Regulating Federal Prosecutors' Ethics

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Regulating Federal Prosecutors' Ethics

Bruce A. Green* and Fred C. Zacharias**

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I. INTRODUCTION

Consider some questions of federal prosecutorial ethics that have been debated, sometimes heatedly, over the past two decades. Can and should the Department of Justice ("DOJ" or "Department") exempt itself from state and federal ethics rules regulating lawyers' communications with represented persons? May federal courts order federal prosecutors to disclose exculpatory evidence to the grand jury? If not, may states impose the same obligation via their professional rules? Should federal courts adopt state rules that would restrict federal prosecutors' authority to issue grand jury subpoenas to criminal defense attorneys? Conversely, should the


3. State ethics rules modeled on ABA Model Rule 3.3(d) can be interpreted to impose a disclosure obligation on prosecutors. See MODEL RULES OF PROF'L CONDUCT R. 3.3(d) (1983) (hereinafter MODEL RULES) (requiring a lawyer in an ex parte proceeding to "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse"); id. R. 3.8 cmt. (stating that grand jury proceedings are included among those to which Model Rule 3.3(d) applies). The DOJ has challenged applications of rules applied in this way. See, e.g., United States v. Colo. Supreme Court, 189 F.3d 1281 (10th Cir. 1999) (concerning injunctive action by DOJ to prevent state disciplinary authorities from sanctioning federal prosecutors for failing to disclose exculpatory material to the grand jury); cf. AM. BAR ASS'N, REPORT OF THE COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT 314, 316 (2000) (hereinafter REPORT OF THE COMMISSION) (reporting a proposed amendment to Model Rule 3.8 comment "on the ground that grand-jury proceedings are not ex parte adjudicatory proceedings").

4. See, e.g., Stern v. United States Dist. Court for Dist. of Mass., 214 F.3d 4 (1st Cir.), cert. denied, 531 U.S. 1143 (2001) (concluding that the federal district court exceeded its authority by adopting a local rule restricting the issuance of grand jury subpoenas to attorneys); Colo. Supreme Court, 189 F.3d at 1283 (upholding state ethics rule); Whitehouse v. United States Dist. Court for Dist. of R.I., 53 F.3d 1349 (1st Cir. 1995) (upholding federal court rule following state rule limiting attorney subpoenas); Baylson v. Disciplinary Bd., 975 F.2d 102 (3d Cir. 1992), cert.
federal courts exempt federal prosecutors from state regulation for-bidding prosecutors and their agents from employing deceit in criminal investigations? Finally, should Congress take a position on these and other issues of federal prosecutorial ethics and, if so, how? Underlying these questions are fundamental, overarching is-sues about the allocation of authority to regulate federal prosecu-tors. More specifically, to what extent should the authority to regu-


5. In a recent disciplinary decision, the Oregon Supreme Court opined, in dicta, that there is no "prosecutorial exception" to the ethics rules forbidding lawyers, and those acting under their direction, to make false statements or engage in deceit or dishonesty. In re Gatti, 8 P.3d 966, 974-76 (Or. 2000). The Oregon Supreme Court also noted that these rules encompass the gathering of evidence in the course of criminal investigations. Id. Federal officials responded with alarm because federal criminal investigations frequently employ undercover agents, infor-mants, and other forms of deceit. See, e.g., DOJ Sues Oregon Bar over Dishonesty Rule, Asserts Need for 'Prosecutorial Exception,' 17 Laws. Man. on Prof. Conduct (ABA/BNA) 407, 408 (July 4, 2001) [hereinafter DOJ Sues Oregon Bar] (reporting Oregon Supreme Court's rejection of a bar proposal to recognize an exception for government lawyers and investigative agents); Peter Farrell, Oregon State Bar May Rewrite Undercover Investigations Rule, PORTLAND OREGONIAN, Oct. 26, 2000, at D4 (noting the argument of the U.S. Attorney's Office in Gatti that forbidding deception in criminal investigations would hamper law enforcement). The DOJ filed a federal lawsuit to enjoin the Oregon bar from disciplining federal prosecutors for violations of the no-deceit rule. Id. (citing United States v. Or. State Bar, No. 6-01-06168-HO (D. Or. May 23, 2001)). On January 29, 2002, the Oregon Supreme Court amended its disciplinary rule to permit lawful covert investiga-tions. Oregon Amends Disciplinary Rule to Clarify that Lawyers May Supervise Covert Activity, 18 Laws. Man. on Prof. Conduct (ABA/BNA) 94, 94 (Feb. 13, 2002) [hereinafter Oregon Amends Disciplinary Rule].

late federal prosecutors be exercised by states, by federal courts, or by self-regulation on the part of the DOJ? When the different regulatory authorities disagree, whose judgment ultimately should control? From the states' perspective, the answers are simple: state courts should have plenary authority to impose state ethics rules on federal prosecutors; federal courts should make rules for federal prosecutors only interstitially. From the DOJ's perspective, the opposite holds true: the regulatory authority of states and federal courts is limited; they ordinarily should defer to the Department's judgments about the proper standard of conduct for government prosecutors.

This Article challenges both views, offering a more nuanced perspective in their place. It argues that federal courts should have ultimate authority to regulate federal prosecutors, subject to congressional oversight. Although we identify a broad range of considerations that influence when and whether federal courts should exercise that authority, on the one hand, or defer to state ethics rules or DOJ self-regulation, on the other, we argue that it is impossible to identify categorical rules to govern those determinations. We suggest that federal courts should narrow the areas of disagreement between the different players by engaging in rulemaking that formally elicits and weighs the respective views of state regulators and the Department. We also propose that Congress adopt legislation that builds on these insights in place of the recent McDade Amendment, which leaves ambiguous the role of the federal courts and the jurisdiction of the various potential regulators of federal prosecutorial ethics.

Although we focus on the normative question of how federal courts should regulate federal prosecutors, questions about the legal authority of states and federal courts obviously remain important to our inquiry. As Part I notes, the imposition of federal judicial regulation is most justifiable when the courts implement power about the existence of which there is little debate—such as the inherent authority to protect judicial processes and the authority to decide constitutional issues. Judicial regulation seems somewhat less justifiable when based on vaguely defined judicial powers—such as the supervisory authority over the criminal process, congressionally delegated authority to adopt local practice rules, or the general authority of courts to supervise the conduct of lawyers practicing before them by adopting "ethics" rules. Ultimately, since we assume that federal courts either have authority or can be
granted authority by Congress to do what makes sense from a normative perspective,\(^7\) we do not attempt to resolve the complex jurisdictional issues. We do examine them, however, in order to derive principles relevant to the substantive inquiry at the heart of this Article.

Many of the issues we discuss and conclusions we reach may apply equally to federal court regulation of ordinary federal litigators.\(^8\) We focus on prosecutors for four principal reasons. First, recent efforts to promulgate federal judicial regulation of attorney conduct more generally appear to have petered out. Second, as we have noted elsewhere,\(^9\) federal prosecutors have attributes differentiating them from other federal lawyers that may justify a special approach by federal courts. Third, federal prosecutors have argued over the course of two decades that they should be free of particular types of state or federal regulation that apply to state prosecutors; their arguments have prompted heated debates concerning the competence of particular institutions to regulate. Fourth, Congress clearly perceives federal prosecutors to be special and has already adopted two major pieces of legislation that affect state and federal

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7. Some advocates of strong DOJ authority have suggested that separation of powers concerns prevent Congress from authorizing the federal courts to regulate the Department lawyers on the grounds that judicial regulation would invade constitutionally conferred executive functions. See Zacharias & Green, supra note 6, at 250-52. For the most part, this argument is arguably viable only with respect to a very narrow range of DOJ activities. Id. at 251. The DOJ is an agency created by Congress and generally subject to congressional oversight. Presumably, Congress may delegate regulatory authority to the federal courts provided that Congress could itself impose similar regulation and Congress does not call upon the courts to exercise nonjudicial functions.

8. In his McGlinchey Lecture, Professor Andrew Kaufman considers the question of who should make rules governing federal lawyers and reaches conclusions somewhat different from our own. See Andrew L. Kaufman, Who Should Make the Rules Governing Conduct of Lawyers in Federal Matters, 75 TUL. L. REV. 149 (2000). Although some of his points do not apply fully to the issue of federal prosecutorial ethics, many of his observations are instructive.

Kaufman, like us, is cognizant of the "ongoing struggle for lawmaking power, and the failure of lawmakers themselves to take charge of the process [which] has invited others—both private parties like the ABA, and the other branches of government, like Congress—to intervene." Id. at 158. We agree with Kaufman that "the time has come for the judiciary to run the show." Id. However, this Article concludes that federal courts should control federal prosecutorial ethics, while giving due deference to state regulation. See infra Part II. Kaufman, in contrast, advocates that the solution to the balkanization of rules be "dynamic conformity" by state and federal rulemakers. Kaufman, supra, at 162. He suggests that "local control and decentralization have their virtues," so long as state courts recognize and defer to the interests of the federal courts. Id. at 159, 162.

Nevertheless, in the end, we all share significant common ground: whatever the method for achieving the goal, the goal itself should be less contentiousness in regulating. Id. at 157. For the three of us, the ultimate solution seems to be some form of a "cooperative joint venture" among all the interested regulators and regulated parties. Id. at 164.

9. See Zacharias & Green, supra note 6, at 224-45.
judicial regulation. Our analysis calls the wisdom of those laws into question and signals the need for additional legislative attention to the matter.

What do we hope to accomplish in our analysis? Most importantly, we expect to highlight coherent justifications for federal judicial regulation and/or federal judicial restraint—justifications that go beyond the application of constitutional and statutory mandates or the mechanical adoption of state professional rules. As federal executive branch officials, federal prosecutors have some claim to be free of both state regulation and regulation by the federal judiciary. As a result, when either state or federal courts adopt rules regulating federal prosecutors, they should identify a rationale for doing so. In addition, given the tradition of state regulation of the practice of law and a host of practical reasons for deferring to state regulation, federal courts need some understanding of when it is appropriate to preempt, supplant, or supplement particular state rules.

Teasing out these rationales should help federal courts approach the regulation of prosecutors on a less haphazard basis. It should also help make clear when additional authorization or clarification is needed from Congress to enable federal courts to act. The latter should have the dual benefit of rationalizing the current law and ending recent bickering among state regulators, courts, and the DOJ regarding the substance of appropriate regulation.

Part I sets the stage. Section A notes the kinds of ethics standards that states apply to federal prosecutors—either specifically as prosecutors or as members of the bar generally. Section B then identifies the range of regulation that federal courts impose. Section B also notes the various types of legal authority—some controversial—that federal courts have relied upon in regulating prosecutors. Section C then briefly addresses the legal bases on which the DOJ has questioned both state and federal judicial regulation. Finally, Section D considers the legal effect of federal judicial intervention, either in adopting or purporting to preempt the state rules. Thus, as a whole, Part I identifies both the federal judicial authority to regulate prosecutors that is clearly accepted and that authority about which there remains legal question.

Parts II through V explore the normative questions. When and why should federal courts regulate federal prosecutors? Part II sets out reasons for which federal courts should not simply assume their superior ability to determine appropriate prosecutorial behavior. There are a host of factors, many of them rooted in practical realities, that should make federal courts hesitate to assume the
lead role in promulgating and enforcing ethics regulation. Part II therefore posits that, at least in situations in which a federal court supplants standards of behavior adopted by state regulators, the court should provide a basis for believing that federal regulation is more appropriate.

Part II then considers what justifies federal regulation and when federal courts are the better decisionmakers. These issues raise numerous questions. When should state regulators be trusted or mistrusted? What kinds of institutional characteristics of federal courts militate in favor of, and against, federal judicial regulation? When is the current congressional preference in favor of subjecting federal prosecutors to state ethics rules actually the appropriate rule?

Part III analyzes the extent to which the DOJ has, or should have, the prerogative to make its own decisions about standards of conduct governing federal prosecutors. As federal officers, prosecutors have a claim to be free of state regulation. As executive officers, prosecutors have a claim to be free of judicial, and perhaps even congressional, control. We do not propose to discuss the legal aspects of these claims, for those are issues we have addressed before. Rather, Part III focuses on the institutional characteristics of federal prosecutors that militate in favor of immunizing them from particular kinds of state and federal judicial oversight. Part III also suggests that when prosecutors are exempted from state regulation for federalism reasons, additional justifications for federal court regulation may appear but that these justifications apply only in particular contexts.

Part IV focuses briefly on how federal courts should exercise their authority to regulate. We do not concern ourselves with specific professional rules or proposals, but rather identify approaches or conceptualizations of prosecutorial activities that may help the court determine whether to defer to state regulation or prosecutorial self-restraint. Part IV also raises issues that the federal courts must consider regarding the costs of enforcing judicial regulation or adopting rules that are unlikely to be fully enforced. In the same vein, Part IV suggests factors courts might take into account in assessing the appropriateness of different forms of judicial regulation.

Finally, Part V pulls together the considerations identified in earlier parts of the Article and offers a series of conclusions, particularly with regard to the role Congress should play in the regula-

10. See id. at 247-59.
One alternative is for Congress to enter the field completely by adopting its own federal code of ethics, but Congress is unlikely to take that step. And if that is so, we conclude that Congress can best contribute to the regulation of federal prosecutorial ethics by limiting its involvement to a facilitating and oversight role. Congress should confine itself to reducing the possibility of jurisdictional disputes among the potential regulators, enabling federal judicial regulation, and developing a mechanism through which interested constituencies can provide input for federal judicial rulemaking.

II. CURRENT REGULATION OF FEDERAL PROSECUTORS

A. State Regulation

At first, it might seem strange to suppose that any state has the authority to regulate the professional conduct of federal prosecutors. One might expect the regulation of federal officials to be the exclusive province of federal law. Yet in any given case, at least two different states may claim the ability to make law governing a federal prosecutor: the state of the federal district in which the prosecutor is appearing and the state (if it is different) in which the prosecutor is licensed to practice law.

The bases for the forum state's assertion of power to apply its ethics rules to the federal prosecutor's professional conduct are threefold. The first two bases are derivative. State ethics rules may apply by virtue of a local rule of the federal district court. Many

11. See generally Fred C. Zacharias, Federalizing Legal Ethics, 73 Tex. L. Rev. 335 (1994) (analyzing the possibility of a federal code of ethics).

12. Preliminarily, it is important to recognize that the state of the federal forum and the licensing state are not invariably the same. Under federal law, a lawyer may serve as a federal prosecutor in any federal district. See 28 U.S.C. § 517 (1994). The authority to practice nationally is of particular importance to those prosecutors in divisions of the DOJ that focus on conduct anywhere in the country that implicates a particular set of criminal provisions, such as federal criminal laws concerning antitrust, tax, securities, espionage, or the environment. For example, a federal prosecutor in the environmental crimes section whose principal office is in the DOJ's main headquarters in the District of Columbia may be assigned to investigate or try a case anywhere in the country.

13. Other states in which the prosecutor engaged in practice activities related to the case might also claim a right to regulate.
federal district courts provide that lawyers appearing before a district court must comply with the ethics rules of the state in which the court sits.\textsuperscript{14} Second, state ethics rules may apply by virtue of a recently enacted federal statute known as the McDade Amendment, which provides in part that "[a]n attorney for the Government shall be subject to State laws and rules . . . governing Attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."\textsuperscript{15} Insofar as state laws other than ethics rules are specifically directed at attorneys, those, too, seem to apply by virtue of the McDade Amendment.\textsuperscript{16}

A state, however, may claim an independent substantive right to apply its ethics rules to the work of all lawyers, including the work of federal prosecutors, when that work is performed physically within the state’s borders.\textsuperscript{17} The premise that a state may apply its laws to the conduct of anyone within the state also would justify the application of state criminal provisions to prosecutors,

\begin{itemize}
  \item \textsuperscript{14} See Daniel R. Coquillette, \textit{Report on Local Rules Regulating Attorney Conduct in the Federal Courts}, in \textit{COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE ADMIN. OFFICE OF THE U.S. COURTS, SPECIAL STUDIES OF FEDERAL RULES GOVERNING ATTORNEY CONDUCT} 1, 4 (1997) [hereinafter SPECIAL STUDIES] (canvassing the local rules of the federal district courts). Other federal district courts provide that federal litigators are governed by the \textit{Model Rules} or by a distinctive set of federal ethics rules.\textit{Id.}
  \item \textsuperscript{15} 28 U.S.C. § 530B(a) (Supp. V 1999). \textit{See generally} Zacharias & Green, \textit{supra} note 6, at 211-15 (describing the McDade Amendment’s background and legislative history); \textit{Note, Federal Prosecutors}, \textit{supra} note 6 (analyzing the McDade Amendment).
  \item \textsuperscript{16} As we have discussed previously, one federal court has oddly limited the statute’s reach based on its title \textit{Ethical Standards for Attorneys for the Government}. Zacharias & Green, \textit{supra} note 6, at 217 n.60 (discussing United States v. Colo. Supreme Court, 189 F.3d 1281, 1288 (10th Cir. 1999), in which the court concludes that the statute makes only state "ethical rules" applicable to federal prosecutors); \textit{cf.} Casey P. McFadden, \textit{Note, Prosecutorial Misconduct}, 14 GEO. J. LEGAL ETHICS 1211, 1223, 1228 (2001) (focusing on argument that the McDade Amendment should be construed narrowly to apply to true "ethics" regulation and arguing that federal supremacy issues may arise in the absence of such an interpretation).
  \item \textsuperscript{17} \textit{See, e.g.}, Attorney Grievance Comm’n v. Johnson, 770 A.2d 130, 148 (Md. 2001) (determining that a lawyer licensed in Virginia and Washington, D.C., who engaged in disciplinary misconduct in Maryland, where the lawyer was not admitted to practice, was subject to disbarment). This latter claim will be strongest on the occasions when a federal prosecutor, ancillary to a federal investigation or prosecution, appears in a state court pro hac vice. Out-of-state lawyers are ordinarily required to submit to the state’s ethics rules (and other rules of court) when they are admitted pro hac vice to appear in state court. \textit{See Pro Hac Vice Rules}, at http://www.crossingthebar.com/pro_hac_vice.htm (last modified Dec. 27, 2001) (collecting states’ pro hac vice provisions). In that situation, the lawyer is, in effect, licensed to practice in that state, albeit for the limited purpose of appearing in a particular proceeding, and, consequently, the state in which the lawyer practices becomes (temporarily) the licensing state as well. \textit{Cf. MODEL RULES, supra} note 3, R. 8.5(b)(1) (stating that for purpose of disciplinary proceedings, an out-of-state lawyer admitted to practice for purposes of a proceeding in court is governed by the rules of the jurisdiction in which the court sits, unless the court’s rules otherwise provide).}
\end{itemize}
such as those forbidding subornation of perjury or obstruction of justice.¹⁸

In the case of a licensing state, the state's professional rules are, perhaps, the only applicable body of regulation. The rationale for applying these to federal prosecutors practicing outside the state is the same as the rationale for allowing regulation of other lawyers who practice out of state; namely, that lawyers take an oath to comply with the ethics rules adopted by the state's highest court as a condition of receiving and retaining a state law license. Once having admitted a lawyer to practice, the state may hold the lawyer to the oath by disbarring or otherwise sanctioning that lawyer for disciplinary misconduct, regardless of where the misconduct occurs.¹⁹

That a federal prosecutor may be bound by the ethics rules of two states as well as those of the federal court²⁰ raises a choice of law question: Must the prosecutor comply with all these sets of ethics rules, even when they are different or conflicting, or is it enough to comply with one set (e.g., those of the federal court or those of the state in which the federal court sits)? One might expect that, under prevailing choice of law rules, federal prosecutors and other lawyers appearing in federal proceedings are governed exclusively by the rules of the federal court.²¹ But, in disciplinary proceedings based on alleged misconduct occurring outside the state, the courts of the licensing state will not necessarily defer to the ethics rules of another jurisdiction.²²

¹⁸. Since federal criminal law will cover these same subjects, state prosecutors may, as a practical matter, defer to federal prosecutors to decide whether to conduct an investigation or prosecution of alleged criminal conduct in connection with a federal proceeding.

¹⁹. See, e.g., Fla. Bar v. Cox, 794 So. 2d 1278 (Fla. 2001) (suspending federal prosecutor for federal activities on the basis that Florida Constitution gives the Florida Supreme Court authority to regulate all lawyers licensed to practice by the state).

²⁰. The McDade Amendment expressly provides that a government attorney "shall be subject to . . . local Federal court rules" as well as state laws and rules governing attorneys. 28 U.S.C. § 530B(a) (Supp. V 1999).

²¹. See, e.g., MODEL RULES, supra note 3, R. 8.5(b)(1) (providing that, for conduct within a judicial proceeding, a lawyer ordinarily is governed by the rules of the jurisdiction in which the court sits); Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 472-73 (D.N.J. 1998) (holding that New Jersey ethics rules, which governed practice before the federal courts of New Jersey, determined the propriety of a New York lawyer's conduct in connection with a matter in New Jersey federal court).

²². For example, in a disciplinary proceeding predating the McDade Amendment, Colorado disciplinary authorities sought to sanction a federal prosecutor licensed in Colorado based on an alleged violation of a Colorado rule against communicating directly with a represented party, notwithstanding that the conduct was arguably permissible under the rules of the District of Columbia, where the prosecutor practiced. United States v. Ferrara, 54 F.3d 825 (D.C. Cir. 1995); In re Doc, 801 F. Supp. 478 (D.N.M. 1992). As far as one can tell from the public record,
As both of us have noted elsewhere, most state professional rules simply do not bear on the work of full-time prosecutors, since prosecutors do not market their services or represent private clients. Further, many of the rules that might apply to prosecutors do not establish an independent standard of professional conduct, but rather incorporate standards established by some other body of law. Some of these rules incorporate other law by reference. Others implicitly draw on other law. Although the latter do not establish an independent standard of conduct, these provisions nevertheless serve a symbolic or educational function while enabling courts to sanction prosecutors personally for conduct that is impermissible in any event.

Of greater potential importance are state ethics provisions that establish an independent standard of conduct for federal prosecutors' work. These provisions are of various kinds. Professional rules relevant to prosecutors run the gamut from the exceedingly vague (and, thus, potentially far-reaching) to the relatively

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24. See, e.g., MODEL RULES, supra note 3, R. 3.4(a) (forbidding a lawyer to "unlawfully obstruct another party's access to evidence"); id. R. 3.4(c) (forbidding a lawyer from "knowingly disobey[ing] an obligation under the rules of a tribunal").

25. For example, the restriction against prosecuting a charge that "the prosecutor knows is not supported by probable cause" is coextensive with the criminal defendant's constitutional right. Compare MODEL RULES, supra note 3, R. 3.8(a), with United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991) (stating that a grand jury must determine whether there is probable cause). Similarly, the core of the ethical requirement that prosecutors disclose evidence "that tends to negate the guilt of the accused or mitigates the offense" derives from the due process line of cases beginning with Brady v. Maryland. MODEL RULES, supra note 3, R. 3.8(d); cf. Brady v. Maryland, 373 U.S. 83 (1963) (requiring the disclosure of exculpatory evidence on constitutional grounds); see also Strickler v. Greene, 527 U.S. 263 (1999) (fine-tuning Brady); United States v. Bagley, 473 U.S. 667 (1985) (same); United States v. Agurs, 427 U.S. 97 (1976) (same). Insofar as this ethical requirement may be more demanding than the constitutional requirement, it is routinely ignored by prosecutors and judges alike. See generally Lisa Kurcias, Note, Prosecutor's Duty to Disclose Exculpatory Evidence, 69 FORDHAM L. REV. 1205, 1205 (2000) (discussing the differences between the ethical requirement of the Model Rule 3.8(d) and the legal requirement of Brady).

26. The personal sanction might be viewed in various ways. For example, it might be viewed as punishment that provides deterrence supplemental to that effectuated by other remedies or sanctions already provided by the law. Alternatively, it might be viewed as a measure designed to protect the public from a lawyer who lacks the requisite character to practice law, on the theory that the violation of the preexisting standard of conduct is evidence that the lawyer lacks respect for law or legal institutions.
specific (though not necessarily unambiguous).\textsuperscript{27} At the vague end of the spectrum is a rule forbidding a lawyer from "engag[ing] in conduct that is prejudicial to the administration of justice,"\textsuperscript{28} which is occasionally applied to prosecutorial conduct that seems plainly to be wrongful but not specifically proscribed by another provision.\textsuperscript{29} At the other end of the spectrum is the attorney subpoena rule, a provision proposed by the American Bar Association ("ABA") and adopted by a handful of states, that restricts the circumstances under which a prosecutor may subpoena a lawyer to the grand jury to testify concerning a past or present client.\textsuperscript{30}

Although it might be argued that federal prosecutors should, in certain respects, be regulated differently from state and local prosecutors, no state's professional rules distinguish between state and federal prosecutors. Indeed, most professional codes barely distinguish between prosecutors and other lawyers. None specifically exempt prosecutors from otherwise applicable rules and most add only a handful of restrictions to those that generally govern lawyers.\textsuperscript{31} Of the rules specifically directed at prosecutors, the attorney subpoena rule has been the most controversial. Other common provisions, derived from the \textit{Model Rules} or the predecessor \textit{Model Code of Professional Responsibility},\textsuperscript{32} include a duty to ensure that the accused has been advised of the right to counsel,\textsuperscript{33} a restriction against obtaining "a waiver of important pretrial rights" from the accused,\textsuperscript{34} and a responsibility to limit extrajudicial statements by other law enforcement personnel.\textsuperscript{35} Many states have tinkered with

\begin{itemize}
  \item \textsuperscript{27} For a full discussion of the effects of professional regulation of varying levels of specificity, see generally Fred C. Zacharias, \textit{Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics}, 69 \textit{Notre Dame L. Rev.} 223 (1993).
  \item \textsuperscript{28} \textit{Model Rules}, supra note 3, R. 8.4(d).
  \item \textsuperscript{29} For example, courts have recognized that a prosecutor violates this provision by refusing to plea bargain with a defendant because of personal animus toward the defendant's attorney or for other personal reasons. \textit{See}, e.g., \textit{State v. Noriega}, 690 P.2d 775 (Ariz. 1984) (dicta); \textit{In re Rook}, 556 P.2d 1351, 1357 (Or. 1976) (imposing sanctions for refusing to plea bargain).
  \item \textsuperscript{30} \textit{Model Rules}, supra note 3, R. 3.8(f); \textit{see supra} text accompanying note 4.
  \item \textsuperscript{31} In the \textit{Model Rules}, only the provisions of Model Rule 3.8 are exclusively directed at prosecutors. Model Rule 3.6, which restricts extrajudicial statements concerning a pending investigation of litigation, is applicable to all trial lawyers, but also has a subsection focusing on lawyers (criminal defenders and prosecutors) in criminal cases. \textit{Model Rules}, supra note 3, R. 3.6(b)(7).
  \item \textsuperscript{32} \textit{Model Code of Prof'l Responsibility} (1969) [hereinafter \textit{Model Code}].
  \item \textsuperscript{33} \textit{Model Rules}, supra note 3, R. 3.8(b).
  \item \textsuperscript{34} \textit{Id.} R. 3.8(c).
  \item \textsuperscript{35} \textit{Id.} R. 3.6, 3.8(g); \textit{Model Code}, supra note 32, DR 7-107.
\end{itemize}
these provisions.\textsuperscript{36} A few individual states have adopted additional restrictions regulating prosecutors.\textsuperscript{37}

For the most part, the rules that most affect federal prosecutors are rules that apply generally to all litigators. Some of these seem to apply to prosecutors in essentially the same way that they apply to other lawyers and are not especially onerous—for example, a provision against counseling a witness to testify falsely\textsuperscript{38} (which derives from criminal provisions against suborning perjury\textsuperscript{39}) or a provision forbidding references at trial to matters that are irrelevant or unsupported by admissible evidence.\textsuperscript{40} But several other types of professional rules are potentially more significant, because they restrict conduct that many prosecutors might otherwise be inclined to engage in. In addition to the attorney subpoena rule, these include conflict of interest provisions,\textsuperscript{41} the prohibition against communicating with a represented person (the so-called "no contact" rule),\textsuperscript{42} a restriction on giving advice to an unrepresented

\textsuperscript{36} 61 Laws. Man. on Prof. Conduct (ABA/BNA) 603-05 (Apr. 30, 1997) (identifying state variations).

