

# NOTES

## ***Bond, Buckley, and the Boundaries of Separation of Powers Standing***

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## I. INTRODUCTION

A constitutional crisis is at hand. It is 2017, and a new President of the United States has taken office.<sup>1</sup> The new President generally opposes environmental regulations and accordingly nominated a candidate for Administrator of the Environmental Protection Agency (“EPA”) with a deregulatory track record. The Senate, however, stood in the way: a proenvironment party holds the majority and threatened to filibuster.<sup>2</sup> New presidents in this situation typically withdraw their nominations to avoid political embarrassment. But this time was different.

In a forceful display of executive authority, the President unilaterally installed the nominee as the EPA Administrator. True, this action almost certainly violates the Appointments Clause, which requires the Senate to confirm any “Officer of the United States.”<sup>3</sup> The Administrator nevertheless wasted no time and immediately began the rulemaking process to increase the maximum pollutant level that factories may discharge into waterways.

Once the Administrator promulgated the new rule, factories across the country began releasing higher levels of potentially toxic chemicals into rivers, streams, and groundwater. Communities across the nation soon reported massive fish kills. As a result, the freshwater fishing industry’s nets are now coming up empty.

Several commercial fishing companies have responded by suing the EPA, alleging that the Administrator could not have validly promulgated the regulation because he is holding office in violation of the Appointments Clause. The court faces a key question: do the fishing companies have standing to raise their claim?

In *Buckley v. Valeo*, the Supreme Court explained that “[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights.”<sup>4</sup> The D.C.

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1. See U.S. CONST. amend. XX (“The term[] of the President . . . shall end at noon on the 20th day of January . . .”).

2. See SENATE R. XXII (requiring a three-fifths cloture vote of all Senators to end debate); BLACK’S LAW DICTIONARY 704 (9th ed. 2009) (defining a filibuster as a “dilatory tactic . . . employed in an attempt to obstruct legislative action”).

3. U.S. CONST. art. II, § 2, cl. 2. Because “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ ” *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), and the EPA has significant enforcement power, *see, e.g.*, *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 484–88 (2004) (holding that the Clean Air Act permits the EPA to stop its construction when it determines a state has violated the Act), an EPA Administrator cannot validly take office without Senate confirmation.

4. *Buckley*, 424 U.S. at 117.

Circuit—the federal judiciary’s administrative law expert<sup>5</sup>—has interpreted *Buckley* as limiting separation of powers standing to plaintiffs “directly subject to the authority of the agency.”<sup>6</sup> The commercial fishing companies in the hypothetical above, however, do not have any real nexus with the EPA, since the relaxed pollution standards only apply to the manufacturing plants. They appear to therefore lack standing to raise their Appointments Clause challenge under *Buckley*.

A recent Supreme Court decision, on the other hand, supports the opposite conclusion. In *Bond v. United States*,<sup>7</sup> the Supreme Court unanimously held that a criminal defendant had standing to mount a Tenth Amendment challenge against the federal statute under which she was indicted. The Court in that case pronounced that “[i]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object.”<sup>8</sup> *Bond* accordingly indicates that the fictional fishing companies *would* have standing to challenge the Administrator’s appointment, because their decrease in fish yields is a separate justiciable injury from their constitutional claim.

*Buckley*, in short, requires plaintiffs who assert a separation of powers claim against an administrative agency to meet an additional standing hurdle that *Bond* does not. *Bond* requires only a justiciable injury, whereas *Buckley* demands a justiciable injury *plus* some nexus with the challenged agency. The two cases cannot coexist.

This Note argues in favor of the *Bond* approach: any plaintiff who has a justiciable injury-in-fact should have standing to assert a separation of powers claim against an administrative agency. In other words, as long as the other constitutional and prudential standing requirements are satisfied, a plaintiff should not need a nexus with the challenged agency. The Note proceeds as follows. Part II provides a brief overview of black-letter standing doctrine, its rationales, and the debate over the justiciability of separation of powers claims. Part III details the standing test from *Buckley* and how subsequent lower

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5. See PETER STRAUSS ET AL., GELLHORN AND BYSE’S ADMINISTRATIVE LAW 1194 n.1 (11th ed. 2011) (“[T]he D.C. Circuit hears the lion’s share of petitions for review of [agency] rules.”); John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 553 n.2 (2010) (labeling the D.C. Circuit as a “semi-specialized” court because of its heavy administrative law docket); see also John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376–77 (2006) (“One-third of the D.C. Circuit appeals are from agency decisions. That figure is less than twenty percent nationwide.”).

6. Comm. for Monetary Reform v. Bd. of Governors, 766 F.2d 538, 543 (D.C. Cir. 1985).

7. 131 S. Ct. 2355 (2011).

8. *Id.* at 2365.

courts have applied it. Part IV explains how *Bond* represents a challenge to *Buckley*'s standing requirements. Part V then argues that courts should follow *Bond* because *Buckley*'s nexus rule serves no good purpose in the separation of powers context. Part VI concludes.

## II. STANDING, JUSTICIABILITY, AND SEPARATION OF POWERS CLAIMS

This Part provides a brief overview of standing doctrine, paying special attention to the doctrine's underlying rationales. It then explains what a separation of powers suit entails and details the scholarly debate over whether the judicial process is the best method for resolving such claims.

### A. Standing Doctrine and Its Rationale

Standing to sue in federal court is a question of jurisdiction.<sup>9</sup> Article III courts cannot entertain an action in which the plaintiff lacks a sufficient interest in the outcome.<sup>10</sup> Standing requirements fall into two general categories.<sup>11</sup> First, the case-or-controversy clause in Article III imposes three constitutional requirements that a litigant must satisfy to have standing in federal court: (1) injury-in-fact, (2) traceability, and (3) redressability.<sup>12</sup> An injury-in-fact is a "concrete and particularized" harm that is "actual or imminent, not conjectural or hypothetical."<sup>13</sup> The injury must also be "fairly traceable" to the defendant's conduct and not "the result of the independent action of some third party not before the court."<sup>14</sup> Finally, a favorable decision must "likely" redress the plaintiff's injury.<sup>15</sup>

Parties who meet the basic constitutional standing requirements may nevertheless lack standing due to the second class of requirements: the prudential standing rules.<sup>16</sup> These prudential

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9. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 490 (1982) (Brennan, J., dissenting) ("A plaintiff's standing is a jurisdictional matter for Art. III courts . . . ."); see also *Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1973) (noting that federal courts do not have jurisdiction if the plaintiff does not allege a cognizable injury).

10. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) (explaining that the "gist" of standing is whether the plaintiff has "a personal stake in the outcome of the controversy").

11. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

12. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

13. *Id.* (internal quotations and citations omitted).

14. *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

15. See *id.* at 561 ("[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." (internal quotation marks omitted)).

16. See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982) (listing the prudential standing requirements).

limitations are “merely . . . part of judicial self-government” and are not constitutionally mandated.<sup>17</sup> Just like the constitutional standing requirements, there are three basic prudential rules. First, a litigant must assert his or her own interests, not the interests of third parties.<sup>18</sup> Second, courts will decline to entertain cases based only on “generalized grievances”—a mere interest in the government abiding by the law.<sup>19</sup> Lastly, a plaintiff’s suit must fall within the “zone of interests” protected by the relevant statute.<sup>20</sup>

The Justices did not spin this spider web of standing rules simply to ensnare unsuspecting suitors; rather, the doctrine helps ensure that disputes before federal courts are in fact judicially manageable.<sup>21</sup> Judges have limited abilities and resources. The judiciary—unlike Congress and the President—lacks an independent, external fact-finding arm.<sup>22</sup> Judges must therefore rely, as the Supreme Court has explained, on the “parties’ treatment of the facts and claims before it to develop its rules of law.”<sup>23</sup> Otherwise, a court may inaccurately resolve cases in which the parties present hypothetical harms with few specific facts, because courts lack most ability to do independent, outside fact finding.<sup>24</sup> *Stare decisis*,

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17. *Lujan*, 504 U.S. at 560.

18. *Valley Forge*, 454 U.S. at 474. *But see, e.g.*, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (allowing attorney to challenge drug-forfeiture statute applied to client when confiscated assets would be used to pay legal fees); *Craig v. Boren*, 429 U.S. 190, 194–97 (1976) (permitting vendor to raise customer’s Equal Protection Clause claims).

19. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“[T]he Court has held that when the asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.” (internal quotation marks omitted)).

20. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

21. *See Warth*, 422 U.S. at 498 (“In essence the question of standing . . . is founded in concern about the proper—and properly limited—role of the courts in a democratic society.”); 13A WRIGHT & MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.3 (3d ed. 2012) (“Standing and other concepts of justiciability have been developed as means of limiting the role played by courts in society.”); *see also* Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 317 (2001) (“Over the past three decades, the Supreme Court has used standing doctrine to restrict the ability of private citizens to vindicate broad public rights and, concomitantly, to limit the authority of Congress to vest such power in the citizenry.”).

22. Courts do not have the ability to perform general investigations like congressional committees or utilize administrative agencies to gather facts. *See* WRIGHT & MILLER ET AL., *supra* note 21, § 3531.3 (“[J]udicial procedures simply do not provide as comprehensive a body of information for decision as do legislative procedures. The rules of evidence, the traditions of adversary litigation, and limitations of judicial competence preclude the fully informed decision that can be made by legislative or administrative procedures.”). Courts do, of course, have an *internal* fact-finder: the judge or jury, depending on the case.

23. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974).

