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The Second Circuit's Application of Standing in *In re United States Catholic Conference*: Another Plea for Clarity and Consistency

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THE SECOND CIRCUIT'S APPLICATION OF STANDING IN *IN RE UNITED STATES CATHOLIC CONFERENCE**: ANOTHER PLEA FOR CLARITY AND CONSISTENCY

INTRODUCTION

Section 501(c)(3) of the Internal Revenue Code (the Code) offers tax-exempt status to groups "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literacy, or educational purposes"¹ Under section 170 of the Code, donations to most organizations meeting section 501(c)(3) are tax-deductible.² Given the incentive that section 170 provides to those desiring to make donations to such groups, organizations seeking such donations are strongly motivated not only to achieve but to maintain the privileges that section 501(c)(3) affords.³

The qualifications for establishing and maintaining section 501(c)(3) status are not, however, directed simply at the purposes of the organization. Section 501(c)(3) also limits the means by which an organization may advance those purposes. Under

* 885 F.2d 1020 (2d Cir. 1989) (before Newman, Kearse and Cardamone, JJ.; opinion per Cardamone, J., dissent per Newman, J.).

¹ 26 U.S.C. § 501(c)(3) (1988). The income tax regulations provide that "[i]n order to be exempt as an organization described in section 501(c)(3)," an organization must satisfy both an "organizational" and an "operational" test. Treas. Reg. § 1.501(c)(3)-1.(a)(1) (as amended in 1990). To satisfy the organizational test, the organization's articles of incorporation must "[l]imit the purposes of such organization to one or more exempt purposes; and . . . not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes." Treas. Reg. § 1.501(c)(3)-1.(a)(2)(b)(1)(i)(a) & (b) (as amended in 1990). Under the operational test, an organization must engage "primarily in activities which accomplish one or more . . . exempt purposes specified in section 501(c)(3)." Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 1990).

² 26 U.S.C. § 170(c) (1988) (listing permissible tax-deductible donations).

³ The tremendous practical importance of section 501(c)(3) status is discussed in *Bob Jones Univ. v. Simon*, 416 U.S. 725, 727-30 (1974) (in addition to being exempt from federal income taxes, § 501(c)(3) organizations are also exempt from federal social security (FICA) taxes under 26 U.S.C. § 3121(b)(8)(B), and from federal unemployment (FUTA) taxes under 26 U.S.C. § 3306(c)(8); donations to § 501(c)(3) organizations are tax-deductible under § 170(c)(2) of the Code).

section 501(c)(3), an organization may not devote a "substantial part" of its activities to "carrying on propaganda, or otherwise attempting to influence legislation" ⁴ Furthermore, the organization may "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." ⁵ The IRS's enforcement—or more accurately, nonenforcement—of these prohibitions, and the attempts by third parties to use the judiciary to cure this selective nonenforcement problem, as exemplified in the recent Second Circuit case of *In re United States Catholic Conference*, are the subjects of this Comment. ⁶

The IRS has long been accused of closing its eyes to violations of section 501(c)(3), especially those violations committed by well-established religious organizations. ⁷ A similar level of tolerance has not been afforded smaller, less influential section 501(c)(3) organizations. ⁸ The controversy surrounding abortion

⁴ 26 U.S.C. § 501(c)(3) (1988). There is no bright-line test to determine what constitutes a "substantial part" of an organization's activities. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 855 (10th Cir. 1972) (a percentage test to determine what is substantial ignores the necessity of examining the organization's activities in relation to the objectives of the organization and the circumstances surrounding those activities), *cert. denied*, 414 U.S. 864 (1973). The determination is made by measuring the organization's lobbying activities relative to the organization's overall activities. *Haswell v. United States*, 500 F.2d 1133, 1142 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975).

The political limitations embodied in § 501(c)(3) have attracted a significant amount of commentary, most of it critical. See, e.g., Caplin & Timbie, *Legislative Activities of Public Charities*, 39 LAW & CONTEMP. PROBS. 183 (1975); Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201 (1987-88); Clark, *The Limitation On Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439 (1960); Troyer, *Charities, Law-Making and the Constitution: Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. INST. FED. TAX'N 1415 (1973); Noto, *Charitable Lobbying Restraints and Tax Exempt Organizations: Old Problems, New Directions?*, 1984 UTAH L. REV. 337.

The lobbying limitations have been attacked on a number of grounds. Critics claim that the limitation violates First Amendment speech and associational rights and is overbroad and vague. *But see* *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (the lobbying limitations in § 501 do not violate either the First or Fifth Amendments). For a detailed analysis of decisions dealing with this issue, see Schwarz & Hutton, *Recent Developments in Tax Exempt Organizations*, 18 U.S.F. L. REV. 649 (1984).

⁵ 26 U.S.C. § 501(c)(3) (1988).

⁶ 885 F.2d 1020 (2d Cir. 1989).

⁷ See Schwarz & Hutton, *Recent Developments*, *supra* note 4, at 668.

⁸ See *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972) (tax-exempt organization is regarded as attempting to influence legislation contrary to § 501(c)(3) if it contacts or urges public to contact members of legislative body

has brought this unequal enforcement of the Code's prohibitions against lobbying and political campaigning to a head.

The Catholic Church (the Church) has reputedly used tax-deductible funds to engage in political activities in violation of section 501(c)(3).⁹ Nevertheless, its tax-exempt status remains secure. Pro-choice groups, however, risk their tax-exempt status by displaying even the slightest appearance of electioneering.¹⁰

The practical significance of this discriminatory enforce-

for purpose of proposing, supporting or opposing legislation, or itself advocates adoption or rejection of legislation), *cert. denied*, 414 U.S. 864 (1973); *see also* *United States v. Dykema*, 666 F.2d 1096 (7th Cir. 1981) (an otherwise exempt organization loses its exemption by participating in any political campaign), *cert. denied*, 456 U.S. 933 (1982), *reh'g denied*, 458 U.S. 1132 (1982); *Harding Hosp., Inc. v. United States*, 505 F.2d 1068, 1072 (6th Cir. 1974) (taxpayer's "failure to satisfy any one of the statutory requirements" causes loss of the exemption); *Scripture Press Found. v. United States*, 285 F.2d 800 (Ct. Cl. 1961) (IRS revoked tax exemption on theory that corporation was no longer operating solely for religious purposes), *cert. denied*, 368 U.S. 985 (1962); *Freedom Church of Revelation v. United States*, 588 F. Supp. 693, 696 (D.D.C. 1984) (if nonexempt activities of organization are "more than incidental or insubstantial, it is not entitled to continuing qualification as an exempt organization"); *Church of the Chosen People v. United States*, 548 F. Supp. 1247, 1253 (D. Minn. 1982) (religious organization engaged in political activities is denied tax exemption even if activities were religiously motivated).

⁹ *See* note 42 and accompanying text *infra*. *See also* Lader, *Church Political; Religious Groups Rights to Endorse Political Candidates*, *NATION*, May 21, 1990, at 693 ("[The plaintiffs in *In re United States Catholic Conference*] had collected scores of articles from official Catholic newspapers listing names of candidates to support or oppose . . ."); Victor, *Not Praying Together*, *Nat'l J.*, Oct. 10, 1987, at 2546 (the alleged violations of this prohibition include the endorsement of Reagan in an official church newspaper, calling him "the only presidential candidate who is clearly opposed to abortion and is willing to use the political power of the presidency to support his position"). In *United States v. Dykema* the Court of Appeals for the Seventh Circuit held that in determining whether a church claiming exempt status was operated exclusively for religious purposes, it is necessary and proper for the IRS to survey all the activities of the organization, by receiving testimony by persons having knowledge of the activities, and by examining church bulletins, programs, and other publications as well as minutes, memoranda, and financial books and records. *Dykema*, 666 F.2d at 1100. Subject to certain restrictions, 26 U.S.C. § 7611(b) expressly permits the examination of even the religious activities of an organization to the extent such examination is necessary to determine whether the organization is entitled to exempt status by reason of being a church. Furthermore, the IRS has a monitoring function with respect to all § 501(c) exempt groups to determine whether their actual activities conform to the requirements Congress established as entitling them to tax-exempt status. *Dykema*, 666 F.2d at 1101. In addition, the IRS has a statutory duty *ex officio* to inquire "concerning all persons . . . who may be liable to pay any internal revenue tax." 26 U.S.C. § 7601(a) (1989); *see* *Donaldson v. United States*, 400 U.S. 517, 523 (1971) (§ 7601 "flatly imposes upon the Secretary the duty to canvass and to inquire").

¹⁰ *See* note 8 and accompanying text *supra*; *see also* Schwarz & Hutton, *Recent Developments*, *supra* note 4, at 668.

ment of the Code is profound. By allowing the Church to use funds acquired through tax exemption in an illegal manner, the tax exemption acts as a federal subsidy of the Church's political goals.¹¹ Such a "subsidy" serves to increase the effectiveness of the Church's voice in the competitive political arena. Pro-choice organizations, on the other hand, refused a similar subsidy by the IRS, have their political power comparatively diminished.

Individuals and organizations adversely affected by IRS activities such as these have turned to the federal courts for redress.¹² Unfortunately, such violations of the Code are virtually immune from judicial review.¹³ Despite the probability of actual harm resulting from the IRS's inaction, third parties attempting to challenge the IRS's enforcement of section 501(c)(3) have repeatedly been denied access to the federal courts. Courts have generally held that these third parties have failed to meet the constitutional requirements of standing.¹⁴ Such a fate met the plaintiffs in *Catholic Conference*.

In *Catholic Conference* a consortium of twenty individuals and nine organizations brought suit in the United States District Court for the Southern District of New York.¹⁵ Asserting that

¹¹ See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) (the tax exemption and charitable deduction are a type of subsidy administered through the tax system having much the same effect as a cash grant); *Haswell v. United States*, 500 F.2d 1133, 1140 (Ct. Cl. 1974) (limitations in § 501(c)(3) stem from the policy that the government should be neutral in political affairs).

¹² The Administrative Procedure Act (APA) provides that any "person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute" may seek judicial review of that agency action in federal court. 5 U.S.C. § 702 (1982).

¹³ Because judicial review under the APA is limited to the federal courts, see note 12 *supra*, a plaintiff seeking redress must satisfy Article III's standing requirements. See notes 85-106 and accompanying text *infra*. See also *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Sierra Club v. Morton*, 405 U.S. 727 (1972). State courts provide no help to a plaintiff seeking review of agency action.

¹⁴ See *Coyle, Standing of Third Parties to Challenge Administrative Agency Actions*, 76 CALIF. L. REV. 1061, 1063-65 (1988) (constitutional standing requirements make it exceedingly difficult for third parties to challenge violations by the IRS).

When faced with a motion to dismiss for lack of standing, the court must accept all of the plaintiffs' allegations as true and draw all inferences in their favor. See *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

¹⁵ *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982), *on reh'g*, 603 F. Supp. 970 (S.D.N.Y. 1985), *parallel proceeding*, *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986), *on appeal sub nom.* In re *United States Catholic Conference*, 824 F.2d 156 (2d Cir. 1987), *cert. granted sub nom.* *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 484 U.S. 975 (1987),

the Catholic Church had engaged in lobbying and campaigning in contravention of section 501(c)(3), the plaintiffs sought, *inter alia*, to compel the IRS to revoke the Church's tax-exempt status.¹⁶ The district court, addressing the defendants' motion to dismiss for lack of standing, held that the twenty individual plaintiffs had standing as voters to contest the alleged infringement of their right to participate equally in the political process free from arbitrary government interference.¹⁷ In addition, three of the nine organizational plaintiffs had standing to represent their voter members.¹⁸ Moreover, the court determined that a fourth organization, an abortion clinic, and plaintiffs who were members of the clergy, had standing under the Establishment Clause.¹⁹ Following numerous intermediate proceedings, the case came before the United States Court of Appeals for the Second Circuit.²⁰ The Second Circuit, in the opinion that is the subject of this Comment, reversed the district court, holding that none of the plaintiffs had met the constitutional requirements for standing.²¹

In critiquing that opinion, Part I of this Comment will discuss the rights provided and the limitations imposed by the doctrine of standing. Part II will discuss the Second Circuit's use of

rev'd and remanded, 487 U.S. 72 (1988) (Court remanded to the Second Circuit for resolution of subject matter jurisdiction; see notes 82-84 and accompanying text *infra*), *rev'd*, 885 F.2d 1020 (2d Cir. 1989).

¹⁶ 544 F. Supp. at 473.

This Comment will refer to the individuals and organizations that initiated this action collectively as "plaintiffs." Because the plaintiffs sought standing under a variety of theories, an individual or organization that was granted standing as a voter may also, for example, have been granted standing under the Establishment Clause. Thus, overlaps may, and did, exist. When the identity of a specific individual or organization is material to this Comment, that plaintiff's identity will be noted. See note 35 *infra*.

¹⁷ 544 F. Supp. at 480-82; see also note 59 and accompanying text *infra*.

¹⁸ 544 F. Supp. at 480; see also note 60 and accompanying text *infra*.

¹⁹ 544 F. Supp. at 479. "The clergy plaintiffs and the Women's Center for Reproductive Health . . . have disclosed . . . compelling and personalized injuries flowing from the tacit government endorsement of the Roman Catholic Church position on abortion that are sufficient to confer standing on them to complain of the alleged establishment clause violations." *Id.*

The Establishment Clause of the First Amendment states in relevant part that "Congress shall make no law respecting an establishment of religion" U.S. CONST. amend. I. Governmental action that, either directly or indirectly serves to further one religion at the expense of others, violates this clause. See notes 108-23 and accompanying text *infra*.

