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Gregory P. Magarian  
*University of Michigan Law School*

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## NOTE

### Fighting Exclusion From Televised Presidential Debates: Minor-Party Candidates' Standing To Challenge Sponsoring Organizations' Tax-Exempt Status

Gregory P. Magarian

As American voters grow increasingly alienated from their elected leaders and interest groups focus ever more sharply on narrow goals, minor-party candidates<sup>1</sup> are likely to become more important players in federal elections. As it began, the 1992 presidential race offered minor parties an especially dramatic opportunity to exploit the weakness of the national Democratic Party.<sup>2</sup> Severe legal and structural disadvantages, however, limit minor parties' chances for electoral success at the national level in ways that are at odds with the core principles of American democracy.<sup>3</sup> The mass media potentially hold the best hope for minor-party competition in the national arena, but media exposure often eludes minor-party candidates. Televised presidential debates, which provide candidates unique opportunities to boost their stature and project their messages, typify this dilemma.<sup>4</sup> The organizations which sponsor televised debates — the League of Women Voters Education Fund through the 1988 primaries, and since then the bipartisan Commission for Presidential Debates (CPD) — consistently employ rigorous standards that exclude minor-party candidates.<sup>5</sup>

Minor-party candidates have occasionally tried, and failed, to chal-

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1. This Note uses the generic term "minor parties" to refer to ad hoc interest groups organized as parties for specific elections, support groups which form around independent individual candidates, and minor parties, such as the Libertarian and Socialist Workers' parties, which have existed continuously over several election cycles. Although they function outside the political mainstream and share a common interest in weakening the political dominance of the Democratic and Republican parties, these different types of minor parties often form and operate differently. See generally FRANK SMALLWOOD, *THE OTHER CANDIDATES: THIRD PARTIES IN PRESIDENTIAL ELECTIONS* (1983).

2. See James Ridgeway, *Politics as Unusual: The Parties Are Boring, But the Indies Aren't*, *VILLAGE VOICE*, Sept. 17, 1991, at 25 (claiming that the major parties no longer provide "a sense of real citizen participation, leaving more and more people searching for a real connection with the nation's future"). Even a candidate for the Democratic Party's 1992 presidential nomination, Jerry Brown, has built his campaign around the declaration that "[t]here is only one party in America — the Incumbent Party." Marc Cooper, *The Home Shopping Candidate*, *VILLAGE VOICE*, Dec. 31, 1991, at 18.

3. See *infra* section III.B.

4. See *infra* section III.C.

5. See SIDNEY KRAUS, *TELEVISED PRESIDENTIAL DEBATES AND PUBLIC POLICY* 140-42 (1988); SMALLWOOD, *supra* note 1, at 270-72; see also *Fulani v. Brady*, 935 F.2d 1324, 1326-27 (D.C. Cir. 1991).

lenge their exclusions from debates on direct constitutional grounds.<sup>6</sup> But one candidate, the New Alliance Party's Lenora Fulani, has twice advanced a novel legal attack against the televised debate system's exclusion of minor party candidates. Under Federal Election Commission regulation 110.13(a), only tax-exempt organizations may sponsor televised debates.<sup>7</sup> To receive tax-exempt status under section 501(c)(3) of the Internal Revenue Code, an organization must abstain from partisan political activity.<sup>8</sup> Fulani has argued that the Treasury Department's granting of tax-exempt status to the League of Women Voters and the CPD violates the statute because, by limiting debates to major party candidates, the organizations engage in impermissible partisan political activity.<sup>9</sup> If Fulani's challenge resulted in revocation of a sponsoring organization's tax exemption, Rule 110.13(a) would bar that organization from sponsoring debates.

The defendant Treasury Department and sponsoring organizations replied that Fulani lacked standing to challenge the organizations' tax status.<sup>10</sup> The Second Circuit recognized Fulani's standing to maintain the action,<sup>11</sup> while the District of Columbia Circuit denied standing.<sup>12</sup> The ultimate resolution of this issue will strongly influence the future of minor-party candidacies in the United States: judicial recognition of standing in this context could lead to eventual victory on the merits

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6. See, e.g., *Chandler v. Georgia Pub. Telecommunications Commn.*, 917 F.2d 486 (11th Cir. 1990) (no violation of First Amendment or Fourteenth Amendment Equal Protection Clause to sponsor two-party gubernatorial debate); *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990) (holding minor-party candidate had no First Amendment right to appear in televised debate); *Johnson v. F.C.C.*, 829 F.2d 157 (D.C. Cir. 1987) (same).

7. The regulation on "Nonpartisan candidate debates" states, in relevant part:

*Staging organizations.* (1) A non-profit organization which is exempt from federal taxation under 26 U.S.C. 501(c)(3), and a nonprofit organization which is exempt from federal taxation under 26 U.S.C. 501(c)(4) and which does not endorse, support or oppose political candidates or political parties may stage nonpartisan candidate debates in accordance with 11 CFR 110.13(b) and 114.4(e).

11 C.F.R. § 110.13(a) (1991).

8. Section 501(c)(3) of the Internal Revenue Code, the statute under which the government has granted both the League and the C.P.D. tax-exempt status, exempts from federal taxation, in relevant part:

(A)ny . . . fund, or foundation, organized and operated exclusively for . . . charitable . . . or educational purposes . . . , no part of the net earnings of which inures to the benefit of any . . . individual, no substantial part of the activities of which is carrying on propaganda . . . , and which does not participate in, or intervene in (including the publishing and distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

I.R.C. § 501(c)(3) (1988).

9. *Fulani v. Brady*, 935 F.2d 1325, 1324 (D.C. Cir. 1991); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir. 1989).

10. Standing doctrine involves a set of rules that determine whether a litigant may raise a particular issue in a particular court. Lack of standing effectively prevents a plaintiff from pursuing her claim.

11. See *League*, 882 F.2d at 628.

12. See *Brady*, 935 F.2d at 1331.

for a minor-party candidate.<sup>13</sup> The standing battle will also affect the future of standing jurisprudence as a whole: standing for candidates to mount tax challenges would boost other third-party challenges to regulatory decisions and affirm our legal system's capacity to confront coherently some of its deeply rooted inequities.

This Note argues that courts should recognize minor-party presidential candidates' standing to challenge the section 501(c)(3) tax-exempt status of organizations sponsoring televised debates that exclude minor-party candidates. Part I situates the issue within the context of the Supreme Court's standing jurisprudence and concludes that the validity of a third-party tax-status challenge by an aggrieved minor-party presidential candidate remains an open question. Part II analyzes the Second and District of Columbia Circuits' decisions and concludes that the Second Circuit's approach properly interprets the Supreme Court's standing doctrine and correctly resolves the particular arguments which both courts consider. Part III first demonstrates that the Supreme Court's standing doctrine permits an inquiry into the public interests which granting standing in this context may advance. It then examines political scientists' conclusions about minor parties in U.S. politics and argues that the inherent inequities of our political structure, the importance of media exposure in elections, and the social value of minor-party candidacies support granting standing for minor-party candidates. Part IV explores some of the questions which the U.S. political system will need to address if courts grant standing for minor-party candidates and the plaintiffs eventually win their challenges to debate sponsors' tax exemptions. This Note concludes that courts should grant standing for minor-party presidential candidates to challenge the tax-exempt status of organizations that exclude them from televised debates.

## I. SUPREME COURT DOCTRINE

The Supreme Court has characterized standing as involving both constitutional and prudential considerations.<sup>14</sup> The Court has located three standing requirements in Article III of the Constitution: the plaintiff must have suffered a personal injury-in-fact; the injury must be fairly traceable to defendant's allegedly illegal conduct; and the plaintiff's requested relief must be likely to redress her alleged injury.<sup>15</sup> Although the elements often overlap conceptually,<sup>16</sup> the Court

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13. See *infra* Part IV.

14. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984) ("Standing doctrine embraces several judicially self-imposed limits . . . . The requirement of standing, however, has a core component derived directly from the Constitution.")

15. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982). For a discussion of the traceability and redressability requirements, see *infra* section I.B.

16. For example, in *Warth v. Seldin*, 422 U.S. 490, 502-07 (1975), the Court combines a no-

typically analyzes them in succession. The Court also considers various "prudential" limitations on standing beyond the direct constitutional limitations.<sup>17</sup>

This Part examines how the Supreme Court's doctrine affects a minor-party candidate's standing to challenge the tax-exempt status of a debate sponsor. Section I.A discusses the Court's injury-in-fact requirement, the dominant prong of the Court's three-pronged constitutional standing analysis. Section I.B examines the Court's decisions denying standing for lack of traceability and redressability, focusing on the major cases denying standing for third-party challenges to regulatory action. It concludes that the Court will not deny a plaintiff standing simply because she alleges an indirect harm. Section I.C briefly discusses the Court's prudential limitations on standing and concludes that they do not apply to third-party tax status challenges.

## A. *Injury in Fact*

### 1. *The Doctrine*

The Supreme Court typically begins its standing analysis with the injury-in-fact requirement.<sup>18</sup> The requirement, initially articulated in *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>19</sup> ensures that a court will resolve legal issues "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."<sup>20</sup> The Court has noted that tying each ruling to all of the facts of each particular case reduces the precedential value of any one standing decision.<sup>21</sup> The Court's decisions nonetheless draw certain broad lines: a plaintiff's injury-in-fact need not be economically quantifiable, and many other people may share the injury.<sup>22</sup> Furthermore, the Court does not consider the magnitude of a plaintiff's alleged in-

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injury with a no-traceability analysis. Plaintiff residents of Rochester, New York contended that neighboring Penfield's zoning ordinances precluded construction of low-income housing. After finding that plaintiffs had not suffered cognizable injuries, the Court accepted plaintiffs' allegation that the ordinance had increased housing prices in Penfield for the purpose of separately discussing traceability. 422 U.S. at 504. But the Court never recognized, even *arguendo*, any harm stemming from this alleged effect; its traceability analysis therefore lacked an injury to trace, leading it to find no traceability. 422 U.S. at 506-07. The Court failed to explain convincingly why, after it had rejected standing for lack of injury, it needed to inquire into traceability.

17. See *infra* section I.C.

18. The plaintiff's injury need not have manifested itself to satisfy the injury-in-fact standard; a threatened injury may suffice. See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

19. 397 U.S. 150 (1970); see also *Barlow v. Collins*, 397 U.S. 159 (1970) (companion case).

20. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 404, 472 (1982).

21. 454 U.S. at 472; see also *Data Processing*, 397 U.S. at 151 ("Generalizations about standing to sue are largely worthless as such.")

22. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973). The Court has, however, restricted standing for claims of generalized constitutional grievances as a prudential limitation. See *infra* section I.C.

jury.<sup>23</sup> The critical consideration is whether the plaintiff actually suffered the alleged injury; if not, the Court's examination of her claim "becom[es] no more than a vehicle for the vindication of the value interests of concerned bystanders"<sup>24</sup> and "an ingenious academic exercise in the conceivable."<sup>25</sup>

Examination of Supreme Court and circuit court decisions applying the injury-in-fact requirement demonstrate that a broad range of actual, personal injuries may satisfy the injury-in-fact requirement. The Supreme Court has recognized intangible injuries to plaintiff's interest based upon environmental degradation.<sup>26</sup> In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, plaintiff environmentalists claimed injury from environmental degradation resulting from a federal commercial regulation.<sup>27</sup> The Court recognized plaintiffs' injuries, stressing that plaintiffs had alleged cognizable personal injuries to their individual use and enjoyment of natural resources.<sup>28</sup> The Court recognized similar but more acute injuries in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*<sup>29</sup> Plaintiffs in that case, including residents living near a nuclear power plant, claimed several immediate harms from a regulation facilitating the plant's operation; the Court found these injuries sufficient to support standing.<sup>30</sup> In both of these cases, the Court recognized arguably remote, ideologically motivated injuries because plaintiffs demonstrated that the challenged actions affected them directly and personally.

Lower federal courts have followed the Supreme Court's tendency to recognize environmental injuries. An environmental group whose members used national wildlife refuges to observe wildlife alleged a sufficient injury to challenge opening of the refuges to hunting.<sup>31</sup> An-

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23. 412 U.S. at 689 n.14.

24. 412 U.S. at 687.

25. 412 U.S. at 688.

26. One commentator argues that environmental cases have led courts to transcend the traditional private law focus of the injury-in-fact requirement because ordinary experience allows courts to recognize the individual stakes in communal environmental interests. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1491 (1988).

27. 412 U.S. at 675-76 (Plaintiffs challenged the Interstate Commerce Commission's increase in rates for rail freight carriers on the ground that the increase would harm the environment by encouraging use of nonrecyclable products.).

28. 412 U.S. at 689. The Court distinguished *Sierra Club v. Morton*, 405 U.S. 727 (1972) (denying environmental group's standing to challenge federal approval of ski resort in natural forest), noting that plaintiffs in that case had alleged only a special interest in preserving the environment rather than personal injury from environmental damage. 412 U.S. at 685; see also *Japan Whaling Assn. v. American Cetacean Socy.*, 478 U.S. 221, 230 n.4 (1986) (holding that adverse effect on plaintiff's watching and studying of whales was a sufficient injury-in-fact to support standing in suit to compel federal agency to take action under statute restricting whaling).

29. 438 U.S. 59 (1978).

30. 438 U.S. at 73.

31. *Humane Socy. v. Hodel*, 840 F.2d 45, 51-52 (D.C. Cir. 1988). The Court rejected the

other group had standing to challenge mining regulations where it claimed harm to the aesthetic and recreational interests of its members.<sup>32</sup> An appellate court also found standing for consumer groups to raise challenges to federal automobile emissions standards on the theory that the standards impinged upon consumers' freedoms to purchase the types of cars they wanted.<sup>33</sup> As in the preceding cases, the court recognized harms in the two emissions cases because the plaintiffs were able to allege tangible, personal stakes in the legal issues involved.

Outside the environmental context, courts have been less willing to recognize injuries-in-fact in controversial cases. The Supreme Court denied an advocacy group standing to challenge a conveyance of land from the federal government to a religious college at a discounted price.<sup>34</sup> Plaintiffs claimed harm from violation of the constitutional separation of church and state; the Court found the injury insufficient because plaintiffs failed to plead any direct personal injury resulting from the alleged constitutional violation.<sup>35</sup> The Court hinted that some harm to plaintiffs' interests from the property transfer itself might have sufficed for standing purposes,<sup>36</sup> but the mere "observation of conduct with which one disagrees"<sup>37</sup> did not.

The Court similarly found no cognizable injury where plaintiffs alleged that a community's zoning ordinance hindered their ability to find affordable, low-income housing.<sup>38</sup> The Court concluded that plaintiffs were merely residents of the area which the ordinance affected, not intended residents of specific projects, and thus suffered no personal injuries.<sup>39</sup> These alleged injuries seem no more remote or ideologically rooted than those alleged by plaintiffs in *SCRAP* and *Duke Power*. The Court also offered no policy bases for distinguishing the two sets of cases, but the Court has hewed strictly to its injury-in-fact standard.

Commentators have sharply criticized the injury-in-fact standard as a foundation for standing jurisprudence, charging that its un-

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Society's other claimed injury, to its special interest in wildlife preservation, as insufficient to support standing. 840 F.2d at 51-52.

32. *National Wildlife Fedn. v. Hodel*, 839 F.2d 694, 704 (D.C. Cir. 1988).

33. *See Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 112-13 (D.C. Cir. 1990) (recognizing injury from decreased opportunity to buy larger, purportedly safer cars); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1332-34 (D.C. Cir. 1986) (recognizing injury from decreased opportunity to buy smaller, more fuel-efficient cars).

34. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

35. 454 U.S. at 485.

36. 454 U.S. at 486-87.

37. 454 U.S. at 485.

38. *Warth v. Seldin*, 422 U.S. 490 (1975).

39. 422 U.S. at 507-08.

workability has led to inconsistent application,<sup>40</sup> that it cannot assure “vigorous and responsible advocacy” if applied — as the Court has at least ostensibly directed — only to tangible injuries,<sup>41</sup> that it represents a logically indefensible encroachment upon Congress’ power to create enforceable rights,<sup>42</sup> and that it fragments social interests by failing to recognize altruistic motives for legal challenges.<sup>43</sup> Commentators have further complained that the requirement, taken to its extreme, wholly precludes challenges to constitutional violations by the government that affect all citizens in kind.<sup>44</sup> Despite these objections, injury-in-fact remains the most important component of the constitutional standing analysis.<sup>45</sup> The case law demonstrates that the plaintiff

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40. See Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 73-79 (1984) [Hereinafter Nichol, *Rethinking Standing*]. Nichol praises the *Data Processing* Court’s effort to ground the injury requirement in an objective basis for determining standing apart from the merits of claims. *Id.* at 74. But he concludes that the standard proved too malleable to fulfill its constitutional role, leading to artificial distinctions in later cases between sufficient and insufficient injuries. *Id.* at 75-78. Nichol later sharpened his attack on the injury requirement, concluding that injury-in-fact “is particularly vulnerable to distortion.” Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 653 (1985) [hereinafter Nichol, *Abusing Standing*]; see also William Burnham, *Injury for Standing Purposes When Constitutional Rights Are Violated: Common Law Public Value Adjudication at Work*, 13 HASTINGS CONST. L.Q. 57, 111-12 (1985) (arguing that the injury-in-fact standard increases “the difficulty and uncertainty in ascertaining injury,” leading to untenable distinctions in the case law).