24. WRIGHT & MILLER ET AL., *supra* note 21, § 3531.3.

moreover, compounds the consequences of any resulting errors.<sup>25</sup> On a separate note, if the plaintiff does not have a concrete injury, a court might misjudge the scope of the injury and grant unnecessarily broad relief, unjustly enriching the plaintiff.<sup>26</sup> Broader standing rules would also allow more litigants to bring suits, thus burdening federal courts already working at or above their capacity.<sup>27</sup>

Perhaps more importantly, federal courts have consistently stated that standing is crucial to maintaining the separation of powers.<sup>28</sup> Judge Robert Bork once noted that standing “relates in part . . . to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”<sup>29</sup> This concern arises most clearly in constitutional litigation. When the judicial branch determines the constitutionality of legislative or executive action, that interpretation overrides the interpretations of other branches.<sup>30</sup> The elected officials then face a dilemma—they must abide by the court’s ruling or act

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25. *Id.* As Lea Brilmayer has explained:

A better explanation of the concept of judicial restraint is based on the relationships among courts over time. *Stare decisis* in effect subordinates the opinions and policy choices of later courts to those of the present court. . . . To allow a court to settle any matter it wished to address would give precedence to the preferences of earlier courts . . . .

Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 304 (1979).

26. See *Schlesinger*, 418 U.S. at 208, 222 (explaining how a lack of concrete facts can lead to overly broad relief granted).

27. See, e.g., Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 889–90 (1991) (“The total number of cases filed in the federal courts grew from 33,591 in 1938 to 217,879 in 1990. The total number of weighted civil filings increased from 207 per judgeship in 1955 to 448 per judgeship in 1990.” (footnotes omitted)); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 274 n.3 (1996) (“The increase in [federal circuit court] caseload is well-documented. The numbers are staggering. . . . [I]n 1960, there were 57 filings for each appellate judge; the comparable figure for 1994 is 270.”).

28. See, e.g., *Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers. It is this fact which makes possible the gradual clarification of the law through judicial application.”).

29. *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring).

30. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”); see also *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (discussing the special importance of standing in “head-on confrontations between the lifetenured [sic] branch and the representative branches of government” when plaintiffs seek invalidation of a political branch’s action on constitutional grounds).

ultra vires.<sup>31</sup> And citizens cannot respond to unpopular constitutional decisions by invoking the normal political process. The Justices have lifetime tenure and thus cannot be voted out of office, and the public cannot overturn an unpopular decision without going through the herculean effort of amending the Constitution.<sup>32</sup> Our Nation is founded, however, on the people's right and ability to govern themselves through their representatives. Federal courts must accordingly take great care to not "usurp the powers of the political branches."<sup>33</sup>

Standing doctrine protects against exactly that risk. It ensures that the parties presenting an issue to the judiciary actually need the judicial power in order to be made whole. If, for example, the complaining party cannot point to an actual, concrete injury, it is unclear whether there is any wrong for the court to redress. Further, a court that grants declaratory or injunctive relief despite the plaintiff's inability to prove causation might block a political branch from taking harmless action. And if a plaintiff cannot prove redressability, then deciding the case would simply waste judicial resources. Indeed, parties who lack standing under current doctrine may, at bottom, simply be trying to win a policy debate in the courts rather than at the polls. By cabining judicial authority, standing doctrine thus ensures that the political process is ultimately the primary method of resolving abstract policy disputes in American society. At the extreme, the Court has noted, the overuse of judicial authority would transform the American representative political system into a "government by

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31. If the Court *strikes down* executive action as unconstitutional, that interpretation is considered "supreme" and thus binding on the President, regardless of whether the President agrees. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952) (holding that a presidential order that amounted to legislation was unconstitutional under the separation of powers doctrine and thus invalid). But it is unclear whether the President can validly refuse to enforce a law that the Court has *upheld*. See generally Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. (forthcoming Apr. 2014) (manuscript at 37), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2359685](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359685) (noting the tension between a Supreme Court decision from 1911 mandating action by the executive branch and "later decisions characterizing prosecutorial discretion as a core executive function").

32. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1394 (2006) (conceding that, "if legislators disagree with a judicial decision about rights, they can campaign to amend the Bill of Rights" but arguing that, because the amendment process requires supermajority approval, the "deck [is] stacked" in favor of the judicial decision).

33. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). But cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (explaining that heightened judicial intervention might be necessary in contexts where courts cannot trust the political process to function effectively).

injunction”<sup>34</sup> that requires citizens to inefficiently petition the courts one by one for government action.<sup>35</sup>

### B. The Justiciability of Separation of Powers Claims

This Note focuses on one small aspect of constitutional litigation: separation of powers claims. A separation of powers claim alleges that some government action violates the power-sharing structure that the Framers enshrined in the Constitution. Consider, for example, the famous *Humphrey’s Executor* case.<sup>36</sup> There, Congress had insulated the commissioners of the Federal Trade Commission from presidential removal save for “inefficiency, neglect of duty, or malfeasance in office.”<sup>37</sup> Article II, however, commands the President to “take Care that the Laws be faithfully executed,” and the prior case of *Myers v. United States* had held that the power to unilaterally remove executive officers was essential to fulfilling that constitutional duty.<sup>38</sup> *Humphrey’s Executor* thus posed a question of the Constitution’s power-sharing structure: does a for-cause removal restriction unduly trammel the President’s authority?<sup>39</sup>

The separation of powers is even more important today given the expansion of the administrative state. Although Congress sometimes directly imposes duties on private citizens or organizations,<sup>40</sup> it much more frequently delegates general lawmaking

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34. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (“To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would... open the Judiciary to an arguable charge of providing ‘government by injunction.’ ”).

35. See *United States v. Richardson*, 418 U.S. 166, 179 (1974):

[T]he Founding Fathers [did not] intend[] to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a representative Government with the representatives directly responsible to their constituents at stated periods . . . . Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

36. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 619 (1935).

37. *Id.*

38. 272 U.S. 52, 164 (1926).

39. The court answered in the negative. See *Humphrey’s Ex’r*, 295 U.S. at 631–32. That decision’s propriety is still debated. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 725–26 (1988) (Scalia, J., dissenting) (arguing that *Humphrey’s Executor* “gutted, in six quick pages devoid of textual or historical precedent . . . [the] 70-page opinion” in *Myers*).

40. See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566, 2580–81 (2012) (challenging the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as exceeding Congress’s Article I powers).

authority to an administrative agency.<sup>41</sup> Such delegations blur the traditional boundaries between executive, legislative, and judicial power.<sup>42</sup> In today's legal environment, therefore, courts must even more diligently ensure that Congress's new and experimental power-delegating schemes conform to the Constitution's structural protections. And of course, courts cannot accomplish this task unless litigants have standing to bring separation of powers claims.

Beyond standing doctrine, however, there is a deeper debate that underlies all separation of powers cases: should the Judiciary be policing interactions between the political branches at all? Professor Jesse Choper argues that the Judiciary should completely avoid separation of powers conflicts between the legislative and executive branches.<sup>43</sup> He believes that courts should instead dismiss such cases as nonjusticiable political questions:

The federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President vis-à-vis one another; rather, the ultimate constitutional issues of whether executive action (or inaction) violates the prerogatives of Congress or whether legislative action (or inaction) transgresses the realm of the President should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process.<sup>44</sup>

This "political process" perspective argues that the Framers did not envision judicial enforcement of separation of powers principles even if they believed diffuse power protected individual rights.<sup>45</sup> Professor Choper relies heavily on Justice Stone's famous footnote in *United States v. Carolene Products Co.*<sup>46</sup> to support his nonjusticiability

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41. See STRAUSS ET AL., *supra* note 5, at 13 (defining "organic statute").

42. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting).

43. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263 (1980); see also John J. Gibbons, *The Court's Role in Interbranch Disputes over Oversight of Agency Rulemaking*, 14 CARDOZO L. REV. 957, 992–93 (1993) ("Unfortunately, by reaching out to decide separation of powers issues of dubious justiciability, the Court itself seems bent on becoming just another player in the game of Washington power politics."). But see Martin H. Redish & Elizabeth J. Cisar, "*If Angels Were to Govern*": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 DUKE L.J. 449, 492 & nn.230–31 (1991) (noting that "Dean Choper's theory has been the subject of substantial scholarly commentary, much of it critical," and providing sources to that effect).

44. CHOPER, *supra* note 43, at 263.

45. *Id.* at 268 (finding support as far back as John Adams).

46. For the unfamiliar reader, Justice Stone's footnote is the antecedent for the standards of review employed today by courts determining whether a given legislative enactment is constitutional. See 304 U.S. 144, 152 n.4 (1938):

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

argument.<sup>47</sup> The judiciary must vindicate individual constitutional rights, Professor Choper argues, because the victims are normally minorities whom the political process does not protect.<sup>48</sup> Separation of powers issues, in contrast, do not require judicial attention because both Congress and the President have “tremendous incentives jealously to guard [their] constitutional boundaries and assigned prerogatives against invasion by the other.”<sup>49</sup> Professor Choper’s political-process theory argues that this interbranch tug-of-war will eventually end in a stalemate, promising a “trustworthy resolution” of separation of powers issues.<sup>50</sup>

Professor Choper argues, furthermore, that there are multiple forces guarding against the primary separation of powers concern of modern times. In 1787, the Framers were mostly concerned with legislative aggrandizement.<sup>51</sup> Today, however, executive overreaching proves the greater concern.<sup>52</sup> According to Professor Choper, judicial protection against this concern is unnecessary because the executive branch itself, external groups, Congress, and the electorate all act as sufficient checks on executive aggrandizement.<sup>53</sup>

Despite Professor Choper’s process-based arguments, the Supreme Court currently views the separation of powers as a protector of individual rights, which counsels in favor of judicially

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It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities . . . [nor] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

47. CHOPER, *supra* note 43, at 275; see also JOHN HART ELY, DEMOCRACY AND DISTRUST 75–77 (1980) (using *Carlene Products* footnote four as a model for his theory of judicial review).

