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Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators: Response to Little

Cover Page Footnote
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WHO CAN BEST REGULATE THE ETHICS OF FEDERAL PROSECUTORs, OR, WHO SHOULD REGULATE THE REGULATORS?: RESPONSE TO LITTLE

Fred C. Zacharias*

On August 4, 1994, U.S. Attorney General Janet Reno adopted a formal rule governing federal lawyers' "Communications With Represented Persons" (the "Reno rule" or the "no-contacts rule"). The regulation asserts a broad power of the Department of Justice ("DOJ") to supplant state ethics regulation of federal prosecutors.

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and, more specifically, supersedes all professional rules governing contacts by federal prosecutors with represented persons.\(^3\)

The Reno rule raises two difficult legal questions. First, may the DOJ rely on its statutory crime-investigative authority to administratively preempt state ethics codes that encompass federal prosecutors?\(^4\) Second, under the same authority, may the DOJ preempt local federal district court rules?

Rory Little's contribution to this symposium compiles and strengthens the legal arguments supporting the Attorney General's position.\(^5\) Lower federal courts have not uniformly accepted these arguments.\(^6\) Numerous commentators also have taken the position that the Reno rule exceeds the Attorney General's authority, particularly insofar as it overrules federal judicial mandates.\(^7\) Part I of this Response offers a

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3. 28 C.F.R. § 77.12 (1995) (stating that "this part is intended ... to preempt the entire field of rules concerning such contacts.").

4. In addition to its statutory authority to investigate crimes under U.S.C. Title 28, the DOJ relies on its general authority as an executive agency to adopt regulations to govern "the conduct of its employees ... and [the] performance of its business." 5 U.S.C. § 301 (1994). This general provision of the Administrative Procedures Act ("APA") alone cannot justify the Reno rule. For an agency to adopt a substantive rule of law under the APA, the adoption must be authorized by Congress. See Chrysler Corp. v. Brown, 441 U.S. 281, 301-2, 313 (1979). The Supreme Court has held that the APA itself does not constitute such authorization. Alternatively, if the regulation is deemed procedural, then it does not have the "force and effect" of preemptive federal law under the APA. Id.; see also Corinna B. Lain, Prosecutorial Ethics Under the Reno Rule: Authorized by Law?, 14 Crim. Just. Ethics 17, 22-24 (Summer/Fall 1995) (discussing the DOJ's regulatory power under the APA).


6. See, e.g., Whitehouse v. United States Dist. Court, 53 F.3d 1349 (1st Cir. 1995) (upholding federal local court rule applying state ethics provision against federal prosecutors); United States v. Klubock, 832 F.2d 664, 667 (1st Cir. 1987) (en banc) (holding that the Supremacy Clause does not bar enforcement of local court attorney discipline rule).

7. See, e.g., Burke, supra note 2, at 1660-61 (arguing that "the regulations intrude upon the attorney-client relationship in ways unwarranted by the needs of effective law enforcement"); Lain, supra note 4, at 17 (arguing against preemptive DOJ authority); Mashburn, supra note 1, at 495 (arguing that Reno's position lacks support in the case law or in statutory authority); see also Little, supra note 5, at 362-63 & n.30 (noting "outraged bar officials"); Bruce A. Green, Federal Prosecutors' Ethics: Who Should Draw the Line, 7 Prof. Law. 1, 7 (Nov. 1995) (questioning the wisdom of the Reno rule); Jocelyn Lupert, Note, The Department of Justice Rule Governing Communications with Represented Persons, 46 Syracuse L. Rev. 1119, 1144-45 (1996) (cataloging the hostility to the Reno rule); cf. Elizabeth A. Allen, Note, Federalizing the No-Contact Rule: The Authority of the Attorney General, 33 Am. Crim. L. Rev. 189, 219, 227 (1995) (arguing that the Reno rule is consistent with existing ethics rules); Roger C. Cramton & Lisa K. Udell, State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-contact and Subpoena Rules, 53 U. Pitt. L. Rev. 291 (1992) (challenging state bars' authority to regulate federal prosecutors); F. Dennis Saylor, IV & J. Douglas Wilson, Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors, 53 U. Pitt. L. Rev. 459 (1992) (discussing the application of Model Rule 4.2 to federal prosecutors).
few observations on the legal issues, but will not duplicate the work that others have done.\footnote{8}

The bulk of this Response, Part II, focuses on a separate question that Professor Little's article raises. Namely, even if the Attorney General has the authority she claims, should the Attorney General preempt state or district court codes?\footnote{9} Little answers in the negative.\footnote{10} I am not so convinced. In light of the history of the no-contacts issue and the related issue of rules governing grand jury subpoenas of attorneys,\footnote{11} I view the Reno rule as a small battle in a larger war between the ABA and the DOJ for control of ethics governance. Part II suggests that neither institution is an appropriate decision maker in the areas over which they are squabbling. The process of DOJ preemption, however, may be the easiest way to encourage the most suitable decision maker—Congress—to intervene.

\section*{I. The Legal Issues}

A. DOJ Preemption of State Ethics Regulation

The DOJ relies on two sets of statutory authority for the proposition that the DOJ may preempt state ethics codes.\footnote{12} First, it relies upon the general authority of Executive Department heads to “prescribe regulations for the . . . conduct of its employees [and the] . . .
performance of [the Department's] business."\textsuperscript{13} Second, it relies generally upon the attorney general's authority under Title 28 to detect and prosecute crimes.\textsuperscript{14}

Although there is significant room for creative legal arguments regarding a federal agency's authority to prescribe preemptive regulations, several principles are clear.\textsuperscript{15} To the extent an agency has preemptive authority, that authority derives from Congress.\textsuperscript{16} Congress may expressly delegate preemptive authority in a particular area of law.\textsuperscript{17} When Congress has not done so and the statutory language is ambiguous with respect to Congress's intent, courts may infer intent to delegate, but do so reluctantly.\textsuperscript{18}

Courts have offered various scenarios in which it is appropriate for an agency to infer a congressional desire to displace state law; for example, when federal legislation in a field is so pervasive as to leave no other reasonable conclusion\textsuperscript{19} or when "compliance with both federal

\begin{itemize}
\item \textsuperscript{13} 5 U.S.C. § 301 (1994).
\item \textsuperscript{14} 28 U.S.C. §§ 515, 516, 532-47 (1994).
\item \textsuperscript{15} For an excellent summary of the law of preemption and of the arguments against preemption in the no-contacts area, see Lain, \textit{supra} note 4 (discussing the statutory authority and preemptive power over state laws of a DOJ regulation that exempts federal prosecutors from the no-contacts rule).
\item \textsuperscript{16} See Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) (holding that the ability to preempt state law derives from Congress); Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986) (noting that a federal agency may preempt state regulation if it is acting within the scope of its congressionally delegated authority); Chrysler Corp. v. Brown, 441 U.S. 281, 301-02 (1979) (holding that an agency's exercise of preemptive authority must derive from Congress and is subject to limitations imposed by Congress).
\item \textsuperscript{18} See, \textit{e.g.}, Exxon Corp. v. Governor of Md., 437 U.S. 117, 132 (1978) (noting the Court's general reluctance to infer preemptive authority); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).
\end{itemize}

Although acknowledging these general principles, Professor Little argues for the existence of a broad rule of deference to agency choices. See Little, \textit{supra} note 5, at 389 (arguing that "it is difficult to conclude neutrally that an Attorney General's national regulation of her prosecutor's ethics that is \textit{rationally related} to the effective and fair enforcement of federal criminal laws would be invalid if it was in conflict with state codes" (emphasis added)); \textit{id.} at 397 (arguing case law for the proposition that "the Attorney General has implied legal authority to act preemptively if she has \textit{reasonable cause} after due deliberation . . . to ensure that federal prosecutors comply with fair and uniform ethical rules" (emphasis added)). Without entering into further debate on this legal issue, I should note that my reading of the cases suggests that Little may be stretching the law.

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and state regulations is a physical impossibility." In defending the DOJ claim, Professor Little relies primarily on the principle that authorization to preempt can be inferred when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." If state ethics provisions frustrate the "structure and purpose" of the congressional delegation to the DOJ to investigate and prosecute crime, the argument goes, Congress must have intended to let the DOJ supersede those provisions.

When one unpacks all the rhetoric of the DOJ position, here is the nub of the issue. What do we mean by frustrating the "structure and purpose" of the congressional scheme? Corinna Lain has demonstrated ably that Congress's general grant to all agency heads to "prescribe regulations governing . . . the conduct of its employees" hardly rises to the type of specific, substantive federal scheme that provides a foundation for preemptive authority. Little himself acknowledges that the Attorney General needs to show more than that state ethics codes "interfere" with some criminal investigation. There must be a broader statutory purpose "the accomplishment and execution" of which state regulation threatens, and which Congress therefore implicitly authorized the DOJ to protect.


23. Lain, supra note 4, at 22-23 (quoting 5 U.S.C. § 301 (1988)) (illustrating that the APA provides a foundation for preemptive authority only where there is a separate, substantive delegation of statutory authority); see also Mashburn, supra note 1, at 501 (quoting Dobbs v. Train, 409 F. Supp 432, 436 (N.D. Ga. 1975), aff'd sub nom., Dobbs v. Costle, 559 F.2d 946 (5th Cir. 1977)) (concluding that the housekeeping statute does not provide preemptive authority where the regulations at issue "do not comport with congressional intent"). Throughout his article, Professor Little dismisses Corrina Lain's arguments as those of a "third year law student." See, Little, supra note 5, at 386 n.174. In fairness, I think Lain's piece is a good one. Her arguments are flawed, if at all, only in their tendency to overstate in brief-like fashion. On occasion, Little's arguments also suffer from this failing because Little clearly is attempting to bolster, not just analyze, the DOJ's legal position—just as Lain was trying to refute it. See, e.g., supra note 18, infra notes 42, 59 and accompanying text (arguing for a broad rule of deference to the DOJ's choices).

24. See Little, supra note 5, at 392-93.
Although a full analysis of the preemption issue is beyond the scope of this piece, it seems to me that the DOJ, and to some extent Little, may have put the rabbit in the hat. They seem to argue that the substantive question really is one of procedure. Once the Attorney General promulgates a regulation which substitutes for limited parts of state codes—following the prescribed mechanism for administrative rulemaking—then the question of whether the state rules “stand as an obstacle to the accomplishment and execution of the . . . objectives of Congress” somehow disappears. I have difficulty understanding why the issue of whether state law frustrates Congress’s objectives should turn on the mechanism the Attorney General uses to further Congress’s objectives.

Consider this example. If Congress were to exempt federal investigators from obeying state criminal statutes or laws designed to protect citizens’ privacy, Congress’s action would simply be tested for its constitutionality. However, if the Attorney General issued a regulation doing the same, or more specifically authorized agents to use wiretaps, which are illegal under some state laws, one would have to consider whether Congress implicitly authorized that preemption. Neither

25. Others, including Little and Lain, have already undertaken that task. See, Delker, supra note 1, at 874-881; Mashburn, supra note 1, at 498-513.