41. Burnham, *supra* note 40, at 108. Burnham gives the Court some credit for applying the injury-in-fact standard to less tangible injuries but attributes more flexible applications to “the Court’s failure to clearly perceive the true nature of . . . injury in fact” and to the difficulty which the requirement poses to judges and lawyers. *Id.* at 110.

42. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 233 (1988). Fletcher contends that the Court’s creation of a standing hurdle which Congress cannot remove by statute “limit[s] the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against.” *But cf.* C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 881-82 (1985) (suggesting that Congress, by creating statutory interests which supersede courts’ prudential limitations on standing, may remove standing hurdles which the Court cannot remove through constitutional adjudication).

43. Winter, *supra* note 26, at 1503.

44. See David L. Doernberg, “*We the People*”: *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 92-95 (1985); Fletcher, *supra* note 42, at 272 (arguing that constitutional standing analysis should rely on the underlying claim asserted rather than on an abstract requirement such as injury-in-fact). See generally Burnham, *supra* note 40, at 71-81. The Court, when faced with egregious but technically unactionable violations, might simply cut through the injury-in-fact requirement due to the importance of the interest at stake. Professor Burnham argues that the Court has done just that, adjudicating based upon public values in such areas as equal protection and voting rights. *Id.* at 82-89. But, as Burnham suggests, only a more principled solution can prevent “hidden agendas and intellectual dishonesty.” *Id.* at 117.

45. See, e.g., *National Wildlife Fedn. v. Hodel*, 839 F.2d 694, 704 (D.C. Cir. 1988) (calling injury-in-fact “the core of standing”). Injury-in-fact is necessarily the most important component of the constitutional analysis because it logically precedes the traceability and redressability requirements. Moreover, courts rarely recognize an injury as cognizable and proceed to deny standing on one of the other constitutional grounds. See, e.g., *Duke Power v. Carolina Envtl. Study Group Inc.*, 438 U.S. 59, 72-78 (1978) (finding sufficient causal relationship after finding cognizable injury); *Warth v. Seldin*, 422 U.S. 490, 503-08 (1975) (denying traceability and redressability only after having denied injury-in-fact). *But see* *Allen v. Wright*, 468 U.S. 737, 756-57



who can confidently assert a tangible, personal injury is likely to win standing even for a causally remote or ideologically motivated injury.

## 2. *The Standard in Competitor Standing Cases*

The "competitor standing" doctrine, which allows standing for a plaintiff involved in an enterprise who challenges a policy that illegally benefits her competitor(s), figured prominently in the Second and D.C. Circuits' analyses of Fulani's standing. This doctrine, developed in economic competition cases, allows plaintiffs to challenge government actions that place them at competitive disadvantage. Such a disadvantage clearly satisfies the injury-in-fact requirement: the Supreme Court in the *Data Processing* case articulated that requirement in a competitor standing context.<sup>46</sup> Plaintiffs in that case, providers of data processing services, proved that an allegedly unlawful Comptroller of Currency regulation expanding the range of services national banks could provide "might entail some future loss of profits" and that the banks had already prepared to provide services to some of plaintiffs' customers.<sup>47</sup> The Court held there was "no doubt" that plaintiffs had alleged an actual injury.<sup>48</sup>

The Court continued to develop the competitor standing doctrine in financial service contexts. In a subsequent case, investment companies challenged a regulation that permitted banks to operate collective investment funds in alleged violation of a federal statute. The Court held that *Data Processing* "foreclosed" defendant's challenge to plaintiff's standing.<sup>49</sup> Although the facts of the two cases were similar, the plaintiffs, statutes, and services involved were distinct; the Court's wholesale grafting of the *Data Processing* holding onto the subsequent case suggests that the competitor standing doctrine carries considerable precedential force. The Court recently reaffirmed the doctrine when it recognized a financial service trade organization's standing to challenge a ruling of the Comptroller allowing a bank to offer discount brokerage services.<sup>50</sup> Aside from its distinct fact situation, the case differed from the Court's earlier competitor standing decisions in that the plaintiff challenged a specific agency ruling rather than a regula-

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(1984) (recognizing injury-in-fact where government action arguably diminished children's right to education in an integrated school but denying standing for lack of traceability).

46. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970). *Data Processing* also articulated the prudential zone of interests test for standing, 397 U.S. at 153, a factor which was important in that decision and has continued to play a prominent role in subsequent cases. See *infra* section I.C.

47. 397 U.S. at 152.

48. 397 U.S. at 152.

49. *Investment Co. Inst. v. Camp*, 401 U.S. 617, 620 (1971).

50. *Clarke v. Securities Indus. Assn.*, 479 U.S. 388, 403 (1987). The Court's discussion in this case centered on the zone of interests test, apparently reflecting a lack of controversy about the sufficiency of plaintiff's injury to support standing. See 479 U.S. at 394-403.

tion of general application.<sup>51</sup> The Court has not wavered from its approval of injury to competitive interests as a basis for standing.

The District of Columbia's federal courts have also applied the competitor standing doctrine, not only to redress similar economic injuries,<sup>52</sup> but also to protect political rights. In an early case, the D.C. District Court recognized the rights of voters, political workers, and campaign contributors to sue major-party campaign organizations for alleged violations of statutes limiting campaign contributions.<sup>53</sup> Although plaintiffs sued their competitors, rather than challenging a government action as the plaintiffs in the Supreme Court's competitor standing cases had done, the district court acknowledged an injury analogous to competitive disadvantage: that "the votes of the plaintiffs and their efforts to effect the nomination or election of individuals of their choice are likely to be, as a practical matter, diluted or even nullified."<sup>54</sup>

The D.C. Circuit subsequently permitted individuals and organizations to challenge election regulations and statutes affecting their political activities on even more clearly defined competitor standing theories.<sup>55</sup> The court's analysis turned on recognition of alleged harms from competitive disadvantages to plaintiffs' "political voices — their influence in federal elections"<sup>56</sup> through campaign contributions<sup>57</sup> and lobbying.<sup>58</sup> In extending competitor standing into the political sphere, the D.C. courts worked no great innovation but simply recalled the Supreme Court's maxim that injury, for standing pur-

51. 479 U.S. at 390-92.

52. See, e.g., *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977) (recognizing plaintiff oil businessman's injury-in-fact from tax credits extended to foreign nations for oil extraction but denying standing for failure to satisfy zone of interests test), *cert. denied*, 434 U.S. 1086 (1978).

This Part's focus on District of Columbia case law in examining the lower-court development of standing is not deliberate. The D.C. courts simply decide more significant standing cases than courts in other regions because of the large number of challenges to federal statutes and regulations which they hear. As a result, the D.C. Circuit has become the leading forum for elaboration of the Supreme Court's standing doctrines. See, e.g., *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322 (D.C. Cir. 1986) (finding standing for consumer group to challenge federal automobile emissions standards based upon alleged injuries stemming from diminished availability of light trucks).

53. *Common Cause v. Democratic Natl. Comm.*, 333 F. Supp. 803, 808-09 (D.D.C. 1971).

54. 333 F. Supp. at 808.

55. See *International Assn. of Machinists & Aerospace Workers, Inc. v. Federal Election Commn.*, 678 F.2d 1092, 1098 (D.C. Cir.) (labor union members, eligible to vote, raised challenge to Federal Election Commission rulings on corporate political solicitation practices), *affd.*, 459 U.S. 983 (1982); *Taxation With Representation v. Regan*, 676 F.2d 715, 722-23 (D.C. Cir. 1982) (nonprofit organization challenged 26 U.S.C. § 501(c)(3) prohibition against lobbying by nonprofits), *revd. on other grounds*, 461 U.S. 540 (1983).

56. *Machinists*, 678 F.2d at 1098.

57. 678 F.2d at 1098.

58. *Taxation*, 676 F.2d at 722-23.

poses, need not affect plaintiffs economically.<sup>59</sup>

Federal courts have not hesitated to reject competitor standing theories when plaintiffs fail to plead sufficient injuries-in-fact. In *American Society of Travel Agents, Inc. v. Blumenthal*,<sup>60</sup> a travel industry organization challenged the Treasury Department's failure to collect taxes from nonprofit groups which ran travel enterprises that allegedly competed with the organization's business.<sup>61</sup> The D.C. Circuit denied the organization's standing, finding that plaintiffs "ha[d] not indicated with sufficient specificity either the manner in which their alleged injury occurred or the nature of that injury," but had instead simply alleged "creation of an unfair competitive atmosphere. . . ."<sup>62</sup>

Courts have also rejected claims of injury to competitive political advantage. In *In re United States Catholic Conference* the Second Circuit denied standing for pro-choice Catholic clergy and activists to challenge the Catholic Church's tax exemption because plaintiffs failed to show that they were engaged in actual competition with the church in any particular political enterprise.<sup>63</sup> The court found implicit in *Data Processing* and its progeny "a requirement that in order to establish an injury as a competitor a plaintiff must show that he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit."<sup>64</sup> The D.C. District Court similarly rejected the competitor standing theories of pro-Palestinian activists seeking to challenge the tax-exempt status of Jewish organizations.<sup>65</sup> As in *Catholic Conference*, the court found that plaintiffs' alleged political setbacks were too vague to transcend mere objection to "conduct with which one disagrees" and rise to the level of actual injury.<sup>66</sup>

These cases denying competitive advocate standing are the excep-

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59. See *supra* text accompanying note 22.

60. 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978).

61. 566 F.2d at 147-48.

62. 566 F.2d at 148, 149. The court suggested that plaintiff could have pleaded a sufficient harm by identifying patrons of the nonprofit organizations' travel enterprises "who might legitimately be expected to do business with a private travel agent in the event appellees enforced the relevant tax code provisions according to appellants' recommendations." 566 F.2d at 148. Besides seeming to bear more on redressability than on injury-in-fact, this invitation to hypothetical pleading undermines the court's attempt to distinguish between an actual injury and a mere effect on the competitive environment. Even so, the court's formulation does not measurably alter the competitor standing doctrine because it still permits plaintiffs to prove injury by pleading specific adverse effects from competitive disadvantage.

63. *In re United States Catholic Conference*, 885 F.2d 1020, 1028-31 (2d Cir. 1989), *cert. denied sub nom. Abortion Rights Mobilization, Inc. v. United States Catholic Conference*, 110 S. Ct. 1946 (1990).

64. 885 F.2d at 1029.

65. *Khalaf v. Regan*, 85-1 U.S. Tax Cas. (CCH) 9269 (D.D.C. 1985).

66. 85-1 U.S. Tax Cas. (CCH) at 87,591 (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 485-86 (1982)).

tions that prove the doctrine. In none of them did a court mitigate either the Supreme Court's conception of the doctrine or its genesis in the D.C. Circuit. Rather, the courts rested their rejections squarely on deficiencies in the specificity of pleadings. Such deficiencies should defeat claims of injury-in-fact in any standing analysis.<sup>67</sup> These courts' rigorous applications of the doctrine, along with the numerous decisions recognizing injury-in-fact where plaintiffs have shown specific, personal injuries to competitive advantages, demonstrate that competitive injuries fully satisfy the injury-in-fact requirement of the constitutional standing test.

## B. *Traceability and Redressability*

### 1. *The Doctrine*

Once a plaintiff has established an injury-in-fact, she must show both that her injury can reasonably be traced to the challenged conduct and that the court can redress the injury by granting the relief she seeks.<sup>68</sup> Courts employ the traceability and redressability requirements to weed out cases in which causal relationships between injuries and illegal acts are "too attenuated" or prospects for relief from a favorable disposition are "too speculative."<sup>69</sup> Thus, the plaintiffs in *Warth v. Seldin*<sup>70</sup> failed to show a sufficient causal link between their inability to secure low-income housing and defendant town's zoning ordinance.<sup>71</sup> Similarly, supporters of an unsuccessful presidential candidate failed to show that alleged illegal acts of his opponent, the incumbent president, limited their ability to induce support for their candidate.<sup>72</sup> In another case, advocates for the handicapped could not demonstrate that an FCC order permitting a radio station's owner to purchase the station had caused the station's allegedly unlawful disregard for rights of the handicapped.<sup>73</sup> Even so, plaintiffs need not anticipate and rebut every speculative, hypothetical infirmity which defendants might raise.<sup>74</sup> In addition to the court's degree of comfort

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67. See *supra* text accompanying notes 34-39.

68. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-46 (1976). Although the Court first articulated the traceability and redressability standards in *Simon*, the essential concept dates at least to *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). Holding in that case that a woman lacked standing to challenge a government agency's failure to pursue her husband for overdue support payments, the Court stated that plaintiffs must show an injury "resulting from the putatively illegal action" in order to have standing. 410 U.S. at 617.

69. See *Allen v. Wright*, 468 U.S. 737, 752 (1984).

70. 422 U.S. 490 (1975).

71. 422 U.S. at 506-07.

72. *Wimpinger v. Watson*, 628 F.2d 133, 137 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 929 (1980).

73. *California Assn. of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 825 (D.C. Cir. 1985).

74. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 77-78 (1978). In *Duke Power*, defendant nuclear plant operator unsuccessfully attacked traceability and redres-

in following plaintiff's causal claim, successful showings of traceability and redressability rely on whether plaintiff defines his injuries in proportion to the illegal acts he charges.<sup>75</sup>

The early development of the traceability and redressability standards suggests that they are aspects of the same test.<sup>76</sup> But the Supreme Court has explicitly distinguished the two standards as they apply to cases "in which the relief requested goes well beyond the violation of law alleged."<sup>77</sup> Differentiating between the two requirements, the Court stated: "To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested."<sup>78</sup> Because virtually all plaintiffs in cases involving standing issues sue for injunctive or declaratory relief against the illegal conduct charged, the redressability requirement becomes academic.<sup>79</sup> In any event, the D.C. Circuit has also equated traceability and redressability where the relief requested is cessation of the illegal conduct<sup>80</sup> or where the claimed injury will occur in the future as the result of an agency action.<sup>81</sup> Even courts that analyze traceability and redressability sepa-

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sability by contending that, had Congress never passed the challenged act facilitating private development of nuclear power, the government would have developed nuclear power on its own, causing the same injuries which plaintiffs claimed from the plant. 438 U.S. at 77-78. See also *Jet Courier Servs. v. Federal Reserve Bank*, 713 F.2d 1221, 1226 (6th Cir. 1983) (not speculative that plaintiffs' claimed business injuries would result from challenged administrative rulings).

Plaintiffs frequently must defeat less speculative counterfactuals which may cast doubt on the causal sources of their injuries. See, e.g., *Warth*, 422 U.S. at 505-07 (suggesting that nonexistence of challenged zoning ordinances would not necessarily have resulted in the construction of low-income housing, the absence of which constituted the injury upon which plaintiffs sued).

75. Professor Sunstein argues that, in practice, the outcome of the traceability and redressability inquiries "will turn in large part not on causation itself, but on how the relevant injury is characterized and on what sorts of injuries qualify as legally cognizable." Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COL. L. REV. 1432, 1458 (1988).

76. See, e.g., *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976) (defining plaintiffs' claims of redressability and traceability as "equally speculative"); see also *Duke Power*, 438 U.S. at 74 (describing the traceability requirement as the redressability requirement "put otherwise").

77. *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984) (challenging failure to avoid granting tax exemptions to racially discriminatory private schools).

78. 468 U.S. at 753 n.19.

79. Indeed, *Allen's* denial of traceability without denying redressability is extremely unusual. The Court found that plaintiffs' suit exceeded the scope of defendant's alleged illegal acts because the requested injunction would have barred tax exemptions for a broader class of private schools than those which engaged in open racial discrimination. 468 U.S. at 746-47. The Court failed to explain why it could not simply have analyzed the standing issue with regard to only those schools which discriminate openly.

80. See *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 113 (D.C. Cir. 1990); *Dellums v. Nuclear Regulatory Commn.*, 863 F.2d 968, 971 (D.C. Cir. 1988); *National Wildlife Fedn. v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1988).

81. *California Assn. of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 828 n.2 (D.C. Cir. 1985) (Wald, J., dissenting).

rately generally rule the same way on both.<sup>82</sup>

Scholars and courts have criticized the traceability and redressability requirements for a number of reasons. Several have complained that the Supreme Court has applied the standards inconsistently from case to case, fostering an uncomfortably subjective climate.<sup>83</sup> One commentator sympathetic to this objection suggested that causation standards should enter into standing analysis at the formative stage of laws and regulations.<sup>84</sup> This approach would ensure consistent standing rulings in subsequent litigation. Commentators have also criticized the redressability requirement as demanding excessive certainty.<sup>85</sup> Traceability and redressability appear to be settled features on the Supreme Court's standing landscape, but these criticisms, and the precedential inconsistencies that have prompted them, underscore the elusiveness of these requirements.

