Federalism and Choice of Law in the Regulation of Legal Ethics

H. Geoffrey Moulton Jr.
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* Associate Professor, Widener University School of Law. B.A., 1980, Amherst College; J.D., 1984, Columbia University. I am grateful to Bob Hayman, Louise Hill, David Hodas, Dan Richman, Len Sosnov, and John Wladis for their valuable comments, to Kim Anderman and Matt Wilson for their tireless research assistance, and to Widener University School of Law for its financial support.
INTRODUCTION

The American federal system combines interstate diversity of norms with overlapping jurisdiction, producing inevitable uncertainty about which jurisdiction’s law governs multijurisdictional conduct. For most of our nation’s history, lawyers

1. That modern choice-of-law doctrine fails to offer a significant remedy to that uncertainty is beyond dispute. See Lea Brilmayer, Conflict of Laws xiv (2d ed. 1995) (“The field of choice of law may suffer from more confusion today than ever before.”). Dean Prosser’s famous 1953 description of conflicts law as “a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon,” William L. Prosser, Interstate Publication, 51 Mich. L. Rev. 959, 971 (1953), still retains some descriptive force. See also Eugene F. Scoles & Peter Hay, Conflict of Laws 42-44
have addressed that uncertainty not on their own account, but on behalf of their clients.\(^2\) Two relatively recent trends, however—the increasingly multijurisdictional character of law practice and the increasingly disparate ethical norms of those jurisdictions—have conspired to put lawyers in the same uncomfortable position often occupied by their clients. As lawyers more commonly cross state lines in the course of their practice, their conduct has become subject to the norms and authority of multiple jurisdictions.\(^3\) Further, individual states have made significant modifications to the Model Rules of Professional Conduct or have rejected them altogether, thus increasing the likelihood of conflicts in professional standards.\(^4\) These conflicts have potential significance not only in terms of professional discipline but also in nondisciplinary contexts, such as malpractice liability and disqualifications for conflicts of interest.\(^5\)

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2. When legal practice was largely confined to a single state and lawyer-conduct standards were essentially uniform across jurisdictions, lawyers rarely needed to be concerned with interstate conflicts in the law governing their conduct.

3. See infra Part I.A (discussing the increasingly multistate nature of the practice of law).

4. See infra Part I.B (tracing the evolution of legal ethics regulation).

5. The Model Rules of Professional Conduct expressly disclaim their applicability to legal malpractice and other nondisciplinary contexts:

   Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are . . . not designed to be a basis for civil liability. . . . Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

MODEL RULES OF PROFESSIONAL CONDUCT Scope, para. 18 (1995).

Recently, commentators and the organized bar have begun to note with alarm the problems of uncertainty posed by inconsistent and conflicting professional standards. Some commentators have suggested a solution to these problems that is both obvious and radical: the creation of uniform national standards by some component of the federal government. Such a uniform code, the argument runs, would end the confusion for lawyers generated by the combination of multistate practice and disparate standards, and indeed enhance the public perception of lawyers. The American Bar Association, uninterested in a federally imposed solution, responded in
In the emerging debate over the problems of and proposed solutions to the diversification of ethics norms, scant attention has been paid to the relevance of federalism principles. While some commentators have observed that the setting of legal ethics norms has traditionally been left to the states, no one has seriously considered how federalism values should affect either the evaluation of the problem or the selection of appropriate solutions. The principal focus of this Article is to analyze both the perceived problems posed by the so-called balkanization of ethics norms and possible solutions to those problems in light of federalism principles. Perhaps the most important and obvious point to be made is that the balkanization “problem” described by commentators is inherent in the American federal system. While the federal government has had an increasingly expansive regulatory role, in most areas that most directly affect American citizens states remain the primary norm setters and enforcers. Moreover, no subject governed by state law is uniformly regulated. Indeed, in state-dominated areas such as torts, consumer fraud, and contracts, the interstate disparity in conduct-regulating standards is probably far greater than in legal ethics. Even in areas dominated by “uniform” statutes, such as the Uniform Commercial Code, significant state variations in language and interpretation preclude anything close to true uniformity.

Not only is nonuniformity inevitable in a federal system, it is one of the principal goods of federalism. As a matter of his-
tory, politics, economics, and culture, the fundamental role of states in the federal system is to permit diversity of normative choices. Normative diversity, in turn, helps further the enduring utilitarian principle that governments ordinarily should try to satisfy the greatest number of individual preferences. Because many individual policy preferences, including preferences concerning attorney-conduct standards, are unevenly distributed among the states, state-level decision-making can satisfy more people than could a unitary national government.\textsuperscript{13} State-level diversity also fosters state competition for citizens and capital and promotes innovation.\textsuperscript{14} National preemption of state law imposes a significant cost by eliminating normative variation and its benefits.