48. See CHOPER, *supra* note 43, at 275 (“In the [case of individual constitutional rights], the political machinery is ordinarily aligned against the interests of powerless minorities whose fundamental personal liberties must ultimately be vindicated by judicial review if at all.”).

49. *Id.* (“If either branch perceives a constitutional violation of this kind, not only will it be encouraged to respond vigorously but each department possesses an impressive arsenal of weapons to demand observance of constitutional dictates by the other.”).

50. *Id.* (“[B]oth [the executive and legislature] will effectively participate in defining the reach of their respective authorities—a process that promises trustworthy resolution without the expenditure of precious judicial capital.”).

51. *Id.* at 266.

52. *Id.* at 270.

53. See generally *id.* at 276–314 (overviewing and analyzing the various checks on presidential power that, in Professor Choper’s opinion, render judicial review of alleged separation of powers violations unnecessary).

resolving these claims.<sup>54</sup> In *Bond*, for example, the Court emphasized that “the dynamic between and among the branches is not the only object of the Constitution’s concern. The structural principles secured by the separation of powers protect the individual as well.”<sup>55</sup>

The Court’s individual-rights perspective draws support from the Framers’ justifications for the checks and balances in the Constitution. In *Myers v. United States*, Justice Brandeis famously stated,

The doctrine of the separation of powers was adopted by the convention of 1789 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.<sup>56</sup>

Similarly, James Madison noted in the Federalist Papers that the separation of powers is “essential to the preservation of liberty.”<sup>57</sup> Accordingly, Chief Justice Burger’s explanation in the 1986 case of *Bowsher v. Synar*—that “[e]ven a cursory examination of the Constitution reveals the influence of Montesquieu’s thesis that checks and balances were the foundation of a structure of government that

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54. See *infra* notes 60–66 and accompanying text (discussing the individual-rights perspective to separation of powers standing).

55. *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011). The Court has also noted, for example:

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the ‘Officers of the United States.’ . . . They instead look to the President to guide the ‘assistants or deputies . . . subject to his superintendence.’ Without a clear and effective chain of command, the public cannot ‘determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.’

*Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3155 (2010) (citing THE FEDERALIST No. 72, at 487 (Alexander Hamilton) (J. Cooke ed., 1961));

The declared purpose of separating and dividing the powers of government, of course, was to ‘diffus[e] power the better to secure liberty.’ ”

*Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)); and

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

*INS v. Chadha*, 462 U.S. 919, 959 (1983).

56. 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

57. THE FEDERALIST NO. 51 (James Madison).

would protect liberty”—is emblematic of the Court’s recent separation of powers jurisprudence.<sup>58</sup>

Given its concern with individual rights, the Court in recent years has routinely entertained separation of powers cases, including challenges to dual for-cause insulation for inferior officers,<sup>59</sup> the line item veto,<sup>60</sup> congressional removal power over an executive officer,<sup>61</sup> and the legislative veto.<sup>62</sup> The Court has permitted these suits because the alleged injuries are the precise infringements of liberty that the Framers sought to prevent when ensuring federal power was diffuse.<sup>63</sup> These recent cases, moreover, suggest that the judiciary is the ultimate arbiter of separation of powers disputes. Although the Court has explained that it is not the sole interpreter of the Constitution,<sup>64</sup> it does maintain the authority to determine which branch’s interpretation reigns supreme.<sup>65</sup> The Court’s recent willingness to resolve separation of power cases indicates that the Constitution’s separation of powers principles are for judicial, not political, interpretation. Indeed, as Chief Justice Roberts recently explained, “[T]he obligation of the Judiciary [is] not only to confine itself to its proper role, but to ensure that the other branches do so as well.”<sup>66</sup>

### III. BUCKLEY AND ITS PROGENY

*Buckley v. Valeo* grapples with the question of who has standing to petition the courts to enforce separation of powers principles. Unfortunately, like many other standing cases, *Buckley* obfuscates rather than clarifies standing doctrine.<sup>67</sup> The Court in

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58. *Bowsher*, 478 U.S. at 722. Madison directly cited the “celebrated” Montesquieu in support of the Constitution’s separation of powers principles. THE FEDERALIST NO. 47 (James Madison).

59. *Free Enter. Fund*, 130 S. Ct. at 3138.

60. *Clinton v. City of New York*, 524 U.S. 417 (1998).

61. *Bowsher*, 478 U.S. at 714.

62. *INS v. Chadha*, 462 U.S. 919 (1983).

63. See *supra* note 55.

64. See *Nixon v. United States*, 506 U.S. 224, 233 (1993) (holding that interpretation of the impeachment-trial power is textually committed to the Senate and is therefore immune to judicial review).

65. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . .”).

66. *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting).

67. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (“We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it . . .”); see also WRIGHT & MILLER ET AL., *supra* note 21, § 3531.3 (“Current standing law is an incredibly rich tapestry woven from all the strands that have been twisted by the wheels of time.”); Cass R. Sunstein, *What’s Standing After Lujan? Of*

*Buckley* hinted at the standing requirements for litigants who want to mount a separation of powers challenge against an administrative agency, but that hint was only a single sentence. As a result, the few courts that have tackled *Buckley* standing have struggled to define its ultimate scope. *Buckley*, in short, is a sphinx in the realm of standing, telling a one-sentence riddle that courts have yet to solve.<sup>68</sup>

### A. The Buckley Decision

In *Buckley*, federal political candidates, parties, and organizations challenged the constitutionality of the 1974 Amendments to the Federal Election Campaign Act.<sup>69</sup> The 1974 Amendments created the eight-member Federal Election Commission,<sup>70</sup> and the petitioners alleged that the method for selecting the Commission's six voting members<sup>71</sup> violated the Appointments Clause.<sup>72</sup> Under the 1974 Amendments, the Speaker of the House and President pro tempore of the Senate each appointed two of the six voting commissioners.<sup>73</sup> The Appointments Clause, however, requires the President alone to appoint "Officers of the United States."<sup>74</sup>

The petitioners invoked the Federal Election Campaign Act's citizen-suit provision to challenge the appointment arrangement.<sup>75</sup> In addition to meeting the Act's statutory standing requirements,

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Citizen Suits, "Injuries," and Article III, 91 MICH. L. REV. 163, 186–92 (1992) (conveying three ways in which the *Lujan* decision, in Professor Sunstein's opinion, misconceptualizes standing law).

68. In Greek mythology, the Sphinx was a monster who terrorized the town of Thebes by eating the local citizens. See BARRY B. POWELL, CLASSICAL MYTH 475–76 (5th ed. 2007). Before killing her prey, the Sphinx would pose a riddle: "What goes on four legs in the morning, two at midday, and three in the evening?" *Id.* at 476. Until answered correctly, Thebes would live in her shadow. *Id.*

Oedipus, the tragic hero who had unknowingly murdered his father and who would later unknowingly wed his mother, delivered Thebes from the Sphinx's grip by correctly answering the riddle. *Id.* *Human beings*, Oedipus explained, crawl on all fours as infants (the morning), walk on two legs thereafter (midday), and rely on the support of a cane in their later years (the evening). *Id.*

69. *Buckley v. Valeo*, 424 U.S. 1, 6 (1976).

70. *Id.* at 113.

71. Two of the eight FEC Commissioners did not have voting rights. *Id.*

72. *Id.* at 118–19.

73. *Id.* at 113.

74. *Id.* at 118–19.

75. *Id.* at 8. The Court of Appeals did find, however, that a limited portion of the case, involving the Commission's ability to issue advisory opinions and review expenditures, was ripe for review. See *Buckley v. Valeo*, 519 F.2d 821, 893–96 (D.C. Cir. 1975) (finding ripe for adjudication the portions of the case related to the Commission's ability to issue advisory opinions and to review and authorize expenditures).

though, the petitioners also needed Article III standing.<sup>76</sup> But that was of no concern, the Court explained, because “[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights.”<sup>77</sup> This sentence defines what this Note refers to as “*Buckley* standing.”

The core problem with *Buckley* standing is the same one that troubled country music legend Conway Twitty: “That’s all she wrote.”<sup>78</sup> In a case spanning 294 pages of the U.S. Reports, the Court spent a mere two paragraphs explaining the intersection of standing and separation of powers.<sup>79</sup> Presumably that is because the *Buckley* Court felt that Article III standing was a foregone conclusion. Indeed, the Court believed that the case really presented a prudential “question of ripeness, rather than lack of case or controversy under Art[icle] III.”<sup>80</sup> The Court therefore did not engage in an in-depth analysis of how separation of powers standing would work in future cases.

Looking at *Buckley*’s plain language, it appears that separation of powers standing has two components. First, the asserting party must have “sufficient concrete interests” at stake. This requirement makes perfect sense; it merely restates the Article III injury-in-fact requirement.<sup>81</sup> In contrast, the second requirement—that the agency a party is challenging on separation of powers grounds must be “designated to adjudicate [the party’s] rights”—seems to come from nowhere. And unfortunately, *Buckley* fails to address the origin, scope, and desirability of this agency-nexus requirement.

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76. See *Buckley*, 424 U.S. at 11–12 (explaining that Article III standing rules still apply even when a statute contains a citizen-suit provision); accord *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572–78 (1992) (same).

77. The *Buckley* Court used an almost identical phrase to convey this standing principle in two different parts of the opinion. Compare *id.* at 12 n.10 (“[P]arties with sufficient concrete interests at stake have been held to have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights.”), with *id.* at 117 (“Party litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights.”). Courts applying *Buckley* standing often use the latter quotation, although the former stems from *Buckley*’s actual standing discussion. See, e.g., *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 15 (1st Cir. 2012); *Comm. for Monetary Reform v. Bd. of Governors*, 766 F.2d 538, 543 (D.C. Cir. 1985). I too have adopted the latter quotation for its more rule-like language.