\textsuperscript{37} See Niki Kuckes, Report to the ABA Commission on Evaluation of the Rules of Professional Conduct Concerning Rule 3.8 of the ABA Model Rules of Professional Responsibility 39-40 & nn.110-17 (Dec. 1, 1999). The report specifically identified the following state ethics provisions: D.C. Rules of Prof'L Conduct R. 3.8(e) (2000) (providing that a prosecutor shall not "[i]ntentionally avoid the pursuit of evidence or information because it may damage the prosecution's case or aid the defense"); id. R. 3.8(a) (providing that a prosecutor shall not, "[i]n exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person"); id. R. 3.8(h) (providing that a prosecutor shall not ";p\)eremptorily strike jurors on grounds of race, religion, national or ethnic background, or sex"); Me. Code of Prof'L Responsibility R. 3.7(i)(3) (2000) (providing that a prosecutor shall not "conduct a civil or criminal case against any person whom the lawyer represents or has represented as a client"); id. R. 3.7(i)(4) (mandating that a prosecutor "shall not conduct a civil or criminal case against any person relative to a matter in which the lawyer represents or has represented the complaining witness"); Mass. Rules of Prof'L Conduct R. 3.8(h) (2001) (providing that a prosecutor shall "not assert personal knowledge of the facts in issue, except when testifying as a witness"); id. R. 3.8(i) (requiring that a prosecutor shall "not assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the prosecutor may argue, on analysis of the evidence, for any position or conclusion with respect to the matters stated herein."); Va. Rules of Prof'L Conduct R. 3.8(b) (2001) (stating that a prosecutor shall "not knowingly take advantage of an unrepresented defendant").

\textsuperscript{38} Model Rules, supra note 3, R. 3.4(b).

\textsuperscript{39} See generally Bruce A. Green, The Criminal Regulation of Lawyers, 67 Fordham L. Rev. 327, 347-48 (1998) (discussing the influence of the criminal prohibitions on suborning perjury, and other criminal law, on the drafting of professional norms).

\textsuperscript{40} Model Rules, supra note 3, R. 3.4(e).

\textsuperscript{41} See, e.g., id. R. 1.7, 1.9. In practice, these provisions are often ignored by courts, which focus instead on the more vague and less restrictive standards of the Due Process Clause.

\textsuperscript{42} Id. R. 4.2. For discussions of the decades-long controversy concerning how this rule should apply to prosecutors, see authorities cited supra note 1.
party, a requirement of candor in ex parte proceedings (which, in the Model Rules and some state ethics codes, is interpreted specifically to apply to grand jury proceedings), a restriction on witness compensation, a rule generally proscribing conduct involving "dishonesty, fraud, deceit or misrepresentation," and another forbidding a lawyer from violating a disciplinary rule "through the acts of another."

State professional rules potentially apply to virtually every area of a federal prosecutor’s work. For example, rules governing conduct “prejudicial to the administration of justice” arguably control bad faith prosecutorial decisions even in such traditionally discretionary areas as charging, plea bargaining, and sentencing. Prosecutors’ public communications outside of court are governed by several types of rules, including one proscribing false or reckless criticism of judges which has been the basis for sanctions against prosecutors on various occasions. In the end, however, the professional codes have their most significant impact on prosecutors’ conduct at trial and prosecutors’ relationships with witnesses and opposing parties outside the courtroom, including behavior during investigations.

At the same time, as a practical matter, state professional rules do not play as much of a role in regulating prosecutors generally, or federal prosecutors particularly, as a broad interpretation of the rules would allow. This is true for at least three reasons.

44. MODEL RULES, supra note 3, R. 3.3(d).
45. Id. R. 3.8 cmt. 1.
47. MODEL RULES, supra note 3, R. 8.4(c); see supra note 5.
48. MODEL RULES, supra note 3, R. 8.4(a).
49. See supra note 28 and accompanying text.
50. Id. R. 8.2(a); see, e.g., Idaho State Bar v. Topp, 925 P.2d 1113 (Idaho 1996) (sanctioning a county prosecutor who stated to newspaper reporter that judge’s decision may have been politically motivated); In re Westfall, 808 S.W.2d 829, 831 (Mo. 1991) (sanctioning a prosecutor who publicly criticized judge’s opinion as “somewhat illogical, and . . . even a little bit less than honest”).
51. See, e.g., MODEL RULES, supra note 3, R. 3.3 (regulating candor to the tribunal); id. R. 3.4 (regulating to promote fairness to the opposing party and counsel); id. R. 3.5 (regulating to preserve judicial impartiality and decorum); id. R. 3.8(b), (c), & (d) (identifying prosecutors’ special obligations with regard to the accused); id. R. 4.1 (regulating to promote truthfulness to others); id. R. 4.2 (governing communications with represented persons); id. R. 4.3 (governing dealings with unrepresented persons).
First, the professional codes typically regulate prosecutors with a fairly light touch. Notwithstanding perennial complaints by federal prosecutors that state ethics regulation inappropriately ties their hands,\textsuperscript{52} the codes place no meaningful restriction on prosecutors' conduct in the areas that are the most momentous and contentious—that is, with regard to the exercise of discretion regarding charging, plea bargaining, and sentencing. Even when the prosecutor's charging or sentencing decisions are, in a court's view, "unconscionable and patently unjust," those decisions are unlikely to be ethically proscribed.\textsuperscript{53} Outside the context of discretionary decisionmaking, many types of conduct come under public or judicial criticism but remain essentially unregulated by ethics rules.\textsuperscript{54} The limited range of state regulation may be illustrated in various ways, including by comparing them to the far more extensive restrictions contained in the DOJ Manual (which are enforceable only internally), by comparing them to the more extensive but entirely unenforceable provisions of the ABA Standards for Criminal Justice,\textsuperscript{55} or by examining them in light of the range of prosecutorial conduct that has been the subject of judicial attention,\textsuperscript{56} academic

\textsuperscript{52} See, e.g., Jamie S. Gorelick & Geoffrey M. Klineberg, Justice Department Contacts with Represented Persons: A Sensible Solution, 78 JUDICATURE 136 (1994) (justifying the DOJ position); F. Dennis Saylor & 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, 462 (1992) (arguing, as federal prosecutors, they should not be subject to Model Rule 4.2); Jamie S. Gorelick, Within the Law, WASH. POST, May 21, 1995, at C7 (arguing that certain state ethics rules "interfere with precisely the types of law enforcement activities—undercover operations, organized crime investigations and examinations of corporate wrongdoing—that [the DOJ] has primary responsibility to conduct"); Morning Edition (National Public Radio broadcast, Sept. 3, 2001) (quoting U.S. Attorney as stating that the result of the Oregon ethics restriction on the use of deception "is that we are now not pursuing what I view as the smartest, the most dangerous and the most far-flung criminal enterprises in Oregon").

\textsuperscript{53} See United States v. Langmade, 125 F. Supp. 2d 373, 374 (D. Minn. 2001) (concerning recusal by federal judge because of his belief that he could not overrule a ten-year mandatory minimum sentence under the U.S. Sentencing Guidelines).

\textsuperscript{54} See Green, supra note 23, at 616 (discussing the incompleteness of professional codes).

\textsuperscript{55} See Kuckes, supra note 37, at 41 & nn.120-25 (citing ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION standards 3-3.1(c)-(d), 3-3.5(b), 3-3.6(d), & 3-3.9(g) (3d ed. 1993) [hereinafter ABA STANDARDS]).

\textsuperscript{56} See, e.g., Lynn R. Singband, Note, The Hyde Amendment and Prosecutorial Investigation: The Promise of Protection for Criminal Defendants, 28 FORDHAM URB. L.J. 1967 (2001) (noting the failure of ethics rules to address the adequacy of prosecutors' investigation before filing criminal charges in unsuccessful prosecutions that were the subject of attorneys' fee proceedings under the Hyde Amendment); Lesley E. Williams, Note, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3458-63 (1999) (discussing the failure of rules to address prosecutorial conduct that has been the basis for civil actions against prosecutors).
criticism,\textsuperscript{57} or investigative action by the DOJ's Office of Professional Responsibility.\textsuperscript{58}

Second, disciplinary authorities do not appear particularly eager to bring actions against prosecutors except in situations involving unambiguously wrongful conduct.\textsuperscript{59} Disciplinary agencies often seem to conclude that, if the federal district court was not sufficiently troubled by the prosecutor's conduct to impose a sanction, the apparent misconduct does not warrant a state disciplinary proceeding. An obvious reason for this conclusion is the need to conserve resources: in cases involving controversial or ambiguous disciplinary provisions, disciplinary authorities run the risk that they will find themselves litigating against the DOJ, not just against an individual lawyer.\textsuperscript{60} Another reason is a sense that state disciplinary agencies should defer to the courts for institutional reasons.\textsuperscript{61}

Third, courts often take a liberal approach to interpreting professional rules with regard to prosecutors, applying them less

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\item \textsuperscript{57} See, e.g., David Aaron, Note, Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information, 67 FORDHAM L. REV. 3005, 3037 (1999) (addressing prosecutors' failure to disclose nonevidentiary information, such as the death of witnesses, that would affect defendants' plea bargaining decisions); Roland Acevedo, Note, Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study, 64 FORDHAM L. REV. 987, 999 (1995) (addressing a prosecutor's refusal to offer a plea bargain unless a defendant accepts an offer shortly after his arrest); Michael Q. English, Note, A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?, 68 FORDHAM L. REV. 525, 527-28 (1999) (addressing the prosecution of two defendants for a crime that only one could have committed); Ross Galin, Note, Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements, 68 FORDHAM L. REV. 1245, 1247 (2000) (addressing prosecutors' failure to carry out sentencing agreements).
\item \textsuperscript{58} See U.S. GEN. ACCOUNTING OFFICE, FOLLOW-UP INFORMATION ON THE OPERATIONS OF DEPARTMENT OF JUSTICE'S OFFICE OF PROF'L RESPONSIBILITY (2001) (summarizing OPR's findings and specific allegations in cases from 1997 to March 2000).
\item \textsuperscript{59} See Zacharias, supra note 23, at 774 (concluding from a comprehensive review of published disciplinary decisions involving prosecutors that authorities have "targeted particularly serious prosecutorial misconduct and cases in which private clients are affected and public remedies are unlikely to address the prosecutor's behavior"); Jennifer Blair, Comment, The Regulation of Federal Prosecutorial Misconduct by State Bar Associations: 28 U.S.C. § 530B and the Reality of Inaction, 49 UCLA L. REV. 625, 639 (2001) (discussing student survey suggesting that state discipline of federal prosecutors since the adoption of the McDade Amendment has been rare); cf. Bruce A. Green, Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?, 8 ST. THOMAS L. REV. 69, 75 (1995) (noting that [(f)ormal accusations of prosecutorial misconduct are . . . rare]
\item \textsuperscript{60} E.g., United States v. Ferrara, 54 F.3d 825 (D.C. Cir. 1995); Kolibash v. Comm. on Legal Ethics, 872 F.2d 571 (4th Cir. 1989); In re John Doe, 801 F. Supp. 478 (D.N.M. 1992); see also Zacharias, supra note 23, at 760 (discussing the propensity of prosecutors' offices to litigate issues raised in disciplinary proceedings); Zacharias, supra note 27, at 280-81 (discussing resource decisions implicated by litigating issues with DOJ).
\item \textsuperscript{61} See Zacharias, supra note 23, at 762 (discussing the relationship between disciplinary proceedings and proceedings in parallel criminal cases).
\end{itemize}
restrictively than to other lawyers in seemingly comparable situations. This reflects two understandings: courts generally have authority to interpret professional rules in ways that make sense in context, and criminal prosecutions call for less restrictive ethical regulation in certain respects, notwithstanding the general conception of prosecutors as "ministers of justice" who must abide by higher standards than other lawyers.

While various reasons might be given for the relative modesty of state professional regulation, one goes to the heart of this Article's inquiry: states may be uncertain to what extent prosecutors ought to be regulated by ethics rules, to what extent prosecutors ought to be regulated by other laws, and to what extent they should be permitted to regulate themselves. This uncertainty might derive from a concern about the state's regulatory power. A supervisory state court, for example, might have doubts whether it has legal authority to regulate federal prosecutors. The uncertainty might also derive, however, from a normative concern. In other words, the state court might doubt that it is the appropriate authority to make rules regarding most aspects of prosecutorial conduct.

62. For example, several years ago, defendants in federal courts throughout the country argued, on the strength of a decision by the Court of Appeals for the Tenth Circuit that was later overruled en banc, that it was impermissible for prosecutors to provide a defendant immunity in exchange for testimony. Courts analyzed the question under the federal gratuities statute but largely ignored ethics rules that could have been read to proscribe this conduct. See, e.g., United States v. Singleton, 165 F.3d 1297 (10th Cir.) (en banc), cert. denied, 527 U.S. 1024 (1999); United States v. Haese, 162 F.3d 359 (5th Cir. 1998), cert. denied, 526 U.S. 1138 (1999); United States v. Ware, 161 F.3d 414 (6th Cir. 1998), cert. denied, 526 U.S. 1045 (1999); United States v. White, 27 F. Supp. 2d 646 (E.D.N.C. 1998). Similarly, courts have interpreted the no-contact rule more liberally with respect to criminal than civil investigations. See Green, supra note 1, at 472-73 (noting that "[f]ederal courts [have] almost invariably rejected defendants' claims that a federal prosecutor, acting either directly or through investigative agents, violated the no-contact rule by communicating with represented persons"). The DOJ has advocated, so far unsuccessfully, for amendments to the rule that would acknowledge these decisions as essentially "authorizing" prosecutors to engage in conduct that would otherwise be ethically proscribed. See REPORT OF THE COMMISSION, supra note 3, at 324 (explaining that "after consideration of concerns aired by prosecutors about the effect of Model Rule 4.2 on their ability to carry out their investigative responsibilities, the Commission decided against recommending adoption of special rules governing communications with represented persons by government lawyers engaged in law enforcement").


64. See Zacharias & Green, supra note 6, at 235-36.

Although this Article will focus on the question of who (as between states, federal courts, and the DOJ) should regulate federal prosecutors, much of what we have to say casts light on the less complicated, yet still relatively unexplored question of how extensively state courts should regulate state prosecutors.

B. Federal Court Regulation

Unlike states, which address prosecutorial ethics explicitly through their professional codes, federal courts have no uniform or focused approach for addressing the subject. Nevertheless, federal judges do regulate prosecutorial ethics in a variety of ways and rely on a variety of legal authority to justify the regulation, some of which has never been approved expressly by Congress or the U.S. Supreme Court. The following pages identify both the methods by which federal courts regulate and the authority they purport to exercise.

1. Methods of Federal Judicial Regulation

   a. Adopting Rules of Ethics

      Federal district courts vary in their approach to the generally applicable state professional codes. Some districts mandate, in local practice rules, that the professional codes that apply in the state in which the district is located apply in the federal court as well. Other districts adopt their state's code, but expressly preempt particular provisions applicable to federal prosecutors. A third set of districts treat the local professional codes as advisory only, feeling free to adopt district-specific ethics standards. These

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66. For a summary of the status of professional standards applicable in the district courts, see Coquillette, supra note 14, at 53-77.

67. According to a 1997 study, ninety-five percent of all federal districts have adopted a local rule adopting some professional standards. Of these, seventy-six percent have adopted the rules of the state in which the district is located. Marie Leary, Standards of Attorney Conduct and Disciplinary Procedures: A Study of the Federal District Courts, in COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE ADMIN. OFFICE OF THE U.S. COURTS, SPECIAL STUDIES OF FEDERAL RULES GOVERNING ATTORNEY CONDUCT 335, 337 (1997).

68. See Coquillette, supra note 14, at 4-5 (noting that ten districts refer only to an ABA model code, ten districts refer to both a model code and a state standard, eleven districts have no local rules governing attorney conduct, and one district has adopted its own idiosyncratic code).

69. Leary, supra note 67, at 2 (noting that five percent of the districts adopt no specific rules and one district adopts its own set of rules).
courts often rely heavily on the ABA model codes for guidance regarding the appropriate standards to apply in individual cases.\textsuperscript{70}

The practice of adopting, revising, or rejecting local professional codes raises several sets of issues germane to this Article—some of which we will analyze fully, others of which we will only allude to.\textsuperscript{71} First, there is the global question of whether federal courts have the authority to adopt professional codes at all—either through federal court rulemaking authority or by reference to some other source of authority. As a practical matter, however, the full adoption of state rules lessens the possibility of legal disputes concerning particular rules. If both the federal courts and state regulators are implementing the same standard, the authority of either institution to impose the standard will suffice to uphold the rule.

When the federal and state rules are inconsistent, however, numerous issues arise. Ordinarily, one would assume that the federal court can preempt state rules with respect to the regulation of federal prosecutors and other attorneys litigating in federal court. But that is true only if the federal court has an independent power to set rules.

The issues become even more complicated when Congress enters the arena by sanctioning state rules but does not make clear the relationship between state rulemaking and federal court rulemaking, as Congress has done in the McDade Amendment.\textsuperscript{72} That creates an ambiguity regarding federal court authority, especially to the extent that the authority is dependent on congressional delegation from the outset.\textsuperscript{73}

\textit{b. Setting Standards Indirectly}

Federal courts most commonly regulate prosecutorial ethics by deciding issues in individual cases in a way that signals the court's view of appropriate conduct. The most forceful implementation of such regulation occurs when a court's decision affects the outcome of a particular case. A judge who wishes to make an example of particular prosecutorial conduct, or misconduct, may dismiss

\textsuperscript{70} Id. (noting that nine percent of districts adopting rules adopt an "ABA Model directly").

\textsuperscript{71} We propose to discuss fully the normative issues regarding federal judicial regulation of prosecutorial ethics, but not to delve deeply into the legal issues concerning the extent of that authority.

\textsuperscript{72} In the McDade Amendment, Congress simultaneously subjected federal government attorneys to "State laws and rules" and "local Federal court rules" without clarifying which should govern when inconsistencies arise. 28 U.S.C. § 530B(a) (Supp. V 1999).

\textsuperscript{73} See infra text accompanying notes 105-23.
a case,\textsuperscript{74} exclude evidence,\textsuperscript{75} instruct the jury in a way benefitting the defense,\textsuperscript{76} or make other trial and pretrial rulings that respond to the prosecutorial conduct.\textsuperscript{77} By reacting to prosecutorial behavior, the judge sets a standard—whether or not the reaction ever is memorialized in a formal opinion that serves as precedent. The judge, in effect, tells this prosecutor and others who learn of this judge's courtroom practice that the particular prosecutorial conduct will not be tolerated.

Federal judges deciding cases can, of course, set standards more directly by writing opinions that disapprove of the prosecutorial conduct. Similarly, they can express their disapproval through oral admonitions that appear on the record. Both forms of direct criticism will be available to the press, the prosecutor's supervisors, and the defense. Because such admonitions bring with them the

\textsuperscript{74} See, e.g., Cook v. Houston Post, 616 F.2d 791, 793 (5th Cir. 1980) (dismissal in part because of prejudicial prosecutorial statements to the media); United States v. Minn. Mining & Mfg. Co., 551 F.2d 1106, 1112 (8th Cir. 1977) (dismissal of indictment because of prosecutor's breach of his agreement); United States v. Henderson, 525 F.2d 247, 250-51 & n.12 (5th Cir. 1975) (dismissal of indictment because of prosecutor's failure to furnish defendants with transcript of prior state court trial in which three defendants had been acquitted); United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972) (dismissal of indictment because of prosecutor's continued failure over a period of years to heed "clear warnings" to avoid undue reliance on hearsay before the grand jury).

\textsuperscript{75} See, e.g., United States v. Hammad, 858 F.2d 834, 841 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990) (suppressing a recorded conversation procured through prosecutor's use of a sham subpoena to elicit information from defendant without knowledge of defendant's attorney); United States v. Rogers, 751 F.2d 1074, 1079 (9th Cir. 1985) (noting that if, in fact, the prosecutor revealed a confidential communication in violation of his ethical obligations as an attorney, suppression of that evidence at trial is the appropriate remedy); United States v. Sabri, 973 F. Supp. 134, 146 (W.D.N.Y. 1996) (suppressing evidence of a conversation based on violation of Model Code DR 7-101).

\textsuperscript{76} See, e.g., United States v. Morris, 568 F.2d 396, 402 (5th Cir. 1978) (approving instructions given to jury to disregard improper statements by prosecutors in closing argument); United States v. Lewis, 423 F.2d 457, 459-60 (8th Cir. 1970) (approving instructions given to jury to disregard prosecutor's improper reference to grand jury action).

\textsuperscript{77} Such rulings may include granting mistrials, precluding the testimony of particular witnesses, sustaining objections to questions the prosecutor wishes to ask witnesses, and striking statements in openings and summations. See, e.g., United States v. Bazan, 807 F.2d 1200, 1204 (5th Cir. 1986) (approving sustaining of objections to prosecutors' examination); United States v. Hernandez, 779 F.2d 456, 458, 461 (8th Cir. 1985) (affirming the striking of the prosecutor's improper remarks from the record); United States v. Enoch, 650 F.2d 115, 116 (6th Cir. 1981) (approving a mistrial because the prosecutor's commentary collectively prejudiced defendant's right to a fair trial); United States v. Jacobs, 547 F.2d 772, 778 (2d Cir. 1976) (suppressing grand jury testimony as a sanction for a prosecutor's failure to provide warnings to witness who was the grand jury's target); United States v. Nanny, 745 F. Supp. 475, 483-85 (M.D. Tenn. 1989) (granting defendant's motion for mistrial because the prosecutor's misconduct during closing argument, in attempting to vouch for credibility of government witnesses, was not cured by jury instructions).
possibility of future consequences, prosecutors cannot help but treat them as warnings not to engage in similar conduct in the future.

Finally, the recent Hyde Amendment authorizes federal judges to set standards for prosecutorial conduct in individual cases in a different way. The new statute encourages courts to impose consequences upon the DOJ for behavior that they deem to reflect "bad faith," by enabling federal judges to award fees to prevailing defendants. Again, the judicial decision to award fees does not by itself set any standard of conduct. Yet, in practice, the message it sends and the consequences it imposes on prosecutors for engaging in particular conduct effectively tell prosecutors what they should not do.

c. Setting Standards Through Punishment of Individual Prosecutors

Commentators have suggested that many remedies for prosecutorial misconduct are ineffective because they do not impose consequences directly on an offending prosecutor. For example,


80. See, e.g., Edward M. Genson & Marc W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?*, 19 LOY. U. CHI. L.J. 39, 56 (1987) ("The frequency of prosecutorial misconduct indicates that reversal, standing alone, has not acted as a sufficient deterrent."); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. Rev. 851, 900 (1995) ("Reversal is not a true sanction, as it is not specifically directed towards punishing the prosecutor... Reversal cannot be counted on as a deterrent to prosecutorial misconduct."); Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1108 (1994) ("Prosecutors who engage in misconduct normally face, at worst, loss of an indictment or conviction due to suppression or a court's use of its supervisory power. Rarely does a prosecutor face public censure for misconduct."); Williams, supra note 56, at 3464, 3474 ("Prosecutor-specific rules cover only a fraction of prosecutorial actions... [S]upervisory and contempt powers... are useless in situations where a prosecutor's civil rights or torts violations come to light after the proceeding is over."); cf. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. Rev. 393, 454 (1992) ("The courts focus on the impact of the misconduct upon the verdict, and professional disciplinary bodies appear unable or unwilling to grapple with ethical violations by prosecutors. However, given the prosecutor's unique role, it may be appropriate to consider creating a disciplinary mechanism aimed
appellate reversals based on prosecutorial misconduct rarely identify the misbehaving prosecutor by name. Reversals frequently occur after the prosecutor has left office, so that even administrative reprisals will have no effect on him.

There are a few methods by which federal courts do punish prosecutors directly. Most obviously, judges on rare occasion criticize a prosecutor's behavior in a written opinion. Alternatively, judges often admonish prosecutors off the record or inform their superiors of offensive conduct. While these methods do not actually set any standards or exact any economic toll, they serve to embarrass the prosecutor and encourage him and others to refrain from similar conduct in the future.

Federal judges have a few other tools for imposing direct punishment for offensive conduct. In an appropriate case, a court can hold a prosecutor in contempt for violating known legal requirements or otherwise showing disrespect for judicial processes. When a prosecutor engages in conduct that violates governing ethical rules, the presiding judge can refer the prosecutor to the state...
bar for discipline. Some federal district courts have their own disciplinary mechanisms. Limited federal statutes and, in a few jurisdictions, interpretations of the inherent authority authorize federal courts to fine prosecutors for misconduct. Each form of direct punishment serves to establish or reinforce standards for prosecutorial conduct on a case-by-case basis.

Federal courts may set standards for prosecutorial behavior through more subtle, indirect decisionmaking. For example, a judge can affect the daily routine of a prosecutor who appears regularly in his court. Calendaring decisions and the decision of whether to demand written submissions on legal issues can make the prosecutor's hectic work life manageable or miserable. Likewise, a court's attitude toward the arguments of a particular prosecutor may signal disapproval of previous misconduct. When a judge exercises calendaring or other personal power in reaction to particular types of prosecutorial behavior, the judge indirectly influences the future behavior of this prosecutor and others aware of the judge's reaction.

2. Authority for Federal Judicial Regulation

Thus far, our recitation of the methods by which federal courts regulate federal prosecutorial ethics has been descriptive. Clearly federal judges attempt to constrain prosecutorial behavior frequently, and in a variety of ways. Yet the legal sources for their authority to do so are not always clear, in part because the sources are diffuse, and in part because appellate evaluations of the sources of authority have suggested that each, in some fashion, is limited in scope.

85. See Zacharias, supra note 23, at 750, 769 n.168, 776 (discussing the potential for judicial referral of misconduct to state disciplinary agencies); Williams, supra note 56, at 3477-78 (arguing for increased judicial referral of cases to disciplinary agencies).