²⁰ See notes 15 *supra* and 57-84 and accompanying text *infra*.

²¹ *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989).

standing in *Catholic Conference* and will analyze, as did the Second Circuit, whether the instant plaintiffs had standing to challenge the tax-exempt status of the Church. As will be shown, the individuals who asserted standing as voters and competitive advocates of the Church satisfied the requirements necessary to establish standing.

Furthermore, this Comment will attempt to demonstrate the injustice that results from such a misapplication of the standing doctrine. A determination that a plaintiff lacks standing deprives that plaintiff of judicial redress for an arguably real injury. Because standing is an inherently flexible concept, a court may find that a particular litigant lacks standing simply to avoid hearing the merits of a highly sensitive case. While standing is a limitation on the judiciary's power, it should not be employed arbitrarily to deny an injured litigant the right to seek redress. Standing should *not* be used to allow an arguably politically sensitive judiciary to impose limits on its own power to resolve disputes when such limitations do not, in fact, exist. Therefore, although standing is a limiting doctrine, this Comment will, in conclusion, implore our judiciary to clarify standing in general and to allow the doctrine to function as a means by which an injured plaintiff can seek relief, not as a court's shield.

I. BACKGROUND

A. *The Plaintiffs*

In re United States Catholic Conference was instituted in the Southern District of New York by nine organizations and twenty individuals committed to sustaining a woman's right to obtain a legal abortion.²² Some of the original plaintiffs were denied standing and therefore were not participants in the appeal that came before the Second Circuit.²³ Of the nine organiza-

²² 544 F. Supp. at 471.

²³ Of the nine original organizational plaintiffs that initiated the action, the district court held that five abortion clinics lacked standing and dismissed their complaints. 544 F. Supp. at 479 nn.5 & 6. The district court found those five organizational plaintiffs had failed to set out the injury in fact to themselves or to their members that was necessary to confer standing under the Establishment Clause. *Id.* Their allegations merely demonstrated a concern for the separation of church and state. No direct injury was asserted. See notes 108-23 and accompanying text *infra*. In an attempt to lend both clarity and organization to the Second Circuit's decision, this Comment will discuss only those

tional plaintiffs that the district court considered, four were granted standing.²⁴ The first of these organizations, the Women's Center for Reproductive Health (the Center), is dedicated to assisting women in making decisions concerning family life, including childbearing.²⁵ The Center was founded and is run by Reverend Marvin G. Lutz, a Presbyterian minister.²⁶ Based on the organization's religious affiliation and goals, standing was conferred to challenge the government's alleged violations of the Establishment Clause.²⁷

The three remaining organizations that were granted standing were Abortion Rights Mobilization Inc. (ARM), the National Women's Health Network Inc. (NWHN), and the Long Island National Organization for Women-Nassau, Inc. (Nassau-NOW).²⁸ ARM is a nonprofit, tax-exempt organization under section 501(c)(3) that "seeks to secure and implement a woman's right to a legal abortion."²⁹ As mentioned, section 501(c)(3) prohibits ARM from engaging in political activity. NWHN, like ARM, is tax-exempt under section 501(c)(3).³⁰ NWHN is an organization comprised of many clinics, counseling services, publishers and others who offer a variety of services to women and

plaintiffs who were granted standing by the district court and who were considered by the court of appeals.

²⁴ 544 F. Supp. at 479-83.

²⁵ *Id.* at 479-80.

²⁶ *Id.* at 480.

²⁷ *Id.* at 479-80. The Women's Center for Reproductive Health (the Center) is dedicated to putting "the principles of the Presbyterian Church into effect." *Id.* at 480. The Center was granted standing because, according to the district court, "[t]acit government endorsement of the . . . Church view of abortion hampers and frustrates these plaintiffs' ministries. The government[s] . . . official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message." *Id.* The district court held that this favoritism injured the plaintiffs' spiritual values and thus provided the Center with a sufficient stake in the controversy to merit judicial redress. See notes 85-101 and accompanying text *infra*.

Such favoritism of one orthodoxy over another is, unquestionably, a violation of the Establishment Clause. See note 19 *supra*. Nevertheless, such a violation does not necessarily mean that an individual or organization has standing to challenge that violation. A prospective plaintiff claiming standing under the Establishment Clause must demonstrate that an Establishment Clause violation resulted in an individual, ascertainable injury. The instant plaintiffs failed to do so according to the Second Circuit. See notes 108-23 and accompanying text *infra*.

²⁸ 544 F. Supp. at 479-83.

²⁹ *Id.* at 474.

³⁰ *Id.*

support a woman's right to have a legal abortion.³¹ Nassau-NOW is a membership organization that shares ARM's and NWHN's objectives.³² It is exempt from federal taxes under section 501(c)(4) of the Code rather than section 501(c)(3).³³ ARM, NWHN, and Nassau-NOW were granted standing to represent their voter members.³⁴

The twenty individual plaintiffs that initially joined in the suit and were granted standing by the district court included Protestant ministers, Jewish rabbis, and various citizens dedicated to the preservation of women's rights. Many of the individual plaintiffs had donated money to or had served as directors of the organizational plaintiffs.³⁵ All of the individual

³¹ *Id.*

³² *Id.*

³³ *Id.* 26 U.S.C. § 501 (c)(4) offers tax exemptions to "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes." Nassau-NOW is a "local association"; the other organizational plaintiffs are not and therefore do not qualify for an exemption under § 501(c)(4).

Although it appears that § 501(c)(4) social welfare organizations are prohibited from "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office," Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1991), the IRS has ruled that there is no such absolute ban as long as the organization remains primarily engaged in activities that promote social welfare. *See* Rev. Rul. 81-95, 1981-1 C.B. 332.

In *Regan v. Taxation with Representation*, the Supreme Court stated that § 501(c)(3) organizations may create § 501(c)(4) affiliates to carry out their lobbying. 461 U.S. 540, 544 (1983). Section 501(c)(3) organizations may not, however, subsidize § 501(c)(4) organizations in any way. *Id.* In addition, exempt organizations may create political action committees (PACs) to participate in the political process. PACs are not, however, eligible to receive tax-deductible contributions. 26 U.S.C. § 170(c)(2)(D) (1988).

An organization that qualifies for an exemption under § 501(c)(3) and loses that exemption because of its political activities cannot reorganize under § 501(c)(4). 26 U.S.C. § 504(a) (1988).

³⁴ *See* note 60 and accompanying text *infra*.

³⁵ 544 F. Supp. at 474. The individual plaintiffs included the following: Lawrence Lader, founder and president of ARM; Harold Bostrom, Margaret Strahl, M.D., Helen Edey, M.D., and Ruth Smith—all of whom had contributed to ARM, other abortion rights organizations, and pro-choice political candidates; Rabbi Israel Margolies, Reverend Beatrice Blair, Rabbi Balfour Brickner, Reverend Robert Hare, and Reverend Marvin Lutz—all of whom have religious beliefs differing from those of the Catholic Church on the issue of abortion and who have been active in the pro-choice movement; Milan Vuitch, M.D., president of Laurel Clinic, Inc., a clinic that offers a wide variety of medical services including abortions; Jane Delgado, Jennie Lifrieri, Eileen Walsh, Patricia Luciano, Marcella Michalski, Chris Niebrzydowski, and Judith Seibel—all of whom are Roman Catholics who contribute or have contributed to the Catholic Church but are

plaintiffs had expressed a concern for the separation of church and state required by the Establishment Clause.³⁶ All of the individual plaintiffs voted and paid taxes.³⁷

B. *The Dispute*

The original individual and organizational plaintiffs brought suit collectively against Donald T. Regan, then Secretary of the Treasury, Roscoe L. Egger, Jr., then Commissioner of Internal Revenue, the United States Catholic Conference, Inc., and the National Conference of Catholic Bishops (the latter two referred to herein as "the Church").³⁸ The crux of the plaintiffs' challenge concerned the Church's alleged politically partisan activities, section 501(c)(3)'s prohibitions against such activities, and the effect of the Internal Revenue's enforcement—or, as the plaintiffs claimed, nonenforcement—of those prohibitions against the Church.³⁹

Plaintiffs first alleged that the Church repeatedly violated section 501(c)(3) by engaging in campaigning and lobbying. The complaint asserted that the Church lobbied extensively, in contravention of section 501, to promote the position that abortion is immoral and should, as a result, be illegal.⁴⁰ The Church, according to the plaintiffs, is engaged in a "three-fold educational, pastoral, and political" plan designed to mobilize the entire Church in an effort to outlaw abortions in the United States.⁴¹ While such activities would not normally be prohibited, this "Pastoral Plan for Pro-life Activities" has allegedly taken the form of lobbying and partisan political conduct supporting pro-life candidates and opposing others with contrary views.⁴² Sec-

nevertheless opposed to the Church's position on abortion; Karen DeCrow, a leader of the feminist movement, former president of NOW, and former and potentially future candidate for political office; and Susan Sherer, an abortion rights activist. *Id.* The district court granted each individual standing. See note 59 and accompanying text *infra*.

³⁶ *Id.*

³⁷ *Id.*

³⁸ 885 F.2d at 1023. The Church is composed of approximately 30,000 parishes, schools and other organizations. All of these organizations are collectively tax-exempt under the Church's § 501(c)(3) status. *Id.*

³⁹ *Id.* at 1022. See notes 47-51 and accompanying text *infra*.

⁴⁰ 885 F.2d at 1022.

⁴¹ *Id.* at 1022 (quoting from Complaint at ¶ 22).

⁴² *Cf. McRae v. Califano*, 491 F. Supp. 630, 703-28 (E.D.N.Y.), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297 (1980) (describing in detail some of the

tion 501(c)(3) forbids such conduct.⁴³

The complaint alleged that the Church, through its priests and officials, has endorsed and supported pro-life political candidates and opposed pro-choice candidates.⁴⁴ These activities have taken many forms. Church officials have, the complaint alleged, published articles in their bulletins, attacked and endorsed candidates from the pulpit, distributed partisan letters to parishioners, and urged members to donate to and sign petitions of "right to life" committees and candidates.⁴⁵ In addition, the plaintiffs contended that the Church has contributed large sums of money to organizations that, either directly or indirectly, support the political candidacies of persons favoring anti-abortion legislation.⁴⁶

The plaintiffs' claims against the government stemmed from the contention that the IRS knew about the Church's alleged political activities and failed to enforce the Code's prohibitions against such activities.⁴⁷ They asserted that the IRS, cognizant of activities beyond the scope of those permitted by section 501(c)(3), either should have revoked the Church's tax-exempt status or refused to renew its annual exemption.⁴⁸ This nonenforcement of section 501(c)(3) allegedly injured the plaintiffs.⁴⁹ By "exempt[ing] the Roman Catholic Church from the strictures of the law and from the government's enforcement efforts,"⁵⁰ the IRS treated the Church more favorably than pro-choice organizations that have obeyed the strictures of section 501(c)(3).⁵¹

Church's lobbying and campaigning activities pursuant to this "Pastoral Plan" to have abortions declared illegal).

⁴³ See notes 4-5 and accompanying text *supra*.

⁴⁴ 885 F.2d at 1022 (quoting from Complaint at ¶ 26).

⁴⁵ *Id.*

⁴⁶ 885 F.2d at 1022 (quoting from Complaint at ¶ 27).

⁴⁷ 885 F.2d at 1022.

⁴⁸ *Id.*

⁴⁹ 544 F. Supp. at 475. See note 11 and accompanying text *supra* and note 51 *infra*.

⁵⁰ 885 F.2d at 1022 (quoting from Complaint at ¶ 33).

⁵¹ *Id.* While the plaintiffs did not complain about their own treatment by the IRS, they nevertheless asserted that the IRS's failure to enforce the Code's prohibitions against the Church injured them. The individual plaintiffs and tax-exempt organizations that support a woman's right to have a legal abortion cannot contribute tax-deductible funds to the campaign of pro-choice candidates. On the other hand, individuals who are pro-life can funnel donations to pro-life candidates through the Church and thereby receive a tax benefit. This inconsistency allegedly distorts the political process by impairing the "effectiveness of plaintiffs' political speech and their chances to prevail at the polls by enhancing the voice of plaintiffs' political adversaries." 544 F. Supp. at 475.

Plaintiffs also expressed general constitutional concerns about the separation of church and state.⁵² They alleged that the IRS's selective grant of a virtually unrestricted tax exemption to the Church constituted a favoring of one religion over another, thereby violating the Establishment Clause.⁵³ Essentially, by allowing the Church to use contributions in an unlawful manner according to section 501(c)(3), and by prohibiting others from engaging in similar transgressions of the Code, the government treated the Church more favorably than its ideological adversaries.⁵⁴

The relief the plaintiffs sought included a declaration from the court that the political activities of the Church and the inaction of the IRS in response to those activities violated section 501(c)(3) and the Establishment Clause of the Constitution.⁵⁵ They also sought an injunction requiring the government to take all actions necessary to enforce the Code and the Constitution, including revocation of the Church's tax-exempt status, collection of all taxes due, and notification to contributors to the Church that they could no longer deduct such contributions from their income tax returns.⁵⁶

C. *Prior Proceedings*

After the original plaintiffs brought this action, the defendants moved to dismiss the complaint, alleging that the plaintiffs lacked the requisite standing to bring the suit.⁵⁷ The district

Such activity violates the "one person, one vote" principle that governs governmental attempts to alter or allow the alteration of the political process. *Reynolds v. Simms*, 377 U.S. 533 (1964) (an individual's right to vote is unconstitutionally impaired when its weight is diluted when compared with votes of other citizens in the same state). See also Schwarz & Hutton, *Recent Developments*, *supra* note 4, at 327:

[T]here can be little doubt that [the IRS'] enforcement of the political campaign limitation in § 501(c)(3) has been uneven. As a practical matter, large established religious organizations are virtually immune from IRS scrutiny, but less influential groups on the other side of a controversial issue place their tax exemptions (and ability to solicit charitable contributions) at great risk if they become active in political campaigns.