## 2. *The Standards in Challenges to Federal Regulatory Status of Third Parties*

The Supreme Court has held that a plaintiff's injury-in-fact need not result directly from the defendant's allegedly illegal act. Rather, the injury may issue from a third party, not before the Court, whose harmful behavior the challenged act makes possible.<sup>86</sup> Such indirect causation may simply make plaintiff's showing of traceability — and, by extension, redressability — more difficult as a practical matter.<sup>87</sup> The issue of "third party causation" arises most frequently in cases

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82. See, e.g., *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1334-35 (D.C. Cir. 1986) (distinguishing traceability and redressability requirements but finding both requirements satisfied through parallel analyses).

83. See, e.g., Nichol, *Rethinking Standing*, *supra* note 40, at 79-82 (noting the Court's "inability to maintain a principled line" in redressability analysis); Nichol, *Abusing Standing*, *supra* note 40, at 656-57 (concluding that the Court's inconsistent applications of redressability made "the conclusion that standing turns on judicial whim seem[] almost unavoidable"); Sunstein, *supra* note 75, at 1458-59 (finding that traceability and redressability "have reintroduced precisely the sort of unpredictability that the *Data Processing* test was intended to eliminate").

84. Fletcher, *supra* note 42, at 242-43. This suggestion appears similar to other commentators' urgings to base standing analysis more closely on statutory and constitutional expressions of intent to protect particular parties under particular provisions. See David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41; Floyd, *supra* note 42, at 880-87.

85. See Fletcher, *supra* note 42, at 240-42 (objecting to the Court's implication in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), "that a person with a legal right to a particular remedy loses that right when she seeks to achieve something else indirectly by means of that remedy and when it is unlikely that the ultimate goal will be achieved"); Sunstein, *supra* note 75, at 1458 (pointing out that "[t]he consequences of greater enforcement for any particular member of the class of beneficiaries are often unavoidably speculative" in the context of regulatory status challenges). *But cf.* *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978) (stating that the Court requires plaintiffs only to show "substantial likelihood" of redressability); *National Wildlife Fed'n. v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1988) ("mere likelihood" sufficient).

86. *Warth v. Seldin*, 422 U.S. 490, 504-05 (1975).

87. 422 U.S. at 505.

where plaintiffs assert harm caused by injuries from third parties' favorable status under federal regulations.

Courts have granted standing in challenges to a variety of regulations where third parties caused plaintiffs' injuries, including nearly all of the competitor standing cases.<sup>88</sup> Other plaintiffs have shown indirect harms sufficient to support standing by alleging that federal fuel efficiency standards diminished their consumer options,<sup>89</sup> and that federal orders or regulations degraded the environment, thereby diminishing plaintiffs' demonstrated personal enjoyment of the outdoors.<sup>90</sup> Although these cases required courts to accept at least two-staged causal relationships, some of them quite tenuous,<sup>91</sup> the courts obliged wherever they found logical connections between regulations and injurious acts.

Courts have repeatedly refused to grant standing in cases challenging third parties' tax exemptions. But the Supreme Court has never categorically prohibited such challenges. Instead, the specific facts of the tax-status challenges have failed to support standing because plaintiffs have failed to prove either sufficient injuries-in-fact or traceability and redressability. Plaintiffs in *Allen v. Wright* failed to allege sufficient injuries-in-fact based on the "mere fact" of the government's failure to deny tax exemptions to racially discriminatory private schools.<sup>92</sup> Absence of sufficient injury-in-fact defeated an industry group's allegation of vague harm from the government's failure to tax nonprofit organizations' supposedly competitive income.<sup>93</sup> It also precluded, in *Khalaf v. Regan*,<sup>94</sup> challenges to the tax-exempt status of pro-Israel organizations by certain pro-Palestinian plaintiffs whose claimed harms amounted only to the undesirable observation of poli-

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88. See, e.g., *Clarke v. Securities Indus. Assn.*, 479 U.S. 388 (1987) (plaintiffs challenged administrative ruling to redress alleged competitive disadvantage from applicant for ruling); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970) (plaintiffs challenged banking regulation to redress alleged competitive disadvantage from banks). See *supra* notes 46-66 and accompanying text.

89. See *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 113-14 (D.C. Cir. 1990); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1334-35 (D.C. Cir. 1986). See *supra* note 33 and accompanying text.

90. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973); *National Wildlife Fedn. v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1988).

91. See, e.g., *SCRAP*, 412 U.S. at 688 (describing the injury at issue as involving "a far more attenuated line of causation" than in *Sierra Club v. Morton*, 405 U.S. 727 (1972), in which the Court denied standing).

92. 468 U.S. 737, 753-56 (1984).

93. *American Socy. of Travel Agents v. Blumenthal*, 566 F.2d 145, 148-49 (D.C. Cir. 1977) (challenging failure to assess taxes only for particular types of income; plaintiffs failed to show that failure to assess taxes injured their profits), *cert. denied*, 435 U.S. 947 (1978). The extent to which the *Travel Agents* court's traceability/redressability analysis is bound up with its injury-in-fact analysis demonstrates powerfully that plaintiffs must plead credible injuries-in-fact in order to satisfy the remaining prongs of the constitutional test.

94. 85-1 U.S. Tax Cas. (CCH) 9269 (D.D.C. 1985).

cies with which they disagreed.<sup>95</sup>

Overly attenuated traceability and redressability arguments were fatal to plaintiffs' claim in *Allen* that the government's failure to deny tax exemptions somehow hindered plaintiffs' children's chances to receive integrated education by facilitating development of segregated schools.<sup>96</sup> Similarly, indigent plaintiffs in *Simon v. Eastern Kentucky Welfare Rights Organization*<sup>97</sup> failed to demonstrate that a revenue ruling granting favorable tax status to hospitals providing limited indigent services actually caused their inability to secure medical care.<sup>98</sup> It also precluded standing for Palestinian plaintiffs in *Khalaf* who claimed that the tax exemptions they sought to challenge had caused confiscation of their property in the Occupied Territories.<sup>99</sup>

The cases denying standing to tax-exemption challenges confirm that a claim of indirect harm requires a solidly defined injury-in-fact and a logically consistent line of causation. Each challenge discussed fell short of one or both of these standards. The courts have never indicated that they would deny standing for a better-stated challenge to a third party's tax exemption; they have granted standing in numerous and varied cases involving challenges to third-party status under other federal regulations.

### C. Prudential Limitations on Standing

In addition to the constitutional tests for standing, the Supreme Court has developed a number of "prudential" limitations to ensure judicial self-restraint. The Court has described these limitations as "closely related to Art[icle] III concerns but essentially matters of judicial self-governance."<sup>100</sup> Unlike the constitutional standing tests, the prudential requirements are subject to elimination for any given

95. 85-1 U.S. Tax Cas. (CCH) at 9269. Mere observation of conduct with which one disagrees cannot satisfy the injury-in-fact requirement. See *supra* text accompanying note 37.

96. *Allen*, 468 U.S. at 756-79.

97. 426 U.S. 26 (1976).

98. *Simon*, 426 U.S. at 41-43. It is significant that the plaintiffs in *Simon* charged only that the revenue ruling at issue "had 'encouraged' hospitals to deny services to indigents." 426 U.S. at 42 (quoting petitioners' complaint). Plaintiffs thus made no attempt to demonstrate that their claimed injuries would not have occurred, or would have been less likely to have occurred, without the government's allegedly illegal ruling.

99. 85-1 U.S. Tax Cas. (CCH) at 9269 (plaintiffs failed to show how U.S. government's grant of tax exemptions led to Israeli government's subsequent seizures of property).

100. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). See *Floyd*, *supra* note 42, at 889-90 (suggesting that the prudential zone of interests requirement must be seen as "basic and fundamental"). But cf. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (stating that "the counsels of prudence . . . should [not] be mistaken for the rigorous Art. III requirements themselves"); *International Assn. of Machinists & Aerospace Workers v. Federal Election Commn.*, 678 F.2d 1092, 1099 (D.C. Cir. 1982) (stating that prudential rule against assertion of third parties' rights "is not of constitutional dimension"), *aff'd.*, 459 U.S. 983 (1982).



class of plaintiffs.<sup>101</sup>

The most ubiquitous prudential limitation is that a plaintiff claiming a right under a regulation must stand within the "zone of interests" which Congress intended the attendant statute to protect.<sup>102</sup> Although the zone of interests test does not demand an actual showing of Congressional purpose, the Court uses the test to decide whether particular plaintiffs are appropriate parties to challenge regulations under the "evident intent [of Congress] to make agency action presumptively reviewable."<sup>103</sup> This requirement occasionally precludes standing for plaintiffs who have shown cognizable injuries-in-fact to challenge statutes or regulations.<sup>104</sup> But in general, the zone of interests test is relatively kind to plaintiffs.<sup>105</sup> The standard shares with the Court's constitutional standing criteria a tendency toward ambiguity.<sup>106</sup>

The Court has articulated two other prudential limitations, both of which are subject to exceptions in particular cases. The Court usually denies standing when plaintiffs plead "generalized grievance[s] shared in substantially equal measure by all or a large class of citizens."<sup>107</sup> The Court also generally refuses to hear claims in which plaintiffs assert the rights of third parties rather than their own rights.<sup>108</sup> The

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101. *Warth*, 422 U.S. at 501; *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1335 (D.C. Cir. 1986).

102. *See Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-54 (1970); *Barlow v. Collins*, 397 U.S. 159, 163-65 (1970).

103. *Clarke v. Securities Indus. Assn.*, 479 U.S. 388, 399 (1987).

104. *See, e.g., Jet Courier Servs. v. Federal Reserve Bank*, 713 F.2d 1221, 1226-27 (6th Cir. 1983) (denying standing to plaintiffs, who had satisfied constitutional standing requirements, because of lack of congressional intent to protect plaintiffs' interest in banking act giving rise to challenge); *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 143-45 (D.C. Cir. 1977) (denying standing for plaintiff nonprofit organization to pursue cognizable injury where court found purpose of statute not to have included protection of plaintiffs), *cert. denied*, 434 U.S. 1086 (1978).

105. *See Clarke*, 479 U.S. at 403 (finding plaintiff within statute's zone of interest upon showing of "plausible relationship" between plaintiff's interest and policy underlying statute); *see also Tax Analysts*, 566 F.2d at 142 (describing "generous nature" of zone of interests test).

106. *See Tax Analysts*, 566 F.2d at 138-39 (strongly criticizing zone of interests test as "deficien[t], ambigu[ous]," "confusi[ng]," and "imprecise"). The Supreme Court itself has acknowledged criticism of the test and conceded that the test "has not proved self-explanatory." *Clarke*, 479 U.S. at 396 & n.11.

On the other hand, some scholars have called for greater emphasis on the zone of interests test in standing decisions to counter the difficulties they recognize in applying the constitutional requirements. *See, e.g., Floyd, supra* note 42, at 889-91.

107. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). *But cf. United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973) (granting standing based upon alleged environmental harms which affected "all persons who utilize the scenic resources of the country, and indeed all who breathe its air").

108. *Warth*, 422 U.S. at 499-500 (1975); *see* 422 U.S. at 509-10 (denying standing for plaintiff taxpayers to challenge zoning ordinance which allegedly denied housing to people with low incomes). The Court may permit assertion of third parties' rights where plaintiffs plead consequences to third parties of allegedly illegal enforcement of regulations against plaintiffs. 422 U.S. at 510. Other factors entering into the disposition of "third party standing" claims are the rela-

Court views both of these limitations, like the zone of interests test, as protecting courts from the need to decide "abstract questions of wide public significance" which other branches of government might more appropriately address.<sup>109</sup>

Although the prudential limitations may affect standing determinations for challenges to the regulatory status of third parties<sup>110</sup> and claims of competitor standing<sup>111</sup> in general, they should not bar challenges raised against third parties' tax exemptions. The Supreme Court has limited its standing analysis of such challenges to the constitutional requirements even where plaintiffs did not assert underlying constitutional rights.<sup>112</sup> Moreover, little possibility exists that plaintiffs asserting cognizable harms to challenge third-parties' tax exemptions would fall outside the zone of interests of section 501(c)(3); when Congress passes a statute barring tax-exempt organizations from certain activities, it protects competitors or others who would suffer if those organizations participated in the specified activities. With neither of the other prudential limitations apposite, third-party tax status challenges appear safe from whatever confusion the limitations have fostered.

The Supreme Court's standing doctrine demonstrates that Lenora Fulani has raised a viable challenge to debate sponsors' tax exemptions. The Court has acknowledged that injuries to competitive capacities satisfy its injury-in-fact standard. Once a plaintiff has alleged a significant injury, he must simply show a sufficient causal relationship between his injuries and the challenged conduct to fulfill the traceability and redressability requirements and establish constitutional standing. Numerous plaintiffs challenging regulatory treatment of third parties have shown such causal connections, despite the indirect nature of their injuries. For a challenge like Fulani's, the added standing burdens of the prudential limitations are not a concern. An analysis of

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tionship between plaintiff and the third party and the ease with which the third party could assert her own rights. See *Fletcher*, *supra* note 42, at 246. For criticisms of the third party standing doctrine as a largely artificial division which should give way to a zone of interests approach, see *id.* at 245-47; *Floyd*, *supra* note 42, at 900-02.

109. *Warth*, 422 U.S. at 500. While *Warth* clearly identifies an important separation of powers rationale in the Court's prudential restraints, see 422 U.S. at 499-500, it does not appear to have contemplated the dominant position to which *Allen v. Wright*, 468 U.S. 737 (1984), has elevated federalism concerns in standing analysis. See *infra* section III.A.

110. See, e.g., *Humane Socy. v. Hodel*, 840 F.2d 45, 60-61 (D.C. Cir. 1988) (zone of interests test applied); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1335 (D.C. Cir. 1986) (generalized grievance test applied).

111. See, e.g., *Clarke*, 479 U.S. at 401-03 (zone of interests test applied).

112. See *Allen*, 468 U.S. 737; see also *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (no prudential analysis of challenge to revenue ruling under § 501(c)(3) benefiting third party). The D.C. Circuit has similarly foregone prudential analysis in a case challenging failure to tax certain specific income of § 501(c)(3) tax-exempt organizations. See *American Socy. of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978).

Fulani's challenges in the Second and D.C. Circuits will demonstrate that a correct reading of the Court's standing doctrine supports standing in this case.

## II. THE SECOND CIRCUIT-D.C. CIRCUIT SPLIT

This Part compares the Second Circuit's<sup>113</sup> and District of Columbia Circuit's<sup>114</sup> divergent decisions about minor-party candidates' standing to challenge debate sponsors' tax exemptions in Lenora Fulani's cases and concludes that the Second Circuit's arguments supporting standing are more persuasive. Section II.A finds that the Second Circuit's opinion, along with Chief Judge Mikva's dissent in the D.C. Circuit, appraised Fulani's injuries more thoroughly and accurately than did the D.C. Circuit, and concludes that those injuries weigh strongly in favor of standing. Section II.B rejects the D.C. Circuit's key arguments against traceability and redressability in favor of the Second Circuit's more accurate application of relevant Supreme Court precedents and characterization of causal factors in Fulani's claim. While acknowledging the relative uncertainty of the two causal prongs, this section concludes that Fulani's showing should have been sufficient to withstand the D.C. Circuit's denial. Section II.C confirms that the irrelevance of prudential standing limitations to Fulani's claims precludes the statutory attack on Fulani's standing arguments which the D.C. Circuit suggests. This analysis demonstrates that a candidate should have standing to challenge debate sponsors' tax status.

### A. *Injury in Fact*

#### 1. *The Second Circuit Analysis*

The key to the Second Circuit's grant of standing in *Fulani v. League of Women Voters*<sup>115</sup> was its thorough characterization of plaintiff Fulani's injuries. The court understood that minor-party candidacies serve multiple societal goals and that degrees of exposure and

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113. *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir. 1989).

114. *Fulani v. Brady*, 935 F.2d 1324 (D.C. Cir. 1991).

115. In addition to candidate Fulani herself, plaintiffs in both *League* and *Brady* included Fulani's campaign committee and a supporter. *League*, 882 F.2d at 621; *Brady*, 935 F.2d at 1331 (Mikva, C.J., dissenting). Unless otherwise noted, this Note will treat Fulani alone as the plaintiff in these cases. Defendants in each case included the current debate sponsor as well as the Secretary of the Treasury and the Commissioner of Internal Revenue. *League*, 882 F.2d at 621; *Brady*, 935 F.2d at 1324. Fulani apparently included the League as a defendant in the first action in a failed attempt to challenge its actions directly. See *Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185, 1186 (S.D.N.Y. 1988). She initially sued the Commission on Presidential Debates in the second case but dropped her claims against the Commission at the district court level; the Commission subsequently reentered the fray as intervenor. See *Fulani v. Brady*, 729 F. Supp. 158, 160 & n.3 (D.D.C. 1990). This Note focuses on the government defendants as the adversaries to Fulani's tax-status challenge, although the organizational defendants' arguments presumably figured prominently in both the Second and D.C. Circuits' decisions.

success in elections may greatly influence progress toward those goals. These insights prompted the court to emphasize both the breadth and the depth of Fulani's alleged injuries.