86. See, e.g., Grievance Comm. v. Simels, 48 F.3d 640 (2d Cir. 1995) (reviewing a disciplinary decision of the Committee on Grievances for the Southern District of New York); Doe v. Fed. Grievance Comm., 847 F.2d 57 (2d Cir. 1988) (reviewing a disciplinary decision of a judge in the District of Connecticut); see Green, supra note 59, at 83-84 (discussing federal district court disciplinary committees).

87. See, e.g., 28 U.S.C. § 1927 (1994) (permitting courts to charge any attorney who "unreasonably and vexatiously [multiplies the proceedings]" with "excess costs, expenses, and attorneys' fees reasonably incurred"); FED. R. CIV. P. 37(b), (d) (authorizing monetary sanctions for discovery abuses in civil cases).

88. See, e.g., Eash v. Riggins Trucking Inc., 757 F.2d 557, 567-69 (3d Cir. 1985) (discussing the debate in the courts regarding the fining issue and holding that the inherent power does include the power to impose fines for attorney misconduct); id. at 565-66 (providing authorities); J.M. Cleminshaw Co. v. City of Norwich, 93 F.R.D. 338, 357 (D. Conn. 1981) (finding authority to fine lawyers within the district court's inherent authority).
We do not propose to analyze or define each of the various legal doctrines that give rise to federal judicial regulation. The complexity of that analysis would require a separate article. However, it is important to identify the doctrines briefly because their potential limitations may bear on a court's or Congress's decisions regarding what regulation is appropriate. For ease of discussion, we will separate the relevant sources of authority into "primary authority" that does not derive from congressional delegation and "secondary authority" that either comes from Congress or that Congress could change by statute.

a. Primary Sources of Judicial Power to Regulate Ethics

i. Constitutional Decisionmaking Authority

Most federal judicial power is secondary. Congress defines the federal system, has the power to change federal jurisdiction, and sets the rules for the courts. Nevertheless, Article III of the U.S. Constitution prescribes the federal courts initially and, by referring to "the judicial power," gives the federal courts some authority with which Congress arguably cannot interfere.

Most importantly, Congress cannot interfere with the federal courts' power to decide cases once jurisdiction is found. Thus, to the extent a court regulates prosecutorial ethics through a particular decision, Congress cannot overrule the decision directly. Similarly, if the resulting rule is constitutional in nature, Congress presumably has no authority to prescribe an alternative. If, in contrast, the court has established the rule within its so-called "supervisory power over the criminal justice system," Congress can subse-

89. See Laurence H. Tribe, American Constitutional Law 789-90 (3d ed. 2000) (discussing congressional power over the federal courts); id. (providing authorities).
91. See, e.g., Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (concluding that an attempt by Congress to reopen litigation that had already been dismissed by an Article III court violated separation of powers); Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962) ("The authority of Congress to curb the jurisdiction of Article III courts is not, of course, unlimited. ... Congress may not invade the judicial province by prescribing a rule of decision in a pending case."); United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872) (holding that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it").
quently prescribe an alternative rule unless the court characterizes the rule as necessary to protect constitutional rights.  

ii. Inherent Authority

In addition to the power to decide cases, a federal court has a limited sphere of authority—commonly characterized as “inherent judicial authority”—the exercise of which is necessary to protect the constitutionally conferred judicial power of the court. Most courts have considered this power limited, but a few have suggested that it includes broad authority to set general standards of conduct for all lawyers in the federal bar.

At a minimum, courts have used the power to hold lawyers in contempt or to impose other sanctions for lawyer activity that threatens the efficient operation of the court’s functions, even though the punishment may not otherwise be authorized through federal rules or federal legislation. The power also has been used

93. See Dickerson, 530 U.S. at 437 (“Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.”); accord Palermo v. United States, 360 U.S. 343, 345-48 (1959).


95. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980) (holding that a court’s authority to assess sanctions against counsel is at least as great as its authority to assess them against litigants); 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.”); United States v. Klubock, 832 F.2d 664, 667 (1st Cir. 1987) (en banc) (finding inherent and statutory authority to prescribe local ethics rules); Eash v. Riggins Trucking Inc., 757 F.2d 557, 567 (3d Cir. 1985) (authorizing, in principle, the district court to charge attorney cost of impaneling a jury arising from attorney’s abuse of process); Ali v. A & G Co., 542 F.2d 595, 597 (2d Cir. 1976) (Oakes, J., dissenting) (“The power to impose costs on attorneys as a disciplinary measure is a well-settled, if perhaps infrequently used, facet of a court’s inherent authority over the attorneys who practice before it.”); Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 888 (5th Cir. 1968) (“The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.”); J.M. Clemintshaw Co. v. City of Norwich, 93 F.R.D. 338, 354 (D. Conn. 1981) (using court’s inherent authority to impose sanctions on an attorney for discovery abuses).

96. See, e.g., Chambers v. Nasco, Inc., 501 U.S. 32, 46 (1991) (“We discern no basis for holding that the sanctioning scheme of the statute, and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. . . . [T]he inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill the interstices.”); Young v. United States ex rel. Vuitton et Fil S.A., 481 U.S. 787, 793 (1987) (“[I]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders.”); Roadway Express, Inc., 447 U.S. at 765, 767 (recognizing federal courts’ inherent, though narrow, authority to “assess attorney’s fees against counsel”).
to sanction fraud and bad faith conduct by attorneys, tardiness, failure to prosecute, and other in-court practices. There is, however, some suggestion in the case law that even the exercise of this inherent authority can be limited by statute.

Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 (1975) (acknowledging the inherent power of courts to assess attorney's fees in limited situations); In re Sutter, 543 F.2d 1030, 1037-38 (2d Cir. 1976) ("[D]istrict courts have the power, absent a statute or Supreme Court rule to the contrary, to promulgate local rules that impose sanctions for conduct by lawyers that falls short of contempt of court.").

97. See, e.g., Chambers, 501 U.S. at 50-51 (finding no abuse of discretion in trial court's resort to inherent power to sanction bad faith conduct and an attempt to perpetrate fraud); Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946) ("The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question." (citing Hazel-Atlas Co. v. Hartford Empire Co., 322 U.S. 238 (1944))); Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 74 n.11 (3d Cir. 1994) ("A court need not always find bad faith before sanctioning under its inherent powers."); Harlan v. Lewis, 982 F.2d 1255, 1260 (8th Cir. 1993) (rejecting the argument that sanctions under inherent authority of courts always requires finding of bad faith); cf. Elliott v. Tilton, 64 F.3d 213, 217 & n.3 (5th Cir. 1995) (rejecting the notion that finding of misconduct short of bad faith can support imposition of sanctions (citing Chambers, 501 U.S. at 58 (Scalia, J., dissenting)).

98. See, e.g., United States v. Seltzer, 227 F.3d 36, 42 (2d Cir. 2000) (reviewing the district court's imposition of a $350 fine on an attorney for tardiness and holding that the inherent power of the district court includes "the power to police the conduct of attorneys as officers of the court, and to sanction attorneys for conduct not inherent to client representation, such as, violations of court orders or other conduct which interferes with the court's power to manage its calendar and the courtroom").

99. See, e.g., Link v. Wabash R.R. Co., 370 U.S. 626, 630-32 (1962) (recognizing the "well-acknowledged" inherent power of the federal district court to dismiss a case sua sponte for failure to prosecute, even though the language of Fed. R. Civ. P. 41(b) required a motion from a party); Titus v. Mercedes Benz, 695 F.2d 746, 749 (3d Cir. 1982) (noting the inherent authority of the district court to impose sanctions, including dismissal of the plaintiff's action with prejudice for failure to prosecute); Schwarz v. United States, 384 F.2d 833, 836 (2d Cir. 1967) (upholding trial court's dismissal for failure to prosecute); West v. Gilbert, 361 F.2d 314, 316 (2d Cir. 1966) (affirming district court's dismissal for failure to prosecute).

100. See, e.g., Jencks v. United States, 353 U.S. 657, 668 (1957) (implementing inherent power to require government to disclose statements or reports of its witnesses); Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 439 (9th Cir. 1983) (finding inherent authority of courts to regulate the conduct of attorneys appearing before them); Penthouse Int'l, Ltd. v. Playboy Enters., Inc., 663 F.2d 371, 391-92 (2d Cir. 1981) (affirming district court's inherent power to dismiss action for failure to comply with discovery order).

101. See, e.g., Chambers, 501 U.S. at 47 ("It is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of Congress.' Nevertheless, 'we do not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." (citations omitted)). But Congress's power in this regard is questionable, at least to the extent the authority comes from the power to protect constitutionally conferred "judicial power." See Amy R. Mashburn, A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts, 8 GEO. J. LEGAL ETHICS 473, 500-02, 525-26 (1995) (questioning Congress's ability to overrule the exercise of inherent authority); Edwin J. Wesely, The Civil Justice Reform Act; The Rules Enabling Act; The Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83—What Trumps What?, 154 F.R.D. 563, 567 (1994) ("Congress could not through its rulemaking power so hamstring the federal courts so as to deprive them of carrying out their constitutional functions."); cf. Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act
iii. Supervisory or "Ethics" Authority over Federal Litigators

Some lower federal court decisions seem to assume that federal judges have a general plenary authority to regulate the professional behavior of federal litigators, distinct from the limited "inherent authority" and the "supervisory authority over participants in the criminal justice system." The existence of such broad authority is controversial, for if it exists it may subsume the latter two sources. Arguably, there would be no reason for the Supreme Court to constrict their scope if lower courts could then simply implement behavioral rules that accomplish the same ends under the plenary authority. Still, as a descriptive matter, some exercises of district court regulation of federal lawyers may only be explicable either by resort to a general ethics regulating power, similar to that exercised by state legislatures and state courts, or by an unusually broad interpretation of the courts' inherent authority.

b. Secondary Authority

Federal courts have exercised a series of mechanisms for regulating federal litigators, including prosecutors, that implement either authority directly conferred by Congress or authority that the courts themselves recognize to be subject to congressional will.

\[\text{and Separation of Powers, 77 MINN. L. REV. 1283, 1322 (1992) (arguing for a limited congressional power to interfere with the exercise of inherent authority).} \]

102. See, e.g., United States v. Hammad, 858 F.2d 834, 837 (2d Cir. 1988) (noting that "[t]he federal courts enforce professional responsibility standards pursuant to their general supervisory authority over members of the bar"); Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975) (stating that "the district court bears the responsibility for the supervision of the members of its bar"). \text{But see Grievance Comm. for the S. Dist. of N.Y. v. Simels, 48 F.3d 640, 644 (2d Cir. 1995) (suggesting that "[t]he conceded power of federal district courts to supervise the conduct of attorneys should not be used as a means to substantially alter federal criminal law practice").} \text{Supreme Court pronouncements might be read to support the understanding that federal courts have authority similar to that of state courts to supervise lawyers who practice before them. See, e.g., In re Snyder, 472 U.S. 634, 645 n.6 (1985) ("The state code of professional responsibility does not by its terms apply to sanctions in the federal courts. Federal courts admit and suspend lawyers as an exercise of their inherent power; the standards imposed are a matter of federal law."); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1871) ("This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession.").} \]

103. See infra note 94 and accompanying text.

104. See infra note 115 and accompanying text.

105. One source of secondary authority is not implemented frequently enough to warrant discussion in the text. Under the All Writs Act, Congress has granted the federal appellate courts power to issue extraordinary writs not otherwise prescribed by law when "necessary or appropria-
i. Specific Statutory Authority to Set Standards

Most obvious among these is statutory authority under which Congress has directed the federal courts to exercise power over litigation practice. The recent Hyde Amendment, for example, expressly empowers and instructs federal judges to order the payment of attorneys’ fees in cases in which prosecutors act in bad faith. Likewise, Congress has allowed the federal courts, pursuant to the Rules Enabling Act, to regulate the admissions criteria for persons who wish to practice in the federal bar.

ii. Rulemaking Authority

Congress also has authorized the federal courts to set rules of procedure and evidence, so long as they do not conflict with Congress’s will. Thus, Rule 83 of the Federal Rules of Civil Procedure authorizes the adoption of local practice rules, as does its criminal counterpart, Rule 57 of the Federal Rules of Criminal Procedure. Under the Rules Enabling Act, the U.S. Supreme Court

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108. FED. R. CIV. P. 83(a)(1) ("Each district court acting by a majority of its district judges may, after giving appropriate notice and opportunity for comment, make and amend rules governing its practice.").

109. FED. R. CRIM. P. 57.

and "all courts established by Act of Congress may . . . prescribe rules for the conduct of their business,"\textsuperscript{111} including general rules of practice and procedure.\textsuperscript{112} They are, however, subject to the limitation that the rules may not abridge, enlarge, or modify substantive rights.\textsuperscript{113}

The adoption of local practice rules typically is justified with reference to these sources of authority.\textsuperscript{114} When the local practice rules include pure "ethics" standards, however, they arguably exceed the congressionally delegated authority. The problem comes, of course, in defining which rules govern practice or procedure and which are limited to a different genre of behavior characterized as ethics.

iii. Supervisory Authority over the Criminal Justice System

The potentially broadest, but also perhaps the most controversial, secondary authority that courts have exercised is the so-called supervisory authority over participants in the federal criminal justice system. Where "inherent authority" ends and supervisory authority begins is difficult to pinpoint. Both have yet to be defined.\textsuperscript{115} The inherent authority typically has been considered to apply narrowly to situations in which the exercise of authority is related to preserving core judicial functions.\textsuperscript{116} The federal courts—at all levels—have used the supervisory authority more broadly to

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  \item \textsuperscript{111} 28 U.S.C. § 2071(a) (1994).
  \item \textsuperscript{112} 28 U.S.C. § 2072(a) (1994) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.").
  \item \textsuperscript{113} § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right."); cf. Raymond C. Caballero, \textit{Is There an Over-Exercise of Local Rule-making Powers by the United States District Courts?}, 24 FED. B. NEWS 325, 326 (1977) (arguing that district courts have exceeded their rulemaking authority).
  \item \textsuperscript{114} Under § 2071(c)(1), "a rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit." For a full discussion of federal rulemaking processes, see, for example, Peter G. McCabe, \textit{Renewal of the Federal Rulemaking Process}, 44 AM. U. L. REV. 1655, 1664-75 (1995).
  \item \textsuperscript{116} As discussed above, however, some lower courts have interpreted inherent authority expansively. \textit{See supra} note 95 and accompanying text.
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regulate activities of prosecutors and law enforcement agents in ways that neither the Constitution nor judicial efficiency require.\textsuperscript{117} \textit{McNabb v. United States} provided an open-ended definition of the power: "[J]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."\textsuperscript{118} During the years of the Warren Court, courts implemented that liberal conception of supervisory power.\textsuperscript{119} Recent cases, however, have suggested that the Warren era cases may have gone too far and have sought to limit the exercise of supervisory power. Thus, the Supreme Court has rejected the use of supervisory authority to provide general standards for prosecutorial conduct before the grand jury,\textsuperscript{120} to disregard limitations of federal statutes or federal rules,\textsuperscript{121} and to adopt rules requiring members of a state bar to live in that state.\textsuperscript{122} In the absence of a clear definition of what is, and is not, permissible under the supervisory power, however, lower courts have continued to exercise it to regulate improper conduct by federal lawyers and officials.\textsuperscript{123}

\textsuperscript{117} See, e.g., United States v. Ming He, 94 F.3d 782, 793 (2d Cir. 1996) (exercising supervisory authority to require the presence of counsel for "cooperating witnesses"); United States v. Hammad, 858 F.2d 834 (2d Cir. 1988) (limiting prosecutorial contacts with represented persons); United States v. Hogan, 712 F.2d 757, 761-62 (2d Cir. 1983) (dismissing indictment because of prosecutorial misconduct before the grand jury); United States v. Samango, 607 F.2d 877, 882 (9th Cir. 1979) (dismissing criminal charges because of prosecutorial overreaching and deceit before the grand jury); United States v. Ottley, 439 F. Supp. 587, 591-92 (S.D.N.Y. 1977) (reviewing "prosecutorial discretion" and dismissing indictment because of prejudgment delay in charging the defendant); United States v. Banks, 353 F. Supp. 399 (D.S.D. 1974) (dismissing charges because of prosecutorial misconduct during discovery and trial), appeal dismissed, 513 F.2d 1329 (8th Cir. 1975).

\textsuperscript{118} 318 U.S. 332, 340 (1943).

\textsuperscript{119} See Burton v. United States, 483 F.2d 1182, 1187 (9th Cir. 1973) (noting thirty cases implementing supervisory authority); see also Beale, supra note 115, at 1433, 1448-49 ("[T]he four decades since \textit{McNabb} the lower federal courts have employed supervisory power in hundreds of cases."); Murray M. Schwartz, \textit{The Exercise of Supervisory Power by the Third Circuit Court of Appeals}, 27 VILL. L. REV. 506, 509-11 (1982) (cataloguing cases).

\textsuperscript{120} United States v. Williams, 504 U.S. 36, 50 (1992).


\textsuperscript{123} See, e.g., United States v. Cortina, 630 F.2d 1207, 1217 (7th Cir. 1980) (excluding evidence obtained through a warrant for which the application included false statements); United States v. Banks, 383 F. Supp. 389 (D.S.D. 1974), appeal dismissed, 513 F.2d 1329, 1336 (8th Cir. 1975) (dismissing case because of prosecutorial misconduct); see also John Gleeson, \textit{Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges}, 5 J.L. & Pol'Y 423, 459-66 (1997) (giving examples of broad lower court use of the supervisory power, but arguing that "although the temptation to supervise prosecutors is very strong, the power of the federal courts to prescribe standards of conduct for them is limited").
C. The Bases for Challenge by Federal Prosecutors

There are three broad categories of legal challenges federal prosecutors might raise to regulation of prosecutorial ethics. This Article will not consider them in depth, because our primary focus is identifying the level of federal judicial regulation that makes sense as a prudential matter. Nevertheless, it is important to identify the possible challenges to state and federal court regulation because the mere existence of the legal issues may affect a federal court's determination of when regulation is appropriate.

When states regulate federal prosecutorial ethics, the DOJ has resort to a claim that federalism concerns foreclose state rules that interfere with federal functions. The argument is one of preemption. Although states may regulate all lawyers, including those who prosecute for a living, Congress arguably has implicitly preempted state regulation of federal prosecutors by giving the DOJ the power to enforce federal laws.\textsuperscript{124} A series of (mostly older) Supreme Court cases has considered attempts by states to interfere or prevent the execution of federal law enforcement functions. In each case, the Court has nullified the state action.\textsuperscript{125}

The difficulties with the implicit preemption argument, of course, is that Congress has never expressed an intention to insulate federal prosecutors from state ethics regulation.\textsuperscript{126} Indeed, recent legislation suggests the contrary.\textsuperscript{127} In recent years, the DOJ thus has resorted to a second preemption argument: even if states may in general regulate federal prosecutors, the DOJ may explicitly preempt particular state\textsuperscript{128} and federal court\textsuperscript{129} regulation that in-


\textsuperscript{125} See, e.g., Boske v. Comingore, 177 U.S. 459, 469-70 (1900) (holding that an IRS regulation preempted an inconsistent state order against an IRS agent); In re Neagle, 135 U.S. 1, 76 (1890) (upholding the preemption of state homicide charges brought against a federal law enforcement officer).

\textsuperscript{126} See Zacharias, supra note 1, at 435 (noting the difficulty in DOJ's preemption arguments of identifying any specific congressional delegation of the power to preempt state and federal ethics rules).

\textsuperscript{127} See, e.g., Citizens Protection Act ("McDade Amendment"), 28 U.S.C. § 530B(a) (Supp. V 1999) (quoted supra in text accompanying note 15) (subjecting state and federal prosecutors expressly to state and federal ethics rules); see also Zacharias & Green, supra note 6, at 214-15 (analyzing the McDade Amendment).

\textsuperscript{128} See Little, supra note 124, at 387-93 (discussing DOJ preemption of state ethics codes); Zacharias, supra note 1, at 433-35 (discussing the limits of the preemption argument).
terferes with the performance of its federal functions.\textsuperscript{130} Thus, the Justice Departments of two recent administrations have used their agency rulemaking authority to attempt to limit the effect of state rules that circumscribe the ability of their lawyers to contact represented persons.\textsuperscript{131}

When federal courts adopt state professional codes or implement independent regulation, federal prosecutors cannot rely upon federalism concerns.\textsuperscript{132} In addition to the argument that Congress has authorized the DOJ to preempt federal court rules by administrative regulation,\textsuperscript{133} the Department may make a more general argument that judicial regulation violates the principle of separation of powers by interfering with executive functions.\textsuperscript{134} This argument clearly has limits. As we have already noted, federal courts regulate federal prosecutors in a variety of ways.\textsuperscript{135} Some of these have been recognized as legitimate.\textsuperscript{136} Nevertheless, the argument remains that certain kinds of judicial regulation that interfere substantially with the DOJ's ability to investigate and prosecute cases step over the line.

Perhaps the strongest argument against some federal court regulation of federal prosecutors is that the court acts in a way that exceeds its regulatory powers. Most of the putative sources of regulatory authority are limited in scope. The power to constrain prosecutorial power because of its effect upon individual cases is limited by the courts' constitutional authority. The federal courts have exercised a broader power to develop prophylactic rules, using their

\textsuperscript{129} See Little, \textit{supra} note 124, at 405-10 (discussing DOJ preemption of federal judicial ethics regulation).

\textsuperscript{130} See 28 C.F.R. §§ 77.1-.2 (2001) (asserting DOJ's authority to preempt state and federal court ethics rules and identifying the claimed sources of that authority); cf. Lain, \textit{supra} note 124, at 22-24 (arguing against preemptive authority); Zacharias, \textit{supra} note 1, at 434-35 (questioning DOJ's claim that the adoption of regulation increases its power to preempt state and federal judicial regulation).

\textsuperscript{131} For a description of the history of these regulations, see Zacharias, \textit{supra} note 1, at 429-31.

\textsuperscript{132} In other words, when one federal institution regulates another, issues of federal-state conflicts simply are not in question.


\textsuperscript{134} See, e.g., Zacharias & Green, \textit{supra} note 6, at 249.

\textsuperscript{135} See \textit{supra} notes 66-88 and accompanying text.

\textsuperscript{136} For example, no one disputes the authority of federal courts to regulate prosecutorial ethics indirectly through constitutional decisionmaking and informally through calendar control decisions.
authority to supervise participants in the criminal justice system,\textsuperscript{137} but commentators\textsuperscript{138} and the Supreme Court\textsuperscript{139} have insisted that this power is also circumscribed. The more general judicial rule-making power is limited procedurally and in terms of the subject matter of particular rules.\textsuperscript{140}

When one puts together the various sources of authority, it appears that they provide federal courts with a basis for regulating many aspects of prosecutorial conduct, but that federal judicial power is not plenary. Only if one subscribes to the existence of some other, general power to supervise lawyers in federal court beyond the “inherent authority” or “supervisory authority over the criminal justice system” can one argue that federal courts have unbounded

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\item \textsuperscript{137} See, e.g., United States v. Udziela, 671 F.2d 995 (7th Cir. 1982) (holding “prospectively, that where perjured testimony supporting an indictment is discovered before trial the government has the option of either voluntarily withdrawing the tainted indictment . . . or of appearing . . . for an \textit{in camera} inspection of the grand jury transcripts for a determination whether other, sufficient evidence exists to support the indictment”); United States v. 608 Taylor Ave., 584 F.2d 1297, 1302-04 (3d Cir. 1978) (using supervisory authority to set a rule for prosecutors’ retention of seized property); \textit{In re Schofield}, 486 F.2d 85, 93 (3d Cir. 1973) (establishing a general requirement that prosecutor make a preliminary showing before using the grand jury to subpoena particular forms of evidence); Pea v. United States, 397 F.2d 627, 637-38 (D.C. Cir. 1967) (en banc) (requiring the government to establish the voluntariness of confessions by proof beyond a reasonable doubt), overruled by Lego v. Twomey, 404 U.S. 477, 488 (1972).
\item \textsuperscript{138} See, e.g., Beale, supra note 115, at 1434-35 (concluding that there is no “source of authority broad enough to encompass all of the supervisory power decisions”); Bennett L. Gershman, \textit{Supervisory Power of the New York Courts}, 14 PACE L. REV. 41, 47 (1994) (stating that “the rise and fall of supervisory power resembles a parabolic arch, beginning with \textit{McNabb}, reaching its crest during the tenure of Chief Justice Warren, and then descending precipitously during the Burger and Rehnquist courts”); Gleeson, supra note 123, at 464 (arguing that “with the narrow exception of matters occurring in the federal grand jury, the supervisory power of federal district courts should be limited to fashioning remedies for violations of existing federal law and prescribing rules of procedure for their own, in-house proceedings”); Schwartz, supra note 119, at 508, 524-25 (questioning broad implementation of judicial supervisory authority).
\item \textsuperscript{140} See supra note 113 and accompanying text; cf. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) (interpreting class certification rule according to a limited rule of construction designed to assure that judicial rules adopted pursuant to the Rules Enabling Act do not modify or enlarge substantive rights); Ross v. Bernhard, 396 U.S. 531, 543-44 (1970) (Stewart, J., dissenting) (arguing that Fed. R. Civ. P. 38 enlarges the right to jury trial in violation of the Rules Enabling Act); Olympic Sports Prods., Inc. v. Universal Athletics Sales Co., 760 F.2d 910, 914 (9th Cir. 1985) (“[T]he test for the validity of a federal rule of procedure is whether the rule regulates judicial process for enforcing rights and duties recognized by substantive law.” (quoting Sibbach v. Wilson, 312 U.S. 1, 14 (1941)); Affholder, Inc. v. Southern Rock, Inc., 746 F.2d 305, 309-12 (5th Cir. 1984) (considering but rejecting argument that Fed. R. Civ. P. 38 was invalid as abridging rights under Mississippi substantive law); Crescent Wharf & Warehouse Co. v. Pillsbury, 259 F.2d 850, 852 (9th Cir. 1958) (noting that rules adopted by the federal courts may “not abridge, enlarge or modify any substantive right”).
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power to regulate prosecutorial ethics. In any case involving such regulation, the DOJ has available to it the argument that the judicial order is ultra vires.

D. The Legal Effect of Federal Court Action

Let us assume for a moment that a federal court takes action to regulate federal prosecutorial ethics by a decision in a particular case, by adopting state rules, or by adopting its own rules. The substance of the regulation aside, what are the possible legal effects of the federal judicial action?

One conclusion seems clear. To the extent the federal court is exercising authority derived from a congressional mandate, Congress can overrule or alter the regulation. The only limits on Congress are that it may not reverse a particular judgment in particular litigation,\textsuperscript{141} that it cannot undermine the Court's exercise of "inherent authority" to protect its own functions,\textsuperscript{142} and that it cannot overrule any decision that is constitutionally based.\textsuperscript{143}

A federal court's decision to adopt a state's professional code can eliminate legal obstacles to the application of the state code to federal prosecutors. By adopting the code, the federal court essentially makes the code its own. To the extent federal prosecutors might have been able to challenge the state code as violating principles of federalism, they no longer can do so. To challenge the regulation under these circumstances, prosecutors need to develop a frontal challenge to the basic authority of both states and federal courts to limit the prosecutorial conduct in question.