In some areas, of course, the costs of disparate state regulation and the benefits of uniformity may combine to warrant national intervention. Perhaps the problems associated with the regulation of lawyer conduct are sufficiently distinct to overcome the federal system's presumption in favor of state regulation. None of the most persuasive arguments for national intervention, however, apply to the regulation of lawyer conduct. Lawyers are not like national defense, the interstate highway system, the space program, or Yosemite National Park—public goods that simply will not be supplied without national policy-making and funds.\textsuperscript{15} Lawyer regulation neither produces significant negative externalities that would allow one state to achieve the benefits of particular regulation while imposing the costs on another state, nor involves the sort of wealth redistribution that might attract needy recipients while driving out wealthy taxpayers.\textsuperscript{16} Nor does the history of lawyer regulation offer evidence of the sort of interstate "race to the bottom" arguably evident in the regulation of the environment or corporations.\textsuperscript{17} Finally, the case has not been made that significant economies of scale would be achieved by nationalizing administration of lawyer regulation.\textsuperscript{18} In short, proponents of across-the-board, nationally imposed lawyer-conduct standards have failed to establish that the benefits of uniformity outweigh the benefits of diversity.

\begin{footnotesize}
\begin{enumerate}
\item See infra Part III.B.1.a.
\item See infra Part III.B.1.b.
\item See infra notes 316-320, 366 and accompanying text.
\item See infra notes 366-369 and accompanying text.
\item See infra note 365 and accompanying text.
\item See infra notes 370-371 and accompanying text.
\end{enumerate}
\end{footnotesize}
Federalism principles, together with insights from game theory, also inform a reasoned assessment of the ABA "resolution" of the problems posed by nonuniform attorney-conduct standards. Choice-of-law rules enjoy no immunity from the diversity-promoting forces inherent in the federal system. The ABA's hope that amended Model Rule 8.5 will be uniformly adopted is thus no more warranted than its earlier failed hope that the original Model Rules would be uniformly adopted. Moreover, barriers to effective collective action virtually ensure that neither the ABA rule nor a better-crafted version of it will ever be widely embraced on the state level, with or without individual state modifications. The only prospect for a uniform choice-of-law rule governing conflicts in attorney-conduct standards rests with the national government.

Part I of this Article sets the stage for the federalism inquiry by first describing the increasingly multistate nature of the practice of law and the recently developing disparity in lawyer-conduct standards, and then outlining the resulting problem of uncertainty for lawyers as perceived by the organized bar and commentators. Part I concludes by summarizing the two existing proposed solutions to that problem of uncertainty—the creation by the national government of uniform standards for all lawyers, and the more modest promulgation by the ABA of amended Model Rule 8.5, a choice-of-law rule for matters of attorney discipline.

Part II examines the disparity in lawyer-conduct standards and the resulting uncertainty for lawyers through the lens of federalism. Taking state variations on the Uniform Commercial Code as an example, it explains that nonuniformity is commonplace and indeed inevitable in our federal system. Part II concludes that the problems now faced by lawyers, while potentially serious, are no more difficult or momentous than similar problems faced much more often by their clients.

Part III turns to the proposed creation of national standards of attorney conduct. It begins with a brief evaluation of congressional authority, concluding that while Congress has the power to preempt state standards, it does not, under current Supreme Court doctrine, have the power to require state agencies to enforce those standards. The bulk of Part III is devoted to a critical examination of the claim that federalism values pose no serious obstacle, in terms of policy, to a national takeover of norm setting and enforcement. It both delineates the critical role of normative variation in the American federal
system, explaining that such variation promotes individual preference-satisfaction and fosters efficiency- and innovation-generating interstate competition for citizens and capital, and describes the significant limits on the value of state-level norm setting. Part III then measures the articulation of attorney-conduct standards against the benefits and limits of state-level responsibility, and concludes that they strongly suggest leaving standard-setting in the hands of the states.  

Finally, Part IV considers the alternative approach to ameliorating the costs associated with diverse state norms—a uniform choice-of-law rule for attorney ethics. This Part first examines the ABA's amended Model Rule 8.5, noting the legitimate criticisms of the Rule's substance and scope but emphasizing the collective-action obstacles to the rule ever being widely adopted. It then briefly explores the possibility of a federal choice-of-law rule as a solution to those collective-action problems, explaining that the federalism objections to national standards of attorney conduct would not apply to a national choice-of-law rule, and that such a rule would be fully consistent with the federal government's role as interstate umpire.

