

NOTES

STANDING FOR PUBLIC AND QUASI-PUBLIC INTEREST TAX LITIGANTS

If a federal taxpayer's tax liability is adversely affected by the Secretary of the Treasury's interpretation of the Internal Revenue Code,¹ either through the issuance of a revenue ruling or a regulation,² the taxpayer may challenge the validity of that ruling or regulation through statutory judicial review.³ The aggrieved taxpayer may either refuse to pay an alleged deficiency and file a petition in the United States Tax Court,⁴ or pay the deficiency and sue for a refund in a federal district court or the Court of Claims.⁵ One who does not assert an incorrect assessment of his own taxes, yet claims to be adversely affected by a revenue ruling or regulation, must rely on nonstatutory forms of review.⁶ Such an indirectly affected claimant may seek an injunction,⁷ a declaratory judgment, or both.⁸

1. I.R.C. §§ 1-9042.

2. *Id.* § 7805.

3. *Id.* §§ 6213 & 7422.

4. *Id.* §§ 6214 & 7422.

5. *See id.* § 7422.

6. *See* Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1976). *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 23.04-.06 (Supp. 1976); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 193-94 (1965); Note, *Non-Taxpayer Challenges to Internal Revenue Service Rulemaking: Constitutional and Statutory Barriers to Judicial Review*, 63 GEO. L.J. 1263, 1273 (1975).

7. Plaintiff must overcome the Tax Anti-Injunction Act, I.R.C. § 7421(a) ("Except as provided in sections 6212(a) and (c), 6213(a), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."). *See Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974); *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974); *Educo, Inc. v. Alexander*, 557 F.2d 617 (7th Cir. 1977); *Cattle Feeders Tax Comm. v. Shultz*, 504 F.2d 462 (10th Cir. 1974); *ITT v. Alexander*, 396 F. Supp. 1150 (D. Del. 1975).

8. Plaintiff must also overcome the federal taxes exception to the Declaratory Judgment Act, 28 U.S.C. § 2201 (1976) ("In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any Court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration . . ."). For a discussion of the application of the Tax Anti-Injunction Act, I.R.C. § 7421(a), and the Declaratory Judgment Act, see *Bittker & Kaufman, Taxes & Civil Rights: "Constitutionalizing the Internal Revenue Code,"* 82 YALE L.J. 51 (1972); Note, *supra* note 6.

Unlike the taxpayer whose tax liability is in issue,⁹ the taxpayer who merely challenges the validity of a ruling or regulation without asserting that the ruling or regulation affects his own tax liability¹⁰ must establish his standing to sue under section 10(a) of the Administrative Procedure Act (APA).¹¹ This Note traces the cases in which these indirectly affected plaintiffs, asserting either a public interest or a quasi-public interest,¹² have brought suit against the Secretary of the Treasury claiming the invalidity of a rule or regulation. This culminates in an analysis of *Simon v. Eastern Kentucky Welfare Rights Organization*¹³ and concludes with predictions for the future of public and quasi-public interest tax litigation.

I. INTRODUCTION

The Internal Revenue Code¹⁴ is more than a complex, statutory mechanism enabling the federal government to collect revenues. It has also been designed¹⁵ and construed¹⁶ to implement substantive poli-

9. See text accompanying note 3 *supra*.

10. For the purposes of this Note, such plaintiffs will be referred to as "indirectly affected plaintiffs" and "public and quasi-public interest litigants." See note 12 *infra*.

11. Administrative Procedure Act, § 10(a), 5 U.S.C. §§ 701-06 (1976); see notes 22-25 *infra* and accompanying text.

12. The use of the phrase, "quasi-public interest," is borrowed from Tannenbaum, *Public Interest Tax Litigation Challenging Substantive IRS Decisions*, 27 NAT'L TAX. J. 373, 374 (1974). Quasi-public interest suits represent a class of plaintiffs narrower than all federal taxpayers. However, to the extent that if successful the court ruling "will result in higher federal tax payments by the limited class of taxpayers whose benefits are reduced or eliminated, and ultimately in reduced tax payments for the general public," the suit also represents the general public interest. See generally Zacharias, *Standing of Public Interest Litigation Groups to Sue on Behalf of Their Members*, 39 U. PITT. L. REV. 453 (1978).

13. 426 U.S. 26 (1976). See also Note, *Constitutional Law—Standing of Indigents in Need of Hospital Care to Challenge the Charitable Tax Status of Hospitals*, 1977 WIS. L. REV. 247; Comment, 48 U. COLO. L. REV. 95, 103 (1976).

14. I.R.C. §§ 1-9042.

15. *E.g.*, The Tax Reform Act of 1969, § 902, 83 Stat. 710-11 (now I.R.C. § 162), explicitly sanctions business expenses that are contrary to public policy. Such nondeductible expenses include penalties and fines for violations of the law, I.R.C. §§ 162(f), (g), illegal bribes or kickbacks to government officials or employees, *id.* § 162(c)(1), and unethical business payments such as bribes and protection payments. *Id.* § 162(c)(3).

16. Prior to the Tax Reform Act of 1969, the federal courts refused to allow deductions that encouraged "frustration of sharply defined national or state policies." *Tank Truck Rentals v. Commissioner*, 356 U.S. 30, 35 (1958). See *Commissioner v. Tellier*, 383 U.S. 687 (1966); *Hoover Motor Express Co. v. United States*, 356 U.S. 38 (1958); *Commissioner v. Sullivan*, 356 U.S. 27 (1958); *Lilly v. Commissioner*, 343 U.S. 90 (1952); *Dixie Mach. Welding & Metal Works, Inc. v. United States*, 315 F.2d 439 (5th Cir. 1963); *Fuller v. Commissioner*, 213 F.2d 102 (10th Cir. 1954); *Benjamin T. Smith*, 34 T.C. 1100 (1960), *aff'd per curiam*, 294 F.2d 957 (5th Cir. 1961); *Luther M. Richey, Jr.*, 33 T.C. 272 (1959); *Leon Turrisspeed*, 27 T.C. 758 (1957); *Ellett & Rubinstein, Disal-*

cies¹⁷ wholly unrelated to the collection of revenues. The Code encourages activities that Congress has determined to be beneficial¹⁸ and discourages conduct deemed contrary to public policy.¹⁹ Implementation of the Code, therefore, affects taxpayers both directly, through the payment of tax dollars, and indirectly, as beneficiaries²⁰ of the activities that Congress intended to encourage or discourage. Thus, public and quasi-public interest plaintiffs have sought relief from the courts alleging that the Secretary of the Treasury's interpretation of the Code was contrary to congressional intent that the Code be construed consonantly with public policy.²¹

Public and quasi-public interest tax litigants must seek nonstatutory review.²² Plaintiffs seeking nonstatutory review of administrative actions, whether a Treasury ruling or any other agency action, must satisfy the standing test set forth in section 10(a) of the APA.²³ This section provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."²⁴ Although the same test applies to all nonstatutory review plaintiffs, courts are more reluctant to grant standing to public and

lowed Deductions: 1969 Tax Reform Act Changes to Code Section 162, 48 TAXES 457, 457 n.1 (1970); Gordon, *The Public Policy Limitation on Deductions from Gross Income: A Conceptual Analysis*, 43 IND. L.J. 406, 414 n.45 (1968); Taggart, *Fines, Penalties, Bribes, and Damage Payments and Recoveries*, 25 TAX. L. REV. 611, 613 n.2 (1970); Note, *The Judicial Public Policy Doctrine in Tax Litigation*, 74 MICH. L. REV. 131, 131 (1975).

