FEDERAL JURISDICTION—THE SECOND CIRCUIT'S COMPETITIVE ADVOCATE STANDING THEORY: PUBLIC OR PRIVATE MODEL THEORY? A CALL FOR CHOICE

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NOTES

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INTRODUCTION

Article III of the Constitution restricts federal court jurisdiction to cases and controversies. The Supreme Court has developed doctrines of justiciability to help define the case and controversy limitation and the scope of federal judicial power. Standing doctrine is one such doctrine of justiciability.

Standing is a threshold issue in federal court litigation in which the court’s inquiry is primarily focused on the party before the court and secondarily focused on the issues to be decided. To have standing, a litigant must have a “sufficient stake in an otherwise justiciable

1. Allen v. Wright, 468 U.S. 737, 750 (1984) (stating that the case or controversy requirement is a “fundamental limit[ ] on federal judicial power”). Article III provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

2. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-1 (2d ed. 1988); Susan Bandes, The Idea of a Case, 42 STAN. L. REV. 227, 227 (1990). For a discussion of the justiciability doctrines of mootness, ripeness, avoidance of advisory opinions, and standing, see TRIBE, supra, §§ 3-7 to 3-14. The scope of this Note is limited to standing doctrine, more specifically, competitive advocate standing.

3. See TRIBE, supra note 2, § 3-14, at 107. Professor Tribe maintains that standing is “[t]he doctrine most central to defining Article III’s requirement of a ‘case’ or ‘controversy.’” Id.


5. Flast v. Cohen, 392 U.S. 83, 99 (1968); TRIBE, supra note 2, § 3-14, at 107.

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controversy to obtain judicial resolution of that controversy.”6 The
Supreme Court has interpreted standing to consist of two sets of re­
quirements: Article III requirements and prudential requirements.7
Article III requires that a litigant suffer injury in fact, that the injury
be traceable to the opposing party’s conduct, and that the litigant's
injury be redressable by a judicial remedy.8 Prudential requirements
are derived from a set of judicially self-imposed policy considerations.9
If standing requirements are not satisfied, the federal court lacks sub­
ject matter jurisdiction over the litigation and is unable to hear the
case.10

Standing requirements, while easily stated, are in fact very diffi­
cult to implement11 and even harder to reconcile.12 One method of
conceptualizing the standing doctrine places the varying treatments of
standing on a bipolar continuum, marked by the private rights model
of federal court jurisdiction on one end and a public rights model of
federal court jurisdiction on the other end. The private model realm is
characterized by judicial reluctance to intervene13 in disputes unless a

D.C. Circuit: Here and Now, 55 GEO. WASH. L. REV. 718, 719 (1987) (Standing is “basi­
cally . . . used to decide who has enough stake in the controversy at hand to be recognized
by the court as capable of litigating the issue.”).
8. Id.
9. Id. at 751. These policy considerations include avoiding decisions involving gen­
eralized grievances, prohibiting the litigation of others' rights, and ensuring that a litigant's
interests are within the zone of interests protected by the statute sued under. Id. For a
more detailed discussion of prudential considerations, see infra notes 73-77 and accompa­
nying text.
court’s “power . . . to entertain the suit.”); Sierra Club, 405 U.S. at 731-32.
(“Standing entails a complex . . . inquiry.”), cert. denied sub nom. Abortion Rights Mobil­
12. Standing is one of the most controversial and amorphous elements of Article III
justiciability. See, e.g., William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221,
221-24 (1988) (arguing that because standing is in such a confused and “unhappy state of
affairs,” it should be reduced to an inquiry into whether a plaintiff can claim relevant statu­
tory or constitutional rights and sue for violations thereof); Gene R. Nichol, Jr., Injury and
hundred years, the judiciary has yet to outline successfully the parameters of a constitu­
tional 'case.’ ”); Kevin A. Coyle, Comment, Standing of Third Parties to Challenge Admin­
istrative Agency Actions, 76 CAL. L. REV. 1061, 1062 (1988) (arguing that standing is
unclear because traditional Article III principles “have become intertwined with . . . ex­
traconstitutional doctrines”); Jordana G. Schwartz, Note, Standing to Challenge Tax-Ex­
empt Status: The Second Circuit’s Competitive Political Advocate Theory, 58 FORDHAM L.
REV. 723, 724 (1990) (noting that standing determinations are the “most difficult compo­
nent[s] of the case or controversy analysis”).
13. See, e.g., Allen, 468 U.S. at 752 (stating that “federal courts may exercise power
litigant is suing upon a right specific to that litigant. Thus, claims common to the general population are beyond the private rights realm and cannot be judicially redressed in a lawsuit brought by a private litigant. The public model realm, on the other hand, is characterized by a broad judicial willingness to construe and enforce the Constitution and federal law. Relying upon the public model, courts can recognize broader claims so that they can rule on the merits and, if necessary, enforce the government's compliance with the law.

Though courts do not typically announce which conceptual realm they are grounding their standing analysis upon, commentators have argued that a court's choice of conceptual realm determines the outcome of the standing decision and, ultimately, the scope of federal court power. The courts' failure to enunciate the model of judicial authority upon which their standing analysis is predicated has attracted criticism. Commentators have argued that failure to identify the underlying analytical model has produced confusion, lack of guidance, contradictory results, and opportunity for courts to base their standing analysis on the attractiveness of the underlying merits.

A recent Second Circuit decision, In re United States Catholic Conference, illustrates how a court's failure to articulate the analytical framework can produce the confusion and lack of guidance that characterizes modern standing doctrine. In Catholic Conference, the

only 'in the last resort, and as a necessity' (quoting Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

14. The private rights model is predicated upon a right-duty relationship. See Cass R. Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432, 1434-35 (1988). In other words, a litigant has standing to sue only where the opposing party breached a duty that they owed to the litigant. See infra notes 31-34 and accompanying text for a discussion of the derivations of the private rights model.

15. See Tribe, supra note 2, § 3-2; Bandes, supra note 2, at 281 (discussing the federal courts' primary purpose as interpreting and enforcing existing law and the Constitution); Sunstein, supra note 14, at 1446-47 (making the distinction between the private model basis in the right-duty relationship and public model basis in ensuring the government's fidelity to the law).


17. See Bandes, supra note 2, at 227 (arguing that the adoption of one of the conceptual models is "a primary issue of constitutional interpretation" because it "delineates the reach of the federal judicial power").

18. See Tribe, supra note 2, § 3-14, at 111 ("The aspect of the Court's standing jurisprudence most open to criticism . . . is [the Court's lack of candor in articulating and justifying the basic choice [between private or public law models] it has made.").

19. See generally id.; Bandes, supra note 2, at 319 (concluding that failure to adopt a model "leads to incoherence and unpredictability, as well as to a lack of judicial accountability"); Sunstein, supra note 14.

court denied the plaintiffs, political advocates, standing to sue using a new theory of standing, competitive advocate standing. The court, however, failed to explicitly identify the analytical framework upon which competitive advocate standing is based. Moreover, competitive advocate standing has a dual nature: as stated by the court, competitive advocate standing elicits public realm traits; however, the court’s application of the theory elicits strong private realm traits. Thus, Catholic Conference fails to provide clear guidance on how to interpret competitive advocate standing.

Another Second Circuit decision, Fulani v. League of Women Voters Education Fund, further complicates the interpretation of competitive advocate theory. In League of Women Voters, a Second Circuit panel granted a plaintiff standing to sue using a political competition theory very similar to competitive advocate standing. Here too, the court failed to enunciate the analytical framework upon which its standing analysis was predicated. Like the Catholic Conference analysis, the League of Women Voters analysis can be interpreted as adopting either private or public models of federal court jurisdiction. Thus, League of Women Voters also fails to give adequate guidance to lower courts and litigants.

The Second Circuit’s current formulation of competitive advocate

21. Catholic Conference, 885 F.2d at 1028-31. Competitive advocate standing theory recognizes a unique Article III injury in fact: the impairment of a political advocate’s ability to compete with fellow competitor political advocates because the government has conferred an unfair advantage upon fellow competitor advocates by enforcing the law in a discriminatory manner. Id. at 1028-29. The court’s acknowledgement of this injury enables a claimant to comply with constitutional standing requirements provided that the claimant shows a causal nexus between the defendant’s conduct and the claimant’s injury in fact. To have standing, the claimant must further satisfy judicially imposed prudential limitations. Id. at 1029 n.2, 1031; see also Schwartz, supra note 12 (discussing the formulation of competitive advocate standing and arguing that it was misapplied in Catholic Conference). For a discussion of competitive advocate standing and its derivations, see infra notes 83-98 and accompanying text.

The court’s standing analysis also included three other standing theories: clergy standing, taxpayer standing, and voter standing. Catholic Conference, 885 F.2d at 1024-28. The court denied the plaintiffs standing to sue under these alternative standing theories as well. Id. For a discussion of the relationship between voter standing and competitive advocate standing, see infra notes 87-90 and accompanying text.

22. See infra notes 157-216 and accompanying text for a discussion of competitive advocate standing’s dual nature.

23. 882 F.2d 621 (2d Cir. 1989). League of Women Voters was decided one month prior to Catholic Conference. Judge Cardamone, the one judge involved in both Catholic Conference and League of Women Voters, wrote the majority opinion in Catholic Conference and, while concurring with the League of Women Voters majority on the merits, strongly disagreed with the League of Women Voters majority’s standing analysis. See infra note 110.

standing may create confusion and contradictory results in future competitive advocate cases. A court could seize upon either interpretation of competitive advocate standing, public or private, to justify whichever standing decision it wished to make. This current ambiguity in competitive advocate standing might allow a court to render its standing decision based on the attractiveness of the underlying merits and then justify the decision by pointing to the interpretive model that supports the particular holding.

