. See, e.g., the many cases and precedents cited in B. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS ch. 12 (5th ed. 1987).

From one point of view, these lobbying and political campaign restrictions have been given enormous attention by the IRS, particularly during the past five years while the debate raged over the proper scope of the regulations for purposes of the elective provisions of I.R.C. § 501(h).[10] From another viewpoint, however, it may be that the Service has not enforced these restrictions vigorously or even-handedly with respect to certain religious organizations. This latter viewpoint forms the gravamen of the Abortion Rights Mobilization's litigation allegations.

An even less-explored restriction derives not from the face of the statute but from the Supreme Court's interpretation of it. In Bob Jones Univ. v. United States,[11] the Supreme Court denied charitable tax-exempt status[12] to schools which discriminated against blacks. The majority opinion, by Chief Justice Burger, uses a simple syllogism. As its first premise, it interprets I.R.C § 501(c)(3) as resting on "certain common law standards of charity — namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."[13] As its second premise, it finds that "racial discrimination in education violates a most fundamental national public policy . . . ."[14] From these premises, it concludes

10. Much has been written about this recent controversy, and about the earlier development of the Code's restrictions under I.R.C. § 501(c)(3) itself. A selected bibliography, of almost 100 items, is set forth in Appendix B, p. 54, below. The now-final I.R.C. § 501(h) regulations were adopted by T.D. 8308, 55 Fed. Reg. 35579 (Aug. 31, 1990). They appear as Treas. Reg. §§ 1.501(h)-1, -2, and -3.

11. 461 U.S. 574 (1983), decided May 24, 1983.

12. This phrase is intended to refer to I.R.C. § 501(c)(3) generally.

13. 461 U.S. at 586.

14. 461 U.S. at 593.

that the institutions in question[15] do not qualify for tax exemption under I.R.C. § 501(c)(3).

The Justices were clearly concerned about the ultimate reach of this line of reasoning. Thus, the opinion cautions:

> "We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy."[16]

Only a few pages later, it repeats the caveat:

> "We emphasize, however, that these sensitive determinations should be made only where there is no doubt that the organization's activities violate fundamental public policy."[17]

Two aspects of the Bob Jones decision bear noting: (1) it rests on statutory interpretation, not constitutional, grounds;[18] and (2) it identifies only racial discrimination, not other activities, as violating "fundamental public policy."[19]

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15. The Bob Jones opinion involved both Bob Jones University, located in Greenville, South Carolina, and Goldsboro Christian Schools, located in Goldsboro, North Carolina. Neither institution denied that it discriminated on racial grounds; both appear to have claimed that such discrimination was based on sincerely held religious beliefs. See 461 U.S. at 602 n. 28.

16. 461 U.S. at 592.

17. 461 U.S. at 598.

18. The Court explicitly declined to rule on the constitutional arguments presented to it. 461 U.S. at 599 n. 24.

19. This is not, of course, intended as a criticism of the opinion, nor is any negative implication to be drawn from what *was* decided by it.

Nearly eight years after the Court spoke, the law remains surprisingly undeveloped in both of these areas. Despite the tremendous potential impact of the Bob Jones decision, it has rarely been applied except in the area of racial discrimination. The constitutional issues, argued but not decided in Bob Jones, are still largely unexplored.[20] It is as though a massive rock was dropped into a deep lake, but produced only a small splash and very few ripples.

One important reason for this is that the uncertain reach of "fundamental public policy" properly concerns — and thus constrains — government officials. Fear of its potential scope was one of the reasons set forth by the Reagan Administration to explain its about-face, in early 1982, on the Bob Jones case:[21]

> "For example, if we were to endorse the theory on which the Service was proceeding before the Supreme Court, what would prevent the Service from revok-

20. Largely does not mean entirely. In McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), a three-judge district court held that an I.R.C. § 501(c)(8) fraternal beneficiary society — the Elks — was not entitled to tax-exempt status because it practiced racial discrimination. The court did *not* disqualify I.R.C. § 501(c)(7) social clubs on the same basis, because (it held) the scope of the tax exemption granted social clubs was much less, and thus their activities did not constitute "state action." In Green v. Kennedy, 309 F. Supp. 1127 (D.D.C.) (three-judge court, per curiam), appeal dismissed sub nom. Cannon v. Green, 398 U.S. 956 (1970), and appeal dismissed sub nom. Coit v. Green, 400 U.S. 986 (1971), plaintiffs argued that it would be unconstitutional to grant I.R.C. § 501(c)(3) status to racially-discriminatory private schools. In granting a temporary injunction, the District Court held the issues to be "grave and substantial," and found that "plaintiffs have a reasonable probability of success." 309 F. Supp. at 1132. Both decisions squarely rest on constitutional grounds. They also antedate Bob Jones by more than a decade.

21. The direct history of the Bob Jones case is fascinating, but would require a too-lengthy detour to consider here. Some of the more interesting factual aspects of the case are set forth in Appendix A, at p. 49, below.

> ing the tax exempt status of Smith College, a school open only to women? Does sex discrimination violate a clearly ennunciated [sic] public policy? . . .
>
> "What about religious organizations that refuse to ordain priests of both sexes? And could the Commissioner decide that if Black Muslim organizations refuse to admit whites they should be denied a tax exempt status because they discriminate?
>
> "Further, should the IRS Commissioner be permitted — in the absence of legislation — to determine what is national policy on abortion? Should hospitals that refuse to perform abortions be denied their tax exempt status? Or, reading Federal policy another way, should hospitals that do perform abortions be denied their tax exempt status?"[22]

In finding that racial discrimination in education violates a fundamental public policy, the Supreme Court majority in Bob Jones examined the positions of each of the three branches of government. First, it referred to its decision in Brown v. Board of Education[23] as signalling an end to the era in which racial segregation prevailed in education in this country.[24] It looked to the "unbroken line" of cases following that decision to demonstrate the "Court's view that racial discrimination in education violates a most fundamental national policy . . . ."[25] Second, it directed its attention to Congress, finding that the passage of Titles IV and VI of the Civil Rights Act of 1964 and "numerous enactments since then, testify to the public policy against racial dis-

22. Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearing Before the Committee on Ways and Means, House of Representatives, 97th Cong., 2d Sess. 182-83 (Feb. 4, 1982) (statement of Robert T. McNamar, Deputy Secretary of the Treasury).

23. 347 U.S. 483 (1954).

24. 461 U.S. at 593.

25. Id.

crimination."[26] Third, it turned to the Executive Branch, and found in Executive Orders issued by Presidents Truman, Eisenhower, and Kennedy a demonstration of "the commitment of the Executive Branch to the fundamental policy of eliminating racial discrimination."[27]

This methodology knows no clear boundary. Would it be sufficient, for example, if the courts and Congress had taken strong positions, but the Executive Branch had remained silent? Suppose only one of the three branches had acted? With what balance scale and in what quantities should the weight of a "public policy" be measured to determine whether it is "fundamental"?

The Service has clearly indicated its own reticence about possible extensions of the Bob Jones rationale. For example, a fairly recent General Counsel Memorandum, after quoting the Supreme Court's own caveat in the Bob Jones decision, states:

> "This caution expressed by the Supreme Court is an important factor in determining the limitations imposed by charitable trust law. We believe that in Bob Jones the Court set a standard that the public policy involved must be fundamental and there must be no doubt that the activity involved is contrary to that fundamental public policy."[28]

That same G.C.M. confirms that "[o]nly rarely has the Service asserted that an organization was not described in section 501(c)(3) based on illegal acts or violations of clear federal public policy outside the area of racial discrimination in education."

Nevertheless, there are a few situations, outside of racial discrimination, in which the Bob Jones rationale has been employed by the Service or by courts. This

26. 461 U.S. at 594.

27. 461 U.S. at 595.

28. G.C.M. 39800 (June 20, 1989).

paper will briefly discuss certain other types of activity which may lead to a loss of tax-exempt status.

Rev. Rul. 75-384[29] deals with an anti-war group which encouraged its members and others to engage in civil disobedience to further the group's purposes. The ruling holds that tax exemption should be denied. It states, in part:

> "In this case the organization induces or encourages the commission of criminal acts by planning and sponsoring such events. The intentional nature of this encouragement precludes the possibility that the organization might unfairly fail to qualify for exemption due to an isolated or inadvertent violation of a regulatory statute. Its activities demonstrate an illegal purpose which is inconsistent with charitable ends. Moreover, the generation of criminal acts increases the burdens of government, thus frustrating a well recognized charitable goal, i.e., relief of the burdens of government. Accordingly, the organization is not operated exclusively for charitable purposes and does not qualify for exemption from Federal income tax under section 501(c)(3) of the Code."

Note that the ruling carefully puts aside the question of the effect of an isolated or inadvertent violation of law. Although the rationale of the ruling has been asserted occasionally in other precedents,[30] Rev. Rul. 75-384 only rarely has been cited, and never has been relied on either by any court or by the Service in any private letter ruling. By contrast, the Service is willing to grant I.R.C. § 501(c)(3) status to organizations which promote their otherwise-qualifying ends in a confrontational manner, so long as the confrontational tactics are not illegal.[31]

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29. 1975-2 C.B. 204. Rev. Rul. 75-384 is supported by G.C.M. 36153 (Jan. 31, 1975). Although pre-dating the Bob Jones decision, both the ruling and the supporting G.C.M. rest on the same public-policy line of analysis.