One of the issues that is of special, though not unique, concern to federal prosecutors is how federal prosecutors should react to the existence of multiple standards of conduct. A single federal

\textsuperscript{141} See authorities cited supra note 91.

\textsuperscript{142} See, e.g., Chambers v. Nasco, Inc., 501 U.S. 32, 46 (1991) ("At the very least, the inherent power must continue to exist to fill in the [statutory] interstices."); In re Mroz, 65 F.3d 1567, 1575 (11th Cir. 1995) ("The fact that rules such as Rule 11 and Bankruptcy Rule 9011 have been promulgated by Congress does not displace a court's inherent power to impose sanctions for a parties' [sic] bad faith conduct. . . . The inherent power to sanction is both broader and narrower than these other means of imposing sanctions." (citations omitted)); United States v. Shaffer Equip. Co., 11 F.3d 450, 461 (4th Cir. 1993) ("Due to the very nature of the court as an institution, it must and does have an inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates. This power is organic, without need of a statute or rule . . . [and] is not regulated by Congress.").

\textsuperscript{143} See authorities cited supra note 92. Of course, though Congress may not be able to overrule a constitutional decision directly, it may affect a court's ruling by providing alternative remedies or changing the underlying factual basis for the decision.
prosecutor who appears in a federal court in a state in which he is not licensed may be subject to at least three separate standards: those of his licensing state(s), those of the state in which the prosecution is pending, and those of the federal district court. To the extent the matter involves defendants or factual events that occur in other states and therefore may require investigation or prosecution of secondary defendants elsewhere, additional state and federal district court rules may come into play. If the matter involves multiple prosecutors, licensed in yet other jurisdictions, the standards applicable to them may differ as well. How federal courts proceed in developing and adopting ethics regulation can both ameliorate or exacerbate the problem of conflicting rules.

When federal courts adopt the professional rules of the local jurisdiction, they eliminate one potential source of conflict but leave unresolved the conflict between the local rules and those of any different licensing jurisdictions. At one extreme, a federal court could alleviate the problem of conflicts by preempting state codes and authorizing each federal prosecutor to abide by the standards of his licensing jurisdiction. But this may introduce the separate peculiarity of having the lawyers on opposing sides governed by two different standards of behavior. At the other extreme, federal courts that propound independent rules of behavior may simply be subjecting the lawyers before them to an extra set of rules, in addition to the local rules and those of the licensing states. Only by adopting a common set of standards applicable to all litigants in all federal courts could federal judicial regulation fairly be viewed as promoting uniformity. This, in turn, can only be accomplished by joint or parallel rulemaking or by a decision by Congress to adopt a federal ethics code on its own.

144. See supra note 12 and accompanying text.
145. See Mark H. Aultman, The Story of a Rule, 2000 DET. C.L. Mich. St. U. L. Rev. 713, 730 ("A welter of state ethics rules with varying interpretations by the states promulgating them would unduly complicate and hamstring investigations. They might also result in important evidence being thrown out in some cases that would be admissible in others."); cf. Kaufman, supra note 8, at 160 (arguing that avoiding balkanization in ethics regulation is not so important).
146. See generally Zacharias, supra note 11 (discussing the possibility of a uniform, federalized scheme of legal ethics); SPECIAL STUDIES, supra note 14 (providing authorities cited for and report of a working committee of the U.S. Judicial Conference focusing on the problems caused by disuniformity in local district court professional rules).
147. This would include rulemaking by the U.S. Supreme Court or the Judicial Conference of the United States. See generally McCabe, supra note 114 (describing the federal rulemaking process).
148. See generally Zacharias, supra note 11 (discussing the possibility of a federal ethics code).
III. Who Better to Regulate Federal Prosecutors—Federal Courts or the Individual States?

The McDade Amendment specifically contemplates that federal prosecutors will be governed by both state ethics rules and local federal court rules.149 However, state and federal regulators may not see eye to eye. Suppose, as was the case, that the State of Oregon (acting through its legislature or its supreme court) determined that lawyers, including federal prosecutors, may not employ deceit in their investigations.150 If the Oregon federal district court agreed with the DOJ that the state rule is unwise, could it authorize federal prosecutors to determine for themselves whether to use deceit in undercover investigations?151

The potential conflict between the state and federal regulators raises two questions. The first is whether federal courts have legal authority to supersede state regulation. Resolution of this issue will be informed not only by the congressional intent underlying the McDade Amendment but also by constitutional doctrine deriving from the Tenth Amendment and the Supremacy Clause. Whatever the resolution, Congress could, by further legislation, expand or contract federal judicial authority.

We focus, however, on the separate policy question. As a matter of sound regulatory strategy, to what extent should federal courts defer to state regulation? When should they resolve a question of prosecutorial ethics independently? As we discuss in Part II.A, our conclusion is that there are practical reasons to accept some state regulation as a baseline, insofar as that regulation is rooted in state judicial authority to regulate the practice of law. At the same time, as we discuss in Part II.B, there are sound reasons why, in dealing with particular questions regarding the regulation of federal prosecutors, federal courts might justifiably supersede a state ethics rule or impose additional restrictions on federal prosecutors.

149. 28 U.S.C. § 530B(a) (Supp. V 1999) (providing that “[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent ... as other attorneys in that State”).
150. See In re Gatti, 8 P.3d 966, 974-76 (Or. 2000) (dictum).
151. The DOJ asked the federal district court to do so. See DOJ Sues Oregon Bar, supra note 5, at 408 (reporting DOJ's request that the Oregon Supreme Court recognize an exception for federal prosecutors). The Oregon Supreme Court subsequently amended its rule, apparently making the federal litigation moot. Oregon Amends Disciplinary Rule, supra note 5, at 94.
A. State Rules as a Regulatory Baseline

1. Background: The Traditional State Role in Regulating Prosecutors as Lawyers

Federal prosecutors serve simultaneously in two roles: as government officials with criminal law enforcement responsibilities and as trial lawyers. States ordinarily do not seek to regulate federal prosecutors in their role as government officials. It would be anomalous for them to do so.\(^{152}\) In many situations, were states to attempt to regulate federal officials directly, the federal officials could successfully resist by invoking the Supremacy Clause of the Constitution.\(^{153}\) Thus, although states do subject state and local prosecutors to legislation governing investigative methods\(^{154}\) and conflicts of interest,\(^{155}\) states ordinarily leave such regulation of federal prosecutors to federal regulators.

In contrast, it is not anomalous for states to regulate federal prosecutors in their role as trial lawyers. The practice of law historically has been regulated by the states.\(^{156}\) The power to regulate lawyers, like various other state regulatory powers, is reserved to the states under the Tenth Amendment. State constitutions typically have delegated the exercise of this reserved power to the state high courts.\(^{157}\)

States regulate lawyers in three principal ways. First, they decide who may practice law. In most states, the judiciary oversees a licensing process that requires applicants to graduate from an accredited law school, pass a bar examination, and demonstrate the

\(^{152}\) For example, while state legislatures have enacted government ethics provisions to regulate state and local officials, they have not attempted to regulate federal officials by such laws and it is doubtful that they could do so constitutionally. In contrast, states can obviously regulate federal officials when they act outside their official capacities—for example, if a federal official were to rob a bank, a state could enforce its criminal law.

\(^{153}\) See authorities cited supra note 125.

\(^{154}\) For example, states regulate the use of wiretaps or other means of gathering evidence. See, e.g., N.Y. CRIM. PROC. LAW §§ 705.05-70 (McKinney 1995) (regulating eavesdropping and video surveillance).

\(^{155}\) For example, states regulate the receipt of gifts or certain campaign activities. See, e.g., N.Y. GEN. MUN. LAW. § 805-a (McKinney 1999) (restricting the receipt of gifts by municipal officials).

\(^{156}\) See, e.g., Kaufman, supra note 8, at 162 (observing that "[i]t is appropriate to recognize the historical lodging of control of attorney behavior in the state systems").

\(^{157}\) In some states, this authority is thought to be lodged almost exclusively in the judiciary. State courts have held that their inherent authority to regulate lawyers precludes the state executive or legislature from exercising authority of the practice of law. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 27-31 (1986) (discussing state courts' "negative inherent powers").
requisite character to practice law. Second, state courts adopt rules of professional conduct to govern the work of lawyers whom they have licensed to practice in the state.\textsuperscript{158} In most states, the rules are based on recommendations made by a committee appointed by the court or by the state bar association, which typically takes the \textit{Model Rules} as its point of departure. Finally, state courts sanction licensed practitioners who engage in professional misconduct. In most states, the courts oversee a disciplinary process in which professional disciplinary prosecutors conduct investigations and file and prosecute disciplinary charges before a panel or referee whose findings are then subject to judicial review.

Although federal courts exercise authority to admit lawyers to practice before them,\textsuperscript{159} to discipline lawyers for misconduct occurring in federal litigation, and to adopt standards of conduct governing lawyers in federal court, they largely piggyback on state court processes. Federal courts' admission processes tend to be perfunctory. Federal courts do not administer bar examinations nor conduct character investigations, instead requiring applicants to be members in good standing of a state bar.

Likewise, federal courts are less involved than state courts in disciplining licensed practitioners. Although federal courts sometimes sanction lawyers in the context of individual litigation, federal court discipline outside litigation is sporadic and ad hoc. Federal courts generally refer disciplinary questions to the state disciplinary agencies whenever it is possible to do so.\textsuperscript{160}

Finally, federal courts have taken less interest in the development of professional standards. Most federal districts either have

\textsuperscript{158} See \textit{id.} at 24-27.

\textsuperscript{159} It appears that pursuant to congressional authorization, federal agencies, including the courts, would have power to authorize individuals to practice law in federal proceedings, regardless of whether those individuals are licensed to practice law in the state in which the proceedings take place. \textit{Cf.} Sperry v. Florida, 373 U.S. 379, 384-85 (1963) (holding that a state may not impose additional licensing requirements over those federal licensing requirements "contemplated by Congress"). Further, even in the absence of congressional authorization, federal courts would likely have power to admit individuals to practice before them. However, in the absence of federal judicial authorization, an individual who is not licensed to practice law in the state might run afoul of the state's "unauthorized practice of law" provision if he appears on behalf of a client in a federal court located in the state.\textit{ See, e.g., In re Desilets, 247 B.R. 660 (Bankr. W.D. Mich. 2000).}

\textsuperscript{160} When a finding of misconduct is made by the state court, the federal court may then impose a sanction reciprocally. \textit{See, e.g., In re Caranchini, 160 F.3d 420, 424-25 (8th Cir. 1998). But see} Thread v. United States, 354 U.S. 278, 282 (1956) (holding that "disbarment by federal courts does not automatically flow from disbarment by state courts").
adopted the *Model Rules* of the ABA or have adopted the ethics rules of the state in which the district court sits.161

Given the regulatory tradition assigning state courts the lead in regulating lawyers, it makes sense for federal courts to accept state law as a starting point for the oversight of federal prosecutors in their role as lawyers. In contrast, one would not expect federal courts to defer to state law when regulating prosecutors in their role as government agents or officials.162

2. Practical Justifications for Accepting State Ethics Rules

The regulatory tradition that we have sketched above suggests four principal reasons to conclude that state ethics rules should serve as a baseline for federal court regulation of federal prosecutors.

a. Superiority of State Rulemaking Procedures

The most obvious reason is that state courts have procedures in place for the development of ethics rules, while federal courts do not. Typically, state process authorizes some committee to study a particular ethics question before proposing a rule and allows interested individuals and groups to provide input. This process enables the state court to take account of the broad range of considerations that bear on whether to adopt an ethics rule and how it should be crafted, including special considerations relating to state law practice. Such a rulemaking process is far preferable to ad hoc decisionmaking by an individual federal district court.163

Although individual federal district courts might undertake a rulemaking process, and occasionally do so with regard to individual questions of professional conduct,164 it is uncertain whether

161. See supra note 66 and accompanying text. Although a subcommittee of the Judicial Conference of the United States has considered whether to adopt a uniform body of federal ethics rules to address questions of lawyer conduct that recur most frequently in federal proceedings, it ultimately has shown no inclination to do so.

162. For example, state law would not be relevant when a federal court is determining the scope of a prosecutor's discovery obligation as a matter of due process under *Brady v. Maryland*, 373 U.S. 83, 88-92 (1963), under federal statutes such as the Jencks Act, 18 U.S.C. § 3500 (1994) or under FED. R. CRIM. P. 16.

163. See Green, supra note 1, at 513-23 (discussing the preference for judicial rulemaking).

164. See, e.g., S.D.N.Y & E.D.N.Y LOCAL CRIM. R. 23.1 (restricting communications with the media); see also United States v. Cutler, 58 F.3d 825, 836, 840 (2d Cir. 1995) (upholding contempt sanction against a lawyer who disobeyed a court order requiring compliance with a local rule restricting communications with the media).
they are as well positioned as state courts to do the job. State courts are more likely to have processes in place for identifying professional practices that are in need of regulation, to evaluate existing rules and to introduce and implement changes when necessary. They generally have closer ties to the state and local bar associations that can provide assistance.

b. State Court Familiarity with Lawyer Conduct

State courts are likely to have a greater familiarity than federal district courts with the professional conduct of lawyers, including prosecutors. There are far more state than federal criminal prosecutions. State judges are likely to see a broader range of prosecutorial conduct that is potentially relevant to the subject of ethics rules and have more opportunities to see the impact of whatever rules were in place. State disciplinary proceedings provide another window into the need for and impact of ethics regulation—one that is essentially unavailable to federal courts. Although prosecutors are not often disciplined publicly, state judicial oversight of the disciplinary process provides access to recurring questions of prosecutorial conduct that become subject to private review by disciplinary agencies, even if not resulting in a sanction.

c. Judicial Efficiency

It would be inefficient for an individual federal court to adopt an entire professional code from scratch. State courts have had the advantage of reviewing, supplementing, and amending their ethics codes over the course of many years. Federal courts have no reason, in general, to mistrust the work of the state courts and therefore to undertake the same work themselves.

Of course, if a federal court were only to develop ethics rules applicable specifically to federal prosecutors, rather than to all federal litigators, its undertaking would not implicate as many resources. As we have explained previously, many ethics rules have no relevance to federal prosecutors. Nevertheless, developing even an ethics code limited to federal prosecutors would be a con-

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165. See Zacharias, supra note 23, at 755 (reporting an empirical survey of the reported cases of prosecutorial discipline).
166. Certain provisions that specifically affect federal prosecutors may, however, provide federal courts with grounds for suspicion. See infra note 188 and accompanying text.
167. Zacharias, supra note 23, at 728-29 (discussing the inapplicability or irrelevance of many ethics rules to prosecutors); Zacharias & Green, supra note 6, at 226-27 (same).
siderable task. Many ethics rules that might bear on federal prosecutors' work would have their counterpart in ethics rules relevant to litigators representing private clients, including criminal defense lawyers. It is unlikely that a court would want to maintain entirely different rules for prosecutors and defense lawyers. Consequently, the task of developing a comprehensive ethics code for federal prosecutors might require the development of rules for criminal defense lawyers as well.

*d. The Costs of Multiple Regulation*

A federal district court's adoption of distinctive rules of prosecutorial conduct would impose costs both upon the state and upon lawyers practicing within the state. For the state, disciplinary enforcement would become more difficult insofar as the federal court continued to look to the state to investigate and sanction misconduct by federal prosecutors. State disciplinary authorities would need to apply a standard that is not their own, with which they may not be familiar, and which the state courts do not have ultimate authority to interpret.\(^{168}\)

For similar reasons, a federal court's adoption of distinctive ethics rules might complicate the work of local lawyers. Federal prosecutors who are licensed by the state would need to learn and incorporate a second set of rules. Federal defenders would also need to gain familiarity with these rules, in order to invoke them and seek a remedy, where appropriate, for prosecutorial misconduct. Finally, the adoption of distinctive federal rules in individual federal districts would contribute to the general problem of the balkanization of ethics regulation nationwide.

3. Limitations on Accepting State Ethics Rules

That federal courts should give initial weight to state ethics rules should not be terribly controversial. Congress appears to accept this idea, as reflected in its adoption of the McDade Amendment.\(^{169}\) So has the federal judiciary.\(^{170}\) Even the DOJ has long ac-

\(^{168}\) This problem, of course, is not unique to the disciplinary oversight of federal prosecutors. It occurs whenever a trial lawyer practices outside his licensing jurisdiction—for example, when a lawyer is admitted pro hac vice to try a case in another jurisdiction. It is commonly understood that a lawyer is subject to the ethics rules of the court before which he practices, but also subject to discipline in the licensing state. Even so, federal courts ought to have some reason for complicating the work of the state disciplinary agencies on which they rely.

\(^{169}\) See supra note 15.
cepted that state ethics rules are relevant. Before the McDade Amendment required federal prosecutors to abide by state ethics rules, the DOJ's internal regulations called upon prosecutors to be guided by the ABA model on which state courts generally based their ethics rules.171 But the practical reasons that we have outlined suggest that deference to state ethics rules governing prosecutorial conduct will be more strongly justified in some situations than others. We offer the following five principles, based on the considerations that we have identified.

First, deference to a state ethics rule is most appropriate when a state court has justified its rule as an exercise of lawyer regulation, rather than on the basis of some other rationale. In an extension of the hypothetical discussed earlier, for example, Oregon might adopt a law prohibiting prosecutors to direct criminal investigators to use deceit in gathering evidence, including a prohibition on posing undercover as drug dealers. A federal court would have no reason to defer to this law if it simply represents a state rule of criminal procedure based on the rationale that state residents should be protected from overreaching by investigative agencies. Nor would the law be entitled to particular federal court deference if adopted by a state court, based on a similar rationale, as an exercise of state court supervisory authority over the criminal process. The tradition of state court regulation of lawyers does not support the conclusion that state courts are better situated than federal courts to establish criminal law, least of all in federal criminal cases. In contrast, the same restriction might be entitled to more respect if adopted as part of a professional rule applicable to all lawyers in all situations.

Second, state ethics rules are entitled to greater deference when they are adopted through a state rulemaking process that involves study and input from various stakeholders and that draws on the experience of the state courts. The mere fact that state court rulemaking processes in theory have an advantage over federal court processes does not mean that any particular rule reflects the advantage. When a state court adopts an ethics rule in a perfunctory manner, a federal court has less reason to adhere to it.

170. See, e.g., In re Doe, 801 F. Supp. 478, 485-87 (D.N.M. 1992) (rejecting the argument that federal prosecutors are not bound by no-contact rule); United States v. Lopez, 765 F. Supp. 1433, 1445 (N.D. Cal. 1991) (same), rev'd on other grounds, 4 F.3d 455 (9th Cir. 1993).
171. 28 C.F.R. § 45.735-1 (1995) ("[A]ttorneys employed by the Department should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association.").
Third, federal courts should not owe the same deference to state court interpretations of ambiguous ethics provisions as to explicit rules. When the state court did not consider an issue during the rulemaking process nor receive input concerning the issue, the subsequent state court interpretation of the rule represents a de novo resolution of the issue in the context of ad hoc adjudication. The presumed superiority of the state court process vanishes. A federal court invoking its own rulemaking process will be able to do something that the state court, interpreting its ethics rule in an adjudicatory setting, cannot do: engage in fact finding, elicit diverse viewpoints, and closely study how to regulate the particular prosecutorial conduct in question. Moreover, the federal court will not be biased by concerns about how its determination will affect the pending case.

Fourth, federal courts should be less deferential when a state's ethics rule is inconsistent with the rules of a significant number of other states. The collective work product of the other states is entitled to at least as much weight, and probably more weight, than that of a single aberrational jurisdiction. A federal court's departure from an aberrational state rule, in favor of a rule that reflects a national consensus, also reduces the problem of balkanized ethics regulation.

Finally, federal courts should be less deferential when there is a consensus among federal district courts concerning a particular question of prosecutorial conduct. The work product of federal courts that have considered the particular question is itself entitled to respect. Indeed, in any given case, the amount of study given to a question of prosecutorial ethics by a group of federal courts may exceed that given by any particular state court. Further, as would be true if Congress or the Supreme Court were to adopt uniform ethics rules for federal prosecutors, nationally uniform federal rules achieved through local rulemaking or adjudication minimize nationwide disparities in professional regulation.

B. Justifications for Independent Federal Judicial Regulation

Our previous analysis suggests that, in regulating federal prosecutors, federal courts ought to begin by adopting the rules of the state where the court is situated. Federal courts should consider whether to adopt individual rules governing prosecutorial eth-
ics only when there is some initial reason to believe that the state ethics rules are inadequate.\textsuperscript{172}

When interested parties or organizations raise concerns about the adequacy of existing state rules, a federal court may consider excepting federal prosecutors from an existing state rule, on the one hand, or imposing additional obligations on federal prosecutors not generally imposed by state ethics rules, on the other. But the federal court should first have to identify a justification for departing from the state baseline. The best justification, of course, would be that the state court never considered the particular prosecutorial conduct in question; in that case, independent federal court rulemaking would not disrespect state regulation.\textsuperscript{173} The harder issue, which we consider next, is when federal courts are justified in departing from the rule of a state that has explicitly considered a question of prosecutorial conduct.\textsuperscript{174}

1. Federal Courts' Informational Superiority and Judgment Regarding Federal Concerns

State courts ordinarily have an advantage in regulating lawyers, but this is not invariably true. Federal courts, for example, are likely to be better regulators of federal prosecutors when there is something distinctively federal about the regulation—situations in which federal courts have superior access to relevant information, greater experience in dealing with the prosecutorial conduct in question, or a better feel for the potential impact of regulation. Fed-

\textsuperscript{172} A federal court's concern often will be prompted by the actions of federal prosecutors or criminal defense lawyers who take issue with a particular rule or by a bar association committee that proposes an amendment to the professional rules.

\textsuperscript{173} For example, a state's ethics code may not contain a rule requiring prosecutors to call a defense lawyer's conflict of interest to the court's attention. However, the absence of such a rule may not reflect an affirmative decision to give prosecutors the option of remaining silent, but rather may result from the state's failure to consider the question or its belief that the issue is better addressed by judicial decisionmaking. When that is the case, one cannot fairly assume that there even is an ethics rule that can serve as a "baseline." Federal courts should feel free to consider the question de novo, as indeed they have. See, e.g., Mannholt v. Reed, 847 F.2d 576, 583-84 (9th Cir. 1988) (directing prosecutors to call conflicts to court's attention); United States v. Iorizzo, 786 F.2d 52, 59 (2d Cir. 1986) (same). See generally Bruce A. Green, \textit{Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest}, 16 \textit{Am. J. Crim. L.} 323 (1989) (discussing the case law).

\textsuperscript{174} We are not seeking to identify factors determining whether a federal court ultimately should resolve a prosecutorial ethics issue differently from the state. The question we address simply is when a federal court should even undertake an independent inquiry in response to concerns raised about the state's resolution. In the end, a federal court may conclude that the state rule, indeed, is optimal.
eral courts have these types of advantages in at least three situations: when federal prosecutors are distinctive; when federal litigation is distinctive; and when there is a significant interplay between ethics regulation and substantive law.

a. The Distinctiveness of Federal Prosecutors

Federal courts arguably have a better understanding of considerations that make federal prosecutors unique and whether that uniqueness justifies regulating federal prosecutors differently from state prosecutors or other state court practitioners. One aspect of federal prosecutors' distinctiveness is the degree to which they self-regulate. The DOJ differs from most state and local district attorneys offices in the extent to which it has developed internal guidelines and enforced them, as well as in the level of supervision offered to young prosecutors by experienced prosecutors. As a consequence, one can imagine a different need to regulate the two sets of prosecutors. A state ethics rule requiring prosecutors to disclose the full contents of their files to the defense might, for example, be justified for state but not federal prosecutors. The rule might respond to a state court's factual determination that inadequately trained and supervised local prosecutors have systematically failed to produce exculpatory material as required by due process and state law. In contrast, the extent of prosecutorial self-regulation on the federal level could make it less important to impose prophylactic discovery standards. Federal courts are better situated than the state courts to decide whether this is so.

The work of federal prosecutors also is more likely than that of state prosecutors to involve the enforcement of complex laws, to involve long-term and interstate investigations, and to involve a greater personal role of prosecutors in investigations. Because of these differences, state ethics rules that seem to be directed at prosecutorial conduct generally actually may affect federal prosecutors disproportionately. Consider, for example, state rules that restrict the practice of subpoenaing criminal defense lawyers to tes-

\[175\] With respect to particular regulatory questions, federal prosecutors may differ not only from lawyers generally, but from state prosecutors as well. See Zacharias & Green, supra note 6, at 235-42. But see Kaufman, supra note 8, at 162 (arguing that DOJ lawyers should not be viewed differently from other lawyers).

\[176\] A bright-line discovery rule may be easier for prosecutors to comply with and for courts to police. The benefits of such a rule may outweigh the costs to the prosecution of unnecessarily broad disclosure.
tify concerning their clients before the grand jury.¹⁷⁷ These rules respond to a practice that is far more likely to occur on the federal level, where the grand jury is more often used as an investigative tool. Based on their first-hand experience with this practice, federal courts are better able to assess the federal law enforcement interest and the countervailing concerns about how compelling defense lawyers' testimony will affect the lawyers' relationship with their clients.

Federal prosecutors may also have a different relationship with their constituencies. In the case of federal prosecutors in the main DOJ, the constituency is national in nature. State and local prosecutors often are elected and have a small, local population to whom they are responsible. These differences bear on regulation that affects the relationship between prosecutors and the public, such as rules regarding communications with the press. A state court may conclude that prosecutors should have broad discretion to speak with the press, notwithstanding the risk of influencing the jury, because the local community expects regular, open communications from its local elected officials. Or, a state court may conclude that prosecutors must be strictly restricted in communicating about ongoing prosecutions because of the heightened danger that the jury pool will be tainted in small communities. In either case, federal courts would be justified in considering whether the distinctive nature of federal prosecutors calls for a different approach.

b. The Distinctiveness of Federal Criminal Litigation

Federal and state criminal litigation is more alike than different, as are the interests of federal and state courts. State and federal prosecutors serve similar functions within similar adjudicative processes. State and federal judges share an interest in truth seeking. In many cases, therefore, there is no reason why a federal court should approach a prosecutorial ethics question differently from a state court.¹⁷⁸

In limited respects, however, federal litigation differs from state litigation in a way that bears on the regulation of particular prosecutorial conduct. For example, federal criminal investigatory and trial processes sometimes are distinctive. In grand jury proceedings in some states, counsel may accompany a witness and pro-

¹⁷⁷. See supra note 4.
¹⁷⁸. For example, state and federal courts might well approach questions of prosecutorial candor to the tribunal similarly.
vide advice during the proceedings.\textsuperscript{179} The absence of this protection for witnesses in the federal system might justify the imposition of special ethical restrictions or obligations on federal prosecutors, such as an obligation to advise the witness of the right against self-incrimination or to refrain from misleading the witness.\textsuperscript{180}

Federal and state litigators also differ in significant ways. In some states, criminal defense lawyers who appear in state court routinely are less well trained, less experienced, and less qualified than those who practice in federal court. Federal defenders sometimes have greater resources at their disposal than state defenders or appointed counsel.\textsuperscript{181} One can imagine state ethics regimes designed to address the perceived imbalance in ability between criminal defense lawyers and prosecutors that do not make equal sense for the federal system. Based on their experience overseeing federal criminal litigation, federal courts can best determine whether the same rules are warranted.