78. CONWAY TWITTY, *That’s All She Wrote*, on CONWAY (MCA Records 1978).

79. See *Buckley*, 424 U.S. at 11 & n.10.

80. *Id.* at 117.

81. See *supra* text accompanying notes 12 & 13.

The most obvious justification for the agency-nexus requirement is that it somehow stems from the Article III injury-in-fact test. Separation of powers suits implicate two overlapping standing doctrines: the injury-in-fact requirement and the generalized grievances prohibition. Although the generalized grievance rule is typically classified as prudential, it takes on constitutional dimensions when the plaintiff's only injury is that the government is not following the law.<sup>82</sup> In separation of powers cases, plaintiffs are in essence claiming that the government is not following the law of the Constitution's power-sharing structure. Accordingly, the *Buckley* Court could have assumed that, if an agency does not actually regulate the plaintiffs, the only harm any separation of powers violation could possibly cause is the generalized grievance of the government transgressing the law. If that assumption is true, then even if the agency has violated separation of powers principles, unregulated third parties can never assert from that violation a concrete, individualized harm—that is, an injury-in-fact. The Court, in other words, may not have intended the agency-nexus requirement to be an *additional* hurdle at all. Rather, the requirement simply may be an *assumption*—although perhaps an overly broad one—about how Article III's injury-in-fact test applies in the separation of powers context.

Other language in the key sentence from *Buckley*, however, throws a wrench into this interpretation. The Court's use of the permissive "may" insinuates that even with sufficient concrete interests and a proper nexus with the agency-defendant, a party might still not have standing to assert a separation of powers claim. But when would such a situation arise? If a party satisfies constitutional standing requirements but still lacks standing, a court must have been applying some *prudential* standing rule. This possibility undercuts the idea that *Buckley* was merely applying the constitutional injury-in-fact test. And as this Note will explain, subsequent courts have treated *Buckley*'s agency-nexus language as imposing an additional, prudential standing requirement.<sup>83</sup>

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82. See, e.g., Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013) ("A litigant . . . claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large . . . does not state an Article III case or controversy." (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992)) (internal quotation marks omitted)).

83. *Infra* Part III.B–C.

### B. The Post-Buckley Landscape

Since the *Buckley* decision in 1976, federal courts have applied its standing principle approximately ten times.<sup>84</sup> The cases involved a wide range of issues, including the President's power to conduct warrantless wiretaps,<sup>85</sup> the ability of an independent commission to investigate the Iran-Contra Scandal,<sup>86</sup> the validity of the one-house legislative veto,<sup>87</sup> and the limits of the nondelegation doctrine.<sup>88</sup> In half the cases, the plaintiffs had standing to assert their separation of powers challenge;<sup>89</sup> in the other half, they did not.<sup>90</sup>

Why have courts invoked *Buckley* standing so infrequently? Several factors may be at play. Perhaps *Buckley*'s one sentence on standing is so unclear that courts and litigants avoid it by finding other reasons to support standing. Or perhaps the legislative and executive branches generally respect the separation of powers and rarely cross the constitutional line. Ultimately, though, the main reason that *Buckley* standing rarely emerges is probably because sophisticated litigants challenging an agency on separation of powers grounds typically join with multiple diverse parties—individuals, interest groups, and affected businesses—to ensure that at least one of

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84. To find cases discussing *Buckley* standing, I undertook several Westlaw searches on January 3, 2013. First, I looked at all cases citing the relevant headnotes from *Buckley* itself. Additionally, I searched for cases using an advanced search exact language feature to search for the entire *Buckley* standing quotation, the words “party litigants with sufficient concrete interests,” and the words “agency designated to adjudicate their rights.” I then read each opinion and eliminated cases that discussed ripeness or standing principles not related to separation of powers challenges. The final list of cases I have identified as discussing or citing the *Buckley* standing principle is: *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012); *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007); *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987) (Williams, J., concurring and dissenting); *In re President's Comm'n on Organized Crime Subpoena of Scarfo*, 783 F.2d 370 (3d Cir. 1986); *Comm. for Monetary Reform v. Bd. of Governors*, 766 F.2d 538 (D.C. Cir. 1985); *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1981), *aff'd*, 462 U.S. 919 (1983); *Reuss v. Balles*, 584 F.2d 461 (D.C. Cir. 1978); *Natl'l Fed'n of Fed. Emps. v. United States (NFFE I)*, 727 F. Supp. 17 (D.D.C. 1989), *review denied*, (*NFFE II*) 905 F.2d 400 (D.C. Cir. 1990); *Citizens for the Abatement of Aircraft Noise, Inc. v. Metro. Wash. Airports Auth. (CAAN I)*, 718 F. Supp. 974 (D.D.C. 1989), *rev'd on other grounds*, (*CAAN II*), 917 F.2d 48 (D.C. Cir. 1990), *aff'd*, (*CAAN III*), 501 U.S. 252 (1991); *Pac. Legal Found. v. Watt*, 529 F. Supp. 982 (D. Mont. 1981).

85. *ACLU v. NSA*, 493 F.3d at 648–49.

86. *Sealed Case*, 829 F.2d at 51–52.

87. *Chadha*, 634 F.2d at 411.

88. *NFFE I*, 727 F. Supp. at 19.

89. *CAAN III*, 501 U.S. at 264–65; *Sealed Case*, 829 F.2d at 68 (Williams, J., concurring and dissenting); *Organized Crime Subpoena*, 783 F.2d at 374; *Chadha*, 634 F.2d at 418; *Pac. Legal Found.*, 529 F. Supp. at 992–94 (holding that only the individual plaintiffs had standing).

90. *KG Urban*, 693 F.3d at 15; *ACLU v. NSA*, 493 F.3d at 675; *Comm. for Monetary Reform*, 766 F.2d at 544; *Reuss*, 584 F.2d at 471; *NFFE I*, 727 F. Supp. at 17.

them clearly has standing.<sup>91</sup> But despite the relative infrequency of these suits, recent gridlock in the Senate over President Obama's appointees has brought separation of powers issues to the forefront once again,<sup>92</sup> and even if some plaintiffs can join other parties to skirt standing issues, there is no assurance that injured litigants will always be able to do so.

*Buckley* standing is thus plagued not only by the Court's ambiguous language but also by its limited application by lower courts. Indeed, the vague language and lack of robust precedent prompted the First Circuit to recently comment that "[t]he contours of *Buckley*'s standing analysis are not well-defined."<sup>93</sup>

### C. The D.C. Circuit's Interpretation of Buckley

The D.C. Circuit's attempt to clarify *Buckley* standing's agency-nexus prong deserves special attention because it is the federal court most experienced with administrative law.<sup>94</sup> The D.C. Circuit has held that unless parties are "directly subject" to the challenged agency's authority, they cannot have standing to bring a separation of powers claim even if they otherwise meet Article III's standing

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91. See *infra* note 123 (explaining that courts can entertain claims asserted by multiple parties as long as one of those parties has standing). The litigation over the Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), is an example of recent vintage. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1270–73 (N.D. Fla.) (discussing the standing of individuals, organizations, and states), *aff'd in part, rev'd in part*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom. NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

92. See *Noel Canning v. NLRB*, 705 F.3d 490, 514 (D.C. Cir.) (invalidating President's recess appointments to the NLRB), *cert. granted*, 133 S. Ct. 2861 (2013). Recent presidents have also used the Vacancies Act to appoint "acting" directors to administrative agencies when Senate confirmation hopes for their nominee of choice appear dim. See Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 WASH. U. L.Q. 1039, 1047–51 (1998) (rejecting the Clinton Administration's claim that it could appoint "acting" Assistant Attorney Generals indefinitely). See generally HENRY B. HOGUE, CONG. RESEARCH SERV., RS21412, TEMPORARILY FILLING PRESIDENTIALLY APPOINTED, SENATE-CONFIRMED POSITIONS 2–5 (2008) (explaining how President can temporarily fill vacant executive branch positions without Senate confirmation). This practice may violate the Appointments Clause, especially if Presidents ignore the Vacancies Act's time limit on acting appointments. Cf. Sean Scully, *Bid to Reform Vacancies Act up in Air*, WASH. TIMES, Sept. 29, 1998, at A6 ("Democratic opponents of the bill don't deny that presidents routinely ignore the Vacancies Act . . ."); Editorial, *Vacant Government*, WALL ST. J., Mar. 30, 1998, at A18 (explaining that in March 1998, 59 of 320 officers whose appointment normally requires Senate confirmation were sitting in violation of the Vacancies Act).

93. *KG Urban Enters., LLC v. Patrick*, 693 F.3d 15 (1st Cir. 2012).

94. See *supra* note 5 (noting the large portion of administrative-law cases in the D.C. Circuit's docket).

requirements.<sup>95</sup> Yet even when the “directly subject” rule was clearly implicated, the Circuit ignored it twice. The Supreme Court only reviewed one of those cases, and there, the Court affirmed the D.C. Circuit. Ultimately, then, the continued validity of the “directly subject” interpretation is unclear.