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19. Setting lawyer-conduct standards comprises only one piece of the lawyer-regulation mosaic, which also must include interpreting rules, detecting rule violations, and prosecuting and punishing violators. See Ted Schneyer, Legal Process Scholarship and the Regulation of Lawyers, 65 FORDHAM L. REV. 33, 38 (1996). Beginning with David Wilkins' seminal article in 1992, see Wilkins, supra note 9, a substantial body of scholarship is developing that addresses the proper allocation of both enforcement and standard-setting authority among various institutional actors, including judicial agencies and bar associations, the system of civil liability, the courts and agencies before whom lawyers appear, legislatures, law firms, and liability insurers. See, e.g., Jeffrey A. Parness, Enforcing Professional Norms for Federal Litigation Conduct: Achieving Reciprocal Cooperation, 60 ALB. L. REV. 303 (1996) (discussing different norm-enforcement systems and offering ways to achieve better coordination among them); Manuel R. Ramos, Legal Malpractice: Reforming Lawyers and Law Professors, 70 TUL. L. REV. 2583 (1996) (calling for the elimination of ineffective ethical regulations and for increasing the use of legal malpractice litigation as a means of regulation); Special Issue, Institutional Choices in the Regulation of Lawyers, 65 FORDHAM L. REV. 33 (1996). My focus is on the distinct (though obviously related) issue of the impact of federalism principles on the choice between state and federal institutions as principal norm-setters, not on which particular institutions within a level of government are best-suited to set those norms.
I. THE PERCEIVED PROBLEM, ITS CAUSES, AND EXISTING PROPOSED SOLUTIONS

The apparent alarm over the diversification of ethics norms seems to rest on the belief that lawyers now face a wide array of conflicting and potentially applicable conduct standards, with no meaningful way of determining which standard applies to what conduct. In order to evaluate either the warrant for that alarm or the proposed methods of quieting it, a review of the relevant history and current reality is in order.

A. THE INCREASINGLY MULTISTATE NATURE OF THE PRACTICE OF LAW

The latter half of the Twentieth Century has witnessed the development of national markets for many goods and services. Not surprisingly, this developing integration of the American economy has had a noticeable impact on the legal profession. As early as 1975, commentators began to observe that law practice was becoming increasingly multijurisdictional,20 creating at least the possibility that a lawyer's conduct in a single matter might be judged by the standards of more than one jurisdiction.

That lawyers now regularly practice across state lines is beyond dispute, despite the unfortunate dearth of useful empirical data measuring the extent or nature of that practice.21 Personal mobility,22 the elimination of residency requirements,23 and the advent of the multistate bar exam all have

20. See Brakel & Loh, supra note 6, at 699.
21. See Daly, supra note 11, at 725 n.23 (describing the absence of statistically useful descriptive data about the legal profession). As Professor Daly notes, id., the principal source of such data is the periodically published Lawyer Statistical Report, BARBARA A. CURRAN & CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990s (1994) [hereinafter LAWYER STATISTICAL REPORT].
23. Before the Supreme Court's 1985 decision in Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985), many states barred nonresidents from admission to the bar. See WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 15.2.3, at 852 (explaining that states commonly required applicants to the bar to be residents). In Piper, the Court held that such discrimination against nonresidents violated the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1. Since then, the Court has invoked that clause to strike down a
contributed to an increase in the number of lawyers admitted in more than one state. Whatever the nature of their practice, such lawyers are subject to the authority of more than one state's disciplinary authority. Multiple admission also increases the likelihood of a practice that crosses state boundaries. Even a lawyer admitted in just one state may obtain temporary dual licensure by admission pro hac vice from a tribunal in another state, and thereby be subject to more than one set of ethics standards.

Perhaps more significant than multiple admissions are the incredible growth in law firms with multistate branch offices and a growing need for litigation and transactional legal services

state supreme court rule permitting state residents but not out-of-staters to be admitted on motion without taking the bar exam, Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988), and a Virgin Islands district court rule requiring one year’s residence and a declaration of intent to remain a resident as a precondition to admission, Barnard v. Thorstenn, 489 U.S. 546 (1989). See also Frazier v. Hebe, 482 U.S. 641 (1987) (using supervisory authority to strike down federal district-court rule imposing a state residency requirement for admission to federal district court in that state). Some state restrictions on nonresidents, however, have thus far remained intact, such as a New York requirement that a nonresident lawyer maintain a bona fide office in the state. See N.Y. JUD. LAW § 470 (McKinney 1983).

24. See generally Brakel & Loh, supra note 6 (examining the rationale and effect of regulations and restrictions placed on out-of-state lawyers); Daly, supra note 11, at 725-42 (discussing the growth of multijurisdictional practice and its implications). Professor Daly adds “the jurisdictionally untethered character of contemporary legal education,” Daly, supra note 11, at 731 (capitalization omitted), as another cause of multistate admission and multijurisdictional practice, stating that “[l]aw school curricula unwittingly subvert state-based regulation of the legal profession through materials and classroom discussion that minimize or ignore state boundaries,” id. at 725; see also id. at 731-732 (supporting multijurisdictional curricula but describing “unintended consequence” that “law school professors are daily educating their students to practice in a multijurisdictional environment”). While contemporary legal education may be blamed or applauded for many things, I am not sure the growth of multijurisdictional practice is one of them. I suspect that national law schools had “multijurisdictional curricula” long before the relatively recent growth in multijurisdictional practice. And if regional and local law schools have only recently adopted such an approach, perhaps their doing so is a reaction to, rather than a cause of, multijurisdictional practice.

