
Standing to Challenge Tax-Exempt Status

by
Harvey P. Dale*

* Copyright © 1990 by Harvey P. Dale. All rights reserved.

Table of Contents

Introduction and Scope	1
The <u>Bob Jones</u> Decision	2
Precedents ante-dating <u>Bob Jones</u>	3
The <u>Bob Jones</u> litigation	10
The Supreme Court Decision in <u>Bob Jones</u>	16
IRS Use of the <u>Bob Jones</u> Decision	21
The Standing-to-Sue Doctrine	32
The <u>Abortion Rights Mobilization</u> Decision	34
Standing to Challenge Tax Exemption After the <u>Abortion Rights</u> <u>Mobilization</u> Decision	43

I. Introduction and Scope:

- A. In Bob Jones University v. United States, 461 U.S. 574 (1983), the Supreme Court held that organizations which violate "fundamental public policy" do not qualify for tax-exempt status under I.R.C. § 501(c)(3). Since then, the IRS — which clearly is empowered to enforce the Bob Jones standard — has rarely applied that notion to deny tax exemption outside of the area of racial discrimination in education. In United States Catholic Conference v. Abortion Rights Mobilization, Inc., 885 F.2d 1020 (2d Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 1946 (1990), the Second Circuit Court of Appeals held that the plaintiffs lacked standing to challenge the tax-exempt status of the Catholic Church.¹ This outline will examine third-party standing to assert Bob Jones (and certain other attacks on tax-exempt status) after the Abortion Rights Mobilization decision.²

1. The challenge was not based on the Bob Jones rationale, but rather on alleged violations by the Catholic Church of the explicit I.R.C. § 501(c)(3) prohibition against engaging in political campaign activity. See text at note 19, p. 35 below.

2. Portions of this outline are taken from a paper, Public Policy Limits on Tax Benefits: Bob Jones Revisited, Tax Forum Paper No. 459, delivered by the author to The Tax Forum in April 1990.

- B. The outline begins (in ¶ II, at p. 2 below) with a discussion of the Bob Jones decision. It then (in ¶ III, at p. 21 below) sets forth some of the situations in which the IRS has invoked the fundamental-public-policy standard both before and since 1983. After describing the standing-to-sue doctrine (in ¶ IV, at p. 32 below), it next (in ¶ V, at p. 34 below) describes the convoluted litigation leading up to the Second Circuit's 1989 Abortion Rights Mobilization decision. Finally (in ¶ VI, at p. 43 below), it analyzes that decision, and various other precedents, to determine whether there are any circumstances in which parties other than the IRS may achieve standing to raise Bob Jones (or similar) questions about an organization's tax-exempt status. Parts IV, V, and VI are best described as suggestive and preliminary rather than comprehensive. A selected bibliography on standing follows the outline (at p. 45 below).

II. The Bob Jones Decision:

- A. Although not all of the history of the Bob Jones litigation is directly relevant to this outline, it is sufficiently fascinating to justify setting forth a good part of it. This portion of the outline does not attempt to consider all of the precedents bearing on constitutional and other aspects of racial discrimination in education. Rather, it

focusses on the precedents directly bearing on the question of whether a racially-discriminatory educational institution may qualify for tax-exempt status under I.R.C. § 501(c)(3), and on the Bob Jones case itself.

B. Precedents ante-dating Bob Jones:

1. For about a decade after Brown v. Board of Education, 347 U.S. 483 (1954), the IRS appeared to have little interest in the issue of tax exemption for racially discriminatory schools. By the mid-1960's, however, the Service began to focus on it. On August 2, 1967, the Service published a News Release stating that it was reviewing the federal tax status of such schools, and that both tax exemption and charitable contribution deductions would be denied:

"if the operation of the school is on a segregated basis and its involvement with the state or political subdivision is such as to make the operation unconstitutional or a violation of the laws of the United States." IRS News Release, Aug. 2, 1967, 7 CCH 1967 STAND. FED. TAX REP. ¶ 6734, 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. 9 (1979) [hereinafter cited as "1979 Oversight Hearings"].

Because the rationale of the news release was of constitutional dimension and thus depended on finding state action, one possible implication was that such tax benefits would *not* be lost if the school could sustain itself without any state aid (outside of tax relief). See Note, Federal Tax Benefits to Segregated Private Schools, 68 COLUM. L. REV. 922, 925-26 (1968). The Note argues that "the IRS need not, and should not, have left upon [sic] this possibility" *Id.* at 926.