Federal courts themselves might differ from state courts in ways that have implications for how prosecutors are regulated. For example, the federal court workload may prompt a different emphasis upon judicial economy than a state court's workload. If federal courts have more time available to resolve ethics issues, they may have less need for prophylactic rules designed to avoid the necessity of resolving pertinent factual issues.\textsuperscript{182} Conversely, federal courts that have a more burdensome workload may be justified in exempting federal prosecutors from state ethics provisions that impose supervisory responsibilities on federal courts.\textsuperscript{183}

\begin{footnotes}
\item[180] Cf. United States v. Jacobs, 547 F.2d 772, 774 (2d Cir. 1976) (requiring prosecutor to inform grand jury witness of the fact that he is a "target" of the investigation).
\item[181] This is often particularly true in white collar cases.
\item[182] For example, a state ethics rule requiring prosecutors to disclose exculpatory evidence to the grand jury might be justified by an interest in judicial economy. Or, a rule forbidding prosecutors from communicating with arrested defendants might be motivated by an interest in avoiding having to make factual findings as to whether defendants have waived their Miranda rights. A federal court would be better suited than a state court to determine whether there is an equally compelling interest in judicial economy on the federal level.
\item[183] For example, the attorney subpoena rule adopted by some state courts requires a court to authorize the issuance of a grand jury subpoena to a criminal defense lawyer under certain circumstances. See supra note 4 and accompanying text. One can imagine other rules that impose a judicial burden, such as a rule requiring prosecutors to obtain a judicial determination of whether particular material is discoverable. State courts may be unconcerned about the judiciary's role in administering rules such as these, because the practice is infrequent on the state level or because the state court workload is manageable. Federal courts with a heavier workload
\end{footnotes}
c. The Interplay of Federal Law and Ethics

Ethics rules are developed against the background of substantive law. When federal constitutional law or substantive federal law is important to the question of how federal prosecutors should be regulated, federal courts should be free to address the regulatory question independently, both because state courts may not have considered the implications of substantive federal law and because a federal court's expertise and experience in dealing with the background law is likely to be greater than that of the state courts. Likewise, federal courts should be able to proceed independently when the state courts have adopted an ethics rule with particular regard for state substantive law that is inapplicable to federal prosecutors. There are at least three situations in which the interplay between law and prosecutorial ethics is significant.

First, a state court may build upon state law that is inapplicable to federal prosecutors, either by codifying the state law so that lawyers may be disciplined for violating the law or by expanding on it in order to ensure that lawyers avoid coming close to the lines drawn by substantive law. To the extent a federal court concludes that federal criminal law does not impose the same restriction on federal prosecutors, it may fairly exempt federal prosecutors from the state ethics rule. Second, a state court may build upon state law that is not as demanding as federal law. For example, state rules based on Model Rule 3.8(d), which requires prosecutors to disclose particular information to the defense, are arguably intended in part to codify case law governing prosecutors' disclosure obligations. A federal court might consider adopting a more demanding rule for federal prosecutors if it believes that federal statutes and rules of procedure impose greater discovery demands on federal than state prosecutors.

Third, a state court may premise an ethics rule upon an interpretation of, or a desire to import, federal law which federal...
courts have equal ability to interpret. Provisions based on Model Rule 3.8(d), for example, may be designed to codify federal constitutional requirements for prosecutorial behavior. A federal court has no reason to defer to the state court's understanding of the applicable federal cases.\textsuperscript{186}

2. Federal Court Objectivity

In some situations, federal courts may be better rulemakers because they are more objective or trustworthy than state courts with respect to some issues. State regulators may undervalue relevant federal interests for reasons of bias or other improper motivation.

First, state regulation might be adopted in the context of antagonism between federal prosecutors and state regulators. For example, shortly prior to the McDade Amendment, there was significant disagreement between state regulators and federal prosecutors concerning the legitimacy of state ethics regulation; the DOJ was engaged in hotly debated and angrily received efforts to exempt its prosecutors from state ethics rules on this subject.\textsuperscript{187} Imagine that, during this period, some state courts revised their rules restricting lawyers' communications with represented persons to impose significantly more stringent restrictions on prosecutors than those in effect in other states. If a federal court subsequently concluded that a particular state had adopted a stringent rule as an annoyed response to the perceived disrespectfulness of the Department, the federal court would have been justified in deciding the regulatory question anew.

Second, state regulators may undervalue federal interests when these interests are uniquely federal and therefore unlikely to be of concern to state regulators. For example, there is a unique federal interest in having uniform state regulation of federal prose-

\textsuperscript{186} Similarly, federal constitutional or other law may constrain judicial regulation of particular prosecutorial conduct. For example, the First Amendment limits the extent to which prosecutors may be restricted in their public communications about ongoing investigations and prosecutions and in their public criticisms of judges. See generally Fred C. Zacharias, \textit{Rethinking Confidentiality II: Is Confidentiality Constitutional}, 75 IOWA L. REV. 601 (1990) (using attorney-client confidentiality rules to illustrate First Amendment limits on professional rules governing attorney speech). When state courts adopt ethics rules regulating this conduct, they presumably take the First Amendment limits into account. But there is no reason for federal courts to defer to the state judges' views concerning the reach of the First Amendment and about how best to accommodate the relevant First Amendment interests.

\textsuperscript{187} See supra notes 1, 4.
It is difficult for federal prosecutors to conduct interstate criminal investigations if they must comply with disparate state regulation and it is difficult for DOJ to supervise prosecutors who are subject to disparate rules. Therefore, when a state court adopts an unusual standard for criminal investigations, a federal court might reject it on the basis that the state court is likely to have undervalued the federal interest in uniformity.

State regulation sometimes may involve a question on which state and federal interests are inherently or historically antagonistic, in which case a state regulator is likely to overvalue the relevant state interest relative to the federal interest. Suppose, for example, that a state court regulates the exercise of prosecutors' discretion in instituting criminal charges regarding crimes over which other criminal prosecutors have jurisdiction. The state court might essentially expand the protection afforded by the Double Jeopardy Clause by providing that it is unethical for a prosecutor to institute charges against an individual who was acquitted of the same crime within the state. On its face, the rule would be reciprocal, and not specifically targeted at federal prosecutors; it would equally restrict a state prosecutor from bringing charges after an individual was acquitted of essentially the same crime in federal court. The rule would implicate distinctive federal interests, however, since some federal criminal statutes were enacted precisely to allow federal prosecutors to compensate for the perceived inadequacies of state criminal processes. The rule would also implicate state prosecutors' interest in avoiding embarrassment when federal prosecutors obtain convictions in situations where state prosecutors failed to do so.

Finally, prosecutorial regulation may implicate state judges' personal interests. For example, state ethics rules restricting criticism of judges may be designed in part to protect incumbent judges who seek reelection. Or, one can imagine a state ethics rule restricting prosecutors' use of deceit in investigating judicial proceedings. While the restriction may protect judicial integrity, it also may be motivated in part by a desire to impede criminal investigations of judicial corruption (which historically is more common in state and local courts than in federal courts). Independent federal regulation can best respond to the possibility that state judges overvalued

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188. In states such as New York, where the state constitution's double jeopardy provision forbids successive prosecutions, such a rule would impose an additional restriction only on federal prosecutors. N.Y. CRIM. PROC. LAW § 40.20 (McKinney 1995); Abraham v. Justice of the N.Y. Supreme Court, 338 N.E.2d 597, 600 (N.Y. 1975).
their own interests at the expense of federal law enforcement interests.

3. Other Regulatory Advantages of Federal Courts

We have argued that, with respect to certain questions of prosecutorial ethics, federal courts are better rulemakers because of their greater access to relevant information and ability to assess the information, or because of their greater objectivity. There are, however, several additional reasons for which federal courts have an advantage in regulating federal prosecutors that can justify a departure from otherwise applicable state regulation.

a. Federal Courts' Ability to Target Federal Prosecutors

Whether or not state courts are well qualified to regulate federal prosecutors, federal courts are justified in departing from state regulation when there is a need to develop rules specifically for federal prosecutors and the state has not done so. A state court, for example, may have failed to consider possible reasons to regulate federal prosecutors differently than state prosecutors. The federal courts should be free to address the issue, even if one assumes that state regulators would have been better suited to develop rules had they been fully informed. Similarly, a state law also may be silent because state regulators never considered an important issue. A more vigilant federal court should not have to wait for the state to act.

Thus, even when a federal court adopts a state ethics code as a baseline, it is nevertheless justified in considering whether to exempt federal prosecutors from otherwise applicable state regulation or to impose more stringent rules based on grounds that the state regulators apparently failed to consider, or to adopt particularized regulation regarding areas of conduct that state regulators entirely failed to address. The harder questions will involve whether to depart from state ethics rules notwithstanding that state regulators

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189. Many state ethics rules that affect prosecutors make no distinction, on their face, between prosecutors and other lawyers. Of the state ethics rules targeted specifically at prosecutors, we are unaware of any that make an explicit distinction between federal and state prosecutors.

190. For example, where the problem of prosecutorial conduct is uniquely federal, the state may have no reason to regulate it. Even where the problem arises equally in state prosecutions, it may never have been called to the attention of the state regulators.
specifically considered, but rejected, arguments that federal prosecutors should be treated differently.

b. Federal Courts May Determine the Best Method of Regulating

Because federal courts deal with federal prosecutors on a daily basis, they have opportunities to regulate federal prosecutors that are unavailable to state courts. Federal courts can regulate federal prosecutors informally, by raising concerns outside the context of specific prosecutions or by criticizing prosecutors in the course of a prosecution. They also can issue formal sanctions or grant relief predicated on prosecutorial misconduct. This provides federal courts the ability to interpret existing rules and thereby develop their meaning. In implementing these various methods of regulation, federal courts must consider whether it is better to make categorical rules or to develop standards of conduct on a case-by-case basis in adjudication. There is no reason why the answers to these questions would necessarily be the same for federal and state prosecutors.

c. Federal Courts' Distinctive Powers and Perspectives

Just as federal and state prosecutors differ, federal and state courts differ in ways that have significance for the regulation of federal prosecutors. Federal courts draw on different sources of legal authority when they regulate federal prosecutors. They also have a different, and presumably more national, perspective on regulatory questions. This sometimes may justify departing from state regulation.

Because federal courts are federal lawmakers, whatever regulations they adopt are not vulnerable to Supremacy Clause objections. Thus, when federal prosecutors challenged state attorney subpoena rules based on the Supremacy Clause, federal courts rejected the challenges in districts where federal courts had adopted the same rule. One might argue that the federal courts' distinctive legal authority would not justify adopting different rules for federal prosecutors, but only adopting existing state rules in order to immunize them from challenge. Nevertheless, a federal court may perceive that a state rule goes too far and that, if the federal

191. See supra note 88 and accompanying text.
192. E.g., Whitehouse v. United States Dist. Court, 53 F.3d 1349, 1365 (1st Cir. 1995); United States v. Klubock, 832 F.2d 664, 667 (1st Cir. 1987) (en banc).
court is to invoke its own authority, it ought to cut back on the state rule. A federal court thus might adopt a less demanding version of the attorney subpoena rule and, in so doing, authorize some conduct that would otherwise be restricted, while at the same time making what remains of the rule less vulnerable.

Federal courts also can, at least potentially, address the problem of disparate regulation. As we noted earlier, the government has an interest in uniform ethics regulation. No individual state can address that problem, except by cutting back on restrictions that exceed those imposed by other states. Federal courts can promote uniform regulation of federal prosecutors while preserving restrictions. No individual federal court can create a national rule. However, federal courts can act collectively in a formal way, by each agreeing to adopt the same rule. Alternatively, they can promote uniformity by paying attention to each others’ decisions and bringing their own in line with those of other federal courts.193

C. Conclusions: How Should Federal Courts Incorporate the Arguments in Favor of Deferring to States?

We have explained why federal courts should regard some state ethics rules as a baseline for regulating federal prosecutors. The reasons boil down to two. The first concerns the optimal process for developing ethics regulation. As between states regulating lawyers through formal rulemaking and individual federal courts regulating federal prosecutors via rulemaking or ad hoc decision-making, state regulation generally is preferable. State courts employ standing procedures for developing ethics rules and have greater familiarity with lawyer conduct. The second reason reflects more practical, institutional considerations: all things being equal, individual federal courts should not substitute their own ethics rules for state rules because it is time-consuming for them to engage in independent rulemaking and because the result is to balkanize lawyer regulation.

These are broad generalizations that serve only as a starting point. We have identified many situations in which federal courts legitimately may take a different approach to regulating federal

193. Arguably, federal courts can also respond to national concerns to which they are likely more sensitive than state courts. In particular, federal courts might be more likely to perceive when a particular regulation will engender legal or political disputes on a national level. Federal courts may be justified in exempting federal prosecutors from a particular state regulation when appropriate to avoid such disputes.
prosecutors. Federal courts should be able to regulate prosecutorial conduct that existing state regulation does not address. Likewise, federal courts often should be able to regulate conduct that state courts did not intend affirmatively to authorize.

The most difficult questions will arise when federal courts consider forbidding federal prosecutorial conduct that state law affirmatively allows or, as occurs more frequently, permitting conduct that state law proscribes. Federal courts ordinarily should defer to state ethics rules directed specifically at lawyer conduct if the rules were adopted through a robust rulemaking process in which the issue was fully debated. Federal courts should, however, be able to depart from such rules when there is a persuasive justification for doing so.

We have identified various possible justifications for rejecting or modifying a state ethics rule. Federal courts often will be better regulators in situations that implicate the distinctiveness of federal prosecutors, federal criminal litigation, or federal law because federal courts have more expertise with respect to these factors, can view the issue more objectively, or have one of several regulatory advantages that we have discussed. In these circumstances, a federal court that believes that a particular state rule is unwarranted should have at least some discretion to regulate federal prosecutors differently from state lawyers or state prosecutors. It is, however, not enough for a federal court merely to posit a justification for taking a different approach. The court must be able to make a persuasive case for the proposition that the particular state rule does not make sense for federal prosecutors.

It is not feasible for Congress to delineate specifically when federal courts should defer to state regulation and when they should not. As we have discussed (and will discuss further in Part III), many different factors may come into play with respect to particular state rules. The decision of whether to defer to a state's conclusion on an issue must be decided on a rule-by-rule basis, in light of the considerations and principles that we identified—principles that draw on a broad range of procedural, factual, and legal considerations. Since Congress has shown little interest in making individualized determinations on particular ethics issues to date, the best alternative is for Congress to delegate authority to make these choices to the federal courts.

Among the alternative decisionmakers—including the states, the DOJ, and the ABA—federal courts are the least partial body and the body best qualified to decide whether, in a given situation, the federal courts have a procedural or regulatory advantage of the
sort we have identified. State courts are likely to discount arguments based on federal courts' superior expertise in making rules for federal prosecutors. The DOJ and the ABA are likely to overemphasize the interests of their own constituencies.

Congress's most significant foray into the field—the McDade Amendment—therefore is at best ambiguous and at worst woefully misguided. It is unclear whether the statute authorizes federal courts, by local rule or judicial decision, to supersede state ethics rules. If not, then the statute denies federal courts the authority to exempt federal prosecutors from state ethics rules in some situations where federal courts ought to be able to do so.

Senator Leahy has, on several occasions, pressed for an amendment to the McDade Amendment that would direct federal courts collectively to develop uniform ethics rules in areas of particular importance to federal prosecutors and would clarify the authority of federal courts to supplant state ethics rules. Adoption of Leahy's proposal would be a step in the right direction. As we suggest later, however, Congress should take further steps to establish the procedure by which uniform federal ethics rules can be developed—one that is as robust as that which states historically have employed, that invites input from all concerned interest groups, and that ultimately enables federal courts to take distinctively federal interests and considerations into account. In dealing with conduct that is not governed by uniform federal law, federal courts would have clearer authority to decide which state ethics rules to adopt and which to reject, amend, or augment.

Although Congress can participate in establishing an appropriate mechanism for federal court ethics rulemaking, it is doubtful that Congress can helpfully specify the substantive criteria the

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194. See Professional Standards for Government Attorneys Act of 1999, S. 855, 106th Cong. (1999). The Senate included Senator Leahy's proposal in antiterrorist surveillance legislation introduced in response to the recent attack on the World Trade Center, but it ultimately was deleted because of opposition in the House. See United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A. Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; United and Strengthening America Act of 2001, S. 1510, 107th Cong. (2001) (Senate/Leahy proposal); see also Note, Federal Prosecutors, supra note 6, at 2093-95 (discussing the Leahy proposal). Senator Hatch also has proposed legislation superseding the McDade Amendment. Federal Prosecutor Ethics Act, S. 250, 106th Cong. (1999); see Ryan E. Mick, Note, The Federal Prosecutors Ethics Act: Solution or Revolution?, 86 IOWA L. REV. 1251, 1255 (2001) (advocating the adoption of the Federal Prosecutor Ethics Act). Thus far, alternatives to the McDade Amendment have not garnered sufficient congressional support, in part because the McDade Amendment is defended by the organized bar, see Zacharias & Green, supra note 6, at 224 n.101, and in part because the DOJ has been unwilling to throw its support fully behind an alternative that would be legislatively viable. One can safely predict, however, that efforts to supersede the McDade Amendment will continue.
rulemakers should employ. The considerations bearing on whether to adhere to, or depart from, states rules simply are too multifaceted; the decision ultimately calls for an exercise of judgment. Even so, Congress could encourage the approach we outline by amending the McDade Amendment to make clear that state ethics rules apply in the absence of contrary federal law, federal court rules, or federal court decisions. This would establish state ethics rules as a baseline and put the burden on federal courts affirmatively to depart from them. 195

IV. SHOULD PROSECUTORS BE FREE OF FEDERAL COURT REGULATION?

From time to time, federal prosecutors have asserted legal claims that they should be immune to outside regulation. 196 Sometimes, the immunity claim has been limited to state regulation of prosecutorial activity. On recent occasions, though, federal prosecutors also have challenged the imposition of federal court regulation. 197 In asserting prosecutorial independence, they have relied on a series of legal doctrines, ranging from federal preemption, to separation of powers, to simply challenging the underlying jurisdiction of the states or federal courts to regulate. Underlying the doctrines and the general notion that prosecutors might be immune from regulation are policy justifications for prosecutorial independence. 198 The following pages consider these substantive arguments in the context of analyzing whether prosecutorial ethics ever should be free from federal judicial oversight.

195. Although the McDade Amendment is ambiguous, it may well be that Congress intended to delegate to federal courts the ultimate authority to “trump” state professional rules. If so, clarification of Congress’s intent may be all that is needed to resolve sensibly the question of how regulatory authority over federal prosecutors should be allocated.

196. See Zacharias, supra note 1, at 429 n.1 (discussing history of claims by the DOJ of several recent administrations that federal prosecutors have the authority to set their own rules).

197. See, e.g., Little, supra note 124, at 405-10 (discussing DOJ’s purported authority to preempt federal district court ethics rules).

198. We have already disavowed any intention of analyzing the legal doctrines in this Article. See supra Part II.C.
A. Reasons for Prosecutorial Independence Generally

The time-honored tradition of prosecutorial discretion\textsuperscript{199} in areas such as charging,\textsuperscript{200} plea bargaining,\textsuperscript{201} and sentencing\textsuperscript{202} is based on theoretical and practical notions that, under some circumstances, may support prosecutorial freedom from federal judicial ethics regulation as well. First and foremost, the practice of deference to prosecutorial discretion conceptualizes prosecutors as agents for ameliorating overgeneralizations inherent in broad-based legislative policies.\textsuperscript{203} Thus, for example, prosecutors need not

\textsuperscript{199} See, e.g., Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 188 (1969) ("The American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all others is the power to prosecute or not to prosecute."); Brian A. Grosman, The Prosecutor: An Inquiry into the Exercise of Discretion 13-14 (1969) (considering the factors bearing on the exercise of prosecutorial discretion); Norman Abrams, Internal Policy: Guiding the Exercise ofProsecutorial Discretion, 19 UCLA L. Rev. 1, 3 (1971) (suggesting administrative limits on the exercise of prosecutorial discretion); Sidney I. Lezak & Maureen Leonard, The Prosecutor's Discretion: Out of the Closet, Not Out of Control, in Carl F. Pinkele & William C. Louthan, Discretion, Justice and Democracy: A Public Policy Perspective 44 (1985) (discussing prosecutorial discretion and noting that "in the selection of offenders and offenses the power of the prosecutor is almost unlimited"); Symposium, Prosecutorial Discretion, 13 Am. Crim. L. Rev. 379 (1976) (including a variety of articles addressing prosecutorial discretion); James Vorenberg, Decent Restraint ofProsecutorial Power, 94 Harv. L. Rev. 1521 (1981) (criticizing the "pervasive role [of prosecutorial discretion] in the administration of criminal justice"); cf. Abbe Smith, Can You Be a Good Person and a Good Prosecutor, 14 Geo. J. Legal Ethics 355, 385 (2001) ("The truth is most prosecutors have very little discretion.").


\textsuperscript{203} See, e.g., Davis, supra note 199, at 17 ("Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases.");
prosecute all lawbreakers equally; they can make judgments that take into account equity notions and the possibility of mercy in individual cases.\textsuperscript{204} Likewise, federal prosecutors have exclusive authority to authorize\textsuperscript{205} or otherwise arrange for\textsuperscript{206} departures from rigid sentencing guidelines.\textsuperscript{207} This enables prosecutors not only to

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\item\textsuperscript{204} WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.1(d), at 958 (3d ed. 2000) (discussing the function of prosecutorial discretion in charging and plea bargaining of muting the "formal rigidities of the jury trial"); Griffin, supra note 202, at 264-65 (discussing the role of prosecutors in individualizing justice); Lezak & Leonard, supra note 199, at 45 (discussing the role of prosecutorial discretion in counteracting potential harsh sentences and providing "individualization in the administration of justice"); William C. Louthan, The Politics of Discretionary Justice Among Criminal Justice Agencies, in CARL F. PINKELE & WILLIAM C. LOUTHAN, DISCRETION, JUSTICE, AND DEMOCRACY: A PUBLIC POLICY PERSPECTIVE 13, 16 (1985) (noting that "there are considerations unique to a given defendant that may legitimate a decision not to prosecute"); Zacharias, Justice in Plea Bargaining, supra note 65, at 1136; \textit{id.} at 1136 nn.39-40 (providing authorities and discussing the ability of plea bargaining prosecutors to "take equitable factors into account . . . that simultaneously encompass guilt and sentencing issues" and "limit the effects of rigid legislation").
\item\textsuperscript{205} See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a) (2001) ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."); see also 18 U.S.C. § 3553(e) (1994) (authorizing federal prosecutors to move for a departure from statutory mandatory minimum sentences under the U.S. Sentencing Guidelines).
\item Federal prosecutors may help defendants deal with rigid sentencing guidelines in many ways in addition to filing substantial assistance motions. They may, for example, forebear from charging the defendant fully or may dismiss charges that would call for stricter sentences. They can also withhold factual information from a court that would require a higher guideline sentence. See, e.g., Julie Gyurci, Note, Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard, 78 MINN. L. REV. 1253, 1265 n.62 (1994) ("Prosecutors circumvent the Sentencing Guidelines by engaging in bargaining over facts (changing the amount or nature of the drug), Guidelines-factor bargaining (ignoring or reducing the individual's role in the crime), limiting proof (limiting the evidence to be considered in prosecuting a case), bringing less severe alternative charges, and using substantial assistance motions improperly.").
\item See, e.g., Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. CHI. L. REV. 901, 926 n.87 (1991) (arguing that the U.S. Sentencing Guidelines have shifted the locus of discretion from the judges to the prosecutors); Ilene H. Nagel & Stephen
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introduce equitable considerations but also to manage federal law enforcement resources. To the extent federal court ethics regulation interferes with prosecutors' capacity to temper undifferentiated laws—for example, by setting requirements for prosecutorial charging decisions—the regulation may serve one valid function (i.e., controlling erroneous prosecutorial decisions) while undermining another (i.e., the function of smoothing rough edges in the terms of law).

In some areas of criminal law, we assign federal prosecutors largely unfettered discretion in part because prosecutors, as a group, understand the requirements of law enforcement better than other participants in the system—including legislatures, courts, and the police. The decisionmaking superiority of prosecutors derives from several sources. Prosecutors are at least to some extent involved in every stage of criminal prosecutions. They must understand the underlying legislation in order to enforce it, participate in investigations, appear in court, and implement (or reconcile) conflicts between law enforcement decisions and public opinion. As a

J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 539, 548 (1992) (explaining that Assistant U.S. Attorneys regularly drop excess robbery counts in return for pleas and reduce drug counts down to telephone counts); Elizabeth A. Parsons, *Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines*, 29 Val. U. L. Rev. 417, 422 (1994) ("Under the new system, a prosecutor [can] easily influence sentence lengths by increasing or decreasing the number of counts either in an initial charging decision or a plea agreement."); William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guardsing the Hen House?*, 97 W. Va. L. Rev. 373, 383, 390 (1995) ("Prosecutors can now determine what the sentence will be or what they want it to be prior to indictment: prosecutors know what specific facts will increase sentences and which ones will decrease sentences; they know that they can criminally charge the best or most minimal portion of their case and nonetheless gain the benefit of the weak or biggest part of their case through sentencing proceedings. . . . Prosecutors [also] have almost unlimited discretion to make a [substantial assistance] motion and thereby alter the sentence."); David Yellen, *Just Deserts and Lenient Prosecutors: The Flawed Case for Real-Offense Sentencing*, 91 Nw. U. L. Rev. 1434, 1438-39 (1997) ("Prosecutors have a variety of ways to reward favored defendants. These include charging offenses with low statutory maximums and filing substantial assistance motions.").

Thus, for example, prosecutors can obtain benefits for defendants who, while guilty, have cooperated with the government. See, e.g., James B. Burns et al., *We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution)*, 91 Nw. U. L. Rev. 1317, 1326 (1997) (noting the prosecutor's "role as the gatekeeper in determining whether a defendant has cooperated in a substantial way with the government").

Thus, for example, prosecutors control charging, plea bargaining, and making deals for witness immunity. See, e.g., United States v. Ford, 99 U.S. 594, 603 (1878) ("Of all others, the prosecutor is best qualified to determine [whether to offer immunity], as he alone is supposed to know what other evidence can be adduced to prove the criminal charge."); Timothy Hollis, *An Offer You Can't Refuse? United States v. Singleton and the Effects of Witness/Prosecutorial Agreements*, 9 B.U. Pub. Int. L.J. 433, 440 (2000) (noting that the prosecutor is "seen to be the party with the best understanding of the specific factors of the case").
consequence, prosecutors arguably have the broadest overview of the criminal justice system and should play some role in reconciling the perspectives of the other actors.

In addition to prosecutors' broad-based experience, prosecutors have particular expertise that other actors may not. Only they, for example, can fully understand what transpires in the grand jury because only they, among the participants in the system, appear before the grand jury on a regular basis. Unlike judges and legal adversaries who may desire to regulate them, prosecutors are the only persons present in the courtroom with direct knowledge about interrogation techniques—about what works, about how suspects and witnesses respond, and about how police actually misbehave.