that cross state lines. Those phenomena, fueled by the continued integration of the national economy, the mobility of clients, and the increase in legal specialization, not only have fostered multijurisdictional practice but indeed may have begun to create a national market for at least some legal services. Moreover, they create an even greater potential that the rules of multiple jurisdictions will be applied to singular conduct. Even simple transactional work or a straightforward piece of commercial litigation for a client with multistate contacts can have multistate consequences. If it does, the lawyers involved face the prospect that their conduct will be judged by the ethical rules of two or more jurisdictions, whether they physically leave their home states or not. Similarly, members of multistate law firms may find their conduct judged not only by the rules of their state of admission, but also by the rules of the states in which their branch offices are located.

Most descriptions of the growth of multistate practice are incomplete in that they ignore the fact that the work of many (or even most) lawyers is confined to one state. The primary players in the emerging multistate practice of law are large, often multistate law firms with large, multistate clients. The lawyers in those firms inevitably engage in conduct with multistate consequences, and hence may be subject to the conduct rules of more than one state. There is another "hemisphere" of the legal profession, however, which consists of lawyers who primarily represent individuals, not multistate entities. Those lawyers are far less likely to engage in conduct with significant multistate consequences, and hence are far less

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27. Cf. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 (1991) (stating that where a firm has one office in a jurisdiction that permits partnerships with nonlawyers and another office in a jurisdiction that prohibits such partnerships, lawyers admitted in the latter jurisdiction would violate that jurisdiction's rules when their partners in the former jurisdiction brought on a nonlawyer partner or principal).
28. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982). In studying the Chicago bar, Heinz and Laumann identified "two hemispheres" of practice: lawyers who represent large organizations and lawyers who represent individuals and small business. Id. at 319. The hemispheres differed, the study found, in terms of "the social origins of the lawyers, the prestige of the law schools they attended, their career histories and mobility, their social or political values, . . . [and] their networks of friends and professional associates." Id. at 319-20.
likely to be concerned about the problems of uncertainty gen-
erated by multistate practice.

Of course, if the applicable ethical rules from the relevant
multiple jurisdictions are essentially the same, or if they are
too vague either to guide conduct or to form the basis for dis-
cipline, no serious problem arises even for regular multistate
practitioners. But if those ethical rules are both different and le-
gally enforceable, then prudent lawyers will try to determine in
advance of their conduct which jurisdiction’s rules will ulti-
mately apply to that conduct. Such choice-of-law analysis be-
comes even more important if the different jurisdictions’ rules
contain conflicting commands, for then compliance with one
state’s rule means violation of the other, and potential disci-
pline. 29

B. A BRIEF HISTORY OF THE REGULATION OF LEGAL ETHICS:
The Diversification and Legalization of Norms

The so-called “balkanization” of legal ethics norms is a
relatively recent phenomenon. Until the adoption of the Model
Code of Professional Responsibility in 1969, 30 statements of at-
torney ethics generally were not intended to be enforceable le-
gal rules, and perhaps therefore were embraced without sig-
nificant dissent. With the Model Code, and later the Model
Rules, ethics norms became legally enforceable, thereby raising
the stakes of their adoption and increasing the extent to which
individual states deviated from the ABA-expressed norms. As a
result, lawyers engaged in multistate practice have begun to
face the prospect of their conduct being measured against the con-
flicting ethical commands of multiple jurisdictions.

1. The Evolution of Professional Conduct Norms

The legal profession in the United States operated without
a code of professional conduct for the first century of this coun-

29. See infra Part I.B.2.a (discussing inconsistencies among states over
when a lawyer can or must disclose a client’s intent to commit a crime).

30. The ABA originally adopted its 1969 ethics standards under the name
“Code of Professional Responsibility.” Later, as part of the settlement of an
antitrust suit brought by the U.S. Department of Justice, the ABA added the
limiting term “Model” to the title. See WOLFRAM, MODERN LEGAL ETHICS, supra
note 5, § 2.6.3, at 57. This Article refers to the 1969 standards as, interchangeably,
the “Model Code of Professional Responsibility,” the “Model Code,” or simply the
“Code.”
try's existence. During that time, lawyer discipline was rare, with control in the hands of local courts and discipline imposed only sporadically, even for the most egregious conduct. The American Bar Association was organized in 1878, but creating a uniform set of standards to govern attorney conduct was not on its early agenda. The first state code of ethics was not adopted until 1887, when the Alabama State Bar Association established a code based largely on the work of Judge George Sharswood of Philadelphia and David Hoffman of Baltimore. The Alabama Code, which in turn formed the basis for the adoption of codes in ten other states after 1887, was a largely aspirational expression of shared professional values, not an enforceable set of legal rules.