Fulani's alleged injuries were broad because the challenged conduct harmed important goals other than actually winning the presidency. The court characterized Fulani's lost "opportunity to communicate her political ideas to the electorate on equal terms with other significant presidential candidates" as an injury distinct from her loss of competitive advantage in the election per se.<sup>116</sup> By separating these factors, the court acknowledged that political communication serves a variety of advocacy goals beyond the bottom line of victory. Chief Judge Mikva, dissenting from the D.C. Circuit's decision in *Fulani v. Brady*, elaborated on this theme when he noted Fulani's "credibility as a 'spoiler' and public advocate."<sup>117</sup> His dissent also emphasized that Fulani's status as a woman of color would likely have enhanced her importance as a spoiler.<sup>118</sup>

Fulani's alleged injuries from defendants' acts were also substantial. She asserted that participation in televised debates provided a critical source of the mass exposure upon which campaigns depend for legitimacy.<sup>119</sup> The Second Circuit stressed "the powerful beneficial effect that mass media exposure can have today on the candidacy of a significant aspirant seeking national political office" and firmly concluded that debate participants improved their competitive positions over nonparticipants.<sup>120</sup> The court's recognition of the depth of Fulani's alleged injuries gains force from its comprehension of their breadth, because Fulani's exclusion from televised debates arguably affected all of her goals as a candidate.

Fulani's alleged injuries in both *League* and *Brady* arose under the Internal Revenue Code,<sup>121</sup> but they also embraced underlying consti-

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116. 882 F.2d at 625-26; see also *Common Cause v. Bolger*, 512 F. Supp. 26, 30 (D.D.C. 1980), (holding that candidates' alleged injuries from abuses of Congressional franking privileges occurred regardless of outcomes of elections).

117. *Brady*, 935 F.2d at 1332 (Mikva, C.J., dissenting); see also *Chandler v. Georgia Pub. Telecommunications Commn.*, 749 F. Supp. 264, 268-69 (N.D. Ga. 1990), *rev'd*, 917 F.2d 486 (11th Cir. 1990) (arguing for inclusion of minor-party candidate in gubernatorial debate despite his advocacy of an "admitted[] . . . minority point of view").

118. See *Brady*, 935 F.2d at 1332 (quoting affidavit of Fred Newman, Fulani's campaign manager).

119. For an elaboration of support for this view in the political science literature, see *infra* section III.B.

120. *League*, 882 F.2d at 626. The D.C. Circuit had previously expressed the same view. See *Johnson v. FCC*, 829 F.2d 157, 164-65 (D.C. Cir. 1987) (admitting that exclusion from televised debates "removes . . . one of the great number of avenues for candidates to gain publicity and credibility with the citizenry" and that "[petitioners'] inclusion in the televised debates undoubtedly would have benefitted their campaign"). *Johnson* conceded these points despite its conclusory skepticism about the relative importance of debates: the court rejected plaintiff minor-party candidates' appeal of defendant agency's refusal to prohibit televising of a debate from which the debate sponsors had excluded plaintiffs.

121. See *League*, 882 F.2d at 623-624; *Brady*, 935 F.2d at 1329.

tutional claims.<sup>122</sup> Fulani argued that her exclusion from the debates violated her First Amendment right to free expression by denying an opportunity to communicate her political message in the same manner as other legitimate presidential candidates; the *Brady* dissent found that Fulani's claim "suggests restriction of 'classically political speech' and so goes to the core of the First Amendment."<sup>123</sup> She also alleged that the exclusion violated her equal protection rights because of her race and gender.<sup>124</sup> Other candidate plaintiffs have met with mixed success raising First and Fourteenth Amendment claims in challenges to other exclusionary electoral procedures.<sup>125</sup> But the fact that neither the Second nor the D.C. Circuit challenged Fulani's constitutional bases confirms the constitutional tenor of Fulani's alleged injuries. Seen in both their statutory and constitutional dimensions, Fulani's alleged

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122. *Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185, 1186 (S.D.N.Y. 1988), *aff'd.*, 882 F.2d 621 (2d Cir. 1989). The district court in *League* dismissed Fulani's direct constitutional claims against the League for lack of state action, *see* 684 F. Supp. at 1192, but this disposition did not speak to the constitutional character of Fulani's challenge to the League's tax exemption.

123. *Brady*, 935 F.2d at 1333 (Mikva, C.J., dissenting). The dissent correctly pointed out that the court "[d]id not dispute the constitutional sufficiency of Fulani's alleged injury." 935 F.2d at 1332 (Mikva, C.J., dissenting). The court did, however, take a backhand swipe at Fulani's First Amendment theory by citing Justice Stewart's concurrence in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 46 (1976) (Stewart, J., concurring), to the effect that he could not imagine an appropriate context for a third-party tax-status challenge "outside the First Amendment area." The court, while conceding that the concurrence lacked precedential force, suggested that Justice Stewart had meant to refer only to the First Amendment's religion clauses, precluding such a challenge based upon free speech rights. *Brady*, 935 F.2d at 1326-27 & n.2. But the dissent used Supreme Court precedents of the time to demonstrate that Justice Stewart's statement, whatever its precedential value, made far more sense in a speech than a religion context. 935 F.2d at 1333 (Mikva, C.J., dissenting).

124. *See League*, 684 F. Supp. at 1186. Fulani's equal protection claims presumably rested on the historic underrepresentation of women and people of color among major-party candidates for national office and the resultant reliance of many members of those groups on minor parties for participation in national elections. For a discussion of this phenomenon, *see infra* note 224 and accompanying text; *see generally* SMALLWOOD, *supra* note 1, at 30.

125. The Supreme Court overruled a state's early filing deadline for minor-party candidates on First and Fourteenth Amendment grounds in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The Second Circuit in *League* stressed *Anderson's* relevance to Fulani's situation. *See League*, 882 F.2d at 626. But the D.C. Circuit has held that debate participation affected candidates' fortunes significantly less than ballot access and therefore did not implicate the Constitution. *Johnson v. FCC*, 829 F.2d 157, 164-65 (D.C. Cir. 1987). Similarly, the Eleventh Circuit rejected First and Fourteenth Amendment challenges to the failure of a public television station to include third-party candidates in televised debates. *Chandler v. Georgia Pub. Telecommunications Comm.*, 917 F.2d 486, 488-89 (11th Cir. 1990).

But in neither of these decisions did plaintiffs offer constitutional arguments as compelling as Fulani's. Plaintiffs in *Chandler* apparently did not base their First Amendment claim on the special constitutional status of political speech but simply made a more general "marketplace of ideas" argument. *See* 917 F.2d at 488-89. The D.C. Circuit in *Johnson* did recognize safeguarding the integrity of the electoral process as "a fundamental task of the Constitution," 829 F.2d at 164, but plaintiffs in that case apparently argued only that debate restrictions abridged their free speech rights by hurting their chances at victory; they did not contend more broadly that the court should consider their rights to voice their ideas in the political discourse. *See* 829 F.2d at 164. Moreover, Fulani's status as a woman of color gave her an intrinsically more compelling equal protection claim than plaintiffs in *Chandler* could present. *See* 917 F.2d at 489. Finally, both *Chandler* and *Johnson* went to the merits rather than to standing.

injuries gave the Second Circuit a formidable basis on which to find standing.

## 2. *The D.C. Circuit Approach*

The D.C. Circuit's analysis of Fulani's alleged injuries was virtually nonexistent. Contrary to traditional standing analysis, the court did not move methodically through the three prongs of the constitutional test and did not attempt to examine Fulani's alleged injuries through the prism of the challenged conduct. Prior to its discussion of the causation prongs, the court instead raised miscellaneous objections to standing<sup>126</sup> and broadly criticized the application of competitor standing to the facts of Fulani's case.<sup>127</sup> The court's vague treatment of the injury prong simplified its characterization of Fulani's injuries as not traceable to the challenged conduct or redressable by the requested relief.<sup>128</sup>

The court avoided an open attack on Fulani's chosen injury, perhaps aware of the district court's and the Second Circuit concurrence's problematic attempts to characterize Fulani's injury narrowly. The Second Circuit concurrence purported to accept *arguendo* that Fulani had suffered a judicially cognizable injury<sup>129</sup> but characterized Fulani's injury at a critical point in its traceability analysis as the voters' "rejection of her candidacy."<sup>130</sup> By limiting Fulani's injury to her actual inability to garner votes, the court completely discounted her independent interest in circulating her views and thus unfairly diminished the connection between her injuries and the challenged tax exemption.

The district court in *Brady* showed even less regard for Fulani's alleged injuries. The court first attempted to conflate Fulani's loss of political legitimacy from nonparticipation in the debates with her supposed frustration at the advancement of an adverse political agenda.<sup>131</sup> The latter injury would probably not have supported standing,<sup>132</sup> but

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126. See *Brady*, 935 F.2d at 1326-27. The court's strategies included an invocation of Justice Stewart's concurrence in *Simon*, 426 U.S. at 46, and its attempt to create a statutory bar to standing. See *infra* section II.C.

127. See *Brady*, 935 F.2d at 1327-28. Without providing any clear-cut analysis, the court suggested that competitor standing did not apply to third-party challenges to regulatory action. The court, again without firm analysis, argued that a plaintiff might only challenge the government's preferential tax treatment of a third party based upon the plaintiff's own unlawfully burdensome tax liability. It implied that the existence of case law supporting such direct tax challenges precluded Fulani's theory in the wholly distinct area of indirect injury from a third party's tax exemption. See 935 F.2d at 1328.

128. 935 F.2d at 1332-33 (Mikva, C.J., dissenting) (referring to "[t]he majority's failure to come to terms with Fulani's injury"). See *infra* section II.B.2.

129. See *League*, 882 F.2d at 630 (Cardamone, J., concurring).

130. 882 F.2d at 632 (Cardamone, J., concurring).

131. See *Fulani v. Brady*, 729 F. Supp. 158, 161 (D.D.C. 1990).

132. See, e.g., *Allen v. Wright*, 468 U.S. 737, 755-56 (1984) (denying standing where Court

it bore no relationship to the denial of political legitimacy which Fulani had actually alleged. The court rejected "any notion that Fulani has suffered a cognizable injury based upon any alleged lack of recognition or diminution of her political stature," judging itself incapable of analyzing such concepts.<sup>133</sup> This sweeping dismissal shortchanged Fulani's injuries so dramatically that the court could deny traceability and redressability with deceptive ease. Indeed, the court admitted that its injury analysis laid the groundwork for its causation discussion,<sup>134</sup> and it actually spent the latter half of its purported injury analysis attacking Fulani's causation theories.<sup>135</sup>

The implausibility of these prior attempts to understate Fulani's alleged injuries clearly weakened the credibility of the Second Circuit concurrence's and the district court's attendant traceability and redressability analyses. The D.C. Circuit cleverly dodged the same trap, but its almost total failure to analyze Fulani's injury betrayed its strategy. If the court had recognized the breadth and depth of the injuries alleged, as had the Second Circuit, the plausibility of denying those injuries' traceability to the challenged conduct and their redressability through the requested relief would have severely diminished.

## B. *Traceability and Redressability*

### 1. *The Second Circuit Analysis*

The Second Circuit concluded that it could fairly trace Fulani's injuries to the League's tax exemption. The court explicitly rejected the notion that Fulani's injuries "derive[d] solely from the fact that she ultimately failed to win the presidency in 1988," emphasizing defendants' "allegedly partisan restriction of her opportunities to communicate her political ideas to the voting public at large."<sup>136</sup> The court traced this broad injury to Fulani's exclusion from the debates. Because of the regulatory requirement that debate sponsors be tax exempt,<sup>137</sup> the tax exemption that the government granted to the League caused the exclusion.

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found that plaintiffs' claims rested on objections to racial stigmatization but challenged conduct had not harmed plaintiffs themselves).

133. *Brady*, 729 F. Supp. at 162. The court proceeded to downplay Fulani's claim because, in its estimation, the major-party candidates prior to the debates already had the "realistic chance of winning the election and . . . competitive advantage" which Fulani sought. 729 F. Supp. at 162. Aside from this argument's circularity — denial of previous media exposure could not injure Fulani's political legitimacy because her lack of media exposure had prevented her from gaining political legitimacy — it presumes the very sort of analytic insight into the nature of political legitimacy which the court had just abjured.

134. *See* 729 F. Supp. at 162.

135. *See* 729 F. Supp. at 162-63 & n.8. The court denied the value of televised debates for competitive advantage and stressed the possible behavior which various parties might use to circumvent the requested relief, all within its purported injury-in-fact analysis.

136. *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 627 (2d Cir. 1989).

137. *See* 882 F.2d at 627-28.

In discussing traceability, the court compared Fulani's claims to the situation in *Common Cause v. Bolger*.<sup>138</sup> In that case, candidates and prospective candidates for Congress challenged portions of the Congressional franking statute which subsidized incumbents' political mailings. They claimed injuries to their ability to compete politically, alleging that the statute illegally aided reelection of incumbents.<sup>139</sup> The district court denied the defendants' motion to dismiss for lack of standing, ruling *inter alia* that plaintiffs' alleged injuries were directly traceable to the statute's operation.<sup>140</sup>

The Second Circuit found *Bolger* strikingly similar to the circumstances in *League*. The court stressed the earlier decision's expansive view of candidates' interests arising out of elections.<sup>141</sup> *Bolger* also paralleled the degree of attenuation between Fulani's injuries and the conduct she challenged; the court rejected defendants' invocations of cases involving more attenuated injuries.<sup>142</sup> Like Fulani, the plaintiffs in *Bolger* had actually competed, or clearly intended to compete imminently, in the election which gave rise to their challenge and had explained the particular mechanism by which the challenged government action had injured their ability to compete.<sup>143</sup>

The Second Circuit found no impediment to traceability in the high Court's admonition that an injury does not fail the traceability test merely because it is indirect.<sup>144</sup> The court correctly concluded that the decisions in *Allen* and *Simon* had not precluded finding traceability for a third-party tax-status challenge. Those cases had merely confirmed the requirement of a "nexus" between the challenged conduct and the alleged injury; the court found that the FEC regulation mandating tax-exempt debate sponsors created just such a nexus in *League*.<sup>145</sup> The *Brady* dissent extended this analysis, distinguishing both *Allen* and *Simon*. *Allen*, the dissent said, had involved unpredictable decisions of multiple third parties with critical impacts on plaintiffs' alleged injuries. In *Simon*, the plaintiffs' injuries might arguably have arisen without the challenged revenue ruling.<sup>146</sup> The tax exemption which Fulani challenged, in contrast, directly caused the injuries arising out of her exclusion from the debates.<sup>147</sup>

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138. 512 F. Supp. 26 (D.D.C. 1980), *affid.*, 461 U.S. 911 (1983).

139. 512 F. Supp. at 28. Plaintiffs' claims rested on underlying First and Fifth Amendment injuries.

140. 512 F. Supp. at 30-31.

141. *League*, 882 F.2d at 627.

142. 882 F.2d at 627.

143. *See Bolger*, 512 F. Supp. at 28.

144. *League*, 882 F.2d at 627; *see supra* notes 86-87 and accompanying text.

145. 882 F.2d at 627-28. For a discussion of the significance of federal cases denying standing for third-party tax-status challenges, *see supra* notes 92-99 and accompanying text.

146. *See Fulani v. Brady*, 935 F.2d 1324, 1334 (D.C. Cir. 1991) (Mikva, C.J., dissenting).

147. *See League*, 882 F.2d at 627-28. Fulani claimed only injuries which arose directly out



The Second Circuit used a similar analysis to conclude that the requested relief could adequately redress Fulani's injuries. Because revocation of the League's tax exemption would prevent the League's sponsorship of the debates, revocation would also prevent Fulani's injuries.<sup>148</sup> The court rejected the proposition that it had to repair all inequities in competition among the candidates in order successfully to redress Fulani's injuries: "a substantial likelihood that the relief requested will have a substantial ameliorative effect on the specific injury alleged" would suffice.<sup>149</sup> The D.C. Circuit dissent in *Brady* bolsters the Second Circuit's persuasive redressability arguments. Responding to the majority's speculation about the behavior of particular "intervening actors,"<sup>150</sup> the dissent concluded that redress of Fulani's injuries did not require the court to guarantee Fulani some set quantity of media exposure but simply to prevent "the prejudice to her candidacy that would inevitably result from a one-on-one debate between [the] rival candidates."<sup>151</sup>

The two causation prongs, traceability and redressability, might seem to pose the greatest challenge to standing, simply because they require arguments about degrees of causal attenuation that cannot produce absolute answers. This difficulty appears especially acute in the redressability inquiry, which seeks to determine the concreteness of the requested relief. But the traceability and redressability inquiries necessarily merge in cases such as these, where plaintiffs allege future injuries from challenged agency actions<sup>152</sup> and request mere cessation of illegal conduct.<sup>153</sup> Fulani's injuries satisfy both requirements.

## 2. The D.C. Circuit Analysis

The D.C. Circuit held that Fulani's injuries failed the traceability and redressability tests. The court's central theory was that, in a third-party tax-status challenge, "the exemption *likely* will not bear sufficient links of traceability and redressability to the alleged injury to warrant standing under *Allen* . . ."<sup>154</sup> Having thus revealed the un-

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of her debate exclusion, for which the League's tax-exempt status was a necessary condition. Her case therefore diverged starkly from *Simon*, in which plaintiffs had claimed injuries from hospitals' policies which they had not shown necessarily to have arisen out of the challenged government conduct. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976).