26. See 59 Fed. Reg. 39,910, 39,916 (1994) (to be codified at 28 C.F.R. § 77) (emphasizing the procedures followed in enacting the Reno rule and the DOJ’s intent to preempt state law); Little, supra note 5, at 392-93 & n.207 (emphasizing the significance of procedurally correct rulemaking for the preemption issue, but recognizing that proponents of the Attorney General’s regulatory authority also go too far in asserting that the “presumption against preemption . . . has been clearly overcome by the regulation’s express preemption provision” (quoting Jamie S. Gorelick & Geoffrey Kleinberg, Justice Department Contacts With Represented Persons: A Sensible Solution, 78 Judicature 136, 145 (Nov.-Dec. 1994))).

To support a similar proposition earlier in his article, Little quotes United States v. Shimer, 367 U.S. 374, 383 (1961), a case in which the Court deferred to an agency in its accommodation of policy choices that were delegated by Congress. Little, supra note 5, at 383-84. In Shimer, the Court did not defer on the question of whether the power was delegated in the first instance. Shimer, 367 U.S. at 381-83. Here, in contrast, Congress has delegated power to the DOJ only in the broadest possible sense—to enforce federal law—and has not given any indication that the DOJ should be able to preempt state ethics regulation.

27. Professor Little repeatedly draws the distinction between Janet Reno’s adoption of a formal regulation and Richard Thornburgh’s informal adoption of a preemptive rule for DOJ lawyers. See, Little, supra note 5, at 378 n.116. Little approves Reno’s action, but questions Thornburgh’s.

Nevertheless, if a state truly threatened DOJ functions—for example by forbidding federal investigations in the state—it seems clear that an informal order to DOJ lawyers to proceed with their investigations would have as much preemptive force as a formal regulation. In re Neagle, 135 U.S. 1 (1890), one of Little’s favorite “venerable cases,” suggests as much. Little, supra note 5, at 393. In Neagle, the actions of a federal agent operating pursuant to an Attorney General’s informal instructions, as opposed to a formal regulation, were held to preempt state law. Neagle, 135 U.S. at 58-68.

28. In contrast, in Neagle, one of the main cases that Little relies on, the Court specifically found that Congress had granted the Attorney General authority to act
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the Attorney General's specificity nor her willingness to follow admin-
istrative procedures displaces the question of whether state law has so
interfered with the DOJ's crime detection "structure" that Congress
would have expected the DOJ to supersede the state statutes. State
law is "inconvenient" for federal law enforcement, but is not necessarily
inconsistent with it.

Professor Little seems to recognize the vulnerability of the DOJ po-
sition. He therefore considers both the substance—how state no-con-
tact rules interfere with the DOJ's law enforcement functions—and
judicial principles of construction for deciding congressional intent.
Foremost among these principles is that courts will apply a presump-
tion against inferring congressional intent to preempt state law,29 par-
ticularly in areas traditionally regulated by the states—such as legal
ethics.30

Again, however, the DOJ avoids the core issues. First, the DOJ
suggests that the presumption against preemption applies only to the
question of whether Congress expressed a desire to preempt. Reno
argues that the DOJ's own expression of an intention to preempt re-
solves that issue.31 This begs the question, for courts also have applied
the presumptions in considering whether Congress intended to allow
an administrative agency to do the preemption.32 Recognizing as
much, Professor Little acknowledges:

29. See, e.g., CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 667-68 (1993) (apply-
ing a presumption against interpreting congressional intent to preempt express deci-
(applying a presumption against implied preemption); Jones v. Rath Packing Co., 430
U.S. 519, 525-26 (1977) (discussing policy reasons for presumption against
preemption).

U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regula-
tion of lawyers has been left exclusively to the States... ."); Arons v. New Jersey State
Bd. of Educ., 842 F.2d 58, 63 (3d Cir. 1988) (declining to recognize congressional
intent to limit state's control over practice of law absent express statement to that

31. See Communications with Represented Persons, 58 Fed. Reg. 39,976, 39,981
(1993) (to be codified at 28 C.F.R. § 77) (proposed July 26, 1993) (sidestepping the
argument that Congress has not "chosen to" confer preemptive authority on the
DOJ); see also Burke, supra note 2, at 1652 (assuming, without analysis, that the
"DOJ's intention to preempt state law satisfies any requirement that the federal gov-
ernment display a 'clear and manifest purpose' to preempt state law").

32. See, e.g., Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707,
715 (1985) (noting the presumption against preemption when an agency acts without a
clear and manifest purpose by Congress to authorize preemption); Florida Lime &
against preemption unless the nature of "the regulated subject matter permits no
other conclusion" or Congress has unmistakably approved preemption); Wabash Val-
ley Power Ass'n, Inc. v. Rural Electrification Admin., 988 F.2d 1480, 1485 (7th Cir.
1993) (holding that, in order to enforce preemptive regulations, an agency must hur-
[W]here a federal executive officer states an express intention to preempt in furtherance of more general statutory authority, the analysis is one step removed from express congressional preemptive intent. . . . Historic state regulation cannot be overcome simply by federal regulatory assertions of preemption. . . . [I]t is necessary to measure the likelihood of implied congressional authorization for federal regulatory preemption, against the force of the states' historic role of regulation in the area.33

Because this Response does not fully analyze the law of preemption, it would be quibbling for me to criticize the DOJ's or Little's standards for evaluating the Reno rule. My point is simply that that the issues are not as easy as the DOJ would have us believe. Moreover, the two nineteenth century cases Little cites as supplemental support—In re Neagle34 and Boske v. Comingore35—are unconvincing the "longstanding presumption against preemption of an area traditionally subject to state regulation").

33. Little, supra note 5, at 387.
34. 135 U.S. 1 (1890). At root, Neagle is a governmental immunities case in which a specific statute was the source of the federal preemption of state law. The bulk of the Court's opinion is devoted to the question of whether federal law, even statutory federal law, can create an immunity from state prosecution.

In Neagle, the Supreme Court concluded that Congress's grants of authority to the Attorney General necessarily encompassed the power to provide protection for federal judges outside of court. Id. at 58, 68-69. Thus, it concluded that the Attorney General was immune from state prosecution for actions taken pursuant to that authority. Id. at 68-69, 74-76. Given the Court's ruling on the substantive federal law, there was no question that the Attorney General's delegates, the U.S. Marshals, also had authority to act and be immune from (i.e., preempt) state law under that authority. Id. The function of the regulation upon which Little relies was to identify which federal agents would exercise the Attorney General's power, not to create any new substantive preemption of state law.

Professor Little states that he is "at a loss to understand [my] suggestion that Neagle is inapposite because some statute specifically authorized the Attorney General to act." Little, supra note 5, at 393 n.210. I am equally at a loss to understand Little's assertions. The Neagle Court explicitly found the power in question as "necessarily included" by Congress in the Attorney General's enforcement power; in our hypothetical, that intent is the issue. 135 U.S. at 58. Moreover, not satisfied to rest on that authorization, the Court went on to point to a specific federal statute granting the power. The Court described that statute in the following terms: "there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty." Id. at 68. Contrary to Little's claims, the Court thus relied both upon a specific statute as well as strong indication of a congressional delegation of preemption power.

35. 177 U.S. 459 (1900). Boske focuses on who has the burden of proof in establishing the validity or invalidity of an allegedly preemptive regulation. The issue was whether Congress's grant to the Treasury Department of authority to make regulations for "the custody, use and preservation" of tax records encompassed the power to keep those records secret and protected against state subpoenas. Id. at 467. In ruling for the government, the Court held that it would defer to the agency interpretation of the extent of its statutorily granted power unless the challengers could demonstrate that the interpretation was "inconsistent" with the statute. Id. at 470. In Boske, however, the Court explicitly assumed that the subject matter was one for which Congress had delegated preemptive authority. That is the very question that needs to be answered in the no-contacts context. See Little, supra note 5, at 390-91 (arguing that
ing.\textsuperscript{36} When all is said and done, Little (to his credit) agrees, noting that the debate boils down to whether one believes Congress would countenance federal regulation of federal prosecutors' ethics,\textsuperscript{37} and to what extent.\textsuperscript{38}

Are state ethics codes, and in particular the no-contacts provisions, so inimical to federal law enforcement interests that Congress implicitly authorized the DOJ to override them? The DOJ does not, and probably could not, assert that federal law enforcement is incapable of proceeding without the ability of prosecutors to contact represented parties. Rather, the DOJ suggests that the fear of state discipline on the part of individual federal prosecutors will chill their aggressive-courts presuming that an agency interpretation of its authority deserves deference have first required the agency to show a clear congressional intention to delegate with clarity).

36. Of course, one might dismiss these cases as outdated, for much has happened in the preemption area since the turn of the century. As discussed above, however, even if those cases are of continuing vitality, they are not controlling. See supra notes 34-35 and accompanying text.

37. Little, supra note 5, at 391, 400-02 (arguing that "[the] doctrine leaves the preemption question as one of congressional intent," but arguing that the burden is on challengers to the regulation and relying on the absence of evidence that Congress did not wish to allow preemption in the area of federal prosecutorial ethics).

I would suggest, more accurately, that the question is whether Congress did countenance federal regulation of this nature, rather than whether it would countenance federal regulation if it addressed the issue today. See City of N.Y. v. FCC, 486 U.S. 57, 64 (1988) (holding proper inquiry to be whether preemptive action is within the bounds of the delegated authority); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 154 (1982) (stating that preemptive action depends upon whether the action is within the scope of delegated authority); Chrysler Corp. v. Brown, 441 U.S. 281, 306-08 (1979) (considering whether Congress "contemplated" the preemptive action). Indeed, the only two instances in which Congress has considered the extent of DOJ authority suggest that, as a factual matter, Congress might not sanction the DOJ's extreme view of its own authority. First, Congress recently declined to adopt a proposed statute that would have accorded the DOJ broad rulemaking power. See infra note 140 and accompanying text. Second, a post-Thornburgh Memorandum report by a house committee charged with overseeing DOJ activities expressed disapproval of DOJ efforts to preempt local professional regulation. See Subcomm. on Gov't Information, Justice, Agriculture, House Comm. on Gov't Operations, Fedederal Prosecutorial Authority in a Changing Legal Environment: More Attention Required, H.R. Rep. No. 986, 101st Cong., 2d Sess. at 32 (1990) ("We disagree with the Attorney General's attempts to exempt departmental attorneys from compliance with the ethical requirements adopted by the State bars to which they belong and in the rules of the Federal Courts before which they appear.").

38. Consider, for example, a DOJ regulation that allowed DOJ personnel to serve as lawyers without taking or passing the bar. Congress could authorize nonlawyer prosecutors for federal cases. See Sperry v. Florida ex rel. Fla. Bar, 373 U.S. 379, 385 (1963) (holding that federal law governs admission to practice before federal courts and federal agencies); Theard v. United States, 354 U.S. 278, 282 (1957) (holding that "disbarment by federal courts does not automatically flow from disbarment by state courts").

The issue in the hypothetical, however, would be whether Congress's delegation to the DOJ of power to make some regulations for its employees was intended also to encompass the power to supersede state and federal district court unauthorized practice of law rules.
ness, even when contacts might be "authorized by law" (and therefore within standard exceptions to state ethics prohibitions). The need for uniformity of standards for federal prosecutors, Reno claims, justifies preemption.