30. E.g., G.C.M. 38264 (Jan. 30, 1980).

31. G.C.M. 38415 (June 1980).

One case dealt with a purportedly tax-exempt charity — the Church of Scientology of California — which was trying to forestall IRS inquiries into its activities. To that end, it falsified records, burglarized IRS offices, stole government records, and otherwise tried to prevent the Service from properly auditing it. The Tax Court said:

> "When we consider all the facts spread across the voluminous record in this case, we are left with the inescapable conclusion that one of petitioner's overriding purposes was to make money. We also conclude that criminal manipulation of the IRS to maintain its tax exemption . . . was a crucial and purposeful element of petitioner's financial planning."[32]

In an alternate holding, the Tax Court found these criminal activities justified revocation of tax exemption based on Bob Jones. The organization's pattern of conduct was shocking, and there were sufficient *other* grounds, including extensive private inurement, to support the result.[33]

At least one other Court has denied tax exemption to an organization for trifling with the Service. In 1987, the D.C. Circuit Court of Appeals affirmed a denial of tax-exempt status to the Synanon Church. An earlier case between Synanon and a private party had found that Synanon officials had destroyed evidence relevant to the determination of its tax-exempt status, including its alleged advocacy of violence and

32. Church of Scientology of California, 83 T.C. 381, 504 (1984) (footnote omitted), aff'd on other grounds, 823 F.2d 1310 (9th Cir. 1987), cert. denied, 486 U.S. 1015 (1988).

33. The 9th Circuit affirmed solely on the private inurement basis.

deflection of funds to private persons.[34] Since this constituted illegal conduct, tax-exempt status was properly revoked.[35]

One of the most interesting potential applications of the Bob Jones public-policy analysis is found in G.C.M. 39800.[36] There the IRS considered whether tax exemption should be accorded an organization that pays a teacher's salary for teaching three courses, in a public high school, on the Bible as literature and history. The issue was whether such payments violated the Establishment Clause of the First Amendment. If so, thought the Service, the organization in question would contravene a fundamental public policy — what could be more "fundamental" than the U.S. Constitution? — and could not claim tax-exempt status. After a lengthy consideration of the facts and many of the precedents, the memorandum concludes that, in the particular case, the courses dealt with the Bible only as literature, and thus there was no violation of the Establishment Clause. The memorandum clearly contemplates a loss of tax-exempt status, however, should a constitutional violation be found.

Although racial discrimination in education is indisputably condemned, the IRS position on racial discrimination in *grant making* is more complex. Prior to the Bob Jones decision, the Service had indicated that a scholarship program for whites only would be ineligible for tax exemption.[37] The Service later revoked its earlier memorandum, and opined that a whites-only scholarship policy would not *automatically*

34. Synanon Foundation, Inc. v. Bernstein, (D.C. Sup. Ct. 1983) (not officially reported), aff'd, 503 A.2d 1254 (D.C. App.), cert. denied, 479 U.S. 815 (1986).

35. Synanon Church v. United States, 579 F. Supp. 967 (D.D.C. 1984), aff'd, 820 F.2d 421 (D.C. Cir. 1987). See also G.C.M. 37817 (Jan. 10, 1979) (accord).

36. (June 20, 1989).

37. G.C.M. 37462 (Mar. 17, 1978).

result in loss of I.R.C. § 501(c)(3) status. Rather, all the facts and circumstances would be examined to determine whether the administration of the fund fostered racial discrimination.[38] The reasoning is clearly stated in an IRS Training Publication:

> "For instance, a private educational trust that awards scholarships only to Caucasian students to attend a predominantly minority school could be said actually to *discourage* racial discrimination in education. On the other hand, scholarships for Caucasian students to attend a school that has a racially discriminatory policy would clearly *foster* racial discrimination in education and, therefore, would not qualify for exemption under IRC 501(c)(3)."[39]

The same line of reasoning was later applied to a minorities-only scholarship program.[40]

Outside of racial discrimination, illegal conduct, and constitutional violations, there is little precedent illuminating the other sorts of activities which may lead to denial of tax exemption on Bob Jones grounds. Nevertheless, future applications of the Bob Jones standard may be far reaching indeed. Consider, for example, the following possible candidates: sex discrimination (e.g., by non-coed schools),[41] religious

38. G.C.M. 39082 (Nov. 30, 1983).

39. Update on Private Schools and Impact of *Bob Jones University v. U.S.*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR 1984 10 (Training 4277-06 (1-84)) (emphasis added).

40. G.C.M. 39117 (Jan. 13, 1984).

41. In an early reaction to the Bob Jones decision, an IRS training publication noted that "[p]ublic policy in other areas, such as sex discrimination in education, is not so clearly and uniformly established." Update on Private Schools and Impact of *Bob Jones University v. U.S.*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR 1984 10, 16 (Training 4277-06 (1-84)). Note, too, that I.R.C. § 501(i) forbids I.R.C. § 501(c)(7) social clubs from engaging in *racial* discrimination and (with certain modifications) *religious* discrimination, but does *not*

(continued...)

discrimination (e.g., by churches), racial discrimination by black organizations, anti- or pro-abortion activities (e.g., by hospitals), age discrimination, and discrimination against the handicapped.[42]

As noted above,[43] the Service has been extremely cautious in applying or extending the Bob Jones rationale. Except for the examples discussed above, no other instances of its application could be found. The IRS also allegedly has not vigorously and even-handedly enforced the I.R.C. § 501(c)(3) prohibition of political campaign activities. Many advocacy organizations would feel no such constraints. The balance of this paper considers whether anyone other than the IRS might be able to achieve standing to raise these (or other) issues affecting an organization's tax-exempt status.

III. Standing to Sue: An Overview

Because the standing doctrine is complex, the case-law is inconsistent and much-criticized, and the writings about it are voluminous,[44] this paper's analysis of it must be understood to be brief, suggestive, and probably even to some extent mislead-

41. (...continued)
forbid *gender* discrimination. For additional citations, see B. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 152-54 (5th ed. 1987); P. TREUSCH, TAX-EXEMPT CHARITABLE ORGANIZATIONS 178-79 (3d ed. 1988).

42. See Bird, Exempt Organizations and Discrimination, 1 P-H TAX EXEMPT ORGANIZATIONS ¶ 3036 (1986), marshalling various non-tax statutory provisions and court decisions bearing on gender, religious, age, and handicap discrimination.

43. See text accompanying note 28, supra.

44. The selected bibliography on standing, in Appendix C at the end of this outline, p. 63 below, is not exhaustive. C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1984), item 29 in that bibliography, devotes more than 430 pages to the topic of standing, *not* counting pages in the pocket-part supplements. See 13 and 13A id. §§ 3531-3531.16.

ing in its simplicity.[45] No effort has been made to include multiple citations to cases, so even some of the leading relevant decisions are not referred to in this paper.[46] The goal in this part of the paper is merely to provide some scant exposure to the overall structure of the courts' treatment of standing, as a vantage point from which to consider, in more detail, the ARM litigation, other cases involving third-party attacks on another's tax benefits, and possible ways to attain standing after ARM.

"[C]urrent standing law is a relatively recent creation."[47] Indeed, in 1923, one of the first cases to deny a taxpayer the right to challenge a federal act, Frothingham v. Mellon,[48] referred to the plaintiff's interest as "minute and indeterminable,"[49] but never used the word, "standing." The standing doctrine is supported by two different

45. A leading treatise states that "standing doctrine is not susceptible of brief exposition." 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at p. 351 (2d ed. 1984). Because this portion of the paper is concededly brief, heavy reliance is here placed on references to that treatise for additional gloss on concepts which are only lightly addressed.

46. All can be found cited in the authorities cited in the bibliography at p. 63 below.

47. Fletcher, The Structure of Standing, 98 YALE L.J. 221, 224 (1988) (footnote omitted). It has been called "largely a creature of twentieth century decisions of the federal courts." 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §3531, at p. 340 (2d ed. 1984) (footnote omitted).

48. 262 U.S. 447 (1923). The Frothingham case has been called "preeminent among the early decisions limiting standing." 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.1, at 352 (2d ed. 1984).

49. 262 U.S. at 487.

sorts of considerations: (1) Article III concerns[50] — i.e., to protect the courts from giving merely advisory opinions, the parties must be those actually injured — and (2) "prudential" concerns — i.e., to insure vigorous and focussed presentation of evidence and arguments, and to preserve proper limits on the role of courts in our society, the parties must be directly and personally affected by the controversy.[51] The Supreme Court has clearly stated that both sorts of concerns are material.[52]

The first (i.e., constitutional) aspect of standing entails a three-part test: *first*, plaintiffs must demonstrate an injury in fact, which is concrete in nature and particularized as to them;[53] *second*, the injury must be traceable to the defendants' activi-

50. Article III, Section 2, of the constitution provides that "The judicial Power shall extend to all Cases . . . [and] Controversies . . . ." The constitutional aspect of standing doctrine derives from the notion that the federal courts may not entertain a litigation unless it is either a "case" or a "controversy," and that only certain persons (i.e., those with "standing") are the proper parties to commence such a litigation.

51. Several commentators have pointed out that advocacy groups, driven by principle, may actually be more forceful litigators than directly-injured parties. See, e.g., Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. PA. L. REV. 1033, 1037-38 (1968); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.3, at 409 (2d ed. 1984). The Supreme Court, rather than disagreeing, demurs: "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 486 (1982).

52. Warth v. Seldin, 422 U.S. 490, 498-99 (1975). See also 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at p. 345 (2d ed. 1984).

53. See 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.4 (2d ed. 1984).

ties;[54] and *third*, the injury must admit of redress by removing or preventing the defendants' activities.[55] These phrases derive precision of meaning, if at all, only by seeing how they have been applied in dozens or even hundreds of cases.[56] That, in turn, is a task well beyond the scope of this paper. For current purposes, it will have to suffice to identify the three basic inquiries suggested by the above phrases: injury, causation, and redressibility.