148. See 882 F.2d at 628.

149. 882 F.2d at 628 n.6 (citing *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984), and *Simon*, 426 U.S. at 45-46).

150. See *infra* section II.B.2.

151. *Brady*, 935 F.2d at 1335 (Mikva, C.J., dissenting).

152. See *supra* note 81 and accompanying text. The injuries that Fulani alleged, although already having occurred in the context of the 1988 primaries at the time of *League*, would presumably recur in the general election, as in fact they did; at the time of *Brady*, they would presumably recur in future election cycles.

153. See *supra* note 80 and accompanying text.

154. *Brady*, 935 F.2d at 1328 (emphasis added).

certain foundation of its argument, the court struggled to demonstrate that its narrow conception of Fulani's injuries bore an insufficient relationship to the CPD's tax exemption to support standing.

The court denied traceability and redressability because of the critical role played by intervening actors in the chain of causation. The court first examined the FEC regulation requiring tax exemption for debate sponsorship. While conceding that "CPD's tax exemption is a cause-in-fact of [Fulani's] injury,"<sup>155</sup> the court characterized the regulation as an intervening cause because it created the essential relationship between the tax status and the injury.<sup>156</sup> The court proposed that Fulani should have sought relief based upon the regulation itself, citing an attendant FEC regulation providing administrative review for "violation[s] of any statute or regulation over which the Commission has jurisdiction."<sup>157</sup> But Fulani had no cause to complain of any violation of section 110.13(a), because that regulation merely applied mechanically to her circumstances. Only the grant of tax exemption arguably involved an unlawful abuse of discretion, making that action the proper target for Fulani's challenge. Moreover, the D.C. Circuit suggested no administrative adjudication that could have encompassed Fulani's constitutional complaints.

Two other flaws mar the court's argument that the FEC regulation intervened between the debate sponsor's tax exemption and Fulani's alleged injuries. First, the regulation did not "intervene" in the fact pattern which culminated in Fulani's alleged injuries; rather, it existed as a concurrent condition for televised debates to take place. Second, to characterize federal regulations generally as "intervening causes" of injuries that actually result from actions they authorize would involve unreasonable speculation. The dissent attacked the court's argument on this basis, pointing out the absurd result that "the majority's approach would preclude *any* suit to force compliance with a statute or administrative regulation."<sup>158</sup>

The court next suggested that the debate sponsors and the major-party candidates intervened in the causal chain linking the grant of tax exemption to Fulani's injuries. It speculated that the CPD might decline to sponsor televised presidential debates if the government tried

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155. 935 F.2d at 1329. This significant concession undermines the court's conclusion. The Supreme Court has never gone so far as to suggest that an injury cannot be fairly traced to its cause-in-fact. Indeed, the Court has recognized that a showing of "but for" causation satisfies the traceability requirement. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 74-75 (1978).

156. 935 F.2d at 1329.

157. 11 C.F.R. § 111.4(a) (1990).

158. 935 F.2d at 1335 (Mikva, C.J., dissenting). The Supreme Court had previously rejected the argument that speculation about the hypothetical absence of a government enactment could defeat traceability. See *Duke Power*, 438 U.S. at 77-78 (holding that plaintiff did not have to answer defendant's speculation that plaintiff's injury might have happened even absent a challenged statute).

to affect its behavior by revoking its tax exemption, or that if the CPD altered its standards to include minor-party candidates, the major-party candidates might refuse to participate.<sup>159</sup> The court concluded that these possibilities defeated redressability because either would have prevented Fulani from improving her competitive position.<sup>160</sup> But this conclusion depends on the court's artificially restrictive conception of Fulani's injuries. Fully understood, her injuries included diminution of her roles as advocate and spoiler; even the results that the court hypothesized would have helped her in those capacities.<sup>161</sup>

In general, the court ignored the settled principle that indirectness of an injury does not necessarily preclude traceability and redressability.<sup>162</sup> None of the court's proposed "intervening causal actors" altered the fact that Fulani's alleged injuries could not have occurred without the government's grant of tax exemption to the CPD and that her position as a candidate would have improved were the exemption revoked.<sup>163</sup> The court might conceivably have contended that the degree of intervening causation rendered Fulani's causal chain too attenuated to support a finding of traceability, but its categorical argument that intervening actors necessarily broke the chain lacked merit.

Precedent helped neither the D.C. Circuit nor the Second Circuit concurrence in *League* to discredit Fulani's showings of traceability and redressability. The D.C. Circuit invoked *Warth v. Seldin*,<sup>164</sup> *Allen v. Wright*,<sup>165</sup> and *Simon v. Eastern Kentucky Welfare Rights Organization*<sup>166</sup> to support its assertion that "intervening actors" defeated causation. But the court merely recited each case's facts and pointed out that the Supreme Court had denied standing based upon causal deficiencies in all three.<sup>167</sup> It never defined any similarity between those cases' causal problems and Fulani's situation.<sup>168</sup> The Second Circuit

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159. 935 F.2d at 1329; see also *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 632 (2d Cir. 1989) (Cardamone, J., concurring).

160. 935 F.2d at 1329; (citing *League*, 882 F.2d at 632 (Cardamone, J., concurring)).

161. The court's arguments about the debate sponsors and major-party candidates suffer not only from deficient accounting of Fulani's injuries, but also from failure to acknowledge the critical role which debates play in creating the gap between major-party and minor-party candidates. Fulani would have certainly preferred no debates to the status quo, because debates confer legitimacy and provide exposure which are currently restricted to the major parties. See *infra* section III.C.2.

162. See *supra* notes 86-87 and accompanying text.

163. The *Brady* dissent stated that the court's categorical argument against causation based on the existence of intervening actors "is not, and has never been, the law." 935 F.2d at 1333 (Mikva, C.J., dissenting). The dissent concluded that the intervening forces discussed by the majority did not so attenuate Fulani's chain of causation as to preclude redress of her alleged injuries. 935 F.2d at 1334-35 (Mikva, C.J., dissenting).

164. 422 U.S. 490 (1975); see *Brady*, 935 F.2d at 1329-30.

165. 468 U.S. 737 (1984); see *Brady*, 935 F.2d at 1330.

166. 426 U.S. 26 (1976); see *Brady*, 935 F.2d at 1330.

167. See 935 F.2d at 1329-30.

168. The court merely characterized the causal deficiencies in *Simon* and *Allen* as involving

concurrence in *League* countered the majority's use of *Bolger* by invoking *Winpisinger v. Watson*,<sup>169</sup> in which the D.C. Circuit denied standing to a presidential candidate's supporters who challenged certain actions of the incumbent President that they alleged unlawfully aided his renomination.<sup>170</sup> But plaintiffs in *Winpisinger* had not themselves competed in the election at issue.<sup>171</sup> This factor clearly distinguishes *Winpisinger* from the *Fulani* cases, as the D.C. Circuit, which placed no weight on *Winpisinger*, apparently realized.

The Second Circuit concurrence in *League* offered two additional rationales for its conclusion that Fulani's injuries failed the causation tests. First, the concurrence contended that Fulani could not trace her injuries to the challenged conduct because she had not actually competed with the recipient of the challenged tax exemption.<sup>172</sup> This is an overly rigid argument: the Supreme Court's competitor standing cases have never suggested that an additional, clear causal link — in this case, the League's provision of legitimacy and publicity to the major party candidates — would adversely affect plaintiffs' traceability and redressability showings.<sup>173</sup> Second, the concurrence asserted that the challenged grant of tax exemption merely allowed rather than caused Fulani's alleged injuries.<sup>174</sup> This distinction lacks substance in light of

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"intervening factors." It failed to relate these factors to purported deficiencies in Fulani's case, instead rehashing its speculation about possible behaviors of the major-party candidates and the CPD. See 935 F.2d at 1330. The court undermined its reliance on *Simon* by conceding that "the CPD may sponsor the presidential debates only if it receives tax-exempt status from the IRS and is therefore not free, as were the hospitals in *Simon*, to continue its activities as a profit-funded organization." 935 F.2d at 1330.

The court implied that *Warth's* decision, denying standing despite some presumed causal effect of the challenged conduct on the alleged injury, supported a denial of standing for Fulani. See 935 F.2d at 1329. But the court erroneously attributed *Warth's* discounting of the presumed causation entirely to causal deficiencies; in fact, plaintiffs in *Warth* failed to show that the challenged conduct would have injured them personally. See *Warth*, 422 U.S. at 502-04.

169. 628 F.2d 133 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980).

170. 628 F.2d at 138-39. See *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 631 (2d Cir. 1989) (Cardamone, J., concurring).

171. See 628 F.2d at 138-39.

172. See *League*, 882 F.2d at 631 (Cardamone, J., concurring).

173. Judge Cardamone made the same argument for the Second Circuit majority in *In re United States Catholic Conference*, 885 F.2d 1020, 1029-30 (2d Cir. 1989), cert. denied sub nom. *Abortion Rights Mobilization, Inc. v. United States Catholic Conference*, 110 S. Ct. 1946 (1990). The distinction between the two cases demonstrates the argument's inapplicability to *League*. In *Catholic Conference*, the court denied standing for pro-choice advocates to challenge the tax-exempt status of the Catholic Church. Judge Cardamone rejected plaintiffs' competitor standing theory primarily because "by their own admission [plaintiffs] chose not to match the Church's alleged electioneering with their own." 885 F.2d at 1029. Thus *Catholic Conference* involved inadequate pleading of any relevant competitor status. The additional causal link in *League* — the indirect harm to Fulani through the comparatively advantageous debate exposure of the major-party candidates — presented no comparable obstacle to standing; Fulani was still in direct competition with the immediate instruments of her injury, the major parties. See *League*, 882 F.2d at 626. But see Jordana G. Schwartz, Note, *Standing to Challenge Tax-Exempt Status: The Second Circuit's Competitive Political Advocate Theory*, 58 *FORDHAM L. REV.* 723 (1990) (arguing that *League* and *Catholic Conference* are incompatible and should be reconciled).

174. *League*, 882 F.2d at 631 (Cardamone, J., concurring).

the sponsoring organization's need for tax exemption. Neither of the *League* concurrence's arguments thus overcomes Fulani's showings of traceability and redressability.

The D.C. Circuit's failure to present any principle or precedent opposed to finding causation in *Brady* confirms the Second Circuit's conclusions that Fulani could fairly trace her injuries to the debate sponsoring organization's tax exemption and that the court could redress those injuries by revoking the exemption. The D.C. Circuit could not draw Fulani's injuries narrowly enough to obscure their source in the challenged conduct; its attempt to drown out causation in a cacophony of "intervening actors" also failed. Fulani satisfied all three prongs of the constitutional test for standing in both *League* and *Brady*.

### C. Prudential Limitations

None of the *Fulani* decisions explicitly discussed possible prudential barriers to standing. Neither the majority nor the concurrence in the Second Circuit even hinted that a candidate's challenge to a debate sponsor's tax exemption might involve a generalized grievance, pleading of a third party's rights, or a zone of interests problem. But the D.C. Circuit implied that Fulani's injuries might fall outside the zone of interests of section 501(c)(3).<sup>175</sup> The court suggested that a provision of the Internal Revenue Code providing a remedy for entities aggrieved by section 501(c)(3) determinations<sup>176</sup> constitutes "apparent congressional intent" to forbid third-party challenges to tax exemptions.<sup>177</sup>

The suggestion lacks merit. The court hedged its claim, first calling the provision "inconsistent with, if not preclusive of, third party litigation of tax-exempt status"<sup>178</sup> but conceding that "the cited statute does not preclude expressly the possibility that a third party could

175. See *Fulani v. Brady*, 935 F.2d 1324, 1327 (D.C. Cir. 1991).

176. The provision states, in relevant part:

(a) Creation of remedy.

In a case of actual controversy involving —

(1) a determination by the Secretary —

(A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) . . . , or . . .

(2) a failure by the Secretary to make a determination with respect to an issue referred to in paragraph (1), upon the filing of an appropriate pleading, the United States Tax Court, the United States Claims Court, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification . . . .

(b) Limitations.

(1) Petitioner.

A pleading may be filed under this section only by the organization the qualification or classification of which is at issue.

26 U.S.C. § 7428 (1988).

177. 935 F.2d at 1327.

178. 935 F.2d at 1327.

file an action under some [other] statute or source of law. . . ."<sup>179</sup> In fact, the cited statute had nothing to do with third-party tax status challenges. The court triumphantly noted that the provision limits its remedy to would-be 501(c)(3) recipients. "[I]t certainly is telling," the court concluded, "that Congress thought it necessary to create a specific remedy for the adjudication of a [section] 501(c)(3) determination even on behalf of the one entity whose standing is least subject to challenge, and that Congress chose to limit the remedy to that entity."<sup>180</sup> But a simpler interpretation would conclude that Congress was simply not contemplating third-party challengers when it provided a remedy for applicants to challenge their own status. The court fallaciously conflated two qualitatively distinct types of challenges.<sup>181</sup>

Moreover, the court's statutory digression ignored the irrelevance of the zone of interests requirement to third-party tax-status challenges.<sup>182</sup> The dissent pointed out this error, stressing that the zone of interests test has no role in determining standing to raise constitutional claims.<sup>183</sup> The major cases denying standing for third-party tax-status challenges have never invoked the zone of interests requirement.<sup>184</sup>

Only the broad caution about intruding upon functions of the other branches of government might appear relevant to Fulani's claims.<sup>185</sup> Although the D.C. Circuit did not raise this objection to standing, the Second Circuit concurrence argued that granting Fulani standing would compel the court "to tell the executive branch whom it should prosecute for tax violations; in essence, advise it how it should implement the laws."<sup>186</sup> Besides wrongly implying that redressing Fulani's claims would have involved a prosecution, the concurrence's objection miscalculated the impact of granting her standing on separation of powers grounds. Fulani's third-party strategy avoided the sort of direct challenge to Presidential authority which rightly con-

179. 935 F.2d at 1327. The court slid even further off its position by explicitly admitting that it might grant standing for this type of action: "[I]f we were to find that a case does exist in which one party can litigate properly the tax exemption of another, it would have to be something far removed from the norm." 935 F.2d at 1327. The court failed to define "the norm" or explain how an acceptable case would have to deviate from it.

180. 935 F.2d at 1327.

181. The language of § 7428 itself supports this distinction. The statute provides only for declaratory relief, not for the injunctive relief which was central to redress of Fulani's alleged injuries. 26 U.S.C. § 7428(a) (1988).

182. See *supra* notes 110-12 and accompanying text.

183. 935 F.2d at 1335-36 (Mikva, C.J., dissenting).

184. Courts have generally rejected these challenges based upon insufficient showings of traceability or redressability. See *supra* notes 92-99 and accompanying text.

185. See *supra* note 109 and accompanying text.

186. *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 631 (2d Cir. 1989) (Cardamone, J., concurring).

cerns courts.<sup>187</sup> More broadly, Fulani did not raise technical aspects of taxation about which the executive boasts clear expertise but broad issues of social policy perfectly amenable to judicial resolution.<sup>188</sup> Even under *Allen*, Fulani's claims did not raise federalism concerns significant enough to justify denying standing.

The Second Circuit properly granted Lenora Fulani standing to challenge the tax exemption of the organization which excluded her from its televised presidential debates. Analysis of the Supreme Court's constitutional and prudential standing tests as the Second and D.C. Circuits applied them to Fulani's claims permits no other conclusion. In order to deny standing to a plaintiff like Fulani, a court must make at least one of three critical errors: underestimation of plaintiff's injuries; overemphasis of the importance of intervening parties; or errant application of prudential limitations. The D.C. Circuit made all three errors and reached the wrong result.

Strictly legal analysis is not the only path to the conclusion that minor-party candidates should have standing to challenge debate sponsors' tax exemptions. Political scientists' theories and observations about elections provide an alternative basis for standing which none of the *Fulani* decisions explore. Part III of this Note undertakes such an exploration.

### III. POLITICAL SCIENCE PERSPECTIVES

This Part argues that political scientists' findings about minor-party candidates' roles in the American electoral system bolster the Second Circuit's justifications for its decision to find standing, particularly on the causation prongs, and help to justify candidate standing to challenge debate sponsors' tax status in their own right. Section III.A suggests that the Supreme Court's current standing jurisprudence leaves standing analysis open to considerations of normative policy. Section III.B advances the widely accepted theory that the basic structure of American elections cripples minor-party candidacies and argues that this reality compels recourse to the courts for minor-party candidates. Section III.C contends that the mass media's importance to successful political campaigns makes inclusion in televised debates a logical target for minor parties' court challenges. Section III.D contends that even unsuccessful minor-party candidacies offer society significant benefits and concludes that public-benefit theories of standing may justify standing to vindicate minor-party candidates' interests.

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187. Cf. *Winpisinger v. Watson*, 628 F.2d 133, 139-41 (D.C. Cir.) (partially attributing denial of standing to intrusion upon functions of executive branch which requested relief would have forced), *cert. denied*, 446 U.S. 929 (1980).

188. See Robert E. Atkinson, Jr., *Third Parties' Tax Exempt Status Can Be Challenged According to New Decisions*, 63 J. TAXN. 166, 169 (1985) ("Determining what kinds of activities and purposes promote the common benefit of society and are thus to be recognized as charitable is traditionally the province of the courts of equity.").