⁵² 544 F. Supp. at 475.

⁵³ *Id.* at 476. See notes 108-23 and accompanying text *infra*.

⁵⁴ See note 51 and accompanying text *supra*.

⁵⁵ 544 F. Supp. at 476.

⁵⁶ *Id.*

⁵⁷ *Id.* at 471. The defendants also moved to dismiss asserting that the complaint did not state a claim upon which relief could be granted. Noting that the plaintiffs would be

court granted the motion in part and denied the motion in part.⁵⁸

The district court, considering the plaintiffs one at a time, determined that the twenty individual plaintiffs had standing as voters to contest the alleged infringement of their right to participate in the political process on equal terms with all others free from arbitrary government interference.⁵⁹ Furthermore, the court held that three of the nine tax-exempt organizations had standing to represent their voter members.⁶⁰ In addition, the court stated that the individual clergy plaintiffs and the

entitled to proceed " 'unless it appear[ed] beyond doubt that [they] [could] prove no set of facts . . . which would entitle [them] to relief,' " 544 F. Supp. at 485 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957)), the district court dismissed two counts of the complaint. *Id.* at 485. The first of these counts had sought a writ of mandamus to compel the government to enforce the Code against the Church. *Id.* at 487. Holding that mandamus is only available to compel ministerial administrative actions and that discretion permeates IRS activities, the court found that mandamus was an inappropriate remedy and dismissed the count. *Id.* The second of these counts alleged that the Church had committed Code violations. Holding that any grievance the plaintiffs had was with the government, this count was dismissed. *Id.* See notes 63-66 and accompanying text *infra*.

In addition, the defendants moved to dismiss on the ground that the court was not empowered to review the IRS's particular decisions to enforce, or not to enforce, § 501(c)(3). Noting that administrative actions are generally reviewable absent a clear and convincing contrary legislative intent, and finding that no such intent existed, the court dismissed this motion. 544 F. Supp. at 488.

⁵⁸ See notes 59-66 and accompanying text *infra*.

⁵⁹ 544 F. Supp. at 480-82. "Clearly, the government defendants' tax policy is the source of the distortion in the political process that plaintiffs complain of. An injunction against that discriminatory policy will restore the proper balance between adversaries in the abortion debate." *Id.* at 482. See also notes 175-96 and accompanying text *infra*.

⁶⁰ 544 F. Supp. at 482. Voter standing was granted to Nassau-NOW, NWHN, and ARM. Although none of the organizational plaintiffs could allege injury to themselves as organizations under the voter standing doctrine (organizations do not vote), the organizations could establish voter standing " 'as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right.' " *Id.* at 480 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). The injury they asserted was the distortion in the political process that affected their members.

ARM, Nassau-NOW, and NWHN are devoted to promoting and protecting women's rights. Given the political orientation of these groups, the court determined that they and their members were sufficiently involved in affecting the legislative process to establish voter standing. 885 F.2d at 1028; see notes 171-96 and accompanying text *infra*. None of the other organizations could allege any political orientation. 544 F. Supp. at 480 n.9.

Arguably, every organization should have been granted standing. Assuming that all of the organizations' members vote, the political orientation of the organization should be irrelevant to its ability to represent its voter members. If the members could have brought suit in their own right, the organizations are entitled to represent them. *Warth*, 422 U.S. at 511.

Women's Center for Reproductive Health alleged sufficiently concrete injuries resulting from the government's tacit endorsement of the Church's position on abortion to merit Establishment Clause standing.⁶¹ Defendant's motion to dismiss for lack of standing was granted in regard to the other plaintiffs.⁶²

The United States Catholic Conference and the National Conference of Catholic Bishops (the Church), asserting that they had not directly injured any of the plaintiffs, made a motion to dismiss themselves as defendants in the suit.⁶³ That motion was granted.⁶⁴ The plaintiffs, by their own admission, had no direct grievance with the Church.⁶⁵ The injuries they claimed arose from the government's failure to enforce the tax code.⁶⁶ These injuries were caused by the government, not the Church.

Although the Church was dismissed as a defendant in the lawsuit, the district court held that the remaining plaintiffs could proceed against the Secretary of the Treasury and the Commissioner of Internal Revenue ("the government"). After the plaintiffs initiated discovery, the government filed a motion to stay discovery.⁶⁷ The Church, no longer a party to the action,

⁶¹ 544 F. Supp. at 477-80. The other individual plaintiffs could not demonstrate an injury sufficient to satisfy Establishment Clause standing requirements. The plaintiffs' concerns about violations of the Establishment Clause did not constitute an injury-in-fact. *Id.* at 478. The other organizational plaintiffs also failed to demonstrate an injury sufficient to confer standing under the Establishment Clause. While their concerns about transgressions of the First Amendment may have been both justified and sincere, such concerns did not explain how they had been injured. *Id.* at 479. See note 27 *supra*.

⁶² 544 F. Supp. 471. The plaintiffs had also claimed standing under the Equal Protection Clause. *Id.* at 483. The plaintiffs asserted that they had standing based on injuries to rights conferred by the equal protection provisions of the Fifth Amendment. The plaintiffs asserted that the unequal enforcement of § 501 denied them the right to participate equally in the political process. The court dismissed the claim, noting that because the plaintiffs did not assert that the Code was applied to them in a discriminatory manner or that they had been denied some tax benefits to which they were entitled, they had not been injured. *Id.* The Code's alleged misapplication to the Church therefore did not violate the Equal Protection Clause. *Id.*

⁶³ 544 F. Supp. at 487.

⁶⁴ *Id.*

⁶⁵ *Id.* The government's alleged indifference to the Church's violations of § 501(c)(3) assertedly gave the Church an unfair advantage in the political battle over the right to have a legal abortion. The Church, theoretically, played no part in either the maintenance or revocation of its § 501(c)(3) status. The plaintiffs' claims were allowed to proceed against the Secretary of the Treasury and the Commissioner of the IRS.

⁶⁶ *Id.* at 487.

⁶⁷ Abortion Rights Mobilization, Inc. v. Regan, 552 F. Supp. 364 (S.D.N.Y. 1982).

joined in this motion.⁶⁸ The motion was denied but the Church, through a series of tactical maneuvers, successfully stalled the discovery process.⁶⁹

Three years later the government renewed its motion to dismiss against the remaining plaintiffs.⁷⁰ They claimed that the Supreme Court's recent decision in *Allen v. Wright*⁷¹—a case that the defendants asserted closed the door on private suits challenging government grants of tax exemption—mandated a dismissal of all of the plaintiffs' claims.⁷² The district court, determining that *Allen* did not foreclose the action, reiterated its previous holding.⁷³

Subsequently the plaintiffs served subpoenas on the Church as a third party. The Church, allegedly concerned about the infringement of its religious freedoms, refused to comply with the discovery requests.⁷⁴ After numerous attempts by the court to

⁶⁸ *Id.* at 366.

⁶⁹ *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337, 339 (S.D.N.Y. 1986) ("[The Church] began to engage the court and the plaintiffs in a series of maneuvers that—given the [Church's] apparent intention of ultimate noncompliance—made a game of the judicial process."). See also note 74 and accompanying text *infra*.

⁷⁰ *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985).

⁷¹ 468 U.S. 737 (1984). In *Allen* the Supreme Court held that the parents of black school children did not have standing to challenge the tax-exempt status of private schools. According to *Allen*, individuals seeking to establish taxpayer standing must demonstrate that their own tax liabilities have been affected before they can challenge a determination of the IRS. *Id.* at 766.

In *Allen* the parents alleged that IRS grants of tax-exemptions to discriminatory private schools enabled these schools to offer cheaper tuition and thus induced parents of white school children to withdraw their children from public schools and place them in private schools. *Id.* at 744-45. The parents claimed that this activity denied their children their constitutional right to attend integrated public schools. *Id.* See also *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (discriminatory private schools can not qualify for tax-exempt status). The parents were denied standing because they did not demonstrate a sufficiently personal injury. See note 99 and accompanying text *infra*. The Supreme Court held that while "this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing . . . such injury accords a basis for standing only to [plaintiffs who were personally injured by the discriminatory conduct]." *Allen*, 468 U.S. at 755. Even if the plaintiffs met the personal injury requirement by alleging harm to their opportunity to receive an integrated education, the Court held that they failed to satisfy standing's causation requirements. *Id.* at 757-59; see note 100 and accompanying text *infra*.

⁷² *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. at 971.

⁷³ "In applying *Allen* to the present case it must first be noted that the Court did not close the door on private suits challenging government grants of tax exemption . . . but used traditional analysis in concluding that the *Allen* plaintiffs lacked standing." *Id.*

⁷⁴ *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337, 339 (S.D.N.Y. 1986).

make the discovery process acceptable to both sides proved futile, the plaintiffs brought a motion to hold the Church in civil contempt. That motion was granted.⁷⁵

On appeal to the Second Circuit, the Church asserted that it was improperly held in contempt.⁷⁶ The Church claimed that because the plaintiffs lacked standing, the district court lacked subject matter jurisdiction over the case and therefore could not render a valid contempt citation.⁷⁷ The Second Circuit held that, as a nonparty contemnor, the Church itself lacked standing to challenge the plaintiffs' standing in the main suit.⁷⁸ As a nonparty witness, the Church could only challenge a contempt finding when the district court lacked even colorable jurisdiction.⁷⁹ Holding that such colorable jurisdiction existed, the Second Circuit stated that the Church could not challenge the plaintiffs' standing in the underlying action or raise other issues that might demonstrate that the district court had erroneously exercised subject matter jurisdiction over the action.⁸⁰

The United States Supreme Court reversed, holding that a nonparty witness held in contempt had standing to challenge a district court's lack of subject matter jurisdiction over the case.⁸¹ The Court remanded the case to the Second Circuit to determine whether the district court had had subject matter jurisdiction in the underlying action.⁸² Whether such jurisdiction existed depends on whether the plaintiffs had standing to

⁷⁵ *Id.* at 340.

⁷⁶ *In re United States Catholic Conference*, 824 F.2d 156 (2d Cir. 1987).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 165. See *Blair v. United States*, 250 U.S. 273 (1919) (witnesses may only challenge whether there exists a colorable basis for exercising subject matter jurisdiction; they may not challenge the correctness of the court's exercise of such jurisdiction).

⁸⁰ *Id.*

⁸¹ *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988). The Supreme Court held that while Federal Rule of Civil Procedure 45 gives a district court the power to subpoena witnesses and documents, that court's subpoena power cannot be more extensive than its jurisdiction. *Id.* at 76. It follows that if a district court does not have subject matter jurisdiction, and the process was not served in an attempt to determine the presence or lack of that jurisdiction, that process is void. *Id.* See also *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties).

⁸² *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. at 79-80.

challenge the tax-exempt status of the Catholic Church.⁸³ The Second Circuit, in the opinion that is the focus of this Comment, held that they did not.⁸⁴

II. ANALYSIS

A. *Standing Defined: Sources and Purposes of the Doctrine*

Before it is possible to properly critique the Second Circuit's decision in *Catholic Conference*, it is necessary to analyze the somewhat elusive concept of standing, the Article III limitations on that concept, recent changes in the application of standing, and the Second Circuit's use of the doctrine.

Article III of the Constitution permits federal courts to hear only "cases" or "controversies."⁸⁵ It is here, in Article III, that standing finds its roots. The standing requirement "seeks to place fundamental limits on the federal judicial power in our system of government" by restricting federal judicial action to only those cases that are properly before the courts.⁸⁶ Standing is therefore an indispensable element of federal subject matter jurisdiction.⁸⁷ Although simple in theory, the determination of

⁸³ *Catholic Conference*, 885 F.2d at 1023.

⁸⁴ *Id.* at 1031. The Second Circuit held that the plaintiffs did not meet the requirements necessary to confer standing under Article III. Therefore, the district court did not have subject matter jurisdiction and could not render a valid contempt citation. The Second Circuit vacated the contempt citation and dismissed the plaintiffs' complaint. 885 F.2d at 1031.

⁸⁵ U.S. CONST. art. III, § 2. "The judicial Power [of the federal courts] 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 . . . [and] to Controversies to which the United States shall be a Party . . ." *Id.*

This limitation ensures, *inter alia*, that the federal courts do not issue advisory opinions that would, in essence, exceed the scope of their power under Article III and violate the constitutional principle of separation of powers. See *Allen v. Wright*, 468 U.S. 737, 750 (1984); P. BATOR, D. MELTZER, P. MISHKIN, D. SHAPIRO, HART AND WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 66-67 (3d ed. 1988) ("the lines of separation drawn by the Constitution between the three departments of the government . . . [prevent] our extrajudicially deciding the [advisory] questions alluded to") (quoting letter from Chief Justice John Jay and the Associate Justices to President George Washington of Aug. 8, 1793).

⁸⁶ *Allen*, 468 U.S. at 750.