2. Later in the same year, the Service held that tax-exempt status and charitable contribution deductions would be unavailable for a racially-discriminatory recreational facility. Rev. Rul. 67-325, 1967-2 C.B. 113, discussed in Recent Cases, Taxation — IRS Rules Organization Which Discriminates on Basis of Race Not Charitable, 21 VAND. L. REV. 406 (1968).
3. For further reviews of the early history of this issue, see Note, Tax Exemptions for Racial Discrimination in Education, 23 TAX L. REV. 399 (1968); Note, Federal Tax Benefits to Segregated Private Schools, 68 COLUM. L. REV. 922 (1968); and Note, The Tax-Exempt Status of Segregated Schools, 24 TAX L. REV. 409 (1969).

4. In 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), the Supreme Court affirmed an order of the Federal District Court for the District of Columbia requiring the Internal Revenue Service to deny recognition of tax-exempt status to segregated private schools in Mississippi. The order precluded the Internal Revenue Service from granting recognition of tax-exempt status to racially discriminatory Mississippi private schools in the future. The Court stated that "under the Internal Revenue Code, properly construed, racially discriminatory private schools are not entitled to the federal tax exemption" nor are contributors to them entitled to charitable deductions. Although its injunction was limited to Mississippi, the Green Court's rationale was not so limited. See Rice, Can Federal Tax Benefits Constitutionally be Extended to Private Segregated Schools? The Implications of Green v. Kennedy, 24 Sw. L.J. 705 (1970).
5. As a direct result of the District Court's order in Green, the Internal Revenue Service first announced in 1970 and then formally ruled in 1971 that racially discriminatory private schools, wheth-

er state-supported or not, are not entitled to tax-exempt status under the Internal Revenue Code and that, to qualify for tax exemption, private schools must adopt a racially nondiscriminatory admissions policy. IRS News Release, July 10, 1970, and IRS News Release, July 19, 1970, reprinted in 1979 Oversight Hearings at 10, cited supra ¶ II.B.1, p. 3; Rev. Rul. 71-447, 1971-2 C.B. 230. The ruling said, in part: "All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy."

It went on to state:

"[R]acial discrimination in education is contrary to Federal public policy. Therefore, a school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in sections 170 and 501(c)(3) of the Code . . . and accordingly does not qualify as an organization exempt from Federal income tax."

The ruling was thus grounded in statutory interpretation, not constitutional law. The Service's position was not arrived at lightly. Randolph W. Thrower, who was Commissioner of Internal Revenue in 1970 when the News Release was is-

sued, 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) [hereinafter cited as the "1982 Ways and Means Hearings."]

6. 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."³ Unlike Rev. Rul.

3. Congress intervened to change this latter result, adding 501(i) to the Code in 1976. Act of Oct. 20, 1976, Pub. L. No. 94-568, § 2(a), 90 Stat. 2697 (1976). See H. Rep. No. 1353, 94th Cong., 2d Sess. 8 (1976); S. Rep. No. 1318, 94th Cong., 2d Sess. 7-8 (1976).

71-447, the McGlotten decision rested on constitutional grounds.

7. The Internal Revenue Service's position — based on Rev. Rul. 71-447 — grew and strengthened in 1972 and in 1975. Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Rul. 75-231, 1975-1 C.B. 158; Rev. Proc. 75-50, 1975-2 C.B. 587.⁴ Even the strengthened guidelines, however, attracted criticisms. For example, the U.S. Commission on Civil Rights asserted that they were too weak and thus ineffective. See Wright v. Regan, 656 F.2d 820, 824-25 (D.C. Cir. 1981), discussing the criticisms. In 1979, the then Commissioner of Internal Revenue acknowledged a need for more detailed guidelines. See 1979 Oversight Hearings at 302, cited supra ¶ II.B.1, p. 3.
8. In the late 1970's, the Service proposed to publish still further Revenue Procedures,⁵ but, in

4. Rev. Proc. 75-50, § 4.08, refers to Rev. Proc. 72-4, 1972-1 C.B. 706, for the procedures to be followed in revoking tax exemption. Rev. Proc. 72-4 was superseded by Rev. Proc. 76-33, 1976-2 C.B. 655, which was in turn superseded by Rev. Proc. 80-25, 1980-1 C.B. 667.

5. Proposed Revenue Procedure on Private Tax-Exempt Schools, 43 Fed. Reg. 37,296 (Aug. 22, 1978), revised at 44 Fed. Reg. 9,451 (Feb. 13, 1979), corrected at 44 Fed. Reg. 11,021 (Feb. 26, 1979). The

(continued...)

1980 and before they were finally issued, Congress intervened to cut off appropriations "used to carry out" the proposals.⁶ Shortly thereafter, on May 5, 1980, the District Court for the District of Columbia modified and supplemented its original 1971 injunction, requiring the Service to implement procedures stronger and more far reaching than those previously in effect to prevent racially discriminatory schools from being tax-exempt.⁷ The resulting situation was succinctly

5. (...continued)
controversial nature of the proposals prompted Congressional hearings. See 1979 Oversight Hearings, cited supra ¶ II.B.1, p. 3.

6. Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559, 562, 577, §§ 103 and 615. These were referred to as the "Dornan-Ashbrook appropriation riders," after the names of their Congressional sponsors. See Note, The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools, 93 HARV. L. REV. 378 (1979). The 1980 appropriations ban was extended for fiscal 1981. Pub. L. No. 96-536, 94 Stat. 3166 (1980). The co-sponsors, Rep. Dornan and Rep. Ashbrook, both indicated that their riders were not intended to interfere with the ability of the Service to continue to revoke tax exemption of racially discriminatory schools pursuant to the Service's pre-1978 Revenue Rulings and Procedures. 125 Cong. Rec. H5879, 5882 (July 13, 1979, daily ed.) (statement of Rep. Ashbrook); 125 Cong. Rec. H5982 (July 16, 1979, daily ed.) (statement of Rep. Dornan).

7. Green v. Miller, 80-1 U.S.T.C. ¶ 9401, 45 A.F.T.R.2d 1566 (D.D.C. 1980) (not officially reported).

described by Ex-Commissioner Randolph Thrower:

"Thus, the Service is presently in the position of being prohibited by one branch of the government to act while being ordered to do so by another. The end result is a dual system: one method of review for Mississippi schools based on Green II, and another method for the rest of the country based, until recently, on procedures in effect prior to August 22, 1978, and now on no policy whatsoever."⁸

C. The Bob Jones litigation:

1. The first stage of the litigation followed closely on the heels of the IRS announcements, in 1970, that racially-discriminatory schools would no longer be entitled to tax-exempt status. (See ¶ II.B.5, p. 5, above.) 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 I.R.C. § 7421(a), the anti-injunction provisions of

8. 1982 Ways and Means Hearings at 104-05, cited supra ¶ II.B.5, p.7 (statement of Randolph W. Thrower). See also id. at 254 (statement of Roscoe L. Egger, Jr., Commissioner of Internal Revenue).

the Code. Bob Jones University v. Simon, 416 U.S. 725 (1974).

2. In January 1976, the Internal Revenue Service issued a final notice of revocation of tax-exempt status to Bob Jones University, effective from December 1, 1970. The revocation was based upon Bob Jones University policies and practices of racial discrimination.⁹
3. 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 suit was obviously not about \$21; that was merely a way to seek reinstatement of its exemption. The United States counterclaimed for approximately \$480,000 in federal unemployment taxes for the years 1971 through 1975.¹⁰
4. The District Court held Bob Jones University *qualified* for tax exemption on December 26,

9. Bob Jones University appears never to have denied that it discriminated on racial grounds. It merely appears to have claimed that such discrimination was based on sincerely held religious beliefs. See 461 U.S. at 602 n. 28.

10. 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).

1978, and entered judgment for Bob Jones University in the refund suit. In a separate suit decided the same date, the District Court ordered the Secretary of the Treasury and Commissioner of Internal Revenue Service to restore Bob Jones University's tax-exempt status. 468 F. Supp. 890 (D.S.C. 1978).

5. The Court of Appeals for the Fourth Circuit reversed both judgments in a 2-1 decision, held that Bob Jones University was *not* entitled to tax exemption, and entered judgment for the Government on December 30, 1980. 639 F.2d 147 (4th Cir. 1980).
6. Bob Jones University filed a petition for a writ of certiorari to the Supreme Court on July 1, 1981. The petition for a writ was granted October 13, 1981. 454 U.S. 892 (1981). (A companion case, Goldsboro Christian Schools, was granted certiorari on the same date.) The U.S. government's brief had supported the grant, arguing that, although there was no conflict in the Circuits (since both Bob Jones and Goldsboro agreed in denying tax exemption to racially-discriminatory schools), the Supreme Court should affirm the decisions and confirm that both correctly held

that the IRS acted within its statutory authority in revoking petitioners' tax-exempt status.

7. On January 8, 1982, a thunderbolt struck: the Reagan administration announced that it was changing its position on tax exemption for racially-discriminatory schools, and henceforth *would* grant them tax-exempt status. This, it explained, would moot the appeals in Bob Jones and Goldsboro. The same day, it filed a memorandum with the Supreme Court asking that the judgments be vacated. 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."

(The memorandum is reprinted in 1982 Ways and Means Hearings at 616-17, cited supra ¶ II.B.5, p. 7.)

8. A few days later, after a fire-storm of criticism, the administration said it would apply for legislation to permit the IRS to deny tax exemption to schools which discriminate on racial grounds. (It also said it would nevertheless restore tax exemption to Bob Jones and the Goldsboro schools.) The proposed legislation was released January 18, 1982. See Reagan Proposes Bill to Prohibit Tax Exemption for Discriminatory Schools, 14 TAX NOTES 218 (Jan. 25, 1982). 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." Tax Exemption Bill Summary, reprinted in 1982 Ways and Means Hearings at 624-25, cited supra ¶ II.B.5, p. 7.