The D.C. Circuit’s *Reuss v. Balles*<sup>96</sup> case is the first in which a court applied *Buckley*’s standing principle.<sup>97</sup> There, Congressman Henry Reuss alleged that the composition of the Federal Open Market Committee (“FOMC”) violated the Appointments Clause. His theory was that Article II barred the Federal Reserve Banks from appointing five of the Committee’s members (as the organic statute contemplated) because each member needed presidential appointment and Senate confirmation.<sup>98</sup> The Committee, however, disputed Reuss’s standing to bring the suit under *Buckley*.<sup>99</sup>

The D.C. Circuit in *Reuss* analyzed the standing issue according to *Buckley*’s plain language. First, the court explained, a plaintiff must have “sufficient concrete interests” in the case—in other words, a “personal stake” in obtaining the requested relief.<sup>100</sup> The majority believed that, as a bondholder, Reuss lacked a personal interest in the case because he could not prove that his bonds would fare better under a properly appointed Committee.<sup>101</sup> Second, the court held that the challenged agency must “adjudicate [the plaintiff’s] rights,” which it applied as a separate, necessary requirement for plaintiffs to have *Buckley* standing.<sup>102</sup> The court in *Reuss* believed that the FOMC’s regulation of inflation rates was not an “adjudication” of rights with respect to bondholders in the market broadly.<sup>103</sup> In other words, the court seemed to employ a notion similar to proximate cause

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95. See *infra* text accompanying notes 109–18 (detailing Comm. for Monetary Reform v. Bd. of Governors, 766 F.2d 538 (D.C. Cir. 1985)).

96. 584 F.2d 461, 470–71 (D.C. Cir. 1978).

97. See *supra* note 84 for a list of cases in which federal courts have discussed *Buckley* standing.

98. *Reuss*, 584 F.2d at 464.

99. *Id.* at 470.

100. See *id.* (“In its rather brief standing discussion in *Buckley*, the Court took care to stress twice the requirement that parties have to demonstrate a sufficient ‘personal stake’ in the outcome of a controversy before they will be granted access to a federal court’s remedial powers.”).

101. *Id.* at 470–71. But see *infra* note 112 (explaining that the D.C. Circuit no longer applies a strict causation requirement in Appointments Clause cases).

102. See *Reuss*, 584 F.2d at 470–71 (“An injunction prohibiting the Reserve Bank members from participating in FOMC deliberations and decisions until properly appointed, however, would not be of similar benefit to the appellant. In the first place, the FOMC does not adjudicate his rights in any respect . . .”).

103. *Id.*

in tort cases: the FOMC's decisions on inflation rates do affect participants in the bond market, but that connection is not legally sufficient for *Buckley* standing. This reasoning suggests that to satisfy *Buckley*, litigants must not only have a nexus, but a somewhat close nexus, with the challenged agency.<sup>104</sup>

In 1985, the D.C. Circuit again grappled with *Buckley* standing. *Committee for Monetary Reform v. Board of Governors of the Federal Reserve System*<sup>105</sup> involved the same constitutional challenge to the FOMC's bank-appointed members as in *Reuss v. Balles*.<sup>106</sup> This time, however, private businesses and individuals together filed the suit, claiming that the FOMC's private bank members had influenced the committee to increase interest rates, lining the pockets of the private banks while leaving the plaintiffs empty-handed.<sup>107</sup> The plaintiffs first argued that they had standing because of the economic injury inflicted by the heightened rates.<sup>108</sup> The court rejected this theory, however, because the plaintiffs failed to prove causation and redressability as Article III standing requires.<sup>109</sup> But even without economic injury, the appellants argued, *Buckley* conferred standing to challenge the FOMC's appointment structure.<sup>110</sup>

The D.C. Circuit disagreed.<sup>111</sup> The court saw the plaintiffs' separation of powers claim as a generalized grievance shared widely with other bondholders and expressed concern that reading *Buckley* too broadly might result in the resolution of problems better solved by

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104. Chief Judge J. Skelly Wright dissented, arguing that Reuss had standing as a bondholder under *Buckley*. *Id.* at 471 (Wright, J., dissenting). Chief Judge Wright first rejected the majority's requirement that plaintiffs prove they would fare better under a validly constituted committee. *See id.* at 471–72. He then noted that the

appellants in *Buckley* were nowhere required to establish that the method of appointing members to the FEC had any direct, adverse impact upon them, or that different and more favorable decisions would be reached by a properly constituted body. . . . [T]he fact that an individual's rights are being determined by an allegedly unconstitutionally composed body is, in itself, sufficient to meet the injury requirement and to permit the court to decide the merits of his constitutional challenge.

*Id.* at 472. While this Note's author agrees with the Chief Judge's causation analysis, the Author respectfully believes that the reading of the word "adjudicate" as used in *Buckley* is too broad. *See infra* notes 166–167 and accompanying text. The best approach, the Author accordingly believes, is to reject the agency-nexus prong rather than stretch the definition of adjudicate to fit a desired solution.

105. 766 F.2d 538 (D.C. Cir. 1985).

106. *Id.* at 539–41.

107. *Id.*

108. *Id.* at 542–43.

109. *Id.*

110. *Id.* at 543–44.

111. *Id.*

the political branches.<sup>112</sup> Accordingly, the D.C. Circuit held that standing to bring separation of powers suits is limited to plaintiffs who are “directly subject to the authority of the agency, whether such authority is regulatory, administrative, or adjudicative in nature.”<sup>113</sup> Since the FOMC did not exercise any “direct government authority” over the plaintiffs, the plaintiffs lacked standing.<sup>114</sup>

Federal courts in the D.C. Circuit have twice since relied on the “directly subject” rule to determine a party’s standing under *Buckley*.<sup>115</sup> First, in *Federal Election Commission v. NRA Political Victory Fund*, the plaintiffs had standing to attack the composition of the Federal Election Commission on separation of powers grounds because the agency had filed an enforcement action against the plaintiffs, which is the “paradigm of direct governmental authority.”<sup>116</sup> In the second case, *National Federation of Federal Employees v. United States*, two separate plaintiffs attempted to thwart a military base closure by asserting that the Base Closure and Realignment Act<sup>117</sup> delegated excessive authority to the Secretary of Defense.<sup>118</sup> The district court held that the union for civilian employees who worked on

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112. See *id.* (“We believe that to allow all persons indirectly affected by an agency’s decision to challenge its constitutional authority would . . . require the courts to decide abstract questions of wide public significance . . . even though judicial intervention may be unnecessary to protect individual rights.” (internal quotation marks omitted)). This concern is curious considering the appellants appear to have had Article III standing. When the court analyzed *Buckley* standing, it had already assumed plaintiffs sustained an injury-in-fact. *Id.* at 542. Further, the D.C. Circuit uses a relaxed causation requirement in Appointments Clause cases. See *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) (explaining that in separation of powers cases, courts “presume that subtle variations . . . affect conduct” (citing *Bowsher v. Synar*, 478 U.S. 417 (1986))); see also *Andrade v. Lauer*, 729 F.2d 1475, 1495 (D.C. Cir. 1984) (holding that a plaintiff mounting an Appointments Clause challenge does not fail the causation requirement simply because the challenged officers would have taken the same action if properly nominated and confirmed). Finally, Article III standing appears likely since a declaration that the FOMC was unconstitutional and an injunction against it acting would provide the plaintiffs with prospective relief.

113. *Comm. for Monetary Reform*, 766 F.2d at 543–44.

114. See *id.* at 544 (“In the present case, it is clear that the FOMC and the Federal Reserve System in no way exercise direct governmental authority over the appellants. We therefore conclude that the *Buckley* principle fails to support the appellants’ standing in the present case.”). Once the D.C. Circuit dismissed the monetary injury claim, the appellants no longer had any other injury aside from the alleged separation of powers violation itself. *Id.* Under this Note’s solution, the appellants in *Committee for Monetary Reform* would still not have standing because they would not have an “otherwise justiciable injury.” See *infra* Part IV (rejecting *Buckley*’s agency-nexus prong).

115. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993); *Nat'l Fed'n of Fed. Emps. v. United States*, 727 F. Supp. 17, 19 (D.D.C. 1989), *review denied*, 905 F.2d 400 (D.C. Cir. 1990).

116. 6 F.3d at 824 (citations omitted) (internal quotation marks omitted).

117. Note following 10 U.S.C. § 2687 (2012).

118. 727 F. Supp. at 19–21.

the base had standing because those employees were directly subject to the Secretary's authority.<sup>119</sup> A construction company servicing the base, on the other hand, did not. Simply doing business with the military did not "directly subject" the construction company to the Secretary's authority.<sup>120</sup>

The D.C. Circuit's brief opinion denying review in *National Federation of Federal Employees* makes *Buckley* standing even more mystifying than it already was after *Committee for Monetary Reform*.<sup>121</sup> The D.C. Circuit agreed with the district court's holding that the union had standing.<sup>122</sup> And it was unnecessary, the court explained, to determine the construction company's standing, because the union plaintiffs fully represented all claims asserted.<sup>123</sup> Most importantly for *Buckley* standing purposes, the court opined in a short footnote that the union was exempt from the "directly subject" rule because it met Article III's standing requirements.<sup>124</sup> The "directly subject" rule from *Committee for Monetary Reform*, the court opined, was an "alternative formulation" of the Article III test.<sup>125</sup>

This reading of the "directly subject" rule appears to conflict with the stark language in *Committee for Monetary Reform*: "[L]itigants have standing to challenge the authority of an agency on separation-of-powers grounds only where they are directly subject to the authority of the agency."<sup>126</sup> The "directly subject" rule does not read like a mere "alternative formulation" of the traditional

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119. *Id.* at 21.

120. See *id.* (holding the construction company was not directly subject to the Secretary of Defense's authority and thus did not have standing).

121. *NFFE II*, 905 F.2d 400, 400 (D.C. Cir. 1990) (denying request for appellate review).

122. *Id.* at 402.

123. *Id.* (holding the union had standing and therefore declining to discuss the construction company's standing). When a case contains multiple litigants asserting identical claims seeking the same relief, the case can progress so long as one party has standing. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 620 n.15 (1988) (holding that because individual appellants had taxpayer standing to mount facial challenge against law, considering standing of other plaintiffs was unnecessary).