⁸⁷ See, e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1970) (while Congress may not confer jurisdiction on federal courts to render advisory opinions, it may create by statute legal rights, the invasion of which creates standing); see also *Catholic Conference*, 885 F.2d at 1023 ("when a plaintiff lacks standing to bring suit, a court has no subject matter jurisdiction over the case").

whether standing exists has proven to be possibly the most difficult component of the case or controversy analysis.⁸⁸

The United States Supreme Court has described standing as "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy"⁸⁹ Justice Scalia, attempting to shed light on a seemingly clear definition that has nevertheless plagued the Court and the public with inconsistent rulings on the issue,⁹⁰ described standing as follows: "[Standing] is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'"⁹¹ Standing is thus a threshold inquiry, concerned primarily with whether a litigant's stake in a suit is sufficient to merit judicial consideration and redress of the problem.⁹² It represents just one of the many barriers plaintiffs must overcome if they are to have their case heard in federal court.⁹³

In recent years the Supreme Court has attempted to clarify the rules governing the application of the standing doctrine in

⁸⁸ "Standing has been called one of 'the most amorphous [concepts] in the entire domain of public law.'" *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting from *Hearings on S. 2097 Before the Subcomm. on Const. Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 498 (1966) (statement of Prof. Paul A. Freund)); see also *Nichol, Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915 (1986) ("after almost two hundred years, the judiciary has yet to outline successfully the parameters of a constitutional 'case' [or controversy]"); *Sunstein, Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1433-34 (1988) (the Supreme Court's current standing approach results in decisions denying standing when it should be granted and granting standing when it should be denied).

⁸⁹ *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972) ("whether a party has a sufficient stake in an otherwise justiciable controversy is what has traditionally been referred to as the question of standing to sue").

Justiciability is itself an unclear concept. Essentially, justiciability expresses the jurisdictional limitations imposed by the case or controversy requirement of Article III. The concept is best defined by noting the circumstances in which federal courts have held that a certain question is not justiciable. In general, a controversy is not justiciable when the parties seek adjudication of a political question, when the parties desire an advisory opinion, when the question presented is moot, or when the parties lack standing to maintain the action. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

⁹⁰ See note 88 and accompanying text *supra*.

⁹¹ *Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 882 (1983).

⁹² *Flast v. Cohen*, 392 U.S. 83, 99-101 (1968) (standing does not involve a determination of whether the substantive issues in a case are suitable for judicial resolution).

⁹³ See note 87 and accompanying text *supra*.

the federal courts.⁹⁴ The essence of a standing inquiry, according to the Court, "is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverse-ness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" ⁹⁵ The Court, in applying this statement, has settled on a two-tiered method for determining standing that consists of a constitutional test and a prudential test.⁹⁶ The two tiers, not always clearly separable, have led to the evolution of a doctrine of standing that can best be described as "a blend of constitutional requirements and prudential considerations."⁹⁷

To satisfy the constitutional test, a test deriving from the Article III limitation on judicial power, the litigant must demonstrate an injury-in-fact.⁹⁸ Demonstrating an injury-in-fact entails a three-pronged analysis. First, plaintiffs must show that they have suffered an injury that is both concrete and individual in nature.⁹⁹ Second, the injury must be fairly traceable to the de-

⁹⁴ See, e.g., *Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Even in the absence of injury to itself, an association may have standing solely as the representative of its members."); *Flast*, 392 U.S. at 83 (taxpayer standing exists to challenge congressional expenditures alleged to be violative of the Establishment Clause); *Baker v. Carr*, 369 U.S. 186 (1962) (voters have standing to contest the alleged infringement of their right to participate in the political arena on equal terms with others, free from arbitrary government interference).

⁹⁵ *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1978) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

⁹⁶ See Coyle, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 CALIF. L. REV. 1061 (1988) (describing the two components of the Court's standing analysis).

⁹⁷ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-72 (1982). See also *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) ("[prudential rules are] not always clearly distinguished from the constitutional limitation[s]").

⁹⁸ *Valley Forge*, 454 U.S. at 471-72.

⁹⁹ See *Allen v. Wright*, 468 U.S. 737, 757 (1984); *Valley Forge*, 454 U.S. at 472 (plaintiff must show actual or threatened injury fairly traceable to challenged action and redressable by a favorable decision); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (injury must be redressable by a favorable decision of the court).

Although the Supreme Court has not conclusively defined injury, it is clear that the injury must be tangible; an abstract injury, without some direct impact on a plaintiff, is not sufficient. See, e.g., *Valley Forge*, 454 U.S. at 485-86 (violation of Establishment Clause by government giving surplus land to a religious college did not injure plaintiffs); *United States v. Richardson*, 418 U.S. 166 (1974) (plaintiff's claim to compel Secretary of

defendant's conduct.¹⁰⁰ This is essentially a causation requirement. Finally, plaintiffs must demonstrate that "the exercise of the Court's remedial powers would redress the claimed injuries."¹⁰¹

As mentioned above, prudential concerns coexist with the constitutional component of standing. These concerns act as discretionary limitations, furthering the Article III policies that limit the exercise of judicial power.¹⁰² The prudential concerns forbid the litigant from raising the rights of another, bar adjudication of "generalized grievances more appropriately addressed in the representative branches," and require that the plaintiff's complaint fall within the "zone of interest" covered by the statute in question.¹⁰³ These prudential limitations are imposed in order to prevent the erosion of the public confidence upon which the judiciary's power depends,¹⁰⁴ and in recognition of the need

the Treasury to publish CIA receipts and expenditures was generalized grievance which did not confer standing to bring action in federal court); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (concrete injury is indispensable element of standing); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (while it is possible that injury for standing purposes may be aesthetic in nature, party must still demonstrate personal injury).

Although an individual, concrete injury is necessary to confer standing, the Court has in the past recognized the most insubstantial of injuries as satisfying the constitutional requirement. *See, e.g., McGowan v. Maryland*, 366 U.S. 420 (1961) (a five dollar fine sufficient to constitute an injury); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (poll tax of \$1.50 is an injury under the constitutional analysis).

The injury requirement serves to distinguish someone with a personal stake in the outcome of a trial, even though that stake might be exceedingly small, from a person with a mere interest in the problem. *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973).

¹⁰⁰ *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59, 74 (1978); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976) (plaintiff organization lacked standing because it did not demonstrate that change in IRS regulation caused hospital to discontinue treatment of the poor); *Warth v. Seldin*, 422 U.S. 490 (1975) (plaintiffs who claimed to have been injured by zoning rules lacked standing because they were unable to show that they would have been able to purchase or lease the property had the zoning rule not existed).

¹⁰¹ *Duke Power*, 438 U.S. at 74 (citizens living near proposed nuclear power site had standing to maintain action challenging the constitutionality of the Price Anderson Act which imposed insurance liability cap on damages for nuclear accidents at federally licensed private nuclear power plants).

¹⁰² *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §3-19, at 135 (2d ed. 1988) (The prudential concerns address "whether a litigant before a federal court who has satisfied the minimum standing requirements of article III should be allowed to raise particular legal claims in the course of litigation.").

¹⁰³ *Allen v. Wright*, 468 U.S. 737, 751-52 (1984).

¹⁰⁴ *See, e.g., United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (constant head-to-head confrontations between the legislature and the judiciary

to avoid power struggles with the other branches of government.¹⁰⁵ However, when the constitutional concerns have been satisfied, the Court has rarely denied standing on prudential grounds.¹⁰⁶

B. Application

Standing in *Catholic Conference* presents a number of difficult issues. In order to properly assess the Second Circuit's decision it will be necessary to approach standing, as did the Second Circuit, in a piecemeal manner, analyzing the individual plaintiffs in an attempt to determine whether they satisfied the requirements set forth in the preceding section.¹⁰⁷

1. Establishment Clause Standing

The first standing theory addressed by the Second Circuit was "establishment clause standing."¹⁰⁸ The plaintiffs that sought standing under this theory were the religiously affiliated organizations and the members of the clergy that participated in the action.¹⁰⁹ The Second Circuit, notwithstanding the plaintiffs'

will erode the public confidence "vitally critical to the latter").

¹⁰⁵ *Richardson*, 418 U.S. at 188 (Powell, J., concurring) (repeated confrontations between the judiciary and the other branches of government would interfere with the proper functioning of the government).

¹⁰⁶ See *Duke Power v. Carolina Envtl. Study Group*, 438 U.S. 59, 81 (1978) ("the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met"); *Barrows v. Jackson*, 346 U.S. 249, 255-59 (1953) (although prudential concerns dictate that one may not ordinarily claim standing to vindicate the constitutional rights of a third party, this policy is outweighed by the need to guarantee injured litigants the right to assert their grievances before a court).

¹⁰⁷ *Catholic Conference*, 885 F.2d at 1020.

¹⁰⁸ *Id.* at 1024-27. The Supreme Court has developed a three-part test to determine Establishment Clause violations. A challenged government action withstands an Establishment Clause attack "if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980). *Accord Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). See also notes 111-23 and accompanying text *infra*.

¹⁰⁹ 885 F.2d at 1024-27. The Second Circuit's Establishment Clause standing analysis was limited to clergy plaintiffs and the religiously affiliated Women's Center for Reproductive Health because the southern district, in the initial proceeding, held that none of the other individual or organizational plaintiffs alleged sufficiently personal injuries to meet standing requirements. See *Abortion Rights Mobilization, Inc.*, 544 F. Supp. at 477-80. The other three organizations had no religious aims and thus could not show an

religious status, held that the plaintiffs did not demonstrate sufficiently personal injuries to satisfy constitutional standing requirements.¹¹⁰ The forthcoming analysis will show that that decision was correct.

The clergy plaintiffs sought standing under the Establishment Clause of the First Amendment.¹¹¹ The clause provides in relevant part that "Congress shall make no law respecting an establishment of religion"¹¹² Claiming that the IRS's refusal to enforce the section 501(c)(3) prohibitions on lobbying and campaigning constituted government favoritism to the Church, the plaintiffs alleged that:

The failure of the government defendants to apply the [Internal Revenue] Code equally to the . . . Church is in effect a subsidy of the Church's efforts to further its religious aims in the political sphere, a subsidy not granted to law-abiding . . . plaintiffs, who hold contrary religious beliefs. This constitutes an unconstitutional establishment of religion.¹¹³

Essentially, the clergy plaintiffs alleged that the government's failure to compel the Church to conform to section 501(c)(3)'s guidelines allowed the Church to engage in activities that, in effect, advanced the goals of the Church at the expense of those of the plaintiffs.

The clergy involved in this action provide spiritual leadership and care for their congregations, including counsel on the issue of abortion.¹¹⁴ By allowing the Church to lobby and campaign for legislation and candidates dedicated to outlawing abortion, the government tacitly fostered the mission of the Church.¹¹⁵ This tacit favoritism of one orthodoxy over another

injury to themselves arising out of the alleged Establishment Clause violations. 895 F.2d at 1024-27. Their involvement in the abortion controversy described the interest that brought them to court, but not the injury they had suffered. *Id.*

¹¹⁰ 885 F.2d at 1024-27.

¹¹¹ *Id.* at 1024.

¹¹² U.S. CONST. amend. I.

¹¹³ 885 F.2d at 1024 (quoting from Complaint at ¶ 43).

¹¹⁴ A number of the clergy plaintiffs stated in their affidavits that they consider the availability of abortion a compelling and necessary right. See 544 F. Supp. at 479 n.7 ("To force a woman to bring an unwanted fetus into the world is a serious abridgment of the Bible") (quoting from Affidavit of Rabbi Israel Margolies at ¶ 3); *id.* ("part of Episcopal doctrine [is] that women and families should be free to terminate [certain] pregnancies") (quoting from Affidavit of Rev. Beatrice Blair at ¶¶ 5-6).

¹¹⁵ 544 F. Supp. at 480.

translated into a comparative disadvantage for the Church's ideological adversaries.¹¹⁶

Basically, the Church was permitted to use moneys obtained through its section 501 exemption to fund organizations and political machinery that endorsed the Church's religious aims. Therefore, the government, the source of this exemption, illegally subsidized groups and individuals that sought to further the goals of the Church. The religiously affiliated organizational plaintiffs in *Catholic Conference* were not afforded a similarly blind eye. As a result, the religious aims of the plaintiffs did not receive the political support the Church obtained through its partisan contributions. In the inherently competitive political arena such an advantage is invaluable.

The injury thus asserted by the plaintiffs was to their spiritual beliefs. The government, through the inaction of the IRS, assisted the Church in achieving its ideals. Although this assistance was indirectly provided through a tax "subsidy," the government need not expressly coerce individuals to conform to a particular ideology to injure the spiritual values protected by the Establishment Clause.¹¹⁷ Whether such injuries are sufficient to constitute an injury for Article III standing purposes is a question that must begin with an analysis of spiritual injuries in general.

As a general proposition, an injury deriving from a violation of the Establishment Clause can be spiritual in nature.¹¹⁸ How-

¹¹⁶ *Id.* See note 51 and accompanying text *supra*.

¹¹⁷ See *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962):

The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonob-serving individuals or not. . . . [W]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

¹¹⁸ See *Valley Forge*, 454 U.S. at 486-87 n.22 (although plaintiffs failed to demonstrate that Establishment Clause violation injured them, injury can be spiritual in nature, "requirements for standing to challenge state action under the Establishment Clause . . . do not include proof that particular religious freedoms are infringed") (quoting *Abington v. Schempp*, 374 U.S. 203, 224 n.9 (1963)). See also *United States v. SCRAP*, 412 U.S. 669, 686-88 (1973) (standing is not confined to those who could show economic harm); *Association of Data Processing Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) ("[a] person or family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause").

ever, offense to one's sense of separatist principles is not a sufficient injury to constitute standing to bring suit for an alleged Establishment Clause violation.¹¹⁹ A plaintiff seeking to challenge a practice of government must allege a particular injury that directly affects that individual or the group he or she represents.¹²⁰ It is in this respect that the instant plaintiffs failed.