9. On February 1, 1982, two Reagan administration witnesses testified before the Senate Finance Committee on the issue. As Tax Notes reported,

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

"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.'"

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."

10. 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 one brief amicus curiae (filed by Professors Bernard Wolfman and Lawrence Tribe of the Harvard Law School), the Supreme Court appointed William T. Coleman, Jr., to argue the case amicus curiae as counsel for the *judgment* below.

11. Before the Supreme Court's decision, the administration had directed the IRS to grant tax exemption to Bob Jones University and the Goldsboro schools, and to revoke their contrary rulings. The Service was *very* slowly and *very* carefully considering this directive, when — in February 1982 — it was enjoined by the D.C. Circuit Court of Appeals from granting tax-exempt status to any racially-discriminatory school. Wright v. Regan, No. 80-1124 (D.C. Cir. Feb. 18, 1982) (per curiam order), referred to in Bob Jones Univ. v. United States, 461 U.S. 574, 585 n. 9 (1983). (Interestingly, the D.C. Circuit Court's view of the situation was later reversed by the Supreme Court, which held that the plaintiffs in that suit lacked standing. Allen v. Wright, 468 U.S. 737 (1984), reversing Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981).)
 12. For further details, see the helpful discussion in P. TREUSCH, TAX-EXEMPT CHARITABLE ORGANIZATIONS 164-79 (3d ed. 1988).
- D. The Supreme Court Decision in Bob Jones:
1. The Court denied tax exemption to Bob Jones University because of its policy of discrimination

against blacks. The majority opinion,¹¹ by Chief Justice Burger, uses a simple syllogism.

- a. 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." 461 U.S. at 586.
- b. As its second premise, it finds that "racial discrimination in education violates a most fundamental national public policy" 461 U.S. at 593.
- c. From these premises, it concludes that the institutions in question¹² did not qualify for tax exemption under I.R.C. § 501(c)(3).

11. Justices Brennan, White, Marshall, Blackmun, Stevens, and O'Connor joined in the majority opinion. Justice Powell filed a separate concurring opinion, and Justice Rehnquist dissented.

12. 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.

2. The second step is the most significant for purposes of this outline. The Supreme Court majority found that racial discrimination in education violates a fundamental public policy by examining the positions of each of the three branches of government:
 - a. It referred to its decision in Brown v. Board of Education, 347 U.S. 483 (1954), as signalling an end to the era in which racial segregation prevailed in education in this country. 461 U.S. at 593. 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" Id.
 - b. It next 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 discrimination." 461 U.S. at 594.
 - c. It then turned to the Executive Branch, and found in Executive Orders issued by Presidents Truman, Eisenhower, and Ken-

nedy a demonstration of "the commitment of the Executive Branch to the fundamental policy of eliminating racial discrimination." 461 U.S. at 595.

3. 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 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." 461 U.S. at 592.

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." 461 U.S. at 598.

Notwithstanding these warnings, the majority stated that the Internal Revenue Service has wide latitude in interpreting and enforcing the tax law, which may require it to make "determinations of whether given activities so violate public policy that the entities involved cannot be deemed to provide a public benefit worthy of 'charitable' status." 461 U.S. at 598.¹³

4. Three aspects of the Bob Jones decision bear noting:
 - a. It rests on statutory interpretation, not constitutional, grounds. The Court explicitly declined to rule on the constitutional arguments presented to it. 461 U.S. at 599 n. 24.

13. Justice Powell, concurring, disagreed (at least in part), saying: "I am unwilling to join in any suggestion that the Internal Revenue Service is invested with authority to determine which public policies are sufficiently 'fundamental' to require denial of tax exemptions." 461 U.S. at 611. Responding to Justice Powell, the majority, in a confusing footnote, said that, because the national policy against racial discrimination is "sufficiently clear," his concerns on this point "are unfounded." 461 U.S. at 599 n. 23.

- b. It deals only with I.R.C. § 501(c)(3) status, not other tax benefits.
- c. It identifies only racial discrimination, not other activities, as violating "fundamental public policy."

Now seven years after the Court spoke, the law remains surprisingly undeveloped in each of these three areas. Despite the tremendous potential impact of the Bob Jones decision, it has rarely been applied except in the area of racial discrimination. Public policy notions have seldom been invoked as a limitation on tax benefits outside of I.R.C. § 501(c)(3). The constitutional issues, argued but not decided in Bob Jones, are still largely unexplored. It is as though a massive rock was dropped into a deep lake, but produced only a small splash and few ripples.

III. IRS Use of the Bob Jones Decision:

- A. The Service has been extremely cautious in applying the Bob Jones rationale. For example, a fairly recent G.C.M., 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." G.C.M. 39800 (June 20, 1989).