This Note suggests that the Second Circuit select and then clearly state the analytical framework that competitive advocate standing is based upon in order to provide clearer guidance to lower courts and litigants, avoid contradictory standing outcomes, and ensure some degree of accountability. Although not a panacea, the adoption of one model would expose the driving aspect of standing analysis, the underlying analytical framework, to frank and open discussion.

Section I reviews the history and current requirements of standing doctrine. Section II reviews the requirements of competitive advocate standing and discusses the facts and holdings of two Second Circuit standing cases, Catholic Conference and League of Women Voters. Section III analyzes competitive advocate standing under both the public and private models of judicial authority to demonstrate competitive advocate standing's dual nature. Section III ends by proposing a more specific form of competitive advocate standing, labeled partisan electoral standing, that is based on the private model of judicial authority. Partisan electoral standing provides a basis on which to reconcile the two Second Circuit decisions. This Note concludes by suggesting that the Second Circuit clarify its approach to competitive advocate standing by articulating the theory's interpretive basis. This Note further suggests that such a clarification may produce more consistent results and reduce lower court confusion.

I. HISTORY AND CURRENT REQUIREMENTS OF STANDING DOCTRINE

Standing doctrine is based on the case or controversy limitation that Article III of the Constitution places upon federal courts. A federal court may assume jurisdiction only after it has determined that the claimant has established a case or controversy. A claimant can meet the case or controversy requirements of Article III by showing

26. Id. See supra note 1, U.S. CONST. art. III, § 2, cl. 1 for case and controversy limitation.
that a sufficient injury in fact exists and that there is a causal nexus between the defendant's conduct and the claimant's injury. In addition to these constitutional requirements, the claimant may have to satisfy judicially imposed prudential limitations.

This Section will trace the evolution of standing doctrine from its constitutional roots through its modern treatment. It will also provide an historical basis for the private and public rights models of federal court jurisdiction.

A. Standing History

In the late nineteenth and early twentieth centuries, standing doctrine did not exist as a distinct body of law. A plaintiff could bring a suit in federal court only if his or her claim sought to enforce rights protected by the common law, the Constitution, or a statute.

This early concept of federal court power was predicated upon the private rights model interpretation of Marbury v. Madison. This interpretation viewed as the federal courts' primary purpose the deciding of disputes between private parties. The federal courts' power to interpret the Constitution was incidental to this role and used only when necessary in resolving the private parties' dispute. Thus, under a private model analysis, standing inquiries in suits against the government were limited to instances where the government breached a constitutional, common law, or statutory duty that it owed to a litigant. Litigants merely asserting that the government failed to adhere to a statute were forced to resort to other non-judicial means to redress

27. Allen, 468 U.S. at 751.
29. Fletcher, supra note 12, at 224-25; Sunstein, supra note 14, at 1434 ("For most of the nation's history, there was no distinctive body of standing doctrine.").
30. See Fletcher, supra note 12, at 224; Sunstein, supra note 14, at 1434 (stating that "standing depended on whether positive law created a cause of action"). See generally JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 20-33 (1978).
31. 5 U.S. (1 Cranch) 137 (1803). Commentators argue that because Marbury v. Madison "emphasized the necessity for judicial protection of vested or legal rights," Marbury provided a basis for the private rights model of judicial power. Nichol, supra note 12, at 1919-20. Marbury also provides an interpretive basis for the public law model of judicial authority, the antithesis to the private model. See infra notes 53-56 and accompanying text for a discussion of the public model.
32. See Bandes, supra note 2, at 277; Nichol, supra note 12, at 1920 (courts were restricted to arbitrating disputes involving private rights between private parties); Coyle, supra note 12, at 1068; Sunstein, supra note 14, at 1434-35.
33. See Bandes, supra note 2, at 277.
these injuries.\textsuperscript{34} Courts would not imply a private right of action for these litigants.

During the 1930's, standing doctrine evolved into a distinct body of legal principles. This evolution was a reaction to the rapid growth of administrative agencies and an increase in litigation over administrative agencies' obligations.\textsuperscript{35} Courts used early standing doctrine to determine which parties could sue to compel a governmental agency to fulfill its legal obligations.\textsuperscript{36} The doctrine was based on a legal interest test.\textsuperscript{37} Under this test, if a statute clearly granted standing to the plaintiff in a particular context, a court could grant standing to sue.\textsuperscript{38} If, on the other hand, the statute was silent on the issue of standing, courts would grant standing only if the violated right was actionable in common law property, tort, or contract.\textsuperscript{39} Thus, the legal interest test was a mixture of statutory and common law notions.\textsuperscript{40}

In the 1960's, the federal courts began to expand the legal interest test.
test. Some courts implied rights of action in suits against the government and granted standing where litigants could show that they were regulatory beneficiaries. To determine if a litigant was a regulatory beneficiary, courts analyzed the statute to determine the scope of its protection and then determined whether the litigant's interests fell within the statute's scope of protection. A court could imply a right of action if the litigant's interests were protected by the statute. In addition, the Supreme Court liberalized the legal interest test to include voter and taxpayer challenges to agency actions.

The Supreme Court's decision in Association of Data Processing Service Organizations, Inc. v. Camp further "liberalized access to the federal courts" by rejecting the legal interest test and replacing it with a two step analysis. First, the plaintiff had to show an injury in fact. Second, the plaintiff's interest had to be "arguably within the zone of interests to be protected or regulated by the statute or consti-

ers, 17 Suffolk U. L. Rev. 881, 887 (1983) (arguing that the A.P.A. did not merely restate existing federal court practice, but instead "broadened the traditional rules").

41. See Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1966) (standing granted to members of television audience to argue against a broadcast license renewal based on a statutory analysis of the Federal Communications Act); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 615-17 (2d Cir. 1965) (standing granted to users of the environment based upon a statutory analysis of the Federal Power Act).

42. See cases cited supra note 41.


44. Flast v. Cohen, 392 U.S. 83 (1968) (allowing a taxpayer to challenge government allocation of tax revenues authorized by Congress under the Article I, § 8, Taxing and Spending Clause of the Constitution).

45. Fletcher, supra note 12, at 227-28 (describing the growing attempts to sue government agencies by individuals with no injury different from the general populace); Nichol, supra note 12, at 1920 (noting the "[l]iberalized judicial review of administrative decisionmaking"); Coyle, supra note 12, at 1070 (noting that as litigation against government agencies increased, courts correspondingly broadened standing requirements "well beyond the narrow interests of the actual litigants").


47. Nichol, supra note 12, at 1921; see also Data Processing, 397 U.S. at 154 (Writing for the majority, Justice Douglas noted that, at least where statutes were concerned, courts had been granting standing to challenge administrative actions to larger classes of people.).

48. The Court stated: "The 'legal interest' test goes to the merits. The question of standing is different." Data Processing, 397 U.S. at 153. In other words, the legal interest test was no longer considered part of the threshold standing inquiry reached before a decision on the merits. See also Nichol, supra note 12, at 1921 (noting that the Court in Data Processing replaced the legal interest test with an injury in fact requirement).

49. Data Processing, 397 U.S. at 152. Instead of having to show that a private right was violated, plaintiffs were able to claim more abstract injuries in fact. See, e.g., cases cited infra note 51.
Following *Data Processing*, the Court granted standing to claimants in a variety of cases that would previously have been dismissed for lack of standing. Often the injuries found in these cases were difficult to distinguish from injuries to the general public.

Commentators have argued that *Data Processing*-era cases signaled a trend towards the use of a public law model of judicial power as the interpretive basis of standing; federal courts were said to be more concerned with enforcing government fidelity to the law than with restricting themselves to private disputes only. The public law model, based upon a broad interpretation of *Marbury v. Madison*, views as the federal courts' primary role the power to construe and enforce the Constitution and federal law. Thus, litigants have a

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50. *Data Processing*, 397 U.S. at 153. The purpose of the "zone of interests" analysis is to determine whether "in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). Only if "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit" will a court deny standing. *Id.* This standard of judicial review "is not meant to be especially demanding." *Id.*

"Zone of interests" is a concept used to describe the individual interests that a statute or constitutional guarantee is intended to protect. *See id.* at 399-400; *Data Processing*, 397 U.S. at 153-54.

51. *See, e.g., Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (finding that injury to interracial association interest grounded in 1968 Civil Rights Act was sufficient to grant standing); *Tilton v. Richardson*, 403 U.S. 672 (1971) (allowing citizen-taxpayers to sue the government to challenge government grants to religious universities). *See also Nichol*, *supra* note 12, at 1921 (noting that in the period following *Data Processing*, the Supreme Court recognized claims that "federal courts would have rejected in earlier eras"); *Wald*, *supra* note 6, at 720 (stating that the period after *Data Processing* was a "new era of broadened standing").

52. *See cases cited supra* note 51. *See also Fletcher*, *supra* note 12, at 227 (noting that many of the attempts to sue government agencies in the 1960's and 1970's involved litigants asserting injuries not markedly different from those that most of the population could claim); *Nichol*, *supra* note 12, at 1922 (noting that many plaintiffs claimed injuries "widely shared among the populace"); *Wald*, *supra* note 6, at 719-20 (noting that before the mid-1970's, a broad variety of injuries were found to satisfy standing requirements).