39. Communications With Represented Persons, 59 Fed. Reg. 39,910, 39,911 (1994) (to be codified at 28 C.F.R. § 77); see also Little, supra note 5, at 370-77 (citing and expanding on DOJ arguments in favor of uniform preemptive federal regulation). The DOJ has expressed other, less weighty concerns. For example, the DOJ argues that it is unfair to subject federal prosecutors to the possibility of sanction under varying state rules and that facing discipline takes a psychological toll on prosecutors. See 59 Fed. Reg. at 39,911 (discussing the effect of disparate rules on federal prosecutors); Little, supra note 5, at 375-76 (discussing the psychological and financial toll of dealing with bar disciplinary action). Although I am sympathetic to those concerns, the truth is that the problems caused by disuniformity in state regulation are no more severe for federal prosecutors than for other lawyers with a national practice. See Fred C. Zacharias, Federalizing Legal Ethics, 73 Tex. L. Rev. 335, 345-57 (1994) (illuminating the Balkanization of professional regulation and noting the difficulties that Balkanization causes lawyers). Similarly, the psychological impact of confronting disciplinary processes is the same for all lawyers. Cf. Little, supra note 5, at 371-75 (emphasizing the DOJ's "visceral" reaction to the events underlying United States v. Lopez, 4 F.3d 1455 (9th Cir. 1993), appeals docketed, No. 95-10366 and No. 95-10394 (filed Aug 18, 1995 and Sept. 1, 1995).

Professor Little's oral comments at this symposium suggested that the DOJ also takes the position that, while disuniformity in professional regulation may chill the aggressiveness of some federal prosecutors, permissive regulation in individual states will encourage other federal prosecutors to act too aggressively. Cf. Communications with Represented Persons, 59 Fed. Reg. 39,910, 39,912 (1994) (to be codified at 28 C.F.R. § 77) (discussing limits imposed by the rule). It seems obvious that the DOJ could control this danger simply by imposing some limits on prosecutorial contacts without preempting more stringent state codes.

40. 28 C.F.R. § 77.1(a) (1995); 59 Fed. Reg. at 39,911. Of course, the DOJ's promulgation of the Reno rule does not mean that federal prosecutors no longer need to fear state discipline. In the one reported bar action since the Reno rule was adopted, the Utah State Bar issued an advisory opinion that assumed the Reno rule was ineffective in superseding a state ethics provision modelled on Model Rule 4.2. See Utah State Bar Ethics Advisory Opinion Comm., Op. 95-05 (1996), excerpted in 12 Laws. Man. on Prof. Conduct 55-56 (ABA/BNA Mar. 6, 1996).


The case law seems to leave room for disagreement on the degree of deference courts should show. Some commentators read the precedents as foreclosing agency preemption in the absence of a "clear and manifest" authorization by Congress. See, e.g., Delker, supra note 1, at 878 n.152 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); Lain, supra note 4, at 26 n.159 (applying notion that congressional intent must be clear to all aspects of regulatory preemption). Little suggests that courts must defer to agency determinations once it is clear that Congress has authorized the agency to carry out federal objectives in the field being regulated. Lit-
factual question is a project that I must leave to the reader and to the courts.\textsuperscript{42}

B. \textit{DOJ Preemption of Federal District Court Rules}

Both the DOJ and Professor Little assume that if the DOJ has the authority to preempt state law, its regulations also preempt contradictory federal district court rules.\textsuperscript{43} Success on this claim is important to the DOJ, because many of the state ethics provisions forbidding contacts with represented persons have been incorporated by reference in local rules.\textsuperscript{44}

\textsuperscript{42}Throughout this Response, I have avoided responding to Professor Little argument-by-argument, because that is unnecessary to my basic points. However, I should mention in passing that, as a former prosecutor, Little obviously feels strongly about some of the DOJ's positions and may assume incorrectly that all readers share his feelings.

One example is Professor Little's heavy reliance on the facts of United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991), \textit{vacated and remanded}, 4 F.3d 1455 (9th Cir. 1993), \textit{further appeal pending}, Nos. 95-10366 & 95-10394 (filed Aug. 18 and Sept 1, 1995), in the appeal of which Little was involved. Little, \textit{supra} note 5, at 372 n.78. Little argues that \textit{Lopez} somehow justifies the DOJ's claim that proper federal law enforcement requires immunizing DOJ lawyers from state disciplinary rules and district court enforcement of local rules. The core of Little's argument is that the district court in \textit{Lopez} erroneously found the prosecuting attorney to have committed misconduct and that having to face such judicial "abuse" may cause federal prosecutors to limit their aggressiveness. \textit{See} Little, \textit{supra} note 5, at 371-75. An equally reasonable reaction to \textit{Lopez} is that no one can prevent some judges from making crazy mistakes, the appropriate remedy for which is appellate oversight.

In \textit{Lopez}, the Court of Appeals for the Ninth Circuit corrected the district court's error. That the federal prosecutor had to deal with the threat of sanction in the interim is distressing, but no more distressing for federal prosecutors than for other attorneys faced with a judicial or disciplinary threat. Nor does the fact that the Court of Appeals disagreed with Little on an evidentiary matter—the possibility that the federal prosecutor actually may have committed some misconduct—prove that judicial oversight of DOJ attorneys is an "obstacle to law enforcement" that requires DOJ preemption.

\textsuperscript{43}28 C.F.R. § 77.12 (1995) (asserting DOJ power to preempt district court rules); 59 Fed. Reg. at 39,917-18 (citing cases for the proposition that federal district court power to adopt rules for federal prosecutors is extremely limited); Little, \textit{supra} note 5, at 405 ("[I]f the Attorney General's authority under § 301 . . . to promulgate regulations . . . is accepted, then the primacy of such national regulations over 'local' district court rules follows relatively clearly."). Unlike the DOJ, Little does attempt to justify this conclusion.

However, he devotes far less space and effort to this endeavor than to supporting the DOJ's power to preempt state law.

\textsuperscript{44}According to a recent study commissioned by the Judicial Conference of the United States, of the 94 federal district courts, 61 have adopted the local state rules of professional conduct. Memorandum from Daniel Coquillette, Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., "Local Rules Regulating Attorney Conduct In the Federal Courts" (July 5, 1995) [hereinafter \textit{Judicial Con-}
In part, DOJ's conclusion seems obviously right. If DOJ regulations are federal law, presumably they have the same force as an act of Congress. I have already taken the position that Congress probably could adopt a uniform ethics code governing not only the federal courts, but state bars as well. 45

Yet simultaneously, DOJ's conclusion feels wrong. Federal courts always have exercised power to supervise lawyers appearing before them. 46 It seems odd to think that one set of lawyers in federal litigation—DOJ—could make the courts follow a favorable set of rules.

Moreover, DOJ's claim has significant implications, both for the courts' inherent power to regulate lawyers 47 and for the courts' more general supervisory authority. 48 In theory, the Attorney General

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46. See, e.g., Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718, 724 (6th Cir. 1993) (“Federal courts have the inherent authority to discipline attorneys practicing before them and to set standards for their conduct.”) (citation omitted); United States v. Klubock, 832 F.2d 664, 667 (1st Cir. 1987) (en banc) (per curiam) (holding that courts have inherent and statutory authority to prescribe rules governing lawyers' ethics); cf. United States v. Williams, 504 U.S. 36, 46-47 (1992) (acknowledging court's supervisory power to establish standards for at least in-court prosecutorial conduct);

47. The inherent supervisory authority of courts typically has been conceived as a general power to admit lawyers and to protect the integrity of the judicial process, which in turn gives rise to the lesser authority to prescribe rules of conduct as a condition for continued admission. See, e.g., In re Snyder, 472 U.S. 634, 645 n.6 (1985) (acknowledging power of court to require understanding of and compliance with state professional regulation as a condition of admission to practice in federal court); Theard v. United States, 354 U.S. 278, 281 (1957) (“The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court.”); Ex parte Garland, 71 U.S. 333, 384-85 (1866) (upholding inherent power to suspend or disbar lawyers); Ex parte Burr, 22 U.S. 529, 530 (1824) (resting supervisory power on courts' need to maintain decorum and efficiency); In re Evans, 801 F.2d 703, 706 (4th Cir. 1986) (reaffirming courts' inherent authority to disbar and suspend lawyers); Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964) (noting that federal court's ethics rules that differ from state rules apply to attorneys appearing before the court).

48. See, e.g., United States v. Hastings, 461 U.S. 499, 505-06 (1983) (resting limited supervisory authority, inter alia, on power to preserve the integrity of the judicial process); Miranda v. Arizona, 384 U.S. 436, 467-79 (1966) (exercising judicial power to enforce Constitution by imposing prophylactic rule of conduct for police officers); Jencks v. United States, 353 U.S. 657, 667-68 (1957) (suggesting inherent judicial power to control court procedures); Weeks v. United States, 232 U.S. 383 (1914) (ac-
could rely on the same investigatory authority she relies on for the no-contacts regulation to authorize other DOJ personnel (e.g., FBI agents) to violate supervisory judicial mandates.\footnote{For example, the asserted DOJ power, in theory, extends to exempting DOJ officials other than those appearing in court from abiding by judicial gag orders or following orders to avoid contact with (or even to avoid bribing) jurors in pending cases.}

When one tries to reduce these concerns to legal concepts, there appear to be two avenues for analysis. We have already noted that the DOJ promulgates regulations pursuant to the delegation of congressional power. As a separation of powers matter, one might question whether Congress itself has authority to overrule rules promulgated by federal courts in their "inherent" authority.\footnote{See Mashburn, supra note 1, at 500, 502-03, 525-26 (questioning Congress’s authority to interfere with federal courts’ exercise of their inherent authority); Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, 77 Minn. L. Rev. 1283, 1322 (1993) (arguing that Congress has limited control over the courts’ inherent rulemaking power); Cf. Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 887 (5th Cir. 1968) (suggesting that courts’ inherent power over the orderly administration of justice goes beyond that which Congress confers).}

Second, even if Congress can overrule the courts, did Congress’s delegation to the DOJ of the power to supersede state law include a delegation of power to overrule the courts?

The DOJ and Professor Little primarily address the first issue.\footnote{In light of the constitutional grant of authority to Congress to prescribe federal jurisdiction, Congress clearly has some power to control the courts. U.S. Const., art. III. Moreover, Congress has authority under the Commerce Clause to make laws governing the legal profession. Fred C. Zacharias, Federalizing Legal Ethics, supra note 45, at 337 n.4. Thus, any argument that courts have inherent authority to supervise lawyers free from congressional supervision must have limits. One could reasonably construct an argument that there are certain core or essential judicial functions upon which Congress may not intrude. These functions might be restricted to functions necessary to maintain judicial independence or authority (e.g., the contempt and bar admission powers) or might be perceived more broadly to include the control of all aspects of the judicial and lawyering process that are important to the justice system.}

They assert—the DOJ in fairly conclusory fashion, Little in more detail—that the Supreme Court has limited the inherent authority of the judiciary to supervising "in-court misconduct"\footnote{Little, supra note 5, at 408-09 (asserting that broad claims of inherent authority are “suspect” and arguing that the distinction between “in-court versus out-of-court behavior . . . [should be] invoked to circumscribe federal supervisory disciplinary authority”).} and that DOJ regulations therefore take precedence over local court rules governing pros-

49. For example, the asserted DOJ power, in theory, extends to exempting DOJ officials other than those appearing in court from abiding by judicial gag orders or following orders to avoid contact with (or even to avoid bribing) jurors in pending cases.