Perhaps most importantly, federal prosecutors have unique access to information relevant to how prosecutors should operate. They can judge prosecutorial and other law enforcement resources in a way that may inform the decision, for example, of which suspects to pursue and which suspects should receive lenient treatment. A prosecutorial decision in an individual case may be part of a policy decision governing a whole category of cases or a series of linked prosecutions. Judicial probing or regulation, for example, of a prosecutor's motivations often assumes superior judgment by the court that does not really exist. Judicial ethics regulation may force prosecutors to choose between revealing pertinent information and preserving a prosecutorial policy, or may directly undermine a valid policy by bringing it to public attention.

Society may accord prosecutors a measure of independence for reasons other than their superior experience, expertise, or knowledge. In some circumstances, we simply want some federal institution to decide a particular issue and want to insulate the de-

210. It may, for example, represent a general policy decision regarding thresholds for prosecution that maximize deterrence, such as the minimum amount of drugs in the possession of a suspect that will prompt a prosecution for narcotics distribution.

211. Thus, a prosecutor's decisionmaking with respect to a particular defendant may be colored by the effect of the prosecution on the cases of other, more culpable defendants.

212. Prosecutors may, for example, wish to maintain secrecy with respect to ongoing undercover investigations or the government's interest, or lack of interest, in pursuing other potential wrongdoers.

213. To preserve resources and maximize deterrence, the government may maintain guidelines regarding which cases to prosecute. For example, a principle that possessors of a fixed, small amount of narcotics (or less) will be allowed to plead to a misdemeanor is not intended to suggest approval of limited drug possession. Likewise, a decision not to prosecute violations of environmental regulations that fit within "tolerance limits" is not designed to change the regulatory prohibition itself. However, publication of these policies will serve to advise drug users and environmental polluters that they can avoid sanction by limiting their drug possession or pollution to amounts below the threshold.
cision from processes that give rise to needless litigation, unnecessary administrative review, or politics. Thus, for example, Congress grants prosecutors unique power to decide which cooperating witnesses deserve a "downward departure" from the sentencing guidelines.\textsuperscript{214} Congress probably does so not because prosecutorial decisions on these issues are necessarily better than decisions by the police or informed judges,\textsuperscript{215} but rather because Congress recognizes that any plea concession for cooperation is a matter of practical necessity rather than a matter of justice.\textsuperscript{216} Prosecutors are in as good a position as any of the other actors to evaluate the practicalities of any particular case.\textsuperscript{217}

\textbf{B. Reasons for Prosecutorial Independence Stemming from the Legal Doctrines}

Thus far, we have considered only the reasons, in general, for according prosecutors independence. As we have noted, however, legal doctrines such as federal preemption and separation of powers provide independence from regulation by particular regulators or with respect to particular types of regulation. The rationales under-

\textsuperscript{214} See, e.g., Cynthia Kwei Yung Lee, \textit{Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines}, 42 UCLA L. REV. 105, 112 (1994) ("The effect of the government motion requirement is to give the prosecutor unilateral authority to block a downward departure for substantial assistance."); Powell & Cimino, supra note 207, at 391 (discussing the goals and effects of the prosecutorial authority); Ellen Yaroshefsky, \textit{Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment}, 68 FORDHAM L. REV. 917, 927 (1999) ("The sentencing guidelines vest the prosecutor with complete discretion as to whether the government will seek a downward departure... "); Gyurci, supra note 206, at 1260 ("The prosecutor alone has the power to move for a substantial assistance departure; a sentencing court cannot depart on its own authority.").

\textsuperscript{215} In other words, prosecutors could, at sentencing, simply provide judges the information they need to decide whether a downward departure is warranted. See Lee, supra note 214, at 157-58, 160-70 (arguing that judges are more neutral and that, therefore, judges should be empowered to act, with prosecutors making nonbinding recommendations).

\textsuperscript{216} See, e.g., United States v. LaGuardia, 902 F.2d 1010, 1015 (1st Cir. 1990) (noting that a prosecutor's power under the U.S. Sentencing Guidelines arises from his ability to assess accurately the importance and degree of the defendant's cooperation); United States v. Lewis, 896 F.2d 246, 249 (7th Cir. 1990) (pointing out that "the prosecutor knows best whether the defendant's assistance possibly merits a lower sentence"); Lee, supra note 214, at 156-57 (noting that the decision to grant a downward departure is largely a matter of negotiation relating to practical, administrative concerns of the prosecutor's office); Galin, supra note 57, at 1252-53 ("It is clear from the wording of section 5K1.1 that the primary purpose of the section is to induce cooperation by offering reward. Not to be overlooked, however, is the benefit to the government in obtaining guilty pleas.").

\textsuperscript{217} Of course, prosecutors may be biased in their decisionmaking and office pressures may lead them to implement the power differently, and perhaps less equitably, than would judges or other alternative decisionmakers. Cf. Gyurci, supra note 206, at 1265 (discussing instances of prosecutorial bad faith in filings of substantial assistance motions).
lying these doctrines provide valuable insights on the issue of appropriate federal court ethics regulation of prosecutors.

1. Federalism and Preemption

The putative power of the DOJ, under some circumstances, to preempt state regulation of federal prosecutors has three normative justifications. First, state and federal interests in regulating prosecutors may differ for several reasons. Although both the federal and state governments wish to enforce criminal laws, the state often does not agree with the federal conception of what is criminal. State laws tend to be narrower in scope. Sometimes, federal crimes even target the states themselves or activity that states deem permissible. At a minimum, any one state will be less concerned than the federal government about protecting federal prosecutors' abilities to investigate and prosecute crime that occurs outside the state's boundaries.

Second, states may regulate federal prosecutors for reasons most of us would consider improper. State regulators sometimes wish to protect their own citizens against federal prosecutions, particularly when those citizens are respected public officials who

218. Thus, for example, the federal government has targeted state voting laws, their methods of operating correctional and mental institutions, and their failure to protect the environment. See, e.g., New York v. United States, 505 U.S. 144, 151, 187 (1992) (striking down parts of a federal statute requiring states to arrange for radioactive waste control); Rome v. United States, 446 U.S. 156, 161-67 (1980) (implementing federal statute targeting voting practices in states with a history of discriminatory voting practices); United States v. Michigan, 940 F.2d 143, 158 (6th Cir. 1991) (reversing in part a decision in a suit brought by the United States to improve conditions in the state's prison system); United States v. Frazer, 317 F. Supp. 1079, 1079-80 (M.D. Ala. 1970) (involving suit by United States to enforce federal requirement that state personnel administering federally financed institutions be employed on a nondiscriminatory basis). See generally Robert Plotkin, Reagan Civil Rights: The First Twenty Months—A Report by the Washington Council of Lawyers, 1 HUM. RTS. ANN. 99 (1983) (discussing efforts by DOJ to target state violations of federal law through institutional, voting rights, and civil rights litigation targeting state officials and state institutions).

claim to be falsely accused.\textsuperscript{220} Politics may come into play, in the sense that state regulators perceive federal prosecutions to be the work of outsiders or carpetbaggers.\textsuperscript{221} At the level of deepest corruption, some states' regulators may be captured by the criminal element itself.

Finally, there is the issue of information. Popular literature has highlighted the common antagonism between state police officers and the Federal Bureau of Investigation—and the common assumption that federal law enforcement officials ultimately have the final say on issues relating to matters within their purview. The image of federal superiority reflects a notion that federal law enforcement personnel have a broader understanding of, and access to greater resources to deal with, federal crime. Arguably, the same holds true for the federal prosecution corps.

So what do these observations suggest for federal courts considering regulation of federal prosecutorial ethics? Some of the rationales for precluding state regulation under the preemption doctrine are equally applicable to federal judicial ethics regulation, while some are not. The argument that state regulators have different substantive interests than the federal government cannot support a similar argument with respect to federal judicial regulators. Nor is there a reason to mistrust the motives of federal judges regulating federal prosecutors more than the motives of federal prosecutors regulating themselves. On the other hand, federal judges should recognize that they may have similar information constraints as state regulators. Those constraints under some circumstances may justify allowing prosecutors to self-regulate.

\textsuperscript{220} See, e.g., Cooper v. Aaron, 358 U.S. 1, 8-11 (1958) (involving efforts by Arkansas governor to interfere with federally ordered school desegregation); Boske v. Comingore, 177 U.S. 459, 467-70 (1900) (involving effort by Kentucky court to interfere with IRS action against Kentucky citizens). This protectionism may sometimes be evident even with respect to federal legislation. For example, the recent McDade Amendment was sponsored primarily by a congressman who believed that he himself had been targeted improperly by a federal investigation. See Zacharias & Green, supra note 6, at 211-12 (discussing the evolution of the McDade Amendment).

\textsuperscript{221} Thus, for example, during the Reconstruction period, the former Confederate states chafed so much against federal intervention in the South that even some state laws needed to be enforced by federal military prosecutions, which the local citizens in turn resisted. See, e.g., 1 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, at 560-79 (1971) (discussing the events leading up to Ex Parte Yerger, 75 U.S. (8 Wall.) 85 (1868), which involved the murder of a federal officer appointed to act as mayor of Jackson, Mississippi)). Similarly, in the civil rights period of the 1950s and 1960s, southern states resisted attempts by the DOJ to enforce school integration, voting laws, and civil rights statutes. Cf. Faubus v. United States, 254 F.2d 797, 803-06 (8th Cir. 1958) (enjoining Arkansas governor from interfering with school integration ordered by a federal district court).
One other important lesson is evident. The analysis of pre-emption suggests that the reasons for preferring self-regulation over state regulation do not consist of an artificial construct of state versus federal power. Simply changing the situation to one in which a federal authority—namely, the federal court—imposes the regulation does not obviate the underlying concerns. Thus, federal courts ought not just adopt state codes on the assumption that their substance is consistent with federal interests or that the state rules are properly motivated. If a federal court wishes to adopt the state regulation for practical reasons, the preemption analysis suggests that the court should first make an independent assessment of the state regulation’s substance and purpose.

2. Separation of Powers

To the extent the Constitution prevents some federal judicial regulation of the executive branch, we must ask why. Three basic reasons are evident. First, again, the executive branch may have superior knowledge or expertise in particular areas. Second, an overinclusive system of checks and balances can become cumbersome; in other words, too much interference in executive functions can interfere with the executive branch’s ability to complete its work. Finally, the separation of powers doctrine at some level prevents courts from departing, or appearing to depart, from their core judicial functions and entering the arena of politics. The more courts claim authority to oversee individual judgments by political officers, the more they can be seen to be imposing their own political views.

What does this suggest for federal judicial regulation of prosecutorial ethics? Perhaps the primary lesson is that some methods of judicial regulation raise more of the above concerns than others. Even when authorized by Congress to intervene in individual cases in which they sense prosecutorial bad faith, as under the Hyde Amendment, courts risk acting politically when they act on an ad hoc basis and according to vague standards or standards

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222. See supra Part II.A.2.
223. This conclusion is not inconsistent with the presumption that federal courts accept state regulation as a baseline. Our position is that when a particular provision is contested, or when a court wishes to adopt it for efficiency reasons, the presumption remains valid. However, the court should make an independent evaluation of the regulation’s justifications to make sure that they are consistent with federal interests and not self-serving on the part of the state.
that focus on prosecutorial motives. In contrast, the adoption of rules or the implementation of fixed constitutional standards ordinarily seems less directed at particular prosecutors and investigations with which a court simply disagrees.

Moreover, rules that set standards or identify criteria for prosecutors to implement in determining their own conduct are less likely to interfere with law enforcement functions. The risk that a prosecution will be adversely affected by a subsequent judicial ruling or that a prosecutor may be punished personally is more likely to chill aggressive prosecutorial behavior than is judicial advice on how the prosecutor should proceed.

3. Limits on Supervisory and Inherent Authority

Perhaps the most complex legal issues surrounding federal judicial regulation of prosecutors involve the extent of federal courts' inherent authority to protect their processes and the extent of their supervisory authority over participants in the criminal justice system. Courts and commentators differ substantially on the breadth of these judicial powers, but they agree on one thing: the powers are limited. Federal courts are courts of specific jurisdiction. At best, they have circumscribed authority to adopt a federal common law.

This consensus reflects a basic assumption that the Framers of the Constitution and the authors of the federal Judiciary Acts since 1789 envisioned federal judges as having limited expertise.

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224. It is perhaps for this reason that, in applying the Hyde Amendment, the courts have set a high threshold for obtaining a fee award. E.g., United States v. Knott, 256 F.3d 20, 29 (1st Cir. 2001) (holding that a defendant must show that the prosecution was unfounded and that circumstances objectively demonstrate the prosecutor's malice or intent to harass or annoy); United States v. Truesdale, 211 F.3d 898, 908-09 (5th Cir. 2000); United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir. 1999); United States v. Pritt, 77 F. Supp. 2d 743, 748 (S.D. W. Va. 1999), mandamus denied, 213 F.3d 632 (4th Cir. 2000); United States v. Gardner, 23 F. Supp. 2d 1283, 1295-96 (N.D. Okla. 1998); United States v. Troisi, 13 F. Supp. 2d 595, 597 (N.D. W. Va. 1998).

225. Cf. Clarke, supra note 78, at 16 ("While the Hyde Amendment has further opened up the internal workings of prosecutors to scrutiny under some circumstances, this legislation has not brought about a dramatic change.").

226. See supra notes 95, 120 and accompanying text.

227. Congress set the framework for federal jurisdiction in the Judiciary Act of 1789, which has since been amended and supplemented on numerous occasions. E.g., Judiciary Act of 1875, 18 Stat. 470; Judiciary Act of 1789, 1 Stat. 73, 84; 28 U.S.C. §§ 1251, 1331 (1994) (setting original jurisdiction of the Supreme Court and lower federal courts); see also Tribe, supra note 89, at 270-79 (describing congressional supervision of federal court jurisdiction); Paul M. Bator, Congressional Power over the Jurisdiction of the Federal Courts, 27 VILL. L. REV. 1030, 1030-31 (1982) (arguing that Congress has virtually unlimited power to curtail federal court jurisdiction); Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83
and limited capacity for overseeing federal litigation generally and the criminal justice system in particular. In imposing limitations on lower courts’ authority to supervise the criminal justice system, the Supreme Court has anticipated that some business of federal prosecutors and other law enforcement agents should be left to the executive and legislative branches. The dividing line for what issues are reserved, and under what circumstances, of course, is difficult to draw.

The complexities of the legal issues, however, suggest one practical consideration for federal courts engaged in the process of deciding whether to regulate. Any substantial regulation of prosecutorial activity, particularly activity which does not occur in court or directly affect the manner in which the merits of litigation will be presented in court, may become subject to a legal claim that the court is acting ultra vires. 228 Adoption of such regulation may divert both the prosecutors and the court from focusing on the substance of prosecutions, 229 even when the DOJ does not disagree substantially with the goals the court is seeking to implement by regulating. 230 As a practical matter, the adoption of such regulation proba-

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228. Thus, for example, in United States v. Williams, 504 U.S. 36 (1992), the U.S. Supreme Court struck down a district court’s decision to require prosecutors to submit exculpatory evidence to the grand jury. The decision arguably is limited to district court activities that the Supreme Court perceives to be invasive of grand jury independence. Id. at 49 (referring to a “tradition of independence” that “presupposes an investigative body ‘acting independently of either prosecuting attorney or judge’ ” (citation omitted)). However, some commentators have interpreted the Williams decision as fundamentally limiting district court power to regulate out-of-court activities of prosecutors. E.g., Little, supra note 124, at 406, 409-10.

229. Thus, for example, when the ABA sought to apply rules against subpoenaing defense attorneys and communicating with represented persons to federal prosecutors, the result was a raging debate concerning the power of state and federal rulemakers to regulate federal prosecutors and the power of federal prosecutors to preempt such regulation, rather than about the specific content of the rules. See Zacharias, supra note 1, at 429 n.1, 456-61 (discussing the history of the controversy and the debate between the ABA and DOJ).

230. Ethical Standard for Attorneys for the Government, 28 C.F.R. §§ 77.1-3 (2001) (applying most state ethics provisions to DOJ attorneys); Proposed Rule on Communications with Represented Persons, 59 Fed. Reg. 10,086, 10,088 (Mar. 3, 1994) (“[I]n light of the fact that all 50 states and the District of Columbia have adopted some form of a prohibition on contacts with represented parties, and in view of the long history of those rules, the Department believes that its attorneys should adhere to the principles underlying those rules to the maximum extent
bly also will give rise to satellite litigation by defendants seeking to use what may be prophylactic rules as a tool for obtaining acquittals.\(^{231}\)

**C. The Relationship Between Prosecutorial Independence, Self-regulation, and Self-enforcement**

Implicit in any deference to prosecutorial decisionmaking is the notion that, at least sometimes, we can trust prosecutors to behave ethically. We get this notion from two sources. First, as government officials, we hope and expect that prosecutors will serve the government's interests, which in the law enforcement context include "justice." Second, we know that lawyers who choose careers in law enforcement rather than the more lucrative private sector often make that choice because of a desire to serve the public. Although we may not always trust the balance individual prosecutors strike in individual cases, we do have some confidence in their general motivations.\(^{232}\) Thus, when the professional code drafters suggest that prosecutors must "serve justice,"\(^{233}\) they express an intuitive sense that prosecutors are more likely than financially motivated lawyers to take the directive to heart.

Perhaps we have no choice in this regard. The absence of client direction and economic incentives means that prosecutors make many more unfettered decisions than do private attorneys. However much regulation we impose, we depend on prosecutors to implement ethics standards fairly and to behave professionally with respect to matters the standards do not address. However much (or little) we possible. Therefore, even though the Department has the authority to exempt its attorneys from the reach of these rules, the Department has decided not to implement a wholesale exemption.\(^{231}\).

231. Thus, defendants may use the alleged violations of "ethical standards" governing such things as disclosure of evidence, contacts with represented persons, or subpoenaeing of attorneys that go beyond constitutional requirements to seek the exclusion of otherwise valid evidence or even stronger judicial sanctions. *See, e.g.*, United States v. Hammad, 858 F.2d 834 (2d Cir. 1988) (dismissing for pre-indictment contacts with represented party that would not be prohibited by the Constitution); *see also* Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of “Ethical Rules” Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 671 (1996) (arguing that "formalization of ethical standards . . . can transform what was a defensive response to calls for increased regulation of lawyer conduct into an offensive weapon employed by members of the private bar against elements of the national government staffed by lawyers").

232. *See, e.g.*, Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 310 (2001) (offering the example of a prosecutor's sense of obligation to discover truth, arguing that prosecutors have such an obligation and urging consequences for prosecutors' failure to satisfy the obligation); *cf. Smith*, supra note 199, at 377 (arguing that "the reality is most [prosecutors] don't [care or think about their competing duties]").

233. *See supra* note 65 and accompanying text.
enforce professional regulation, we have to acknowledge that courts and disciplinary agencies never will become familiar with most activities in which prosecutors engage. We inevitably rely heavily on prosecutorial self-regulation and self-enforcement.

One danger of federal judicial ethics regulation—or at least of overregulation—is that it may undermine federal prosecutorial self-regulation. Currently, federal prosecutors perceive themselves to be largely independent. This has practical and psychological effects. First, the meagerness of existing regulation makes clear to federal prosecutors that they are in primary control of their own behavior. This provides an impetus to fill the void, both formally through administrative guidelines and enforcement and informally through individual efforts to behave professionally. Second, rightly or wrongly, the perception of independence contributes to federal prosecutors' sense of self-worth. Indeed, one of the common reactions of federal prosecutors to recent efforts to regulate is that regulation is not necessary because federal prosecutors care about ethics issues and do not misbehave. This sense of moral superiority, or capacity, may coincide with an impulse to self-regulate.

To the extent federal courts regulate prosecutorial behavior heavily, they cannot help but change these perceptions, potentially with serious effects on federal prosecutors' instincts. Prosecutors may no longer perceive the need to fill a regulatory void. Accordingly, they may come to believe that obeying existing regulation is sufficient to fulfill their professional obligations. Similarly, the loss of deference may well change their perceptions of themselves and mute any impulse to set standards for their own behavior that exceed the requirements of the formal rules.

234. See Zacharias, supra note 23, at 755 (discussing the rarity of professional discipline of prosecutors).
235. See supra note 196 and accompanying text.
236. See Green, supra note 59, at 76-77 (discussing Department of Justice Manual, which contains guidelines for federal prosecutors' work); id. at 84-87 (discussing internal disciplinary enforcement by DOJ's Office of Professional Responsibility).
237. In order to avoid embarrassing individual prosecutors who have made such claims to the authors, this Article will not cite to their statements. Suffice it to say, at least some federal prosecutors have a sincere (but unsubstantiated) belief in the ethical rigor with which federal prosecutors govern themselves. Cf. Zacharias, supra note 23, at 756-57 n.119 (“Arguably, elite prosecutors' offices, like elite law firms, are able to hire the 'best' lawyers who may be either 'more ethical' or more able to avoid ethical violations.”).
238. See Zacharias & Green, supra note 6, at 227 (discussing prosecutors' inclination to set higher than normal professional standards for themselves).
The above discussion suggests that there sometimes are good reasons for honoring prosecutorial independence, but that some of these reasons apply only with respect to state regulators or with respect to fact-sensitive situations. The primary objections to well-reasoned federal court ethics regulation relate mostly to the limited legal jurisdiction of the courts or to the effects of case-by-case intervention on prosecutors' effectiveness and incentives. Although federal courts need to be mindful of the effects of judicial intervention and sometimes will need to defer to prosecutorial self-regulation, the arguments for independence do not seem to justify any across-the-board rule forbidding judicial intervention.

Congress might learn several lessons from our analysis however. The first is that laws, such as the Hyde Amendment,\footnote{18 U.S.C. § 3006A note (Supp. V 1999) (authorizing federal courts to award attorneys' fees to criminal defendants who have been targeted by the government in bad faith).} that encourage ad hoc, case-by-case supervision of prosecutors by federal judges may have perverse effects. They may undermine self-regulation and encourage prosecutors to see federal judges regulating ethics as their adversaries. They also risk exposing federal courts to the charge of engaging in political decisionmaking.

To the extent authorizing legislation such as the Hyde Amendment incorporates vague and subjective terms,\footnote{The Amendment authorizes a federal court to "award to a prevailing party... a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." Id. (emphasis added); see United States v. True, 250 F.3d 410, 423 (6th Cir. 2001) (relying on Black's Law Dictionary in an attempt to define the meaning of the term vexatious in the Hyde Amendment); United States v. Sherburne, 249 F.3d 1121, 1127-28 (9th Cir. 2001) (overruling the district court's interpretation of the term "vexatious" in the Hyde Amendment); United States v. Adkinson, 247 F.3d 1289, 1292 (11th Cir. 2001) (finding bad faith inherent in government's conscious and explicit attempt to seek a change in controlling precedent); United States v. Bunn, 215 F.3d 430, 437 (4th Cir. 2000) (finding prosecutorial misconduct to be "mere negligence" rather than vexatious or in bad faith); United States v. Holland, 34 F. Supp. 2d 346, 360 (E.D. Va.) (defining "vexatious" as causing "agitation, annoyance, or harassment by process of law"), vacated in part by 48 F. Supp. 2d 571 (E.D. Va. 1999), aff'd, 214 F.3d 523 (4th Cir. 2000). The Amendment also requires the court to make a finding that the party seeking relief was a "prevailing party," a concept that may be difficult to define in cases in which no trial occurred. See, e.g., United States v. Pritt, 77 F. Supp. 2d 743, 747-48 (S.D. W. Va. 1999) (holding a partial acquittal insufficient to justify an award), mandamus denied, 213 F.3d 632 (4th Cir. 2000); United States v. Gardner, 23 F. Supp. 2d 1283, 1290-91 (N.D. Okla. 1998) (limiting defendant's ability to establish that he is a prevailing party in cases in which he did not obtain an acquittal on all counts).} its negative effects may increase. Allowing judicial regulation, say, of prosecutorial "bad faith" or "overzealousness" leaves prosecutors...
and judges at sea regarding the conduct that should be curtailed. This may lead to self-censorship by individual prosecutors, but not necessarily in a way that is consistent throughout the DOJ or that serves prosecutors' law enforcement functions.

Moreover, vague, subjective standards seem to encourage judicial intervention precisely with respect to those prosecutorial functions involving special prosecutorial expertise and information, such as charging and screening cases, in the execution of which society traditionally has most favored prosecutorial discretion.

Our preliminary analysis of prosecutorial independence suggests several other positive and negative conclusions for federal legislation. To the extent the argument against federal judicial regulation is based on doubts about federal court jurisdiction and on the fear that uncertainty regarding jurisdiction will give rise to satellite litigation concerning ethics regulation, Congress can eliminate those arguments. It makes sense to help federal courts and prosecutors focus on the merits of ethics regulation by expressly authorizing judicial ethics rules governing all federal prosecutorial conduct and establishing a process for their adoption.

At first glance, the McDade Amendment seems to accomplish this end. But quite apart from its ambiguities, the McDade Amendment suffers from two major failings. First, it does not support the basic ability of federal courts to set ethics standards. To the extent doubts about federal courts' inherent authority, supervisory authority, or inherent "ethics" authority prevent federal courts from adopting regulation of prosecutorial ethics or open the door to legal challenges, the McDade Amendment does nothing to alleviate those doubts. Congress therefore should pass legislation making the federal court power to adopt ethics standards clear.

Second, the McDade Amendment seems to adopt a preference for state ethics rules and applies them, with or without federal court approval, to federal prosecutors. While we have agreed that state rules typically should be accepted presumptively, our analysis also has suggested that state and federal regulatory ethics sometimes differ. Accordingly, we have argued that, when the appropriateness of state rules are contested, federal courts need to evaluate the state rules independently before adopting them for the federal districts. By extension, the McDade Amendment's assumption that state rules should be honored absolutely is wrong as well.

241. See supra note 195 and accompanying text; see also Zacharias & Green, supra note 6, at 215-24 (discussing different possible interpretations of the McDade Amendment).
The conclusion to which our analysis inexorably leads is that Congress should establish a mechanism through which federal courts can evaluate state and other rules, through which federal prosecutors and other interest groups can provide input, and through which a nonbinding congressional preference for regulation by uniform rule rather than ad hoc decisionmaking can be implemented. Ultimately, this leaves the burden of determining the substance of the rules to the federal courts, but Congress can always preempt particular rules with which it disagrees. The presence of a formal rulemaking process should help make it clear to federal judges that they should implement the new regulatory scheme with care. The courts must give weight to the very real benefits offered by prosecutorial independence and self-regulation regarding some areas of prosecutorial conduct.