Once the constitutional threshold has been crossed, prudential concerns must also be satisfied. At least three verbal formulae exist for further tests which must be met: *first*, the plaintiff must fall "arguably within the zone of interests to be protected

54. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.5 (2d ed. 1984).

55. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.6 (2d ed. 1984). Some courts seem to have viewed the second and third tests as belonging to the prudential, rather than the constitutional, aspect of the standing doctrine. E.g., Tax Analysts and Advocates v. Blumenthal, 566 F.2d 130, 137-38 (D.C. Cir. 1977). But the Supreme Court has linked both causation and redressibility to constitutional concerns: "The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984).

56. It is far from clear that even such extended analysis will produce clarity. As one treatise puts it, "[r]eading the decisions that result seems no more edifying than it would be to read a thousand or two decisions that decide whether negligence was exhibited by a given course of behavior — it is impossible to be confident that all of the facts have been stated, or even that the conclusion represents an honest finding of negligence or no." 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.1, at 350-51 (2d ed. 1984).

by the statute or constitutional guarantee in question";[57] *second*, the plaintiff must be advancing his own rights rather than rights of others;[58] and *third*, courts are reluctant to deal with injuries which are generally shared by most citizens rather than being particular to the plaintiff or a smaller class of citizens.[59]

There is a tight linkage between standing and the substance of an alleged injury. Some cases have held that a plaintiff must plead all elements of the standing test, and must also claim standing by virtue of one or more of his specific attributes.[60] For example, a district court held it to be unconstitutional to deny use of a school's facilities to a prayer group.[61] The school board overwhelmingly voted not to appeal, but the lone dissenting member appealed on his own. No objection to his standing was made in the appellate court. In the Supreme Court,[62] after the issue of standing had been raised by the Court itself, he claimed standing as a parent of a child attending

57. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970). See 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.7 (2d ed. 1984).

58. See 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.9 (2d ed. 1984).

59. See 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3531.10 - 3531.11 (2d ed. 1984).

60. The Supreme Court has said that "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." Allen v. Wright, 468 U.S. 737, 752 (1984).

61. Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983), rev'd, 741 F.2d 538 (3d Cir. 1984).

62. The Supreme Court granted certiorari, 469 U.S. 1206 (1985).

the school. The majority, vacating the judgment, denied standing, holding that if parent standing was to be asserted, it should have been pleaded and proved below.[63] Under this view, a plaintiff actually entitled to standing may be denied that status for failure properly to identify and prove his qualifying posture — the particular hat he claims to be wearing to achieve standing.

Not all cases utilize this strict a standard. Different judges, different causes of action, and different factual patterns probably all affect the stringency of the test. Thus:

> "The level of detail that should be required [in pleadings] will vary with the circumstances of different kinds of cases. Perhaps the most important variable is the probability that standing will be denied. There is little to be gained by strict pleading rules as to classes of cases that are likely to survive. Beyond that point, different kinds of cases present different problems. Some matters are difficult to plead in detail; some kinds of injuries are readily assumed; some kinds of issues are eagerly approached by the courts. Other matters easily permit detailed pleading; other kinds of injuries may be viewed with suspicion; other issues should be approached only with the justification that arises from serious injury."[64]

63. Bender v. Williamsport Area School Dist., 475 U.S. 534, 545-49 (1986) (5-to-4 decision). As the court put it, "[s]ince Mr. Youngman was not sued as a parent in the District Court, he had no right to participate in the proceedings in that court in that capacity without first filing an appropriate motion or pleading setting forth the claim or defense that he desired to assert." 475 U.S. at 548 (footnote omitted).

64. 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.15, at p. 94-95 (2d ed. 1984).

The standing of the parties — at least insofar as determined by Article III considerations — also affects the court's subject-matter jurisdiction.[65] As the ARM court stated, "when a plaintiff lacks standing to bring suit, a court has no subject matter jurisdiction over the case."[66]

This paper analyzes standing for a particular and limited purpose: to consider who may challenge another's tax-exempt status. A distinction thus should be emphasized in order to avoid confusion: cases and commentators often refer to so-called "taxpayer standing." That concerns the status of the plaintiff rather than the substance of the litigation, and it is *not* the focus of attention here. Here we address the question whether persons, claiming *any* form of standing,[67] can challenge governmental action in administering the tax system. Here it is the substance of the litigation, rather than the status of the plaintiff, that is being examined.

65. In one case, the defendants withdrew their challenge to the standing of certain plaintiffs. The court went on, on its own motion, to dismiss for lack of standing, because "insofar as standing is an article III requirement for jurisdiction, the parties do not have the power to confer such jurisdiction upon the Court . . . ." Barhold v. Rodriguez, 863 F.2d 233, 234 (2d Cir. 1988). The U.S. Supreme Court, however, has employed language suggesting that standing affects a court's subject-matter jurisdiction even if based on prudential, rather than constitutional, considerations. "The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." Warth v. Seldin, 422 U.S. 490, 517-518 (1975).

66. 885 F.2d at 1023 (2d Cir. 1989).

67. Such standing could include, but would not be limited to, taxpayer standing.

The standing doctrine has been vigorously criticized by many, including virtually all scholars who have considered it.[68] As one treatise sums it up:

> "However reassuring it may seem to describe the elements of standing in these brief phrases, the doctrines have changed continually in recent years. Even at any single moment, there are almost unlimited opportunities to disagree in applying the currently fashionable phrases. Several years ago, Justice Douglas observed that '[g]eneralizations about standing to sue are largely worthless as such.' Many exasperated courts and commentators have echoed the thought, often adding that standing doctrine is no more than a convenient tool to avoid uncomfortable issues or to disguise a surreptitious ruling on the merits."[69]

Faced then with two alternatives — either to discuss, at considerable length, multitudes of precedents in a perhaps vain attempt to elaborate the scope of the standing doctrine, or instead to leave the field with only the above brief discussion and a serious caveat about the risks of confusion through oversimplification — this paper happily chooses the latter.

IV. The Abortion Rights Mobilization Litigation

In the ARM litigation, the crucial final opinion of the Second Circuit Court of Appeals analyzed four possible claims of standing by various of the plaintiffs: as clergy, as voters, as taxpayers, and as competitive advocates. For purposes of this paper, the last claim is the most significant. To see why, however, it will be helpful first to con-

68. See the articles and books cited in the bibliography in Appendix C following this outline (at p. 63 below).

69. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at pp. 347-48 (2d ed. 1984).

sider the course of the extended ARM litigation,[70] and then to refer to certain other relevant precedents.[71]

The 29 plaintiffs in the ARM litigation included non-church tax-exempt[72] and taxable service and advocacy organizations, certain of their officers, donors to them, clergy from other faiths, donors to the Catholic Church, pro-choice activists, and potential candidates for public office. The nature of their claims has already been described.[73] In response to defendants' motion to dismiss the complaint for lack of standing, District Judge Robert L. Carter dismissed five plaintiffs' claims for lack of standing, but held that the remaining plaintiffs had standing either (1) as voters (or representatives of voters) or (2) as clergy or organizations counseling others about abortion as a result of religious views differing from those of the Catholic Church. In a separate ruling, the court also granted the church defendants' motion to dismiss the suit as to them.[74] In a subsequent decision, it denied the remaining defendants' motion to certify two questions for interlocutory appeal to the Court of Appeals for the Second Circuit,[75] and directed that discovery and trial preparation should proceed.[76]

70. That is the purpose of this Part IV of the paper.

71. See part V, p. 28 below.

72. They were tax exempt under both I.R.C. §§ 501(c)(3) and 501(c)(4).

73. See text at p. 2 supra.

74. Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y. 1982).

75. Under 28 U.S.C. § 1292(b)).

76. Abortion Rights Mobilization, Inc. v. Regan, 552 F. Supp. 364 (S.D.N.Y. 1982).

After the Supreme Court's decision in Allen v. Wright[77] defendants renewed their motion to dismiss for lack of standing, casting the motion, however, in terms of subject matter jurisdiction. After discussing the reasoning in Allen v. Wright, Judge Carter denied the motion, adhered to his prior decision on standing, and permitted the suit to continue.[78] In a subsequent opinion, he again denied defendants' follow-on motion to certify the issue for interlocutory appeal to the Court of Appeals for the Second Circuit.[79]

Following dismissal of the complaint as to the church defendants, plaintiffs served subpoenas duces tecum on them as third-party witnesses. The subpoenaed church organizations declined to comply with the subpoenas, claiming infringement of their religious freedoms. On plaintiffs' motion, Judge Carter held the church organizations in civil contempt and imposed a $50,000-per-day fine.[80] That contempt decision was affirmed by the Second Circuit Court of Appeals, by a 2-1 vote, in an opinion by Judge Newman.[81] Both the District Court and the Court of Appeals reasoned that the church organizations, having been dismissed as parties, could not, as mere

77. 468 U.S. 737 (1984), discussed in the text accompanying notes 149 through 160, below.