17. S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 126-74, 324-42 (1973).

18. *See, e.g.*, 26 U.S.C. § 170 (1976) (providing a deduction for charitable contributions); 26 U.S.C. § 501 (1976) (exempting from federal taxation several kinds of organizations such as corporations organized and operated exclusively for religious, charitable, or educational purposes).

19. *See* note 15 *supra*.

20. Whether public and quasi-public interest plaintiffs are intended beneficiaries of Code provisions is an important factor in the standing analysis that follows. *See* notes 96-104 *infra* and accompanying text.

21. *See, e.g.*, *Simon v. Eastern Ky. Welfare Rts. Org.*, 426 U.S. 26 (1976); *Tax Analysts & Advocates v. Simon*, 390 F. Supp. 927 (D.D.C. 1975), *aff'd sub. nom.* *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977); *Tax Analysts & Advocates v. Shultz*, 376 F. Supp. 889 (D.D.C. 1974); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972); *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub. nom.* *Coit v. Green*, 404 U.S. 997 (1971); *cf.* Note, *supra* note 16, at 131 (general discussion of the public policy tax doctrine).

22. *See* Note, *supra* note 6, at 1263. *See generally* *Ortego v. Weinberger*, 516 F.2d 1005, 1009 (1975); *Nader v. Volpe*, 466 F.2d 261, 266 (D.C. Cir. 1972).

23. 5 U.S.C. § 702 (1976); *cf.* *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (§ 10(a) of the APA "grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute'").

24. 5 U.S.C. § 702 (1976).

quasi-public interest tax litigants because of "the established doctrine that in assessing and collecting taxes and utilizing predictable revenue gathering procedures, the government must be free from premature judicial interference."²⁵

II. STANDING BEFORE *EASTERN KENTUCKY*

*Green v. Connally*²⁶ was the first quasi-public interest suit brought against the Secretary of the Treasury. Plaintiffs, black parents of school children attending public schools in Mississippi, sought to enjoin the Secretary from affording tax-exempt status and allowing the charitable deduction of contributions to private schools that discriminated against black students. The court, without mentioning plaintiffs' standing, found the indirect support provided by exemptions and deductions indistinguishable, in a constitutional sense, from direct government grants²⁷ and issued an injunction. In support of its assertion that the public policy limitation applies to the charitable provisions of the Code,²⁸ the court looked to cases that had held the "Code must be construed and applied in consonance with the Federal public policy"²⁹

25. Note, *supra* note 6, at 1264-74. See *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7-8 (1962); *Bull v. United States*, 295 U.S. 247, 259-60 (1935); *Snyder v. Marks*, 109 U.S. 189, 193-94 (1883); *State R.R. Tax Cases*, 92 U.S. 575, 613-14 (1875); *Cheatham v. United States*, 92 U.S. 85, 88-89 (1875); *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870); *Cattle Feeders Tax Comm. v. Shultz*, 504 F.2d 462 (10th Cir. 1974).

Congress may also be more reluctant to grant standing to public and quasi-public interest tax litigants. Legislation has been proposed which would remove the strictures of *Eastern Kentucky* from the federal courts' standing requirements. The proposed bill, however, provides that it "shall not affect the standing or lack of standing of persons to challenge agency action which affects the liability or status of another person under the revenue laws." S. 3005; 95th Cong., 2d Sess., 124 CONG. REC. S. 6498.99 (daily ed. Apr. 27, 1978). See note 91 *infra*.

26. 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971).

27. Clearly the Federal Government could not under the Constitution give direct financial aid to schools practicing racial discrimination. But tax exemptions and deductions certainly constitute a Federal Government benefit and support. While that support is indirect, and is in the nature of a matching grant rather than an unconditional grant, it would be difficult indeed to establish that such support can be provided consistently with the Constitution.

Id. at 1164-65. "But governmental and constitutional interest of avoiding racial discrimination in educational institutions embraces the interest of avoiding even the 'indirect economic benefit' of a tax exemption." *Id.* at 1169; *cf. Walz v. Tax Comm'n*, 397 U.S. 664 (1969) (first amendment implications of providing tax exemptions to religious organizations and allowing deductions for contributions to such organizations).

28. I.R.C. §§ 170 & 501.

29. 330 F. Supp. at 1163-64. See *Commissioner v. Tellier*, 383 U.S. 687 (1966); *Tank Truck*

In *McGlotten v. Connally*,³⁰ another quasi-public interest tax suit, plaintiffs sought to enjoin the Secretary from granting tax benefits to fraternal and nonprofit organizations that discriminated against non-whites. Unlike the court in *Green*, however, the *McGlotten* court required plaintiffs to establish their standing to sue by satisfying the two-pronged test set forth in *Association of Data Processing Service Organizations v. Camp*³¹ and *Barlow v. Collins*.³² Under this test, to satisfy the case or controversy requirement of Article III,³³ plaintiff must establish "that the challenged action has caused injury in fact, economic or otherwise" and that "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."³⁴

The plaintiffs in *McGlotten* claimed they were injured by the grant of tax benefits because it enabled the maintenance of the organizations' discriminatory policies and constituted "an endorsement of blatantly discriminatory organizations by the Federal Government."³⁵ Without any data about the organizations' financial dependency on the challenged tax deductions, the court found it sufficient that "the Government has indicated approval of . . . their discriminatory practice, and aided that discrimination by the provision of federal tax benefits."³⁶

Although the Supreme Court in *Eastern Kentucky* later would require plaintiffs to demonstrate a "substantial likelihood" that the IRS ruling caused the alleged injury,³⁷ the court in *McGlotten* summarily found causation without examining any facts upon which it could base a causal nexus inquiry. Without regard to the size of the organization, its membership, its financial resources, or the nature of its facilities—factors which determine the impact of the disallowance of exemp-

Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958); Commissioner v. Sullivan, 356 U.S. 27 (1958); Lilly v. Commissioner, 343 U.S. 90 (1952).

30. 338 F. Supp. 448 (D.D.C. 1972).

31. 397 U.S. 150 (1970).

32. 397 U.S. 159 (1970).

33. U.S. CONST. art. III, § 2, cl. 1.

34. 397 U.S. at 153; see *Barlow v. Collins*, 397 U.S. at 164. For a more extensive discussion of standing, see 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.00 (1970 & Supp. 1976); Davis, *Standing*, 1976, 72 NW. U.L. REV. 69 (1977); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1723-47 (1975).

35. 338 F. Supp. at 452.

36. *Id.* at 459.

37. 426 U.S. at 35. See text accompanying notes 74-83 *infra*.

tions and deductions—the *McGlotten* court concluded that the granting of tax benefits constituted federal support or encouragement.³⁸ The court assumed that “[e]very deduction . . . provides a benefit”³⁹ and “the withdrawal of that benefit would often act as a substantial incentive to eliminate the behavior which caused the change in status.”⁴⁰ Thus the organization’s true financial dependency on federal benefits was immaterial to the court’s grant of standing.⁴¹

After *McGlotten* one could argue that where the injury is governmental support and encouragement of a violation of constitutionally protected rights, it is sufficient to allege that the agency action encourages private persons or institutions to violate plaintiffs’ constitutional rights. Under this theory, plaintiffs do not suffer injury from the effects of the agency action on the policies of private organizations, but rather from the agency action, which stamps the imprimatur of approval on discriminatory policies. Thus plaintiffs need not demonstrate the actual effect of the governmental action on private entities’ behavior.⁴²

38. 338 F. Supp. at 456. See Bittker & Kaufman, *supra* note 8, at 62; Note, *supra* note 16, at 140.