124. See *NFFE II*, 905 F.2d at 402 n.2:

We note in passing that since NFFE meets Article III's standing requirements as traditionally formulated—allegations of actual or threatened harm fairly traceable to the challenged action which is likely to be redressed by a favorable decision—it need not also meet an alternative formulation of the standing test discussed in *Committee for Monetary Reform v. Board of Governors of the Fed. Reserve Sys.* . . . which requires a plaintiff to show that he is directly subject to the governmental authority he seeks to challenge.

(citation omitted).

125. *Id.*

126. *Comm. for Monetary Reform v. Bd. of Governors*, 766 F.2d 538, 543 (D.C. Cir. 1985).

constitutional test.<sup>127</sup> Rather, it appears to be a bright-line rule. And it is hard to imagine how a plaintiff could maintain a claim under the “directly subject” rule but not meet Article III standing requirements. Article III sets the outer limits of the Judiciary’s authority; federal courts can *never* hear a case where the plaintiff does not meet those requirements.<sup>128</sup> There is no “alternative” to Article III’s standing requirements.

The D.C. Circuit further complicated matters when it held that an indirectly affected plaintiff had standing to challenge an agency on separation of powers grounds without mentioning the “directly subject” rule at all. In *Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Authority* (“CAAN”),<sup>129</sup> a nonprofit organization dedicated to reducing airport noise sued the agency that operated two airports in the Washington, D.C., metropolitan area.<sup>130</sup> The nonprofit, which asserted that the agency’s new master management plan would increase noise by adding air traffic, argued the agency’s structure violated separation of powers principles.<sup>131</sup> The agency’s organic statute contemplated that the Board of Directors would promulgate a master plan to be reviewed by a board comprised solely of members of Congress.<sup>132</sup> The review board would hold full veto power over the master plan.<sup>133</sup> The nonprofit argued that the review board was an agent of Congress and therefore, under *INS v. Chadha*, could not veto actions by the Board of Directors.<sup>134</sup>

With regard to standing, the district court held that the nonprofit, as an organization, satisfied both Article III and *Buckley*.<sup>135</sup> The nonprofit’s injury-in-fact was the increase in airport noise resulting from the master plan, which made the group’s goal of

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127. *NFFE II*, 905 F.2d at 402 n.2.

128. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (“[O]f one thing we may be sure: Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States.”); cases cited *supra* notes 9–10 (defining standing as a jurisdictional issue).

129. *CAAN II*, 917 F.2d 48 (D.C. Cir. 1990), *rev’d on other grounds* 718 F. Supp. 974 (D.D.C. 1989), *aff’d*, 501 U.S. 252 (1991).

130. *CAAN I*, 718 F. Supp. at 977–79.

131. *Id.* at 980–81.

132. *Id.* at 977–78.

133. *Id.* at 978.

134. *Id.* at 983 (“Plaintiffs maintain that the veto power possessed by the Board of Review amounts to ‘an extra-constitutional check on the execution of the law’ in violation of [INS v. *Chadha*, 462 U.S. 919 (1983)]”).

135. *Id.* at 980–82.

reducing that noise more difficult.<sup>136</sup> The injury was “fairly traceable” to the veto power of the review board because that power “undoubtedly influenced” the Board of Directors’ decision to adopt the master plan, and a declaration that the veto power was unconstitutional would invalidate the master plan.<sup>137</sup> The district court also held that the organization satisfied *Buckley*’s standing requirements. The nonprofit’s injury-in-fact meant it had sufficient concrete interests, and the airport-management agency regulated the nonprofit’s rights since the nonprofit sought to influence local airport policy to reduce aircraft noise.<sup>138</sup> On review, the D.C. Circuit refused to address the *Buckley* standing argument and found that the organization had standing solely by meeting Article III’s requirements.<sup>139</sup> The Supreme Court adopted this same analysis and affirmed the D.C. Circuit’s holding.<sup>140</sup>

The series of decisions in *CAAN* appears inconsistent with the “directly subject” rule. The challenged agency only exercised direct authority over the two airports under its jurisdiction.<sup>141</sup> The nonprofit thus appears to be just the kind of party “indirectly affected by [the] agency’s decision”<sup>142</sup> that the “directly subject” rule filters out. Yet neither the D.C. Circuit nor the Supreme Court mentioned the “directly subject” rule or the *Buckley* decision.

The seemingly bright-line rule from *Committee for Monetary Reform*—that only litigants directly subject to an agency’s authority have standing to challenge that agency on separation of powers grounds—has never been overruled. Whether plaintiffs like the hypothetical fishing companies discussed earlier in this Note have standing to challenge the EPA Director’s appointment is therefore an open question.

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136. *CAAN III*, 501 U.S. 252, 264–65 (1991).

137. *Id.* at 265. Invalidating the veto power would have prevented the agency from acting because of a nonseverability clause in the organic statute. *Id.* at 260–61.

138. See *CAAN I*, 718 F. Supp. at 981–82 (“[P]laintiffs also contend that the veto power of the Board of Review ‘diminished the influence’ of CAAN over airports issues . . . . The Act does make plain, however, that the Authority was created in part to protect the interests of local residents such as the members of CAAN.”).

139. *CAAN II*, 917 F.2d at 53–54.

140. See *CAAN III*, 501 U.S. at 253 (explaining that the increased noise and pollution allegedly resulting from the agency’s master plan was an injury-in-fact traceable to the separation of powers problem, which would be remedied by the requested declaratory relief).

141. See *CAAN I*, 718 F. Supp. at 976–78 (overviewing the agency’s organic statute).

142. Comm. for Monetary Reform v. Bd. of Governors, 766 F.2d 538, 543 (D.C. Cir. 1985).

#### IV. THE *BOND* DECISION AND ITS INHERENT TENSION WITH *BUCKLEY*

The waters of *Buckley* standing became murkier in 2011 with the Supreme Court's decision in *Bond v. United States*.<sup>143</sup> Although *Bond* at its core was about standing to raise Tenth Amendment claims, the Court drew support from its separation of powers jurisprudence. Justice Kennedy's majority opinion explained that standing to bring either separation of powers or federalism challenges is quite broad: any litigant with an injury-in-fact can oppose government action on those grounds. *Bond* therefore cuts the opposite way from the D.C. Circuit's narrow interpretation of *Buckley*. In fact, *Bond* seems to dispense with any nexus requirement at all.

##### A. Bond and the “Otherwise Justiciable Injury” Approach

Paul Clement, counsel for the petitioner, billed *Bond* as “one of the easiest standing cases to reach [the Supreme] Court in some time.”<sup>144</sup> Federal prosecutors indicted Bond for violating a ban on chemical weapons that Congress passed to implement certain treaty provisions.<sup>145</sup> Bond moved to quash the indictment on the grounds that the federal statute exceeded Congress’s Article I powers and therefore violated the Tenth Amendment.<sup>146</sup> The district court denied Bond’s motion, and she appealed.<sup>147</sup> The Government argued on appeal that Bond did not have standing to challenge the statute because individuals cannot assert the rights of states vis-à-vis the federal government.<sup>148</sup> The Third Circuit agreed.<sup>149</sup>

The Supreme Court, however, agreed with Bond: it unanimously reversed.<sup>150</sup> To start, the Court explained that there was no question that Bond met the Article III standing requirements.<sup>151</sup>

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143. 131 S. Ct. 2355 (2011).

144. Brief of Petitioner-Appellant at 14, *Bond*, 131 S. Ct. 2355 (No. 09-1227).

145. The facts of this case involve a “bitter personal dispute,” *Bond*, 131 S. Ct. at 2360, fitting for a daytime soap opera. Carol Anne Bond’s husband had an affair with one of her close friends, who became pregnant. *Id.* Bond began harassing her friend, resulting in a minor conviction under state law. *Id.* Bond then proceeded to cover her friend’s mailbox, car door handle, and front doorknob with caustic substances. *Id.* After the substances burned the victim, Bond was indicted for violating the Chemical Weapons Implementations Act of 1998, 112 Stat. 2681–856. *Bond*, 131 S. Ct. at 2360.

146. *Id.*

147. *Id.*

148. *Id.* at 2360–61.

149. *Id.* at 2361.

150. *See id.* at 2367 (unanimous opinion) (“There is no basis in precedent or principle to deny petitioner’s standing to raise her claims.”).

151. *See id.* at 2361–62 (“[I]t is apparent . . . that Article III poses no barrier.”).

The injury she asserted was her impending incarceration for violating the chemical weapons statute, so a declaration that the statute was unconstitutional would result in the dismissal of the charges.<sup>152</sup> The Court further rejected the Government's argument against third-party standing.<sup>153</sup> It explained that “[f]ederalism has more than one dynamic. . . . [It] secures to citizens the liberties that derive from the diffusion of sovereign power” in addition to protecting State sovereignty.<sup>154</sup> In other words, federalism principles belong not only to the states but to individuals too.

To support its holding, Justice Kennedy's opinion in *Bond* drew an analogy to separation of powers cases.<sup>155</sup> It explained that separation of powers principles, like federalism principles, protect both individual liberties and the constitutional structure envisioned by the Framers.<sup>156</sup> And many times, the unanimous opinion noted, “a cardinal principle of separation of powers [has been] vindicated at the insistence of an individual.”<sup>157</sup> There was no reason why federalism was any different.

Accordingly, the *Bond* Court proclaimed, “If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object.”<sup>158</sup> The Court was careful to note, however, that such challenges must come in a “proper case” in which the litigant meets Article III’s standing requirements and is not asserting a generalized grievance.<sup>159</sup> Even so, under *Bond*, the hypothetical fishing companies described in Part I appear to have standing. Their economic injury from decreased fish yields is an otherwise justiciable injury, which should be enough on its own under *Bond*.

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152. *See id.* (explaining how *Bond* met Article III standing requirements).

153. *Id.* at 2363–64.