78. Abortion Rights Mobilization, Inc. v. Regan, 603 F. Supp. 970 (S.D.N.Y. 1985).

79. Abortion Rights Mobilization, Inc. v. Baker, 1985 WL 2032 (July 15, 1985) (not officially reported).

80. Abortion Rights Mobilization, Inc. v. Baker, 110 F.R.D. 337 (S.D.N.Y. 1986).

81. In re United States Catholic Conference, 824 F.2d 156 (2d Cir. 1987). Judge Kearse concurred in a separate opinion, and Judge Cardamone dissented.

third-party witnesses, raise general objections to the subpoenas by challenging the court's subject matter jurisdiction."[82]

The Supreme Court granted certiorari[83] and reversed, holding "that a nonparty witness can challenge the court's lack of subject-matter jurisdiction in defense of a civil contempt citation, notwithstanding the absence of a final judgment in the underlying action."[84] It remanded the case to the Court of Appeals for a determination of "whether the District Court had subject-matter jurisdiction in the underlying action."[85]

On remand to the Second Circuit Court of Appeals, the same panel which had heard the case before (and which had sustained the contempt order) now dismissed the action altogether, in another 2-1 decision.[86] This time, however, Judge Cardamone, who had dissented in the prior Second Circuit opinion, wrote for the majority, and Judge Newman, the author of the earlier majority opinion, dissented. The majority discussed four theories of standing claimed by the plaintiffs:

82. More precisely, the courts narrowly limited the scope of any such attack. As the Court of Appeals put it, "the *witnesses* have standing to question only whether the District Court has a colorable basis for exercising subject matter jurisdiction . . . ." 824 F.2d 156, 158 (2d Cir. 1987) (emphasis in original).

83. Sub nom. United States Catholic Conference v. Abortion Rights Mobilization, Inc., 484 U.S. 975 (1987).

84. United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988).

85. 487 U.S. at 80.

86. In re United States Catholic Conference, 885 F.2d 1020 (2d Cir. 1989).

1. **Clergy standing** — The District Court had granted standing to clergy plaintiffs, under the Establishment Clause, finding that they had been "denigrated by government favoritism to a different theology."[87] The Second Circuit held that "the district court erred by translating plaintiffs' genuine motivation to sue into a personalized injury in fact."[88] It went on to say that "the clergy plaintiffs have not been injured in a sufficiently personal way to distinguish themselves from other citizens who are generally aggrieved by a claimed constitutional violation."[89]
2. **Taxpayer standing** — This claim was raised anew in the Second Circuit because of the decision of the Supreme Court in Bowen v. Kendrick,[90] granting taxpayers standing to challenge the application of the Adolescent Family Life Act. The Second Circuit distinguished Kendrick on the basis that it dealt with alleged unconstitutional enactment by Congress, whereas the present case dealt with alleged unconstitutional administration, by the IRS, of an admittedly constitution-

87. 544 F. Supp. at 479.

88. 885 F.2d at 1024.

89. 885 F.2d at 1024-25.

90. 487 U.S. 589 (1988).

al statute.[91] Thus, plaintiff taxpayers lacked standing under decisions going all the way back to Frothingham v. Mellon.[92]

3. **Voter standing** — the District Court had relied on Baker v. Carr[93] to grant plaintiffs standing as voters. The Second Circuit, however, distinguished Baker as involving a situation in which the voting power of the plaintiffs had been diluted. By contrast, said the court, in the instant case "plaintiffs' asserted basis for standing has nothing to do with voting."[94] It held that "plaintiffs here do not allege the particularized and objectively ascertainable injury in fact that sustained standing in the malapportionment cases."[95]

4. **Competitive advocate standing** — This theory had not been considered by the district court, and was considered by the Second Circuit separately "because it presents a closer question."[96] "The essence of this charge is that the IRS' non-enforcement of the Code creates an uneven playing field, tilted to favor the

91. This distinction has been made in other cases too, with taxpayer standing being much harder to achieve when administrative activity, rather than legislation, is the crux of the complaint. Flast v. Cohen, 392 U.S. 83 (1968), has been read as denying taxpayer standing in such cases. E.g., Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 479 (1982); Rapid Transit Advocates, Inc. v. Southern Calif. Rapid Transit Dist., 752 F.2d 373, 379 (9th Cir. 1985).

92. Frothingham v. Mellon, 262 U.S. 447 (1923). 885 F.2d at 1027-28.

93. 369 U.S. 186 (1962).

94. 885 F.2d at 1028.

95. Id.

96. Id.

Catholic Church."[97] After an extended discussion of relevant precedents, the court denied standing here too. The court said "[I]t is equally inappropriate to allow the present plaintiffs to challenge the IRS' treatment of the Church, since by their own admission they choose not to match the Church's alleged electioneering with their own."[98] To rephrase this notion: since the plaintiffs had not in fact engaged in electioneering in violation of the I.R.C. § 501(c)(3) prohibition, they were not in direct competition with the Catholic Church, which allegedly had done just that. This portion of the opinion was criticized by Judge Newman in dissent, saying, "I fail to understand why any person or organization, seeking to challenge a violation of federal law, should be denied access to a federal court for the reason that it is obeying the law."[99]

The Supreme Court denied certiorari on April 30, 1990.[100]

All of the judges on the panel which handed down the final ARM decision, both majority and dissent, agreed that being a competitive advocate was a valid ground for achieving standing. The disagreement between majority and dissent was this: the majority said that the plaintiffs — in order to be treated as competitive advocates — should have "[matched] the Church's alleged electioneering with their own,"[101] and should have been denied tax-exempt status under I.R.C. § 501(c)(3) as a result. After discuss-

97. 885 F.2d at 1029.

98. Id.

99. 885 F.2d at 1033.

100. Abortion Rights Mobilization, Inc. v. United States Catholic Conference, ___ U.S. ___, 110 S. Ct. 1946 (1990).

101. 885 F.2d at 1029.

ing certain other relevant precedents,[102] this paper will turn to the planning significance of the ARM majority's view of competitive advocate standing.

V. Other Relevant Precedents

Only nine decisions, other than the ARM case, have been located dealing with third-party standing to challenge tax benefits of another person.[103] Standing was permitted in only three of them. They will be discussed in chronological order.

In 1969, black schoolchildren and their parents in Mississippi sued to prevent the IRS from granting tax exemptions to racially discriminatory private schools in that state. In Green v. Kennedy,[104] the District Court upheld standing, and later granted the relief requested.[105] Plaintiffs' standing received the following brief discussion:

> "We take note of defendants' contention that plaintiffs have no standing to bring this action in their capacity as taxpayers. We need not consider that issue

102. See Part V, below.

103. A tenth possible candidate, Louisiana v. McAdoo, 234 U.S. 627 (1914), is *not* included for several reasons. It involved a suit by Louisiana, as a sugar producer, challenging tariff rates for sugar imported from Cuba. The case is quite old, antedating virtually of the modern standing decisions. It was explicitly disregarded as precedent in Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), discussed in text accompanying notes 114 through 122 below. See 426 U.S. at 36 n. 14. An eleventh possible candidate has also been omitted. Klalaf v. Regan, 85-1 U.S.T.C. ¶ 9269, 55 A.F.T.R.2d 647 (D.D.C. 1985) (not officially reported). The author of this paper would be most grateful for the citations to any *other* cases which might be relevant.

104. 309 F. Supp. 1127 (D.D.C.) (three-judge court, per curiam), appeal dismissed sub nom. Cannon v. Green, 398 U.S. 956 (1970), and appeal dismissed sub nom. Coit v. Green, 400 U.S. 986 (1971).

105. Green v. Connally, 330 F. Supp. 1150 (D.D.C.) (three-judge court), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971).

> at this juncture. This case is properly maintained as a class action . . . by Negro school children in Mississippi and the parents of those children on behalf of themselves and all persons similarly situated. They have standing to attack the constitutionality of statutory provisions which they claim provides 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. We follow the precedent on this point of the three-judge District Court for the Southern District of Mississippi in Coffey v. State Educational Finance Commission, 296 F. Supp. 1389 (1969)."[106]

The Green decision's value has been substantially eroded, however. The Supreme Court, in Allen v. Wright,[107] distinguished the case on several grounds,[108] including perhaps most importantly that its own consideration of Green was limited to "merely a summary affirmance."[109] It concluded that "the decision has little weight as a precedent on the law of standing."[110]

In International Tel. & Tel. v. Alexander,[111] ITT sued the Commissioner of Internal Revenue in an attempt to reverse the IRS's retroactive revocation of a favorable

106. 309 F. Supp. at 1132. The Coffey decision involved state-funded racially-discriminatory schools.

107. 468 U.S. 737 (1984), discussed in the text accompanying notes 149 through 160, below.

108. Id. at 764-66.

109. Id. at 764. Justice Brennan, dissenting, said, "The Court's discussion of our summary affirmance in Coit v. Green simply stretches the imagination beyond its breaking point." Id. at 780 n. 9.

110. 468 U.S. at 764.

111. 396 F. Supp. 1150 (D. Del. 1975).

reorganization ruling in the ITT-Hartford transaction.[112] During the transaction, ITT had advised the Hartford shareholders that the exchange of stock would be tax free. After the revocation of the initial favorable ruling, the Service asserted tax deficiencies against these shareholders (the old Hartford shareholders), ITT was then sued by them, and ITT agreed to indemnify them. ITT itself, however, was not a party to these tax proceedings, and the Service made no claim that ITT owed any tax. The court found that these facts, plus damage to ITT's reputation and credibility with all of its shareholders, demonstrated actual injury. It also held that Congress, in enacting tax legislation to facilitate tax-free corporate reorganizations, had intended to benefit the constituent corporations as well as their shareholders. It therefore held that ITT had standing to challenge the revocation of the ruling. The action was not allowed to proceed, however, because of the anti-injunction acts.[113]

112. ITT agreed to exchange solely its own voting stock for the outstanding stock of Hartford Insurance Company. The tax issue was whether this qualified as tax free under I.R.C. § 368(a)(1)(B). ITT previously had purchased some shares of Hartford for cash (which would have constituted prohibited "boot," thus destroying the "B" reorganization), and somewhat later had "sold" them to a bank — in an effort to purge the "boot" taint — under arrangements which protected the bank purchaser from economic risk. The courts ultimately held that the transaction did *not* qualify as tax free. Heverly v. Comm'r, 621 F.2d 1227 (3d Cir. 1980); Chapman v. Comm'r, 618 F.2d 856 (1st Cir. 1980). A separate, and equally interesting issue, arose because of the revocation of the Service's earlier ruling in favor of ITT, which it did claiming that ITT's ruling request did not make adequate disclosure of the facts. The Hartford litigation was ultimately settled in May 1981, upon the payment by ITT of $18.5 million; the shareholders were given tax-free exchange treatment so long as they treated basis consistently, and were not deemed to have received additional income as a result of ITT's payment. For further discussion of the transaction, see the articles cited in B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 14.13, at 14-40 n. 81 (5th ed. 1987).