These arguments support Part II's conclusion that courts should hear minor-party candidates' challenges to debate sponsors' tax status.

A. *Lack of Clarity and Principle in the Supreme Court's Current Standing Doctrine*

Uncertain sources and inconsistent results mark the jurisprudence of standing. Lower courts and commentators regularly complain that the Court's standing doctrines offer "less than pellucid"<sup>189</sup> guidance. From the uncertain demands of traceability and redressability to the slippery distinction between individualized injuries-in-fact on one hand and generalized grievances on the other, the Court's standing tests leave a wide range of fact situations open to contrary results.

Scholars have repeatedly suggested that the Supreme Court uses its muddy jurisprudence of standing to mold results with an eye to the merits of particular claims.<sup>190</sup> A core axiom of standing analysis is that courts must determine standing apart from the merits.<sup>191</sup> But the suspicion that the Supreme Court considers the merits in its standing decisions has become so ubiquitous that one commentator has explicitly urged the Court to reconceive standing as a question on the merits.<sup>192</sup>

The Court's clearest injection of an extraneous consideration into its purportedly principled standing analysis has been its elevation of "separation of powers principles"<sup>193</sup> to the pinnacle of standing jurisprudence. Separation of powers concerns arguably have an appropriate function in standing determinations as the source of the prudential

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189. *Dellums v. Nuclear Regulatory Commn.*, 863 F.2d 968, 971 (D.C. Cir. 1988); *see also* Doernberg, *supra* note 44, at 92; Fletcher, *supra* note 42, at 243; Winter, *supra* note 26, at 1373. *But cf.* Floyd, *supra* note 42, at 869, arguing that the Burger Court did much to clarify standing doctrine, particularly in *Warth*.

190. *See* Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1715 n.72 (1980) (Court's concept of standing "prone to manipulation and incoherence"); Nichol, *Abusing Standing*, *supra* note 40, at 637 (claiming that standing tests have been "raised or lowered to accommodate the various dictates of federalism, separation of powers, equitable restraint, and the appeal of particular claims on their merits"); Nichol, *Rethinking Standing*, *supra* note 40, at 78 ("Perhaps most often, the standing inquiry is a veiled reflection of the Court's view of the attractiveness of the litigant's case on the merits." (footnote omitted)); *see also* Doernberg, *supra* note 44, at 95 (citing repeated, categorical inconsistencies); Winter, *supra* note 26, at 1470 (pointing to *Simon* as a decision on the merits). Some commentators, while acknowledging a dearth of principle in the Court's development of standing doctrine, have tried to explain the phenomenon with other theories. *See id.* at 1373-74 (attempting to explain inconsistencies of Court's standing jurisprudence by human cognition theories); Fletcher, *supra* note 42, at 243 (acknowledging Court's "lawlessness" in applying traceability and redressability requirements, but arguing that seriousness of charge depends on nature of specific statutes or clauses at issue in particular cases). Although these ideas raise interesting possibilities, they remain consistent with the broad view that the Court has subjectively misapplied standing doctrines.

191. *See, e.g.* *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

192. *See* Fletcher, *supra* note 42, at 223, 234-35.

193. *Allen v. Wright*, 468 U.S. 737, 761 n.26 (1984).



limitations.<sup>194</sup> But in *Allen v. Wright*,<sup>195</sup> the Court invoked separation of powers to support its pivotal finding that the injuries which parents of students of color alleged were not traceable to the government's failure to deny tax exemptions to racially discriminatory private schools.<sup>196</sup> After purporting to explain the absence of traceability with conventional causation analysis,<sup>197</sup> the Court turned to federalism analysis, upon which it also claimed to base its traceability decision.<sup>198</sup>

Justice Stevens, dissenting in *Allen*, sharply criticized the majority's separation of powers alchemy, noting that the Court had provided no basis for lower courts to apply its new reasoning<sup>199</sup> and hinting that the Court had developed a back door approach to the merits.<sup>200</sup> Commentators have made the latter charge explicit, attacking the separation of powers approach to causation as unprincipled.<sup>201</sup> Commentators have also pointed out the fundamental irrelevance of separation of powers concerns to traceability and to the mechanics of constitutional standing as a whole.<sup>202</sup> Finally, they have criticized the Court's invocation of federalism on its own terms, arguing that federal courts should take responsibility for giving citizens opportunities to

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194. See *Warth v. Seldin*, 422 U.S. 490, 500 (1975); see also *Winpisinger v. Watson*, 628 F.2d 133, 141 (D.C. Cir. 1980) (invoking separation of powers to support prudential denial of standing), *cert. denied*, 446 U.S. 929 (1980); Nichol, *Abusing Standing*, *supra* note 40, at 657 (exhorting Court to solve legitimate separation of powers problems under appropriate doctrines rather than wrongly addressing them under standing analysis).

195. 468 U.S. 737 (1984).

196. See *Allen*, 468 U.S. at 759-61 & n.26. This tendency had found its way into previous decisions, see Nichol, *Rethinking Standing*, *supra* note 40, at 78, but had never emerged as a dominant factor in standing analysis.

197. See 468 U.S. at 756-59.

198. The Court said, in part:

The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury "fairly can be traced to the challenged action" of the IRS. That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations.

468 U.S. at 759 (citation omitted). This explanation carries echoes of both the prudential bar against standing to air generalized grievances and of sovereign immunity principles. Its relationship to the problem of causation is less obvious.

199. 468 U.S. at 792 n.10 (Stevens, J., dissenting).

200. 468 U.S. at 790-92 (Stevens, J., dissenting) (suggesting that the Court's approach involves "the justiciability of the issues that respondents seek to raise").

201. See, e.g., Nichol, *Abusing Standing*, *supra* note 40, at 641, 657-58.

202. See *id.* at 645-49 (arguing vigorously that "standing is not a separation of powers doctrine"); Sunstein, *supra* note 75, at 1469 (Court's views on separation of powers "are quite distinct from notions of causation"); cf. Floyd, *supra* note 42, at 891 (advocating separation of powers as central factor in standing analysis based on zone of interests approach). While Professor Floyd approves of a focus on separation of powers in standing, the fact that he does so in the context of advocating a zone of interests approach validates the other commentators' objections. Separation of powers has always played a key role in the prudential standing limitations on which Floyd, unlike Professors Nichol and Sunstein, would refocus standing analysis. See *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). Floyd makes no case for concentrating the constitutional analysis which the Court currently purports to follow on separation of powers concerns.

challenge allegedly illegal agency acts.<sup>203</sup>

The question whether a minor-party presidential candidate can challenge a debate sponsor's tax exemption, like any question of standing, requires analysis under the Supreme Court's doctrines. But the Court has rendered those doctrines ultimately doubtful enough to open standing questions to more broad-based inquiry. Indeed, the Court's imposition of separation of powers concerns invites an examination of the public interests involved in standing questions, assuming that standing gives plaintiffs an opportunity to prevail on the merits. Such an examination benefits standing analyses by offering an alternative to the Court's policy priorities and by countering the Court's disregard for the serious public concerns inherent in standing battles.

### B. *Systematic Barriers to Minor-Party Candidacies*

The two-party system has become a reality of U.S. presidential politics.<sup>204</sup> This situation has not developed through the unchecked flow of natural political passions. Rather, the political system of the United States has instituted a battery of legal and structural barriers to significant minor-party participation in presidential elections.

The system the United States uses to choose the President and members of Congress, which political scientists call "plurality voting,"<sup>205</sup> provides the most pervasive impediment to minor-party candidacies in national elections.<sup>206</sup> U.S. elections reward candidates who receive the most votes in each individual contest, unlike European-style parliamentary systems, which apportion seats among all parties surpassing a certain threshold. According to political thinker Maurice Duverger, plurality voting tends to create and maintain two-party systems.<sup>207</sup> The mechanism is simple: candidates enter elections to win, the Constitution defines winning as securing a plurality of votes on a single ballot, and the resultant need to maximize votes fosters a system

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203. See Sunstein, *supra* note 75, at 1472; Doernberg, *supra* note 44, at 99-102.

204. Since 1924, only five minor-party candidates have made significant dents in the major parties' dominance of the popular vote: Henry Wallace and Strom Thurmond in 1948; Harry F. Byrd in 1960; George Wallace in 1968; and John Anderson in 1980. Only three, Thurmond, Byrd, and George Wallace, won any electoral votes, all in the South and largely through racist appeals. None of the five came close to winning the presidency. See SMALLWOOD, *supra* note 1, at 21-23.

205. See, e.g., William H. Riker, *Duverger's Law Revisited*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 19, 19 (Bernard Grofman & Arend Lijphart eds., 1986).

206. This Note often refers to "national elections," which include congressional as well as presidential elections. For purposes of this discussion, the differences between the two types of elections are often minimal: each depends upon a constituency's popular votes, federal election laws and norms govern both, and the major parties have generally dominated both. Where differences become important, as for example in considering state ballot access problems for presidential candidates, this Note will specify the election to which it refers.

207. See Maurice Duverger, *Duverger's Law: Forty Years Later*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES, *supra* note 205, at 69, 69.

with the minimum number of competitors.<sup>208</sup> This process discourages minor-party candidacies by encouraging candidates to build coalitions before elections; the electorate's multiplicity of views thus collapses around two poles, each rather close the center, instead of finding expression in a multiplicity of parties and candidates.<sup>209</sup>

Several factors exacerbate this process in contemporary presidential elections. First, the expense and complexity of building a nationwide plurality prevents minor parties from competing fully with the better-endowed major parties.<sup>210</sup> Second, the electoral college system<sup>211</sup> minimizes third parties' chances by ignoring their showings in states where they do not win pluralities, thereby hampering minor parties' influence as nationwide "spoilers."<sup>212</sup> Most importantly, primary elections and other intraparty nominating contests preempt minor parties by enveloping multifarious ideological conflicts in intraparty frameworks and dispensing with those conflicts before the general election.<sup>213</sup> Primaries also give the major parties control over access to the political stage because the major parties, through state governments, set the rules governing eligibility for primaries.<sup>214</sup> Primaries and other intraparty nominating contests, although extraconstitutional components of national elections, have become as much fixtures of those elections as the electoral college.

The federal and some state governments have created other provisions outside the Constitution's basic dictates to prevent or discourage minor-party participation in presidential elections. The Federal Elec-

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208. See Riker, *supra* note 205, at 21. Riker slightly amends Duverger's law by including exceptions for countries in which national third parties retain continuous influence as local second parties and where one party among several is a consistent plurality winner. *Id.* at 32. Neither of these exceptions affects the law's application to the United States.

209. See *id.* at 21. Riker contrasts this pattern with events occurring under electoral systems which allocate representation proportionally and those which require a runoff vote in the absence of a simple majority. Because neither of these systems requires candidates to maximize votes at the initial stage, neither fosters a two-party system. *Id.* European parliamentary nations provide evidence of the difference in proportional systems. Runoff systems persist in some American states' election systems.

210. See SMALLWOOD, *supra* note 1, at 11. Smallwood argues that this difficulty has accounted for the regional limitations of most of the important minor-party movements in U.S. history.

211. See U.S. CONST. art. II, § 1, cl. 2.

212. See STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE* 17 (1984). The electoral college has contributed to regional minor parties' greater historical success relative to national minor parties. *Id.* See also William H. Flanigan & Nancy H. Zingale, *United States*, in *ELECTORAL CHANGE IN WESTERN DEMOCRACIES: PATTERNS AND SOURCES OF ELECTORAL VOLATILITY* 23, 26 (Ivor Crewe & David Denver eds., 1985).

213. See Peter F. Galderisi & Benjamin Ginsberg, *Primary Elections and the Evanesence of Third Party Activity in the United States*, in *DO ELECTIONS MATTER?* 115, 127-28 (Benjamin Ginsberg & Alan Stone eds., 1986). Galderisi and Ginsberg's study deals only with primary contests, but their analysis applies with equal force to district caucuses and other intraparty nominating contests that winnow often large fields of hopefuls down to a single candidate.

214. See *id.* at 121-22.

tion Campaign Act Amendments of 1974<sup>215</sup> discriminate against minor-party candidates by providing the major-party presidential candidates with tens of millions of dollars in preelection subsidies and opening large areas of election conduct to unlimited spending by state and local major-party committees; minor parties can receive public funds only after passing certain performance thresholds in national elections.<sup>216</sup> This discriminatory public financing framework exacerbates minor parties' inherent fundraising disadvantage.<sup>217</sup>

Even more invidious have been some states' discriminatory restrictions on ballot access for minor parties. Major parties in many states have manipulated state laws to require early filing deadlines, demand prohibitive numbers of petition signatures in order for minor-party candidates to appear on state ballots, or restrict general election access for candidates who lost primaries.<sup>218</sup> The Supreme Court has intervened in this arena, striking down a state's early filing deadline for independent presidential candidates on equal protection grounds.<sup>219</sup>

Beyond their direct deleterious effects on minor-party candidacies, these structural barriers discourage voters from supporting minor-party candidates. Put succinctly, "Third party candidates also do poorly because most people think they will do poorly. The prophecy that a candidate cannot win is self-fulfilling . . ."<sup>220</sup> Political scientists have dubbed constituent behavior in a regime hostile to minor parties "sophisticated voting."<sup>221</sup> According to this straightforward theory, "the voter takes account of anticipated votes by others and then votes so as to bring about the best *realizable* outcome for himself. . ."<sup>222</sup> Thus voters who actually prefer a minor-party candidate may nonetheless choose the less offensive major-party candidate out of fear that their votes would be wasted on their first choice.<sup>223</sup> This

215. Pub. L. No. 93-443, 88 Stat. 1263 (1974). Congress added these amendments to the Federal Election Campaign Act of 1971, 2 U.S.C.A. §§ 441a-455 (1991).

216. See ROSENSTONE ET AL., *supra* note 212, at 25-26. The authors characterize FECA as "a major party protection act," pointing out that only seven percent of the multistate minor-party presidential candidates to emerge since 1840 would have qualified for FECA's retroactive public financing. *Id.* at 25-27.

217. See SMALLWOOD, *supra* note 1, at 11.

218. See *id.* at 10; ROSENSTONE ET AL., *supra* note 212, at 19-24.

219. See *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The Court rejected the state's argument that its early deadline provided for equal treatment of all candidates by requiring major-party candidates to file for their parties' primaries by the same date when minor-party candidates had to file for the general election; the Court stressed that the burdens which the two requirements placed on parties differed greatly. 460 U.S. at 799-801. The Court also disdained the state's asserted interest in "political stability" as an impermissible "desire to protect existing political parties from competition." 460 U.S. at 801.

220. ROSENSTONE ET AL., *supra* note 212, at 39.

221. See, e.g., Riker, *supra* note 205, at 33-35.

222. *Id.* at 34.

223. See SMALLWOOD, *supra* note 1, at 9; BRUCE I. NEWMAN & JAGDISH N. SHETH, A THEORY OF POLITICAL CHOICE BEHAVIOR 40 (1987).

structural obstacle may hinder minor-party female candidates and candidates of color, members of groups often marginalized out of the major parties, who must overcome significant popular prejudices as well as "sophisticated" biases against minor parties.<sup>224</sup>

These structural provisions present a formidable barrier to minor-party presidential candidacies. Together they comprise an electoral obstacle course. This situation generates arguments both for and against standing for minor-party candidates to challenge debate sponsors' tax exemptions. If exclusion of minor-party candidates was a critical and deliberate motivation behind the constitutional barriers, then such parties are justly doomed to failure. Subsequent structural barriers to minor-party candidacies, the argument goes, are as legitimate as they are formidable and therefore weigh strongly against a judicial forum for a deservedly futile insurgency against the system. If, on the other hand, barriers to minor-party candidates are an unintended and undesirable side effect of the Constitution's electoral framework, then those barriers should not discourage adjudication of minor-party candidates' rights. To the contrary, courts should maximize those rights within proper constitutional boundaries; challenges to the tax exemptions of debate sponsors may provide them an excellent vehicle.

The guiding precepts of American democracy do not foreclose minor-party success. The Constitution did not establish a two-party system; the political system realigned repeatedly during the years following independence. Structural barriers to minor parties have changed over time; the lower they are, the likelier are minor-party candidates to succeed.<sup>225</sup> Political scientists have suggested that partisan realignments, in the natural course of American political events, might lead to greater success for minor parties.<sup>226</sup> Within constitutional limits, we should let nature take its course. Structural barriers to minor-party electoral participation should encourage judicial attention to minor parties' grievances.

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224. See generally JUDITH S. TRENT & ROBERT V. FRIEDENBERG, *POLITICAL CAMPAIGN COMMUNICATION: PRINCIPLES AND PRACTICES* 113-17 (1983) (discussing barriers that public perception presents to female candidacies); SMALLWOOD, *supra* note 1, at 25 (discussing difficulties that minority groups face in entering the political arena).