39. 338 F. Supp. at 456. For a discussion of whether deductions and exemptions are “benefits” provided by the federal government, see McDaniel, *Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction*, 27 TAX L. REV. 377 (1972); Surrey, *Federal Income Tax Reforms: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Government Assistance*, 84 HARV. L. REV. 352 (1970); Stone, *Federal Tax Supports of Charities and Other Exempt Organizations: The Need for a National Policy*, 20 SO. CAL. TAX INST. 27 (1968); Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Governmental Expenditures*, 83 HARV. L. REV. 705 (1970).

40. 338 F. Supp. at 456.

41. See Bittker & Kaufman, *supra* note 8, at 60-62.

42. In the context of racial discrimination this result is appropriate. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); 51 N.C.L. REV. 1530 (1973); 40 TENN. L. REV. 502 (1973). The Supreme Court has relaxed standing requirements where governmental action has a chilling effect on fundamental rights. See *Laird v. Tatum*, 408 U.S. 1 (1972); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Baird v. State Bar*, 401 U.S. 1 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Lamond v. Postmaster Gen.*, 381 U.S. 301 (1965); *Baggett v. Bullitt*, 377 U.S. 360 (1964). See also *Jackson v. Dukakis*, 526 F.2d 64 (1st Cir. 1975).

Moreover, although some cases have held that only black citizens who have suffered wrong from alleged discriminatory practices have standing to sue, see *Brown v. Lutz*, 316 F. Supp. 1096 (E.D. La. 1970); *Hadnott v. City of Prattville*, 309 F. Supp. 967 (M.D. Ala. 1970), the better view is that any citizen, regardless of race, should be able to challenge governmental action that may induce private persons to relegate blacks to second class citizenship. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Carter v. Jury Comm’n*, 396 U.S. 320 (1970); *Coleman v. Aycock*, 304 F. Supp. 132 (N.D. Miss. 1969); *Marable v. Alabama Mental Health Bd.*, 297 F. Supp. 291 (M.D. Ala. 1969); Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 500 (1972). Indeed, Professor Sedler argues that plaintiffs’ injury in fact is the government action itself that contributes to “the institutional racism that is so much a part of the American scene.” *Id.*

*Tax Analysts & Advocates v. Shultz*⁴³ supports the proposition that when fundamental, constitutionally protected rights are at stake, agency action should be more susceptible to public and quasi-public interest litigation. Plaintiffs challenged a revenue ruling⁴⁴ that allowed multiple gifts of up to three thousand dollars to be given in support of political candidates without subjecting the donor to gift taxation.⁴⁵ Because the ruling treated the committee and not the political candidate as the donee, a donor could give three thousand dollars multiplied by the number of his candidate's committees without incurring gift tax liability. The plaintiffs alleged diminution of their vote and dilution of their ability to affect the electoral process.⁴⁶

Notwithstanding the "attenuated line of causation between the allegedly illegal conduct and the complained of injury,"⁴⁷ the court found the causal link less strained than that found persuasive in *United States v. SCRAP*.⁴⁸ The Supreme Court, in *SCRAP*, upheld the standing of an environmental group to assert that a railroad freight rate increase would increase the cost of recycling, thereby increasing the consumption of nonrecyclable products, requiring the consumption of more natural resources, some of which would be taken from areas near plaintiffs' residence, and resulting in the deposit of more refuse in nearby parks.⁴⁹ The choice of comparison to this most liberal interpretation of the standing doctrine⁵⁰ assured plaintiffs' standing in *Shultz*.

Shultz bears a marked similarity to *McGlotten*. Plaintiffs were not required to demonstrate the facts and circumstances that would indicate the probable effect of a change in tax status; they were able to challenge the revenue ruling without demonstrating that donors had taken advantage of the ruling and that its revocation would cause donors to give fewer gifts because of the impact of the gift tax. Those persons whose tax assessment would be directly affected by revocation of the ruling might decide to continue giving gifts in equal amounts for

43. 376 F. Supp. 889 (D.D.C. 1974).

44. Rev. Rul. 72-355, 1972-2 C.B. 532.

45. See I.R.C. § 2503.

46. 376 F. Supp. at 898. See also *Common Cause v. Shultz*, 1973 FED. TAXES (P-H) § 9592 (plaintiffs granted standing to challenge Treasury regulations prescribing the way taxpayers designate one dollar of their tax liability to be paid to the Presidential Election Campaign Fund).

47. 376 F. Supp. at 897.

48. 412 U.S. 669 (1973).

49. *Id.* at 688.

50. See K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.02-2 (1976) (supplementing K. DAVIS, ADMINISTRATIVE LAW TREATISE (1970)).

the benefit of the same candidate. Thus, where, as here, fundamental or constitutionally protected rights are at stake, plaintiffs need allege only agency action that acts as an incentive to persons or organizations to diminish, dilute, or violate those rights. The governmental support or encouragement is the injury in fact.

When public and quasi-public interest plaintiffs do not allege an injury to constitutionally protected rights, the courts have used the standing doctrine to bar suits against the Secretary of the Treasury. In *Tax Analysts & Advocates v. Simon*,⁵¹ plaintiffs, owners of a working interest in a domestic oil well, sought a declaratory judgment that revenue rulings,⁵² which allowed tax credits for income taxes paid to foreign countries by American citizens and corporations in connection with the extraction and production of oil, were contrary to the Internal Revenue Code.⁵³ Plaintiffs claimed injury in their capacity as federal taxpayers on the theory that they were required to bear a heavier tax burden because of the decrease in federal revenues resulting from the tax credits.⁵⁴ In their capacity as competitors, plaintiffs asserted that they would receive lower prices for their oil because foreign competitors taking advantage of the tax credit would depress the domestic oil market. Furthermore, as a result of the depression of the domestic oil market caused by the tax credit, the value of plaintiffs' interests in their domestic oil well would also decline.⁵⁵

In denying standing to plaintiffs in their capacity as federal taxpayers,⁵⁶ the court merely followed well-settled principles enunciated by the Supreme Court.⁵⁷ Among several factors contributing to their de-

51. 390 F. Supp. 927 (D.D.C. 1975), *aff'd sub nom.* *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977). See generally 23 VILL. L. REV. 580 (1978). The D.C. Circuit decided the case after *Eastern Kentucky*. With respect to the issues discussed at this point, the D.C. Circuit expressly affirmed the district court. In dealing with issues discussed later in the Note, however, the circuit court misconstrued Justice Powell's decision in *Eastern Kentucky*. See *American Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 149-50 n.2 (D.C. Cir. 1977); *id.* at 155 n.23 (Bazelon, C.J., dissenting). Thus for purposes of clarity and consistency, the district court opinion is discussed.

52. Rev. Rul. 68-552, 1968-2 C.B. 306; Rev. Rul. 55-296, 1955-1 C.B. 386.

53. I.R.C. §§ 901(b) & 903.

54. 390 F. Supp. at 931.

55. *Id.* at 931, 938.

56. *Id.* at 932.

57. The court rejected plaintiffs' taxpayer standing on the basis of *Flast v. Cohen*, 392 U.S. 83 (1968) and *Frothingham v. Mellon*, 262 U.S. 447 (1923). The *Frothingham* Court ruled that a federal taxpayer, as such, is without standing to challenge the constitutionality of a federal statute. 392 U.S. at 85. The *Flast* exception to *Frothingham* is a narrow one, requiring at least a constitutional challenge. It is applicable only where the taxpayer can

demonstrate a logical link between his status as a taxpayer and the challenged legislative

nial of plaintiffs' standing as competitors,⁵⁸ the court applied an overly strict zone of interests test.⁵⁹ In nontax cases, courts generally have been quite liberal in granting standing to plaintiffs who challenge governmental action that benefits a competitor⁶⁰ or decreases the value of

enactment, *i.e.* an attack on an enactment under the taxing and spending clause of the Constitution (Art. 1, § 8); and, second, a nexus between the plaintiff's status as a taxpayer and a specific constitutional limitation on the taxing and spending power.

