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Standing Doctrine Notwithstanding

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I. Introduction

In his *Texas Law Review* article, *The Fragmentation of Standing*,[1] Professor Richard Fallon has argued persuasively that standing doctrine is far from the unitary jurisprudence that the Justices of the Supreme Court suggest. Rather, the factors on which standing turns (even if Court opinions do not explicitly recognize this to be the case) vary with respect to the particular setting out of which a case arises. He highlights both positive and negative aspects of this phenomenon.

In this Response, I have two aims. The first is to further Professor Fallon's thesis—that standing doctrine is fragmented—by elucidating two related areas where standing doctrine is even more fragmented than Professor Fallon's article makes clear.[2] The second is to explore a few ways in which fragmented standing may give rise to doctrinal complexity.

II. Standing for the Government

In this Part, I discuss two ways in which standing for the government is more context driven than Professor Fallon's article delineates. I first consider three esoteric questions about standing for state governments in criminal cases. I then turn to a discussion of so-called congressional standing, that is, standing for the houses and members of Congress.

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1. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEXAS L. REV. 1061 (2015).

2. I note that Professor Fallon makes no claim to have identified every instance of fragmentation. Indeed, one could take his thesis to argue that fragmentation is so widespread that it could not reasonably be catalogued in a journal article. *See id.* at 1093-94.

A. *Article III Standing Requirements for State Governments in Criminal Cases*

Professor Fallon states:

> The Supreme Court apparently never intended that the injury in fact, causation, and redressability requirements would apply to the federal and state governments in the same way as to private litigants. In perhaps the most obvious illustration, the government need not make a showing of personal injury to itself or anyone else in order to initiate a criminal prosecution.[3]

The notion that the government need not establish standing in a criminal adjudication holds for the federal government, but it is less clear that state governments do not need to establish Article III standing, at least when they seek to proceed with respect to federal criminal prosecutions, and at least sometimes to proceed with state criminal prosecutions in federal court. I address here three points: first, that a state government must, it seems, meet standing requirements to the extent it wishes to play a role in a federal criminal prosecution in federal court (other than in an amicus curiae capacity); second, that a state government official (who has not been appointed as a federal prosecutor) probably must meet standing requirements in order to prosecute a federal crime in state court; and, third, that a private party appointed by a state prosecutor to pursue a state criminal prosecution in federal court must meet standing requirements.

I begin with the first issue I noted just above: Does a state government need to establish standing to proceed in federal court (and presumably also in state court) with respect to a federal criminal prosecution? In *Maine v. Taylor*,[4] the federal government brought a prosecution against Taylor under a statute rendering it a federal crime "to import . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law."[5] Maine had in place an import ban on baitfish that Taylor had ordered from out of state.[6] Taylor sought to dismiss the federal criminal indictment on the ground that the Maine import ban that underlay the indictment unconstitutionally burdened interstate

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3. *Id.* at 1080; *see also id.* at 1109 ("[N]o one believes that the government must demonstrate a concrete injury to itself in order to prosecute a criminal case."). One might nevertheless query whether there is at least some requirement that the sovereign be pursuing a prosecution of a violation of the *sovereign's own* criminal laws. As Professor Michael Collins and I discuss in the context of the prospect of a state prosecutor pursuing a federal criminal prosecution (a topic I discuss below in the text), "the prosecuting party must be the legitimate representative of the relevant sovereign or public whose interests have been harmed by the violation of its criminal law." Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 304 (2011).

4. 477 U.S. 131 (1986).

5. *Id.* at 132–33 (quoting 16 U.S.C. § 3372(a)(2)(A) (1982)).

6. *Id.* at 132.

commerce, whereupon Maine intervened to defend the constitutionality of its statute.[7] The district court rejected Taylor's argument, but the First Circuit accepted it and directed that the indictment be dismissed. While the federal government did not appeal the First Circuit's ruling,[8] Maine did. The Supreme Court confirmed Maine's standing to pursue its appeal. Notably, however, it did not use Maine's sovereign status to rubberstamp its conclusion:

> We . . . have recognized that intervenors in lower federal courts may seek review in this Court on their own, so long as they have "a sufficient stake in the outcome of the controversy" to satisfy the constitutional requirement of genuine adversity. Maine's stake in the outcome of this litigation is substantial: if the judgment of the Court of Appeals is left undisturbed, the State will be bound by the conclusive adjudication that its import ban is unconstitutional. And although private parties, and perhaps even separate sovereigns, have no legally cognizable interest in the prosecutorial decisions of the Federal Government, a State clearly has a legitimate interest in the continued enforceability of its own statutes.[9]

The Court thus (i) reasoned that Maine, like all intervenors under the governing statute, enjoyed all the rights of a party, including the right to appeal, and then (ii) strongly suggested that Maine's standing was based on its particular interest in the case and not its governmental status.