The ABA first attempted a common statement of professional norms in 1908, when it adopted the Canons of Professional Ethics. The 1908 Canons, drawn largely from the 1887 Alabama Code, consisted of thirty-two broadly written exhortations to lawyers that were far more aspirational than prescriptive. Indeed, the Canons were not originally adopted as

31. See WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 2.6.2, at 53-54 (discussing the historical development of the 1908 ABA Canons of Professional Ethics). As Professor Wolfram notes, several "codes" were written in the mid-nineteenth century, "but those codes were generally intended for edification rather than enforcement and had only the authority of their individual authors behind them." Id. at 53.

32. See id. (citing ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 184-85, 242, 248 (1953)).

33. See id.


35. See WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 2.6.2, at 54 n.21; Jones, supra note 34, at 494.

36. ABA CANONS OF PROFESSIONAL ETHICS (1903).

37. See HAZARD ET AL., supra note 34, at 13; WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 2.6.2, at 54 n.21; Jones, supra note 34, at 496-98.

38. The Preamble to the Canons states that they were adopted "as a general guide," ABA CANONS OF PROFESSIONAL ETHICS Preamble (1908), and even a casual reading demonstrates their general and aspirational character, see, e.g., id. Canon 1 ("It is the duty of the lawyer to maintain towards the Courts a respectful attitude ...."); id. Canon 2 ("It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges."); id. Canon 15 ("The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability' ...."); id. Canon 16 ("A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do ...."); id.
enforceable legal standards forming the basis for disciplinary enforcement, but rather as "moral and fraternal admonitions." The ABA expanded the Canons to forty-seven by 1937, and later asserted that the Canons were to serve as "guides for the basis of discipline." Throughout their existence the Canons were criticized as too vague and general to be of much useful guidance. Professor Tony Amsterdam offered one of the more pointed criticisms when he described the Canons as "vaporous platitudes...which have somewhat less usefulness as guides to lawyers in the predicaments of the real world than do Valentine cards as guides to heart surgeons in the operating room." Despite, or perhaps because of, their vague and non-binding character, the Canons were accepted with "virtually unchallenged universality" by state courts and bar associations. That "universality" was of limited import, however, because the admonitory nature of the Canons left courts as the primary source of the "law" governing lawyers.

Canon 17 ("Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward the suitors in the case."); id. Canon 32 ("No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or public trust, or deception or betrayal of the public.").

39. See WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 2.6.2, at 54; see also Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1239, 1250 (1991) (explaining that the Canons had "no direct legal effect").

40. Geoffrey C. Hazard, Jr., Lawyers and Client Fraud: They Still Don't Get It, 6 GEO. J. LEGAL ETHICS 701, 705 (1993). Professor Hazard describes the 1908 Canons as "a professional credo but not a set of legal obligations," and states that "until the promulgation of the bar-sponsored Code of Professional Responsibility in 1970, the courts were the primary source of the law governing lawyers." Id. at 703.

41. See REPORT OF THE SPECIAL COMMITTEE OF THE AMERICAN BAR FOUNDATION ON CANONS OF ETHICS 6-7 (June 30, 1958) [hereinafter 1958 REPORT].

42. Id. at 9.

43. Professional Ethics: Charity & Perjury, TIME, May 13, 1966, at 81 (quoting Professor Anthony Amsterdam), cited in WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 2.6.2, at 55 n.29. Justice Stone was somewhat more circumspect in his criticism, describing the Canons as "generalizations designed for an earlier era." Harlan F. Stone, The Public Influence of the Bar, 48 HARV. L. REV. 1, 10 (1934).

44. WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 2.6.1, at 50; see also HAZARD ET AL., supra note 34, at 13 (explaining how bar associations and state courts widely recognized the Canons).

45. See Hazard, supra note 40, at 703; see also WOLFRAM, MODERN LEGAL
By the 1950s, complaints about the Canons' vagueness and lack of legal effect led to calls for revision or replacement. In 1964, responding to those complaints, then-ABA president Lewis F. Powell, Jr., appointed an ABA committee to study the Canons and suggest appropriate amendments. The committee decided to abandon the format and approach of the Canons, and offered a Preliminary Draft of the Model Code of Professional Responsibility in January 1969, followed by a Final Draft on July 1, 1969. The Final Draft was adopted with no changes by the ABA House of Delegates on August 12, 1969. Recognizing that the Model Code could achieve the force of law only when adopted in a jurisdiction by an arm of the state, the ABA appointed a special adoption committee whose mission was to persuade the states to adopt the Code. The adoption

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46. See, e.g., 1958 REPORT, supra note 41, at 96 (concluding that "the present Canons of Professional Ethics of the American Bar Association do not provide adequate standards of professional conduct for members of the Bar"); Philbrick McCoy, The Canons of Ethics: A Reappraisal by the Organized Bar, 43 A.B.A. J. 38 (1957) (explaining the American Bar Foundation's plan to re-appraise the Canons).