That same G.C.M. confirms that:

"Only 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 outline will briefly discuss: *first*, types of activity which may lead to a loss of tax-exempt status, and, *second*, types of organizations, other than § 501(c)(3) organizations, to which the Bob Jones rationale may be applied.

- B. Rev. Rul. 75-384, 1975-2 C.B. 204,¹⁴ 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:

14. 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.

"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, e.g., G.C.M. 38264 (Jan. 30, 1980), Rev. Rul. 75-384 has rarely been cited, and has never been relied on either by any court or by the Service in any private letter ruling. By contrast, the Service is willing to grant 501(c)(3) to organizations which promote their otherwise-qualifying ends in a confrontational manner, so long as the confrontation tactics are not illegal. G.C.M. 38415 (June 1980).

- C. 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." 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).

In an alternate holding, the Tax Court found these 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.¹⁵

- D. At least one other Court has denied tax exemption to an organization for trifling with the Service. The D.C. Circuit Court of Appeals affirmed a denial of tax-exempt status to the Synanon Church where an earlier case against it, brought by a private party, had found that officials of the church had destroyed evidence relevant to the determination of its tax-exempt status, including

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

its alleged advocacy of violence and deflection of funds to private persons. Since this constituted illegal conduct, tax-exempt status was properly revoked. Synanon Church v. United States, 820 F.2d 421 (D.C. Cir. 1987). See also G.C.M. 37817 (Jan. 10, 1979) (accord).

- E. One of the most interesting potential applications of the Bob Jones public-policy analysis is found in G.C.M. 39800 (June 20, 1989). 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 give rise to a violation of the Establishment Clause of the First Amendment. If so, thought the Service, the organization in question would clearly be violating 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.

- F. 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. G.C.M. 37462 (Mar. 17, 1978). The Service later revoked its earlier memorandum, and opined that a whites-only scholarship policy would not *automatically* 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. G.C.M. 39082 (Nov. 30, 1983). 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)." 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).

The same line of reasoning was later applied to a minorities-only scholarship program. G.C.M. 39117 (Jan. 13, 1984).

- G. 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, the 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),¹⁶ religious 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. See Bird, Exempt Organizations and

16. 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* 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).

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.

- H. Turning now to the types of organizations to which the Bob Jones rationale might apply, note first that the Bob Jones Court cautiously restricted its holding to religious *schools*, rather than "churches or other purely religious institutions." 461 U.S. at 604 n. 29. Despite this, later cases and authorities have strongly indicated that the underlying notion of the case applies more broadly. Thus, for example, the Tax Court stated, "We believe the Bob Jones opinion unqualifiedly held that all organizations seeking exemption under 501(c)(3) must comply with fundamental standards of public policy." Church of Scientology of California, cited above at ¶ III.C, p. 24, 83 T.C. at 503 n. 74. The IRS agrees. G.C.M. 39792 (Aug. 17, 1987).
- I. The Service will also apply similar policy notions to I.R.C. § 501(c)(4) social welfare organizations. In Rev. Rul. 75-384, 1975-2 C.B. 204, the Service, after denying charitable tax exemption to the civil-disobedience-urging organization in question, went on to hold that its illegal activities were *also* inconsistent with tax-exempt status

under I.R.C. § 501(c)(4). Accord, G.C.M. 38264 (Jan. 30, 1980); G.C.M. 38251 (Dec. 31, 1979).

- J. One seminal early decision considered racial discrimination by I.R.C. § 501(c)(8) fraternal beneficiary societies and I.R.C. § 501(c)(7) social clubs. A three-judge district court, in McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), held that an I.R.C. § 501(c)(8) fraternal beneficiary society was not entitled to tax-exempt status if it practiced racial discrimination. The court carefully considered the scope of the tax-exemption benefits afforded such organizations, pointing out that the Code granted them both freedom from tax on investment income and eligibility to receive deductible charitable contributions. These, it held, constituted "sufficient government involvement to invoke the Fifth Amendment." 338 F. Supp. at 459. By contrast, it held that an I.R.C. § 501(c)(7) racially-discriminatory social club *was* entitled to remain tax exempt because the scope of the tax benefits granted to it was much less,¹⁷ and thus its discriminatory activities did not constitute "state action."

17. By virtue of I.R.C. § 512(a)(3), only member income of social clubs is exempt from tax. Their other income, whether from investments or from transactions with non-members, is subject to tax. See generally B. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* § 17.4, at 349-53 (5th ed. 1987).

It stated "that the exemption of nonprofit clubs, limited as it is to member-generated funds and available regardless of the nature of the activity of the particular club, does not operate as a 'grant' of Federal funds." 338 F. Supp. at 462 (footnote omitted). The McGlotten decision, unlike Bob Jones, rests firmly on constitutional grounds. It is interesting, also, for the care with which it attempts to appraise the precise scope of tax exemption for different entities, in order to decide whether the benefits rise to the level of state action.