Next, what about state prosecutors prosecuting *federal crimes* in state court? Commentators have from time to time touted such an arrangement (which would of course need congressional endorsement) on the grounds that it might decrease the pressure on federal prosecutorial and judicial resources.[10] Professor Michael Collins and I have highlighted numerous

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7. *Id.* at 133.

8. The federal government originally filed an appeal but subsequently withdrew it, preferring instead to devote its resources to other cases. *See id.* at 136 n.5.

9. *Id.* at 136–37 (citations omitted) (quoting Bryant v. Yellen, 447 U.S. 352, 368 (1980)).

10. For older arguments to this effect, see FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 293 (1928); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 516 (1928); Felix Frankfurter, *The Federal Courts*, NEW REPUBLIC, Apr. 24, 1929, at 273, 275; Letter from Louis D. Brandeis to Charles Warren (June 23, 1922), *in* LETTERS OF LOUIS D. BRANDEIS: VOLUME V (1921–1941): ELDER STATEMAN 54 (Melvin I. Urofsky & David W. Levy eds., 1978); Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 569–72 (1925). For proposals of more recent vintage, see, for example, Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 1011–13 & n.127 (1995); Paul D. Carrington, *Federal Use of State Institutions in the Administration of Criminal Justice*, 49 SMU L. REV. 557, 557–61 (1996); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 535–36 (1995); Jon O.

problems with this notion.[11] In particular, we have questioned "whether state prosecutors as such (that is, without an appointment) would have standing in state court to pursue violations of federal criminal laws."[12] We recognize—in line with Professor Fallon's general observation about standing in criminal cases—that the government need not establish injury in fact,[13] that government "prosecutors may pursue generalized grievances on behalf of the public,"[14] and that "it is a sufficient 'harm' to the public that the defendant has violated the criminal laws of the sovereign."[15] At the same time, we suggest that there remains some form of standing hurdle: "[T]he prosecuting party must be the legitimate representative of the relevant sovereign or public whose interests have been harmed by the violation of its criminal law."[16] That being the case, "it is likely that state prosecutors, as such, can legitimately pursue only the interests of the state and its public, as opposed to those of the federal government."[17] And, if that is so, then, "absent appointment as federal officers, state and local officers (and the governments they represent) may lack standing to redress harms to the sovereignty interests of the United States."[18]

Professor Collins and I also question whether standing would be satisfied were Congress to choose expressly to recognize a state's standing to represent the interests of the United States. Here, the hurdle is the possibility that federal standing requirements carry over to state court when federal law is being enforced (a proposition that draws some academic support,[19] although the Court has never squarely addressed it). If that is so, then any limitations on Congress's ability to confer public law standing in the federal courts would be applicable in state courts as well, with the result that "a state prosecutor (without a proper appointment) may still be in no better position than a private party seeking to enforce federal criminal law, despite congressional authorization."[20]

Finally, might standing requirements in any way impede a state criminal prosecution being maintained in *federal court*? The Judicial Code authorizes federal officers facing state criminal prosecution to remove the prosecution

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Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 771–72 (1989).

11. *See generally* Collins & Nash, *supra* note 3.

12. *Id.* at 303.

13. *Id.*

14. *Id.*

15. *Id.* at 303–04.

16. *Id.* at 304.

17. *Id.*

18. *Id.* at 304–05.

19. *See* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 265 (1990); Paul J. Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and the Reverse-*Erie *Analysis*, 99 NW. U. L. REV. 1315, 1318–19 (2005).