113. I.R.C. § 7421(a) and 28 U.S.C. § 2201.

In 1969, the IRS issued new ruling guidelines for tax-exempt hospitals.[114] These modified the "more restrictive" provisions of an earlier ruling,[115] by removing the requirement that, to be tax exempt under I.R.C. § 501(c)(3), a hospital had to care for patients without charge or at rates below cost. In 1971, several low-income individuals and organizations representing them brought suit to overturn the new guidelines. The individual plaintiffs alleged that they had been denied hospital services because of inability to pay. In the District Court, the plaintiffs' standing was upheld and the requested relief was granted.[116] The Court of Appeals, while upholding plaintiffs' standing, reversed on the merits.[117] The Supreme Court granted certiorari,[118] and vacated after holding that the plaintiffs lacked standing.[119] The Court held that plaintiffs neither proved causation nor redressibility. The missing link was any demonstration that the new ruling was itself responsible for denial of care to the plaintiffs, or that its revocation would compel tax-exempt hospitals to reinstitute free or below-cost care. The Court said:

> "It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioner's [the Secretary of the Treasury and the

114. Rev. Rul. 69-545, 1969-2 C.B. 117.

115. Rev. Rul. 56-185, 1956-1 C.B. 202.

116. Eastern Kentucky Welfare Rights Organization v. Shultz, 370 F.Supp. 325 (D.D.C. 1973).

117. Eastern Kentucky Welfare Rights Organization v. Simon, 506 F.2d 1278 (D.C. Cir. 1974).

118. 421 U.S. 975 (1975).

119. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).

> Commissioner of Internal Revenue] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications."[120]

The majority opinion expressly said, "[w]e do not reach . . . the question of whether a third party ever may challenge IRS treatment of another."[121] Mr. Justice Stewart, however, in his concurring opinion, said, "I cannot now imagine a case, at least 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."[122]

Tax Analysts and Advocates, an organization which publishes various newsletters and newspapers in print and electronic form, and which acts to educate and advise the public on tax issues, is tax exempt under I.R.C. § 501(c)(3). Its president is Thomas F. Field. In Tax Analysts and Advocates v. Blumenthal,[123] the organization and Field sued the Secretary of the Treasury and others challenging the validity of IRS rulings allowing credits for certain foreign taxes imposed on foreign oil extraction.[124]

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120. 426 U.S. at 42-43.

121. 426 U.S. at 37.

122. 426 U.S. at 46.

123. 390 F. Supp. 927 (D.D.C. 1975), aff'd, 566 F.2d 130 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

124. Rev. Rul. 55-296, 1955-1 C.B. 386 held creditable certain taxes paid to Saudi Arabia. Rev. Rul. 68-552, 1968-2 C.B. 306, held creditable certain taxes paid to Libya. Various private rulings also held creditable certain taxes paid to Iran, Kuwait, and Venezuela. The fiscal, political, and technical stakes involved were very substantial. For a review of some of these issues, from the early 1960's until the publication of regulations (in the early 1980's) which changed the law, see, e.g., E. OWENS, THE FOREIGN TAX CREDIT 26-88 (1961); American Bar Ass'n Tax Section, The Creditability of Foreign Income Taxes: A Critical Analysis of Revenue Rulings 78-61, 78-62, and 78-63, 32 TAX

(continued...)

The plaintiff organization claimed standing as a taxpayer and as a representative of its members (other taxpayers). Plaintiff Field claimed standing as an individual taxpayer and as the owner of a working interest in a currently-producing domestic oil well.[125]

The District Court denied standing, and the D.C. Circuit Court of Appeals, over a dissent by Chief Judge Bazelon,[126] affirmed. It paid short shrift to claims of taxpayer standing, dismissing that argument in one footnote on the basis of the District Court's opinion.[127] That left only plaintiff Field's claim of what the appellate court styled "competitor standing" by virtue of his status as owner of a working interest in a competing, but domestic, oil well. Field's injury, as a competitor, was held to be suffi-

124. (...continued)
LAW. 33 (1978); American Bar Ass'n Tax Section, Comments Regarding Proposed Foreign Tax Credit Regulations, 35 TAX LAW. 35 (1979); Hannes & Levey, *Inland Steel* in the Court of Claims: What will its Impact be on the Foreign Tax Credit Area?, 57 J. TAX'N 74 (1982); Hannes & Levey, How Regulatory and Judicial Analyses of the Foreign Tax Credit Differ: Regs. v. *Inland Steel*, 57 J. TAX'N 162 (1982); Horowitz, Kelleher, Nordberg & Silverstone, The Proposed Foreign Tax Credit Regulations: Interpretations, Comparisons and Comments, 19 TAX NOTES 171 (1983); Horowitz, Kelleher, Nordberg & Silverstone, The Final Foreign Tax Credit Regulations: A Summary and Analysis, 21 TAX NOTES 203 (1983); Levey, Creditability of a Foreign Tax: The Principles, the Regulations and the Complexity, 3 J.L. & COM. 193 (1983); Dolan, General Standards of Creditability Under the Section 901 and 903 Final Regulations — New Words, Old Concepts, 13 TAX MGMT. INT'L J. 167 (1984); Isenbergh, The Foreign Tax Credit: Royalties, Subsidies, and Creditable Taxes, 39 TAX L. REV. 227 (1984).

125. All agreed that "[t]he oil well owned by plaintiff Field is quite small . . . ." 566 F.2d at 138 n. 44.

126. Judge Bazelon also dissented to the opinion of the D.C. Circuit Court of Appeals in American Soc'y of Travel Agents, Inc. v. Blumenthal, 566 F.2d 145 (D.C. Cir. 1977) (discussed in the text accompanying notes 135 through 148 below). His single dissenting opinion dealt with both cases. 566 F.2d at 152.

127. 566 F.2d at 134 n. 10. See also ibid. at p. 136 n. 22 and p. 137 n. 31.

ciently "distinct" and "palpable" to satisfy the injury-in-fact test of the constitutional portion of the standing doctrine.[128] The Court went on, however, to deny Field standing by applying the zone-of-interests test from the prudential portion of the standing doctrine.[129]

The majority first concluded that, in determining whether Field's interests were "arguably within the zone of interests to be protected or regulated by the statute," it should scrutinize only the specific section of the Code in question, rather than any of its other provisions or its overall purpose.[130] Accordingly, the relevant statute was I.R.C. § 901. After rejecting recourse to legislative history,[131] and thus limiting its inquiry to the face of the statute, the court formulated "with precision" the ultimate question: "did Congress arguably legislate with respect to competition in Section 901 of the Code so as to protect the competitive interests of domestic oil producers?"[132] It answered the question in the negative, and affirmed the district court's denial of standing:

> "[W]e conclude that the interests being asserted by Appellant Field as a competitor are not the interests arguably intended to be protected by the tax credit provision of section 901 which is the statutory basis for the challenge in this case. The congruence between the purpose of the statute (to prevent the dou-

128. 566 F.2d at 138.

129. 566 F.2d at 138-45.

130. 566 F.2d at 140-41.

131. 566 F.2d at 141-43. Chief Judge Bazelon crisply criticized this reasoning: "If the basis of the zone test is the discernment of congressional purpose, a court should use whatever material is relevant to that inquiry." 566 F.2d at 163. See generally 566 F.2d at 163-66.

132. 566 F.2d at 143.

> ble taxation of particular parties) and the interests asserted by appellant (competitive interest in fairness) is not sufficient to invoke the federal judicial power."[133]

The court expressly declined to decide whether a third party *over* could achieve standing to challenge another's tax status.[134]

Three months later, a different panel of judges from the same Court of Appeals[135] decided American Soc'y of Travel Agents, Inc. v. Blumenthal.[136] The American Society of Travel Agents ("ASTA") represents for-profit travel agents. It alleged that various tax-exempt organizations, such as the American Jewish Congress, were offering tour packages to their members at prices below those which could be offered by tax-paying travel agents. ASTA alleged that the defendants — including the Secretary of the Treasury — failed to administer the tax laws properly by not imposing tax on the tour income of such I.R.C. § 501(c)(3) organizations[137] or, in the alternative, by not revoking the tax-exempt status of such organizations because of their too-heavy involvement in commercial activities. It requested various forms of injunctive relief.

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133. 566 F.2d at 143 (footnote omitted).

134. 566 F.2d at 145 n. 90.

135. Only Chief Judge Bazelon participated in both cases, and only he dissented.

136. 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978) .

137. The complaint alleged that the tour income was "unrelated business taxable income" within the meaning of I.R.C. § 512. The IRS has ruled that tour income may indeed constitute UBTI under some — but not all — circumstances. Rev. Rul. 78-43, 1978-1 C.B. 164 (tours had no educational component, so income was UBTI to university sponsor). Compare, e.g., LTR 8846002 (tour income was *not* UBTI), LTR 9027003 (examples of tours that did and did not produce UBTI).