154. *Id.* at 2364 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

155. *See id.* at 2365 (“The recognition of an injured person’s standing to object to a violation of a constitutional principle that allocates power within government is illustrated, in an analogous context, by cases in which individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations.”).

156. *See id.* (“The structural principles secured by the separation of powers protect the individual as well” as “each branch of government from incursion by the others.”).

157. *Id.* (citing *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138 (2010); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Bowsher v. Synar*, 478 U.S. 714 (1986); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

158. *Id.*

159. *See id.* at 2365–66 (explaining that litigants have “no standing to complain simply that their Government is violating the law” and must meet the tripartite Article III standing test discussed *supra* notes 9–15).

*B. Bond's Conflict with Buckley*

As explained in Part II.A, *Buckley* standing has two parts. First, a litigant must have “sufficient concrete interests,” and second, a litigant must assert its separation of powers claim against an “agency designated to adjudicate [its] rights.”<sup>160</sup> The *Buckley* Court did not define either prong. The D.C. Circuit, as previously explained, expounded on the second prong by imposing a “directly subject” rule.<sup>161</sup>

The “sufficient concrete interest” prong simply restates well-established standing requirements. In part, it duplicates constitutional standing requirements. Without a particularized injury caused by the challenged agency that is redressable by the requested relief, a plaintiff would have little “concrete interest” in the case’s outcome. *Buckley*’s first prong also restates the Court’s prudential concerns about generalized grievances. If parties merely “suffer[ ] in some indefinite way in common with people generally,”<sup>162</sup> they would also appear to lack a “concrete” interest in the case. So far, *Bond* and *Buckley* are perfectly compatible.

*Buckley*’s agency-nexus prong also incorporates traditional standing requirements. As noted, this part of the rule seems to assume that separation of powers claims by parties whose rights the agency does not adjudicate are generalized grievances.<sup>163</sup> The D.C. Circuit’s “directly subject” rule also supports this theory, since it was crafted to allow courts to avoid separation of powers conflicts that are better addressed to the political branches.<sup>164</sup> To the extent that this prong mirrors traditional doctrine, *Bond* and *Buckley* are still in accord.

But *Buckley*’s agency-nexus prong goes one step farther: it creates an additional standing hurdle that is unique to separation of powers cases.<sup>165</sup> Myriad scenarios exist in which litigants could meet traditional Article III and prudential standing requirements and yet have no relationship with the agency they seek to challenge on separation of powers grounds. Consider again the opening

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160. *Buckley v. Valeo*, 424 U.S. 1, 117 (1976).

161. *See supra* Part III.C (explaining how the D.C. Circuit interpreted *Buckley*’s agency-nexus prong).

162. *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

163. *Supra* paragraph containing notes 82 & 83.

164. *See supra* notes 105–114 and accompanying text (detailing the *Committee for Monetary Reform* decision).

165. Not to mention that it seems to have been applied inconsistently. *See supra* notes 129–42 and accompanying text (explaining how the D.C. Circuit has ignored the agency-nexus prong).

hypothetical involving the fishing companies and the EPA. The freshwater fishermen have no relationship with the EPA, but the increased water pollution that the new EPA regulations permit undoubtedly led to the decreased catch levels. *National Federation of Federal Employees* is another example. The military base closure most certainly hurt the construction company's bottom line, yet the company did not have a sufficiently close nexus with the Department of Defense. This is where *Bond* and *Buckley* part ways.

One could attempt to harmonize the two cases by defining away the "directly subject" rule and arguing that an agency always adjudicates people's rights when it causes a cognizable injury under Article III. That argument, however, faces two key problems. First, it stretches the term "adjudication" beyond any reasonable definition. Adjudication in the American legal tradition entails determining the rights of a finite class of individuals. Agency rulemaking may sometimes single out certain individuals, but it is usually most congruent with broad, generally applicable legislation.<sup>166</sup> Second, that argument conflicts with *Buckley*'s language. If any agency action causing particularized harm gives a plaintiff *Buckley* standing, then whether the agency adjudicated a party's rights would be irrelevant; the *Buckley* standing test would collapse to the first prong.<sup>167</sup> And since the first prong is just a restatement of existing constitutional and prudential standing requirements, no special standing rules would apply to separation of powers claims.

In the federalism context, *Bond* said just that: there are no special standing rules. Standing to assert that a government action violates federalism principles after *Bond* requires only an "otherwise justiciable injury."<sup>168</sup> Put another way, plaintiffs acquire standing first by demonstrating an injury-in-fact separate from the generalized grievance that the government violated federalism principles and second by meeting Article III's traceability and redressability requirements.<sup>169</sup> Most importantly, *Bond* strongly suggested that the

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166. As one well-known commentator has explained:

[T]here is a universally drawn distinction between due process requirements of participation in 'legislative' decisions and those in 'adjudicative' decisions. In the legislative context, no participation need be afforded as a matter of constitutional right. . . . By contrast, in adjudicative proceedings—when a single person or small group is singled out for special treatment—participation is required.

Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 67 (1985) (comparing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), with *Londoner v. City of Denver*, 210 U.S. 373 (1908)).

167. *Buckley v. Valeo*, 424 U.S. 1, 117 (1976).

168. *Bond v. United States*, 131 S. Ct. 2355, 2366–67 (2011).

169. *Id.* at 2365.

rules for standing in federalism cases are the same in separation of powers cases.

*Bond* and *Buckley* therefore conflict. *Buckley* requires Article III standing, a nongeneralized grievance, and a nexus with the challenged agency. *Bond* requires only the first two.<sup>170</sup>

## V. THE PROPER PATH: ADOPTING *BOND* IN SEPARATION OF POWERS SUITS

The conflict between *Bond* and *Buckley* begs the central question that this Part seeks to answer: should prudential standing rules require litigants to have a nexus with the agency they seek to challenge on separation of powers grounds? This Note answers that question in the negative. Courts should not impose any agency-nexus requirement. Federal courts should instead look to *Bond* when analyzing separation of powers standing. Put simply, any party that has sustained a justiciable injury-in-fact should be able to assert a separation of powers challenge against the agency that caused the injury.

This Part argues that there are two primary policy justifications for this approach. First, an agency-nexus requirement is unnecessary to keep litigants with insufficient interests at stake out of federal courts. Second, although scholars disagree about whether the judiciary should entertain separation of powers suits at all, an agency-nexus requirement thwarts the goals of both sides of this debate.

### A. *Bond's Approach Is Sufficient to Avoid Abstract Disputes*

The motivating factor behind *Buckley's* agency-nexus requirement, as previously explained, seems to be the Court's unwillingness to entertain generalized grievances.<sup>171</sup> That unwillingness stems from the rationales underlying the doctrine of standing: the judiciary's inability to accurately resolve cases without concrete facts, and deference to the political process.<sup>172</sup> *Buckley's* agency-nexus requirement, however, does not further these interests.

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170. Most lower courts do not appear to have yet recognized this conflict. In fact, most courts applying *Bond* are only using it in the federalism context. *E.g.*, *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 444 (4th Cir. 2011), *vacated*, 133 S. Ct. 679 (2012); *Seven-Sky v. Holder*, 661 F.3d 1, 52 (D.C. Cir. 2011); *Matias v. Jett*, Civ. No. 12-63, 2012 WL 983683 (D. Minn. Jan. 13, 2012), *report and recommendation adopted*, 2012 WL 983758 (D. Minn. Mar. 22, 2012). The Ninth Circuit, however, has applied *Bond's* rationale in the separation of powers context, albeit without mentioning *Buckley*. *See Jewel v. NSA*, 673 F.3d 902, 909–10 (9th Cir. 2011).

171. *See supra* Part IV.B (explaining the *Bond-Buckley* conflict).

172. *See supra* notes 21–35 (detailing the rationales that underlie standing doctrine).

The agency-nexus rule provides no additional assurance over existing standing requirements that a plaintiff will present specific facts or sharpen the issues for the court. Plaintiffs who plead a nongeneralized injury-in-fact can point to a specific, real-world situation in which they suffered harm.<sup>173</sup> If such plaintiffs can further connect the alleged separation of powers violation to their injury and can demonstrate that a federal court could provide relief, the court should have all the information it needs to resolve the case. The Supreme Court's decision in *CAAN* directly supports this notion. The plaintiffs there presented a valid injury-in-fact (decreased ability to reduce airport noise) fairly traceable to the alleged separation of powers violation (the review board's veto power) that the court could redress (by invalidating the unconstitutional provision).<sup>174</sup> On these facts alone, the Supreme Court apparently believed the judiciary was fully capable of resolving the case, even though the plaintiffs lacked a close nexus to the challenged agency.<sup>175</sup>

Further, the agency-nexus rule does nothing more to ensure courts avoid policy disputes than the traditional justiciability doctrines. Article III's case-or-controversy requirement and the prudential rule against generalized grievances ensure that litigants in federal court do not have standing to bring challenges based on "purely ideological" grounds.<sup>176</sup> Other doctrines play a part as well.<sup>177</sup> But it is unclear what, if anything, an agency-nexus requirement adds. It is possible that, more often than not, litigants without a nexus to the challenged agency present abstract disputes or mere ideological

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173. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[A]n injury in fact [is] . . . an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." (citations omitted) (internal quotation marks omitted)). *But see United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973) ("[T]he fact that many persons shared the same injury [cannot] be [a] sufficient reason to disqualify from seeking review of an agency's action any person who had in fact suffered injury.").

174. See *supra* notes 129–42 (detailing the holding from *CAAN* on standing).

175. See *CAAN III*, 501 U.S. 252, 264–65 (1991) (holding that aircraft-noise-prevention nonprofit had standing to challenge federal airport-management agency's master plan).