48. See Sutton, supra note 47, at 255. According to Professor Sutton, the reporter for the committee that produced the Model Code, both the preliminary draft and the final draft were proposed by the committee without dissent. See id. at 255 n.2.

49. See id. at 255. The House of Delegates simultaneously repealed the ABA Canons of Ethics. See id.; see also Association's House of Delegates Meets, 55 A.B.A. J. 970 (1969) (summarizing the annual meeting of the ABA governing body, August 11-13, 1969).

50. This point was sometimes lost on ABA ethics committees, which from time to time made "extravagant and insupportable claims" for the legal effect of the Canons. WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 2.6.2, at 55 n.31; see, e.g., ABA Comm. on Ethics and Professional Grievances, Formal Op. 142 (1935) (stating that Canons override contrary state statutes); ABA Comm. on Professional Ethics and Grievances, Formal Op. 203 (1940) (stating that Canons prohibit lawyers who limit their practice to the U.S. Patent Office from advertising, despite federal statute that permits such advertising).

51. See WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 2.6.3, at 56; Sutton, supra note 47, at 256 n.8; see also Report of Special Committee to Secure Adoption of the Code of Professional Responsibility, 97 ANN. REP. ABA 268 (1972) (reporting the rapid acceptance of the Model Code by states).
committee was enormously successful, and by 1972 it reported that all but three states had taken steps to adopt the Model Code. Two of the three remaining states adopted the Model Code in short order, and even California, which never adopted the Model Code, borrowed from it heavily. Although not all states enacted the Model Code verbatim, and a few made changes of some significance, the ABA initially came close to achieving its goal of national uniformity.

While the Model Code rested on many of the same principles as the Canons, its structure and intended import were fundamentally different. In particular, the Model Code made the leap from fraternal aspirational norms to an enforceable legal code, beginning what Geoffrey Hazard has described as the "legalization" of the profession's governing standards. While the Model Code included "Canons" and "Ethical Considerations" that, like the 1908 Canons, were intended to be admonitory, at its heart were the black-letter "Disciplinary Rules," violation of which was to result in disciplinary adjudication and sanctions. The Preliminary Statement to the Model Code stated: "The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. [They] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. . . . [They] should be uniformly applied to all lawyers, regardless of the nature of their professional activities."

52. See Report of Special Committee to Secure Adoption of the Code of Professional Responsibility, supra note 51 at 268.
53. See WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 2.6.3, at 56-57.
54. See id. at 56 (noting that some states declined to adopt the ethical considerations); Ritts, supra note 6, at 18 (reporting that some state authorities made important changes to the Model Code before adopting it).
55. See Burbank, supra note 7, at 972; O'Brien, supra note 6, at 679.
56. See Hazard, supra note 39, at 1246-52 (comparing individual provisions of the Code with corresponding Canons).
57. Id. at 1249. Part of the motivation for a more concrete and "law-like" set of professional standards may have been the concern that unless lawyers themselves engaged in meaningful self-regulation, other potential regulators might step in. See Richard Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639, 667 (1981) (arguing that ABA rules are designed to legitimate lawyers' relative freedom from outside control); David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 801, 802 n.10, 803 (1992); Zacharias, supra note 7, at 338-39 & n.10.
forceable legal rules, dramatically increasing the significance of the Code's content.

That increased significance led to increased scrutiny, serious dissent, and, ultimately, a new set of rules. Despite the Model Code's nearly uniform initial acceptance by the states, commentators were quick to point out significant flaws. As a result, the ABA adopted amendments to the Code every year between 1974 and 1980, several of which were rejected or substantially modified by a large majority of states. By 1977, the problems were serious enough that a committee was appointed to study overhauling the Code. This committee, called the Kutak Commission after its chair, recommended the adoption of yet another new approach, the Model Rules of Professional Conduct.

Unlike the Model Code, the Model Rules evoked controversy and dissent from the outset, even before they were finally adopted by the ABA House of Delegates and sent out to the states. The first draft of the Model Rules, which was leaked to the press in August 1979, revealed that the Kutak Commission intended a "bold reworking" of the Code, proposing major changes not just in the structure but also in the substance of the rules on confidentiality, pro bono work, advertising and solicitation, conflicts of interest, and disclosure during litigation and negotiation. This ambitious approach was met with a

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60. See WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 2.6.3, at 57.


62. In terms of structure, the Model Rules took the "legalization" begun by the Model Code a step further, eliminating aspirational Canons and Ethical Considerations and using instead a "restatement" format—black letter rules with official commentary.