Injuries common to the general populace violate the private model principle of allowing federal courts jurisdiction only where the litigant sues upon a right specific to the litigant (e.g., tort, contract, and constitutional rights). *See supra* notes 31-34. Thus, under a private model analysis, courts would not grant standing to litigants that assert injuries common to all.


54. 5 U.S. (1 Cranch) 137 (1803).

55. *See id.* at 176-77 (stating that federal courts have the power to assess the constitutionality of congressional acts); *Tribe*, *supra* note 2, § 3-2; Sunstein, *supra* note 14, at 1450-51.
broader claim to standing under a public model analysis. They can assert that the government has acted unlawfully by not enforcing the law, as opposed to being restricted to standing, under a private model, only where the government has breached a duty owed to the litigant.\textsuperscript{56}

The Burger Court reacted to this trend of liberalized access to the courts “by substantially tightening the Data Processing test.”\textsuperscript{57} Commentators have argued that this restrictive trend is based on a return to the private rights model of judicial power.\textsuperscript{58} This trend has continued and is the basis for modern standing requirements.\textsuperscript{59}

B. Modern Standing Requirements

Modern standing doctrine has been divided into two sets of considerations: Article III constitutional considerations and judicially

\textsuperscript{56} In support of the public law model, Professor Bandes argues, “First, the federal courts are best suited to the task of constitutional adjudication. Second, they were originally conceived for that purpose. Third, and alternatively, constitutional interpretation and enforcement have become their primary role since the Civil War. And fourth, this role is the most efficient use of judicial resources.” Bandes, \textit{supra} note 2, at 281-82 (footnotes omitted).

\textsuperscript{57} Nichol, \textit{supra} note 12, at 1923; see also Wald, \textit{supra} note 6, at 720. For two examples of the more stringent Burger Court standard, see Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), and Allen v. Wright, 468 U.S. 737 (1984). The Court in \textit{Valley Forge} found that the plaintiffs lacked a sufficiently particularized injury in fact and denied standing to plaintiffs challenging Congress’ allocation of land to a religious college. \textit{Valley Forge}, 454 U.S. at 485, 489-90.

The plaintiffs in \textit{Allen} were parents of black school children who alleged that the Internal Revenue Service lacked adequate standards and procedures to ensure that racially discriminatory private schools were denied tax-exempt status. The result, plaintiffs argued, was that the Internal Revenue Service awarded tax-exempt status to some racially discriminatory private schools. The plaintiffs further argued that because of the discriminatory private schools’ tax-exempt status, the schools were able to stay open and enroll white students who would otherwise attend public schools.

The Supreme Court recognized the parents’ injury in fact as “their children’s diminished ability to receive an education in a racially integrated [public] school.” \textit{Allen}, 468 U.S. at 756. However, the Court denied plaintiffs standing to sue because the parents failed to satisfy the causal nexus requirement; revocation of the racially discriminatory private schools’ tax-exempt status was held not to be sufficiently certain to facilitate public school racial integration. \textit{Id.} at 758-59.

\textsuperscript{58} See Bandes, \textit{supra} note 2, at 229 (arguing that recent federal court decisions indicate an “unstated acceptance of the private rights model”).

\textsuperscript{59} “It is clear . . . that the Court has selectively employed standing doctrine . . . to constrict the expansive access to federal courts previously enjoyed by litigants challenging governmental action.” \textit{Tribe, supra} note 2, at 110; see also Nichol, \textit{supra} note 12, at 1923-24; Wald, \textit{supra} note 6, at 720 (stating that the trend to tighten standing requirements, which began in the mid-1970’s, has continued and has become such a “paramount focus of [the federal courts] . . . that [n]o plaintiff . . . can afford . . . to be unprepared to defend standing”).
imposed prudential considerations. These considerations are intended to effectuate the limitation Article III places upon federal courts to hear only cases and controversies. Failure to satisfy both constitutional and prudential considerations will result in denial of standing.

The Article III constitutional considerations consist of three "core component[s]." A plaintiff must (1) show a "distinct and palpable" injury in fact that is (2) "fairly traceable to the defendant's allegedly unlawful conduct and [(3)] likely to be redressed by the requested relief." The injury in fact must not be "'abstract' or 'conjectural' or 'hypothetical.'" Abstract interests lacking a palpable injury fail standing requirements. Injury requirements have been argued as necessary to ensure that a claimant has a "personal stake" in the litigation, to weed out overly abstract cases, and to encourage...
self-determination. The second and third prongs of traceability and redressability are "essentially ... a causal nexus between the plaintiff's injury and the defendant's assertedly unlawful act." Courts impose further limiting principles upon themselves to effectuate Article III case and controversy limits. These additional limiting principles, commonly referred to as prudential considerations, require a court to deny standing, even when Article III considerations are met, if (1) a litigant raises another person's legal rights; (2) a litigant attempts to litigate subject matter that unnecessarily forces a court to intrude on another branch's dominion; or (3) a litigant's claim is not protected by a statute or constitutional guarantee's "zone of interests."

The Article III and prudential considerations that make up modern standing doctrine are predicated on the separation of powers principle. The Supreme Court views standing doctrine as a tool to effectuate the limited role federal courts should play in a democratic

71. Id. Injury in fact requirements encourage the most directly injured persons to litigate their own rights.
73. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979) (prudential considerations are used "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.").
74. Id.
76. Id.; see also Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (denying standing in part because the relief sought would have "produced a confrontation with one of the coordinate branches of the Government"); Flast v. Cohen, 392 U.S. 83, 106 (1968) (stating that courts lack "confidence in [hearing] cases ... where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System"). This second limitation is also known as the avoidance of generalized grievances limitation. See infra note 77 for the Supreme Court's discussion of prudential considerations in Allen.
society as authorized by Article III.79 This narrow view of judicial authority seeks to avoid “overjudicialization of the processes of self-governance” by avoiding unnecessary conflicts with other government branches.80 It is also intended to foster democratic accountability (persons denied standing will be forced to challenge government actions by other means, such as lobbying, grass roots political campaigns, etc.) and free up the federal courts for claims properly before the courts.81 The separation of powers principle appears to be grounded in an interpretation of Marbury v. Madison approximating the private rights model because it effectively screens out broad claims asserting the government’s failure to enforce a law.82

II. COMPETITIVE ADVOCATE STANDING AND ITS APPLICATION IN CASE LAW

A. Competitive Advocate Standing

The Court of Appeals for the Second Circuit recently articulated a new theory of standing that it called “competitive advocate standing.”83 Under this theory, a court may grant standing to political advocates who are unable to effectively compete with a fellow competitor advocate because the government has conferred unfair advantages on the competitor advocate by enforcing the law in a discriminatory man-

79. Allen, 468 U.S. at 752. Standing helps to weed out cases that, if admitted, would turn federal courts into a “‘forum in which to air . . . generalized grievances about the conduct of government.’” Valley Forge, 454 U.S. at 483 (quoting Flast, 392 U.S. at 106).
80. Scalia, supra note 40, at 881-82 (arguing that the framers incorporated the separation of powers principle into Article III, and that this principle is best effectuated by strictly requiring concrete and particularized injury); see also Tribe, supra note 2, § 3-14, at 108-09 (asserting that separation of powers principles were implicit in Burger Court decisions before being expressly recognized in Allen).
82. See Tribe, supra note 2, § 3-14, at 110 (describing the Supreme Court’s trend towards more restrictive standing requirements and arguing that implicit in this trend is an adoption of the private rights model of Marbury v. Madison); Bandes, supra note 2, at 277 (“The view of the separation of powers . . . assumes that the role of the judiciary is solely to decide the rights of individuals.”). In addition, the Supreme Court’s interpretation of injury in fact as requiring concrete injury and its prudential requirement of avoidance of generalized grievances indicates use of the private model because these concepts help weed out claims common to the general population. See supra note 67 for a discussion of concrete injury; see supra note 76 for a discussion of generalized grievances.
ner. In other words, a sufficient injury in fact exists where the government's discriminatory enforcement of the law unfairly tilts the playing field in favor of one political advocate over a fellow competitor political advocate.

Competitive advocate standing differs from the traditional standing model requiring a "direct withholding of a benefit due the plaintiff" because it recognizes the benefit unfairly conferred upon competitor advocates as sufficient injury. This form of injury is thus slightly broader than the traditional standing model; it recognizes the less direct injury of increased competitive advantage conferred upon political competitors.

Competitive advocate standing is derived from two principal sources: voter standing theory and the economic competitor standing theory. In voter standing cases, courts have granted standing to litigants where the government's actions restrict the litigants from effectively participating in the political process as voters. This theory recognizes as sufficient injury a reduction in the litigants' voting power.

Competitive advocate standing and voter standing share a common basis in political inequity: both theories recognize injuries that occur when the government's failure to enforce the law evenhandedly

84. _Catholic Conference_, 885 F.2d at 1028-29; _see also_ Schwartz, _supra_ note 12, at 723.

85. _Catholic Conference_, 885 F.2d at 1029. In addition to satisfying this form of injury in fact, complainants must still satisfy the remaining constitutional and prudential considerations. _Id._ at 1029 n.2, 1031.