390 F. Supp. at 934. Since plaintiffs merely alleged an unauthorized administrative ruling resulting in a heavier tax burden, the court found the taxpayers outside the *Flast* exception. *Id.* at 935-36.

58. The court found that plaintiffs failed to present sufficient evidence to establish injury in fact, that plaintiffs did not fall within the zone of interests created by the statute, and that "policy considerations" militated against a grant of standing. 390 F. Supp. at 941-42.

59. See note 34 *supra* and accompanying text.

60. See *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) (Comptroller of the Currency authorized banks to operate collective investment funds in competition with open-end investment companies); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (Comptroller of the Currency ruling that banks, incidental to their banking services, may provide travel services, challenged by a group of travel agencies); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970) (Comptroller of the Currency authorized banks to "make data processing services available to other banks and to bank customers" in competition with companies that "sell data processing services to businesses generally"); *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968) (Tennessee Valley Authority authorized to supply power at rates less than half those of an established private utility company); *Baltimore & Ohio R.R. v. United States*, 264 U.S. 258 (1924) (The Chicago Junction Case) (Interstate Commerce Commission authorized acquisition of two terminal railroads by larger railroad company in direct competition with other local railroad companies); *Scanwell Laboratories v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970) (Federal Aviation Administration accepted offer of lowest bidder on a contract for installation of instrument landing systems although the bidder had not complied with qualifications for bidders contained in the bid invitation, whereas second lowest bidder had complied); *Air Reduction Co. v. Hickel*, 420 F.2d 592 (D.C. Cir. 1969) (Interior Department promulgated regulation requiring government agencies and their contractors to purchase helium requirements only from government or certain "eligible" private suppliers, thus prohibiting purchases from all other private suppliers); *Marine Space Enclosures, Inc. v. Federal Maritime Comm'n*, 420 F.2d 577 (D.C. Cir. 1969) (New York City gave Port of New York Authority a contract for construction and maintenance of maritime passenger terminal facilities in port of New York City under restrictive covenants, which excluded other developers for more than seventy years from operating different kinds of terminals); *Safir v. Gibson*, 417 F.2d 972 (2d Cir. 1969), *cert. denied*, 400 U.S. 850 (1970) (Federal Maritime Administrator and Maritime Subsidy Board failed to recover subsidies paid to a shipping company found by the Federal Maritime Commission to be cutting rates to drive competition out of business); *Public Serv. Co. v. Hamil*, 416 F.2d 648 (7th Cir. 1969), *cert. denied*, 396 U.S. 1070 (1970) (Indiana's Rural Electrification Administrator granted a loan commitment to an electric cooperative without the approval of the Indiana Public Service Commission and contrary to the interests of an electric company already servicing the area involved); *Matson Navigation Co. v. Federal Maritime Comm'n*, 405 F.2d 796 (9th Cir. 1968) (Federal Maritime Commission approved a merger or consolidation agreement between three steamship lines in direct competition with another company doing business in that area); *Mid-West Nat'l Bank v. Comptroller of the Currency*, 296 F. Supp. 1223, 1226 (N.D. Ill. 1968) (Comptroller of the Currency approved a national bank's application to establish detached drive-in banking facilities in a location of questionable validity under a state law regu-

their investments.⁶¹ The *Tax Analysts* court could have followed this liberal standing policy by considering the Code in its entirety and its general policy to tax persons in equivalent economic situations equally⁶² as creating a protected zone of interests.⁶³ The court, however, fearing a flood of suits against the Secretary of the Treasury,⁶⁴ found the general equitable goals of the Internal Revenue Code too vague and uncodified to be construed as creating a protected zone of

lating the location of such facilities, the approval of which would subject another national bank to "potential competitive harm"); *Stephens v. Dennis*, 293 F. Supp. 589, 593 (N.D. Ala. 1968) (Alabama State Board of Pharmacy was authorized by state law to issue "assistant pharmacist certificates" to persons with at least fifteen successive years in pharmacy under the supervision of a licensed pharmacist; the certificates granted status and rights equivalent to those of licensed pharmacists, but required less burdensome qualifications).

61. *See, e.g.*, *The Bootery, Inc. v. Washington Metropolitan Area Transit Auth.*, 326 F. Supp. 794 (D.D.C. 1971) (Transit Authority gave affected business operators an inadequate opportunity to address the Authority on a mass transit plan); *L'Enfant Plaza N., Inc. v. District of Columbia Dev. Land Agency*, 300 F. Supp. 426 (D.D.C. 1969) (agency grant of permission to property developer to build a cafeteria, drug store, bank, post office, and savings and loan building, even though the urban renewal plan for the area limited construction to offices and "accessory uses such as employee restaurants and off-street parking," upheld in suit to enjoin the construction by owners of neighboring property).

62. W. KLEIN, *POLICY ANALYSIS OF THE FEDERAL INCOME TAX 5-8* (1976).

63. The court noted that the purpose behind the passage of §§ 901(b) and 903, the Code sections upon which the challenged revenue rulings were based, was the prevention of double taxation. 390 F. Supp. at 340, 342 (citing *Burnet v. Chicago Portrait Co.*, 285 U.S. 1 (1932)). This, however, should not preclude, as the court implied, a finding that Congress also intended to equalize the tax burden between foreign and domestic competitors, *see* note 62 *supra*, thus bringing plaintiffs within the protected zone of interests. In light of the multiple purposes served by the Code, *see* notes 14-20 *supra* and accompanying text, one can hardly argue that each provision serves only one purpose or interest.

64. 390 F. Supp. at 942. The court also expressed its concern that the case might present a political question:

The revenue rulings at issue here are Executive Branch decisions which have particular relevance today to the conduct of foreign affairs by this country. These rulings do not simply interpret Code provisions which have only internal ramifications. Rather they are responses to the acts of sovereign nations with whom the United States is at present engaged in a delicate relationship. The courts' lack of expertise in foreign affairs has led to a longstanding deference to the Executive Branch in such matters and that deference is an appropriate policy for consideration in the instant suit, although not controlling since the Court has found that Plaintiffs do not have standing to bring this suit.

Id. It is impossible to determine how much the court's decision to deny standing was influenced by the existence and magnitude of the lurking political question. One would expect, however, that in 1975 the court would entertain vivid memories of the 1973-74 Arab oil embargo. *See generally* A. BLAUSTEIN & J. PAUST, *THE ARAB OIL WEAPON* (1977); E. COPP, *REGULATING COMPETITION IN OIL* (1976); D. DAVIS, *ENERGY POLITICS* (1974); R. HARNISH & M. WEIDENBAUM, *GOVERNMENT CREDIT SUBSIDIES FOR ENERGY DEVELOPMENT* (1976); R. MANCKE, *THE FAILURE OF U.S. ENERGY POLICY* (1974); *THE MIDDLE EAST: OIL, POLITICS, AND DEVELOPMENT* (J. Anthony ed. 1975).

interests.⁶⁵

Prior to *Eastern Kentucky*, most courts found standing in public and quasi-public interest tax suits where plaintiffs alleged an injury to constitutionally protected rights and denied standing where plaintiffs did not allege such injury.