K. Congress disagreed with and reversed one aspect of the McGlotten case. It added I.R.C. § 501(i) to deny tax exemption to racially-discriminatory private clubs. Pub. L. 94-658, § 2(a), 10 Stat. 2697 (1976). The Congressional remedy did *not*, however, outlaw all forms of discrimination. It is limited to discrimination "on the basis of race, color, or religion," and even religious discrimination is permitted in specified circumstances. I.R.C. § 501(i)(1) and (2).

L. One later decision, which attempts to calculate the weight of particular tax benefits, is worthy of mention. The case involved alleged discrimination by airlines against the handicapped. The D.C. Circuit Court of Appeals held that special investment tax credits granted to the aviation industry were *not* enough to give rise to

"state action" for this purpose. The court, discussing both Bob Jones and McGlotten, referred to:

"the possibility that Congress did not intend, by granting a limited tax incentive to a particular industry or group, to thereby encompass [sic] every such industry or group, or, for that matter, individual within some ever-widening and potentially almost limitless definition of 'federal financial assistance.'" Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 694, 710.

In its discussion of the issue, the Court stated:

"[I]t is . . . true that the exemptions and deductions at issue in McGlotten, Bob Jones, and Regan were of a much more fundamental nature than the modest incentive to capital expenditures to which petitioners point here. To find that the government could force an airline to comply with a federal antidiscrimination mandate solely because it takes advantage of section 46(a)(8) tax credits would be to find the government impotent to compel such compliance if any airline should elect to forego such credits. If Congress did intend handicapped citizens to have access to air transportation and to apply the nondiscrimination principles of section 504 to all carriers, we would violate that intent by holding that a carrier could avoid compliance through its accountant, or that Congress would be giving a green light to discrimination if it ever chose to enhance federal revenues in this deficit-plagued era by closing tax loopholes or simplifying the Code." Id. (footnote omitted).

The opinion was written by Chief Judge Bazelon, who also authored the McGlotten decision.

IV. The Standing-to-Sue Doctrine:

- A. Because the standing doctrine is complex, the case-law is inconsistent and much-criticized, and the writings about it are voluminous,¹⁸ this outline's analysis of it must be understood to be brief, suggestive, and perhaps even to some extent misleading in its simplicity. No effort has been made to cite cases, so even some of the leading relevant decisions are not referred to in this outline (although all can be found cited in the authorities cited in the bibliography at p. 45 below).
- B. "[C]urrent standing law is a relatively recent creation." Fletcher, The Structure of Standing, 98 YALE L.J. 221, 224 (1988) (footnote omitted). Indeed, one of the earliest cases to deny a taxpayer the right to challenge a federal act, Frothingham v. Mellon, 262 U.S. 447 (1923), referred to the plaintiff's interest as "minute and indeterminate," 262 U.S. at 487, but never used the word, "standing."
- C. The standing doctrine is supported by two different sorts of considerations:

18. The selected bibliography at the end of this outline, p. 45 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.

1. "Prudential" concerns — to insure vigorous and focussed presentation of evidence and arguments, the parties must be directly and personally affected by the controversy.
2. Article III concerns — to protect the courts from giving merely advisory opinions, parties must be those actually injured.

Both types of consideration are material. Allen v. Wright, 468 U.S. 737 (1984) (standing is rooted in Article III's "case or controversy" requirement, and also reflects separation-of-powers principles).

D. Standing entails a three-part test:

1. Plaintiffs must demonstrate an injury in fact, which is concrete in nature and particularized as to them.
2. The injury must be traceable to the defendants' activities.
3. The injury must admit of redress by removing or preventing the defendants' activities.

E. There is a tight linkage between the substance of an alleged injury and standing. 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. For example, in the Abortion Rights Mobilization litigation, the crucial final opinion of the Second Circuit

Court of Appeals, discussed below at ¶ V.H, p. 40, analyzed four possible claims of standing by various of the plaintiffs: as clergy, as voters, as taxpayers, and as competitive advocates.

- F. The standing of the parties also affects the court's subject-matter jurisdiction. "[W]hen a plaintiff lacks standing to bring suit, a court has no subject matter jurisdiction over the case." In re United States Catholic Conference, 885 F.2d 1020, 1023 (2d Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 1946 (1990).
- G. The standing doctrine has been vigorously criticized by many, including by most of the authors of the articles and books cited in the bibliography following this outline (at p. 45 below).