The District Court dismissed "on the ground of nonjusticiability,"[138] and ASTA appealed.

The D.C. Circuit Court of Appeals began its analysis of the standing issue by referring to Justice Stewart's observation in Simon v. Eastern Kentucky Welfare Rights Organization.[139] It noted that ASTA had neither identified any "prospective customers who spurned the services of ASTA members because of appellees' allegedly inequitable tax treatment of § 501(c)(3) organizations,"[140] nor any tour package purchasers who, having patronized a tax-exempt organization, "might legitimately be expected to do business with a private travel agent in the event appellees enforced the relevant tax code provisions according to appellants' recommendations."[141] Instead, said the Court, ASTA complained of an unfair competitive atmosphere "in more abstract terms."[142] This, it said, did not amount to a particularized injury in fact. "We regard this sort of injury claim as too speculative to support standing under the circumstanc-

138. American Soc'y of Travel Agents, Inc. v. Simon, 75-1 U.S.T.C. ¶ 9484, 36 A.F.T.R.2d 5142 (D.D.C. 1975) (not officially reported).

139. The observation is quoted in the text accompanying note 122, supra. Although the majority opinion did not address the general question of whether standing could *ever* be attained in a suit to challenge another's tax liability, the dissenting opinion, by Chief Judge Bazelon, criticized the majority for constructing "a constitutional standard of injury in fact that would effectively preclude taxpayer suits claiming competitive injury." 566 F.2d at 152 n. 1.

140. 566 F.2d at 148.

141. 566 F.2d at 148.

142. 566 F.2d at 149.

es presented here."[143] The court also held that ASTA had failed to prove that its injury, if any, was caused by the appellees' failures, or that the requested relief would indeed redress the injury.[144]

The ASTA court was at pains to distinguish the Supreme Court's decision in Ass'n of Data Processing Serv. Orgs., Inc. v. Camp.[145] The Supreme Court there upheld standing for private competitors to challenge a ruling, by the Comptroller of the Currency, permitting national banks to enter the data-processing business. Three reasons for not following Ass'n of Data Processing Serv. Orgs. were set forth by the ASTA court. First, it stated that the Supreme Court's earlier opinion was unclear.[146] It went on, in language of particular significance to the theme of this paper:

> "Secondly, and more significantly, Data Processing was not a tax case. Whatever may be the impact of competitor standing when ordinary administrative action is at issue, we do not believe that Data Processing should be read to endorse standing for any private business, individual or corporate, which wishes to contest the tax treatment of a competitor."[147]

Third, the relief requested by ASTA — imposition of heavier tax burdens on competing not-for-profit entities — would not necessarily put them out of business, whereas the

143. 566 F.2d at 149.

144. 566 F.2d at 150-51.

145. 397 U.S. 150 (1970). The Ass'n of Data Processing Serv. Orgs. decision was the genesis of the "zone of interests" test, discussed in the text accompanying note 57, supra.

146. 566 F.2d 151.

147. 566 F.2d at 151.

relief sought in Ass'n of Data Processing Serv. Orgs. would have made the complained-of competition illegal and thus would have eliminated it altogether.[148]

In 1984, the Supreme Court returned to this particular fray for the second time.[149] In Allen v. Wright,[150] a five-justice majority, over three dissents, dismissed, for lack of standing, a nationwide class action, brought by black parents and their school children, challenging the IRS's standards and procedures for denying tax exemption to racially discriminatory private schools. "The nub of [the] complaint [was] that . . . IRS guidelines and procedures [were] inadequate to detect false certifications of nondiscrimination policies."[151] Plaintiffs did not allege that any of their children were denied admission to the schools in question.

> "Rather, respondents claim a direct injury from the mere fact of the challenged Government conduct and . . . injury to their children's opportunity to receive a desegregated education. The latter injury is traceable to the IRS grant of tax exemptions to racially discriminatory schools, respondents allege, chiefly because contributions to such schools are deductible from income taxes . . . and the 'deductions facilitate the raising of funds to organize new schools and expand existing schools in order to accommodate white students avoiding attendance in desegregating public school districts.'"[152]

148. 566 F.2d at 151.

149. Its first foray was in Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976), discussed in the text accompanying notes 114 through 122, supra.

150. 468 U.S. 737 (1984).

151. 468 U.S. at 744 n. 11.

152. 468 U.S. at 746 (footnotes omitted).

The complaint was filed in 1976. The District Court, in 1979, dismissed the suit for lack of standing and on other grounds.[153] On appeal, the D.C. Circuit Court of Appeals reversed and held that plaintiffs *did* have standing to maintain the litigation by virtue of "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."[154] The Supreme Court granted certiorari.[155]

The Supreme Court denied standing to plaintiff *parents* because the denigration they suffered was not a sufficiently direct and personal injury. Explaining its fears about the possible reach of a contrary holding, permitting standing, the court said:

> "If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. . . . A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'"[156]

The Supreme Court majority conceded, however, that the *children's* injury — "diminished ability to receive an education in a racially integrated school" — was direct

153. Wright v. Miller, 480 F. Supp. 790 (D.D.C. 1979).

154. Wright v. Regan, 656 F.2d 820, 827 (D.C. Cir. 1981).

155. Allen v. Wright, 462 U.S. 1130 (1983).

156. 468 U.S. at 755-56 (citation omitted). The majority opinion was written by Justice O'Connor. Chief Justice Burger and Justices White, Powell, and Rehnquist joined in it. Justice Brennan dissented, as did Justice Stevens, in whose dissenting opinion Justice Blackmun joined. Justice Marshall recused.

and personal, and sufficient to "support standing in some circumstances."[157] It denied standing, nevertheless, for failure to allege causation and redressibility. It said:

> "The illegal conduct challenged by respondents is the IRS's grant of tax exemptions to some racially discriminatory schools. The line of causation between that conduct and desegregation of respondents' schools is attenuated at best."[158]

It went on to say that "it is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies."[159]

The majority opinion did not articulate a specific foreclosure of all suits challenging another's tax status. It did, however, comment on legal challenges to "particular programs agencies establish to carry out their legal obligations" in the following language: "Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication."[160]

The seventh relevant case is Research Consulting Assoc. v. Elec. Power Research Inst., Inc.[161] Plaintiff, a for-profit organization in the business of promoting a device for protecting power lines, sued to challenge the tax-exempt status of the defendant, an educational and testing organization.[162] It alleged that the defendant was testing and promoting a power-line protective device which competed with plaintiff's, that de-

157. 468 U.S. at 756.

158. 468 U.S. at 757.

159. 468 U.S. at 758.

160. 468 U.S. at 759-60.

161. 626 F. Supp. 1310 (D. Mass. 1986).

162. The defendant was qualified under I.R.C. § 501(c)(3).

fendant's purported educational and testing activities were only a "guise," and that defendant's actual activities were inconsistent with its tax exemption. The court agreed that "In appropriate circumstances competitive injury due to government regulation constitutes injury in fact . . . ."[163] It denied standing, however, for failure to show causal connection or redressibility. The court refused to make a blanket statement about whether standing could *ever* be found in such situations, saying instead that "this Court recognizes the possibility of standing in these types of cases . . . ."[164]

The last two cases both involve Dr. Leonora Fulani, who was an independent and minor party candidate for President of the United States in 1988. In the first case — Fulani I — she challenged the tax-exempt status of the League of Women Voters for failing to include her in the nationally-televised primary-season debates. The District Court dismissed the complaint on the merits, without reaching the issue of Dr. Fulani's standing.[165] On appeal, the Second Circuit Court of Appeals affirmed and denied relief, but only after first analyzing and *granting* Dr. Fulani standing to sue.[166]

The appellate court considered Dr. Fulani's claim that she was directly injured by being denied opportunities to get "critical media exposure" and to communicate her political ideas to the public. The majority opinion said:

> "[I]n our view, the loss of competitive advantage flowing from the League's exclusion of Fulani from the national debates constitutes sufficient 'injury' for

163. 626 F. Supp. at 1314.

164. 626 F. Supp. at 1313.

165. Fulani v. League of Women Votes Educ. Fund, 684 F. Supp. 1185 (S.D.N.Y. 1988).

166. Fulani v. League of Women Votes Educ. Fund, 882 F.2d 621 (2d Cir. 1989).

> standing purposes, because such loss palpably impaired Fulani's ability to compete on an equal footing with other significant presidential candidates."[167]

The court then turned to the second and third inquiries: causation and redressibility. One particular aspect of federal election law was crucial: the Federal Election Commission regulations prohibited organizations from sponsoring a candidate debate unless they were qualified under I.R.C. § 501(c)(3).[168] The court thus held that both inquiries were satisfied:

> "*But for* the government's refusal to revoke the League's tax-exempt status, then, the League, as a practical matter, would have been unable to sponsor the allegedly partisan debates which caused the injury of which Fulani complains.
>
> ". . .
>
> "We think it rather clear that Fulani's asserted injuries could have been redressed by the relief she sought, since, practically speaking, revocation of the League's tax-exempt status at least would have prevented the League's sponsorship of the debates, from which Fulani claims she was wrongfully excluded."[169]

Having found standing, however, the court proceeded, on the merits, to affirm the District Court's denial of Dr. Fulani's claims for relief:

> "It is of critical importance that the subject debates were not *general election* debates. Rather, they were *primary season* debates, sponsored by the League in an effort to educate the electorate about the candidates who were vying for the nomination of either the Republican or the Democratic Party."[170]

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167. 882 F.2d at 626.