176. See *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 465 (7th Cir. 1998) (Posner, J.) ("A purely ideological interest is not an adequate basis for standing to sue in a federal court . . . ." (citing *Diamond v. Charles*, 476 U.S. 54, 67 (1986); *SCRAP*, 412 U.S. at 687; and *Sierra Club v. Morton*, 405 U.S. 727, 739–40 (1972))).

177. The *Londoner/Bi-Metallic* distinction shuts the door on parties demanding individualized procedural protections from widely applicable legislation. See *supra* note 166. The ripeness doctrine ensures that courts stay out of administrative policy disputes until an agency takes formal action. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). And the political question doctrine keeps the judiciary out of constitutional areas that are either textually committed to other branches or lack judicially manageable standards. See *Baker v. Carr*, 369 U.S. 186, 209–16 (1962).

disagreements. But the traditional standing doctrines already bar those parties from court. With those doctrines doing the legwork, the nexus requirement is just deadweight.

### B. Buckley's Agency-Nexus Rule Leaves No One Happy

As explained earlier, there are two schools of thought on whether the judiciary should police the boundaries of authority between the executive and legislative branches.<sup>178</sup> Those who believe that separation of powers protects individual liberty feel that it is precisely the courts' role to stop the political branches from transgressing the constitutional limitations of their authority.<sup>179</sup> Others who are confident that the political process adequately resolves these problems believe that the judicial branch has no role in adjudicating separation of powers disputes.<sup>180</sup> The agency-nexus rule, however, does nothing to further the interests of either perspective.

Take first the individual-rights approach. If the Constitution's separation of powers provisions actually do protect individual rights, then courts should flatly reject an agency-nexus rule. The judiciary has traditionally protected individual rights against majority oppression, and "[i]t is emphatically the province and duty of the judicial department"<sup>181</sup> to interpret the Constitution. From the individual-rights perspective, then, it follows that courts should be adjudicating as many justiciable separation of powers cases as they can to ensure that constitutional violations do not harm citizens. The agency-nexus rule does just the opposite.

Now consider the political-process perspective. In one sense, an agency-nexus rule does just what political-process proponents want: it limits the judicial resolution of separation of powers cases. Litigants who cannot bring separation of powers challenges because they lack a close nexus to the challenged agency are funneled to the polls to bring about whatever change they seek. The issue from a political-process perspective, though, is that the agency-nexus rule gets the right results for the wrong reasons. And this point is not trivial. Without employing the correct rationale (at least from the political-process perspective), courts will continue to determine the justiciability of separation of powers claims on a case-by-case basis, rejecting some claims while letting others through. Not only will the judiciary likely

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178. *Supra* Part II.B.

179. *Id.*

180. *Id.*

181. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.).

adjudicate some conflicts between the executive and legislative branches—anathema to the political-process perspective—but courts will also be unable to develop the kind of across-the-board nonjusticiability rule that Professor Choper and like-minded scholars desire.

The announced justification for the agency-nexus rule in *Committee for Monetary Reform*—to avoid generalized grievances—does not actually support the rule, since other standing doctrines already perform that function. Perhaps the D.C. Circuit *was* using standing as a means to allow the political branches to settle separation of powers disputes. But if so, the court did not say what it was actually doing.

This may not be the first time a court has done just that. Judge William Fletcher believes the Supreme Court has previously used standing to avoid separation of powers issues in two prominent cases: *United States v. Richardson* and *Schlesinger v. Reservists Committee to Stop the War*.<sup>182</sup> He argues that, in both cases, the constitutional provisions in question did not give the plaintiffs a right to enforce them in court:

The Court’s decision in *Richardson* makes sense only if the Statement and Account Clause should be read not to permit a member of the body politic—whether a federal taxpayer, a voter, or a citizen—to require, through judicial process, the production of the CIA’s secret accounts. The Court seems to have sensed this, but its statement that there is “no logical nexus” between plaintiff’s taxpayer status and the constitutional claim under the clause only hints at the reasoning that should support its decision. . . . As in *Richardson*, the Court’s decision in *Schlesinger* can be justified based on an analysis of the constitutional provision whose protection is invoked by the plaintiffs, but the Court failed to provide that analysis.<sup>183</sup>

In Judge Fletcher’s view, in other words, the *real* reason that the Supreme Court dismissed *Richardson* and *Schlesinger* was that the Statement of Account Clause and the Ineligibility Clause, respectively, do not provide implied causes of action. Neither the plaintiffs nor anyone else could plead a *legal* claim resting on those constitutional provisions. Yet both of the *Richardson* and *Schlesinger* opinions rest on standing grounds, holding that the plaintiffs lacked not a cause of action but an individualized *factual* injury. The key distinction here is that under Judge Fletcher’s cause-of-action analysis, no individual plaintiff would *ever* be able to sue for violations of those provisions, whereas the Court’s standing-based opinions leave open the possibility that some plaintiff with a sufficiently concrete and particularized

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182. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 270–71 (1988) (explaining how the Supreme Court’s decisions in *Richardson* and *Schlesinger* are only coherent if explained on other reasons besides the standing rationales that the Court announced).

183. *Id.*

injury could invoke those clauses in the future. As Judge Fletcher argues, though, an analysis based on whether the constitutional clauses at issue were legally actionable is the only way that *Richardson* and *Schlesinger* “make sense.”<sup>184</sup> But the Court’s analysis in both cases, Judge Fletcher notes, only “hints” at the cause-of-action theory.<sup>185</sup> His point is that the Court’s attempt to make a “narrow” standing ruling was hollow; the Court was actually foreclosing *all* actions relying on those constitutional provisions without expressly saying so.<sup>186</sup>

In a similar vein, an agency-nexus rule is undesirable even from the political-process vantage point because, like *Richardson* and *Schlesinger*, it is a veil that hides courts’ true intentions and thwarts the development of a coherent separation of powers framework.<sup>187</sup> A court’s refusal to hear a separation of powers suit is always the right result according to Professor Choper. Yet if a judge dismisses a separation of powers case because the plaintiff was not “directly subject” to the agency’s authority or because the agency was not “designated to adjudicate [her] rights,” another court could still hear that *same case* so long as it was brought by the right plaintiff (i.e., one with a close nexus to that agency). What a proponent of the political-process perspective would seem to desire is an express explanation that separation of powers cases are nonjusticiable—an announcement

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184. *Id.* at 270.

185. *Id.*

186. Professor Cass Sunstein’s article *What’s Standing After Lujan*, *supra* note 67, supports Judge Fletcher’s cause-of-action reasoning. Professor Sunstein argues that since an obscure standing case in 1970 (*Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970)), the Supreme Court has conflated injuries-in-fact with injuries-at-law, a mistake that, in his opinion, has lead the Court’s standing jurisprudence significantly astray. *Id.* at 183–92. The consequence of this mistake, Professor Sunstein explains, is that even when Congress provides citizens with a *legal* interest, those same citizens may be unable to protect that interest for want of an injury-in-fact. This result, in turn, curtails Congress’s ability to empower individuals to sue executive-branch officials to ensure compliance with congressional mandates. *See id.* at 205–06 (explaining how the Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), rejected Congress’s attempt to manufacture standing).

The import of this mistake, Professor Sunstein argues, is clear: it “narrow[s] the judicial role” in actions seeking to compel an agency to provide additional protection to regulatory beneficiaries. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1460 (1988). In essence, Professor Sunstein argues that courts have invoked standing as a veil to cover their actual belief that private parties must use the political process, not the courts, to gain greater regulatory protection. *See id.* at 1459–60.

187. *See, e.g.*, E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 507 (1989) (“Our separation of powers jurisprudence is abysmal because the Supreme Court has failed for over two hundred years of our history to develop a *law* of separation of powers.”); *see also* CHOPER, *supra* note 43, at 260 (“[R]elatively few [separation of powers] questions have been presented for judicial resolution—particularly before the 1970s—and even fewer have ever reached the docket of the Supreme Court.”).

from the bench that the President and Congress should ultimately resolve those issues on their own. But the case-by-case nature of standing precludes such broad announcements. So ultimately, if the political spheres are the final word on whether an agency's structure complies with constitutional principles, then standing is merely—pardon the pun—standing in the way of the Court announcing a cardinal principle of constitutional interpretation. Accordingly, an agency-nexus rule is just as undesirable from the political-process perspective as from the individual-rights perspective.

This discussion may leave the reader with a lingering question: does the political-process or individual-rights perspective provide the correct rationale for dispensing the agency-nexus requirement? Wading into that debate, however, is beyond this Note's scope. The point is that retaining *Buckley's* agency-nexus rule does not make sense under *either* perspective. Both sides, it seems, should champion *Bond* as the proper approach.

## VI. CONCLUSION

In the separation of powers context, *Buckley's* agency-nexus requirement for standing is not grounded in the Constitution or in sound policy. Indeed, the Supreme Court suggested as much in *Bond*. But *Buckley's* standing requirement has not been explicitly overruled, so courts may dismiss separation of powers claims for want of standing when a party does not present a sufficiently close nexus with the challenged agency. Such an approach would leave our hypothetical fishers from Part I paddleless, bending their gaze downstream.

This should not be so. An agency-nexus standing requirement does not further the underlying rationales behind standing doctrine, and it thwarts the goals of both sides of the debate over the justiciability of separation of powers claims. At the very least, access to the courts should not turn on such an arbitrary procedural hurdle.

*Bond's* “otherwise justiciable injury” approach to standing in federalism cases should therefore also apply in the separation of powers context. As long as litigants meet the basic constitutional and prudential standing requirements, federal courts should have jurisdiction to entertain these suits. Parties should not have to show any nexus—direct or indirect—with the agency that they challenge. Put simply, courts should analyze separation of powers standing under *Bond's* simple and straightforward framework rather than *Buckley's* ungrounded and unjustified requirements.

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