The clergy plaintiffs were not personally injured by the government's actions. They did not allege that they were mistreated by the IRS; the IRS had never threatened their tax status.¹²¹ Therefore, although the plaintiffs asserted that the activities of the IRS comparatively stifled their religious aims, they did not allege any specific, personal injury. The plaintiffs were unable to point to any governmental conduct that had directly affected their own ministries or organizations. They simply sought to force the IRS to enforce the section 501(c)(3) prohibitions they were obligated to comply with. The clergy plaintiffs' particular devotion to the pro-choice position does not explain how they were damaged; it only serves to explain why they chose to challenge the renewal of the Church's section 501(c)(3) status.¹²² A motivation to bring suit, however sincere, is not a substitute for standing's injury-in-fact requirement.¹²³

¹¹⁹ *Valley Forge*, 454 U.S. at 487 ("[Plaintiffs] claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court."). See also *Doremus v. Board of Educ.*, 342 U.S. 429, 435 (1952) (the essence of standing "is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct").

¹²⁰ *Schempp*, 374 U.S. at 224 n.9 (plaintiffs alleging injury must have been "directly affected by the . . . practices against which their complaints are directed").

¹²¹ *Catholic Conference*, 885 F.2d at 1026.

¹²² "[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge*, 454 U.S. at 486.

¹²³ *Id.* Although a particularized injury standard lends a degree of consistency to the standing doctrine, historical support for the requirement is lacking. The idea that a plaintiff must suffer some injury before a federal court can provide relief, although already in wide use, was articulated in *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (injury-in-fact must be shown). An analysis of the language of Article III, however, does not support the conclusion that the violation of a constitutionally recognized right creates no injury. See Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 818 (1969) ("Unlike 'case or controversy,' which can summon the express terms of Article III, 'standing' is not mentioned in the Constitution or the records of the several conventions. It is a judicial construct pure and simple which, in its present sophisticated form, is of relatively recent origin."); Nichol, *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C.L. REV. 798, 821 (1983) ("Even if an injury component could be historically sus-

2. Taxpayer Standing

The second standing theory considered by the Second Circuit was a theory typically referred to as "taxpayer standing."¹²⁴ Taxpayer standing, a doctrine the Supreme Court has developed in its continuing effort to clarify standing requirements, allows litigants to challenge the constitutionality of congressional expenditures made under the taxing and spending authority.¹²⁵ This requirement—that a plaintiff seeking standing as a taxpayer must challenge the taxing and spending power—ensures that a litigant can demonstrate a sufficient personal stake in the controversy to satisfy the first prong of the constitutional standing analysis.¹²⁶ Essentially, under certain limited circumstances, a plaintiff's status as a taxpayer supplies the personal injury essential to standing. Plaintiffs in the instant case asserted that, as taxpayers, they had standing to challenge the IRS's refusal to revoke the Catholic Church's tax-exempt status.¹²⁷ However, the crux of this challenge did not concern an exercise of the congressional taxing and spending power. Rather, what the plaintiffs

tained, nothing in the case or controversy requirement supports a *particularized* injury standard.") (emphasis in original). As well supported as these arguments may be, the injury-in-fact requirement nevertheless remains the cornerstone of the Court's constitutional standing component.

An additional problem concerning Establishment Clause standing is that granting standing to the clergy simply because they are clergy could encourage plaintiff shopping. A group or individual seeking to challenge a violation of the Establishment Clause could circumvent constitutional standing requirements by joining a member of the clergy in the lawsuit. The Second Circuit did not address this.

¹²⁴ See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968) (a federal taxpayer has standing to challenge federal aid to religious schools alleged to violate the First Amendment's Establishment Clause). The decision that granted taxpayers standing to challenge federal expenditures violative of the Establishment Clause reversed a longstanding rule that taxpayers do not have standing to contest how the federal government spends tax revenue. See *Frothingham v. Mellon*, 262 U.S. 447 (1923).

¹²⁵ *Flast*, 392 U.S. 83 (1968).

¹²⁶ *Id.* at 102-03.

¹²⁷ 885 F.2d 1020, 1027-28. Subsequent to the filing of the instant complaint, the Supreme Court decided *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). Because some commentators have concluded that *Valley Forge* has eliminated taxpayer standing, the plaintiffs in *Catholic Conference* abandoned this standing theory in the district court. See Note, *Analyzing Taxpayer Standing in Terms of General Standing Principles: The Road Not Taken*, 63 B.U.L. Rev. 717 (1983). Following the Court's decision in *Bowen v. Kendrick*, 487 U.S. 589 (1988), holding that taxpayers had standing to challenge the executive branch's administration of a taxing and spending statute, the plaintiffs renewed their taxpayer standing arguments. See also notes 163-70 and accompanying text *infra*.

challenged was the enforcement of an exercise of that power. The Second Circuit held that because the plaintiffs' challenge did not directly concern an exercise of Congress's taxing and spending power, the plaintiffs did not demonstrate any nexus between their status as taxpayers and the IRS's refusal to enforce section 501(c)(3).¹²⁸ Absent such a nexus, the plaintiffs did not allege the personal injury upon which standing depends. An analysis of several recent decisions by the Supreme Court will demonstrate that the Second Circuit's review of taxpayer standing and its subsequent refusal to grant plaintiffs such standing were correct.

In order to establish taxpayer standing, plaintiffs must satisfy a two-pronged test.¹²⁹ First, plaintiffs must establish a connection between their status as taxpayers and the legislation attacked.¹³⁰ Therefore, taxpayers would have standing only to challenge the constitutionality of "exercises of the congressional . . . taxing and spending power clause of Art. I, §8" and consequently would lack standing to challenge the expenditure of funds incidental to a regulatory scheme.¹³¹ A challenge that does not attack an exercise of the taxing and spending power lacks the necessary nexus between an individual's status as a taxpayer and the claim sought to be adjudicated.¹³² Under the second prong, the taxpayer-plaintiff must show that the challenged en-

¹²⁸ 885 F.2d at 1027-28.

¹²⁹ *Flast*, 392 U.S. at 102. "When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction." *Id.* at 103.

In *Flast*, a group of federal taxpayers brought suit to enjoin the expenditure of federal funds being used to purchase textbooks and other instructional materials for parochial schools. The Supreme Court, in an opinion by Chief Justice Warren, held that federal taxpayers had standing to sue to challenge such expenditures on the ground that they violated the Establishment Clause of the First Amendment. *Id.*

¹³⁰ *Id.* at 102.

¹³¹ *Id.* Nearly every measure enacted in the form of a tax will have at least a partially incidental regulatory effect. For example, an excise tax on alcohol will, to a certain degree, encourage people to drink less. If the regulatory impact of the tax could have been achieved by the use of another enumerated power (e.g., the Commerce Clause), the fact that the tax has a regulatory impact is not of constitutional significance. *But see* *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (Congress's enactment of the Child Labor Tax Law of 1919, a law designed to prohibit the shipment of products of child labor in interstate commerce, was invalidated because the Court found that the purpose of the tax was primarily regulatory.). Today, this tax law would probably be upheld under the Commerce Clause.

¹³² *Flast*, 392 U.S. at 102. *See* note 130 *supra*.

actment exceeds specific constitutional limitations on the congressional taxing and spending power, such as those limitations imposed by the First Amendment.¹³³

Although taxpayer standing is a potentially powerful tool for injured taxpayers, its actual significance has never been fully realized. As the Second Circuit noted in its opinion, the Court's strict application in three subsequent cases of what has been labeled the *Flast* test has essentially eliminated the doctrine of taxpayer standing.¹³⁴

*United States v. Richardson*¹³⁵ was the first of these cases. In *Richardson* the plaintiff, a federal taxpayer, alleged that the Central Intelligence Agency Act of 1949,¹³⁶ a statute that permitted the nondisclosure of the CIA's expenditures, violated the Accounts Clause of the Constitution.¹³⁷ The plaintiff asserted that without access to "detailed information on CIA expenditures—and hence its activities—he [could not] intelligently follow the actions of Congress or the Executive, nor [could] he properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office."¹³⁸ Regardless of

¹³³ *Id.* at 102-03. It is not sufficient that the taxpayer-plaintiff simply allege that the challenged enactment is beyond the powers delegated to congress in Article I, § 8. The plaintiffs must find a constitutional restriction directed specifically at an exercise of the taxing and spending power. The *Flast* Court distinguished *Frothingham v. Mellon*, 262 U.S. 447 (1923), on this basis. *Id.* at 104-05. See note 124 *supra*. The plaintiff in *Frothingham* alleged that Congress caused an increase in her taxes by infringing the states' Tenth Amendment rights. What the plaintiff failed to allege was any positive right that protected her from the increased tax liability. *Frothingham*, 262 U.S. at 488. Therefore, she failed to satisfy the second prong of the *Flast* test and was denied standing. *Flast*, 392 U.S. at 104-05. The Supreme Court also held that *Frothingham* represented only a prudential bar to taxpayer suits. *Flast*, 392 U.S. at 92-93 (the holding in *Frothingham* "rests on something less than a constitutional foundation"). *Id.* at 93.

¹³⁴ 885 F.2d at 1027. See notes 135-61 and accompanying text *infra*. See also *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); Note, *Analyzing Taxpayer Standing*, *supra* note 127.

¹³⁵ 418 U.S. 166 (1974).

¹³⁶ 50 U.S.C. § 403j (1988) (concerning the accounting and reporting procedures and requirements for the CIA).

¹³⁷ The Accounts Clause provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.

¹³⁸ 418 U.S. at 176. Although the plaintiff's claim did not allege any pecuniary injury, for taxpayer standing purposes, an injury "need not always be the appropriation

the plaintiff's arguably genuine interest in the use of his taxes, the Court held that he did not satisfy the *Flast* double-nexus test. First, the plaintiff had challenged a statute regulating agency action, not an exercise of Congress's taxing and spending power.¹³⁹ In addition, he had not, as the second prong of *Flast* mandates, alleged that the funds were spent "in violation of a 'specific constitutional limitation [on] . . . the taxing and spending power.'"¹⁴⁰

This application of the *Flast* test was suspect. *Flast v. Cohen* held that a taxpayer had standing to challenge expenditures of federal taxes that served to finance the establishment of a religion contrary to the Establishment Clause.¹⁴¹ In more general terms, *Flast* recognized standing of a taxpayer "to challenge appropriations made in the face of a constitutional prohibition."¹⁴² Given the *Richardson* Court's reliance on the above assessment of *Flast*, it is difficult to ascertain, in light of the Accounts Clause, how the Court failed to address the gap in reasoning that pervades its opinion. Although the plaintiff in *Richardson* did not satisfy the letter of either prong of the *Flast* test, the Accounts Clause was intended to give taxpayers the right to know "the way public funds are expended."¹⁴³ Furthermore, even though the CIA is an agency of the executive branch, it is funded by Congress. Thus, the money the CIA spent derived from Congress's spending power. If, as *Flast* stated, a taxpayer can have a personal stake in the expenditures of government, it is difficult to see how that right can be enforced if an organization such as the CIA is not required to disclose those expenditures.¹⁴⁴

and spending of [taxpayer's] money for an invalid purpose. The personal stake may come from an injury in fact even if it is not directly economic in nature." 418 U.S. at 176 (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970)).

¹³⁹ 418 U.S. at 175.

¹⁴⁰ *Id.* (quoting *Flast*, 392 U.S. at 104).

¹⁴¹ *Flast*, 392 U.S. at 83.

¹⁴² *Richardson*, 418 U.S. at 198. See *Flast*, 392 U.S. at 102 (Federal taxpayers may have standing to "challenge the constitutionality of a federal spending program . . . [if] they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.").

¹⁴³ *Richardson*, 418 U.S. at 200 (Douglas, J., dissenting).

¹⁴⁴ As the Third Circuit noted, given that *Flast* recognized the standing of a taxpayer to challenge unconstitutional appropriations, "how can a taxpayer make that challenge unless he knows how the money is being spent?" *Richardson v. United States*, 465

Richardson's reliance on the letter of *Flast* demonstrates that a failure to come within that letter is fatal to a plaintiff seeking standing in federal court. It ignores what is, arguably, the purpose of taxpayer standing: to allow federal taxpayers to challenge how their taxes are being spent.¹⁴⁵

*Schlesinger v. Reservists Committee to Stop the War*¹⁴⁶ was a companion case to *Richardson*. The plaintiffs in *Schlesinger* challenged the membership of Congressmen in the armed forces reserves, alleging that such membership violated the Incompatibility Clause.¹⁴⁷ The Court, without explanation,¹⁴⁸ affirmed the district court's denial of taxpayer standing on the ground that the plaintiffs failed to satisfy the *Flast* nexus test.¹⁴⁹

The district court, applying the letter of *Flast*, had held that the plaintiffs failed to satisfy the nexus test.¹⁵⁰ The plaintiffs did not challenge an exercise of the congressional taxing and spending power but rather "the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status."¹⁵¹

Arguably, the Court's cursory dismissal of the plaintiffs' taxpayer standing claims was mistaken. The plaintiffs' complaint alleged that Congressmen holding positions in the reserves were "subject to the possibility of undue influence by the Executive Branch," the governmental branch in charge of the armed forces.¹⁵² Such undue influence could result in additional expenditures in which the plaintiffs would have a specific interest as taxpayers. Assuming that the plaintiffs in *Schlesinger*

F.2d 844, 853 (3d Cir. 1972), *rev'd*, 418 U.S. 166 (1974).