20. Collins & Nash, *supra* note 3, at 305.

to federal court,[21] and the Supreme Court in *Tennessee v. Davis*[22] found such removal to be jurisdictionally proper under the Constitution.[23] It seems that standing (to the extent a showing of standing is required at all) is readily satisfied where the prosecution is pursued by a state (or local) prosecutor.[24] But what if the prosecution is instead pursued by a private party? Some states allow state or local prosecutors under some circumstances to appoint private attorneys to pursue criminal prosecutions.[25] The Supreme Court has recognized the standing of private individuals to pursue federal criminal contempt sanctions in federal court.[26] It seems likely, however, that this

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21. More broadly, § 1442 provides:

> A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
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> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
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> (2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.
>
> (3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;
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> (4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

28 U.S.C. § 1442(a) (2012). Section 1443 also provides a basis for removal of state criminal prosecutions:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

Id. § 1443. However, "courts [have] construe[d] the[se provisions] narrowly to require that a party show that the denial of equal rights would result from the operation of state positive law that conflicted with a specific federal law providing for equal rights." Collins & Nash, *supra* note 3, at 282.

22. 100 U.S. 257 (1879).

23. *Id.* at 271.

24. Even though the case is on the federal court's docket, still "the prosecuting party [is] the legitimate representative of the relevant sovereign or public whose interests have been harmed by the violation of its criminal law." Collins & Nash, *supra* note 3, at 304.

25. *See, e.g.*, State v. Storm, 661 A.2d 790, 793 (N.J. 1995) (discussing the historical origins of the practice in English law and the modern-day practice in New Jersey).

26. *See* Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 800–01 (1987). The Court concluded:

> Petitioners' assertion that the District Court lacked authority to appoint a private attorney to prosecute the contempt action in these cases is . . . without merit. While

exception for federal prosecutions is limited to criminal contempt.[27] True, a state might argue that Article III should recognize its attempt to delegate broad prosecutorial authority to a private attorney, such that the private prosecutor indeed can claim to be "the legitimate representative of the relevant sovereign or public whose interests have been harmed by the violation of its criminal law."[28] After the Court's decision in *Hollingsworth v. Perry*,[29] however, such an argument seems to be of at least somewhat dubious force.

B. Article III Standing Requirements for Congress, Its Houses, and Members

As I argue in a forthcoming article in the *Michigan Law Review*,[30] congressional standing—that is, the standing under Article III[31] of Congress and its members, to challenge the executive branch—is another area where there seems little question but that a government plaintiff[32] must establish standing.[33] The outstanding question is whether that showing is based on a

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> contempt proceedings are sufficiently criminal in nature to warrant the imposition of many procedural protections, their fundamental purpose is to preserve respect for the judicial system itself. As a result, courts have long had, and must continue to have, the authority to appoint private attorneys to initiate such proceedings when the need arises.

Id.

27. Professor Collins and I explain that a criminal contempt prosecution by a private party:

> involve[s] a one-time proceeding by a disinterested party, who was appointed by the court whose process was being vindicated. The temporary nature of an appointment may be a substantial factor in determining non-officer status. In addition, criminal contempt may be *sui generis* to the extent that it is thought to involve one of the genuinely inherent powers of the courts.

Collins & Nash, *supra* note 3, at 298 (footnotes omitted).

28. *Id.* at 304.

29. *See* 133 S. Ct. 2652, 2661–67 (2013) (applying standing requirements to assignees of state's interest and finding standing to be absent).

30. Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. (forthcoming 2015) (arguing that congressional standing should be recognized in limited circumstances based upon the functions that Congress and its members are constitutionally called upon to undertake).

31. In keeping with Professor Fallon's focus, I address only standing requirements that emerge from Article III. For the argument that Article I sets requirements for standing with which the Legislative Branch must comply *in addition* to the standard Article III requirements for standing, see Tara Leigh Grove, *Standing Outside Article III*, 162 U. PA. L. REV. 1311, 1314 (2014).

32. I restrict the discussion here to congressional plaintiffs. However, the issue also arises where Congress is a defendant—for example, where a house of Congress tries to defend a statute against a challenge to its constitutionality in the absence of such a defense by the executive. *See* United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) (leaving unresolved the issue whether the House of Representatives' Bipartisan Legal Advocacy Group had standing as an intervenor to defend the constitutionality of the Defense of Marriage Act, reasoning that the Executive Branch retained a sufficient Article III stake by abiding by the statute until it was definitively declared unconstitutional); Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1247–50 (2012) (arguing that there should be such standing).