50. See Mashburn, supra note 1, at 500, 502-03, 525-26 (questioning Congress’s authority to interfere with federal courts’ exercise of their inherent authority); Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, 77 Minn. L. Rev. 1283, 1322 (1993) (arguing that Congress has limited control over the courts’ inherent rulemaking power); Cf. Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 887 (5th Cir. 1968) (suggesting that courts’ inherent power over the orderly administration of justice goes beyond that which Congress confers).

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51. Unlike the DOJ, Little at least has addressed the second issue. Yet he largely seems to assume that the arguments concerning congressional intent and preemption of state law apply equally to congressional intent and preemption of local district court rules. See Little, supra note 5, at 404-05.

52. Little, supra note 5, at 408-09 (asserting that broad claims of inherent authority are “suspect” and arguing that the distinction between “in-court versus out-of-court behavior . . . [should be] invoked to circumscribe federal supervisory disciplinary authority”).
executor's out-of-court conduct. Little also constructs an interesting new theory that the statutory authority of judges to make court rules is limited to in-court behavior and is subordinate to the DOJ's concurrent statutory authority over DOJ lawyers.

One has to wonder whether either of these analyses can be right, for they would mean that local court rules governing prosecutorial contacts are ultra vires whether or not the DOJ promulgates regulations. Yet conventional wisdom has always been that courts do have some

53. See Communications With Represented Persons, 59 Fed. Reg. 39,910, 39,917 (1994) (to be codified at 28 C.F.R. § 77) (citing United States v. Williams, 504 U.S. 36 (1992)); Little, supra note 5, at 408-10. Williams, the case the DOJ cites, does focus on the in-court/out-of-court distinction in limiting judicial supervision in the grand jury context. Williams, 504 U.S. at 46-47. Even Williams acknowledges, however, that with respect to out-of-court conduct that may ultimately affect judicial proceedings, there are limits to outside executive agencies' freedom from judicial supervision. Id. at 46 (citing Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) (upholding court's power to dismiss an indictment because of misconduct occurring before the grand jury)).

Moreover, to the extent that the Williams court recognized the grand jury's independence, the Court based its decision on the grand jury's historical independence from the judicial and executive branches. Williams, 504 U.S. at 49. Williams did not extinguish a long line of cases in which courts have exercised supervisory authority over lawyers, federal agents, and their own proceedings. See authorities cited supra notes 40-41; cf. Williams, 504 U.S. at 50 (holding that the courts' power over the grand jury is not "remotely comparable to the power they maintain over their own proceedings"). Thus, the proposition that federal courts have no authority over DOJ lawyers except for conduct that appears in court is far from certain. Cf. Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th Cir. 1995) (holding that a federal court may exercise inherent authority over misconduct by lawyer that has affected federal proceedings even though that lawyer has not entered an appearance in federal court).

54. Little, supra note 5, at 405-10. Little bases his theory on the words in the Rules Enabling Act which limit courts to prescribing rules for the conduct of "their business." Id. Little interprets the words "their business" narrowly, as not encompassing all conduct of lawyers registered to practice before the court.

I do not respond to Little's new theory here because Little only sketches the argument and, by itself, it does not change my tentative conclusion that the law is unsettled. I instinctively question the theory as an intuitive and historical matter. Courts long have exercised supervisory authority and the dividing line between in-court and out-of-court behavior may be unworkable when applied to matters, or actors, that may someday reach court. Still, the legal question Little identifies deserves more attention than I give it. Perhaps Professor Little will see fit to expand on his ideas in a separate piece.
core authority to regulate lawyers.\textsuperscript{55} Little even concedes the existence of such authority.\textsuperscript{56}

Moreover, to the extent that the power to regulate lawyers goes to the heart of the judicial process, courts may have some power to resist congressional or executive actions that undercut the integrity of the process.\textsuperscript{57} Congress, for example, might not be able to withdraw judges' power to cite lawyers and litigants for contempt, because that would leave the courts defenseless against those who would undermine the courts' mandates.\textsuperscript{58} It is beyond the scope of this Response

\textsuperscript{55} See supra note 7; see also Chambers v. Nasco, Inc., 501 U.S. 32, 54-55 & n.17 (1991) (holding that courts have inherent power to sanction not only lawyers' in-court conduct, but also conduct that occurs in connection with trial court proceedings).

It may be that, at root, the DOJ and Little do not believe in that authority. Little cites Rodgers v. U.S. Steel Corp., 508 F.2d 152 (3d Cir.), cert. denied, 423 U.S. 832 (1975), the one case that seems to reject such authority. \textit{Id.} at 163 (holding that courts' rulemaking authority does not give them authority to regulate the practice of law). Rodgers, however, is inconsistent with later cases in Rodgers' own circuit which recognize the authority. United States v. Klubock, 832 F.2d 664, 667 (1st Cir. 1987) (en banc). Little also cites Justice Scalia's dissenting opinion in \textit{Chambers}, 501 U.S. at 60 (Scalia, J., dissenting), despite the fact that the majority upheld a district court's power to sanction a lawyer who had not entered an appearance before the court. See Little, \textit{supra} note 5, at 406-09.

\textsuperscript{56} Little, \textit{supra} note 5, at 409 (accepting "some [judicial] rule-making authority over federal prosecutors' ethics"). Little's concession is grudging, for he notes that courts' "invocations of inherent authority are generally revealingly devoid of specific citational support." \textit{Id.} at 408. A few recent decisions have called into question the extent, and perhaps even the existence of, inherent judicial power. See, e.g., Mallard v. U.S. Dist. Ct., 490 U.S. 296, 310 (1989) (reserving the issue of whether courts possess inherent authority to require lawyers to accept court assignments); see also Sara Sun Beale, \textit{Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts}, 84 Colum. L. Rev. 1433, 1520-22 (1984) (arguing for the existence of limits on courts' inherent supervisory authority).

\textsuperscript{57} See, \textit{e.g.}, Chambers v. NASCO, Inc., 501 U.S. 32 (1991) (suggesting that local rules adopted pursuant to Rules Enabling Act do not displace federal courts' separate, inherent authority to sanction lawyers); cf. United States v. Klein, 80 U.S. 128, 144-48 (1871) (acknowledging congressional power to limit federal jurisdiction, but suggesting that there are some limits to that power); A. Leo Levin & Anthony G. Amsterdam, \textit{Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision}, 107 U. Pa. L. Rev. 1, 30 (1958) (suggesting that even where state constitutions do not grant the state judiciary rulemaking power, the judicial branches consistently have claimed absolute command of those spheres of activity that are fundamental and necessary for courts); Jack B. Weinstein, \textit{Reform of Federal Court Rulemaking Procedures}, 76 Colum. L. Rev. 905, 906 (1976) (noting courts' inherent rulemaking power that derives in part from courts' role as a constitutional independent judiciary).

\textsuperscript{58} See Cooke v. United States, 267 U.S. 517, 539 (1925) ("The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable."); Zambrano v. City of Tustin, 885 F.2d 1473, 1478 (9th Cir. 1989) (describing courts' inherent power to sanction lawyers as flowing "from the very nature of a court, from strict functional necessity" (citing Michaelson v. United States, 266 U.S. 42, 66 (1924))); cf. Mashburn, \textit{supra} note 1, at 529-30 ("Surely, the federal courts must retain some control over attorney misconduct that indisputably
to identify the dividing line between core, unregulable judicial powers and judicial powers subject to Congress’s will. My point here is simply that the DOJ and Little have assumed the answer to what might be a difficult question.

Even more problematic is the DOJ’s dismissal of the question of whether Congress intended to delegate power to supersede district court rules. I have already noted that congressional intent is key to the preemption issue. To the extent courts would give the DOJ and other federal agencies the benefit of the doubt regarding preemption of state law, that probably is because courts recognize that Congress has established the federal agencies but has not had input into state law. Arguably, courts are relying on a background assumption that Congress has an interest in preserving the federal structure against interference by the state.

The same background assumption does not hold true with respect to federal district court rules. First, such local rules are authorized by federal statute. Absent an express statement to the contrary, there

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59. Professor Little does acknowledge that the question of whether the DOJ may preempt local district court rules “boils down to” whether congressional statutes have authorized such preemptive regulations. Little, supra note 5, at 404; see also Judicial Conference Report, supra note 44, at 31 (“[W]ith proper authority, through an Act of Congress, federal agencies could pass valid regulations which supersede local rules governing attorney conduct.”) (emphasis added). However, Little’s arguments for finding such an authorization are mostly conclusory.

Little first argues that “the Attorney General’s authority under § 301 and Title 28 to promulgate regulations in this area is accepted, then the primacy of such national regulations over ‘local’ district court rules follows relatively clearly.” Little, supra note 5, at 405. This sidesteps the possibility that Congress may have had a different view of preemption of judicial rules than it has for preemption of state law.

Little next argues that DOJ regulations trump because they are “national” in nature (“as well as Federal Register noticed and approved”) while district court rules are “local.” Id. at 406. It is unclear how and why this semantic distinction should determine Congress’s wishes about which rule should govern.

Third, Little asserts that when local rules conflict with an agency rule, “a reasonable interpretation of § 2071 is that duly promulgated regulations having the status of federal law should override any conflicting ‘local’ federal rules” and that allowing federal districts to exempt themselves would create a “patchwork vision [that] seems inconsistent with a federal regulatory system.” Id. at 407-08. Again, Little assumes the congressional intent.

As discussed below, Little does make some interesting constitutional and statutory arguments about the extent of inherent judicial power and judicial authority under the Rules Enabling Act. These new theories ultimately may help the DOJ’s position. For my purposes, however, it suffices to conclude that the issue of DOJ preemption of local rules, at present, remains murky and unresolved. See supra notes 31-33, and accompanying text.

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60. See supra notes 27-34 and accompanying text.

is little reason to assume that Congress would want to give the Executive’s regulations priority over the courts. Second, as a separation of powers matter, Congress should be presumed to respect judicial independence from regulation by other branches. Although this independence may have limits, its existence suggests that Congress would not intend to curtail it through a general grant of authority to individual agencies or—as the DOJ asserts—through the even more general grant to all agencies of rulemaking power. Again, there is more to the issue than the Reno rule’s proponents acknowledge.

C. Conclusion

The DOJ ultimately may prevail on both preemption issues. But the pertinent decisions that the courts have issued thus far illustrate that achieving a judicial resolution will be a slow, tortuous process. The above analysis suggests that a DOJ victory is by no means certain.

§ 2701 (1994). In addition, Rule 57 of the Federal Rules of Criminal Procedure provides:

Each district court acting by a majority of its district judges may . . . make and amend rules governing its practice. A local rule shall be consistent with - but not duplicative of - Acts of Congress and rules adopted under 28 U.S.C. § 2072. . . . In all cases not provided for by rule, a judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district.