V. CONSIDERATIONS FOR THE EXERCISE OF FEDERAL JUDICIAL REGULATION

Our analysis of the justifications for prosecutorial independence suggests that federal judges should not assume that they should supervise all aspects of prosecutors' conduct even supposing that Congress assigns federal courts full legal authority to do so. We probably can all agree on some basics. A federal court, for example, should not tell a prosecutor whom to investigate or whom to indict.\(^{242}\) On the other hand, the general preference for prosecutorial independence does not foreclose occasional situations that justify departure from the baseline. There are probably situations in which a court should prevent an indictment or at least should identify factors that prosecutors may not take into account—either because they are improper in a constitutional sense or because prosecutors misperceive their own role in implementing them.\(^{243}\)

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242. In the best-known case on the subject, the Court of Appeals for the Fifth Circuit disavowed this power, presumably based on its assessment that judicial involvement in bringing prosecutions would embroil courts too far in administrative and political matters. United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (upholding U.S. Attorney's refusal to prepare an indictment at request of grand jury); see also Wayte v. United States, 470 U.S. 598, 607 (1985) (ruling that "the decision to prosecute is ill-suited to judicial review" because governmental efficiency matters are outside the competence of the court); Inmates of Attica v. Rockefeller, 477 F.2d 375, 379-80 (2d Cir. 1973) (holding that court interference with a decision not to prosecute would violate the separation of powers doctrine).

243. Thus, there are constitutional prohibitions against vindictive prosecutions, ethical standards against filing charges without probable cause, and situations in which courts may dismiss cases based on prosecutorial misconduct by a prosecutor who has interpreted the obligation to do justice as requiring him to seek conviction at all cost. See, e.g., Thigpen v. Roberts, 468 U.S. 27,
The question thus becomes what kinds of judicial regulation is appropriate. We have asserted a preference for regulation by rule, as opposed to case-by-case supervision of prosecutorial activities, but when should that preference give way? Some of the considerations we have identified suggest that courts act more politically, and therefore less legitimately, when they decide on a case-by-case basis. However, case-by-case decisionmaking is more in line with the traditional practice of courts. Regulation by rule may be more invasive of prosecutorial freedom, in the sense that it prevents prosecutors from pursuing an entire category of activity, but less invasive in the sense of monitoring specific processes within the prosecutor's office.

In evaluating federal judicial regulation of prosecutors, one should be mindful of how a court's rules will, or can, be enforced. Sometimes, for example, a court may have special expertise or other reason to guide appropriate prosecutorial behavior, yet be afraid of impinging too far on executive independence. Is it plausible that the courts should set rules, yet forebear (explicitly or by habit) from enforcing them?244

These are issues we will explore in the next sections. First, we will focus on the different ways of conceptualizing prosecutors and what they do. The different conceptions may help courts develop approaches to determining when regulation is most appropriate and to considering the impact of judicial enforcement of those regulations. We then will consider the ramifications of enforcing the judicial rules and of using different forms of regulation.

27 (1984) (holding that the prosecution of respondent for manslaughter, following his invocation of his statutory right to appeal his misdemeanor convictions, was unconstitutional as a violation of due process); Blackledge v. Perry, 417 U.S. 21, 28-29 (1974) (holding that a prosecutor may not upgrade a defendant's charges vindictively, in retaliation for defendant's invocation of constitutional rights); United States v. Hogan, 712 F.2d 757 (2d Cir. 1983) (dismissing defendant's grand jury indictments because of prosecutorial overreaching); United States v. Serubo, 604 F.2d 807, 816 (3d Cir. 1979) (asserting that a court has "the authority . . . in the exercise of its supervisory power, to order the dismissal of the indictment as a remedy for prosecutorial misconduct before the grand jury"); Dixon v. Dist. of Columbia, 394 F.2d 966, 969-70 (D.C. Cir. 1968) (using supervisory power to grant immunity from vindictive prosecution "in order to deter blatant Government misconduct"); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (granting immunity from prosecution because of government misconduct); cf. MODEL RULES, supra note 3, R. 3.8(a) (requiring prosecutor to believe there is probable cause before instituting charges).

244. Essentially, this is what the Court of Appeals for the Second Circuit achieved in United States v. Hammad, 858 F.2d 834 (2d Cir. 1988). There, the court applied a rule against communicating with represented parties that the government clearly had violated, but then found an exception for future cases that covered ordinary undercover activities not accompanied by egregious prosecutorial behavior.
One caveat should be mentioned at the outset. The considerations identified in the following pages are meant simply to inform federal courts. We are discussing ethics regulation in the abstract. It would be foolhardy to expect any such analysis to provide firm principles for regulation because each subject matter and each remedy will implicate different concerns and practical effects. Having concluded earlier that federal courts should be given broad authority to regulate federal prosecutorial ethics, we endeavor here simply to offer the courts a variety of conceptualizations and considerations they should take into account when approaching particular proposals.

A. Is Prosecutorial Independence More Important for Some Prosecutorial Roles than for Others?

Federal prosecutors perform at least three different types of functions. The professional codes, in addition to setting an overall generic guideline for prosecutorial performance, traditionally have regulated prosecutors with respect to each function. Initially, prosecutors are investigators of crime, or collaborators of the investigators. The codes tell them whom they may contact and how. Prosecutors next serve an adjudicative function in screening cases, deciding on immunity for witnesses, charging, plea bargaining, and sentencing. The codes instruct prosecutors regarding the standards

245. The codes typically caution that prosecutors are charged with an obligation to serve "justice." See, e.g., MODEL RULES, supra note 3, R. 3.8 cmt. (characterizing prosecutors as "minister[s] of justice"); MODEL CODE, supra note 32, EC 7-13 (stating that government lawyers must "seek justice"); Green, supra note 23 (analyzing arguments why prosecutors should serve justice); cf. Steven K. Berenson, Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest, 41 B.C. L. REV. 789 (2000) (arguing for a broad interpretation of civil government lawyers' obligation to serve justice). See generally Zacharias, Justice in Plea Bargaining, supra note 65, at 1124 (analyzing the justice requirement in plea context); Zacharias, Structuring the Ethics, supra note 65, at 58 (analyzing the "justice" requirement in the trial context).

246. See, e.g., MODEL RULES, supra note 3, R. 3.8(f) (limiting subpoenas directed at attorneys); id. R. 4.2 (regulating communications with represented persons).

247. See, e.g., id. R. 3.8(b) (requiring prosecutors to help defendants obtain counsel); id. R. 3.8(c) (prohibiting prosecutors from seeking certain waivers from unrepresented persons); id. R. 3.8(e) (requiring prosecutors to supervise extrajudicial statements by law enforcement personnel); id. R. 4.3 (regulating communications with unrepresented persons).
for prosecutions. Third, the codes impose a host of constraints on prosecutors executing the functions of federal litigators.

There are, however, several ways one might conceptualize prosecutorial roles other than according to the functions prosecutors perform. One conceptual approach follows from the legal doctrines already discussed. Prosecutors can be viewed simply as ordinary executive officers, who sometimes are subject to federal judicial regulation but sometimes deserve deference from the courts. Likewise, prosecutors are federal officers, a status which has legal and normative ramifications for state ethics regulation and federal court adoptions of state regulation.

Alternatively, one could categorize prosecutorial roles according to the stage of litigation at which prosecutors' activities occur. For example, most observers would concede that federal prosecutors should be subject to some federal court regulation while appearing in court. Any other conclusion would enable federal prosecutors to defy and undermine the judicial process. What, however, of prosecutorial activities that occur at the prelitigation, investigative stage? The U.S. Supreme Court has, at the very least, distinguished the ability of federal courts to regulate prosecutorial behavior before the grand jury from the courts' authority to regulate in-court activities. At the other extreme, prosecutors make prosecutorial decisions even after cases are complete—as when they consider requests to reopen investigations, to consider new evidence, or to take a position in a pardon or habeas corpus proceeding. Should the judicial power to regulate federal prosecutors extend even to these semi-lawyerly, semi-adjudicative activities that do not touch upon any matter that is the subject of current litigation and which may never become subject to federal court jurisdiction?

Finally, one might conceptualize federal prosecutorial roles in terms of the interests prosecutors serve. In a sense, that is what the ethics codes do in encouraging prosecutors to "serve justice"

248. See, e.g., id. R. 3.8(a) (requiring a prosecutor to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause").

249. See, e.g., id. R. 3.3 (regulating candor to the tribunal); id. R. 3.8(d) (requiring prosecutors to disclose particular information to the defense); id. R. 3.8(g) (regulating extrajudicial statements).

250. Hence, at least a court's inherent authority to protect its own processes must apply. See supra note 94 and accompanying text.

Arguably, however, deference to prosecutorial decisions might vary depending on whether they are, at any given stage of litigation, serving the interests of society (e.g., in investigating and screening cases), the interests of the victim (e.g., in taking a position in sentencing), or the interests of particular government agencies (e.g., in protecting government secrets).

The question therefore arises whether any of these conceptualizations facilitate the decision of when federal courts should emphasize prosecutorial independence. We would be overly optimistic to expect bright-line distinctions to emerge, because the conceptualizations themselves encompass definitional generalizations that break down in some cases. Nevertheless, the conceptualizations do help identify circumstances in which federal court intervention seems most appropriate and when the justifications for federal judicial regulation seem attenuated.

1. Regulating with a View to Prosecutors’ Functional Roles

   a. The Federal Prosecutor as Investigator

   Among federal prosecutors’ functional roles, the investigative function is at once the most controversial and most confusing area of potential ethics regulation. This is the primary area in which the DOJ has bridled—for example, when states and federal courts have attempted to impose rules regarding contacts with represented persons and subpoenaing of attorneys to appear before grand juries.

   To highlight the confusion, consider the issue of prosecutors’ misrepresentations to criminal suspects, defendants, and potential witnesses. State ethics codes typically forbid lawyers, including federal prosecutors, to make misrepresentations of “material facts”

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252. See supra note 65 and accompanying text. One of the bases of the generalized “duty to do justice” obligation is that prosecutors serve multiple constituencies whose interests the prosecutor must balance in pursuing prosecutorial goals. Zacharias, Structuring the Ethics, supra note 65, at 57.

253. Of course, this approach will necessarily be limited by the reality that prosecutors, at any given time, will usually be balancing the interests of multiple constituencies, not just pursuing the interests of one.

254. For example, prosecutors sometime act as investigators, adjudicators, and litigators at the same time and must often serve multiple interests simultaneously. The distinction between in-court and out-of-court functions also is not always clear.

255. See Zacharias, supra note 4, at 924-25 (detailing the response of DOJ to the adoption of Model Rule 3.8(f)).

256. See Zacharias, supra note 1, at 429 n.1 (describing the response of DOJ to the adoption of Model Rule 4.2).
to third parties.\textsuperscript{257} In contrast, police investigators are expected and allowed to engage in trickery and misrepresentations to further law enforcement, provided they do not overstep constitutional bounds.\textsuperscript{258} How should federal courts regulate the conduct of federal prosecutors who collaborate with police officers in investigating crime?

At first glance, one might conclude that federal courts should hold federal prosecutors, when overseeing investigators, only to the same standard as DEA, FBI, and other investigative agents of the federal government. This is consistent with the prevailing judicial understanding that prosecutors may oversee undercover investigations and other investigations employing deceit.\textsuperscript{259} On the other hand, ethics rules clearly forbid lawyers from acting deceitfully themselves or \textquoteleft through the acts of another.\textquoteright \textsuperscript{260} This proscription has been applied to private lawyers who direct private investigators to act deceitfully,\textsuperscript{261} presumably because state regulators assume that misrepresentations by nonlegal personnel acting under a lawyer's supervision are somehow worse than misrepresentations by nonlegal personnel acting at a client's behest. Similar reasoning arguably applies to prosecutors. Even if this reasoning does not by itself require application of the rules to prosecutors, allowing lawyers for the prosecution to engage in behavior proscribed for private lawyers, including, presumably, defense lawyers, seems to tilt the playing field in criminal litigation.

In light of the conflicting principles, it makes some sense to consider what is at stake in regulating prosecutorial investigative behavior. The controversy over the proposed rules against communication with represented persons suggests that the investigative role is highly significant to the DOJ. Why?

\textsuperscript{257} E.g., \textit{MODEL RULES}, supra note 3, R. 4.1.
\textsuperscript{258} See, e.g., \textit{Moran v. Burbine}, 475 U.S. 412, 422 (1986) (upholding police withholding of information from suspect on the basis that \textquoteleft we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights\textquoteright); \textit{Miller v. Fenton}, 796 F.2d 598, 605 (3d Cir. 1986) (noting that psychological trickery \textquoteleft may play a part in the suspect's decision to confess, but as long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary\textquoteright); \textit{State v. McKnight}, 243 A.2d 240, 250 (N.J. 1968) (\textquoteleft The Constitution is not at all offended when a guilty man stubs his toe.\textquoteright); \textit{see also} Fred E. Inbau, \textit{Police Interrogation—A Practical Necessity}, 52 J. CRIM. L. CRIMINOLOGY & POL. SCI. 16, 20 (1962) (arguing that \textquoteleft the only tactics or techniques that [should] be forbidden are those which are apt to make an innocent person confess\textquoteright). For a discussion of when trickery crosses the line and becomes coercive, see \textit{YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE} 610-13 (9th ed. 1999); \textit{id.} (providing authorities).
\textsuperscript{259} See \textit{Zacharias & Green}, supra note 6, at 231 & nn.133-34.
\textsuperscript{260} \textit{MODEL RULES}, supra note 3, R. 8.4(a) & (c).
\textsuperscript{261} See \textit{Zacharias & Green}, supra note 6, at 231 n.132.
One reason is that federal investigations often cross state lines, potentially subjecting the DOJ and individual lawyers to ethics regulation by multiple states and perhaps even multiple federal courts. Another is that defendants in large-scale prosecutions are more likely than state defendants to be poised to take advantage of litigation benefits offered by ethics regulation; in the "communications-with-represented-persons" context, white collar and organized crime federal defendants are more likely than street criminals in the state system to retain counsel simply in order to claim "represented status" and thereby fend off undercover investigations.

Perhaps most significantly, federal prosecutors are involved in investigations more frequently than state prosecutors. Federal investigations tend to be planned and supervised, rather than reactive to particular criminal activity. In the DOJ's view, the modern increase in prosecutorial involvement is a good thing for everyone; it not only helps structure the potential prosecutions, but it also avoids much improper behavior by the investigating agents. Hence, the argument goes, it would be counterproductive to encourage prosecutors to avoid involvement in investigations because it serves to impose new, artificial limitations on the investigation itself. Were that to become the tradeoff, society might be better off having the investigating agents return to the former practice of handling investigative decisions on their own.

These considerations suggest that federal courts should not hesitate to impose the same constitutional and supervisory ground rules on prosecutors as the courts impose on other law enforcement personnel. There is simply no reason to insulate prosecutors with respect to conduct that courts forbid the police to engage in. Conversely, however, courts should be circumspect in limiting prosecutorial investigative independence specially.

262. Id. at 237 (discussing the unique characteristics of federal prosecutors).
263. See supra note 12 and accompanying text.
264. There is, of course, a question about whether retaining a lawyer generally is sufficient to make the client "represented in the matter" for purposes of rules like Model Rule 4.2. In cases like United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), the client who had retained a lawyer knew he was being investigated by a grand jury with respect to an offense. By retaining a lawyer to represent him in the future with respect to that offense, the client was able to satisfy the rule even though no indictment had yet been filed.
265. This, of course, is a generalization. States do investigate more than street crime and the federal government sometimes does respond to unforeseen crime (e.g., kidnaps and bank robberies).
266. See Rory K. Little, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role, 68 FORDHAM L. REV. 723, 733-38 (1999) (describing the increasing involvement of federal prosecutors in law enforcement investigations).
Moreover, when courts do regulate, they should avoid creating incentives for federal prosecutors to disavow their investigative role. Thus, for example, adopting a fixed rule that warns prosecutors to leave particular activities to investigating agents is preferable to case-by-case prohibitions adopted under a “law enforcement supervisory” rationale. Similarly, adopting a general rule but implementing haphazard exceptions—as the federal courts have done using an “authorized by law” exception to the no-contact rules and state courts have done by absolving individual prosecutors of lying to defendants—leaves the DOJ at sea in deciding how to use prosecutors in investigations. Although a flexible approach has the benefit of encouraging federal prosecutors to self-censor their activities, it sends an unfortunate message that any prosecutorial involvement in investigations is fraught with peril.

b. The Federal Prosecutor as Adjudicator

When commentators invoke the concept of prosecutorial independence or discretion, they most often are focusing on adjudicative functions that prosecutors perform—including screening, charging, and the like. Although ethics codes impose a general obligation on prosecutors to serve justice in making adjudicative decisions and sometimes codify limited constitutional standards, the codes typically envision little if any actual supervision of prosecutorial behavior. In contrast, under the recent Hyde Amendment, Congress has authorized and encouraged federal courts to be more active in supervising federal prosecutors’ bad faith or negligence in exercising some of their adjudicative functions.

As discussed above, there are a variety of justifications for the traditional deference to prosecutors exercising adjudicative functions. One is that, in an arena where defendants always have incentives to raise legal issues, we simply do not want constant re-

267. See Note, Federal Prosecutors, supra note 6, at 2091 (“One of the greatest dangers of the McDade Amendment... is that federal prosecutors may feel compelled to disassociate themselves from undercover investigations ... ”).
268. See, e.g., Hammad, 858 F.2d at 839.
270. See, e.g., MODEL RULES, supra note 3, R. 3.8(a) (setting a standard for bringing charges); id. R. 3.8(d) (codifying and expanding prosecutors’ constitutional obligation to disclose exculpatory evidence).
272. See supra note 199 and accompanying text.
view of decisions about which reasonable people could differ. To the extent the exercise of prosecutorial adjudication serves to correct harsh results of inflexible laws or judicial rules\textsuperscript{273}—for example, a “three strikes” law\textsuperscript{274} or judicial adherence to sentencing guidelines\textsuperscript{275}—we may wish to empower the prosecutorial activity behind closed doors, without suggesting to potential wrongdoers or the public that the underlying law or rule is flawed. Finally, in some respects, the prosecutors’ adjudicative decisions are made against a background of resource allocation which prosecutors simply understand better or have more information about than the courts.\textsuperscript{276}

When courts regulate prosecutors' adjudicative functions, they inevitably invite discovery into the facts and mental processes that led to a prosecutorial decision—including the facts of a particular contested case and the facts underlying prosecutorial policy. Federal courts, at a minimum, should avoid case-by-case regulation that casts light onto the types of decisions that the deference tradition seeks to protect. Thus, for example, implementation of regulation like the Hyde Amendment without at least requiring a substantial prima facie showing by a defendant claiming bad faith can have serious negative effects on prosecutors' abilities to exercise their adjudicative functions.

Rule-based regulation may have similar effects, but these depend on the extent to which the rules are enforced and the extent of discovery that enforcement requires.

c. The Federal Prosecutor as Litigator

The arguments in favor of prosecutorial independence wane once the prosecutor begins to serve as a litigator in a proceeding directly supervised by a federal court. For the most part, the prosecutors' functions are the same as those of the defense attorney and other federal litigators. The courts' expertise and interests in regu-

\textsuperscript{273} See supra note 203 and accompanying text.

\textsuperscript{274} See, e.g., CAL. PENAL CODE § 1170.12(c)(2)(A) (West Supp. 2001) (setting forth California's Three Strikes law). Thus, for example, to the extent a three strikes law mandates life imprisonment for someone convicted of three felonies, a prosecutor can show mercy by charging a misdemeanor or not charging the third crime at all.

\textsuperscript{275} See, e.g., 18 U.S.C. §§ 3551-3586, 3621-3625, 3742 (1994) (defining strict sentencing guidelines to which judges must adhere); 28 U.S.C. §§ 991-998 (1994) (prescribing factors for the Sentencing Commission to consider in establishing sentencing ranges); Nagel & Schulhofer, supra note 207, at 520 (noting the view of federal judges that the U.S. Sentencing Guidelines “transfer . . . sentencing discretion from the judge to the prosecutor”); see also Gyorci, supra note 206, at 1265 n.62 (describing ways prosecutors can ameliorate the inflexibility of the U.S. Sentencing Guidelines).

\textsuperscript{276} See supra note 210 and accompanying text.
lating are at their peak, as is their legal authority; in court, the inherent authority and the judicial authority to make rules of practice clearly come into play.

There is some basis for arguing that federal courts should be limited in the types of rules they can impose—that, say, discovery, candor to the court, and client protection rules are appropriate but that pure “ethics” rules designed to protect the image of the profession are not. But these arguments do not stem from any conceptualization of the prosecutors’ “functions” as warranting special independence or scrutiny.277

2. Regulating with a View to Prosecutors’ Institutional Roles

We have already discussed the relationship between federal judicial regulation and legal doctrines that may forbid regulation of federal prosecutors because of their federal or executive roles. An institutional conception of federal prosecutors may identify situations in which federal courts should be hesitant to regulate, even when they can legally do so.

Consider first a restriction on what federal prosecutors may say to the press—by rule, court seal, or specific gag order. And let us consider the regulation in the context of a nationally important case—the prosecution of terrorists or a former president charged with corruption in office. A prosecutor has a good argument that he is speaking to the public as a government official on behalf of the executive branch. The government has an obligation to the public to keep it informed about government processes. In regulating extra-judicial speech, a federal court therefore should consider the federal

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277. One other conceptualization is possible, the prosecutor as surrogate “client.” To the extent federal prosecutors serve a unique role in making substantive decisions as surrogate clients (i.e., on behalf of the government) while acting as litigators, the codes seem to prescribe some constraints for them as well. We do not discuss this conceptualization in the text because it is quite similar to that of “the prosecutor as adjudicator.”

Nevertheless, it is clear that some professional regulation is designed to accommodate the rights and responsibilities of lawyers and clients vis-à-vis each other. Federal prosecutors sometimes serve as both client and lawyer simultaneously—at least in the sense that the prosecutor is the federal official charged with making the substantive decisions on the client’s behalf. Thus, regulations that impose limits on attorneys for the benefit of the client—such as rules requiring the giving of information—often make little sense in the prosecutorial context even when they are technically applicable. On the other hand, a regulation that affects substantive decisions organizational clients make can interfere with the executive functions that a prosecutor is required to perform when acting as a client. See, e.g., MODEL RULES, supra note 3, R. 1.13 (requiring lawyers to take steps to assure proper decisionmaking by organizational clients under specified circumstances).
executive branch's independent interest in communicating with the public about the way the government has functioned.278

Likewise, consider a rule that requires an organizational lawyer who learns of a "violation of law that might reasonably be imputed to the organization"279 to seek redress through the organization, resign, or even reveal the information publicly. And imagine a prosecutor who learns, in the course of prosecuting a drug dealer, that CIA or DEA agents have committed illegal acts (unrelated to the prosecution) that the agencies (and even the President) want to keep secret for national security reasons. In the private context, ethics regulation might require a lawyer's fidelity to the law to trump an organization's perceived self-interest. But here, the prosecutor's organizational client itself is a representative of "the law." Should a federal court be willing to require prosecutors, like private attorneys, to take action to publicize the illegality? Or should the court defer to the prosecutor's role as an executive agent subject to executive will?

These examples do not identify any criteria for determining how federal courts should regulate federal prosecutors. But they do suggest the importance of recognizing the institutional role of federal prosecutors in deciding when to regulate. In some circumstances, that role may mandate special regulatory treatment, including a greater measure of deference.

3. Regulating with a View to the Stages of Prosecutions

In United States v. Williams,280 the U.S. Supreme Court overruled a lower court's insistence that federal prosecutors reveal exculpatory evidence to grand juries. Based on suggestive language in the Williams opinion,281 at least one former prosecutor has proposed that federal courts may regulate "in-court" but not "out-of-

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279. See, e.g., MODEL RULES, supra note 3, R. 1.13(b).
281. The Court stated:

[A]ny power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings. . . . [W]e conclude that courts have no authority to prescribe . . . a duty [to disclose exculpatory evidence to the grand jury] pursuant to their inherent supervisory authority over their own proceedings.

Id. at 50, 55.
court” behavior by federal prosecutors. This argument would define federal judicial power to regulate prosecutorial ethics according to the time, place, or stage of the prosecution at which the behavior occurs.

Let us consider the temporal distinction first. Modern federal prosecutors engage in a series of “precourt” activities, including: (1) assisting the police or other investigating agents in structuring investigations or determining how to abide by legal standards; (2) interrogating witnesses or helping arrange immunity bargains; (3) representing the government before the grand jury; and (4) determining whether and in what form cases should be docketed in federal court. Once a suspect is arraigned, prosecutors handle all aspects of the case, including discovery, trial, plea bargaining, sentencing, and appeal. Thereafter, the prosecutor may be involved in “postconviction” activities, most notably dealing with publicity matters and responding to requests for postconviction relief.

One of the problems in considering these activities temporally is that the actual functions prosecutors perform during the different seasons of prosecutions often are similar. Investigations, for example, sometimes continue during a trial, as do discussions with witnesses. Plea bargaining can occur before arraignment or even after a conviction.

The spatial in-court/out-of-court distinction falls apart for similar reasons. One cannot neatly separate a prosecutor’s in-court functions from out-of-court functions, because many trial-related activities (such as discovery) occur out of court and many nontrial-related activities (such as investigation) occur simultaneously with courtroom activity. There is a set of prosecutorial activities that the prosecutor clearly conducts under judicial supervision, including in-court appearances, discovery, and dealing with designated witnesses in a particular case, but these do not break down along either temporal or spatial lines.

Categorizing along more conceptual “stages of prosecution” lines is somewhat more appealing. Intuitively, the Court in Williams is correct in suggesting that there are some prosecutorial activities that seem more related than others to matters judges are charged with supervising. Discovery issues, for example, affect the

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282. Little, supra note 124, at 406, 409-10 (relying upon the in-court/out-of-court distinction).
283. Technically, of course, federal prosecutors deal with federal law enforcement agents (e.g., from the FBI, DEA, and other federal agencies), rather than with people we commonly think of as “the police.” We use the term “police” here to apply to all federal law enforcement investigative agents.
evidence that is presented in court and the ability of the lawyers to test the witnesses. The prosecutor's decision of whether to prosecute at all, in contrast, has little to do with issues of proof at trial.

Here again, however, there are problems of definition. Consider a prosecutor's interrogation of and bargaining with potential prosecution witnesses. On the one hand, his behavior may be relevant to whether the witness tells the truth on the stand, a matter of direct judicial concern. On the other hand, some traditional ethics regulation of communications between prosecutors and witnesses has nothing to do with these concerns—for example, rules against communication with represented parties that are designed to protect attorney-client relationships. Determining the appropriateness of the judicial regulation has little to do with the stage at which the communication occurs.

Indeed, when it makes sense to look at the stage of prosecutorial behavior, one typically is making an analysis of the function that the prosecutor is performing and evaluating whether that function implicates an issue of enough judicial concern to warrant a judicial role in regulating the behavior. In the Williams context, for example, the key to the Supreme Court's distinction probably was not based on when or where the grand jury proceeding occurred. What mattered to the Court was how the grand jury was supposed to function as an institution and what the prosecutor's and the court's respective functions were in helping the grand jury complete its tasks. Timing, place, and stage simply are too artificial as dividing lines to explain the Williams decision or to provide significant analytic benefit in determining whether federal courts should defer to prosecutorial decisionmaking.

4. Regulating with a View to the Interests Prosecutors Serve

In some sense, courts do regulate prosecutorial behavior with a view to the interests prosecutors are trying to serve. For example, when courts regulate prosecutors' use of closing arguments that suggest the prosecutors' personal opinions regarding the de-

284. E.g., Model Rules, supra note 3, R. 4.2. As described in Stephen Gillers, Regulation of Lawyers 98 (5th ed. 1998), the rules against communicating with represented persons have several purposes, most of which have less to do with assuring truthful evidence than with preserving attorney-client relationships and the adversarial process.