168. 11 C.F.R. §§ 110.13, 114.4(e) (1988)

169. 882 F.2d at 628 (emphasis in original). Some commentators have found it impossible to reconcile the standing analyses in Fulani I and ARM. See, e.g., Note, Standing to Challenge Tax-Exempt Status: The Second Circuit's Competitive Political Advocate Theory, 58 FORDHAM L. REV. 723 (1990).

170. 882 F.2d at 629 (emphasis in original).

It concluded: "Since Fulani was not competing in either of those primary contests, it was not improper for the League to exclude her from the three debates in issue."[171] Judge Cardamone, concurring, would have denied standing to Dr. Fulani.[172]

The last case — Fulani II — was brought by Dr. Fulani against the Secretary of the Treasury and others, challenging the tax-exempt status of the Commission on Presidential Debates, an organization formed to assume the role of sponsoring general election debates after the League of Women Voters withdrew from its sponsoring role in a disagreement over the candidates' agreed ground rules for the conduct of those debates. The District Court denied standing, discussing and distinguishing the Second Circuit Court of Appeal's decision in Fulani I.[173] The court declined to find injury in fact from Fulani's deprivation of media coverage:

> "More fundamentally, Fulani's claim that she would have received media coverage and public recognition had she been included in the debates is sheer speculation. This Court has no way of determining what the real injury to Fulani is based on her exclusion from the debates because the media coverage is dependent upon a number of diverse factors involving the structure and quality of the debates, including the number of candidates participating and the stature of those participating. If all eighty-two candidates for President in 1988 were participants in the debates this Court cannot reasonably infer that the debates would actually be broadcast nationally and that there would be millions of viewers. . . . Indeed, if such a debate were staged, this Court maintains serious doubt whether major party candidates — who presumably would be the media draw in the first place — would participate."[174]

171. 882 F.2d at 630.

172. 882 F.2d at 630.

173. Fulani v. Brady, 729 F. Supp. 158 (D.D.C. 1990).

174. 729 F. Supp. at 163.

The court thus held: "Fulani has not identified a palpable and nonspeculative injury for standing and Article III purposes."[175]

It proceeded to find, in addition, that Fulani had failed to demonstrate causation and redressibility. The sponsoring organization, whose tax exemption was at issue, was not directly in charge of media access, said the court. Rather, it was "simply the coordinator and sponsor of the debates. The decisions to cover the debates and the extent of that coverage are made independently by the media organizations."[176] Thus, the alleged improper grant of tax-exempt status to the sponsor was not the direct cause of Fulani's media exclusion, nor would denying tax-exempt status to the sponsor assure Fulani of media coverage.

VI. Finding Standing After ARM

The ARM decision denied competitive advocate standing because none of the plaintiff organizations had been denied tax exemption by virtue of their political campaign activities. It would be easy, however, to find — or create — an organization which *has* been denied such status for that reason. At least two routes suggest themselves.

First, an application could be filed with the IRS to recognize the tax-exempt status of an otherwise-clearly-qualifying, newly-formed not-for-profit corporation. The new organization, for example, might have as its mission educating woman about free choice issues, birth-control methods, and the like."[177] The application, however, and

175. 729 F. Supp. at 163.

176. 729 F. Supp. at 164.

177. Several of the ARM plaintiffs were, indeed, tax exempt under I.R.C. § 501(c)(3) and pursued pro-choice activities other than engaging in political campaigns. Perhaps (continued...)

its governing documents, could specify — perhaps even in boldface type — that the organization intended to participate in political campaign activities in furtherance of its goals. It is extremely likely that the Service would deny the organization tax exemption. Under the ARM case rationale, the organization would then have competitive advocate standing.

Second, one of the existing, and already-exempt, ARM plaintiff organizations could choose to engage in political campaign activities, disclose that fact prominently on its annual filing with the IRS,[178] and wait. Once again, it seems likely that the Service would act to revoke the organization's tax exemption. Under the ARM case rationale, the organization would then have competitive advocate standing.

In each case, of course, the organization would cease to be eligible for tax exemption and donations to it would no longer qualify for the charitable contributions deduction. No matter: it is not very expensive to form a new entity and file the necessary documents to qualify it for tax-exempt status. In the first case, only those fairly modest costs would be involved. In the latter case, an already-existing organization might be *disqualified*, thus losing its good will and going-concern value. A new successor organization, the costs of forming which are similarly modest, however, could be already formed and prepared to take over its predecessor's activities. In neither case are the expenses and costs likely to be meaningful when compared to the quite-

177. (...continued)
the charters of those organizations would serve as good models for the newly-formed organization.

178. Form 990, required to be filed annually by I.R.C. § 501(c)(3) organizations, would seem to be an appropriate place to put this suggested disclosure.

substantial expenses involved in bringing and prosecuting the ARM litigation itself, costs which the plaintiff organizations were clearly prepared to incur for their cause.

Of course, given the understandable and considerable reluctance of courts to entertain suits challenging another person's tax status, it would be foolishly sanguine to predict that these suggested routes would ultimately succeed. Federal courts may decline to decide cases not only by virtue of the Article III concerns considered in this part VI, but also on other, "prudential" grounds. A federal court might well avoid the ARM issue by invoking such standing standards as the "zone of interests" test, the notion that the plaintiff must be advancing his own rights rather than rights of others, or the courts' reluctance to deal with injuries which are generally shared by most citizens rather than being particular to the plaintiff. Furthermore, of course, the courts might grant standing and then decline to afford relief on the merits.

Nevertheless, the view taken by ARM's president — that no person could achieve standing under the Second Circuit's ARM rationale[179] — seems too pessimistic.

VII. Concluding Comments

It is possible that the ARM plaintiffs *could* achieve standing by following one or both of the suggested routes set forth above. Further, it may be possible to consider bringing such suits in state, rather than federal, courts.[180] State courts are likely to invoke their own notions of standing, and case-or-controversy concerns are likely to be shared by them. Their tests, however, may be different even at that threshold, and it may well be that their prudential concerns are *not* the same as those of the federal

179. See the text accompanying note 8, supra.

180. This suggestion has not been adequately researched. Not only would further research be needed to test it, but all will agree that state courts are likely to be extremely unwilling to be drawn into an adjudication of federal tax questions.

courts. At the very least, they would not be conclusively bound by the prudential rules adopted for the federal court system.

It is, nevertheless, of deep concern to the entire justice system whether to admit third-party standing to challenge another's tax exemption. Granting such standing could very well open a Pandora's box, risking the imposition of costly burdens not only on the courts but on the organizations whose tax status is contested. Yet, as discussed below, an absolute bar to such standing gives the IRS the ultimate say in fixing the permissible minimal standards of conduct of I.R.C. § 501(c)(3) organizations.

The Service has heard the caveats of the Supreme Court in Bob Jones[181] and has adopted them as its own position.[182] Thus, it has not asserted any violation of the Bob Jones rationale unless completely satisfied both that the public policy involved was clearly "fundamental," and that there was "no doubt" that the activities in question violated that policy. Although understandable,[183] this is a misguided standard which the IRS should reconsider and abandon.

The Supreme Court's caveats addressed the role of courts in ultimately upholding or rejecting the IRS's position. The public policy issues, however, are profound and central to our notions of the proper role of charities in our society. Given the extreme difficulty of achieving third-party standing to challenge allegedly improper activities, if the Service is unduly reluctant, the courts may be denied the chance to

181. See text accompanying notes 16 and 17, supra.

182. See text accompanying note 28, supra.

183. There are obvious and powerful "political" forces at work here, in addition to the usual administrative concerns.

draw the proper policy line."[184] The Service's excessive caution may cloak and bless activities which courts, given the opportunity, might condemn. The IRS might be contributing to *lower* standards for charitable organizations.

Thus, the Service should *not* adopt the same standard of caution the Supreme Court set forth in Bob Jones. A lesser, but still careful, standard should guide it. The Service should act to deny tax exemption to charities whose activities are thought to violate a fundamental public policy whenever, in the exercise of its own sound judgment, that seems proper. It should not wait for absolute certainty, totally-clear facts, and an unambiguously "fundamental" public policy. It should not shy away from taking on at least some hard cases. The courts will then have an opportunity to delineate the sorts of activities and policies which constitute violations of the Bob Jones rationale.

184. As Chief Judge Bazelon put it, in his dissent in American Soc'y of Travel Agents, "[t]o permit tax liability to be challenged only by the taxpayer himself is in effect to permit the IRS virtually unfettered discretion . . . ." 566 F.2d at 152 n. 2. That is "discomforting," as Judge Bazelon observed, even when the issue is statutory and the impact fiscal. When, as in Bob Jones situations, the issue is arguably of constitutional dimension and the impact societal, it is of grave concern.

Appendix A. History of the Bob Jones Litigation

The direct history of the Bob Jones decision is fascinating.[185] Its early stages followed closely on the heels of the IRS announcements, in 1970, that racially-discriminatory schools would no longer be entitled to tax-exempt status.[186] Bob Jones University commenced an action, in 1971, seeking to enjoin the Service from revoking the University's tax exemption. That suit was ultimately held to be barred by the anti-injunction provisions of the Code.[187]

Then, on January 19, 1976, the Internal Revenue Service issued a final notice of revocation of tax-exempt status to Bob Jones University, effective from December 1, 1970. On May 4, 1976, Bob Jones University filed suit in federal District Court in South Carolina seeking a refund of $21 in federal unemployment taxes. The United

185. Much of the direct history is recounted in the Bob Jones opinion itself. See 461 U.S. at 581-82.

186. IRS News Release, July 10, 1970, and IRS News Release, July 19, 1970, reprinted in Tax Exempt Status of Private Schools: Hearings Before the Subcommittee on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 10 (1979). The News Releases also denied tax deductions for gifts to such schools. See also Rev. Rul. 71-447, 1971-2 C.B. 230; Green v. Connally, 330 F. Supp. 1150 (D.D.C.) (three-judge court), aff'd mem. sub. nom. Coit v. Green, 404 U.S. 997 (1971). Randolph W. Thrower, who was Commissioner of Internal Revenue in 1970 when the News Releases were issued, later testified that "[p]erhaps no other decision made by me received as much study and attention from so many people in so many different departments and agencies of Government . . . ." Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearing Before the Committee on Ways and Means, House of Representatives, 97th Cong., 2d Sess. 84 (Feb. 4, 1982) (statement of Randolph W. Thrower). [These Hearings are hereinafter cited as the "Ways and Means 1982 Hearings."]