86. Schwartz, _supra_ note 12, at 726.

87. _See Catholic Conference_, 885 F.2d at 1028-29.


89. _See Baker_, 369 U.S. at 207-08 (recognizing sufficient injury where enforcement of a statute placed voters "in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties"); _Catholic Conference_, 885 F.2d at 1028.

distorts the political process. Voter standing, however, requires that the political inequity affect a litigant's voting power. Competitive advocate standing, on the other hand, requires that the political inequity affect a litigant's ability to compete with fellow political competitors.

The Second Circuit further developed competitive advocate standing by relying on the Supreme Court's economic competitor cases. In these cases, the Supreme Court granted standing to parties who could show that the government's failure to enforce relevant laws conferred unfair economic advantages upon the parties' competitors. For example, the plaintiffs in Association of Data Processing Service Organizations, Inc. v. Camp challenged a federal comptroller's ruling allowing banks, such as the defendant's bank, to foray into the data processing field and make data processing services available to clients and other banks. The plaintiffs, data processors, claimed that the Comptroller's ruling violated sections of the National Bank Act, including a provision prohibiting banks from "engag[ing] in any activity other than the performance of bank services." The Court, calling the case a "competitor's suit," found that injury in fact existed where "competition by national banks in the business of providing data processing services might entail some future loss of profits for the petitioners." The Second Circuit reasoned that the Supreme Court's recognition of injury to competitors in the economic realm justified recognizing injuries to competitors in the political realm.

90. See Baker, 369 U.S. at 207-08.
92. See cases cited supra note 91.
94. Data Processing, 397 U.S. at 151.
96. Data Processing, 397 U.S. at 152.
97. Id.
B. Competitive Advocate Standing Case Law

1. Fulani v. League of Women Voters Education Fund

In *League of Women Voters*, the Second Circuit recognized an Article III injury in fact that was very similar to that recognized by the competitive advocate standing theory. The defendant, the League of Women Voters Education Fund ("the League"), was a tax-exempt, non-profit association organized under Internal Revenue Code ("I.R.C.") § 501(c)(3). The League aimed to educate voters and encourage participation in the electoral process by sponsoring three nationally televised primary debates, two for the contenders for the 1988 Democratic presidential nomination and one for the contenders for the 1988 Republican presidential nomination. The plaintiff, Dr. Lenora Fulani, an independent and minor party presidential candidate, attempted to participate in the League sponsored debates. The League denied her participation because she was not seeking to be either the Democratic or Republican presidential nominee. Fulani appealed an unsuccessful attempt to enjoin the League from con-

99. 882 F.2d 621 (2d Cir. 1989).
101. I.R.C. § 501(c)(3) (1988). I.R.C. § 501(c)(3) confers tax-exempt status to: Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, .... no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id.


103. Id.
104. Id.
ducting the debates without her participation.  

Fulani claimed that the League’s failure to invite her to the debates constituted “partisan” activities because the League “structured the debate phase of its primary election voter education program in such a way as to favor the two traditional major parties, and to exclude significant independent and minor party candidates such as herself.” Because these allegedly “partisan” activities violated the League’s tax-exempt charter under I.R.C. § 501(c)(3), Fulani requested that the court revoke the League’s tax-exempt status.  

A Second Circuit panel noted that the “powerful beneficial effect ... [of the] mass media ... [can confer] some competitive advantage” to participants in televised debates. The court found a sufficient injury in fact in the “loss of competitive advantage flowing from the League’s exclusion of Fulani from the national debates.” Sufficient injury existed where the government’s allegedly preferential enforcement of the laws significantly benefitted one political competitor over another.

2. In re United States Catholic Conference  

One month after deciding League of Women Voters, the Court of Appeals for the Second Circuit decided Catholic Conference. In Catholic Conference the Second Circuit expressly articulated competitive advocate standing theory, a theory that also recognized competitive political injury as a sufficient Article III injury in fact. The plaintiffs in Catholic Conference consisted of three organizations with

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106. League of Women Voters, 882 F.2d at 624.
107. Id.
108. Id. at 626.
109. Id.
110. Id. After finding that Fulani satisfied the second and third prongs of the Article III constitutional considerations, the court granted Fulani standing to sue. The court then held against Fulani on the merits, stating that the “League’s exclusion of [Fulani] from its primary season debates did not constitute ‘partisan’ activity in contravention of I.R.C. § 501(c)(3).” Id. at 630.

Judge Cardamone’s concurring opinion agreed with the final holding, but disagreed with the majority’s method in reaching the holding. Id. (Cardamone, J., concurring). He found that Fulani failed to meet the second and third prongs of the constitutionality test and, therefore, lacked standing to sue. Id. at 630-33. No consideration of the merits would then have been necessary.

112. Id.
tax-exempt charters under I.R.C. § 501(c)(3),113 one organization with a tax-exempt charter under I.R.C. § 501(c)(4),114 and twenty individuals (mainly Protestant ministers and Jewish rabbis).115 All of the plaintiffs believed in a woman's right to a legal abortion.116

The plaintiffs claimed that the Catholic Church ("the Church") violated statutes governing the Church's tax-exempt status.117 They claimed that the Church devoted a substantial portion of its activities towards influencing the political process by "electioneering," campaigning for and indirectly financing pro-life candidates.118 The plaintiffs contended that the Internal Revenue Service ("I.R.S.") knew of the violations yet chose to look the other way.119 They claimed that the I.R.S. sheltered the Church from the tax law by not taking appropriate actions to ensure that the Church complied with tax exemption rules.120 Because other tax-exempt organizations, like those in Catho-


114. The one I.R.C. § 501(c)(4) organization was the Long Island National Organization for Women. Catholic Conference, 885 F.2d at 1021.

115. Id.

116. Id.

117. Id. at 1022. The Church is an I.R.C. § 501(c)(3) organization. Id. at 1021-22. For a discussion of I.R.C. § 501(c)(3) requirements, see supra note 101.

118. Catholic Conference, 885 F.2d at 1022.


120. Catholic Conference, 885 F.2d at 1022.
lic Conference, still had to abide by the same tax exemption statutes, the plaintiffs claimed that the I.R.S. treated the Church preferentially.121 They wanted the I.R.S. to revoke the Church's tax-exempt status, "collect the resulting back taxes, and . . . notify contributors to the Catholic Church that they may no longer claim their donations as deductions on their income tax returns."122

In its majority opinion, a Second Circuit panel found that the plaintiffs lacked sufficient injury in fact123 and thus did not satisfy competitive advocate standing requirements.124 The court grounded its finding on two premises: (1) the plaintiffs were not "competitors" with the Church within the meaning of competitive advocate standing theory;125 and (2) the plaintiffs' claimed injury was not sufficiently particularized.126 The court found that the plaintiffs and the Church were not competitors in the same political arena because the plaintiffs chose "not to match the Church's alleged electioneering with their own."127 The Catholic Conference majority required exact, "personal" competition between competitor political advocates because such personal competition was viewed as implicit in the relied upon economic competitor cases.128

The court found that the plaintiffs did not suffer a sufficiently particularized injury in fact because the plaintiffs did not "plead[ ] that they were personally denied equal treatment."129 The fact that the Church was electioneering had no bearing on the plaintiffs unless they too tried to electioneer and were personally denied equal opportunity to do so.130 The plaintiffs would have to show injury on the political campaign field to satisfy the injury in fact requirement.131 The court held that even if they were to recognize an alternative view of the

121. Id.
122. Id. at 1023.
123. Id. at 1030. The court also found that the plaintiffs failed to satisfy clergy, taxpayer, and voter standing requirements. Id. at 1024-28.
124. Id. at 1031. The court never reached the second and third prongs of Article III constitutionality considerations or prudential considerations because it found that the plaintiffs did not meet the first Article III requirement of injury in fact. Id. at 1029 n.2, 1031.
125. Id. at 1029 ("The fatal flaw in [the plaintiffs'] argument is that [they] are not players in [the same] arena or . . . field" as the Church.).
126. Id. at 1030. The particularized injury in fact requirement requires a "distinct and palpable" injury. See supra notes 64-65 and accompanying text.
127. Id. at 1029.
128. Id. See supra notes 91-98 and accompanying text for a discussion of the Supreme Court's economic competitor cases.
129. Catholic Conference, 885 F.2d at 1030.
130. Id.
131. Id.
plaintiffs’ injury as injury to their pro-choice beliefs, the injury requirement would be insufficiently particularized. Such an injury to the plaintiffs’ beliefs “would lack a limiting principle [as it] would effectively give standing to any spectator who supported a given side in public political debate.” A lack of limiting principles would contravene the Article III separation of powers precepts.

Finally, the Second Circuit noted that in the “stormy sea of this litigation, it is prudent to closely hug the shores of the pleaded facts and established law, and not venture out any further than we must.” This indicated a policy of strict conformity with the recent legal trend restricting standing to sue to those litigants with narrow, private-like claims. A wide range of litigants could assert the plaintiffs’ injury in fact, as characterized by the majority. Thus, Catholic Conference’s facts extended too far “off shore” to fall within the purview of the modern trend.

The dissenting judge, Judge Newman, disagreed with the majority’s finding that the plaintiffs and the Church were not “competitors” within the meaning of competitor advocate theory, and with the majority’s finding that the plaintiffs lacked a sufficiently particularized injury in fact. Judge Newman found the narrow scope with which the majority viewed “competitors” unrealistic. A broader scope, he stated, would better reflect the multifaceted forms of political competition in a democracy. He argued that competitor political advocates may choose to oppose each other by expounding their political views in activities beyond political campaigning. He noted that political competition could take the form of “speak[ing with] friends and neighbors; . . . participat[ing] in community activities; [and] devot[ing] . . .