33. Thus, in *Coleman v. Miller*, 307 U.S. 433 (1939), the competing principal opinions disputed not whether the plaintiff state legislators were obligated to establish standing at all but rather

standard distinct from what ordinary plaintiffs must meet—or, in Professor Fallon's terms, whether this is another setting where we observe fragmentation. In fact, the evolution of congressional standing in some ways amounts to a debate over fragmentation. This is especially the case for the District of Columbia Circuit, which is the appellate court that (not surprisingly) sees the most congressional standing cases and has had to respond to evolving Supreme Court precedent over the years.

The Supreme Court gave its apparent imprimatur to congressional standing in the 1969 case of *Powell v. McCormack*.[34] In response, the number of cases resting on congressional standing grew. The District of Columbia Circuit developed a welcoming test for congressional standing: a plaintiff member of Congress had standing to obtain a legal determination that would (if successful) "bear upon" the plaintiff's "duties" as a legislator.[35] However, the court soon thereafter rejected the "bear upon" test as legally obsolete in the wake of 1970s Supreme Court cases on standing.[36] In the language of the debate over fragmentation, a D.C. Circuit panel explained: "The most basic point to consider is that there are no special standards for determining Congressional standing questions. Although the interests and injuries which legislators assert are surely different from those put forth by other litigants, the technique for analyzing the interests is the same."[37] Since the bears upon test did not square with the Supreme Court's general directives on standing, it could not survive.

Instead of the bears upon test, the court of appeals opted for a narrower, although still fairly welcoming, standard. In *Kennedy v. Sampson*,[38] the court concluded that (i) the Senate had standing to allege that action by the President impaired its lawmaking function,[39] and (ii) an individual Senator

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whether in fact they had established it. *Compare, e.g.*, *id.* at 446 ("[A]t least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision."), *with id.* at 464 (opinion of Frankfurter, J.) ("In the familiar language of jurisdiction, these Kansas legislators must have standing in this Court. What is their distinctive claim to be here, not possessed by every Kansan? What is it that they complain of, which could not be complained of here by all their fellow citizens?").

34. 395 U.S. 486 (1969) (upholding standing of duly elected Congressman to challenge the action of the U.S. House of Representatives to "exclude" him from his seat based on allegations of corruption).

35. *See* Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973). However, the court soon thereafter abandoned this basis for standing; it cited a spate of Supreme Court decisions in the 1970s that refined the law of standing and rendered the "bear upon" standard legally obsolete. *See* Harrington v. Bush, 553 F.2d 190, 207–09 (D.C. Cir. 1977).

36. *See* Harrington v. Bush, 553 F.2d 190, 207–09 (D.C. Cir. 1977).

37. *Id.* at 204 (emphasis omitted).

38. 511 F.2d 430 (D.C. Cir. 1974).

39. *See id.* at 434. Indeed, the executive branch defendants conceded this point. *See id.* at 435.

enjoyed derivative standing based upon the alleged resulting impairment of the effectiveness of his vote.[40]

By 1981, the District of Columbia Circuit confronted confusion sewn by its existing approach to congressional standing—in particular, the notion that congressional plaintiffs ought to face no more hurdles than other plaintiffs—and the conflicting notion that "this court will not confer standing on a congressional plaintiff unless he is suffering an injury that his colleagues cannot redress."[41] Deciding that separation-of-powers concerns were "best addressed independently" of the congressional standing issue,[42] the court of appeals decided to deploy instead the possibility of abstention under the courts' equitable discretion.[43] The abstention doctrine was engrafted onto the existing standard for standing. Thus, even where standing would otherwise inhere, "[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action."[44] In the language of fragmentation, concerns specific to congressional plaintiffs were not included in the test for standing (which was, in the view of the court of appeals, drawn from the Supreme Court's general directives on standing); instead, those separation-of-powers concerns were to be relegated to a separate discretionary abstention.