V. **The Abortion Rights Mobilization Decision:**

- A. The Second Circuit Court of Appeal's 1989 decision in Abortion Rights Mobilization is central to this outline's analysis of standing. It is not, however, a Bob Jones "fundamental public policy" decision. Rather, it turns on the words of I.R.C. § 501(c)(3), which expressly prohibit such organizations from "participat[ing] in, or interven[ing] in (including the publishing or distribut-

ing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."¹⁹

- B. The entire lengthy string citation to 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. 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,

19. The final parenthetical phrase in the quoted language was added by the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987) ("OBRA"), and was not in the version of the Code relevant to the Abortion Rights Mobilization litigation. The regulations under the pre-1987 version of I.R.C. § 501(c)(3), however, long included the negative proscription. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). The legislative history to OBRA confirms that it was intended merely to confirm the view of the regulations and clarify the state of the law, not to change it. H.R. Rep. No. 391, 100th Cong., 1st Sess., pt. 2, at 1621.

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). Each of the most significant reported decisions in the litigation is discussed in chronological order below.

- C. In the early 1980's, 29 organizations and individuals 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). The plaintiffs included non-church tax-exempt (under I.R.C. §§ 501(c)(3) and 501(c)(4)) 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. 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.

- D. 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. Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y. 1982). 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 (under 28 U.S.C. § 1292(b)), and directed that discovery and trial preparation should proceed. Abortion Rights Mobilization, Inc. v. Regan, 552 F. Supp. 364 (S.D.N.Y. 1982).
- E. After the Supreme Court's decision in Allen v. Wright, 468 U.S. 737 (1984)²⁰ — which denied standing to a na-

20. The importance of this case to the Bob Jones controversy is described supra at ¶ II.C.11, p. 16.

tionwide class of parents of black children attending public schools but who had not actually been refused admission to allegedly racially-discriminatory private schools — 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. Abortion Rights Mobilization, Inc. v. Regan, 603 F. Supp. 970 (S.D.N.Y. 1985). 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. Abortion Rights Mobilization, Inc. v. Baker, 1985 WL 2032 (July 15, 1985) (not officially reported).

F. Following dismissal of the complaint as to the church defendants (see supra ¶ V.D, at p. 37), plaintiffs served subpoenas duces tecum on them as third party witnesses. The subpoenaed third-party church organizations declined to comply with the subpoenas, claiming they infringed on their religious freedoms. On plaintiffs' motion, Judge Carter held the church organizations in civil contempt and imposed a \$50,000-per-day fine. Abortion Rights Mobilization, Inc. v. Baker, 110 F.R.D. 337 (S.D.N.Y. 1986).. That contempt decision was af-

firmed by the Second Circuit Court of Appeals, by a 2-1 vote, in an opinion by Judge Newman.²¹ In re United States Catholic Conference, 824 F.2d 156 (2d Cir. 1987). Both the District Court and the Court of Appeals reasoned that the church organizations, having been dismissed as parties, could not, as mere third-party witnesses, raise general objections to the subpoenas by challenging the court's subject matter jurisdiction.²²

- G. The Supreme Court granted certiorari sub nom. United States Catholic Conference v. Abortion Rights Mobilization, Inc., 484 U.S. 975 (1987), 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." United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988). It remanded the case to the Court of Appeals for a determination of "whether the

21. Judge Kearse concurred in a separate opinion, and Judge Cardamone dissented.

22. 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).

District Court had subject-matter jurisdiction in the underlying action." 487 U.S. at 80.

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

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." 544 F. Supp. at 479. The Second Circuit held that "the district court erred by translating plaintiffs' genuine motivation to sue into a personalized injury in fact." 885 F.2d at 1024. 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." 885 F.2d at 1024-25.

2. Taxpayer standing — This claim was raised anew in the Second Circuit because of the decision of the Supreme Court in Bowen v. Kendrick, 487 U.S. 589 (1988), granting taxpayers standing to challenge the application of the Adolescent Family Life Act. The Second Circuit distinguished Kendrick on the basis that Kendrick dealt with alleged unconstitutional enactment by Congress, whereas the present case dealt with alleged unconstitutional administration, by the IRS, of an admittedly constitutional statute. Thus, plaintiff taxpayers lacked standing under decisions going all the way back to Frothingham v. Mellon, 262 U.S. 447 (1923). 885 F.2d at 1027-28.
3. Voter standing — the District Court had relied on Baker v. Carr, 369 U.S. 186 (1962), 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." 885 F.2d at 1028. It held that "plaintiffs here do not allege the particularized and objectively ascertainable injury in

fact that sustained standing in the malapportionment cases." 885 F.2d at 1028.

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." 885 F.2d at 1028. "The essence of this charge is that the IRS' non-enforcement of the Code creates an uneven playing field, tilted to favor the Catholic Church." 885 F.2d at 1029. After an extended discussion of relevant precedents, the court denied standing here too. The court said:

"It 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." 885 F.2d at 1029.