132. Id.
133. Id.
134. Id. This broad notion of injury could contravene the prudential considerations of avoiding general grievances as well. See supra note 76 and accompanying text for a discussion of the prudential policy of avoiding the litigation of generalized grievances.
135. See supra notes 78-82 and accompanying text for a discussion of modern standing doctrine as being predicated on the separation of powers principle.
136. Catholic Conference, 885 F.2d at 1031.
137. See supra notes 57-59, 78-82 for a discussion of the modern legal trend that uses the private model of judicial power as its interpretive basis.
138. See supra notes 133-35 and accompanying text.
140. Id. at 1032.
141. Id.
142. Id.
143. Id.
time, . . . energy, and sometimes . . . money to . . . causes.” Judge Newman felt that political competition was not limited to adversaries in a political campaign.

For support, Judge Newman relied on Texas Monthly, Inc. v. Bullock. In Texas Monthly, the Supreme Court found that the plaintiff, Texas Monthly, a magazine publisher catering to the general public, had standing to challenge the tax status of a third party, a magazine publisher catering to a specific religious audience. Because Texas Monthly was granted standing to challenge the tax status of a publisher with which it was not in direct competition, Judge Newman interpreted this case to create a broader focus of competition than that used by the majority in Catholic Conference. Thus, Judge Newman found that the plaintiffs and the Church need not have engaged in the direct political competition of electioneering to satisfy injury requirements. Instead, he claimed that sufficient injury existed because the plaintiffs chose “to compete . . . by speaking, writing, and marching, and by championing in countless other ways the cause of abortion rights.”

Judge Newman also disagreed with the majority’s finding that the plaintiffs lacked a sufficiently particularized injury in fact. He first argued that the majority misdefined the injury. Instead of finding no injury because the plaintiffs and the Church did not compete with each other, or defining the injury as one to plaintiffs’ beliefs, Judge Newman argued that the injury in fact was the plaintiffs’ “competitive disadvantage” flowing from the government’s allegedly unequal enforcement of the tax exemption laws. He viewed the plaintiffs as competitively disadvantaged because, being confined to the “insubstantial lobbying activities” permitted by the tax laws, they could not effectively compete on the same level with the Church’s stronger political

144. Id.
145. Id.
146. Id. (citing Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989)).
147. Texas Monthly, 489 U.S. at 8.
148. Catholic Conference, 885 F.2d at 1032 (Newman, J., dissenting). Judge Newman refers to Texas Monthly as an economic competitor case. See id. The Supreme Court in Texas Monthly, however, never expressly recognized the case as an economic competitor case nor did it cite to economic competitor precedent. See Texas Monthly, 489 U.S. at 7-9.
149. Catholic Conference, 885 F.2d at 1032.
150. Id. Judge Newman also argued that the court should not have denied the plaintiffs standing when they obeyed tax exemption laws and the Church allegedly did not obey these same laws. Id. at 1033. See also Schwartz, supra note 12, at 735-36.
152. Id. at 1032-33.
electioneering.\textsuperscript{153}

Judge Newman next argued that the injury in fact was sufficiently particularized because the injury was limited to tax-exempt organizations complying with I.R.C. § 501(c)(3) (the plaintiffs) and those allegedly violating the same tax exemption provision (the Church).\textsuperscript{154} Judge Newman argued that any injury to parties beyond the purview of I.R.C. § 501(c)(3) was "a question far beyond the narrow issue . . . in this case."\textsuperscript{155} The limiting principle of I.R.C. § 501(c)(3), he argued, placed standing in this case "entirely within manageable bounds."\textsuperscript{156}

III. AN ANALYSIS OF COMPETITIVE ADVOCATE STANDING UNDER THE PUBLIC AND PRIVATE MODELS OF FEDERAL COURT AUTHORITY

Commentators have argued that the public rights model/private rights model dichotomy is a fundamental concept that drives all standing analyses.\textsuperscript{157} The analytical model that courts adopt will influence their constitutional and prudential analyses and, ultimately, the decision as to whether or not a litigant has standing to sue.\textsuperscript{158} The modern trend towards restricting standing, which began in the 1970's, has been attributed to a movement back to the use of the private rights model as the interpretive basis of standing.\textsuperscript{159} Commentators have criticized the courts' failure to clearly enunciate this movement.\textsuperscript{160} The criticism has focused on the ease with which courts can manipulate the standing analysis in the absence of clearly articulated analytical guideposts.\textsuperscript{161}

\textsuperscript{153} Id.
\textsuperscript{154} Id. at 1033.
\textsuperscript{155} Id.
\textsuperscript{156} Id. The majority had concluded that the plaintiffs' injury was not cognizable because it lacked a "limiting principle." Id. at 1030; see also supra notes 132-35 and accompanying text.
\textsuperscript{157} See generally Bandes, supra note 2 (arguing for a public law interpretive basis for all justiciability doctrines associated with Article III, including standing); see also Sunstein, supra note 14, at 1480 (arguing that the current standing trend incorporates private model traits).
\textsuperscript{158} See generally Sunstein, supra note 14, at 1464-66.
\textsuperscript{159} See Sunstein, supra note 14, at 1433 ("Recent . . . innovations in the law of standing have started to push legal doctrine in the direction of . . . a private-law model of standing.").
\textsuperscript{160} See Tribe, supra note 2, § 3-14, at 111 ("The aspect of the Court's standing jurisprudence most open to criticism . . . [is] the Court's lack of candor in articulating and justifying the basic choice [between public or private law models] it has made.").
\textsuperscript{161} Id. at 110-11.
This Section argues that competitive advocate standing has a dual nature, incorporating traits of both the public and private models of judicial power. As stated by the *Catholic Conference* court, competitive advocate standing appears to be primarily public in nature. However, the *Catholic Conference* court's method of applying competitive advocate standing also evokes strong private model traits. In an effort to demonstrate competitive advocate standing's dual nature, this Section analyzes competitive advocate standing as a public model theory and as a private model theory.

A. Competitive Advocate Standing as a Public Law Theory

Competitive advocate standing doctrine as stated in *Catholic Conference* requires a litigant to show that the government's failure to enforce a statute unfairly confers an advantage on the litigant's political competitor. 162 This formulation of the injury in fact requirement appears quite broad. Litigants may claim an indirect injury in fact merely by showing that their political competitors are favored. 163 Thus, the government need not directly hamper the litigant's competitive ability; it only has to favor the litigant's political competitors. 164

Competitive advocate standing's injury in fact requirement appears public in nature because a greater number of plaintiffs could claim standing to sue the government than would otherwise be permitted under the private model of federal court jurisdiction. Standing would not be restricted to only those claimants in direct, personal competition with their competitors (i.e., those claimants demonstrating injuries specific to themselves). Instead, standing could be granted to all claimants showing (1) that they directly or indirectly competed with an opposing party in the political arena and (2) that the govern-

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162. *In re United States Catholic Conference*, 885 F.2d 1020, 1029 (2d Cir. 1989), *cert. denied sub nom. Abortion Rights Mobilization, Inc. v. United States Catholic Conference*, 110 S. Ct. 1946 (1990). A litigant who satisfies these requirements will have met the Article III injury in fact requirement and must further satisfy the causal nexus requirement together with any prudential considerations. See *supra* notes 60-82 and accompanying text for a discussion of modern standing requirements.

163. *Catholic Conference*, 885 F.2d at 1029. "'In the inherently competitive political arena an advantage granted to one competitor automatically constitutes a hardship to others.'" *Id.* (quoting the Complaint ¶ 41). See Schwartz, *supra* note 12, at 726 (noting that competitive advocate standing injury "results from the granting of an advantage to a competitor and not from the direct withholding of a benefit due the plaintiff").

164. In its application of competitive advocate standing theory, however, the majority narrowed the scope of competitive advocate standing by insisting on head-to-head, personal competition amongst competitors. See *Catholic Conference*, 885 F.2d at 1029-30. See *infra* notes 205-07 and accompanying text for a private model interpretation of the majority's requirement of head-to-head competition.
ment's failure to enforce the law impaired the claimant's ability to compete with the opposing political competitor.165

This greater access to federal courts promotes the public model view of federal court jurisdiction by increasing the likelihood that federal courts will have to ensure that the government complies with the law.166 Federal courts will have more opportunities to hear claims against the government and decide whether or not the government is complying with its own laws.

For example, federal courts would be compelled to rule upon charges that the government has failed to enforce the law in a non-discriminatory manner in cases where claimants satisfied injury in fact requirements solely on the basis of indirect injury. In these cases, the claimant's personal injury, or private right of action, would not exist; the government would not have breached a common law, statutory, or constitutional duty that it owed to the claimant. Federal courts would thus primarily be concerned with ensuring the government's fidelity to the law. This result would reflect the public law model's view of the federal courts' primary duty as interpreting the Constitution, not merely deciding private disputes.167

The economic competition cases that the Catholic Conference court relies upon further support the public law interpretation of competitive advocate standing.168 In the economic competitor cases, the Supreme Court granted litigants standing to sue the government to enforce statutory regulations where the government conferred unfair advantages upon an economic competitor.169 The Supreme Court ap-

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165. This broader formulation of competitive advocate standing raises potential floodgate problems: more litigants would be able to sue in federal courts, and the courts could thus be unable to cope with the potential flood of competitive advocate cases. But see Bandes, supra note 2, at 296-97. Responding to floodgate arguments, Professor Bandes maintains that (1) the public law model has a limiting principle—cases calling for an interpretation of the Constitution are preferred; (2) federal courts are currently not too overburdened to handle public law cases; and (3) even if federal courts are facing an onslaught of litigation, public law ought to occupy highest priority. Id.