¹⁴⁵ Although the Burger and Rehnquist Courts have never overruled *Flast*, they have steadfastly refused to allow any broadening whatsoever of the *Flast* exception to the general rule prohibiting taxpayer standing. Since *Flast* no case other than *Bowen v. Kendrick*, 487 U.S. 589 (1988), has been held to fit within *Flast's* narrow exception. See note 164-70 and accompanying text *infra*.

¹⁴⁶ 418 U.S. 208 (1974).

¹⁴⁷ The Incompatibility Clause states, in relevant part, that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art I, § 6, cl. 2.

¹⁴⁸ See text accompanying note 151 *infra* for the language of the district court.

¹⁴⁹ *Schlesinger*, 418 U.S. at 228.

¹⁵⁰ *Reservists Comm. to Stop the War v. Laird*, 323 F. Supp. 833 (D.D.C. 1971), *aff'd*, 495 F.2d 1075 (D.C. Cir. 1972), *rev'd sub nom. Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

¹⁵¹ *Schlesinger*, 418 U.S. at 228.

¹⁵² *Id.* at 212.

were injured as taxpayers, and assuming that the Incompatibility Clause created a personally enforceable right,¹⁵³ then the policies underlying *Flast*—allowing a taxpayer standing to challenge the manner in which his or her taxes were spent—seem to argue for a grant of standing, despite the language of *Flast*.

The most striking of these three cases is *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*¹⁵⁴ *Valley Forge* is particularly important to the present analysis because, like *Catholic Conference*, *Valley Forge* concerned an alleged violation of the Establishment Clause. In *Valley Forge* a group of plaintiffs attempted to challenge the transfer of a valuable parcel of government property to a religious college.¹⁵⁵ Subsequent to the transfer, Americans United for Separation of Church and State, Inc., a citizens group, brought suit alleging that the conveyance violated the Establishment Clause. The United States Supreme Court, in a five-to-four decision,¹⁵⁶ held that the plaintiffs lacked taxpayer standing.¹⁵⁷ Writing for the majority, Justice Rehnquist determined that the plaintiffs failed to satisfy the first prong of the *Flast* test for two reasons.¹⁵⁸ As mentioned above, the first prong of the *Flast* test mandates that plaintiffs seeking standing as taxpayers must challenge an exercise of the congressional taxing and spending power founded in Article I, section 8. The plaintiffs in *Valley Forge* challenged the decision of an executive agency to transfer a parcel of federal property, not an exercise of congressional spending power.¹⁵⁹ Second, the Court stated that the statute that authorized the conveyance of the land was enacted under the Property Clause of Article IV, not the Taxing

¹⁵³ Justice Douglas, in his dissent, developed support for the contention that the Incompatibility Clause created a personally enforceable right. 418 U.S. at 238-40 (Douglas, J., dissenting). Arguably, such a right is similar to the limitations on Congress's power that *Flast* held were inherent in the First Amendment.

¹⁵⁴ 454 U.S. 464 (1982).

¹⁵⁵ The Department of Health, Education and Welfare (HEW) transferred the land in 1976 pursuant to the Federal Property and Administrative Services Act. 40 U.S.C. §§ 471-535 (1988 & Supp. I 1989). Valley Forge Christian College, the recipient of the parcel, was created "to offer systematic training on the collegiate level to men and women for Christian service as either ministers or laymen." 454 U.S. at 468.

¹⁵⁶ Justice Brennan dissented, joined by Justices Marshall and Blackmun. 454 U.S. at 490. Justice Stevens filed a separate dissent. *Id.* at 513.

¹⁵⁷ *Id.* at 490.

¹⁵⁸ *Id.* at 479-80.

¹⁵⁹ *Id.* at 479.

and Spending Clause of Article I.¹⁶⁰

The Supreme Court's application of the *Flast* test in the three aforementioned cases can best be described as limited. The literal, formalistic manner in which the Court has employed the double-nexus test has, in effect, eliminated taxpayer standing.¹⁶¹ The letter, and not the spirit, of *Flast* has governed all subsequent attempts to establish taxpayer standing. It is this approach that no doubt motivated the plaintiffs in *Catholic Conference* to abandon the taxpayer standing doctrine in the district court.¹⁶²

A recent decision by the Supreme Court convinced the plaintiffs, albeit mistakenly, to renew these arguments.¹⁶³ In *Bowen v. Kendrick*¹⁶⁴ the plaintiffs-taxpayers challenged the application of the Adolescent Family Life Act (AFLA), a statute that authorized federal grants to public or private organizations or agencies for services and research in the area of prenatal adolescent sexual relations and pregnancy.¹⁶⁵ Although the defendants in *Bowen* alleged that the federal taxpayers lacked standing

¹⁶⁰ *Id.* at 480.

¹⁶¹ "Literal application of the . . . Court's first distinction virtually overrules *Flast*, because the *Flast* plaintiffs attacked actions of the same executive department challenged in [*Valley Forge*]." Note, *Analyzing Taxpayer Standing*, *supra* note 129, at 741; see also Doernberg, "We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 CALIF. L. REV. 52, 54 (1965).

As Justice Brennan argued in his dissent in *Valley Forge*, "The opinion of the Court is a stark example of this unfortunate trend of resolving cases at the 'threshold' while obscuring the nature of the underlying rights and interests at stake. . . . [N]ot one word is said about the Establishment Clause right that the plaintiff seeks to enforce." 454 U.S. at 490-91 (Brennan, J., dissenting) (emphasis in original). Justice Brennan's point, rejected by the majority, was that the protections provided by the Establishment Clause cannot be fully realized unless there is easy, unrestricted access to the federal courts to challenge expenditures that might violate the clause. Standing, according to Justice Brennan, should not focus on the party seeking to get his complaint before a federal court, but rather on the issue he seeks to have adjudicated. 454 U.S. at 484.

If one accepts Justice Brennan's view, taxpayer standing, as the Court has construed it, is overly narrow. Arguably, a member of society should not have to demonstrate that he pays taxes to seek judicial enforcement of the Establishment Clause. The Establishment Clause should protect all members of society from excessive entanglement of church and state, not just taxpayers.

¹⁶² *Catholic Conference*, 885 F.2d at 1027.

¹⁶³ Plaintiffs renewed their taxpayer standing arguments before the Second Circuit in the appeal that is the subject of this Comment. *Id.* See notes 164-73 and accompanying text *infra*.

¹⁶⁴ 487 U.S. 589 (1988).

¹⁶⁵ 42 U.S.C. § 300z (1988).

because the expenditures were made by the executive branch and not by Congress,¹⁶⁶ the Court, noting the challenge's similarity to *Flast*, rejected this argument.¹⁶⁷ The AFLA, according to the Supreme Court,

is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to AFLA's statutory mandate. In this case there is thus a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending, notwithstanding the role the Secretary plays in administering the statute.¹⁶⁸

In so holding, the Supreme Court clarified, but did not expand, the *Flast* test: taxpayers have standing to challenge the executive branch's administration of a taxing and spending statute.¹⁶⁹ The fact that the executive branch, and not the Congress, oversaw expenditures made pursuant to the statute was irrelevant. Plaintiffs challenged the taxing and spending power of Congress; the complaint need not be directed exclusively at Congress.¹⁷⁰

As powerful as *Bowen* may be in future taxpayer suits, it did not, as the Second Circuit stated, enhance the instant plaintiffs' taxpayer standing claims.¹⁷¹ In *Bowen* Congress controlled the disbursement of the AFLA funds. The executive branch acted simply as an intermediary; its sole function was to direct the expenditure of the capital pursuant to AFLA's statutory mandate. Therefore, as the Second Circuit noted, the challenge in *Bowen* was entirely harmonious with *Flast*: the plaintiffs challenged an exercise of Congress's taxing and spending power: the executive branch merely carried out that power.

The litigants in *Catholic Conference*, on the other hand, did not challenge Congress's exercise of its taxing and spending powers as embodied in section 501(c)(3).¹⁷² The argument cen-

¹⁶⁶ The plaintiffs in *Flast* attacked actions of an executive department. The *Flast* plaintiffs pleaded in the alternative that the defendant HEW's actions were beyond the scope of the challenged Act, or, if HEW's actions were deemed to be within the authority and intent of the Act, that the Act was unconstitutional because it amounted to an establishment of religion. *Flast*, 392 U.S. at 87.

¹⁶⁷ *Bowen*, 487 U.S. at 618.

¹⁶⁸ *Id.* at 619-20.

¹⁶⁹ *Id.* at 620; *Catholic Conference*, 885 F.2d at 1027.

¹⁷⁰ *Bowen*, 487 U.S. at 620.

¹⁷¹ *Catholic Conference*, 885 F.2d at 1028.

¹⁷² *Id.*

tered instead on the contention that the IRS, by allegedly disregarding the Church's violations of section 501(c)(3), had not enforced the Internal Revenue Code.¹⁷³ This is incongruous with *Flast*. *Flast* mandates that a litigant seeking standing as a taxpayer must challenge an exercise of the congressional taxing and spending power. The instant plaintiffs did not. Nowhere did the plaintiffs in *Catholic Conference* challenge the constitutionality of section 501(c)(3) of the Code. They did not allege that the Code favored the Church, but rather that the executive branch had not enforced the Code. This is distinguishable from *Bowen*. In *Bowen* the plaintiffs attacked the AFLA, an exercise of the congressional taxing and spending power, notwithstanding the executive branch's administration of that statute.

The plaintiffs in *Catholic Conference* did not attack section 501(c)(3). They challenged instead the enforcement of that section. The claim thus lacked any nexus whatsoever between the taxpayers' status as taxpayers and the congressional exercise of the taxing and spending power.¹⁷⁴ This nexus, according to *Flast*, supplies the injury that Article III requires. Therefore, absent the necessary nexus, the personal stake that is essential to standing was lacking. The plaintiffs did not sufficiently attack the constitutionality of the exercise of Congress's taxing and spending power, nor did they allege that section 501(c)(3) exceeded specific constitutional limitations on that power. Thus, neither prong of the *Flast* test was met and the Second Circuit properly denied the plaintiffs standing as taxpayers.

3. Voter Standing

The third standing theory evaluated by the Second Circuit was a doctrine known as "voter standing."¹⁷⁵ The Supreme Court first articulated the concept of voter standing in *Baker v. Carr*.¹⁷⁶ In *Baker* the Court conferred what it termed "voter standing" on a group of Tennessee citizens that sought to challenge the state's apportionment scheme.¹⁷⁷ The injury the plain-

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ 369 U.S. 186 (1962).

¹⁷⁷ *Id.* at 207. The *Baker* plaintiffs instituted an action seeking: 1) a declaration that the Tennessee Apportionment Act of 1901 was unconstitutional; and 2) an injunction

tiffs asserted was that the classification arrangement disfavored the voters in the counties in which they resided, "placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties."¹⁷⁸ Essentially, the wrong that the plaintiffs wanted to vindicate was the dilution of their vote relative to the vote of other citizens of the same state.¹⁷⁹ The *Baker* Court held that voters disadvantaged by Tennessee's apportionment plan had standing to challenge that plan.¹⁸⁰ According to the Court the dilution of the plaintiffs' voting power, the "gross disproportion of representation" they were granted, provided the direct, cognizable injury necessary to a standing claim.¹⁸¹

The Second Circuit adopted an extremely narrow view of *Baker* in *Catholic Conference*. The court held that the instant plaintiffs' asserted basis for standing had nothing to do with voting.¹⁸² Given that the "voter" plaintiffs in *Catholic Conference* alleged that the IRS's refusal to revoke the Catholic Church's tax-exempt status injured them by impairing and diminishing their right to vote,¹⁸³ a right that *Baker* specifically stated voters had standing to enforce, it is difficult to justify the Second Circuit's reasoning.¹⁸⁴ An analysis of this reasoning will demon-

restraining the defendants from conducting any further elections under the act. *Id.* at 195. They alleged that the act violated the Fourteenth Amendment in its disregard of the standard of apportionment prescribed by the state's constitution resulting in a gross disproportion of representation to voting population. *Baker*, 369 U.S. 186.

¹⁷⁸ *Id.* at 207-08.

¹⁷⁹ See, e.g., *Heckler v. Mathews*, 465 U.S. 728, 738 n.4 (1984); *Reynolds v. Sims*, 377 U.S. 533 (1964) (construing *Baker*). See also *Shakmen v. Democratic Org. of Cook Cty.*, 435 F.2d 267 (7th Cir. 1970) (two voters had standing to challenge county's patronage system because of alleged injury to plaintiffs' "equal chance and . . . equal voice" in the electoral process); *Tax Analysts and Advocates v. Schultz*, 376 F. Supp. 899 (D.D.C. 1974) (standing conferred on a nonprofit corporation that challenged an IRS revenue ruling concerning campaign gifts because the alleged diminution of one's vote and the dilution of the ability to affect the electoral process "are judicially recognized wrongs and are thus sufficient" to confer standing); *Common Cause v. Democratic Nat'l Comm.*, 333 F. Supp. 803 (D.D.C. 1971) (allegations that several national committees of political parties circumvented a statute placing limits on individual campaign contributions, thereby diluting the plaintiffs' voice in the voting process, were sufficient to constitute standing for the plaintiff corporation).

¹⁸⁰ *Baker*, 369 U.S. at 186.

¹⁸¹ *Id.* at 204-08.