63. See WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 2.6.4, at 61; see also Schneyer, supra note 61, at 700-03.
great deal of alarm and some outrage, and resulted in fully formed, self-described counterproposals from other organizations and successively milder drafts of the Model Rules. The process within the ABA was finally completed in August 1983, when the ABA House of Delegates amended and then approved the Rules by a divided vote, with the recommendation to states that the Model Rules replace their existing versions of the Model Code.

The controversy surrounding the Model Rules did not abate following House of Delegates approval. Understanding that these Rules had "real bite," people unhappy with the final ABA product continued the debate in their own states, arguing for a return to earlier Kutak Commission drafts, other significant amendments, or outright rejection. While the ABA's professed goal was uniform state adoption of the Model Rules, a member of the ABA Special Committee on Implementation of the Model Rules offered as a selling point for the Model Rules the invitation to "shape these rules to your own states when you get home." While 39 states have now adopted codes based on the structure and content of the Model Rules, every one of those states has acted on that invitation and made some modification to the ABA's model.

64. See Schneyer, supra note 61, at 702-03 & n.151.
65. See id. at 708-14 (discussing alternative drafts prepared by or on behalf of American Trial Lawyers Association and National Organization of Bar Counsel).
66. See WOLFRAM, MODERN LEGAL ETHICS, supra note 5, § 2.6.4, at 61.
67. See id. at 62.
68. See HAZARD ET AL., supra note 34, at 15.
69. See HAZARD et al., supra note 6, at 1235 ("establishment of uniform rules to the maximum extent feasible [was] the original driving force behind proposal of the Model Rules").
70. See ABA Committee on Counsel Responsibility, supra note 6, at 1235 ("establishment of uniform rules to the maximum extent feasible [was] the original driving force behind proposal of the Model Rules").
2. Current Disparity

A brief review of the extent and nature of the current disparity in lawyer-conduct standards will help put in perspective both the prevailing description of the problem posed for lawyers and proposed solutions. Though the Model Rules and their amendments have not been uniformly adopted, and some state amendments have been significant, those amendments typically involve a small number of rules and take a limited number of forms. In other words, those states adopting some version of the Model Rules have adopted the vast bulk of the text without change. The great majority of state amendments concern either confidentiality or information about legal services (advertising and solicitation). Most of the rest address details about fees or particular conflict-of-interest situations. In terms of the states that have adopted the Model Rules, therefore, the level of disparity in adopted standards is not as great as advertised. Of course, the substantial number of states that still retain some version of the Model Code increase the diversity of standards. Moreover, in some areas even identically worded rules may be interpreted differently in different jurisdictions, creating nonuniformity out of uniform language. Finally, the diversity picture is not complete without reference to the remarkably haphazard federal court approach to setting lawyer-conduct standards.

a. State Variations in Text

The most amended provision of the Model Rules has been Rule 1.6, which states the Rules' basic confidentiality principle and sets out the main exceptions. Lawyers and scholars have long debated the appropriate scope of attorney-client confidentiality, particularly with respect to revealing future client crimes, and that debate was given full voice during both the

73. See HAZARD & HODES, supra note 69, § AP4:102.
74. See id.
75. See id.
76. See id. § AP4:103.
77. See generally MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 6 (1975) (distinguishing an attorney's duty when possessing knowledge of a past crime with knowledge of a future crime); Harry Subin, The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm, 70 IOWA L. REV. 1091, 1101 (1985) (discussing the balance of attorney confidentiality and disclosure); Fred C. Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351, 354-55 (1989) (suggesting that strict confidentiality rules are contrary to public and professional interests). Compare Marvin Frankel, The
Kutak Commission drafting process and the debates in the House of Delegates.\(^7\) It is hardly surprising, therefore, that the states adopting the Model Rules have not agreed on a uniform version of Model Rule 1.6.

A brief review of the Rule's history both reveals the diversity of views on the subject and helps explicate the resulting state resolutions. The Model Code provision on confidentiality—Disciplinary Rule 4-101—states the general rule that "a lawyer shall not knowingly . . . reveal a confidence or secret of [a] client,"\(^7\) and then provides for specific exceptions, including permissive disclosure when required by law, or of a client's intention to commit any crime.\(^8\) The version of Rule 1.6 presented by the Kutak Commission to the ABA House of Delegates contained a somewhat broader statement of the confidentiality principle: "A lawyer shall not reveal information relating to representation of a client. . . ."\(^9\) Its exceptions were both broader and more limited than those in the Model Code, including permissive disclosure (1) to comply with other law, (2) to prevent a client from committing a crime or fraud that would cause substantial harm to the person or financial interests of a third person, and (3) to rectify the consequences of a client's crime or fraud in which the lawyer's services had been used.\(^1\)

The Proposed Final Draft exceptions for compliance with other law, for prevention of crime or fraud involving only substantial financial harm, and for rectifying the consequences of past crime or fraud all proved controversial, and all were rejected by the ABA House of Delegates.\(^2\) As a result, Model

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\(^7\) Kutak Commission drafting process and the debates in the House of Delegates. See Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031, 1057-58 (1975) (arguing that the legal system would improve if lawyers were required to disclose all information favorable to client's adversary), with H. Richard Uviller, The Advocate, the Truth and Judicial Hackles: A Reaction to Judge Frankel's Idea, 123 U. Pa. L. Rev. 1067, 1081-82 (1975) (maintaining that the adversary system is an effective method for reconstructing truth).