166. Professor Sunstein argues that broadly characterized injuries serve public model purposes because a greater range of injuries are recognized and the causation requirement is more easily satisfied. See Sunstein, supra note 14, at 1464-66. Courts can, therefore, hear a greater range of suits against the government and can more ably fulfill their public law function of enforcing the government's fidelity to the law.

167. See Bandes, supra note 2, at 281 (explaining that public theory views the federal courts' primary role as interpreting and enforcing federal law and the Constitution); see supra notes 53-56 and accompanying text for a discussion of public model derivations and purposes.

168. See supra note 91 and accompanying text for the economic cases on which the court relied.

169. See cases cited supra note 91.
peared to devalue the injury in fact requirement in favor of a zone of
interests analysis.

In fact, the Supreme Court in Clarke v. Securities Industry
Ass'n,170 a recent economic competitor case, did not even discuss in-
jury in fact.171 Instead, the Supreme Court granted standing to the
plaintiff based on an extensive zone of interests analysis.172 Comment-
tators have argued that Clarke may have rejected the injury in fact
requirement in statutory injury cases in favor of a zone of interests
analysis.173

The zone of interests analysis requires courts to ascertain whether
the legislature intended a claimant to have standing to sue in a particu-
lar context.174 This emphasis on the zone of interests analysis, similar
to the statutory analysis method that grew from the legal interest
test,175 appears to focus the courts' judicial powers primarily on ensur-
ing governmental compliance with the law, and secondarily on con-
stricting itself to ruling upon traditional private rights. Thus, the
public model appears to be the analytical basis for the economic com-
petitor cases relied upon by Catholic Conference.

Applying the public law interpretation of competitive advocate
standing to the facts of Catholic Conference, it is likely that the out-
come would have been different; the court would have granted stand-
ing to the plaintiffs. Injury in fact, the first constitutional prong,
would have been satisfied because, using the broad scope of political
competition advocated by dissenting Judge Newman,176 the Church

170. 479 U.S. 388 (1987). In Clarke, a trade association representing firms in the
securities industry contested a Comptroller of the Currency ruling that allowed two banks
to provide discount brokerage services to the public. Id. at 390-93. The trade association
maintained that the ruling violated § 36(c) of the McFadden Act. Id. at 392-93 (citing
§ 36 (1988))).

171. See Clarke, 479 U.S. at 393 n.5.

172. Id. at 400-03.

173. Id. at 401-03; Fletcher, supra note 12, at 263-64 ("[T]he Court's rejection of
Data Processing's two-step inquiry into the existence of standing must be regarded as a
significant clarification, and improvement, of standing law."); Coyle, supra note 12, at
1077-78. Discussing the Court's failure to analyze injury in Clarke, Mr. Coyle argues that
Clarke establishes a new standing inquiry limited to a "zone of interests" analysis. Id. He
further argues that Clarke indicates that the "zone of interests" test would apply to all
A.P.A. claims and most other claims as well. Id.

174. Clarke, 479 U.S. at 399; see Fletcher, supra note 12, at 264-65 ("[T]he touch-
stone [in a standing inquiry] is statutory intent: Does the statute confer on plaintiff the
right to enforce the asserted duty?").

175. See supra notes 41-45 and accompanying text.

176. See supra notes 139-45 and accompanying text for a discussion of the scope of
Judge Newman's view of political competition.
and the plaintiffs could have been found to be political competitors. They supported and voiced opposing opinions on the abortion issue.

Moreover, the causal nexus requirement of traceability and redressability177 may have been satisfied by arguing that were the Church threatened with revocation of its tax-exempt status, it would have likely stopped electioneering and conformed to the non-partisan requirements of I.R.C. § 501(c)(3) so as to ensure its survival.178 Religious organizations like the Catholic Church depend for their livelihood on tax-exempt status and tax deductible donations;179 revocation

177. Judges and commentators alike have noted that the causal nexus requirement is extremely malleable. They argue that the causal nexus requirement is susceptible to conjecture on the merits, how the injury in fact is framed, and the analytical model the court chooses to use. See Allen v. Wright, 468 U.S. 737, 782 (1984) (Brennan, J., dissenting) (Causation is “no more than a poor disguise for the Court’s view of the merits of the underlying claims.”); Tribe, supra note 2, § 3-18; Sunstein, supra note 14, at 1464-65.

178. But see Allen, 468 U.S. at 756-59. The Supreme Court in Allen ruled that the impact of tax exemption revocation on the racially discriminatory practices of some private schools was “entirely speculative.” Id. at 758. Because the revocation would not have, in the Court’s view, necessarily cured the discriminatory conduct of the private schools, the causal nexus requirement of Article III was not satisfied. The Court therefore denied plaintiffs standing to sue. Id. at 758-59. See also Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40-46 (1976) (holding that, when the defendants’ response to tax exemption revocation was unclear, the causal nexus was broken and standing to sue was therefore denied). See supra note 57 for a more detailed discussion of Allen.

It could be argued that revocation of the Church’s tax-exempt status would have produced the same speculative result: the Church, free of any electioneering restrictions, may then have pursued its political objectives openly and more vigorously. See D.B. Robertson, Should Churches Be Taxed? 227 (1968). If the Church’s response to revocation of its tax-exempt status would have been uncertain, the causal nexus requirement would have been broken and an alternate ground for denial of standing established. See Allen, 468 U.S. at 758-59; Simon, 426 U.S. at 40-46.

179. Commentators have argued that the revocation of tax-exempt status for religious organizations would sound the death knell for economically unstable religious organizations. See Robertson, supra note 178, at 228; The Religious Situation 1968 942 (Donald R. Cutler ed. 1968). These commentators have further argued that revocation of tax-exempt status would force even economically stable religious organizations to restrict or cut off their community activities altogether to focus on fiscal survivability. See Robertson, supra note 178, at 228; The Religious Situation 1968, supra, at 942. A 1978 survey of Rochester, N.Y.-area churches confirms this severe impact. See Vaughn Polmenteer, Some Don’t Have to Pay, Rochester Democrat & Chron., Apr. 9, 1978 (Magazine), at 5. For example, one Rochester-area Roman Catholic church, the Blessed Sacrament Church, figured that, based on the 1978 tax rate, its tax-exempt status represented $81,900, approximately half of its annual budget. Id. The Church’s pastor predicted that the Church would have to close its school and cut back community programs without tax exemption. Id.

The government also has an interest in exempting religious organizations like the Church from taxation. The Supreme Court has stated that tax exemption of religious organizations is necessary to ensure the separation of church and state. The Court has argued that the taxation process would create excessive entanglement between church and state by involving the government in valuations and assessments of church property. See Walz v.
of their I.R.C. § 501(c)(3) status would likely curtail donations and severely hamper their ability to function as religious organizations.\textsuperscript{180} Were the Church to conform to the I.R.C. § 501(c)(3) requirements, the plaintiffs’ injury of reduced political effectiveness vis-à-vis the Church would be redressed—both the Church and the plaintiffs would be competing with the same non-partisan activity restrictions.

\textit{League of Women Voters} can also be argued to have adopted the public law model as an analytical basis. The \textit{League of Women Voters} court used a broad focus in determining that Fulani had a sufficient injury in fact.\textsuperscript{181} For example, it found that the loss of Fulani’s competitive advantage from exclusion in the League’s debate was sufficient injury in fact.\textsuperscript{182} This injury was based on the diminished political stature and recognition that allegedly resulted from exclusion from the debates.\textsuperscript{183} However, the court could not offer evidence as to the specific value that media coverage would have had to Fulani. It could only make a general statement that Fulani could have lost “some competitive advantage” from her inability to participate in the debates.\textsuperscript{184}

It is difficult to see how such general injury meets the “distinct and palpable” requirement of Article III injury in fact. All eighty-two 1988 presidential candidates could have feasibly claimed Fulani’s loss of “some competitive advantage.” Yet the Second Circuit, using a broad focus, was willing to look past such vagaries and traditional standing concepts to find sufficient injury in fact.\textsuperscript{185}

\textsuperscript{180} See discussion \textit{supra} note 179. See generally Glenn Goodwin, \textit{Note, Would Caesar Tax God? The Constitutionality of Governmental Taxation of Churches}, 35 Drake L. Rev. 383 (1986). Arguing that the exemption of churches from taxes is constitutionally mandated, Mr. Goodwin states: “To grant the state the power to impose such a tax on a church would be equivalent to granting the state the power to control or suppress the religious activities of the church. ‘The power to tax involves the power to destroy.’” \textit{Id.} at 400 (quoting \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 429 (1819)).

\textsuperscript{181} See \textit{supra} notes 108-10 and accompanying text.

\textsuperscript{182} \textit{League of Women Voters}, 882 F.2d at 626.

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} See \textit{supra} notes 108-10 and accompanying text.