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 viola-

tion of federal law, should be denied access to a federal court for the reason that it is obeying the law." 885 F.2d at 1033.

- I. The Supreme Court denied certiorari on April 30, 1990. Abortion Rights Mobilization, Inc. v. United States Catholic Conference, ___ U.S. ___, 110 S. Ct. 1946 (1990).

VI. **Standing to Challenge Tax Exemption After the Abortion Rights Mobilization Decision:**

- A. After the final denial of certiorari by the Supreme Court on April 30, 1990, 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." N.Y. Times, May 1, 1990, at A18, cols. 4-5.
- B. Was Mr. Lader correct? Consider:
 1. An organization is granted I.R.C. § 501(c)(3) status, and then engages in vigorous electioneering and other political activities. If the IRS then revokes its tax exemption, would it not have competitive advocate standing even under the majority opinion in the Second Circuit?
 2. An organization applies for I.R.C. § 501(c)(3) status, and states clearly in its documents and on its Form 1023 that it intends to engage in vigorous electioneering and other political activities.

If the IRS then denies it tax exemption, would it not have competitive advocate standing even under the majority opinion in the Second Circuit?

3. A candidate opposed by the Catholic Church brings action on grounds similar to those raised in the Abortion Rights Mobilization case. Would that candidate have standing under the Second Circuit's opinion in Fulani v. League of Women Voters Education Fund, 882 F.2d 621 (2d Cir. 1989)?
- C. Is the ultimate decision in Abortion Rights Mobilization an insuperable obstacle to standing, or a road map of how to achieve standing?

Selected Bibliography
on
Standing to Challenge
Tax-Exempt Status

1. Note, Standing to Challenge Tax-Exempt Status: The Second Circuit's Competitive Political Advocate Theory, 58 FORDHAM L. REV. 723 (1990).
2. Note, Standing on Shaky Ground, 57 GEO. WASH. L. REV. 1408 (1989).
3. Note, Voter Standing: A New Means for Third Parties to Challenge the Tax-Exempt Status of Nonprofit Organizations?, 16 HASTINGS CONST. L.Q. 453 (1989).
4. Note, Taxpayer Standing and the Preventive-Remedial Distinction: A Call for Reform, 41 MAINE L. REV. 137 (1989).
5. Note, Subject Matter Jurisdiction, Standing, and Citizen Suits: The Effect of *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 48 MD. L. REV. 403 (1989).
6. Note, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 23 U.S.F.L. REV. 499 (1989).
7. Comment, Standing of Third Parties to Challenge Administrative Agency Actions, 76 CALIF. L. REV. 1061 (1988).
8. Fletcher, The Structure of Standing, 98 YALE L.J. 221 (1988).
9. Note, Divided We Fall: Associational Standing and Collective Interest, 87 MICH. L. REV. 733 (1988).
10. Sunstein, Standing and the Privatization of Public Law, 88 COLUM. L. REV. 1432 (1988).

11. Dow, Standing and Rights, 36 EMORY L.J. 1195 (1987).
12. Comment, Taxpayer's Suits: Standing Barriers and Pecuniary Restraints, 59 TEMP. L.Q. 951 (1986).
13. Nichol, Injury and the Disintegration of Article III, 74 CALIF. L. REV. 1915 (1986).
14. Note, "More Than an Intuition, Less Than a Theory": Toward a Coherent Doctrine of Standing, 86 COLUM. L. REV. 564 (1986).
15. Nichol, Abusing Standing: A Comment on *Allen v. Wright*, 133 U. PA. L. REV. 635 (1985).
16. O'Connor, Federal Courts: Standing to Sue, [1985] ANN. SURV. AM. L. 179.
17. Logan, Standing to Sue: A Proposed Separation of Powers Analysis, 1984 WIS. L. REV. 37.
18. McCoy & Devins, Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools, 52 FORDHAM L. REV. 441 (1984).
19. Stephan, Nontaxpayer Litigation of Income Tax Disputes, 3 YALE L. & POL. REV. 73 (1984).
20. Note, Standing Barriers Faced by Citizen and Taxpayer Plaintiffs in the Federal Courts, 32 DRAKE L. REV. 465 (1983).
21. Currie, Misunderstanding Standing, 1981 SUP. CT. REV. 41.
22. Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 YALE L.J. 425 (1974).
23. Scott, Standing in the Supreme Court: A Functional Analysis, 86 HARV. L. REV. 645 (1973).

24. Davis, The Liberalized Law of Standing, 37 U. CHI. L. REV. 450 (1970).
25. Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. PA. L. REV. 1033 (1968).
26. Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?, 78 YALE L.J. 816 (1969).
27. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 329-36, 459-75 (1965).
28. Davis, Standing to Challenge Governmental Action, 39 MINN. L. REV. 353 (1955).
29. 13 and 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3531-3521.16 (2d ed. 1984).