285. Cf. Williams, 504 U.S. at 47-48 (noting that the "grand jury is an institution separate from the courts, over whose functioning the courts do not preside" and describing the functions courts perform in their relationship with grand juries).
fendant's guilt and other forms of zealous advocacy (e.g., reliance on "victim impact statements") in closing arguments or sentencing, they regulate the emphasis that prosecutors may place on the interests of their varying constituencies. This regulation sometimes can be explained by the courts' role in making evidentiary rulings or assuring due process, but the same considerations have been used to implement ethics regulation as well.

In general, however, looking to the interests being served as a benchmark for whether courts should supervise particular prosecutorial actions may not be practical. Rarely can these interests be defined clearly. The very rationale of the requirement that prosecutors serve justice is that, at any given time, prosecutors serve the interests of multiple constituencies—including the public, victims, future victims, the criminal justice system, and defendants themselves—that they must balance at all times. Determining the balance in a particular case is precisely the type of issue about which reasonable decisionmakers may differ. It may, as a result, be precisely the type of issue that courts might want to leave to a discretionary decisionmaker without inviting review.

That is not to say that it cannot be useful for courts to consider the varying interests in developing general propositions. It may be fair for a court to conclude that a prosecutor's pursuit of one constituent's interests should be deemphasized when the prosecutor is engaged in a particular type of activity. For example, the prosecutor arguably should not be required to assist the defendant at trial except under exceptional circumstances, because the defense attorney already serves that function. In recognition of this general principle, a court might be justified in refusing to adopt case-specific standards that a defendant could use to challenge faulty prosecutorial balancing.

B. Enforcement Issues

Consider a principle that everyone, prosecutors included, would regard as sound: Prosecutors should not make prosecutorial

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286. See, e.g., Payne v. Tennessee, 501 U.S. 808, 817-21 (1991) (reviewing earlier cases overruling convictions because of prosecutors' use of victim impact statements, but finding no absolute constitutional bar to such argument); see also Zacharias, Structuring the Ethics, supra note 65, at 96-97 nn.223-27 (providing authorities).

287. E.g., MODEL RULES, supra note 3, R. 3.4 (forbidding attorneys to allude to irrelevant matters or matters of "personal opinion as to the justness of a cause").

288. See supra note 214 and accompanying text.
decisions based on personal or political self-interest. A federal court could adopt an ethics rule implementing this principle in a way that exceeds constitutional requirements. Should the court forebear for reasons relating to the potential enforcement of the rule?

One immediate difficulty with codifying the above principle is its vagueness. "Self-interest" is subject to varying interpretations; indeed, most prosecutors have a personal self-interest in doing their jobs well and in prosecuting successfully. In order to enforce any rule based on the principle, courts would need to develop standards for appropriate prosecutorial behavior on an ad hoc basis by reviewing the conduct of individual prosecutors in a series of cases involving allegedly questionable conduct.

This form of adjudication carries with it several costs. It burdens federal courts with the need to engage in fact-finding whenever criminal defendants complain of prosecutorial misconduct. As discussed earlier, one of the most important rationales for according prosecutors a measure of independence is to avoid constant review of federal prosecutorial activities in situations in which we generally trust prosecutors to act responsibly. Opening the door to litigation ordinarily is not worth the administrative burden when it is unlikely to avoid substantial injustice.

Moreover, injecting judicial review into the prosecutor's charging decisions may distract the executive and interfere with prosecutorial law enforcement functions. The only way to establish improper motivation is for a court to evaluate the entire investigation of the aggrieved defendant and to probe the decisionmaking process in the prosecutor's office. Not only would this assessment be costly and time-consuming, but it could expose internal decision-making processes that prosecutors need to keep confidential (e.g., the office's standards for when prosecutors actually will prosecute),

289. See, e.g., ABA STANDARDS, supra note 55, standard 3-1.3(d) ("A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.").

290. Thus, for example, constitutional rules may constrain a prosecutor's choice of which law violators to prosecute only insofar as "the selection [is not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Oyler v. Boyles, 368 U.S. 448, 456 (1962); accord United States v. Armstrong, 517 U.S. 456, 464-65 (1996). Likewise, the Constitution forbids only particular manifestations of prosecutorial vindictiveness in charging. See, e.g., United States v. Goodwin, 457 U.S. 368, 384 (1982) ("[A] mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule."). Nevertheless, a court faced with a pattern of prosecutorial conduct may determine that a more prohibitive ethics rule governing selective prosecution or charging is required. See generally Note, Breathing New Life into Prosecutorial Vindictiveness Doctrine, 114 HARV. L. REV. 2074, 2094-97 (2001) ("In 2001, the doctrine of prosecutorial vindictiveness needs judicial reinforcement.").
facts regarding ongoing investigations, and nondisclosable evidence. These are precisely the problems, already discussed, that underlie the separation of powers argument in favor of prosecutorial independence.291

An option suggests itself. Perhaps, in this situation, the federal courts should adopt a rule because it sends an appropriate signal, but then forebear from enforcing the rule.292 In a sense, that is what professional code drafters have done in requiring prosecutors to serve "justice," but then abdicating in enforcing the justice requirement.293 Sometimes purely hortatory rules can have beneficial effects.294

There are, however, costs to this form of federal court regulation. The failure to enforce weakens the message, for prosecutors will quickly sense the extent of their practical insulation from the rule's mandate. Perhaps more significantly, failure to enforce may undermine respect of prosecutors and other federal litigators for the rest of the federal court's ethics mandates.295 Although the positive effects of a hortatory rule sometimes may warrant that risk, this seems unlikely where, as in this situation, prosecutors accept the basic hortatory message without its codification.

There is another enforcement consideration for the federal courts. Although they do have power to issue orders that affect the litigants, the power to hold individual prosecutors in contempt, and indirect methods for regulating prosecutors,296 they typically have no machinery to investigate and directly punish violations of ethics standards. When indirect means are insufficient to bring prosecutors into line, the courts' main remedy for rule violations is to refer them to state disciplinary authorities.

That remedy is often appropriate. But sometimes, it may raise the very concerns that underlie the preemption doctrine.297 If, for example, a federal prosecutor is accused of prosecuting a state elected official for improper "personal" or "political" reasons, a court
might hesitate to allow state authorities to evaluate the prosecution. 298 By the same measure, the court might properly hesitate to adopt the federal rule initially because it can foresee that the only effective enforcement mechanism is controlled by the state.

One might avoid some of these concerns by tailoring rules to situations in which the evidence of malfeasance will be clear on its face or by including evidentiary thresholds that a person complaining of the conduct must hurdle. These limitations may, however, weaken the message the rule is designed to send by suggesting that it applies only in extreme situations. The alternative, of course, is to send a firm message but to rely on individual prosecutors and the DOJ to enforce the rules themselves.299

C. The Pros and Cons of Different Forms of Regulation

We have identified a number of reasons why federal courts sometimes might defer to prosecutorial self-regulation. We have also suggested that different forms of regulation implicate the underlying concerns more than other regulation. Can we draw further conclusions about when particular types of regulation are most appropriate or inappropriate?

In the absence of judicial regulation, federal prosecutors remain subject to three forms of ethical constraints. First, constitutional standards control some prosecutorial behavior. Second, internal regulation by the DOJ—including formal guidelines, discipline, and internal regulation by supervisors—set standards. Finally, to some extent, prosecutors self-regulate.

There also are market forces that sometimes make unethical behavior costly for federal prosecutors and the DOJ. Public disapproval of prosecutorial behavior may have political consequences. Disapproval by individual judges who may treat prosecutors less kindly in their courtrooms also can affect prosecutors’ well-being.

Let us consider when these constraints will be most meaningful. And let us proceed from this postulate: Prosecutors and the DOJ are most likely to self-regulate with respect to behavior that is

298. See supra note 220 and accompanying text.
299. One possibility we do not address in the text is for the courts to allow the DOJ to determine appropriate ethical behavior in a particular context, but then to enforce that standard. Arguably, when the initial judicial deference stems from the court’s fear that judicial involvement will interfere too much with executive functions, the same justification supports deference in enforcement. In contrast, when the initial deference stems from a sense that the DOJ has superior information or expertise for deciding the appropriate rule, courts may be justified in enforcing those rules that the DOJ sets.
clearly wrong and that is likely to have adverse consequences for them. Oddly enough, if this postulate is true, courts may have reason to trust the ethical instincts of prosecutors most with respect to some of the potentially most egregious behavior. For example, prosecutors typically will avoid intentionally trying to charge or convict innocent defendants or to introduce fraudulent evidence, because they agree with the impropriety of such conduct and can expect personal retribution if the behavior becomes known.

In contrast, when the propriety of behavior is a matter of dispute, prosecutors are less likely to self-regulate well. Questionable conduct that is by its nature designed to convict the truly guilty—including investigative techniques, tricks, and bargains with coconspirators—often will not seem obviously wrongful.

It is precisely in the ambiguous areas that prosecutors' personal incentives to self-regulate are weakest. Consider, for example, the issue of whether a prosecutor should become involved in undercover operations that risk communications with represented persons. Here, external market forces may not deter prosecutorial behavior because the public and individual judges who otherwise might exert influence are likely to disagree about the propriety of the conduct. Moreover, in deciding how to act, a prosecutor will be advised and surrounded by other law enforcement personnel who wish the prosecutor to participate in the questionable activity. They and the prosecutor have psychological incentives to proceed: their jobs are to identify the guilty; their competitive instincts are to beat the criminals and defense attorneys. These factors all undermine the ability of a court to rely upon prosecutorial self-regulation.

One other relevant factor is the likelihood of the prosecutor's conduct becoming known. Some investigative techniques, like communications with represented persons, inevitably will become public because the prosecutor plans to use the fruits of the conduct at trial. Other conduct, such as the failure to disclose exculpatory evidence, stands some chance of remaining secret. The federal court, in deciding whether to set standards to govern the latter kind of behavior, must determine how much to rely upon a prosecutor's ten-

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300. Some prosecutorial behavior, by definition, is designed to identify the actual guilty party—for example, conduct intended to elicit voluntary confessions. Other prosecutorial conduct may be motivated by a prosecutor's desire to convict a person he thinks is guilty, but by its nature may have the opposite effect—such as tampering with evidence or failing to disclose evidence that a defense counsel might use to illuminate the facts.

dency to act ethically when there are unlikely to be consequences for misbehavior.

The above observations focus on factors affecting the dependability of prosecutorial self-regulation. In deciding whether to regulate on its own, however, a federal court must also take into account the negative byproducts of different forms of judicial regulation. These effects include: (1) the administrative burden on the courts themselves; (2) the interference with the operations of the prosecutor’s office; (3) the risk of creating inappropriate incentives for prosecutorial behavior; and (4) the duplication of regulation when alternative methods of regulation (including the “market”) already produce incentives for ethical behavior.

Some side effects of the different forms of regulation are clear. For example, implementation of a standard that requires case-by-case review of a prosecutor’s behavior and motivation produces a greater administrative burden on the courts and prosecutors’ offices than an unenforced rule that simply prescribes behavior. In general, however, it is difficult to categorize the different forms of regulation in terms of their adverse consequences. The best one can do is to identify characteristics of the negative effects and of the regulatory forms in a way that may help federal courts evaluate the countervailing considerations.

What, for example, makes judicial regulation invasive of prosecutorial operations? Three attributes of regulation may invade. First, the standard a court sets may deprive a prosecutor, or a prosecutor’s office, of an effective law enforcement technique. Second, the potential for judicial oversight of prosecutors may create incentives that cause prosecutors to act differently and less effectively than they might otherwise act. Third, actual enforcement of a rule may interfere with prosecutors’ offices in a variety of ways.

Regulating a prosecutor through a general ethics rule may or may not be invasive. The norms that ethics rules adopt range from merely restating proscriptions with which prosecutors’ offices themselves agree to prohibiting behavior prosecutors consider proper. Ethics rules may require enforcement or they may not, so

302. See supra note 223 and accompanying text.

303. For example, prosecutors would agree that they should not charge defendants without probable cause to believe in their guilt. See, e.g., MODEL RULES, supra note 3, R. 3.8(a).

304. At least some prosecutors, for example, believe that it is sometimes appropriate for prosecutors to communicate with represented persons or to subpoena defense attorneys to appear before a grand jury. See id. R. 3.8(6), 4.2. Dispute between the ABA and the DOJ with respect to these issues has given rise to substantial controversy in recent years. See supra note 1 and accompanying text.
the adverse consequences of enforcement may vary from provision to provision. In general, the key danger of most regulation by rule is that the resulting standards may be overbroad—encompassing behavior that, were it to be evaluated alone, would be deemed appropriate.

In contrast, regulation that involves judicial supervision of prosecutorial activities on a case-by-case basis typically is more precise in identifying misbehavior. But it almost always requires some degree of invasiveness. The standard a court adopts may not itself require prosecutors to avoid conduct they desire to pursue. However, the knowledge that the court stands ready to inquire into prosecutorial actions and motivation may cause the prosecutor to avoid conduct at the margin, even if the court ultimately would find it appropriate. And actual hearings on the merits almost always will call for a probing of the government's case and the procedures used within the prosecutor's office.

Regulating by rule may have one additional effect that case-by-case supervision lacks. The adoption of explicit general standards of conduct often promotes market regulation. The existence of a rule teaches the public that particular behavior is wrongful. Thus, for example, public reaction to a judicial decision that a prosecutor violated a defendant's right to counsel by supervising an undercover agent who communicated with a represented defendant might well be muted. It might appear to the public (and the press) that the prosecutor and undercover agent simply committed a technical violation in the pursuit of a guilty defendant. If, however, the prosecutor has knowingly violated an express rule against such communications, the public is more likely to perceive the prosecutor as culpable. The political ramifications of the latter misconduct, as a result, may be greater.

Thus far, we have not mentioned a third form of regulation; namely, informal regulation through extraneous courtroom sanctions of the prosecutor rather than direct sanction for the specific prosecutorial misconduct.305 When a court shows its disapproval for a prosecutor's activities in this way, the prosecutor typically is aware of the reasons for the sanctions. The remedy, however, is not calibrated to the offense. In other words, when a court makes it difficult for the prosecutor to handle his calendar or is curt with the prosecutor during future arguments, the court hampers the prosecutor's effectiveness but does not do so in a way that prevents the

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305. See supra note 88 and accompanying text.
particular misconduct from recurring. The regulation creates incentives for the prosecutor to tread lightly before this judge, but does not necessarily create incentives towards particular types of behavior. To the extent the court signals other prosecutors not to reproduce the initial misconduct, the court's signal may be obscure or never heard.

VI. CONCLUSION: THE RESPECTIVE ROLES OF STATES, CONGRESS, AND THE COURTS IN REGULATING FEDERAL PROSECUTORIAL ETHICS

Earlier in this Article, we concluded that simultaneous regulation of federal prosecutorial ethics by a variety of regulators leads to anomalous and dangerous results. We also noted the complications that arise when the authority of the regulators is unclear and the hierarchy among the regulators is in doubt. To eliminate these problems, we have recommended that Congress recognize the application of generally applicable state ethics rules to federal prosecutors, but that Congress specifically authorize federal courts to trump those rules and develop standards of their own. To clarify an ambiguity in the McDade Amendment, Congress also should preempt state regulation that focuses specifically upon federal prosecutors, because that is beyond the expertise of the states.

In the interests of uniformity, we have suggested that Congress establish a process by which federal court rules would be developed for all federal district courts, after a full vetting of the issues. To the extent Congress believes categories of prosecutorial activity should be insulated from state or federal court regulation—such as the execution of prosecutors' "adjudicative" functions—Congress can exempt those activities. However, Congress's ability to overrule or reject particular regulations adopted by the federal courts should, in our view, be sufficient to implement most of Congress's potential concerns.

Our analysis has suggested that federal courts should presumptively accept those state ethics rules that can fairly be viewed as "lawyer regulation" and that have been adopted after a formal rulemaking process. The federal courts should defer less with respect to state court interpretations of vague state rules. In general, however, we have taken the position that federal courts rarely should feel disqualified altogether from considering subjects that state regulation has addressed. Indeed, Part III argues that federal courts typically would be remiss in adopting state rules governing
federal prosecutorial ethics without making an independent evaluation of their merits.

Accordingly, our recommendation that Congress establish a "mechanism" or "procedure" for federal ethics rulemaking includes a suggestion that all interested constituencies have an opportunity to participate.306 In light of the sharp, hostile disputes in recent years among the DOJ, the ABA, state regulators, and the federal courts, a cooperative process through which regulation can be arrived at rather than disputed clearly seems the better approach. Only a nonlitigation setting for rulemaking provides an opportunity for cooperative discussion.

The Judicial Conference of the United States, which promulgates rules of practice for federal courts pursuant to the Rules Enabling Act, is the natural setting for such a process.307 But Congress still needs to ensure that the Judicial Conference undertakes the task in an effective and timely fashion. Congress also should establish legislatively the right of the DOJ, the ABA, defenders' associations, and representatives of the state judiciaries to be represented in the process.

In the absence of uniform rules, it is up to Congress to clarify the authority of local federal courts to regulate federal prosecutors. Individual district courts may need to set standards for prosecutorial conduct before the Judicial Conference adopts an initial set of rules and may also need to act, at least on an interim basis, regarding issues that the Judicial Conference has not addressed. Suppose, for example, that a state adopts a new ethical standard that would apply to federal prosecutors in the absence of contrary action by the local district court or the Judicial Conference. Congress not only needs to provide a mechanism for referring the issue to the Judicial Conference, but probably also should enable the district court to exempt federal prosecutors from the new rule while the Conference deliberates. Similarly, in instances when new prosecutorial ethics issues arise in a federal district, Congress both needs to establish a referral procedure and to authorize the district court to set interim standards.

306. Congress has already tried to establish such procedures, both for Supreme Court rules and local district court rules. See McCabe, supra note 114, at 1663 n.60, 1664 (discussing the current rulemaking procedures). However, the current procedure has often proven slow, cumbersome, inadequately inclusive, and too easily used to maintain balkanized rules. See id. at 1676-89 (recommending changes); see also Daniel R. Coquillette et al., The Role of Local Rules, A.B.A. J., Jan. 1989, at 62, 64-65 (discussing the balkanization of federal district court rules).

307. See generally McCabe, supra note 114 (describing the federal judicial rulemaking process).
Eventually, Congress may have to confront the enforcement implications of federal rules of prosecutorial ethics. States traditionally have carried the laboring oar in enforcing disciplinary standards. In theory, state regulators could continue to process disciplinary matters with respect to prosecutors who violate federal ethics rules. The states, however, may resist doing so, particularly when the federal rules reject the local position on prosecutorial conduct or when the state regulators perceive that enforcement of the federal rules would be expensive. Conversely, Congress ultimately may determine that states are failing to enforce federal standards effectively, either because the states are not interpreting the rules properly or because they are too unfamiliar with federal law enforcement processes.

One cannot know in advance whether the result of adopting federal ethics rules will be underenforcement by state regulators, overenforcement, or both. It is also hard to predict whether the DOJ’s Office of Professional Responsibility will compensate for deficiencies of state regulation by vigorously enforcing new federal rules. A congressional response to the enforcement issues therefore

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308. See supra Part II.A.1.

309. States currently sanction their lawyers for misconduct in federal proceedings. In doing so, they inevitably have had to take federal law into account. Moreover, many state ethics rules incorporate other law. See, e.g., MODEL RULES, supra note 3, R. 3.4(a) (prohibiting a lawyer to "unlawfully" obstruct access to evidence); id. R. 3.4(b) (prohibiting a lawyer to offer an inducement "that is prohibited by law"); id. R. 3.4(c) (prohibiting a lawyer to knowingly disobey the rules of the tribunal); id. R. 3.4(d) (prohibiting a lawyer to fail to comply with a "legally proper discovery request"); id. R. 3.5(a) (prohibiting a lawyer to seek to influence a judge or juror "by means prohibited by law"); id. R. 3.5(b) (forbidding ex parte communications except "as permitted by law"); id. R. 4.1(b) (requiring a lawyer to disclose facts to third parties when necessary to avoid assisting a criminal act); id. R. 4.2 (forbidding ex parte communications with represented party except where "authorized by law"). Evaluating the impact of law from other jurisdictions, including the impact of federal law, therefore, is part and parcel of the traditional function of state disciplinary bodies.

310. Federal subsidization of state disciplinary enforcement may become necessary to alleviate such concerns. Cf. 2 U.S.C. § 658 (2000) (requiring congressional committee to take steps to quantify federal requirements necessitating the expenditure of state resources); Daniel H. Cole & Carol S. Comer, Rhetoric, Reality, and the Law of Unfunded Federal Mandates, 8 STAN. L. & POL’Y REV. 103, 117-18 (1997) (analyzing the federal statute and questioning the extent of existing unfunded mandates and arguing that all that should be required is a "net subsidy" in federal legislation affecting the states).

311. In some cases, it may be efficient for the federal court that presides over the alleged prosecutorial misconduct to make an initial determination regarding discipline. Alternatively, even if states remain the dominant disciplinary regulators, federal courts might be authorized to engage in fact-finding regarding a particular matter or to render interpretations of federal rules that would be binding in state disciplinary proceedings. Going to the extreme of establishing an independent federal disciplinary agency, however, may be more of an investment than Congress wishes to make, especially if the option of using other state or federal resources is available. See Zacharias, supra note 11, at 378 (discussing the potential costs of federalizing ethics regulation).
should be held in abeyance pending implementation of Congress's substantive legislation.

This Article's conclusion that federal judicial regulation of prosecutorial ethics sometimes is appropriate and that Congress should facilitate federal court regulation only begins to resolve the issues. The harder questions are how the courts should regulate and when they should defer to prosecutorial self-regulation. Part IV highlights that one cannot provide set rules for deciding those questions. There are a variety of conceptualizations of prosecutors and a variety of practical considerations that federal courts will need to take into account.

Part IV does identify factors that sometimes militate in favor of letting prosecutors regulate themselves. It also identifies institutional characteristics of state regulators and federal courts that federal courts should take into account in deciding whether to regulate, and how. In the end, however, federal courts should not apply state ethics regulation to federal prosecutors without reaching an independent conclusion that the regulation is appropriate. In adopting regulation, federal courts ordinarily should avoid case-by-case evaluation of prosecutors' motives or the internal processes of prosecutors' offices.

Our analysis of the possible conceptualizations of prosecutorial roles and the different frameworks for organizing judicial ethics regulation leads to several negative and several positive prescriptions. One bottom line is that the appropriateness of regulation cannot be determined categorically based on the interests prosecutors serve or on the stage of the prosecution at which prosecutorial behavior occurs.\textsuperscript{312} On the other hand, looking at the functions that prosecutors serve may help judges decide whether and how to proceed.\textsuperscript{313}

When judges regulate the investigative function of federal prosecutors, they risk creating perverse incentives.\textsuperscript{314} We therefore have suggested that courts should regulate investigative conduct by prosecutors to the same extent they regulate investigative behavior by other law enforcement personnel, but should hesitate to impose additional restrictions on prosecutors.

When courts regulate federal prosecutors' implementation of adjudicative functions, several policy considerations are implicated.

\textsuperscript{312} See supra note 280 and accompanying text.
\textsuperscript{313} See supra note 255 and accompanying text.
\textsuperscript{314} See supra note 268 and accompanying text.
Often, the exercise of these adjudicative functions achieves its legitimate goals best when not subject to judicial review or public exposure. Moreover, judicial review of prosecutorial adjudicative decisions may be particularly invasive of law enforcement functions. As a result, courts should hesitate to regulate in this realm, particularly through methods that require inquiry into prosecutorial motives.

On the other hand, when prosecutors are serving a traditional litigators' function, federal courts should feel freer to impose limits on behavior. Here, the courts' expertise and authority are at their height. Although the federal courts may need to acknowledge special responsibilities of prosecutors in acting as agents of the executive branch of government, the courts should not be as ready to defer to prosecutors in this realm.

In deciding whether to regulate, federal courts of course need to take into account the costs of enforcement. These include the administrative burden on the courts, the risk of undermining effective prosecution, the risk prosecutors will react by avoiding prosecutions they should in fact institute, the risk that prosecutors will erroneously self-censor the activities in which they engage, and the risk that enforcement will undermine prosecutors' willingness to take their own obligation to self-regulate seriously. In general, case-by-case regulation is likely to create at least some administrative burden and to invade prosecutorial functions. Regulation by rule may or may not be invasive, depending on how a rule is written and whether it is enforced. Indirect regulation through extraneous sanctions on individual prosecutors may not be costly, but the message the court is trying to send is likely to be obscured.

Yet federal courts also must recognize that there are costs to adopting rules and then failing to enforce them, as well as costs to deferring to state enforcement mechanisms. Judges in the first instance must determine whether the potential costs justify avoiding otherwise valid regulation. The answer, in part, depends on whether the regulation addresses behavior regarding which prosecutors already have incentives to address in an appropriate manner.

In this regard, our analysis suggests that there are constraints on prosecutorial behavior that operate even in the absence of judicial regulation, including internal administrative regulation, market forces, and prosecutors' personal incentives to "serve justice." Setting standards through rules may have the beneficial ef-
fect of promoting separate market regulation of prosecutorial misconduct. But too much regulation, in any form, may create incentives for prosecutors to view judicial regulation as comprehensive and therefore to underemphasize their own responsibility to identify ethical behavior.

More than anything else, the complexity and length of our analysis suggests two significant conclusions. First, even intelligent decisionmaking by Congress and the federal courts cannot eliminate all of the problems arising from the existence of multiple regulators. In different situations implicating federal prosecutorial ethics, states, federal courts, and the DOJ all have a valid claim to the final say. Each regulatory body has authority to define ethics standards and its own form of expertise. By authorizing the federal courts to assume control, as we have suggested, Congress would move towards eliminating contentious jurisdictional issues that have diverted the regulators in the past, minimizing the costs of multiple regulation, and providing a single forum in which the issues can be debated.

The second important conclusion is that one cannot overemphasize the importance of the latter goal—the establishment of a process by which cooperative solutions can develop. Consider the examples of the recent debates over rules prohibiting contact with represented parties and rules governing attorney subpoenas. Lost in those debates were the fact that all of the relevant actors—including the DOJ—conceded that some limits on federal prosecutors are appropriate. The debates consisted largely of a three-pronged war among the DOJ, the defense bar, and the Conference of State Judges regarding jurisdictional issues. Time-consuming litigation was a prominent aspect of the war. The federal courts were called upon mainly to decide who may regulate rather than to address the question of how regulation should be accomplished.

Congress's legislative focus should be on producing a mechanism by which cooperative solutions are more likely. The federal courts may need to make final determinations on whether and how federal prosecutors should be regulated, but not before all interested actors have their say in a nonadversarial setting in which they can appeal to the logic of the decisionmaker. In the end, if nothing else, the debate that occurs during the rulemaking deliberations should provide a record that will better enable Congress to implement its own oversight responsibilities.

315. See supra note 304 and accompanying text.