\textsuperscript{185} Perhaps the court’s holding was motivated by its observation that denial of standing in this case “would [have] impl[ied] that such a candidate could never challenge the conduct of the offending agency or party.” \textit{League of Women Voters}, 882 F.2d at 626. In other words, the Second Circuit may have loosened injury in fact requirements in the interest of allowing a party to sue to enforce an agency’s obligations and to avoid effectively screening a federal agency’s actions from judicial review. The Supreme Court, however, expressly rejected use of this policy to grant standing. \textit{Schlesinger v. Reservists Comm. to
Fulani's claim to standing under a public law analysis may be buttressed with a zone of interests analysis of I.R.C. § 501(c)(3). The main problem with this statutory analysis is that, because no hearings were held when the electioneering prohibition was enacted, no clear legislative intent with regard to the purpose of I.R.C. § 501(c)(3) is ascertainable. However, one commentator has argued that Congress intended to protect partisan activists not able to claim the full benefits of I.R.C. § 501(c)(3) against I.R.C. § 501(c)(3) organizations who are able to enjoy the I.R.C. § 501(c)(3) benefits of deductible contributions and tax exemption. Thus, a “purpose of the [I.R.C. § 501(c)(3)] restriction is to discourage the [I.R.C. § 501(c)(3) beneficiaries] from creating an unfair imbalance in the political arena.” Under this interpretation of I.R.C. § 501(c)(3), Fulani would be within the ambit of the statute’s protection because she was engaging in partisan activities by running for political office. Using the public model of judicial authority, Fulani would have standing to sue the government to enforce the government’s fidelity to the law.

Additional support for a public rights model interpretation of League of Women Voters is found in Fulani v. Brady. In Brady, a case involving exactly the same facts, plaintiff, and legal issues as League of Women Voters, the United States District Court for the District of Columbia expressly rejected the findings of League of Women Voters. The District Court for the District of Columbia denied Fulani standing based on its finding that her injury was “speculative” and

Stop the War, 418 U.S. 208, 227 (1974) (“The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”).

186. See Coyle, supra note 12, at 1100-01.


188. Coyle, supra note 12, at 1101.

189. Alternately, this interpretation of I.R.C. § 501(c)(3) may hamper the plaintiffs as they were not engaged in partisan political activity—I.R.C. § 501(c)(3) barred them from doing so.


191. Brady, 729 F. Supp. at 162. One difference between League of Women Voters and Brady is that the defendant in League of Women Voters was the League of Women Voters. On the other hand, the defendant in Brady was the United States Government, specifically, Secretary of the Treasury Nicholas F. Brady and Internal Revenue Service Commissioner Lawrence B. Gibbs.
“attenuated at best.” The district court reasoned that it was too hard to determine “with any degree of reasonableness” what gain media coverage actually bestowed upon Fulani’s competitors and, conversely, what degree of harm was conferred upon Fulani. There were too many variables on which to base a “meaningful” evaluation of her harm.

The Brady district court refused to adopt the broader view of injury in fact espoused by the League of Women Voters court and found that Fulani’s injury did not satisfy narrowly drawn injury requirements. Thus, the district court’s criticism of League of Women Voters’ broad scope indicates that the Second Circuit in League of Women Voters was more lenient in its analysis of injury in fact. The Second Circuit’s willingness to bypass stringent standing requirements in favor of deciding the case on the merits fulfilled its public law duty of ensuring government fidelity to the law.

When viewed as a public law theory, competitive advocate standing would probably have produced similar results in both League of Women Voters and Catholic Conference—both plaintiffs would have had standing to sue. There may, however, be an alternate explanation for the denial of standing in Catholic Conference, even under a

192. Id.
193. Id. at 163.
194. For example, the court noted that media exposure is of questionable value as evinced by then Vice President Bush’s request for “less rather than more opportunities to engage in debate appearances.” Id. at 163 n.8. The court saw the amount of increase in public recognition from debate appearances and the factors composing political stature as variables that were not reasonably quantifiable. Id. at 162-63.

It can be argued, however, that media exposure is greatly beneficial to a relatively unknown candidate, like Fulani, because the media exposes the candidate to an audience that may never have heard of the candidate. Unlike then Vice-President Bush, who had an abundance of media exposure and may have sought to limit it, Fulani, and other minor party candidates in her position, was faced with a paucity of media exposure. Fulani would, therefore, have sought as much media exposure as possible.

195. Id. at 162.
196. Referring to the League of Women Voters decision, the District Court for the District of Columbia stated: “[M]erely stating the obvious [value of debates] does not substitute for analysis of the injury requirement in Article III standing.” Id.
197. In affirming the district court opinion, the appellate court stressed the lack of causation and redressability. Fulani v. Brady, 935 F.2d 1324, 1328-31. The appellate court majority never once took a clear stance on whether injury in fact existed; it merely stated what Fulani alleged her injury to be. See, e.g., id. at 1326 (“According to Fulani, [the sponsor of the presidential debates] directly injured her by depriving her of the media coverage . . . .”); but see id. at 1332 (Mikva, C.J., dissenting) (arguing that “the majority does not dispute the constitutional sufficiency of Fulani’s alleged injury”). The appellate court, however, did not expressly disagree with the district court’s injury in fact analysis.
198. A public law analysis is thus reconcilable with the holding in League of Women Voters and irreconcilable with the holding in Catholic Conference.
public law analysis. Courts have traditionally been hesitant to grant a litigant standing to litigate the tax liability of a fellow taxpayer.199 This policy is based on two grounds: a fear of "widespread litigation, uncertainty, and unfortunate stare decisis effects";200 and a negative inference of congressional intent—Congress could not have intended to imply standing to assess another's tax liability when it specifically granted standing to some taxpayers and not others.201 This policy may have informed the court's decision not to grant the plaintiffs standing in Catholic Conference because they were asking the court to rule on the tax liability of a fellow taxpayer, the Church.202 Perhaps the court's stated policy of strict conformity with prior case law203 implicitly recognized the judicial policy against allowing standing to assess a fellow taxpayer's tax liability.204

199. See, e.g., Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976). In his concurrence in Simon, Justice Stewart stated: "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." Id. at 46 (Stewart, J., concurring).

Justice Stewart's quote stating the policy against standing to litigate another taxpayer's tax liability has given rise to vigorous arguments over how to characterize injury in fact. For example, Chief Judge Mikva, the dissenting judge in the Brady appellate court decision, argued that Fulani's "core allegation" was based on a restriction of her First Amendment rights: the government's discriminatory enforcement of the laws suppressed her ability to express her political ideas. Brady, 935 F.2d at 1333 (Mikva, C.J., dissenting). Reading Justice Stewart's opinion to state that individuals raising First Amendment-based claims could contest the tax liability of fellow taxpayers, Chief Judge Mikva argued that because Fulani had a First Amendment-based injury, Fulani had standing to litigate the tax liability of the debate sponsor. Id.

The majority in the Brady appellate court decision, however, characterized Fulani's claim as rooted in the tax liability of a fellow taxpayer. Id. at 1326-27. Thus, the majority argued that Justice Stewart's opinion weighed against the granting of standing to Fulani. Id. at 1327.

See also Dunec, supra note 88, at 479-81. Ms. Dunec argues that granting standing to litigate nonprofit organizations' tax liability "could have a chilling effect on the very existence of nonprofit, charitable organizations." Id. at 481.

200. Sunstein, supra note 14, at 1454 n.105.

201. Id. For examples of specific grants of standing for taxpayers, see 26 U.S.C. §§ 7422, 7426, 7428-7429 (1988).

202. As relief, the plaintiffs requested the revocation of the Church's tax-exempt status. In re United States Catholic Conference, 885 F.2d 1020, 1023 (2d Cir. 1989), cert. denied sub nom. Abortion Rights Mobilization, Inc. v. United States Catholic Conference, 110 S. Ct. 1946 (1990). Thus, the Church's tax liability would have increased from tax-free liability to fully taxable liability.

203. See supra notes 136-37 and accompanying text.

204. Of course, this same policy against litigation of a fellow taxpayer's tax liability would apply to League of Women Voters because Fulani was litigating the League's tax liability.
B. Competitive Advocate Standing as a Private Rights Model
Theory

Though competitive advocate standing is in some measure public in nature, the Second Circuit's application of competitive advocate standing in *Catholic Conference* also demonstrates its strong private law traits. These traits were especially evident in the court's interpretation of the competition requirement; the court interpreted competition to require head to head personal competition. The plaintiffs could have satisfied such exacting injury requirements only by matching the Church's electioneering with their own, thereby breaking the law.

This view of competition effectively narrows disputes cognizable under competitive advocate standing to those disputes that have strong private-model-like characteristics. A personal competition requirement eliminates a broad range of potential litigants, especially those posing more abstract claims. Personal competition thus also serves as a limiting principle and helps avert any potential floodgate effects of a broad interpretation of competition.

The *Catholic Conference* outcome would be justified under a private law model interpretation of competitive advocate standing. As the *Catholic Conference* majority argued, the plaintiffs lacked sufficient injury in fact because they were not in direct personal competition with the Church—the plaintiffs did not electioneer; the Church did. Without a sufficient injury in fact, the plaintiffs failed to satisfy Article III standing requirements.

The court's opinion in *League of Women Voters* is not as easily reconciled with the private model since the court used the language

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205. See *supra* notes 127-31 and accompanying text.