¹⁸² *Catholic Conference*, 885 F.2d at 1028.

¹⁸³ *Id.*

¹⁸⁴ The Second Circuit premised its decision to deny the plaintiffs voter standing on *Davis v. Bandemer*, 478 U.S. 109 (1986). In *Davis* the Supreme Court conferred standing

strate that the court's restrictive view of *Baker's* impact and the court's subsequent denial of voter standing were incorrect.

Baker and its progeny all concerned allegations that, by impermissibly diluting one group's voting strength relative to that of another group, arbitrary government action hinders one organization's ability to affect the political process in relation to the ability of a more favored group.¹⁸⁵ According to *Baker*, a "citizen's right to vote free of arbitrary impairment . . . has been judicially recognized as a right secured by the constitution, when such impairment resulted from dilution by a false tally¹⁸⁶. . . or by a refusal to count votes from arbitrarily selected precincts¹⁸⁷. . . or by a stuffing of the ballot box."¹⁸⁸ While these rights and the right protected by *Baker* specifically concerned voters and voting legislation, arguably, the interests the *Baker* Court sought to protect were much broader.

Beyond the words the Court employed, *Baker* recognized that individuals have standing to challenge government activities that diminish the effectiveness of their votes.¹⁸⁹ Assuming that the right to maintain voting power in the political arena in the face of arbitrary government interference is a right that the Court has recognized, the allegations in the instant complaint

on a group of voters that challenged a gerrymandered apportionment plan. The plan was allegedly drawn to place voting district lines in such a way as to reduce or eliminate the voting leverage of a given group of voters. *Id.*

The Second Circuit, adopting an unreasonably narrow view of *Baker*, held that because the instant plaintiffs did not allege a gerrymandering of voting district lines or allege that anyone had "stuffed the ballot box with votes for Church-backed candidates or that anyone ha[d] been prevented from voting," the injuries sustained were not sufficiently particularized and ascertainable to sustain standing. *Catholic Conference*, 885 F.2d at 1028. See notes 185-96 and accompanying text *infra*.

¹⁸⁵ *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 482 (S.D.N.Y. 1982).

¹⁸⁶ *Cf. United States v. Classic*, 313 U.S. 299 (1941) (the right of qualified voters to vote and have their votes counted is a right secured by the Constitution and thus plaintiffs could maintain action asserting that commissioners of elections willfully altered and falsely counted and certified the ballots of voters).

¹⁸⁷ *Cf. United States v. Mosley*, 238 U.S. 383 (1915) (the Constitution guarantees the right to vote for a member of Congress; thus it is illegal for members of the election board to omit precinct returns from their vote count).

¹⁸⁸ *Baker*, 369 U.S. at 208. *Cf. United States v. Saylor*, 322 U.S. 385 (1944) (the right to vote is guaranteed by the Constitution, and it is illegal for election officers to stuff a ballot box in a congressional election).

¹⁸⁹ *Baker*, 369 U.S. at 208 ("They are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes' . . .") (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)).

are strikingly similar to those raised in *Baker*.

Plaintiffs in this action claimed that allegedly arbitrary government conduct and illegal private conduct have disturbed the natural representative and electoral processes by creating and preserving a system which gives members of the public greater incentive to donate to the Catholic Church than to politically active abortion rights groups.¹⁹⁰ While the plaintiffs did not assert diminished representation or demand increases in actual representation¹⁹¹—claims that the Second Circuit seems to consider necessary to establish voter standing¹⁹²—they did complain of arbitrary government interference that disfavored them in the electoral process.¹⁹³ As the district court noted:

Plaintiffs' injury is no less real because they claim discrimination based on issues rather than geography, nor is it relevant that the impact of allegedly harmful government conduct is felt during the battle over choosing representatives than in the number of representatives technically available to the aggrieved voters. The bottom line is that the plaintiffs have alleged government action which has improperly biased the political process against the discrete group to which they belong.¹⁹⁴

Thus, even in the absence of the specific and discrete mathematically demonstrable injury that the Second Circuit probed for,¹⁹⁵ the plaintiffs' complaint alleged an injury that the Supreme Court has consistently recognized: the right to participate in the political process on equal terms with all others, free from arbitrary government interference.¹⁹⁶ Standing should have been granted to all the plaintiffs who asserted that the IRS's failure to enforce the Code diminished their voting power.

4. Competitive Advocate Standing

The final standing theory considered by the Second Circuit presents possibly the most troubling questions that the court's

¹⁹⁰ As the district court pointed out, "each dollar contributed to the Church is worth more than one given to non-exempt organizations." *Abortion Rights Mobilization, Inc.*, 544 F. Supp. at 482.

¹⁹¹ *Id.*

¹⁹² See notes 182-83 and accompanying text *supra*.

¹⁹³ 544 F. Supp. at 482.

¹⁹⁴ *Id.* at 481.

¹⁹⁵ *Id.* at 482.

¹⁹⁶ See notes 185-94 and accompanying text *supra*.

opinion posed. This theory, not addressed by the district court, has been dubbed "competitive advocate standing" by the Second Circuit.¹⁹⁷ Competitive advocate standing is a relatively new standing theory.¹⁹⁸ According to the Second Circuit, plaintiffs seeking standing under the competitive advocate theory—"competitive advocates"—may satisfy the Article III case or controversy requirement by alleging that the "unequal enforcement" of a statute provides an unfair advantage to a political competitor.¹⁹⁹ The statement is deceptively simple.

Central to competitive advocate standing is the concept that "[i]n the inherently competitive political arena an advantage granted to one competitor automatically constitutes a hardship to the others."²⁰⁰ For the competitive advocate, the hardship that the unequal enforcement of a statute causes provides the injury-in-fact necessary for standing.²⁰¹ This concept of injury diverges dramatically from the traditional model:²⁰² the competitive advocate's injury results from the granting of an unfair advantage to a competitor, not from the withholding of a benefit due the plaintiff.²⁰³

Although competitive advocate standing is a new theory in name, in practice it can be traced to a well-established line of federal cases.²⁰⁴ The Second Circuit, in support of its competi-

¹⁹⁷ *Catholic Conference*, 885 F.2d at 1028.

¹⁹⁸ See note 204 *infra*.

¹⁹⁹ 885 F.2d at 1028-29.

²⁰⁰ *Id.* at 1029 (quoting from Complaint at ¶ 41).

²⁰¹ *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. at 974 ("The injury alleged . . . is unequal footing in the political arena . . .").

²⁰² See *Fulani v. League of Women Voters Election Fund*, 882 F.2d 621, 626 (2d Cir. 1989) ("[T]he loss of competitive advantage flowing from the League's exclusion of Fulani from the national debates constitutes sufficient 'injury' for standing purposes, because such loss palpably impaired Fulani's ability to compete on an equal footing with other significant presidential candidates."). Cf. *Allen v. Wright*, 468 U.S. 737, 755 (1984) (plaintiffs have no standing to complain simply that the government is violating the law; they must allege that they personally have been denied equal treatment); *Valley Forge*, 454 U.S. 464, 482-87 (1982) (plaintiffs must allege personal injury); *Warth v. Seldin*, 422 U.S. 490, 502 (1975) (plaintiffs must allege and demonstrate that they personally have been injured).

²⁰³ The plaintiffs who could have benefitted from the competitive advocate analysis were nonprofit, pro-choice organizations, that were tax-exempt under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, including ARM, NWHN, Nassau-Now, and the Women's Center for Reproductive Health.

²⁰⁴ Although the Second Circuit coined the phrase "competitive advocate standing," the federal courts of the District of Columbia have developed a theory that, in practice, is identical to competitive advocate standing. See, e.g., *Taxation with Representation v.*

tive advocate theory, relied upon a series of Supreme Court economic competitor cases.²⁰⁵ These economic competitor cases arose when banks diversified their functions and began to supply incidental banking services. The delivery of these services created competition between the banks and the firms that had traditionally supplied these services.²⁰⁶ The Supreme Court held that this competition constituted an injury-in-fact and was sufficient to establish standing for the organizations that were losing business as a result of the banks' new forays into non-banking functions.²⁰⁷

Regan, 676 F.2d 715 (D.C. Cir. 1982) (alleging that the Internal Revenue Code illegally subsidized the political activities of veterans' organizations and not those of their competitors), *rev'd on other grounds*, 416 U.S. 540 (1983); International Ass'n of Machinists & Aerospace Workers v. Federal Election Comm'n, 678 F.2d 1092 (D.C. Cir.) (alleging federal election laws irrationally favor corporate political action committees (PACs) over union PACs resulting in a diminution of the unions' political influence in federal elections), *aff'd*, 459 U.S. 983 (1982); Common Cause v. Bolger, 512 F. Supp. 26 (D.D.C. 1980) (The plaintiffs alleged that discriminatory enforcement of congressional franking statute, 39 U.S.C. § 3210 (1988), subsidized the campaigns of incumbent members of Congress. The "frank," a stamp that allows members of Congress to use the United States mail free of charge, may not be used for political purposes. See 39 U.S.C. § 3210(a)(5)(a) (1988)); Tax Analysts & Advocates v. Schultz, 376 F. Supp. 889 (D.D.C. 1974) (alleging that ruling of Internal Revenue Code favors large political contributors over small in electoral process). The Second Circuit did not cite any of these cases in its discussion of competitive advocate standing. *Catholic Conference*, 885 F.2d at 1028-31.

It is apparent that the Court of Appeals for the Second Circuit does not consider competitive advocate standing a new standing theory. *Id.* at 1028 ("We consider finally whether the plaintiffs may have standing under a theory that the district court did not explicitly consider, yet which derives from its discussion of 'voter standing.' This theory may be labeled as 'Competitive Advocate Standing.'"). *Id.* Rather, concentrating on the effect the discriminatory enforcement of a statute has on the political process, the Second Circuit viewed competitive advocate standing as derivative of voter standing. *Id.*

For a detailed analysis of the genesis of competitive advocate standing see Schwartz, *Standing to Challenge Tax-Exempt Status: The Second Circuit's Competitive Political Advocate Theory*, 58 *FORDHAM L. REV.* 723 (1990).

²⁰⁵ 885 F.2d at 1029-30. See *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (per curiam); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

²⁰⁶ While banks may ordinarily engage in "all such incidental powers as shall be necessary to carry on the business of banking," National Bank Act, 12 U.S.C. § 24 (1988), § 1864 of the 1964 National Bank Act provides that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks." 12 U.S.C. § 1864 (1982).

²⁰⁷ See, e.g., *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 403 (1987) (trade association had standing to challenge governmental ruling allowing banks to act as discount brokers); *Data Processing*, 397 U.S. at 150, 151 (data processors have standing to challenge banks' expansion into data processing); *Arnold Tours, Inc. v. Camp*, 400 U.S.

The Second Circuit relied on these economic competitor cases in developing its competitive advocate theory, holding that "political competitors arguably should fare as well as [economic competitors]." ²⁰⁸ Although the competition in the economic competitor cases is analogous to the competition under the competitive advocate theory, the two are not entirely reconcilable. In the economic competitor cases, the plaintiffs alleged that a misinterpretation of the National Bank Act allowed third parties to compete with the plaintiffs in areas in which they had not previously competed. ²⁰⁹ A competitive advocate plaintiff, on the other hand, alleges that an individual or organizations with whom the plaintiff competes has been conferred an unlawful advantage by the government. Nevertheless, the Second Circuit indicated, justifiably, that the Supreme Court's acceptance of competition as a basis for standing provided sufficient support for the competitive advocate theory. ²¹⁰ A brief synopsis of the instant plaintiffs' claims will demonstrate the operation of competitive advocate standing and the Second Circuit's questionable application of that theory.

In *Catholic Conference* the plaintiffs alleged that certain tax-exempt organizations with whom they competed engaged in political activity in violation of Internal Revenue Code section 501(c)(3). The relevant plaintiffs, a group of section 501(c)(3) and (c)(4) tax-exempt abortion rights organizations, alleged that the Catholic Church had endorsed or supported pro-life political candidates and had opposed pro-choice candidates. ²¹¹ It was as-

45, 46 (1970) (travel agents have standing to challenge rule permitting banks to offer travel services).

²⁰⁸ *Catholic Conference*, 885 F.2d at 1030. The Supreme Court laid the foundation for competitive advocate standing in *Data Processing*, 397 U.S. at 150. The *Data Processing* Court pointed out that in a competitor's suit, noneconomic injuries, such as injuries that are aesthetic, conservational, or spiritual in nature, could be sufficient to confer standing. *Id.* at 153-54.

²⁰⁹ See notes 205-07 and accompanying text *supra*.

²¹⁰ *Catholic Conference*, 885 F.2d at 1028-31.

²¹¹ It was the contention of the plaintiffs that this activity had taken the shape of articles published in church bulletins, letters distributed to parishioners, and attacks or endorsements of candidates from the pulpit. *Id.* at 1022.