225. See ROSENSTONE ET AL., *supra* note 212, at 148-49.

226. See Flanigan & Zingale, *supra* note 212, at 23-24; see also David W. Brady & Joseph Stewart, Jr., *When Elections Really Matter: Realignment and Changes in Public Policy*, in *DO ELECTIONS MATTER?*, *supra* note 213, at 19 (arguing that occasionally elections effect political realignments with important policy consequences). Beyond the possibility of particular partisan realignments, the United States has experienced a general decline in partisanship as the decisive factor in voters' choices of candidates, with personalities and ideology making increasingly greater impressions. See KRAUS, *supra* note 5, at 7-8, 17. See generally NEWMAN & SHETH, *supra* note 223, at 31, 35 (summarizing and confirming growing importance of ideological issues and personalities over partisan preferences).

### C. *The Importance of Television Exposure*

#### 1. *Television Exposure in General*

In contemporary elections for national office, candidates cannot communicate directly with all voters about all of the concerns which animate campaigns. The issues have become too complex and varied, the electorate too divided. In this climate, "[m]ass communication has become the center stage for all major political events."<sup>227</sup> The mass media, most importantly television,<sup>228</sup> have come to dominate many critical processes in elections, including setting agendas, legitimating candidates, and determining candidates' public images.

Over the past three decades political theorists have argued convincingly that the media play an increasingly critical if often unfocused role in determining which issues achieve prominence in campaigns.<sup>229</sup> News outlets' decisions about which issues to stress dictate voters' priorities in analyzing candidates; in one political scientist's words, the media "is stunningly successful in telling its readers what to think about."<sup>230</sup>

This role has gained force as television has become the major source of the information which voters consider.<sup>231</sup> Although television has generally aided major-party candidates, its agenda-setting function holds great potential for minor-party candidates. First, minor-party candidates often run primarily to place unpopular views on the public policy map. Second, ideology and personality, the candidate characteristics which television communicates most successfully,

227. TRENT & FRIEDENBERG, *supra* note 224, at 124; *see also* F. CHRISTOPHER ARTERTON, *MEDIA POLITICS I* (1984) (stating that "[n]ewspapers, radio, newsweeklies, and television have become the major sources of information about election campaigns for most U.S. citizens").

228. *See generally* ARTERTON, *supra* note 227, at 1; KRAUS, *supra* note 5, at 7-27. Professor Kraus stresses that "the relationship between television and the voter" has elevated television to its pinnacle of electoral influence. *Id.* at 19.

229. *See, e.g.* TRENT & FRIEDENBERG, *supra* note 224, at 145-48. Professors Trent and Friedenbergh identify the focus on agenda-setting as one of several, not necessarily exclusive, models of the media's role in campaigns. While conceding that the media's role in agenda-setting has varied too widely in different circumstances to generate a universal axiom, the authors assert that continuing research on agenda-setting effects bodes well for the model's acceptance. *Id.* at 148; *see also* THOMAS E. PATTERSON, *THE MASS MEDIA ELECTION: HOW AMERICANS CHOOSE THEIR PRESIDENT 95-105* (1980).

230. BERNARD C. COHEN, *THE PRESS AND FOREIGN POLICY 13* (1963), *quoted in* TRENT & FRIEDENBERG, *supra* note 224 at 146; *see also* ARTERTON, *supra* note 227, at 13-14. Professor Arterton notes that "[j]ournalists . . . retain ultimate control over what is disseminated as the news of the day," *id.* at 13, and argues that journalists may choose to intrude on the electoral process rather than allow candidates to manipulate the contents of their stories. This argument affirms both the influence of candidates' media strategies and the ultimate power of media outlets themselves.

231. *See* KRAUS, *supra* note 5, at 17. Professor Kraus stresses that television makes a powerful impact on voters because it communicates "not by mere transmission alone, but by a series of condensed statements about issues; by the camera closeups of . . . candidates, and their nonverbal cues that elicit emotional responses in voters; and by the rehashing and reassessing of candidates' television performances by commentators." *Id.* (footnotes omitted).

are the same factors that have eroded American voters' traditional partisan affiliations.<sup>232</sup> Finally, television undermines parties' authority in the presidential candidate selection process by giving candidates a direct line of communication with voters.<sup>233</sup>

Even more potentially valuable to minor-party candidates is the mass media's prominent role in familiarizing candidates to the voters.<sup>234</sup> Although this process continues throughout an election, the media exert especially strong influence during the "surfacing period," when some candidates achieve the status of serious contenders by obtaining greater visibility than their opponents.<sup>235</sup> Unfortunately for minor-party candidates, however, "there is a huge disparity between the amount of coverage the media give minor parties and the attention they devote to the Democrats and Republicans."<sup>236</sup> Discussing John Anderson's 1980 independent campaign, probably the most widely covered minor-party presidential candidacy in the past two decades, Professors Rosenstone, Behr, and Lazarus explain that the media initially praised Anderson's maverick effort but eventually turned against him when they decided that he could not win.<sup>237</sup> The lesson, say the authors, is that "the media can affect voters' perceptions by concentrating on who will win instead of what the candidates are saying. The de facto result benefits the major parties."<sup>238</sup> This result obviously disadvantages minor-party candidates like Fulani, who may have significant goals short of victory.

The media perform a related important function in giving candidates access to voters and allowing them to shape their images and messages to the circumstances of elections. Use of the mass media has become candidates' most efficient means of communicating with vot-

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232. See KRAUS, *supra* note 5, at 18; Robert G. Meadow & Marilyn Jackson-Beeck, *A Comparative Perspective on Presidential Debates: Issue Evolution in 1960 and 1976*, in *THE PRESIDENTIAL DEBATES: MEDIA, ELECTORAL, AND POLICY PERSPECTIVES* 33, 57 (George F. Bishop et al. eds., 1978) [hereinafter *THE PRESIDENTIAL DEBATES*] (concluding that "the course of modern-day politics may be embodied more than before in the candidates as individuals").

233. See KRAUS, *supra* note 5, at 9; see also ARTERTON, *supra* note 227, at 9. Professor Arterton makes the further important point that partisanship has little importance in intraparty nominating processes; media projections thus become extraordinarily important during primary elections. *Id.* at 3.

234. See ROSENSTONE ET AL., *supra* note 212, at 33-35; PATTERSON, *supra* note 229, at 107-17.

235. See TRENT & FRIEDENBERG, *supra* note 224, at 32.

236. See ROSENSTONE ET AL., *supra* note 212, at 33. "In 1980 the leading newspapers and weekly news magazines gave Reagan and Carter about ten times more coverage than all eleven third party and independent candidates combined." *Id.* at 33 (footnote omitted; emphasis in original).

237. See *id.* at 33-34.

238. *Id.* at 34. The mass media largely determine voters' perceptions of candidates' chances of victory. See PATTERSON, *supra* note 229, at 119. An argument exists that the "horse race" is the natural and proper focus of campaign coverage. See Richard F. Carter, *A Very Peculiar Horse Race*, in *THE PRESIDENTIAL DEBATES*, *supra* note 232, at 3, 7 (1978). See generally ARTERTON, *supra* note 227, at 143-92.

ers.<sup>239</sup> Television in particular gives candidates and their "handlers" unparalleled control over the selection and presentation of imagery that they want the public to associate with the candidate.<sup>240</sup> Of course, mass media also provide candidates with a rich opportunity to associate negative imagery with their opponents.<sup>241</sup> Political scientists have consistently found the public's perception of a candidate's image to be a more important factor in voting decisions than party identification.<sup>242</sup> In short, "[v]oters depend on the mass media for their access to a presidential campaign."<sup>243</sup>

## 2. Televised Debates

Televised debates stand among the most important media spectacles in American presidential elections. In one political scientist's words, "[t]elevised presidential debates may be unparalleled in modern campaigning as an innovation that engages citizens in the political process by building large audiences, creating interest and discussion among voters, and influencing voting decisions."<sup>244</sup> Presidential general election debates stand among the most-watched programs on television<sup>245</sup> and may constitute television's most powerful influence on voters' decisionmaking.<sup>246</sup>

Televised debates touch almost every critical aspect of participating candidates' campaigns. Professors Trent and Friedenber

239. See, e.g., ARTERTON, *supra* note 227, at 7-8.

240. See TRENT & FRIEDENBERG, *supra* note 224, at 74.

241. See, e.g., ARTERTON, *supra* note 227, at 14 (arguing that reporters are more comfortable propagating negative than positive imagery because they believe that the public is less likely to construe negative images as partisan).

242. See TRENT & FRIEDENBERG, *supra* note 224, at 75.

243. PATTERSON, *supra* note 229, at 9.

244. KRAUS, *supra* note 5, at 123; see also ARTERTON, *supra* note 227, at 169 (asserting that candidates and media cooperate to turn televised debates into "pseudo-primaries," providing a sequence of tests of support which the general election would otherwise lack).

245. See generally KRAUS, *supra* note 5, at 123-26. Kraus points out that 83% of the electorate watched all or part of the Carter/Reagan debate in 1980, while even the earlier Reagan/Anderson debate drew almost half the electorate. *Id.* at 125. This fact demonstrates not only that many viewers will watch a debate involving a minor-party candidate but also that many viewers will watch a debate which one of the major-party candidates snubs. The 1984 Reagan/Mondale debates drew audience shares conservatively estimated at 66% and 57%. *Id.* at 126.

246. See *id.* at 127-28. After surveying data on televised debates from 1960 through 1980, Kraus concludes that "[o]ver half of the voting-age public rely on televised debates for decision making." *Id.* at 128; see also Lee B. Becker et al., *Debates' Effects on Voters' Understanding of Candidates and Issues*, in THE PRESIDENTIAL DEBATES, *supra* note 232, at 126, 138 (concluding from survey data that 1976 presidential debates increased voters' knowledge of the candidates and dictated the issues about which voters learned the most during the campaign). *But cf.* Johnson v. FCC, 829 F.2d 157, 165 (D.C. Cir. 1987) (contending that "exclusion of [minor-party presidential and vice-presidential candidates] from the debates did not prevent them from waging an effective campaign"). Petitioners in *Johnson* gained ballot access in nineteen states and finished fifth in the 1984 presidential election. 829 F.2d at 165. The *Johnson* court's characterization of these results as "effective" seems especially odd given the court's failure to consider interests other than victory in evaluating the success of petitioners' campaign.



concluded that televised debates perform seven significant functions: they draw audiences far larger than any other electoral communication event; reinforce the candidate preferences of many voters; change the preferences of a limited number of voters; help to set voters' agendas; increase voters' knowledge of issues; modify lesser known candidates' images; and build confidence in American democracy.<sup>247</sup> The reinforcement effect, having developed in a climate of traditional partisanship,<sup>248</sup> could presumably weaken upon introduction of new electoral forces into televised debates. All of the other effects except the last offer distinct advantages to lesser known, minor-party candidates.

Underdogs' routine desire for debate exposure underscores the comparative advantage which minor-party candidates stand to gain from equal standing with major-party candidates in televised debates.<sup>249</sup> Frontrunners generally prefer to avoid debating, reasoning that they should take few risks when victory is likely.<sup>250</sup> Incumbents in particular frequently shun debates, largely because incumbents usually possess greater credibility than their opponents, have better opportunities to communicate their ideas to the electorate, and want to prevent added exposure for their opponents.<sup>251</sup> When challengers can secure debates, they generally strike more aggressive postures than frontrunners.<sup>252</sup>

John Anderson in 1980 was a prominent example of a minor-party

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247. TRENT & FRIEDENBERG, *supra* note 224, at 263-72. Aside from these enumerated effects of debates, candidates and the media perceive debates as extremely important. See, e.g., ARTERTON, *supra* note 227, at 169-73.

248. See TRENT & FRIEDENBERG, *supra* note 224, at 265-66 (describing support for reinforcement effect only from past bipartisan presidential elections).

249. See, e.g., Robin Toner, *Networks to Hold Election Debates*, N.Y. TIMES, Nov. 15, 1991, at A18 (describing "delight[]" of little-known contenders for 1992 Democratic presidential nomination at prospect of a series of prime-time debates).

250. See TRENT & FRIEDENBERG, *supra* note 224, at 244-45. In a related point, Professors Trent and Friedenbergr argue that the presence of a third candidate in an election makes debates less likely to occur. *Id.* at 245. The argument does not bear strongly on the discussion in this Note, since minor-party candidates would prefer no debates to debates whose many benefits accrued only to their major-party opponents. See *supra* text accompanying notes 150-51. Even so, Trent and Friedenbergr's argument requires a regime where two-candidate elections are the norm and "[t]hird party candidates are not predictable." TRENT & FRIEDENBERG, *supra* note 224, at 245. If the legal and structural barriers which support this regime softened, and minor-party candidates became more familiar players in American politics, their effect on other candidates' decisions whether to debate would almost certainly change. Moreover, public expectations of presidential debates are making refusal to debate politically risky. *Id.* at 254. At least one scholar has proposed that electoral rules might join political norms in compelling major-party candidates to debate by denying federal matching funds to candidates who shun debates. See SMALLWOOD, *supra* note 1, at 272.

251. See TRENT & FRIEDENBERG, *supra* note 224, at 246. The D.C. District Court in *Brady* unwittingly confirmed this trend when, in an attempt to undercut the value of media exposure through debates, it noted that "in the 1988 debates then Vice-president Bush actually negotiated for less rather than more opportunities to engage in debate appearances with his challenger Governor Dukakis." *Fulani v. Brady*, 729 F. Supp. 158, 163 n.8 (D.D.C. 1990).

252. See, e.g., KRAUS, *supra* note 5, at 121 (citing studies on candidates' statements in 1976 and 1980 presidential debates).

candidate eager for debates' legitimating effects.<sup>253</sup> Anderson's strange journey from inclusion to exclusion during the 1980 general election illustrates ways in which our system has failed to develop principled standards to determine which candidates may participate in debates. The League of Women Voters Education Fund, sponsor of the 1980 debates, invited Anderson to join in that campaign's first debate.<sup>254</sup> But President Carter refused to participate, diminishing public interest in the debate.<sup>255</sup> The chastened League applied an exclusionary standard, based upon showings in national opinion polls; Anderson had fallen beneath the threshold between the two debates, clearing the way for a major-party showcase.<sup>256</sup> Beyond its apparent lack of principle as conceived in 1980, scholars criticized the use of opinion polls to determine debate eligibility as unreliable,<sup>257</sup> prompting the League to move to a more lengthy set of criteria.<sup>258</sup> But questions about fairness to minor-party candidates have persisted, intensifying when the League gave way in 1988 to a new sponsoring consortium consisting of the Democratic and Republican National Committees themselves.<sup>259</sup>

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253. See *id.* at 46-52; TRENT & FRIEDENBERG, *supra* note 224, at 248-54.

254. See TRENT & FRIEDENBERG, *supra* note 224, at 249.

255. See *id.* at 249-50. Carter correctly characterized the debate between Reagan and Anderson as a Republican forum; the political similarity of Reagan and Anderson may have caused much of the public's apathy.

256. The League announced that the standard for inclusion was a 15% showing in the polls, which happened to be Anderson's level of support at that time. KRAUS, *supra* note 5, at 111. Anderson fell to 10% by the time the League announced its invitations for the second debate. TRENT & FRIEDENBERG, *supra* note 224, at 250. Commentators have suggested that the League's standard was initially a device to accede to public pressure to include Anderson, KRAUS, *supra* note 5, at 47, 111, and that the League later "sought a rationale for not inviting [Anderson] to subsequent debates." TRENT & FRIEDENBERG, *supra* note 224, at 250. Another analyst has characterized the exclusion as nominally honest, see SMALLWOOD, *supra* note 1, at 270-71, but still concluded that the League's "task would be made significantly more creditable . . . if firm criteria were established well in advance of election campaigns . . ." *Id.* at 271.

257. See KRAUS, *supra* note 5, at 111 (noting that polls reflect views only at a given moment and that sampling errors cause divergent results across polls); ARTERTON, *supra* note 227, at 169 (criticizing polls generally as "imprecise because many voters do not decide on a candidate until quite late in the race").

258. The League resolved to invite only "significant" candidates to two of its three general election debates in 1988. Among its standards for "significance" were eligibility for federal matching funds, "[a]ctive campaigning in a number of states," "[r]ecognition by the national media as a candidate meriting media attention," and "[o]ther factors . . . that in the League's good faith judgment may provide substantive evidence of nationwide voter interest in a candidate, such as the extent of campaign contributions and national voter poll results." *Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185, 1188 (S.D. N.Y. 1988) (quoting the "1988 League of Women Voters Education Fund Democratic Presidential Primary Debates Participant Selection Criteria"). The League applied the same standards for "significance" during the primaries within the major parties and during the general election across parties. See *League*, 684 F. Supp. at 1188 n.2. The League explicitly set aside its third general election debate for major-party candidates only. *Id.*

259. No less an authority than the League itself criticized the proposal to transfer debate sponsorship to the bipartisan Commission on Presidential Debates. League President Dorothy S. Ridings questioned whether "'third party/independent candidates [would] ever get a fair

The necessity of mass media exposure to candidates of all parties is clear, and televised debates appear to offer greater political opportunities than any other media events, especially to minor-party candidates. But the political process has failed to administer these critical debates impartially. Remedying these inequities demands a judicial role to address the complaints of minor-party candidates for whom the doors to the debating stage have been bolted from the inside.