206. Such a view might have the negative consequence of encouraging lawless self-help in order to meet standing requirements. I.R.C. § 501(c)(3) litigants may violate the tax exemption rules by engaging in electioneering to meet the *Catholic Conference*'s exacting head to head injury requirement. See *supra* note 101 for a discussion of I.R.C. § 501(c)(3) requirements.

207. Professor Sunstein argues that narrowly defined injuries "move the [standing] doctrine sharply in the direction of the private-law model [of federal court jurisdiction] . . . ." Sunstein, *supra* note 14, at 1457. A narrow characterization of an injury makes the causation requirements extremely difficult to prove and thereby eliminates all but the narrowest private claims. *Id.* at 1463-66. See also *id.* for a discussion of the impact the characterization of injury has on causation requirements and, ultimately, on standing determinations.

208. In addition, it could have been argued that the causal nexus was not satisfied either. See *supra* notes 177-80 and accompanying text for a discussion of causal nexus in *Catholic Conference*. 
and approach of a public model. However, the facts of this case fit nicely within the private model: Fulani was a direct competitor who alleged that she suffered direct personal injury caused by the government’s breach of its duty to allow presidential candidates to compete on an equal basis.

Additionally, Fulani arguably satisfied the head to head competition requirement. After all, Fulani was competing with the major party candidates for one job, the United States presidency. It is difficult to envision any more direct competition than that which exists when a group of people compete for one job.

League of Women Voters and Catholic Conference may be reconcilable under a private law analysis that uses as its normative model a more specific form of political competition—partisan electoral competition. Like competitive advocate standing, partisan electoral competition would grant political competitors standing to sue where the government unfairly conferred advantages upon a political competitor. Unlike competitive advocate standing, however, a partisan electoral competition would allow standing to sue only where the competitors were engaged in partisan electoral activity.

The restrictive focus of partisan electoral competition would promote private model purposes by narrowing the field of potential claimants to electoral aspirants and by weeding out mere issue advocates. Political activists directly oppose fellow competitors by running against each other as candidates for political office or by campaigning for political candidates. Thus, within the realm of political activity there is a high likelihood of direct personal competition.

Recognizing standing in cases involving partisan electoral competition would also help protect an important value: ensuring an equal opportunity to participate in the electoral process. The importance of this value is evident in a line of Supreme Court cases beginning with Williams v. Rhodes. In these cases, the Court repeatedly protected

209. The League of Women Voters court’s adoption of the public model is all the more convincing when viewed in light of the district court’s decision in Fulani v. Brady: See supra notes 181-97 and accompanying text for a discussion of League of Women Voters as a public model case.

210. It can also be argued, however, that the personal competition requirement does not necessarily correlate with use of the private model. Where the group of people in personal competition with one another is large (such as the 82 aspirants for the 1988 presidency), an individual’s claim becomes more public in nature; any one person in the large group would be able to assert the claim.

political parties' access to the ballot from unreasonably burdensome government restrictions. Partisan electoral competition would further this value by granting standing to political competitors so that they could challenge unfair enforcement of laws affecting their ability to compete in the political arena.

The court in Catholic Conference would probably have arrived at the same conclusion under a partisan electoral competition analysis. The plaintiffs were merely non-partisan issue advocates, not partisan activists. Though the plaintiffs may indeed have suffered an injury because they were not able to voice their side of the abortion issue as loudly as one of their competitors, the Church, their injury would not be cognizable under a partisan electoral competition theory. The plaintiffs were not opposing the Church as partisan activists. Their

sion of the Supreme Court cases dealing with restrictions on political parties' access to the ballot, see Gerald Gunther, Constitutional Law 849-54 (12th ed. 1991).

212. See, e.g., Williams, 393 U.S. at 30-31. Justice Black, writing for the majority, invalidated Ohio election laws that placed "unequal burdens" on the right of individuals to exercise their "right . . . to associate for the advancement of political beliefs." Id. at 30. Applying strict scrutiny to the laws, he found no compelling interest that justified the abridgement of such "precious freedoms." Id. at 30-31.

213. As an I.R.C. § 501(c)(3) organization, the plaintiffs were barred from partisan activities. See supra note 101 for a discussion of I.R.C. § 501(c)(3) requirements.

214. A question exists as to whether one plaintiff, the Nassau, Long Island branch of the National Organization for Women ("Nassau NOW"), would have standing under competitive advocate standing and partisan electoral standing. The majority in Catholic Conference stated that "[p]artly as a result of [the] self-imposed restraint, plaintiffs chose not to compete [on the same political playing field as the defendants]." In re United States Catholic Conference, 885 F.2d 1020, 1030 (2d Cir. 1989), cert. denied sub nom. Abortion Rights Mobilization, Inc. v. United States Catholic Conference, 110 S. Ct. 1946 (1990).

It is not clear from where the self-imposed restraints were derived. If the court assumed that Nassau NOW, an organization formed under I.R.C. § 501(c)(4), was not able to electioneer because of its tax exemption restrictions, the decision concerning Nassau NOW would not be convincing.

Like I.R.C. § 501(c)(3) organizations, Nassau NOW is tax-exempt. As an I.R.C. § 501(c)(4) organization, however, Nassau NOW (1) has the right to engage in electioneering and (2) does not have the benefit of receiving tax deductible donations. Thus, Nassau NOW was free to compete on the same political playing field as the Church. Nassau NOW would meet the head to head competition requirement that prevented the I.R.C. § 501(c)(3) plaintiffs from satisfying competitive advocate standing (or partisan electoral standing). Moreover, Nassau NOW would satisfy the unfair competition requirements of competitive advocate standing and partisan electoral standing because the Church, an I.R.C. § 501(c)(3) organization, still retained the benefit of tax deductible donations while Nassau NOW was able to solicit fully taxable donations only. See id. at 1033-34 (Newman, J., dissenting).

If, on the other hand, Nassau NOW imposed electioneering restrictions upon itself and refused to electioneer against the Church as a matter of principle, Nassau NOW would lack standing under both partisan electoral standing and competitive advocate standing, as interpreted by the Catholic Conference majority. Nassau NOW would not have engaged in
remedy would lie in the political process where they could solicit the Executive Branch to enforce relevant laws.

The outcome of League of Women Voters under a partisan electoral competition analysis would also be justified. Fulani could have satisfied the injury in fact requirement using partisan electoral competition theory because, by campaigning for office, Fulani was engaging in partisan electoral activities just as were her competitors, the major party presidential candidates invited to the League's debates. The Article III causal nexus requirement could be satisfied using the League of Women Voters' analysis. Fulani would satisfy the traceability requirement because, but for the League's tax-exempt status, there would have been no debate. In addition, Fulani's injury would have been redressed because "practically speaking, revocation of the League's tax-exempt status at least would have prevented the League's sponsorship of the debates" and her injury would not have occurred.

**CONCLUSION**

Analysis of League of Women Voters and Catholic Conference indicates that these cases incorporate both private and public models of judicial authority. Failure to provide guidance as to what model of judicial authority underlies competitive advocate standing creates the potential for confusion and abuse, especially in light of the fact that the courts' choice of interpretive model may be outcome-determinative. The lack of clear interpretive guidance substantiates the criticism often leveled by commentators that courts manipulate standing as an ad hoc tool for admitting or denying cases depending on the political bent of the particular court.

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216. Id. at 628.
217. See Tribe, supra note 2, § 3-14, at 110. Professor Tribe maintains that the current trend towards restricting standing to limit federal court jurisdiction based on the private rights model of Marbury is legitimate. But, he argues, the methods used to restrict standing are confusing and provide little guidance as to what constitutes justiciable litigation. Id.
218. Courts will be able to seize upon either model of judicial authority to justify their standing decisions.
219. See, e.g., Tribe, supra note 2, § 3-14, at 110-11 ("[C]ritics have charged the Court with habitually manipulating announced standing doctrine to pursue extraneous, often unacknowledged ends."); Nichol, supra note 12, at 1917 (describing how critics of the
Much of the potential for abuse and confusion may be eliminated if the Second Circuit would expose the interpretive basis of competitive advocate standing to free and open debate and, based on the debate, adopt a model of judicial authority. Adoption of a model of judicial authority would hold courts accountable to following that model on a consistent basis. Though there would be room for disagreement within the adopted model, courts would not be able to choose arbitrarily any model in an attempt to justify their competitive advocate standing holdings.

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current trend towards constricting standing requirements argue that courts are more interested in the "underlying claims rather than any objective measurement of injury"); David A. Domansky, Note, Abusing Standing: Furthering the Conservative Agenda, 29 WM. & MARY L. REV. 387, 414 (1988) (arguing that standing law as used by the Burger Court was "little more than a convenient vehicle to promote the conservative agenda").

220. Ambiguity within each conceptual realm may continue to exist. For example, the district and appellate courts in Fulani v. Brady implicitly adopted a private rights model and ruled that Fulani lacked standing. 729 F. Supp. 158 (D.D.C. 1990), aff'd on other grounds, 935 F.2d 1324 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 912 (1992). In Fulani v. League of Women Voters Educ. Fund, arguably a private model case, the court held oppositely: Fulani did have standing. Thus, even if one were to interpret both decisions as incorporating the private model, the outcomes would be contradictory. See supra notes 209-10 and accompanying text for a discussion of League of Women Voters as a private model case. For further discussion of the relationship between the two Fulani cases, see supra notes 190-97 and accompanying text.