62. See Mashburn, supra note 1, at 500, 503 (rejecting DOJ argument that the DOJ rule trumps district court rule made pursuant to at least equivalent statutory authority).

Little resolves this issue by concluding: “When valid rules of national application, duly promulgated pursuant to the APA, conflict with ‘local’ rules not so promulgated, ought not the latter give way?” Little, supra note 5, at 406. Little, again equating the DOJ’s rulemaking with an act of Congress, also argues that the federal regulatory system envisions that regulations “having the status of federal law should override any conflicting ‘local’ federal court rules.” Id. at 407. The argument sidesteps the essential question of what authority Congress intended to delegate to the DOJ.

63. See 28 C.F.R. § 77.1(b) (1995) (relying inter alia, on 5 U.S.C. § 301’s general grant of authority agencies to prescribe regulations for the conduct of their employees and the performance of their business).

64. Courts that have addressed the preemption issues in the context of the prosecutorial subpoena and no-contacts rules have reached a variety of conclusions. See, e.g., United States v. Ferrara, 54 F.3d 825 (D.C. Cir. 1995) (avoiding preemption issues by finding lack of personal jurisdiction over the lawyer in question); Whitehouse v. United States Dist. Court, 53 F.3d 1349 (1st Cir. 1995) (upholding federal district court’s adoption of state anti-subpoena rule with respect to trial subpoenas but not grand jury subpoenas); United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993) (requiring prosecutorial compliance with California no-contacts rule), appeals docketed, No. 95-10366 and No. 95-10394 (filed Aug 18, 1995 and Sept. 1, 1995); Baylson v. Disciplinary Bd., 975 F.2d 102, 105 (3d Cir. 1992) (rejecting district court’s authority to adopt state rule limiting grand jury subpoenas), cert. denied, 507 U.S. 984 (1993); Kolibash v. Committee on Legal Ethics, 872 F.2d 571, 575 (4th Cir. 1989) (noting that the Supremacy Clause may bar state enforcement against federal prosecutors of state’s anti-subpoena rule); United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (holding that local rule’s “authorized by law” exception to no-contacts was satisfied by the federal government’s legal authority to investigate crimes), modified
Professor Little, although more certain than I of the legal ground on which the DOJ stands, suggests that continuing the fight through expansive use of the DOJ's claimed authority would result in a phryric victory.\(^5\) He urges DOJ restraint.

Part II of this Response considers Little’s view on its own terms. Assuming Little is correct in his legal analysis and that the DOJ technically has power to preempt state and local ethics codes, should it exercise that power? Little answers in the negative, arguing that a scheme of DOJ preemption is too costly for the DOJ in terms of resources,\(^6\) damage to the DOJ’s prestige,\(^7\) and damage to the DOJ’s relationships with the states and the private bar.\(^8\) Little also argues that a preemptive rule may, ultimately, lead to a poor substantive regime resulting from biased enforcement\(^9\) and may have a negative effect on DOJ personnel.\(^10\) The following pages will suggest that on the normative question of whether the DOJ should preempt, too, there may be more to the issue than Professor Little’s DOJ-centered cost-benefit analysis acknowledges.\(^1\)

II. SHOULD THE DOJ PREEMPT STATE OR DISTRICT COURT RULES?

For me, whether the DOJ should issue preemptive ethics provisions is, in part, a public choice issue.\(^2\) Thus far, we have seen three sets of

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\(^5\) See Little, supra note 5, at 417-23 (arguing that the costs of imposing a preemptive rule outweigh the benefits).

\(^6\) See id. at 418-19 (discussing burden that a federal enforcement system would impose on the DOJ’s resources and the Attorney General’s time).

\(^7\) See id. at 419-20 (discussing damage to prestige and arguing that it would manifest itself in expensive legal challenges).

\(^8\) See id. at 419-21 (arguing that preemption constitutes an “arrogant federal incursion on historic state and local authority” that may breed reciprocation).

\(^9\) See id. at 422 (discussing negative substantive effects of rules promulgated and enforced by the DOJ).

\(^10\) Although most of Little’s predicted costs are plausible, the argument that a preemptive system will encourage DOJ lawyers to become career prosecutors seems somewhat far-fetched. Little suggests that prosecutors who follow the DOJ rule somehow will lose prestige or become pariahs in states whose rules differ, and thus will be unwelcome, or even be excluded, as private practitioners in those states. Id. at 422-23. The preemptive scheme in question covers so small a portion of the federal prosecutor’s practice that it is difficult to imagine this reaction. Admittedly, however, the probabilities of Little’s scenario is an empirical matter about which Little, as a former federal prosecutor, may have better information than I.

\(^1\) By “DOJ-centered,” I simply mean to suggest that Little analyzes the DOJ’s policy largely on its own terms, based on the costs and benefits of the policy to the DOJ’s own interests.

\(^2\) To purists, “public choice” analysis refers to the application of “economics to the study of political processes.” Geoffrey Brennan & James M. Buchanan, *Is Public
rulemakers address prosecutorial ethics: the ABA, the DOJ, and the courts. Given their membership, we can most usefully conceive of the ABA and the DOJ as the sets of lawyers on the opposite side of federal litigation (or a significant part of federal litigation) with the federal courts acting as the arbiters of that litigation. In resolving Little's normative issue, we should ask ourselves three very practical questions: (1) Should either side of the litigation be making the rules? (2) If not, who should? and (3) How do we get there? The following section considers these questions by analyzing each of the potential rulemakers in turn.

A. Who Should Control Regulation of Federal Prosecutors?

1. What Rulemakers Need to Decide

Professor Little considers the broad substantive issue of "who should decide" the substance of prosecutorial ethics regulation by looking at the side effects of DOJ regulation—in particular, the side effects on the DOJ itself. His analysis focuses on the substance of proposed rules, including their normative correctness and the consequences for the DOJ of who decides the substantive issues.

Because this symposium takes David Wilkins's 1992 article as a starting point, it is worth distinguishing Wilkins's approach from Little's. Wilkins's framework takes some definition of "misconduct"—.
for example, lawyers may not talk to represented parties—as a given. Wilkins would have us focus on who, if anyone, should enforce prohibitions against that misconduct. He suggests that resolution of the enforcement question should vary with the context. That analytic framework addresses Little's substantive question—who should decide what constitutes wrongful prosecutorial conduct—only indirectly.

There is, however, an overlap. The theory that would give the DOJ power to decide the substance of ethics rules simultaneously would give the Attorney General power to decide how and when ethics prohibitions should be enforced. That approach is fundamentally inconsistent with Wilkins's view that enforcement questions should be analyzed contextually.

In a piece I wrote several years ago, I argued that Wilkins's process issue (i.e., who should enforce prohibitions against misconduct) and the substantive issue (i.e., what should the rules say) are linked. I suggested that professional regulation has a variety of functions. The value which regulators place on each of those functions inevitably affects the substance of the rules. Rulemakers, both in deciding on the nature of professional codes as a whole and in formulating narrow provisions, need to consider the array of purposes the regulation is designed to further and assign weights to them. That process, in turn, will help determine the substance of each rule.

Professor Little asks, "who should regulate?" prosecutorial ethics. My response requires me to take my previous position one step further. A proper analysis of, say, the no-contacts debate should consider which potential rulemaker is in the best position to decide which regulatory functions deserve emphasis. In other words, among the

77. See id. at 804.
78. Id. at 805-09
79. Id. at 814-18.
80. See 28 C.F.R. § 77.11 (1995) ("The Attorney General shall have exclusive authority over ... any violations of these rules."). Little recognizes this reality, but parts with the DOJ's handling of the enforcement issue. He suggests that the DOJ promulgate, or participate in the promulgation of a uniform rule, but then allow states to enforce it. Little, supra note 5, at 414-15. It is unclear that such a scheme would be constitutional—particularly if, as Little suggests, the reason for implementing the scheme is to shift the cost of enforcement from the federal government to the states. See authorities cited in Zacharias, Federalizing Legal Ethics, supra note 45, at 397 n.282.
81. Zacharias, Specificity in Professional Responsibility Codes, supra note 1 at 249-285.
82. These functions include, among others, guiding lawyer behavior, promoting introspection, punishing misconduct, defining fraternal norms that facilitate the legal process, influencing substantive law, and enhancing the image of the bar. Id. at 225-39.
83. See id. at 249-85 (describing the correlation between code drafting and the different regulatory functions).
ABA, the DOJ, courts, Congress, and state legislatures, who should we trust to assign weights and to make the rules?

Fully analyzing those issues is beyond the scope of this brief comment on Little's article. However, the following pages offer a few observations, using the context of the Reno rule. It is my hope that this limited, first stab at considering the issues will help clarify and further the debate.

2. The DOJ and the ABA as Rulemakers

If the issue is the "trustworthiness" of the potential regulators of prosecutorial ethics, the ABA and the DOJ immediately seem suspect. Each institution consists largely of one side in the regulated litigation, so each is likely to allow institutional or membership interests to dominate its substantive value choices.

Consider, for example, the no-contacts issue. The Reno rule prescribes a certain balance between defendants' rights to communicate through counsel and federal law enforcement interests in using undercover agents. Even if we assume that the DOJ's substantive balance is appropriate, or correct, we nevertheless must recognize that the DOJ's regulation includes many other (perhaps questionable) choices regarding the weight to be given the different regulatory goals.

For example, in some circumstances, the Reno rule leaves intact prohibitions against contacts with represented parties. Let us take the DOJ at its word and assume that it truly believes such contacts would constitute misconduct. Under the Reno rule, those prohibitions are to be enforced internally, through the DOJ administrative procedures previously applicable to other prosecutorial behavior. In those other contexts, the procedures have often been misused, or even

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84. Federal prosecutors may be members of the ABA. The DOJ's leaders may, in fact, be prominent enough to demand a platform before the house of delegates. When push comes to shove, however, the defense bar has far more members, is a more influential political lobby, and does not hesitate to promote the interests of criminal defendants and the trial bar. See, e.g., Ted Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 L. & Soc. Inquiry 677, 688-724 (1989) (describing the influence of ATLA and other trial lawyer associations in the promulgation of the Model Rules) [hereinafter Schneyer, Professionalism]. At least in recent years, the DOJ has responded in kind. See, e.g., Green, Whose Rules?, supra note 9 (discussing the problem of subjectivity in DOJ rulemaking); Nancy J. Moore, Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities, 53 U. Pitt. L. Rev. 515 (1992) (focusing on the open warfare between the DOJ and the defense bar in rulemaking matters); cf. Cramton & Udell, supra note 7, at 293 (describing the clash between federal prosecutors and the defense bar); Mashburn, supra note 1, at 487-88 (describing the conflict between the DOJ and the defense bar); Zacharias, Subpoenas of Attorneys, supra note 11, at 951-54 (noting selfish interests of both sides).


86. 28 C.F.R. § 77.11.
ignored. By reimplementing those procedures, the DOJ implicitly has chosen to emphasize the regulatory goal of providing guidance to DOJ lawyers over the goal of disciplining misconduct.