#### D. *Standing Based On Public Value of Minor-Party Candidacies*

Despite the handicaps they face in the electoral process, minor-party candidacies have yielded numerous benefits to American society. Minor parties have often proposed and popularized new substantive policies which the major parties have lacked the political awareness or foresight to develop.<sup>260</sup> The most telling examples come from the range of populist, socialist, and farmer and labor-oriented parties which flourished during the late nineteenth and early twentieth centuries.<sup>261</sup> Among these parties' policy demands which eventually became law were free public education,<sup>262</sup> tougher child labor laws,<sup>263</sup> federal regulation of railroads<sup>264</sup> and other corporations,<sup>265</sup> civil service reform,<sup>266</sup> flexibility in the currency supply,<sup>267</sup> an end to antilabor injunctions,<sup>268</sup> progressive income taxation,<sup>269</sup> and social insurance for the aged<sup>270</sup> and unemployed.<sup>271</sup> These parties advanced many significant political reforms in the United States, including women's

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shake'” from the CPD and argued that “ ‘sponsorship of presidential forums should be the province of an independent, non-partisan organization whose prime concern is providing information for the American voter, not advancing partisan interests.’ ” *Panel Suggests Changes in Presidential Elections*, BROADCASTING, Dec. 2, 1985, at 100, 102.

260. See SMALLWOOD, *supra* note 1, at 26; ROSENSTONE ET AL., *supra* note 212, at 222-23.

261. See generally MURRAY S. STEDMAN, JR. & SUSAN W. STEDMAN, *DISCONTENT AT THE POLLS: A STUDY OF FARMER AND LABOR PARTIES 1827-1948* (1950); LAWRENCE GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* (1978).

262. See STEDMAN & STEDMAN, *supra* note 261, at 13.

263. See SMALLWOOD, *supra* note 1, at 26.

264. See STEDMAN & STEDMAN, *supra* note 261, at 15.

265. See SMALLWOOD, *supra* note 1, at 26.

266. See *id.*; STEDMAN & STEDMAN, *supra* note 261, at 15.

267. See STEDMAN & STEDMAN, *supra* note 261, at 18, 21.

268. See *id.* at 20.

269. See *id.* at 16-17, 18.

270. See *id.* at 22-23; SMALLWOOD, *supra* note 1, at 26.

271. See STEDMAN & STEDMAN, *supra* note 261, at 22-23.

suffrage,<sup>272</sup> the Australian ballot,<sup>273</sup> direct election of Senators,<sup>274</sup> primary elections,<sup>275</sup> initiative and referendum<sup>276</sup> and recall of elected officials.<sup>277</sup> Minor parties have made the United States a more just and democratic society.

More broadly, minor parties have served as essential vehicles for popular discontent. When the major parties have lacked courage to move forward on important issues, frustrated voters have turned to minor parties, sending the political establishment an unmistakable message.<sup>278</sup> The most important instance of this phenomenon in the United States was minor parties' agitation in the mid-nineteenth century which forced the nation to confront and eventually eradicate the disease of slavery.<sup>279</sup> In numerous less dramatic instances, the major parties have observed the voter discontent which minor parties have reflected and have reacted by changing their own policies and platforms.<sup>280</sup> In this respect, minor parties have served as an important check on major parties.<sup>281</sup> Minor parties, in short, stimulate dialogue about the issues of the day, a quality sadly scarce in contemporary presidential elections.<sup>282</sup>

The high value of minor-party candidacies confirms that minor

272. See *id.* at 16-17, 20; SMALLWOOD, *supra* note 1, at 26.

273. See STEDMAN & STEDMAN, *supra* note 261, at 20. Ironically, the Australian ballot system, under which each state prepares an official ballot with party slates, facilitated discrimination against minor parties in ballot access even as it diminished the corruption and inconvenience of the old system where each party prepared its own ballots. See ROSENSTONE ET AL., *supra* note 212, at 19-20.

274. See STEDMAN & STEDMAN, *supra* note 261, at 18, 20-21.

275. See *id.* at 21. Like the Australian ballot, primaries became an impediment to minor parties' electoral success. See *supra* notes 213-14 and accompanying text.

276. See STEDMAN & STEDMAN, *supra* note 261, at 21.

277. See *id.*

278. See ROSENSTONE ET AL., *supra* note 212, at 221-22; SMALLWOOD, *supra* note 1, at 25-26.

279. See SMALLWOOD, *supra* note 1, at 25.

280. See *id.* at 27. Such effects are not always for the best. George Wallace's hardening influence on President Nixon's civil rights policies after Wallace's strong southern showing in 1968 illustrates the major parties' tendency to coopt minor parties' reactionary as well as progressive popular appeals. See ROSENSTONE ET AL., *supra* note 212, at 222.

281. See ROSENSTONE ET AL., *supra* note 212, at 222-23; SMALLWOOD, *supra* note 1, at 26.

282. See generally Richard A. Joslyn, *Candidate Appeals and the Meaning of Elections*, in DO ELECTIONS MATTER?, *supra* note 213, at 9. Joslyn examines several models which attempt to explain electoral approaches and finds candidates' appeals during elections generally consistent with "ritualistic," issue-free campaigning and "rhetorical," issue-light campaigning rather than "policy-oriented" campaigning. He concludes that candidates campaign largely on symbols and personalities, diminishing voters' abilities to learn about policy during the election. He does find presidential debates relatively policy-heavy compared to such other media events as spot advertisements. *Id.* at 28. But others have frequently criticized debates for ultimately elevating appearances over substance. See, e.g., KRAUS, *supra* note 5, at 31; see also NEWMAN & SHETH, *supra* note 223, at 67 (characterizing studies on the importance of issues in voting behavior as inconclusive while finding "evidence suggesting that the best single predictor of voting behavior is candidate image").

parties play an important role in the American political system whose diminution by systematic barriers courts should properly address. But this social value may also go far in its own right toward justifying standing for candidate plaintiffs like Fulani. Numerous commentators have urged a jurisprudence of standing which in some way recognizes public rights and interests.<sup>283</sup> Professor Burnham has argued that the Supreme Court has inconsistently developed such a jurisprudence, through a common law process of making standing judgments based on public values in the absence of traditionally cognizable injuries.<sup>284</sup> Burnham bases his positive conclusion in large measure on the Court's approvals of standing in constitutional cases involving the effectiveness of plaintiffs' votes.<sup>285</sup> The Court has never explicitly condoned such an analysis, which would appear to conflict strongly with the current Court's tendency to restrict judicial reach,<sup>286</sup> but the current status of standing doctrine<sup>287</sup> leaves such a novel analysis doctrinally viable.

If the Court has, as Burnham argues, implicitly adopted public value analysis to allow it to vindicate critical rights where no cognizable injury exists, then it should extend that analysis to minor-party challenges to debate sponsors' tax exemptions. These cases involve crucial rights and interests in the political process, the most vital artery of our democratic system. The judiciary should recognize that every citizen has a strong interest in minor parties' robust performance of their important sociopolitical functions.<sup>288</sup> The greatest difficulty in articulating a public value basis for these challenges, of course, lies in

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283. See Doernberg, *supra* note 44, at 95 (arguing based upon "our Lockean constitutional heritage" that courts should recognize "collective rights" as a sufficient basis to support standing); Nichol, *Rethinking Standing*, *supra* note 40, at 79 (criticizing Supreme Court's failure to accommodate "shared constitutional claims"); Sunstein, *supra* note 75, at 1458 (arguing that regulatory injuries are "best characterized as systemic, collective or probabilistic"); Winter, *supra* note 26, at 1374, 1491 (contending that access to courts should not be "limited to . . . private disputes" and advocating a "reconstituted public rights model" of standing).

284. See Burnham, *supra* note 40, at 107.

285. See *id.* at 88-90. Burnham also illustrates his argument with examples from other equal protection cases. See *id.* at 83-88.

286. For a discussion of the Court's use of separation of powers principles to limit judicial reach by restricting standing, see *supra* text accompanying notes 193-203. One naturally assumes tension between an expansion of standing and separation of powers. See, e.g., Nichol, *Rethinking Standing*, *supra* note 40, at 79. But Burnham argues credibly that common law public value adjudication of standing disputes raises only minor separation of powers and institutional competence concerns. See Burnham, *supra* note 40, at 116-17.

287. See *supra* notes 189-203 and accompanying text.

288. Courts have regularly underestimated this interest. See *Johnson v. FCC*, 829 F.2d 157, 165 (D.C. Cir. 1987) (holding that exclusion of minor-party candidates from debates did not violate voters' First Amendment rights to express their electoral preferences); *Chandler v. Georgia Pub. Telecommunications Commn.*, 917 F.2d 486, 488-89 (11th Cir. 1990) (approving broadcaster's decision to limit televised debates to major-party candidates as "of the most interest and benefit to the citizens of Georgia" and not violative of First Amendment), *cert. denied*, 112 S.Ct. 71 (1991); *Fulani v. Brady*, 935 F.2d 1324 (D.C. Cir. 1991) (completely failing to discuss possibility of injuries to electoral process resulting from debate sponsor's exclusion of minor-party candidates).

sorting out the large variety of interests at stake and determining precisely which ones minor-party candidates should properly advance as plaintiffs. But as citizens whom political dissatisfaction has driven into the electoral fray, minor-party candidates are logical vehicles to vindicate many interests which they both share with and advance for the rest of society.

The work of political scientists reveals several realities about minor-party candidates, media politics and the American political system in general which bear directly on the question whether courts should find standing for such minor-party candidates. The widely held conclusions of scholars that American society has stacked the political deck against minor parties, that televised debates are extremely important sources of electoral exposure, and that minor-party candidates provide society several distinct benefits strongly support standing for such challenges. Whether or not courts heed these particular conclusions, the political science literature on these topics is thorough, relevant, and revealing enough that it should inform future judicial deliberations about standing disputes in similar cases.

#### IV. BEYOND THE STANDING ISSUE

This Part briefly explores the practical likelihood that standing for minor-party candidates to challenge debate sponsors' tax exemptions will actually lead to more diverse televised debates. It first evaluates the available evidence to determine whether minor-party candidate plaintiffs might actually carry Fulani's approach to victory on the merits and concludes that such success is clearly possible. Minor-party candidate court victories would force the political system to develop nonpartisan methods for deciding which candidates may participate in debates; this Part briefly discusses prospects for new selection methods.

Close analysis of any standing controversy begs the question whether the claim at issue has any chance of success on the merits. The question is certainly fair in the setting of minor-party candidates' challenges to debate sponsors' tax exemptions, because to grant the relief Fulani requested would require potentially serious reforms of the U.S. political system. Indeed, the Second Circuit's rejection of Fulani's claim on the merits<sup>289</sup> would appear to render the standing issue academic. But the Second Circuit opinion left significant hope that future minor-party plaintiffs might prevail on the merits of challenges to debate sponsors' tax status. The court rested its ultimate rejection of Fulani's claim squarely on the fact that the action had arisen out of Fulani's exclusion from primary election debates. The court endorsed Fulani's central claim that a debate sponsor which advanced some

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289. See *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 628 (2d Cir. 1989).

parties over others would violate its tax-exempt status under section 501(c)(3).<sup>290</sup> It proceeded to stress the "critical importance" of the fact that "the subject debates were not *general election* debates. Rather, they were *primary season* debates . . ." <sup>291</sup> Because of what it saw as "the goals underlying the primary phase of the presidential election contest — *i.e.*, to resolve intra-party disputes and select among competing candidates —" <sup>292</sup> the court rejected Fulani's plea for inclusion in the primary season debates.

Although the court's treatment of primary debates may seem mechanically appealing, it loses force when the inquiry widens to whether a tax-exempt organization may help a political party resolve its internal disputes, particularly where the organization's activity yields side benefits for the party, and truly remain "nonpartisan." But whatever the outcome of that argument, the court's approach strongly suggests that it would rule differently in a general election setting than it did in *League*. The court did not directly state that it would have granted Fulani relief on a similar claim in a general election setting; but at no point did it even hint at any basis for denying relief other than the case's primary election context. The only firm conclusion which the opinion permits is that the court wholly reserved judgment on the merits of Fulani's claim as it might arise in a general election setting. Given the court's sympathy to Fulani's general arguments, as reflected in its disposition of the standing issue, prospective minor-party tax-status challengers must view the Second Circuit's deferral of Fulani's underlying claims as encouraging precedent.

Victory on the merits for a minor-party candidate plaintiff would require new, truly nonpartisan standards for including candidates in debates that would avoid practically untenable mobs of debaters.<sup>293</sup> Development of such standards, although bound to stir controversy, would be very feasible. Common sense recommends two exceedingly practical criteria: presence on all fifty state ballots<sup>294</sup> and qualification for federal matching funds.<sup>295</sup> These tests would have the benefit of limiting the stage to those few candidates with demonstrated commit-

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290. 882 F.2d at 629.

291. 882 F.2d at 629.

292. 882 F.2d at 630.

293. Courts, scholars and members of the media have all worried that expanding debates beyond two parties would lead to unwieldy mass debates. *See, e.g.*, Fulani v. Brady, 729 F. Supp. 158, 163 (D.D.C. 1990) (claiming that redress of plaintiff's alleged injuries would involve participation of "dozens of other presidential contenders"); KRAUS, *supra* note 5, at 139 (pointing out difficulty of choosing debate participants from among "usually upwards of 100 qualified candidates"); *How To Work in the New Debate Climate*, BROADCASTING, May 7, 1984, at 88, 89 (quoting broadcaster's intention to limit minor-party candidate participation if it created "unwieldy" debates).

294. *See* SMALLWOOD, *supra* note 1, at 272.

295. The League included but did not stress this criterion in its 1988 selection standards. *See supra* note 258.

ments to their campaigns<sup>296</sup> while avoiding the circular attempts to determine "significance" which have undermined previous standards for inclusion.<sup>297</sup> A third component, evaluation of each candidate's value to the national political conversation, might also deserve consideration, although its subjectivity would obviously make it difficult to develop and administer. A new regime might also create incentives to debate, preventing major-party candidates from ducking voters' scrutiny.<sup>298</sup>

A fair solution to minor-party candidates' exclusion from presidential debates would wipe an ugly blot off the nation's democratic political process.<sup>299</sup> Federal courts, as the only governmental institutions which stand almost completely outside that process and the two-party oligarchy which controls it, must take the lead in confronting the problem.<sup>300</sup> Allowing minor-party candidates to litigate their complaints, in contrast to seeking reforms through the political process, will offer the optimal combination of potentially far-reaching relief and measured, serious contemplation of the issues at stake.

### CONCLUSION

The Supreme Court's standing doctrine, while hardly crystalline, supports granting minor-party candidates standing to challenge the tax exemption of a sponsor who excludes them from televised presidential debates. The plaintiff's injuries, in such a case, are easily cognizable as injuries-in-fact under a competitor standing theory. The source of those injuries, the government's grant of tax exemption to the televised debate sponsor, stands well within the limits of causal certainty which the Court's traceability and redressability tests require, as the Court has demonstrated in several decisions finding standing for similar challenges to the regulatory status of third parties.

The Second and D.C. Circuits' competing applications of these rough principles to the problem demonstrate that granting standing in

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296. In 1980, only John Anderson and Libertarian candidate Ed Clark joined the major-party candidates on all 50 ballots; only Anderson qualified for matching funds. SMALLWOOD, *supra* note 1, at 255, 262. Fulani met both standards in 1988. *Fulani v. Brady*, 935 F.2d 1324, 1331 (D.C. Cir. 1991) (Mikva, C.J., dissenting). The only caveat to these criteria's extraordinary narrowing effects may be that the federal campaign finance system and some states' ballot access procedures continue to raise disproportionate hurdles to minor-party candidacies. *See supra* text accompanying notes 215-19.

297. *See supra* notes 256, 258.

298. *See supra* note 250.

299. "The government of any democracy, let alone one shaped by the values of our Constitution's First Amendment, must avoid tilting the electoral playing field, lest the democracy itself become tarnished." *Fulani v. Brady*, 935 F.2d 1324, 1337 (Mikva, C.J., dissenting).

300. *See generally* Sunstein, *supra* note 75, at 1444 (noting, in regulatory context, that rigid standing prohibitions permit those with greater political and economic power to influence policies through the political process, while less-advantaged interests effectively lack an avenue to respond).



this instance better satisfies the Supreme Court's precepts and the principles underlying standing. The Second Circuit's recognition of the breadth and depth of the injuries which exclusion from televised debates caused Fulani create a compelling foundation for standing. Such a thorough appraisal of Fulani's injuries undermines the causation arguments which the D.C. Circuit raises against standing: Fulani's broad-based and severe loss of competitive advantage is clearly traceable to an act which hands a crucial forum to her competitors, and a court could redress that loss by forbidding the act. In such a case, "prudential" limitations on standing are inapposite.

The conclusions of political scientists that American political institutions discriminate against minor parties lend the arguments for standing both empirical support and social urgency. Unjust and unnecessary political discrimination against minor-party candidates creates a breach into which the independent judiciary is ideally suited to step. Televised debates, perhaps the foremost among all of the crucial means of media exposure which increasingly decide American elections, are an ideal starting point for minor-party candidates to assert their legal rights. The numerous ways in which minor parties nourish our political culture strongly enhance the case for standing and may justify standing in their own right to vindicate the public benefits of minor-party candidacies.