But the matter was not settled. Court panels sometimes questioned the appropriateness of equitable discretion,[45] while Antonin Scalia and Robert Bork—then both judges on the court—leveled strong criticism against the practice of abstention based upon equitable discretion and more generally the court's openness to the standing of members of Congress to raise challenges to executive power at all.[46] Nonetheless, the essential approach—asking whether a congressional plaintiff suffered an impairment of duties and

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40. *See* Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir.) (finding that individual Senators had standing to challenge the President's decision to terminate a treaty without a vote of the Senate, reasoning that "[t]he President has thus [allegedly] nullified the right that each appellee Senator claims under the Constitution to be able to block the termination of this treaty by voting, in conjunction with one-third of his colleagues, against it"), *vacated on other grounds*, 444 U.S. 996 (1979); *id.* at 436 (noting that the plaintiff's claim "is derivative, but . . . is nonetheless substantial").

41. *See* Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 877 (D.C. Cir. 1981) ("We believe that these two contradictory principles create unnecessary confusion when applied to suits brought by congressional plaintiffs.").

42. *Id.* at 879.

43. *Id.* at 88.

44. *Id.*

45. *See, e.g.*, Humphrey v. Baker, 848 F.2d 211, 214 (D.C. Cir. 1988) (concerns about the doctrine of equitable discretion "continue to trouble us"); Melcher v. Fed. Open Mkt. Comm., 836 F.2d 561, 565 n.4 (D.C. Cir. 1987) (expressing doubt as to the continuing viability of doctrine).

46. *See* Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting) ("We ought to renounce outright the whole notion of congressional standing [where the dispute is between the Congress and the President]."), *vacated on other grounds sub nom.* Burke v. Barnes, 479 U.S. 361 (1987); Moore v. House of Representatives, 733 F.2d 946, 957 (D.C. Cir. 1984) (Scalia, J., concurring) ("[A] purely intragovernmental dispute . . . has no place in the law courts.").

then (if so) whether the court nevertheless should exercise its equitable discretion and abstain—essentially persisted until the Supreme Court's handed down its decision in *Raines v. Byrd*[47]—the Supreme Court's most recent foray into congressional standing.

The Court in *Raines* found that members of Congress lacked standing to challenge executive implementation of the Line Item Veto Act.[48] Of particular relevance to the question of fragmentation, the *Raines* opinion can be (and, as we shall see, has been) "taken to suggest, without clear justification, that standing requirements should be applied more stringently in cases raising interbranch disputes."[49] For one thing, the Court referred to the separation-of-powers underpinnings of Article III standing doctrine without specifying whether that invocation bore special meaning because of the interbranch nature of the conflict before it.[50] The Court noted that "our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[51] Further supporting this targeted understanding of separation-of-powers concerns is the *Raines* Court's discussion of the historical dearth of litigation over interbranch power disputes as a ground for rejecting standing in *Raines* itself.[52] Indeed, a leading treatise on federal litigation practice sees *Raines* as "standing informed—and indeed virtually controlled—by political-question concerns."[53] And the Justice Department—under both President George W. Bush and President Barack Obama—has relied (to date unsuccessfully) upon

47. 521 U.S. 811 (1997).

48. Pub. L. No. 104-130, 110 Stat. 1200 (1996). The Line Item Veto Act was ultimately determined to be unconstitutional. Clinton v. City of New York, 524 U.S. 417, 439–40 (1998).

49. *See, e.g.*, David J. Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 220 (2001). I elsewhere argue that the dicta by the Supreme Court in *Raines* set too high a bar for congressional standing. *See* Nash, *supra* note 30 (manuscript at 22) (arguing that most courts and commentators erroneously interpret *Raines* to establish a higher bar for standing involving interbranch disputes).

50. *Cf.* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 465–501 (2008) (detailing how the Court's standing cases vindicate various formulations and aspects of the separation of powers).

51. *Raines*, 521 U.S. at 819–20. The Court proceeded to add:

> In the light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.

Id. at 820.

52. *See id.* at 826–28.

53. 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.11.2 (3d ed. 2008).