At the same time, the decision to permit some contacts with represented parties downplays the regulatory function of enhancing communications between DOJ lawyers and the defense bar. In the preindictment stages, for example, the rule allows DOJ lawyers to circumvent defense counsel altogether.

Both the ABA and DOJ regulations attempt to influence the substantive law—for example, on what contacts are legal—in ways that are consistent with their memberships' visions of appropriate attorney-client relationships. The Reno rule's basic decision to preempt all other state and judicial rulemaking represents an extreme approach to

87. See, e.g., Harvey Berkman, GAO: DOJ Ethics Probers Lax, Nat'l L.J., Apr. 17, 1995, at A16 (reporting a GAO report critical of the DOJ's handling of complaints against prosecutors); Bruce A. Green, Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?, 8 St. Thomas L. Rev. 69, 84-87 (1995) (discussing alleged shortcomings of DOJ internal disciplinary machinery); Lain, supra note 4, at 19 (criticizing the history of DOJ enforcement of internal regulations); Lyn M. Morton, Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?, 7 Geo. J. Legal Ethics 1083, 1104-07, 1109-1113 (detailing and questioning viability of DOJ internal disciplining mechanisms).

88. Attorney General Reno has stated that "[t]he Department intends to fully enforce" the Reno rule, but that promise is not binding. 59 Fed. Reg. 39,910, 39,918 (1994) (to be codified at 28 C.F.R. § 77). Moreover, even assuming Reno's good faith, one might reasonably expect the DOJ to revert to its historical tendencies once Reno leaves the department. Cf. Little, supra note 5, at 377 n.110 ("There is absolutely no evidence that Attorney General Reno will not enforce her promise on the no-contacts regulations; any suggestion to the contrary is unsupported cynicism flowing from a prior time when there was no regulation and the Department's internal disciplinary office was relatively new."); Allen, supra note 7, at 221 (arguing that "the DOJ and independent state bar associations [are] equally effective, or ineffective, as the case may be, at regulating the conduct of their respective attorneys").

Little suggests that, because states rarely, if ever, have enforced their no-contacts rules against federal prosecutors, the Reno rule is likely to result in more enforcement. As Little acknowledges, however, the main effect of the state rules may have been in ensuring compliance through the threat of discipline—in Little's terms, the "chilling effect". Id. To the extent the DOJ preempts state rules and DOJ lawyers expect the DOJ to continue in its tradition of nonenforcement, the advisory or guiding impact of the state rules may disappear.

89. One of the functions of professional regulation is to establish norms through which adversarial lawyers can predict and rely on certain conduct by the other side and therefore can gauge when to trust the adversary and when to engage in aggressive adversarial behavior. See, e.g., Zacharias, Specificity in Professional Responsibility Codes, supra note 1, at 266 (discussing ways that professional codes facilitate communication between adversaries).

90. 28 C.F.R. § 77.7 (1995). Under Model Rule 4.2, contacts are not forbidden altogether. Prosecutors, however, must allow the contacted person's lawyer to monitor contacts, thus ensuring that the lawyer will be involved in the client's decision of whether to speak. Model Rules, supra note 11, Rule 4.2 (1996). Defense attorneys can forbid contacts by withholding consent, but prosecutors can mitigate that possibility through incentives; for example, by withholding information counsel would wish to hear (e.g., a plea offer) unless the client is present. Under the Reno rule, lawyers can not know when, if ever, prosecutors will include them in the loop.
the traditional regulatory function of influencing substantive law. Unlike with most professional regulations, the rulemaker here has not envisioned further development of judicial and legislative standards over time. Right or wrong, the rule does not purport to affect the substantive law’s development but rather supplants it—in effect, closing the “laboratory” of the states. That decision implicitly announces that new approaches will neither be forthcoming, nor worth considering, in the future.

Finally, any regulation by the DOJ makes choices regarding the “public image” function of professional regulation—as would any counterformulation by the ABA. The DOJ has its own set of concerns regarding citizens’ view of law enforcement, in general, and of the DOJ’s performance, in particular. The ABA traditionally has emphasized the importance of safeguarding the relationship between criminal defendants and counsel, for both systemic reasons and to protect the financial interests of the bar. Inevitably, rules promulgated by either institution are likely to assign higher weights to the institu-

91. See Zacharias, Specificity in Professional Responsibility Codes, supra note 1, at 274-78 (describing the regulatory function of influencing substantive standards).

92. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing states as laboratories); cf. Zacharias, Federalizing Legal Ethics, supra note 45, at 373-75 (questioning the role of states as laboratories in the professional regulation realm).

93. Little’s criticism of the DOJ relies, in part, on his concerns regarding the reactions this approach may engender. See Little, supra note 5, at 419-21 (discussing potential reactions by state courts, the private bar, and Congress).

94. As discussed in Zacharias, Specificity in Professional Responsibility Codes, supra note 1, at 279-83, there are many potential goals of professional regulation that might include the category of enhancing the bar’s image. These range from making lawyers seem more trustworthy (so clients will use lawyers better) to making lawyers seem more deserving of high fees. Often, as in the case of prosecutorial ethics regulation, code drafting prompts a public image war among segments of the bar, with each group seeking to tarnish the other to make themselves look better or to obtain rules favorable to personal interests. See id. at 255-56 n.100; see also id. at 289-91 nn204-16 (describing personalized characterizations and hidden agendas of proponents and opponents of Model Rule 3.8(f)).

95. In promulgating the Reno rule, for example, the DOJ focused almost exclusively on the need for prosecutors to be actively involved in all aspects of law enforcement, without fear of ethical limits on their conduct. See Communications With Represented Persons, 59 Fed. Reg. 10,086, 10,087 (1994) (to be codified at 28 C.F.R. § 77) (proposed Mar. 3, 1994) (discussing “salutary development” of prosecutorial involvement in preindictment activities).

96. This emphasis appears in a variety of contexts, ranging from attorney-client confidentiality, to rules encouraging zeal, to limits on prosecutorial interference with defendants’ relationship with counsel. See, e.g., Susan P. Koniak, The Law Between the Bar and the State, 70 N.C. L. Rev. 1389, 1395-98 (1992) (discussing the vision of the bar that underlies professional regulation); Fred C. Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351, 358-61 (1989) (discussing justifications for strict confidentiality rules); Zacharias, Subpoenas of Attorneys, supra note 11, at 926-27 (discussing the bar’s confidentiality concerns in the context of Model Rule 3.8(f)) and authorities cited therein.
tion's personal concerns even if, viewed neutrally, that emphasis may not be in society's best interests.

3. Federal Courts as Rulemakers

If we cannot trust the DOJ or the ABA to make appropriate selections among the different possible regulatory goals, should we leave prosecutorial ethics issues to the federal courts? Presumably, the federal judiciary is neutral as between prosecution and defense interests and has some interest in safeguarding federal interests from improper encroachment by state rulemakers. Arguably, trusting lower federal courts to make the rules would alleviate concerns over the regulator's self-interested vision.97

Unfortunately, federal district courts formulating local rules also are prone to misperceiving the different goals of professional regulation. Because federal district court judges, like the DOJ and the defense bar, are involved in the litigation to be regulated, they too are naturally inclined to emphasize their own institutional interests in rulemaking.

For example, district courts tend to tie ethics prohibitions to constitutional baselines, as with the no-contacts rule in United States v. Hammad.98 They do so in the ethics context because constitutional considerations are virtually the only aspect of a local rule that can lead to appellate reversals.

Moreover, psychologically, courts often are driven by jurisprudential theories, public pressures, and personal inclination to recognize

97. See generally Green, Whose Rules?, supra note 9 (advocating greater reliance on federal courts in identifying appropriate prosecutorial conduct).
98. 858 F.2d 834 (2d Cir. 1988), modified, 902 F.2d 1062 (2d Cir.), cert. denied, 498 U.S. 871 (1990). In Hammad, for example, the court first analyzed the no-contacts issues in terms of the constitutional right to counsel once an indictment is issued. Id. at 838-39. Yet such constitutional requirements or guarantees do not necessarily define what lawyers should do in a professional or "ethical" legal system.

Similarly, when local courts adopt rules limiting lawyers' speech to the press, they tend to think in terms of mandatory rules and the First Amendment limits the Supreme Court has imposed on such rules. See Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991) (reviewing the Supreme Court cases regarding gag rules and establishing that gag rules are permissible when lawyer speech poses a "substantial likelihood of material prejudice" to a fair trial); Bailey v. Systems Innovations, Inc., 852 F.2d 93, 99-01 (3d Cir. 1988) (reviewing challenge to district court rule prohibiting statements to the press); United States v. Cutler, 815 F. Supp. 599, 609 (E.D.N.Y. 1993) (discussing mandatory local rule limiting lawyer speech). A professional code drafter, in contrast, might be less concerned with developing enforceable rules than with providing standards that guide lawyers on what they should or should not do. Such standards, if not enforced in a way to forbid protected speech, could survive constitutional analysis. See generally Kevin Cole & Fred Zacharias, The Agony of Victory and the Ethics of Lawyer Speech, 47 S.C. L. Rev. (forthcoming 1996) (discussing the concerns prompted by lawyer speech to the press and the difficulty of writing rules addressing those concerns).
artificial limits on their own rulemaking power. This tendency helps explain not only judicial doctrines of self-restraint, but also the recent decisions by the Supreme Court that for the first time have limited federal courts' power to exercise supervisory authority over actors in the legal system. See, e.g., United States v. Williams, 504 U.S. 36, 47 (1992) (limiting judicial authority over conduct before the grand jury). I already have questioned the DOJ's and Little's view of the meaning and breadth of these decisions. See supra note 43. However, such decisions do suggest that courts may voluntarily impose limits on their own authority to guide lawyer conduct when no imperative to forbid or require the conduct exists.  

Judges also may overemphasize “the image-building” function of ethics regulation. Judicial implementation of ethics rules takes place in a very public forum that tends to highlight borderline lawyer conduct and courts' failure to deal with it. That, perhaps explains the frequency with which courts cite the “appearance of impropriety” in their decisions on lawyer disqualification, even though that ration-
ale for ethics regulation increasingly has been downplayed in scholarship and bar-generated codes.\textsuperscript{104}

These observations are not meant to suggest that courts can never be neutral nor that all local district court regulation is driven by judicial self-interest. Indeed, for the most part, local district courts simply have adopted state ethics regulation as their own.\textsuperscript{105} Moreover, when judges make rules through a centralized body, such as the Federal Judicial Conference, they act more like a legislature.\textsuperscript{106} It is mainly when a local court's attention is drawn to specific provisions and local judges make their own assessments of the proper policy balance that a misplaced emphases on some of the goals of ethics regulation may occur. As a consequence, federal district courts, though technically independent, may not be the most trustworthy regulators when it comes to prosecutorial ethics.

4. State and Federal Legislatures as Rulemakers

The above analysis of the alternative regulators of prosecutorial ethics may seem surprising. When one considers which institutions are most competent to regulate in this area, one's initial instincts are to identify the DOJ, the bar, and the courts. After all, these bodies have the expertise, both with respect to the subject matter of legal ethics and with respect to the process of making rules.