The plaintiffs also contended that the Church had urged its members to donate to and sign petitions of "right to life" candidates and that it had contributed "substantial sums of money to 'right to life' and other political groups which have, directly or indirectly, supported the political candidacies for public office of persons favoring anti-abortion legislation." *Id.* See notes 40-46 and accompanying text *supra*.

serted that the IRS failed to enforce the Code's prohibition against lobbying by ignoring these activities.²¹² The IRS, argued the plaintiffs, was cognizant of these activities and should have either revoked or refused to renew the Church's section 501(c)(3) status. It was therefore the plaintiffs' position that the government's failure to enforce the law afforded the Catholic Church more favorable treatment than organizations that are pro-choice. The plaintiffs, according to the mandates of section 501(c)(3), could not substantially involve themselves in the political process. The Church, supposedly subject to the same mandates, could engage in extensive lobbying. This disparate treatment translated into a competitive advantage for the Church through the section 501 tax "subsidy" which concurrently diminished the plaintiffs' power, effectiveness, and influence in the political arena.²¹³

The Second Circuit, in a discussion that attempted to clarify and trace the development of competitive advocate standing, held that the plaintiffs' alleged injury was not a "direct injury in fact" sufficient to satisfy Article III standing requirements.²¹⁴ The court reasoned that the plaintiffs in *Catholic Conference* were not competitive advocates because, by refusing to match the Church's alleged electioneering with their own, they chose, albeit properly, not to compete.²¹⁵

²¹² 885 F.2d at 1022.

²¹³ Nowhere did the plaintiffs allege that the IRS penalized *them* for violating the Code. Rather, they asserted that they refrained from lobbying and therefore did not violate the prohibitions embodied in § 501(c)(3). The plaintiffs simply wanted the government to enforce the prohibitions that they obeyed against the Catholic Church. *Id.*

²¹⁴ *Id.* at 1030.

²¹⁵ Plainly, the whole point of this lawsuit is plaintiffs' contention that it is illegal for the Catholic Church as a § 501(c)(3) recipient to participate actively in the political process. And, recognizing that potential illegality and the value of their own exemptions under §§ 501(c)(3) and (c)(4), plaintiffs state that they have refused to engage in electioneering to counter the Church's pro-life stance. Partly as a result of this self-imposed restraint, plaintiffs chose not to compete.

885 F.2d at 1031. See *Valley Forge*, 454 U.S. 464, 486 (1982) (strongly held beliefs are not a substitute for an injury-in-fact); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 225-26 (1974), reversing *Richardson v. Reservists Comm. to Stop the War*, 411 U.S. 947 (1973) ("motivation is not a substitute for the actual injury needed"). But see *Catholic Conference*, 885 F.2d at 1032 (Newman, J., dissenting) ("the injury in fact is the competitive disadvantage the plaintiff organizations are obliged to endure when . . . the Catholic Church is permitted to violate the tax laws by using tax-exempt donations to support the 'anti-abortion' side of the national debate through contributions to like-

What the court seemed to imply is that the plaintiffs, to qualify as competitive advocates, should have violated the tax code.²¹⁶ This is an indefensible position. As Judge Newman noted in his dissent, the plaintiffs did not forego electioneering as a matter of personal preference, but rather out of obedience to an act of Congress.²¹⁷ They should not have been denied competitive advocate standing simply because they obeyed the law.²¹⁸ Furthermore, the Second Circuit's position that the plaintiffs are not competitors of the Church is simply untenable. As Judge Newman pointed out in his dissent, "[t]he competition is between those tax-exempt organizations that are abiding by the limitations of section 501(c)(3) in their advocacy on the abortion issue and the Catholic Church, which is violating these limitations in the advocacy of its point of view on the issue."²¹⁹

minded political candidates, while the plaintiff organizations must confine their advocacy of the 'pro-choice' side to those insubstantial lobbying activities that the tax laws permit.").

²¹⁶ 885 F.2d at 1029; see also note 215 *supra*. The court also refused to recognize a competitive advocate theory of standing because "it would be difficult to deny standing to any person who expressed an opinion contrary to that of the Catholic Church." 885 F.2d at 1030. The dissent pointed out that the majority's reasoning at this point was entirely unpersuasive. The plaintiffs in this case were not random citizens who disagreed with the Church's view on the abortion issue. Instead, the plaintiffs were organizations that advocate a specific point of view. As the dissent noted, "A standing doctrine is entirely within manageable bounds when it recognizes the competition among organizations all of which are subject to the same statutory restraint and permits law-abiding competitors to challenge government action that enables one organization to violate that restraint to the detriment of the others." *Id.* at 1033 (Newman, J., dissenting). See *United States v. SCRAP*, 412 U.S. 669, 687-88 (1973) ("standing is not to be denied simply because many people suffer the same injury"). In addition, whether an individual citizen could challenge the Church's action was a "question far beyond the narrow issue" before the Second Circuit. 885 F.2d at 1033.

²¹⁷ 885 U.S. at 1033. If the Church, in violating § 501(c)(3), is insulated from attack, any individual or organization seeking to challenge similar violations will be denied access to the federal courts simply because they adhered to the law. Justice Newman stated that "I fail to understand why any person or organization . . . should be denied access to a federal court for the reasons that it is obeying the law." *Id.*

²¹⁸ A plaintiff need not violate a statute to question its constitutionality. The threat of prosecution may, in and of itself, be sufficient to confer standing. See *Babbitt v. United Farmworkers Nat'l Union*, 442 U.S. 289, 298 (1979) (plaintiff who challenges a statute need not await consummation of threatened injury to obtain preventive relief); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775 (1978) (corporation had standing to challenge statute forbidding certain expenditures by banks and businesses even if it was not subject to threat of prosecution); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (doctor had standing to maintain action challenging state abortion statute even though he had not been prosecuted or threatened with prosecution).

²¹⁹ 885 F.2d at 1033 (Newman, J., dissenting). Judge Newman strongly disagreed

"If the words [competitive advocate] are to have any meaning at all, these plaintiffs are indisputably 'competitive advocates' of the Catholic Church on the issue of abortion."²²⁰

Since competitive advocate standing is a relatively new theory, case law either supporting or weakening the court's decision is lacking. The only other Second Circuit case to discuss the issue of competitive advocate standing is *Fulani v. League of Women Voters Education Fund*.²²¹ *Fulani*, however, is sufficient to demonstrate that the Second Circuit incorrectly decided to deny standing to the plaintiffs in *Catholic Conference*.

In *Fulani* a third-party presidential candidate challenged the section 501(c)(3) tax-exempt status of the League of Women Voters (the League), a nonprofit "charitable organization whose stated goals are to foster voter education and participation in the electoral process."²²² The essence of *Fulani*'s complaint centered around three nationally televised political debates organized and sponsored by the League. Dr. Fulani, a minority candidate for President of the United States, sought but was denied an invitation to these debates.²²³ The plaintiff contended that "the League had engaged in impermissible 'partisan' activity when it denied her the right to participate in the Democratic and Republican primary debates" in violation of the League's tax-exempt status.²²⁴ Section 501(c)(3) prohibitions against electioneering, according to the plaintiff, obligated the League to use nonpartisan criteria in their candidate selection process.²²⁵

The plaintiff initiated a challenge alleging that, by failing to enforce section 501(c)(3) against the League, the IRS "unlawfully encouraged and permitted the League" to use its section

with the majority's holding that the § 501(c)(3) organizations did not compete with the Catholic Church. The dissent argued that the majority took a "needlessly narrow view of both the realities of American political life and the contours of the doctrine of competitive advocate standing." *Id.* at 1032.

²²⁰ *Id.*

²²¹ 882 F.2d 621 (2d Cir. 1989).

²²² *Fulani*, 882 F.2d at 623. In both *Fulani* and *Catholic Conference* the plaintiffs sued the federal government, alleging that discriminatory enforcement of § 501(c)(3) diminished their ability to compete in the political arena by granting an advantage to a competitor.

²²³ 882 F.2d at 623. "Dr. Fulani attempted to procure an invitation to participate in these debates, however, the League did not invite her to take part in any of them." *Id.*

²²⁴ *Id.* at 624.

²²⁵ *Id.* The League stated that it refused to invite Dr. Fulani because she was not seeking the nomination of either the Democratic or Republican Party. *Id.* at 623.

501 tax "subsidy" to promote certain political parties and candidates.²²⁶ Such activities, contended Fulani, distorted the political process. A tax exemption was used impermissibly to support certain candidates and to disadvantage her and her campaign. Fulani claimed that she was injured because she lost media exposure and any competitive advantage that might have flowed from her participation in the debates.²²⁷

The Second Circuit held that the harm alleged by the plaintiff was sufficient to satisfy the injury requirement for standing.²²⁸ The court, stating that "[i]t is beyond dispute that participation in these debates bestowed on the candidates who appeared in them some competitive advantage over their non-participating peers," granted Dr. Fulani competitive advocate standing.²²⁹

Catholic Conference was decided one month later. Given the factual similarity of the two cases, reconciling the two different results is all but impossible.²³⁰ The plaintiffs in *Fulani* and *Catholic Conference* both asserted that their abilities to compete in the electoral process were being diminished.²³¹ Both challenged the section 501(c)(3) tax-exempt status of competing organizations, alleging that the federal government was not enforcing the prohibitions that section 501 status entails.²³² Both plaintiffs contended that the unequal enforcement of section 501(c)(3) afforded a competitive advantage to their competitors which thereby diminished the plaintiffs' effectiveness in the po-

²²⁶ *Id.* at 625.

²²⁷ *Id.* Fulani originally sought to enjoin the League from holding any presidential primary debates without inviting her to participate. *Id.* at 623. The Second Circuit discussed only the claim against the federal government in determining standing because, at the time of the appeal, the debates in question had already been held. *Id.* at 625.

²²⁸ *Id.* Fulani also claimed that she was injured because she was denied the opportunity to exchange, on equal terms with other political candidates, her political ideas. *Id.*

²²⁹ *Id.* at 626.

²³⁰ See note 236 *infra*.

²³¹ *Id.* See also *Johnson v. FCC*, 829 F.2d 157, 165 (D.C. Cir. 1987) ("[petitioners'] inclusion in the televised debates undoubtedly would have benefited their campaign"). But see *Fulani v. Brady*, 729 F. Supp. 158, 162-63 (D.D.C. 1990) (alleged injury resulting from loss of media exposure due to exclusion from presidential debates is too abstract and speculative to constitute an injury sufficient to confer standing).

Dr. Fulani lost her case on the merits because the court determined that the League's decision to exclude her from the presidential primary debates did not constitute partisan activity. *Fulani*, 882 F.2d at 629-30.

²³² See notes 9 & 225 and accompanying text *supra*.

litical arena. Nevertheless, it is here that the comparison ends. Dr. Fulani was granted competitive advocate standing; the plaintiffs in *Catholic Conference* were not.²³³

The only meaningful difference between *Fulani* and *Catholic Conference* is that the plaintiffs in *Catholic Conference* were advocates, not candidates.²³⁴ This factual distinction however, does not affect either the nature or impact of the injuries asserted. In both cases plaintiffs claimed that the government, by failing to enforce a statute, impaired their abilities to participate in the political process by promoting the interests of their adversaries over their own. The Second Circuit did not, in either *Fulani* or *Catholic Conference*, assert that competitive advocate standing was limited to political candidates. Although Fulani's rejection by the League is a more obvious injury than that suffered by the instant plaintiffs, this difference in degree does not serve to diminish the fact that the plaintiffs in *Catholic Conference* were injured.²³⁵ Thus, beyond the difference in the plaintiffs themselves, *Fulani* and *Catholic Conference* are virtually indistinguishable.

After the complaint was dismissed for lack of standing, the plaintiffs in *Catholic Conference* sought a rehearing before the Second Circuit, alleging inconsistency between the opinion in the instant case and the opinion issued in *Fulani*.²³⁶ The court, stating simply that "the competition in *Fulani* is more direct and immediate tha[n] that shown here," summarily denied the petition.²³⁷

²³³ See notes 214-29 and accompanying text *supra*.

²³⁴ See notes 211-29 and accompanying text *supra*.

²³⁵ See note 218 *supra*.

²³⁶ *Catholic Conference*, 885 F.2d at 1034.

Appellants have sought rehearing, alleging inconsistency between the opinion in this case and . . . *Fulani*. In *Fulani*, competitor standing was accorded to a political candidate to challenge her exclusion from a televised debate in which her political rivals were invited to participate. A majority of the panel concluded that she suffered sufficient injury to establish standing. In the present case, though this panel is divided as to whether the plaintiffs are sufficiently in competition with the Catholic Church to have suffered injury that confers standing, we are in agreement that the competition in *Fulani* is more direct and immediate tha[n] that shown here.

The petition for rehearing is denied.

Id. Nowhere does the court explain why the competition in *Fulani* was "more direct and immediate" than the competition in *Catholic Conference*.

²³⁷ *Id.*

CONCLUSION

The current approach to standing in the federal courts is characterized by decisions that are inconsistent at worst, uncertain at best. This has created a particularly serious problem for plaintiffs desiring to challenge administrative agency action.

Agency action is pervasive in the administrative state that oversees so many aspects of our lives. Nevertheless, third-party plaintiffs, often indirectly injured by these agencies, have found it increasingly difficult to challenge unjust statutory interpretations and administrative efforts due to restrictive, unpredictable standing requirements.

This Comment exposes the flexibility of the standing doctrine and the potential for abuse that accompanies that flexibility. Federal courts, confronted with socially, politically, or economically sensitive cases, can use this flexibility to avoid hearing the merits of such cases. Standing requirements, unclear in their purest form, can rarely be alleged with sufficient particularity to overcome a court's desire to steer clear of controversial litigation. Such a fate befell the plaintiffs in *Catholic Conference*. The competitive advocate and voter plaintiffs asserted particular, ascertainable injuries. Nonetheless, the Second Circuit, perhaps motivated by desires not to alienate the Church and to elude the abortion controversy currently embroiling our nation, held that they did not. Our federal courts ought to allow plaintiffs to use standing as a means by which an injured individual can have a grievance heard and redressed. Although standing is, inherently, a limiting doctrine, it should not be used as a shield behind which our courts, afraid of controversy, hide.

Norman Leon