Raines to defend against enforcement of congressional subpoena power directed against the executive branch.[54]

The Supreme Court's decision in *Raines* has had a profound effect on the District of Columbia Circuit's congressional standing jurisprudence.[55] The court of appeals has explained that *Raines* "require[s] us to merge our separation of powers and standing analyses."[56] This incorporation of separation-of-powers concerns into standing analysis *specifically in the*

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54. *See* Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 12–13 (D.D.C. 2013). The court observed:

> [D]efendant takes the position that a claim of executive privilege is unreviewable when it is the legislature that is seeking the documents. . . . Throughout its pleadings and during oral argument, the Department has advanced this constricted view of the role of the courts and maintained that it would violate the separation of powers enshrined in the Constitution if this Court were to undertake to resolve a dispute between the other two branches. . . . But while this position was adamantly advanced, there was a notable absence of support for it set forth in the defendant's pleadings, and oral argument revealed that the executive's contention rests almost entirely on one case: *Raines v. Byrd*. . . .

Id. See also Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 66 (D.D.C. 2008) ("[T]he Committee's injury is 'governmental' rather than 'personal,' the argument goes. . . . That, the Executive says, is the upshot of the Supreme Court's decision in *Raines*, which jettisoned the concept of so-called 'legislative' standing."). The congressional investigations out of which these cases grew—one by a Democratic House of a Republican Administration and the other by a Republican House of a Democratic Administration—both focused on politically charged issues. The investigation that prompted the *Miers* decision involved allegations that the President had improperly dismissed several U.S. Attorneys. *See* 558 F. Supp. 2d at 57–58. For discussion of the underlying legal dispute, see Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1086–89 (2009). And the underlying congressional investigation in *Holder* involved the "Fast and Furious" program, pursuant to which the Bureau of Alcohol Tobacco and Firearms "knowingly allowed firearms purchased illegally in the United States to be unlawfully transferred to third-parties and transported into Mexico," with the goal of "enabl[ing] ATF to follow the flow of firearms to the Mexican drug cartels that purchased them." 979 F. Supp. 2d at 5. District courts in both cases rejected the Department of Justice's arguments. *See Holder*, 979 F. Supp. 2d at 13–14 (noting that "[a] reading of the entire [*Raines*] opinion reveals that the problem that prompted the dismissal was not the fact that legislators were suing the executive; it was that the plaintiffs had suffered no concrete, personal harm, and they were simply complaining that the Act would result in some 'abstract dilution' of the power of Congress as a whole." (quoting *Raines*, 521 U.S. at 826); *Miers*, 558 F. Supp. 2d at 67–70 (distinguishing *Raines* on the ground that there, unlike the case at bar, the House as an institution did not support the lawsuit, and that, while in *Raines* "the injury was conceived of only in abstract, future terms," in *Miers* the harm resulting from leaving a validly-issued House subpoena unenforced was "evident") The *Miers* case did not proceed beyond the district court on the standing issue. The D.C. Circuit granted a motion for stay pending appeal, but before an appeal could be heard an agreement was reached resolving the case. *See* Chafetz, *supra*, at 1092–93. The *Holder* case continues within the jurisdiction of the district court as of this writing. *See* Comm. on Oversight & Gov't Reform v. Holder, No. 12-1332 (D.D.C. filed Aug. 20, 2014) (ordering the Justice Department to prepare a log of privilege claims in anticipation of *in camera* review).

55. *See* Nash, *supra* note 30 (manuscript at 22) (explicating how the Court's decision in *Raines* effected a fundamental shift in the District of Columbia Circuit's congressional standing jurisprudence).

56. Chenoweth v. Clinton, 181 F.3d 112, 116 (D.C. Cir. 1999). I elsewhere critique, as too exacting, this standard for congressional standing. *See* Nash, *supra* note 30 (manuscript at 22).

context of congressional standing constitutes yet another example of fragmentation of standing doctrine.

It is worth making one final note on how congressional standing doctrine highlights the fragmentation of standing. Observe that, while the current approach erects a high bar for congressional standing, the Court has in comparison been quite lax in assessing the standing of executive branch agencies to sue one another.[57] Even the distinction between inter- and intra-branch litigation reveals standing fragmentation.

III. Fragmentation and Complexity

Professor Fallon highlights the complexity of fragmented standing doctrine, yet he also repeatedly mentions how the patterns he uncovers in specific areas yield high degrees of predictability. This suggests that the precise way in which fragmented standing doctrine is complex bears closer examination. I undertake a preliminary discussion of that question here and offer some implications on how the proper diagnostic response turns upon the nature of the complexity to which fragmented standing gives rise.