III. *WARTH V. SELDIN* AND ITS APPLICATION IN *EASTERN KENTUCKY*

In *Warth v. Seldin*,⁶⁶ the Supreme Court enunciated the standing principles, later applied in *Eastern Kentucky*,⁶⁷ which remain the major obstacles to public and quasi-public interest tax litigants. One of four distinct groups of plaintiffs, persons of low and moderate income⁶⁸ alleged they were effectively excluded from residing in Penfield, New York because of the town's restrictive zoning ordinances. The Court found that plaintiffs' claims that they desired to live in the town and made some efforts to locate housing did not establish "in any concretely demonstrable way"⁶⁹ that plaintiffs' inability to locate housing resulted from defendants' restrictive zoning practices.⁷⁰ Moreover, the Court held that plaintiffs must demonstrate to a "substantial probability"⁷¹ that exercise of the Court's remedial powers would vindicate plaintiffs' alleged injury. Plaintiffs' ability to locate low and moderate income housing depended upon the willingness of third parties to build such housing.⁷² Because they failed to demonstrate to a substantial probability that third parties would build suitably priced housing if the Court enjoined defendants' restrictive zoning ordinances, plaintiffs were denied standing.⁷³

Although the Court recognized that the indirectness of the relation-

65. 390 F. Supp. at 937.

66. 422 U.S. 490 (1975).

67. 426 U.S. 26 (1976). See notes 75-84 *infra* and accompanying text.

68. For purposes of clarity, this Note will only discuss the Court's standing analysis with respect to the low and moderate income plaintiffs who sought housing in Penfield. For a more complete discussion of this rather complicated case, see The Supreme Court, 1974 Term, 89 HARV. L. REV. 1, 189-95 (1975); Note, *Warth v. Seldin: The Substantial Probability Test*, 3 HAST. CONST. L.Q. 485 (1977).

69. 422 U.S. at 504.

70. *Id.*

71. *Id.*

72. *Id.* See *Linda R.S. v. Richard D.*, 410 U.S. 614 (1974).

73. 422 U.S. at 504. *Accord*, *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (on facts similar to *Warth*, standing was granted because one of the plaintiffs, a builder, entered into a lease and a sole agreement for land on which he intended to build a low rent apartment complex).

ship between the alleged wrong and the alleged injury does not necessarily preclude standing, it candidly admitted that "it may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm."⁷⁴

In *Eastern Kentucky*, plaintiffs sought revocation of a revenue ruling⁷⁵ that allowed hospitals that did not offer services to indigents, "to the extent of their financial ability,"⁷⁶ to qualify as charitable organizations. Plaintiffs, indigents who sought and were refused medical care in local hospitals, alleged that the ruling injured them because it encouraged the hospitals to deny services to indigents.⁷⁷ They further contended that as intended beneficiaries of the Code provisions that grant favorable tax treatment to charitable organizations,⁷⁸ they had standing to assert that the Secretary of the Treasury had acted contrary to Congress' intent.

The Court assumed for purposes of the standing inquiry "that the IRS's new policy encourages a hospital to provide fewer services to indigents,"⁷⁹ but concluded that this did not imply that a court-ordered revocation of the ruling "would result in the plaintiffs receiving the hospital services they desire[d]."⁸⁰ The Court then noted that "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to defendant's 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications."⁸¹

In an attempt to demonstrate that revocation of the ruling would redress their injury, plaintiffs introduced affidavits indicating that some hospitals received substantial charitable contributions. The Solicitor General asserted that on a nationwide basis, however, charitable contributions accounted for only four percent of private hospital revenues.

74. 422 U.S. at 505.

75. Plaintiffs challenged Rev. Rul. 69-545, 1969-2 C.B. 177, which allowed nonprofit hospitals to maintain their tax exempt status even though nonemergency indigent patients were referred to other hospitals in the community. This ruling modified Rev. Rul. 56-185, 1956-1, C.B. 202, which required that for a hospital to be tax exempt, it must, to the extent of its financial ability, serve indigents.

76. 426 U.S. at 31.

77. *Id.* at 34.

78. *Id.* See note 96 *infra* and accompanying text.

79. 426 U.S. at 42 n.23.

80. *Id.* at 42.

81. *Id.* at 42-43.

Thus the Court concluded "that the dependence upon special tax benefits may vary from hospital to hospital"⁸² and that notwithstanding revocation of the ruling there was a substantial likelihood that the hospitals where plaintiffs sought treatment would continue to elect to deny nonemergency treatment to indigents. The Court, relying on *Warth* to deny standing, said it was unlikely "that victory in this suit would result in [plaintiffs] receiving the hospital treatment they desire."⁸³

Although *Eastern Kentucky's* substantial likelihood test appeared to close the door to public and quasi-public interest tax litigants, the Court specifically left open the question whether one whose tax liability is not at stake may ever challenge the validity of a ruling or regulation.⁸⁴ Indeed, the cases following *Eastern Kentucky* indicate that the door has been left ajar to at least some third party tax litigants.

IV. STANDING AFTER *EASTERN KENTUCKY*

Following *Eastern Kentucky*, most federal courts have required plaintiffs to allege a particularized injury that concretely and demonstrably resulted from defendant's action and that will likely be redressed by the remedy sought.⁸⁵ Although courts uniformly cite *Eastern Kentucky* for the proposition that before a court will exercise jurisdiction plaintiff must demonstrate to a substantial likelihood that

82. *Id.* at 43.

83. *Id.* at 45-46.

84. *Id.* at 37. *But see id.* at 46 (Stewart, J., concurring) ("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.").

85. *Singleton v. Wulff*, 428 U.S. 106 (1976); *Banks v. Multi-Family Mgt., Inc.*, 554 F.2d 127 (4th Cir. 1977); *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977); *Safir v. Kreps*, 551 F.2d 447 (D.C. Cir.), *cert. denied*, 434 U.S. 820 (1977); *National Ass'n of Neighborhood Health Centers, Inc. v. Mathews*, 551 F.2d 321 (D.C. Cir. 1976); *Ellis v. HUD*, 551 F.2d 13 (3d Cir. 1977); *Mulqueeny v. National Comm. on the Observance of Int'l Women's Year 1975*, 549 F.2d 1115 (7th Cir. 1977); *Rental Hous. Ass'n of Greater Lynn, Inc. v. Hills*, 548 F.2d 388 (1st Cir. 1977); *Grey v. Greyhound Lines, E.*, 545 F.2d 169 (D.C. Cir. 1976); *Pittson Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976); *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976); *Jaimes v. Toledo Metropolitan Hous. Auth.*, 432 F. Supp. 25 (N.D. Ohio 1977); *Sigma Delta Chi v. Martin*, 431 F. Supp. 1182 (D. S.C.), *rev'd*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1027 (1978); *AMA v. Mathews*, 429 F. Supp. 1179 (N.D. Ill. 1977); *Hoffman v. DiFalco*, 424 F. Supp. 902 (S.D.N.Y. 1976); *Fair Hous. Council, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071 (D.N.J. 1976); *Doe v. Mathews*, 422 F. Supp. 141 (D.D.C. 1976); *Melanson v. Rantoul*, 421 F. Supp. 492 (D.R.I. 1976); *British Columbian Inv. Co. v. FDIC*, 420 F. Supp. 1217 (S.D. Cal. 1976); *National Land for People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976).

the relief sought will redress the injury suffered,⁸⁶ one court held that *Eastern Kentucky* dealt with prudential considerations rather than constitutional limitations,⁸⁷ and another cited it for the proposition that courts may not exercise jurisdiction over moot controversies.⁸⁸

Notwithstanding the inconsistencies reflected in the lower courts' application of *Eastern Kentucky*, these cases and Justice Brennan's dissent⁸⁹ indicate that federal courts can avoid its strictures by defining plaintiffs' injury as the governmental *encouragement* of a violation of constitutional rights⁹⁰ or statutory rights or benefits.⁹¹ Inquiry into the causal nexus between the agency action and the actions of third parties is then irrelevant because the plaintiff has not asserted that the latter was the cause of his injury. Plaintiffs' injury is caused directly by the IRS ruling that misconstrues the Code; therefore the court need not speculate about the potential responses of the regulated entities⁹² whose

86. See cases cited in note 85 *supra*.

87. Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 133 (D.C. Cir. 1977); see note 51 *supra*.

88. Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d Cir. 1976).

89. 426 U.S. at 55-56 (1976) (Brennan, J., concurring in judgment and dissenting); see text accompanying notes 96-104 *infra*.

90. See discussion of Tax Analysts & Advocates v. Shultz, 376 F. Supp. 889 (D.D.C. 1974) and McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), in notes 30-50 *supra* and accompanying text.

91. See notes 96-104 *infra* and accompanying text. Congress is presently considering legislation that would remove causation and redressability from the federal courts' standing requirements. See S. 3005, 95th Cong., 2d Sess., 124 CONG. REC. S. 6498-99 (daily ed. Apr. 27, 1978). The proposed bill, however, erroneously interpreted *Eastern Kentucky* as resting upon prudential considerations, rather than Article III requirements. See 124 CONG. REC. S. 6497 (daily ed. Apr. 27, 1978) (remarks of Sen. Metzenbaum). Although Congress has the power to remove prudential limitations, it cannot remove considerations of constitutional dimension. See 426 U.S. at 64 (Brennan, J., concurring in judgment and dissenting).

Eastern Kentucky, however, rests "squarely on the irreducible Article III minimum of injury in fact, thereby effectively placing it beyond congressional power to rectify." *Id.* See American Soc'y of Travel Agents v. Blumenthal, 566 F.2d 145, 149-50 n.2 (1977). Accordingly, Congress lacks the power to remove the strictures of *Eastern Kentucky* from the federal courts' standing requirements.

The proposed bill, however, may be an attempt to persuade the courts to narrowly interpret *Eastern Kentucky*. The courts may be persuaded to require a less stringent demonstration of the causal nexus inquiry than *Eastern Kentucky* appeared to mandate. See notes 135-40 *infra* and accompanying text. Until the proposed bill becomes law, one can only speculate on its impact.

92. See Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 159 (D.C. Cir. 1977) (Bazelon, C.J., dissenting); American Soc'y of Travel Agents, Inc. v. Blumenthal, 566 F.2d 145, 159 (D.C. Cir. 1977) (Bazelon, C.J., dissenting).

The phrase "regulated entity" refers to the person or institution to whom the agency action is directed. In the context of tax litigation, it is the entity whose tax liability is at stake. For example, in *Eastern Kentucky* it is the hospitals; in *McGlotten v. Connally*, the fraternal organizations.

tax liability will be affected by the relief sought.

Plaintiffs in *Eastern Kentucky* were denied standing because the Court construed their injury too narrowly, *i.e.*, as the refusal of hospitals to supply medical care to indigents.⁹³ Because plaintiffs' injury was the loss of a benefit supplied by the regulated entity,⁹⁴ the Court required plaintiffs to demonstrate that the IRS rulings caused the hospitals to deny them medical care.⁹⁵

Had the Court interpreted plaintiffs' claim as one of injury to their congressionally conferred beneficial interest,⁹⁶ plaintiffs would not have had to show the likelihood of hospitals admitting indigents in response to revocation of the ruling.⁹⁷ As beneficiaries of these Code provisions, plaintiffs would have standing to challenge the revenue ruling as contrary to the intent of Congress that economic inducements to serve indigents be required for hospitals receiving favorable tax treatment. The Court could have interpreted plaintiffs' injury not as their inability to receive medical care, but rather as their reduced opportunity to receive medical care. The latter was caused by the ruling, which eliminated an inducement to hospitals to serve indigents. Thus, while the relief sought may not ensure their admittance to hospitals, it would restore the inducements to hospitals to admit indigents⁹⁸ and thereby, at least theoretically, increase their opportunity to receive medical services.

By adopting this approach, the Court would satisfy the basic standing requirement⁹⁹ underlying Article III.¹⁰⁰ As intended beneficiaries¹⁰¹ of the charitable provisions of the Code, plaintiffs are persons

93. 426 U.S. at 40-41. See notes 75-84 *supra* and accompanying text.

94. See note 92 *supra*.

95. 426 U.S. at 42-46. See notes 75-84 *supra* and accompanying text.

96. Plaintiffs were intended beneficiaries of the charitable provisions of the Code. See *Eastern Ky. Welfare Rts. Org. v. Shultz*, 370 F. Supp. 325, 330-33 (D.D.C. 1973), *rev'd on other grounds sub nom.* *Simon v. Eastern Ky. Welfare Rts. Org.*, 426 U.S. 26 (1976); *McGlotten v. Connally*, 338 F. Supp. 448, 456 (D.D.C. 1972); *accord*, *Commissioner v. Battle Creek, Inc.*, 126 F.2d 405 (5th Cir. 1942); *Intercity Hosp. Ass'n v. Squire*, 56 F. Supp. 472 (D. Wash. 1944); *Sonora Community Hosp.*, 56 T.C. 519, 525 (1966); *Lorraine Ave. Clinic*, 31 T.C. 141 (1958); *Rev. Rul. 56-185*, 1956-1 C.B. 202.

97. 426 U.S. at 55-56 (Brennan, J., concurring in judgment and dissenting). See Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 683 (1977).

98. 426 U.S. at 55-56 (Brennan, J., concurring in judgment and dissenting).

99. See text accompanying note 103 *infra*.

100. U.S. CONST. art. III, § 2.

101. See note 96 *supra*.

eligible for statutory benefits¹⁰² who have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination"¹⁰³ If it then denied standing, the Court would be holding sub silentio that the Code does not require the IRS to offer hospitals economic inducements to serve indigents in order to qualify for beneficial tax treatment.¹⁰⁴

Thus, one method of avoiding *Eastern Kentucky* is to define the injury as the loss of a statutory right or benefit caused by the implementation of the IRS ruling which encourages the violation of plaintiffs' congressionally conferred beneficial interest. This definition avoids the difficulty of establishing a causal nexus between the IRS action and private action. Plaintiffs who allege that the agency ruling encourages a violation of their constitutional rights can use the same approach to establish their standing.

In *McGlotten v. Connally*,¹⁰⁵ the IRS policy of granting favorable tax treatment to fraternal organizations that discriminated against blacks was held to constitute encouragement of racial discrimination.¹⁰⁶ Because government encouragement of racial discrimination legitimized the discriminatory practices, plaintiffs sought to redress this unlawful legitimization.¹⁰⁷ By so defining their injury, it was irrelevant that the fraternal organizations might, upon revocation of the revenue ruling, continue to discriminate against blacks and forego their favorable tax treatment.

Although federal courts may adopt Brennan's suggested approach where the IRS ruling encourages the violation of constitutionally protected rights,¹⁰⁸ it is unclear whether they will do so where the alleged injury is the governmental encouragement of a violation of statutory rights or benefits. The cases following *Eastern Kentucky* indicate that at least some courts are avoiding its barrier in statutory nontax cases by

102. See *Alexander v. Swank*, 404 U.S. 282 (1971); *Tucker v. Hardin*, 430 F.2d 737 (1st Cir. 1970); *Peoples v. Department of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970); *Sparrow v. Gill*, 304 F. Supp. 86 (M.D.N.C. 1969); *Essex County Welfare Bd. v. Cohen*, 299 F. Supp. 176 (D.N.J. 1969); Reich, *The New Property*, 73 YALE L.J. 733 (1974); Sedler, *supra* note 42.

103. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

104. See Tushnet, *supra* note 97, at 683.

105. 338 F. Supp. 448 (D.D.C. 1972). See notes 30-41 *supra* and accompanying text.

106. See text accompanying notes 30-41 *supra*.

107. 338 F. Supp. at 452.