187. The Supreme Court, applying I.R.C. § 7421(a), so held in Bob Jones Univ. v. Simon, 416 U.S. 725 (1974).

States counterclaimed for approximately $480,000 in such taxes for the years 1971 through 1975.[188] The District Court, on December 26, 1978, held Bob Jones University qualified for tax exemption, entered judgment for the University in the refund suit, and ordered the Secretary of the Treasury and Commissioner of Internal Revenue Service to restore the University's tax-exempt status.[189]

On December 30, 1980, the Court of Appeals for the Fourth Circuit, in a 2-1 decision, reversed, held that Bob Jones University was *not* entitled to tax exemption, and entered judgment for the Government.[190] Bob Jones University filed a petition for a writ of certiorari to the Supreme Court on July 1, 1981. The U.S. government supported the University's petition, arguing that, although there was no conflict in the Circuits, the Supreme Court should affirm the decision below and confirm that the IRS had acted within its statutory authority in revoking the University's tax-exempt status. Certiorari was granted on October 13, 1981.[191]

Up to the end of 1981, the government had consistently followed its long-standing policy of denying I.R.C. § 501(c)(3) status to racially discriminatory schools. On January 8, 1982, however, a thunderbolt struck: in an astonishing about-face, the Reagan Administration announced that it was changing its position, and henceforth would

188. At that time, 501(c)(3) organizations were sometimes exempt from social security taxes. The exemption was removed by the Social Security Amendments of 1983, Pub. L. No. 98-21, § 102(b)(1), 97 Stat. 70, repealing I.R.C. § 3121(b)(8)(B).

189. 468 F. Supp. 890 (D.S.C. 1978).

190. 639 F.2d 147 (4th Cir. 1980).

191. 454 U.S. 892 (1981). The companion case, Goldsboro Christian Schools, was granted certiorari on the same date.

grant such schools tax exemption.[192] This, it explained, would moot the proceedings in Bob Jones and Goldsboro. The same day, it filed a memorandum with the Supreme Court asking that the judgments be vacated as moot. Its memorandum stated, in part:

> "Since the filing of our brief acquiescing in the granting of certiorari in these cases, the Department of the Treasury has initiated the necessary steps to grant petitioner Goldsboro Christian Schools tax-exempt status under Sec. 501(c)(3) of the Code, and to refund to it federal social security and unemployment taxes in dispute. Similarly, the Treasury Department has initiated the necessary steps to reinstate tax-exempt status under Sec. 501(c)(3) of the Code to petitioner Bob Jones University, and will refund to it federal social security and unemployment taxes in dispute. Finally, the Treasury Department has commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners tax-exempt status under the Code."[193]

A few days later, after a fire-storm of criticism, the Administration said it would submit legislation to Congress to authorize the IRS to deny tax exemption to schools which discriminate on racial grounds.[194] The proposed legislation was released Janu-

192. Treasury News Release (Jan. 8, 1982), reprinted in Ways and Means 1982 Hearings, cited supra at n. 186, 607-08. The following discussion, in the text, above, covers only selected highlights of the relevant developments. For descriptions of the background to the change in government position, as set forth by two of its principal proponents, see Ways and Means 1982 Hearings, cited supra at n. 186, 153-59 (statement of Edward C. Schmults, Deputy Attorney General, Department of Justice) and 178-81 (statement of Robert T. McNamar, Deputy Secretary of the Treasury). For further details, see P. TREUSCH, TAX-EXEMPT CHARITABLE ORGANIZATIONS 164-79 (3d ed. 1988); U.S. COMMISSION ON CIVIL RIGHTS, DISCRIMINATORY RELIGIOUS SCHOOLS AND TAX EXEMPT STATUS 5-9 (Clearinghouse Pub. 75, Dec. 1982).

193. Reprinted in Ways and Means 1982 Hearings, cited supra at n. 186, 616, at 617 (footnote omitted).

194. Statement by President Reagan, Jan. 12, 1982, reprinted in Ways and Means 1982 Hearings, cited supra at n. 186, 620.

ary 18, 1982.[195] The Administration's summary states, in part, that its proposed legislation "will, for the first time, give the Secretary of the Treasury and the Internal Revenue Service express authority to deny tax-exempt status to private, nonprofit educational organizations with racially discriminatory policies."[196]

Congressional hearings were urgently scheduled to consider the Administration's change of position and its legislative proposal. On February 1, 1982, two Reagan Administration witnesses appeared before the Senate Finance Committee. As one source reported:

> "Administration witnesses testified on February 1 that the IRS lacks the statutory authority to deny tax exemptions to private schools that practice racial discrimination. According to Deputy Attorney General Edward C. Schmults and Deputy Treasury Secretary R. T. McNamar, the Administration felt compelled to reverse the 11-year-old policy on private schools after their review of the issue led them to the conclusion that 'there is neither a constitutional nor statutory basis for the practice followed by the Internal Revenue Service since 1970.'"[197]

Further, "[s]pecifically, Schmults stated that section 501(c)(3) does not require an educational or religious organization to also meet [sic] the standards of a common law charity."[198]

Because the Administration's position clearly indicated that it would not vigorously support the decisions below, and in line with suggestions contained in at least

195. See Reagan Proposes Bill to Prohibit Tax Exemption for Discriminatory Schools, 14 TAX NOTES 218 (Jan. 25, 1982).

196. Tax Exemption Bill Summary, reprinted in Ways and Means 1982 Hearings, cited supra at n. 186, 624-25.

197. Administration Defends Tax-Exempt School Policy Switch, 14 TAX NOTES 358 (Feb. 8, 1982).

198. Id.

one brief amicus curiae,[199] the Supreme Court appointed William T. Coleman, Jr., to argue the case as counsel for the *judgments* below.[200]

In the meantime, and still prior to the Supreme Court's decision in the case, the Administration directed the IRS to grant tax exemption to Bob Jones University and the Goldsboro schools, and to revoke its contrary rulings. The Service was slowly and carefully considering this directive,[201] when — on February 18, 1982 — it was prevented from complying with it. The D.C. Circuit Court of Appeals enjoined the Service from granting tax-exempt status to any racially-discriminatory school.[202] Ironically, the injunction was later reversed by the Supreme Court, which held — in one of the most important decisions for the main purposes of this paper — that the plaintiffs in that suit lacked standing.[203] It remained in place, nevertheless, long enough to preserve the status quo pending the Court's decision in Bob Jones.

199. The brief was filed by Professors Bernard Wolfman and Lawrence Tribe of the Harvard Law School.

200. This is reflected in note 24 to the opinion of the Supreme Court, 461 U.S. at 599.

201. Commissioner Roscoe L. Egger, Jr., and Chief Counsel Kenneth Gideon disagreed with the Administration's reversal of position, and stated their opposition both to the Administration officials favoring the about-face and to members of Congress. See Ways and Means 1982 Hearings, cited supra at n. 186, 256, 259 (testimony of Roscoe L. Egger, Jr., Commissioner of Internal Revenue).

202. Wright v. Regan, No. 80-1124 (Feb. 18, 1982) (per curiam order). This is reflected in note 9 to the Bob Jones opinion, 461 U.S. at 585. The injunction is reproduced in the Ways and Means 1982 Hearings, cited supra at n. 186, at 363-64.

203. Allen v. Wright, 468 U.S. 737 (1984), reversing Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981).

Appendix B. Selected Bibliography on Lobbying

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2. McGovern, Accettura & Walsh Skelly, The Final Lobbying Regulations: A Challenge for Both the IRS and Charities, 48 TAX NOTES 1305 (Sept. 3, 1990).
3. Colvin, A Suggested Approach to Ballot Measure Lobbying by Public Charities, 46 TAX NOTES 1307 (March 12, 1990).
4. Cummings, Revised Proposed Regulations On Lobbying by Electing Public Charities and By Private Foundations, 67 TAXES 193 (March 1989).
5. Halloran, Churches and Election Campaigns: More Guidance Needed on the Section 501(c)(3) Political Activity Restriction, 44 TAX NOTES 1563 (Sept. 25, 1989).
6. Troyer & Slocombe, New Prop. Regs. on Lobbying Ease Many Restrictions, 70 J. TAX'N 146 (March 1989).
7. Cummings, Political Expenditures, TAX MGMT. (BNA) 231-3rd (1988).
8. McGovern, Accettura & Walsh Skelly, The Revised Lobbying Regulations — A Difficult Balance, 41 TAX NOTES 1425 (Dec. 26, 1988).
9. Chisolm, Exempt Organization Advocacy: Matching the Rules to the Rationale, 63 IND. L.J. 201 (Spring 1988).
10. Christopher, Political Activities Become More Risky for Tax Exempts Due to RA '87, 68 J. TAX'N 136 (March 1988).
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