We begin by asking how we can best conceptualize the fragmentation that Professor Fallon catalogues. A natural place to start is the literature on rules and standards. At the risk of oversimplifying matters, a rule is a bright-line test that clearly delineates what falls within its bounds,[58] while a standard is a murkier test that is likely to produce varied results depending upon the particular inputs.[59] Rules and standards are mirror images of one

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57. *See* Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1231–58 (2013) (detailing the history of such suits). For commentary supportive of broad standing for intrabranch disputes, see Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 898 (1991); Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 ECOLOGY L.Q. 317, 324–52 (1990). For a critique of the current approach to standing in intrabranch disputes that nevertheless approve of standing in some settings, see Grove, *supra* note 31, at 1319–53 (arguing that Article II sets requirements for standing with which the executive branch must comply *in addition* to the standard Article III requirements for standing); Mead, *supra*, at 1258–78.

58. Dean Kathleen Sullivan provides the following definition of a legal "rule":

> A legal directive is "rule"-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. A rule captures the background principle or policy in a form that from then on operates independently.

Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (citations omitted). Professor Fallon defines rules as "relatively determinate formulations that leave little room for case-by-case judgment apart from the ascertainment of facts." Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1288 (2006).

59. Dean Sullivan defines a legal "standard" thus:

> A legal directive is "standard"-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards . . . giv[e] the decisionmaker more discretion than do rules. Standards allow

another. Rules are easier and more straightforward to apply than are standards, and "they are also more predictable in their application."[60] Standards, in contrast, are more flexible than rules; "[j]udges can apply standards with greater sensitivity to what each particular factual setting calls for."[61]

Insofar as Professor Fallon touts the predictability of the various standing fragments he identifies,[62] it seems that the various patterns constitute rules[63] (or at least are more rule-like than standard-like[64]). Since predictable rules don't usually bring to mind complexity, it seems that the complexity of which Professor Fallon speaks hails not from the rules themselves but from the choice among, and interplay among, the various rules. Even with that, however, one can conceptualize the complexity as arising in at least three

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> the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule—the more facts one may take into account, the more likely that some of them will be different the next time.

Sullivan, *supra* note 58, at 58–59 (citations omitted). Professor Fallon explains that, in contrast to rules, "standards require more judgment in application even though they could, in principle, generate correct, nonarbitrary results." Fallon, *supra* note 58, at 1288.

60. Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 522 (2012).

61. *Id.*

62. *See, e.g.*, Fallon, *supra* note 1, at 1063 ("Once identified, those patterns frequently exhibit an implicit normative logic that not only enables predictions of the outcome of future cases, at least by legal experts, but also gives definition and texture to 'the law' that lower courts are obliged to apply."); *id.* at 1070 ("By 'fragmentation,' I mean the division of standing law into multiple compartments, most of which may be wholly intelligible in themselves, but that reflect more conceptual and normative diversity than unity.").

63. Certainly, the Court has never presented standing doctrine as grounded in an ad hoc balancing test, nor does Professor Fallon suggest that any standing fragment rests on such an approach. *Cf.* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (characterizing the Court's approach in takings cases as grounded on "essentially ad hoc, factual inquiries"). Nor again has the Court or Professor Fallon suggested that standing in any setting rests on a rule that specifically directs lower courts *not to reduce* the governing legal standard to rule-like form—what Professor Michael Coenen has termed a "rule against rulification." Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 658–60 (2014). Indeed, Professor Coenen specifically identifies the traditional tripartite standing test as essentially a "pro-rulification rule," i.e., one that even if somewhat vague in initial form will over time in the lower courts coalesce towards a more precise rule. *See id.* at 709 ("[G]iven the overarching separation-of-powers principles at play, and given the lower courts' ability to flesh out the contours of these principles through the common law method, the Court saw an opportunity for 'the gradual clarification of the law through judicial application.'" (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984))).

64. In reality, it is not possible with rule-like precision to separate rules from standards. *See* Jeffrey R. Lax, *Political Constraints on Legal Doctrine: How Hierarchy Shapes the Law*, 74 J. POL. 765, 768–69 (2012); Nash, *supra* note 60, at 521 & n.37. Indeed, Professor Fallon's description of standing doctrine for cases involving probabilistic standing sounds less rule-like than the standing doctrine he identifies for other fragments. *See* Fallon, *supra* note 1, at 1090 ("I would not pretend to be able to rationalize all of the cases . . . ."); *id.* at 1091 ("Undoubtedly, the cases would permit multiple categorizations. Again, I do not mean to imply that all could be fitted into an identifiable, defensible pattern.").

different ways. Indeed, Professor Fallon hints that fragmented standing may give rise to each of these types of complexity.