A legislature, in contrast, might seem a questionable body to write an ethics code. Legislators tend to have limited legal experience.\textsuperscript{107} They typically are not considered the best innovators. Original legislation tends to be produced through the clash of competing lobbyists and other informed sources who provide the legislators with informa-


\textsuperscript{105} See Judicial Conference Report, supra note 44, at 4-5 (listing courts that have adopted state rules); see also supra note 18.

\textsuperscript{106} In proposing new rules to govern all federal courts, the Judicial Conference typically acts pursuant to different authority than local courts. See 28 U.S.C. § 2074 (1994) (Rules Enabling Act); 28 U.S.C. § 2071 (1994) (authorizing local court rules). Under the Rules Enabling Act, the Conference studies issues as a deliberative body. A committee consisting of representative judges proposes uniform rules. After Conference proposals are adopted by the Supreme Court, they are submitted to Congress, with time to evaluate and disapprove the new rules as Congress sees fit. 28 U.S.C. § 2074.

\textsuperscript{107} See Zacharias, Federalizing Legal Ethics, supra note 45, at 394-95 (discussing limited competence of legislators to address specialized legal ethics issues).
tion and perspective. Legal ethics issues have never inspired the variety of lobbying forces necessary for the formulation of new ideas and alternative proposals.

Yet these conclusions may be less valid when one considers narrow areas of ethics regulation such as prosecutorial ethics or, even more specifically, the area of no-contacts. For limited ethics issues, there may be the kind of self-interest, lobbying competition, and public concern that can enable a legislature to face the issues; in other words, it is likely that the legislature can be made competent. We already have seen some signs of that in the area of regulation of prosecutors, where Congress has begun to show an interest in learning about and entering the field.

Would state legislatures or the federal Congress be more “trustworthy” in weighing the different goals of prosecutorial ethics regulation? If we get to this point in the analysis, we probably have to acknowledge the superiority of Congress. State legislatures will not take full account of federal concerns in regulating their lawyers. Moreover, insofar as a need for uniformity in the regulation of prosecutors is important, as the Reno rule suggests, only Congress can devise an appropriate rule. Finally, as a practical matter, since the authority the DOJ claims for the Reno rule derives from Congress, only Congress is in a position to override DOJ regulations in a way that avoids the possibility of a DOJ challenge.

In comparing the competence of federal and state legislatures, it is again important to note the difference between the U.S. Congress promulgating a whole code of ethics and Congress addressing narrow areas. However one feels about federalizing legal ethics, the best argument against it is that different states may experiment with different

108. Id. at 377, 391 (discussing mechanisms for educating legislators regarding issues).
109. See id. at 377.
110. Provided, for example, by the ABA, the DOJ, the American Law Institute and the various prosecutor and defense unions and organizations. The Judicial Conference of the United States, through its Committee on Rules of Practice and Procedure, has begun to study federal cases involving rules of attorney conduct with a view to proposing uniform federal rules. See supra note 106. This project, too, may help to inform Congress, especially in areas where the DOJ claims the right to preempt rules the Conference may propose.
112. See Zacharias, Federalizing Legal Ethics, supra note 45, at 382-84 (discussing difference between state and federal interests in much of professional regulation).
113. See generally 59 Fed. Reg. 39,910, 39,911 (1994) (to be codified at 28 C.F.R. § 77) (emphasizing the need for uniformity as the driving force underlying the Reno rule); Zacharias, Federalizing Legal Ethics, supra note 45, at 345 (discussing possibility of federalizing professional regulation because of the need for uniformity).
solutions, thus providing an empirical track record for future regulators to rely upon.\textsuperscript{114} As the issues Congress focuses on become narrow, as in the no-contacts realm, the argument loses force. State regulation in this area has already had time to develop; no-contacts regulation is not new. Moreover, resolution of the issues turns more on policy choices than data.

There also is something a bit inconsistent about arguing, on the one hand, that regulation in this narrow area requires uniformity and, on the other, that state regulation should govern. As I have discussed elsewhere, to do a proper job of code-drafting, state regulators would need to address the narrow question of, say, no-contacts, with reference to the overall purposes of the whole state code.\textsuperscript{115} The diverse codes are likely to have diverse purposes. It is therefore of questionable utility to gauge the success or failure of state "experiments," because they will have been developed with something other than uniformity in mind. Again, Congress is perhaps the only body that can determine how much weight the goal of achieving uniform regulation of federal prosecutors deserves in the overall rulemaking process.\textsuperscript{116} For all of these reasons, perhaps we should prefer a federal legislative solution over deference to state codes.\textsuperscript{117}

B. The Interaction Between the DOJ and the ABA

I have tried to suggest that there are a variety of reasons for and against relying on each of the potential rulemakers in the area of prosecutorial ethics. The concerns that one might consider in deciding Little's question of whether the Attorney General should exercise her rulemaking power breaks down into two categories. First, which regul-

\textsuperscript{114} See Duncan T. O'Brien, Multistate Practice and Conflicting Ethical Obligations, 16 Seton Hall L. Rev. 678, 721 (1986) (noting that diverse professional rules "can lead to greater debate over and more careful examination of controversial issues"); cf. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that states serve as legislative "laboratories").

\textsuperscript{115} Zacharias, Specificity in Professional Responsibility Codes, supra note 1, at 305-09 (arguing that code drafters must initially identify goals and subgoals of the code before attempting to promulgate reforms).

\textsuperscript{116} It is important to note that, as a policy matter, both the ABA and the DOJ positions regarding the no-contacts issue have some merit. One therefore could not fairly conclude that Congress would be "wrong" or acting entirely in a self-interested way by choosing one position over another. See supra note 72. Legislators might emphasize personal political concerns in deciding the issues, but political pressure will be exerted on them from both sides—through pro-law enforcement lobbyists and lobbyists for the private bar (supported by their potential white collar clients). Unlike the ABA or the DOJ, however, the legislators will not have personal institutional interests that will be affected by the resolution of the policy choice. They thus will decide the policy neutrally, by whatever process they use to make policy choices in any situation.

\textsuperscript{117} I do not dwell here on the general competence of federal versus state legislatures. Cf. Zacharias, Federalizing Legal Ethics, supra note 45, at 391-96 (discussing Congress's competence). One's view of relative competence may, of course, influence one's view of who should decide the substantive issues.
lator can society most trust to choose among the various possible functions of professional regulation? Second, which regulator is most competent to do so?

How one comes out on those questions may depend on whether one is considering wholesale regulation of prosecutorial ethics, in general, or regulation in narrow areas, such as contacts with represented persons or grand jury subpoenas directed to attorneys. In David Wilkins's terms, it depends on context here too.

The history of the Reno rule has been tortuous. The core dispute between the DOJ and the ABA became heated when the ABA sought to regulate specific prosecutorial behavior on two fronts, by enacting a rule limiting prosecutorial subpoenas ordering attorneys to appear before grand juries and by reinterpreting the preexisting no-contacts rule to apply to preindictment undercover activity. The Bush administration DOJ, seeing its institutional interests threatened, issued a policy memorandum challenging ABA and state regulators' authority to implement these rules. Attorney General Reno built on the previous administration's policy by promulgating the Reno rule.

Interestingly, academics and other neutral observers have excoriated the behavior of both the ABA and the DOJ. That response probably reflects the sense of the above analysis that both institutions were acting in a self-interested fashion. Where the no-contacts and grand jury subpoena rules apply, they shape (or at least significantly affect) the balance of power between the prosecution and the defense bar.

118. Model Rules, supra note 11, Rule 3.8(f) (1991) (amended 1995); see generally Zacharias, Subpoenas of Attorneys, supra note 11 (discussing rule and citing authorities).

119. See ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) [hereinafter Formal Op. 396] (forbidding prosecutorial contacts with a represented person even at the preindictment stage). The Standing Committee opinion was the culmination of building support for this position that first drew strength from the Second Circuit's decision in United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), modified, 902 F.2d 1062 (2d Cir.), cert. denied, 498 U.S. 871 (1990), and then coalesced in opposition to the Thornburgh Memorandum. See supra note 1 for a more detailed history of the Reno rule.

120. See Thornburgh Memorandum, supra note 1.

121. See supra note 1 for a more detailed history of the Reno rule.

122. See, e.g., Green, Whose Rules?, supra note 9 (questioning the DOJ's "confrontational attitude" with respect to 4.2); Cramton & Udell, supra note 7 (criticizing the bar's position on Model Rules 3.8(f) and 4.2); Moore, supra note 84 (criticizing warfare between the DOJ and the ABA regarding 3.8(f) and 4.2); Zacharias, Subpoenas of Attorneys, supra note 11 (criticizing Bar's unilateral position in 3.8(f)); Zacharias, Specificity in Professional Responsibility Codes, supra note 1 (questioning both sides' one-sided positions with respect to 3.8(f)).

123. The subpoena rule allows the prosecutor to require a defense attorney to testify in secret, thus potentially driving a wedge between counsel and client or ultimately requiring the lawyer's withdrawal from the case. See Zacharias, Subpoenas of Attorneys, supra note 11, at 942-43 (citing authorities). The no-contacts rule, carried to its extreme, may prevent a prosecutor or federal agents acting under his direction...
emphasize personal concerns of its constituents, to the detriment of other regulatory functions. That probably means that neither the DOJ nor the ABA is an appropriate institution to decide the substance of regulation in the area of prosecutorial ethics.

Professor Little and I are in agreement that the best solution would be for all interested parties to reach a mutually satisfactory conclusion, through a neutral drafting process that takes everyone’s interests into account.\textsuperscript{124} Where we seem to part company, however, is in how that result can best be achieved.

One might conclude, as Little does, that the DOJ’s partiality means that the DOJ should forgo implementing the regulatory authority asserted in the Reno rule. But when one reflects on the history of the no-contacts and grand jury subpoena debates, one can justify the opposite conclusion. What we have seen in these areas is a slow political process which, in effect, works either towards eliminating the biases in the DOJ’s and the ABA’s alternative proposals or towards inviting the intervention of Congress (or, in Little’s terms, some other “blue ribbon” decisionmaker).\textsuperscript{125} As I have suggested above, Congress may be the body most capable of providing useful uniform rules regulating prosecutorial conduct.\textsuperscript{126} Congress may be the only body that can seek, successfully or unsuccessfully, to evaluate neutrally the societal implications of the competing approaches.\textsuperscript{127}

Consider, for example, Model Rule 3.8(f), the grand jury subpoena rule.\textsuperscript{128} As I, and others, have written, the original ABA provision was a bald attempt to create an advantage for criminal defendants and criminal defense lawyers unrelated to the “ethics” policy concerns that purportedly drove the rule. Rather than tailor the rule towards protecting legitimate expectations in attorney-client relationships, the

\begin{verbatim}
from speaking with witnesses or potential defendants (undercover or openly) if the person is represented in this or any other matter. Formal Op. 396, supra note 119.
124. Little, supra note 5, at 424-25.
125. Id. at 414.
126. See supra notes 110-17 and accompanying text.
127. See supra note 116. The only other realistic possibility may be the semi-legislative Judicial Conference, which has already begun looking at the issues with input from the DOJ and others.
128. Model Rules, supra note 11, Rule 3.8(f) (1990), as enacted and before it was modified in 1995, provided in pertinent part:
[A prosecutor shall] not subpoena a lawyer in a grand jury or other criminal proceeding . . . unless:
(1) the prosecutor reasonably believes:
(i) the information sought is not protected from disclosure by any applicable privilege;
(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
(iii) there is no other feasible alternative to obtain the information; and
(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.
\end{verbatim}
ABA sought to insulate unprivileged information from discovery and to protect defense lawyers from having to withdraw from cases.\textsuperscript{129} In contrast, the bar originally interpreted the ABA’s no-contacts provision with significant respect for law enforcement needs.\textsuperscript{130} Judicial decisions supported the prevailing view that professional no-contacts rules did not apply to preindictment law enforcement activities.\textsuperscript{131} As soon as the decision in United States v. Hammad\textsuperscript{132} gave the defense bar some hope of expanding the provision’s reach,\textsuperscript{133} however, the ABA reinterpreted the provision.\textsuperscript{134} The result was the broadest possible rule forbidding all undercover investigation under prosecutorial supervision when a target has counsel.