108. See note 42 *supra*. But see *Melanson v. Rantoul*, 421 F. Supp. 492, 503 (D.R.I. 1976).

adopting this approach sub silentio.¹⁰⁹

In these cases, courts focus on the agency's interpretation of the statute, rather than on the nexus between the ruling and the actions of the regulated entity.¹¹⁰ They construe the statutes as granting plaintiffs a right¹¹¹ or as making them the intended beneficiaries of the statute.¹¹² Injury in fact is then broadly defined as the loss of a right or benefit conferred by Congress. The agency's unlawful interpretation of the statute is the direct cause of the loss. Thus regardless of the ruling's impact on the actions of the regulated entity, plaintiffs have standing to challenge the ruling because it adversely affects a right or benefit conferred by Congress.

In *National Association of Neighborhood Health Centers, Inc. v. Mathews*,¹¹³ for example, plaintiffs alleged that the Department of Health Education and Welfare (HEW) violated the Hill-Burton Act.¹¹⁴ The Act, which authorized federal funding for state construction and modernization of medical facilities, directed HEW to prescribe regulations under which states would determine priority areas.¹¹⁵ Plaintiffs

109. See, e.g., *Safir v. Kreps*, 551 F.2d 447 (D.C. Cir. 1977) (plaintiffs alleged financial injury from the failure of agency to recover improperly paid subsidies); *National Ass'n of Neighborhood Health Centers, Inc. v. Mathews*, 551 F.2d 321 (D.C. Cir. 1976) (plaintiffs alleged failure to receive federal funding because HEW regulation violated the Hill-Burton Act (42 U.S.C. §§ 291-910-1 (1976))); *Ellis v. HUD*, 551 F.2d 13 (3d Cir. 1977) (plaintiffs alleged rent increase caused by agency raising rent ceiling); *Alabama Nursing Home Ass'n v. Califano*, 433 F. Supp. 1325 (M.D. Ala. 1977) (plaintiffs alleged HEW regulations set reimbursement ceilings too low); *AMA v. Mathews*, 429 F. Supp. 1179 (N.D. Ill. 1977) (plaintiff alleged HEW regulations interfered with physicians' professional judgment).

110. See *Safir v. Kreps*, 551 F.2d 447, 454 (D.C. Cir. 1977); *National Ass'n of Neighborhood Health Centers, Inc. v. Mathews*, 551 F.2d 321, 329 (D.C. Cir. 1976); *Ellis v. HUD*, 551 F.2d 13, 16 (3d Cir. 1977); *Alabama Nursing Home Ass'n v. Califano*, 433 F. Supp. 1325, 1328-29 (M.D. Ala. 1977); *AMA v. Mathews*, 429 F. Supp. 1179, 1189-91 (N.D. Ill. 1977).

111. See *Alabama Nursing Home Ass'n v. Califano*, 433 F. Supp. 1325, 1328-29 (M.D. Ala. 1977) (Social Security Act, 42 U.S.C. § 13.96a(a)(13)(E) (1976), granted nursing homes the right to have their Medicaid payments determined on a cost-related basis); *AMA v. Mathews*, 429 F. Supp. 1179, 1189-90 (N.D. Ill. 1977) (Health Insurance for the Aged Act, 42 U.S.C. § 1395 (1976), granted physicians the right to be free of federal supervision or control of their medical practices).

112. See *Safir v. Kreps*, 551 F.2d 447, 454 (D.C. Cir. 1977) (Merchant Marine Act, 46 U.S.C. § 1227 (1976)) allowed shareholders in a steamship company to demand that the Maritime Subsidy Board, Maritime Administrator, and Secretary of Commerce recover subsidies paid to potential competitors of the shareholder's company); *National Ass'n of Neighborhood Health Centers, Inc. v. Mathews*, 551 F.2d 321, 329 (D.C. Cir. 1976) (Hill-Burton Act, 42 U.S.C. §§ 291-910-1 (1976), allowed health centers to challenge HEW cut-off and restriction of funding for their health services); *Ellis v. HUD*, 551 F.2d 13, 16 (3d Cir. 1977) (National Housing Act, 12 U.S.C. § 1715K (1976), protects tenants of buildings erected under programs designed to eliminate slums).

113. 551 F.2d 321 (D.C. Cir. 1976).

114. 42 U.S.C. §§ 291-2910-1 (1970).

115. *Id.* § 291c.

alleged that HEW violated the Act by approving priority areas drawn on political lines, without regard to need for the delivery of health services,¹¹⁶ and by illegally transferring funds from one restricted category to another.¹¹⁷ The court avoided the *Eastern Kentucky* inquiry into the causal nexus between the HEW regulations and the states' allotment of funds by broadly defining plaintiffs' injuries¹¹⁸ as a disadvantage in the "priority of funding"¹¹⁹ and the "sharp curtailment of their opportunities for funding."¹²⁰ Inquiry into the likelihood of plaintiffs actually receiving more funds from the states was, therefore, unnecessary.

As beneficiaries of the Act,¹²¹ plaintiffs had standing to challenge HEW regulations that reduced their opportunity for funding. Although the remedy may not assure plaintiffs of funding, it will restore their rights to the priority and opportunity for funds that Congress intended. The relief sought will redress plaintiffs injury; therefore they satisfied the *Eastern Kentucky* standing test.

Although some courts are willing to avoid *Eastern Kentucky* in non-tax settings by defining injury as the agency's implementation of a ruling that encourages the violation of statutory rights or benefits, the question still remains whether courts will allow public and quasi-public interest tax litigants to challenge IRS rulings on this basis. Judge (then Chief Judge) Bazelon of the D.C. Circuit, however, appeared to have adopted this approach, sub silentio, in his dissent to *American Society of Travel Agents, Inc. v. Blumenthal (ASTA)*.¹²²

In *ASTA*, a group of travel agents alleged that the failure to tax the American Jewish Congress (AJC), a tax exempt organization,¹²³ on in-

116. 551 F.2d at 328.

117. *Id.* at 329.

118. Other courts have done the same to avoid the causal nexus inquiry between the agency ruling and the actions of the regulated entity. *See, e.g.*, *Safir v. Kreps*, 551 F.2d 447, 454 (D.C. Cir. 1977) (injury to competitive interest); *National Ass'n of Neighborhood Health Centers, Inc. v. Mathews*, 551 F.2d 321, 329 (D.C. Cir. 1976) (reduced opportunity for funding); *Ellis v. HUD*, 551 F.2d 13, 16 (3d Cir. 1977) (rent increased without opportunity to be heard); *Alabama Nursing Home Ass'n v. Califano*, 433 F. Supp. 1325, 1328 (M.D. Ala. 1977) (injury to right to have payments made on cost-related basis); *AMA v. Mathews*, 429 F. Supp. 1179, 1190 (N.D. Ill. 1977) (impediment to professional judgment).

119. 551 F.2d at 328.

120. *Id.* at 329.

121. *See id.* at 328 n.44.

122. 566 F.2d 145, 152 (D.C. Cir. 1977) (Bazelon, C.J., dissenting).

123. *See* I.R.C. § 501(c)(3).

come derived from the operation of travel programs¹²⁴ caused competitive injury. Plaintiffs contended that exempting such unrelated business income from taxation enabled the AJC to charge lower prices than private travel agents, thereby placing plaintiffs at a competitive disadvantage.¹²⁵ Thus plaintiffs argued that the IRS's improper administration of the Code caused their competitive injury.¹²⁶

The D.C. Circuit applied the *Eastern Kentucky* reasoning¹²⁷ and concluded that it was purely speculative whether one who patronized the AJC would be likely to do business with plaintiffs if the IRS enforced the Code in the manner plaintiffs sought.¹²⁸ The court construed plaintiffs' injury as the loss of business or profits.¹²⁹ Because its customers might continue to patronize the AJC even if the cost of its services remained higher, the court denied plaintiffs' standing.¹³⁰

Judge Bazelon avoided the *Eastern Kentucky* holding and its causal nexus inquiry by defining injury broadly as the systematic distortion of the marketplace.¹³¹ Plaintiffs, the intended beneficiaries of the Code provisions designed to "protect competitors of tax-exempt organizations,"¹³² were injured by illegal IRS rulings which did not foster the competitive atmosphere¹³³ Congress intended to create between tax exempt organizations and their competitors.