First, it might be that there are a lot of fragments—we might say "pigeonholes"—each with its own rule. But there are so many pigeonholes that it is hard to recognize the honeycomb-like structure that confronts us and to navigate it without a guide. However, the Supreme Court has eschewed providing us with any such guide.[65]

A second possibility is that the complexity arises not from any individual rule but from the sheer number of pigeonholes. Even when one thinks one has identified all the relevant fragments, a closer examination reveals simply more fragmentation.[66] An example might be the explication of aspects of government standing that appears above in Part I: Even a fragment—government standing—that at first seems small consists itself of many smaller fragments.[67] In the language of the law, the rule that seems applicable to a domain is in fact subject to numerous exceptions.[68]

A third possibility is that the various fragments, though small, sometimes may, to some degree, overlap. In other words, there are some portions of some fragments where multiple rules apply and indeed may pull in different directions. If that is true, then the system is not as predictable as one might originally have thought. Indeed, if multiple rules can have application over a single fragment, the governing regime moves closer to ad hoc balancing (at least in some cases).[69]

Depending on which types of complexity fragmented standing doctrine generates, one might arrive at different diagnoses for the problem. If the problem is simply numerous pigeonholes with no authoritative identification of those pigeonholes, then the diagnosis is for the Court to be more true to what it is creating, for legal scholarship to expand the guide that Professor Fallon has begun, or both. If the problem is instead (or in addition to) the

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65. *See* Fallon, *supra* note 1, at 1093 (noting that, with fragmentation, "it becomes increasingly difficult for anyone but a specialist to identify and distinguish all of the potentially relevant doctrinal categories and the different modes of analysis that they call for").

66. *See id.* ("[G]iven the confusing and misleading rationales for decision that the Court frequently offers, even specialists often and understandably disagree about which rules apply to new cases.").

67. In this sense, the system of rules has attributes of fractals, infinitely complex patterns that look the same at any scale. For example, a coastline looks like random collections of line segments whether in a satellite picture or from a hot-air balloon much closer to the earth's surface. For explication, see, for example, David G. Post & Michael B. Eisen, *How Long Is the Coastline of the Law? Thoughts on the Fractal Nature of Legal Systems*, 29 J. LEGAL STUD. 545, 551 (2000).

68. Jurisprudentially, one might say that the various rules are defeasible. *See* Jonathan R. Nash, *Legal Defeasibility in Context and the Emergence of Substantial Indefeasibility*, *in* THE LOGIC OF LEGAL REQUIREMENTS: ESSAYS ON DEFEASIBILITY 379–80 (Jordi Ferrer Beltrán & Giovanni Battista Ratti eds. 2012) (explaining that a legal proposition is legally defeasible if it is not universally applicable).

69. *See* Fallon, *supra* note 1, at 1093–94 ("Competing analogies, which would tend to support different results, often exist.").

fragmentation of standing doctrine into smaller and smaller (and more) pieces, then in addition to a guide, the Court should consider decreasing the extent of fragmentation. Finally, if the problem is overlapping pigeonholes, then in addition to recognizing and describing what it is doing, the Court might choose some categorizations—e.g., national security—that trump others. Perhaps the Court also might convert some "fragmentary rules" into prudential concerns.[70]

Professor Fallon is correct that "a more complex system of rules might, under some circumstances, produce a better set of outcomes than a simpler, more elegant doctrinal structure."[71] In the context of standing, however, it seems that the Court has generated complexity and yet made little effort to ameliorate the costs of that complexity. Acknowledging what it has wrought would be a valuable first step and would at least open dialogue as to whether complex standing doctrine is warranted. Professor Fallon's article invites the Court, and commentators, to proceed down this path.

70. *Cf.* Nash, *supra* note 60, at 528–44 (arguing that it makes more sense to populate jurisdictional boundaries with rules and that standards are better located in discretionary abstention doctrines).

71. Fallon, *supra* note 1, at 1092.