The DOJ fought both the subpoena and no-contacts rules on the ABA floor.\textsuperscript{135} The DOJ was outnumbered by the defense bar.\textsuperscript{136} In essence, it had no way of influencing the outcome.

In response, the DOJ preempted both rules through the Thornburgh Memorandum. Now the situation had reversed itself 180 degrees. This time the defense bar had no influence.\textsuperscript{137} Both unilateral exercises of power left one side unsatisfied. The losers had only two kinds of recourse. They could appeal to the courts, which would decide legal issues rather than the substance of what should constitute professional misconduct.\textsuperscript{138} Alternatively, they could appeal to Congress.

\textsuperscript{129}. Zacharias, Subpoenas of Attorneys, supra note 11, at 941-51 (offering an alternative rule more tailored to the bar’s legitimate concerns).


\textsuperscript{131}. E.g., United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.), cert. denied, 452 U.S. 920 (1981); see also authorities cited in Saylor & Wilson, supra note 7, at 465-71 (discussing split among courts as to whether the “ethical prohibition against communications with represented parties . . . [should] apply in criminal cases”).


\textsuperscript{133}. Id. at 857.

\textsuperscript{134}. Formal Op. 396, supra note 119.

\textsuperscript{135}. See, e.g., Burke, supra note 2, at 1648-49 (describing the debate over 4.2 and its scope); Cramton & Udell, supra note 7, at 319-21 (same); Moore, supra note 84, at 519-22, 530-32 (describing the debate over Model Rule 4.2 and 3.8(f)).

\textsuperscript{136}. See Saylor & Wilson, supra note 7, at 461 n.2 (providing statistics on ABA membership).

\textsuperscript{137}. The process leading to the adoption of the Reno rule provided at least two opportunities for comment. Initially, the Clinton administration made some initial changes softening the breadth of the exceptions to the no-contacts provisions. Thereafter, however, the DOJ’s basic proposal was adopted essentially unchanged despite hostile comments and a critical report by a conference of state judges. The DOJ explained its rejection of the comments but, for the most part, did not attempt to reconcile them. See 59 Fed. Reg. 39,910, 39,913-18 (1994) (to be codified at 28 C.F.R. § 77) (discussing comments received).

\textsuperscript{138}. The legal issues include: whether Congress delegated the DOJ authority to preempt state and federal court professional rules; whether the Supremacy Clause of the Constitution empowers the DOJ, or even Congress, to preempt state codes;
In the big war over prosecutorial ethics in general, members of Congress proposed a bill that specifically would have authorized the DOJ to preempt all state ethics rules relating to federal prosecutors.139 The full Congress thus far has demurred, presumably because Congress feels ill-suited or unprepared to address the entire field of prosecutorial ethics.140 But Congress remains in the picture, having warned the DOJ in a recent report that it will be watching the DOJ position closely.141

But the narrower battles over the no-contacts and grand jury subpoena issues have continued. As often happens with respect to focused legal disputes, courts and academics have addressed the issues and, arguably, changed the nature of the debates. The cases and academic writing have drawn attention to values and approaches that the unilateral decisionmaking processes of the ABA and the DOJ failed to consider.142 Concomitantly, the continued stand-off has fueled media attention to the issues.

Two results were possible. First, the ABA and the DOJ had the option of discussing the subjects more dispassionately. That, indeed, is what has occurred with respect to Model Rule 3.8(f). The ABA redrafted the rule, to ease the impact upon law enforcement.143 Problems for the DOJ remain, for some state provisions continue to

whether separation of powers concerns foreclose DOJ preemption of district court rules; and whether the DOJ fully satisfied all administrative requirements in adopting its regulation.


140. See Zacharias, Federalizing Legal Ethics, supra note 45, at 387-96 (discussing congressional competence, or lack thereof, to address legal ethics issues). There is an alternative explanation for Congress’s conduct; namely, that it approves of the DOJ’s adoption of the Reno rule in principle and merely is awaiting developments before deciding whether to act further on its own. Although plausible, this interpretation seems less likely in light of Congress’s failure to mention it in the course of deciding not to act on the proposed bill.


142. See, e.g., Cramton & Udell, supra note 7, at 311-15, 333-57, 371-85 (discussing undervalued prosecutorial interests with respect to no-contacts and grand jury subpoena rules); Green, Whose Rules?, supra note 9 (discussing subjectivity of the DOJ regulation of contacts with represented persons); Zacharias, Subpoenas of Attorneys, supra note 11, at 944-51 (identifying alternative reforms to address concerns underlying grand jury subpoena rule).

143. The current Model Rule 3.8(f) deletes the part of the original rule requiring prosecutors to obtain “prior judicial approval [for the issuance of a subpoena] after an opportunity for an adversarial proceeding.” Model Rules, supra note 11, Rule 3.8(f) (1995).
follow the original ABA approach. But the Attorney General has responded to the ABA overture with corresponding restraint; notably absent in the Reno rule is any mention of the grand jury subpoena regulations. The DOJ seems prepared to work out the remaining disputes on a case-by-case basis or in nonconfrontational fora.

The second possibility was for the warring institutions to stick to their guns, as in the no-contacts area. Courts ultimately may resolve the dispute indirectly, by resolving legal issues that allow or forbid certain kinds of substantive regulation. But what also inevitably happens as a result of a showdown is that media attention builds. Often, such publicity encourages legislators to become involved. The academic and judicial analyses of the issues that are produced in the interim help give Congress an informational foundation to use in resolving the issues.

My view of the history of the no-contacts debate is that we are in the midst of this second process. The DOJ has reacted to the ABA’s one-sided position with an equally one-sided response. The two institutions will work the hard issues out. Or they will not, in which case Congress should—and I predict will—intervene. Little’s article, and others, will help Congress analyze the issues.

C. How Will Regulation of Prosecutorial Ethics Develop?

What of the broader question of whether the DOJ can preempt all state ethics regulation? The courts continue to dance around the legal questions, often reaching inconsistent conclusions. In the interim,

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144. Of course, some states may refuse to adopt the ABA revision or federal district courts may adopt their own rules. See generally Mullenix, supra note 44, at 126 (discussing disparity in local rules). However, problems may arise even where states do accept the compromise. For example, suppose a federal district court adopted a state code modeled after the old version of Model Rule 3.8(f) and this rule is challenged. Suppose further that the state subsequently adopts the ABA’s redrafted provision. Because the original rule governs in federal court, a challenge to it must address the preemption, separation of powers, and perhaps even the supremacy clause issues, even though the state has accepted the compromise position.

145. See, e.g., Whitehouse v. United States Dist. Court, 53 F.3d 1349, 1365-66 (1st Cir. 1995) (granting the DOJ appeal in part, by upholding federal district court’s adoption of state anti-subpoena rule with respect to trial subpoenas but not grand jury subpoenas).

146. Reportedly, the DOJ has representatives working with the Federal Judicial Conference in its exploration of possible semi-legislative solution to the disuniformity of professional regulation in the federal courts. See supra notes 101, 106.

147. See, e.g., Zacharias, Specificity in Professional Responsibility Codes, supra note 1, at 255-56 n.100, 290 nn. 207-08 (illustrating the response to Model Rule 3.8(f)).

148. In recent months, the ABA has begun to focus on the issue of congressional oversight of federal prosecutorial activity. At its 1996 Annual Meeting, the ABA approved a “policy resolution” purporting to state principles governing congressional oversight and prosecutors’ cooperation with congressional committees. 59 Crim. L. Rep. (BNA) 1441, 1442-43 (Aug. 14, 1996).

149. See the conflicting authorities cited supra notes 6, 64. It is significant to note that the courts have decided many of the cases thus far on grounds other than the
the Attorney General's conduct has been striking. Although she asserts the power to preempt, in practice she has chosen not to exercise that power except with respect to the no-contacts issue.

Professor Little says the Attorney General should not exercise that power. I suggest that, as a practical matter, she will not exercise it, unless driven to taking that step by some new one-sided threat by the bar. But if such a threat should develop, my view is that the Attorney General perhaps should respond by exercising her authority—not because Little is wrong in his cost-benefit analysis, but because that response would create more of a political equilibrium. It may be the only process by which Congress, the most suitable decision maker under my analysis, can be forced to intervene.

CONCLUSION

This Response does not purport to be the final word, either on the legal questions regarding preemption nor on its somewhat fanciful assessment of the political process in which the Reno plays a role. The Response simply attempts to challenge our thinking that the traditional methods of ethics regulation are the only options. I have tried to suggest that Professor Little's two-dimensional way of looking at the no-contacts issue—who should we prefer, the DOJ or the traditional regulators—may be somewhat too narrow.

The increasing politicization\(^{150}\) and legalization\(^{151}\) of professional code drafting suggests that, over time, more of the potential regulators are likely to get involved. David Wilkins's article\(^{152}\) and my earlier piece\(^{153}\) have suggested that this trend already has begun and may be a good thing.\(^{154}\) If, as Professor Wilkins argues, we analyze profes-

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150. See, e.g., Schneyer, Professionalism, supra note 84, at 688-724 (describing the political process through which the Model Rules were adopted).

151. See generally Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 Yale L.J. 1239 (1991) (arguing that professional regulation has become equivalent to legislation in its form and substance and in the process of its formulation and adoption).

152. Wilkins, supra note 76.

153. Zacharias, Specificity in Professional Responsibility Codes, supra note 1.

154. The DOJ is but one example of a relatively new "regulator" of legal ethics that has entered the field. The Office of Thrift Supervision and other federal agencies that have seized upon OTS's conduct in the Kaye, Scholer case are other examples. See Zacharias, Federalizing Legal Ethics, supra note 45, at 368-70 (discussing federal agencies that have adopted OTS-like positions). In this symposium, Anthony Davis and Charles Silver have suggested that malpractice insurers also will play an increasing role in regulating attorney conduct. Anthony E. Davis, Professional Liability Insurers
sional regulation closely—"in context,"—we may find resolving the substance of ethics issues more difficult than ever before. If, as I suggest, we consider the functions of professional regulation and the competence and trustworthiness of alternative regulators, the issues become even more complex. Recognizing the intricacy of the task may, in the long run, be the first step towards completing it in a better way.