Exercise of the court's remedial powers would necessarily increase the costs of the AJC, eliminate the unfair competitive advantage, and create the competitive environment Congress intended.¹³⁴ Thus regardless of whether customers of the AJC would do business with

124. *Id.* § 511 imposes on corporations subject to *id.* § 501(c)(3) a tax on "unrelated business taxable income."

125. 566 F.2d at 148.

126. *Id.*

127. *Id.* at 149.

128. *Id.* at 149-50.

129. *Id.* at 150.

130. *Id.*

131. *Id.* at 159 (Bazelon, C.J., dissenting).

132. *Id.* at 150 n.4. Although Judge Bazelon does not explicitly refer to plaintiffs' status under the statute, it is implicit in his sub silentio adoption of Justice Brennan's *Eastern Kentucky* dissent. Judge Bazelon said:

Appellants allege a competitive injury, stemming from a systematic distortion of the market place. They claim that, because of illegal IRS rulings, their competitors pay no taxes and therefore have lower costs and charge lower prices. There is nothing hypothetical about this allegation: If we grant the relief appellants seek, the costs of their competitors would necessarily increase.

Id. at 159 (Bazelon, C.J., dissenting).

133. *Id.* at 149.

134. *See id.* at 159 (Bazelon, C.J., dissenting).

plaintiffs if the IRS taxed the alleged "unrelated business income," plaintiffs' injury would be effectively redressed by the government's encouragement of fair competition between tax exempt organizations and their competitors.

By defining injury as the government's encouragement of a violation of constitutional rights or statutory rights and benefits, the courts avoid the rigorous demonstration of a causal nexus between the asserted illegal agency action and actions of the regulated entity. Where plaintiffs' injury is defined as the loss of a right or benefit caused by the actions of the regulated entity, however, *Eastern Kentucky* still mandates an inquiry into the causal nexus between the agency ruling and the actions of the regulated entity.¹³⁵ In these cases, some courts have chosen an alternative route around *Eastern Kentucky* by simply requiring a less stringent demonstration of the causal link.¹³⁶

In his dissent to *ASTA*, Judge Bazelon argued that even if plaintiffs' ultimate injury is defined as the loss of business or profits, plaintiffs satisfied the causal nexus inquiry and should therefore be granted standing.¹³⁷ He contended that because causation is a vague concept, the causal link between the IRS ruling and the AJC's customers' response to that ruling is established implicitly by routine economic analysis.¹³⁸

Other courts have also found causation to be a malleable concept and have avoided *Eastern Kentucky* by requiring a less stringent dem-

135. See note 92 *supra* and accompanying text.

136. See, e.g., *Rental Hous. Ass'n of Greater Lynn, Inc. v. Hills*, 548 F.2d 388 (1st Cir. 1977); *Jaimes v. Toledo Metropolitan Hous. Auth.*, 432 F. Supp. 25 (N.D. Ohio 1977); *Fair Hous. Council, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071 (D.N.J. 1976); *National Land for People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976).

137. 566 F.2d at 159 (Bazelon, C.J., dissenting).

138. *Id.* at 159 n.41 (Bazelon, C.J., dissenting). The Supreme Court, as well, recognizes that causation is a malleable standard. In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 98 S. Ct. 2620 (1978), plaintiffs challenged the Price-Anderson Act, 42 U.S.C. § 2210 (1976), which imposes a limitation on liability for nuclear accidents. The defendants contended that the power plants would have been constructed, resulting in plaintiffs' alleged injuries, even if Price-Anderson had not been passed. The Court granted plaintiffs' standing and held that the private power companies' "participation would not have occurred but for the enactment and implementation of the Price-Anderson Act." *Id.* at 2633.

Although the Court found a "but for" relationship between the alleged unlawful act and the injury, it held that "[n]othing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief." *Id.* Where along the continuum of causation the Court will draw the line must therefore depend upon the particular facts of each case. See 566 F.2d at 159 n.41 (Bazelon, C.J., dissenting) (causation and redressability are "the kind of standards that acquire meaningful content only in application to particular circumstances").

onstration of the nexus between the agency ruling and the actions of the regulated entity.¹³⁹ Although Judge Bazelon was willing to accept a lesser demonstration of causation in tax cases, it is unlikely that most courts will bend the causation determination in favor of public and quasi-public interest tax litigants because of their reluctance to interfere with tax collection.¹⁴⁰

Although *Eastern Kentucky* appeared to foreclose all suits by litigants challenging revenue rulings that do not affect their own tax liability,¹⁴¹ closer analysis indicates that at least some public and quasi-public interest tax litigants may, by very careful pleading, establish their standing to sue. *Eastern Kentucky* should not affect plaintiffs who can establish injury caused by the implementation of an agency ruling that encourages the violation of constitutional rights¹⁴² or congressionally conferred rights and benefits.¹⁴³ But where the court interprets plaintiffs' injury as the loss of a right or benefit resulting from the actions of the entity whose tax liability is at stake, standing depends upon the likelihood that the relief sought will affect that entity's conduct in a manner favorable to plaintiffs.¹⁴⁴ Because likelihood is a malleable standard,¹⁴⁵ the degree of probability at which a federal court will exercise jurisdiction will fluctuate with the circumstances of the particular case.¹⁴⁶ Public and quasi-public interest tax litigants, however, must demonstrate a high degree of probability to overcome the courts' traditional reluctance to interfere with tax collection.¹⁴⁷

139. See cases cited in note 136 *supra*.

140. See note 25 *supra* and accompanying text. For this same reason, it is unlikely that lower federal courts will adopt the Supreme Court's method of avoiding *Eastern Kentucky*, *i.e.*, by simply failing to apply it. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976); *Davis, Standing, 1976*, 72 Nw. U.L. REV. 69, 74-77 (1977).

One commentator, however, has noted that where a suit seeks to void a ruling that would result in increased tax revenues, the governmental interest in noninterference with tax collection substantially diminishes. Note, *supra* note 6, at 1264; *cf. American Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 153 n.4 (D.C. Cir. 1977) (Bazelon, C.J., dissenting) (I.R.C. § 7421(a), the Anti-Injunction Act, "only forbids suits instigated 'for the purpose of restraining the assessment or collection of any tax,' . . . it does not bar suits seeking to compel the collection of taxes").

141. See note 84 *supra* and accompanying text.

142. See notes 105-08 *supra* and accompanying text.

143. See notes 93-104 *supra* and accompanying text.

144. See note 135 *supra* and accompanying text.

145. See 566 F.2d at 159 n.41 (Bazelon, C.J., dissenting).

146. See note 138 *supra*.

147. See note 140 *supra* and accompanying text.

Thus the first approach, which at least some courts have accepted *sub silentio* in nontax cases, is the better way to avoid *Eastern Kentucky*. As a matter of litigation strategy, therefore, public and quasi-public interest tax litigants should allege an injury to a constitutionally protected right or a congressionally conferred right or benefit. Confronted with this approach to standing, which is consistent with Article III requirements, courts may seize the opportunity to open their doors to litigants who seek to ensure that the Secretary of the Treasury's interpretation of the Code is consonant with declared public policy.¹⁴⁸

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148. See note 21 *supra* and accompanying text.