\(^8\) The drafting history of Model Rule 1.6 is described by HAZARD & HODES, supra note 69, §§ 1.6:101, at 109-14. See also Schneyer, supra note 62, at 681-724 (chronicling the development of the Model Rules).

\(^9\) See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1990).

\(^1\) See id. DR 4-101(C)(2)-(3). The other exceptions are for client consent, see id. DR 4-101(C)(1), and in connection with fee disputes and lawyer "self-defense," see id. DR 4-101(C)(4).

\(^2\) See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (Proposed Final Draft 1981).

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Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031, 1057-58 (1975) (arguing that the legal system would improve if lawyers were required to disclose all information favorable to client's adversary), with H. Richard Uviller, The Advocate, the Truth and Judicial Hackles: A Reaction to Judge Frankel's Idea, 123 U. Pa. L. Rev. 1067, 1081-82 (1975) (maintaining that the adversary system is an effective method for reconstructing truth).

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See id. DR 4-101(C)(2)-(3). The other exceptions are for client consent, see id. DR 4-101(C)(1), and in connection with fee disputes and lawyer "self-defense," see id. DR 4-101(C)(4).

See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (Proposed Final Draft 1981).

See id. The other exceptions permitted disclosure in connection with fee disputes and "self-defense" against charges made about the lawyer's conduct. Id.
Rule 1.6 as adopted by the ABA permits disclosure only to prevent a client from committing a crime likely to result in imminent death or serious bodily injury, and in fee disputes and "self-defense" situations.\textsuperscript{84} Recognizing that the resulting rule "was so nearly absolute as to be unworkable,"\textsuperscript{85} Model Rules reporter Geoffrey Hazard added, and the House of Delegates adopted, the infamous "notice of withdrawal" comment to the rule,\textsuperscript{86} effectively allowing lawyers to put others on notice of possible crimes or fraud committed by the client without directly revealing a client confidence.

The states that have adopted some version of the Model Rules have taken one of four basic approaches to Rule 1.6. A substantial number of states restored some or all of the Kutak Commission's language permitting disclosure to rectify harm, comply with other law, or prevent future client misconduct threatening substantial harm to financial interests.\textsuperscript{87} Other states adopted the ABA version without amendment.\textsuperscript{88} Still others retained the Model Code approach to future misconduct, permitting disclosure of a client's intent to commit any crime.\textsuperscript{89} Finally, several states mandated revealing client confidences with respect to certain future crimes.\textsuperscript{90} The disparity in permissive

\textsuperscript{84} See \textit{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 1.6(b) (1995).
\textsuperscript{85} \textit{HAZARD \& HODES}, supra note 69, § AP4:103, at 1260.
\textsuperscript{86} \textit{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 1.6(b) cmt. 16 (1995) ("Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like."); see Schneyer, \textit{supra} note 61, at 723 (describing Hazard's responsibility for the commentary). See generally Geoffrey C. Hazard, Jr., Rectification of Client Fraud: Death and Revival of a Professional Norm, 33 \textit{EMORY L.J.} 271, 298-304 (1984) (discussing Model Rule 1.6 and notice-of-withdrawal comment); Ronald D. Rotunda, The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag, 63 \textit{OR. L. REV.} 455, 471-84 (1984) (same).
\textsuperscript{87} See \textit{HAZARD \& HODES}, supra note 69, § AP4:103 (listing states).
\textsuperscript{89} See \textit{HAZARD \& HODES}, supra note 69, § AP4:103, at 1261.
\textsuperscript{90} See id. § AP:104, at 1262. Of the ten states in this category, six re-
disclosure standards is likely to have little practical effect; even "[i]n states that permit disclosure of any contemplated crime, the vast majority of lawyers will quite properly refuse to take that option in all but the most dire circumstances." Lawyers have practiced since 1970 under the permissive disclosure scheme of the Model Code, "yet there are few reported instances of disclosure, let alone unwarranted disclosure." Even the mandatory disclosure of future crimes threatening death or serious bodily injury is unlikely to operate differently from a rule that permits but does not require disclosure: "So long as lawyers are not prohibited from revealing the threat, moral duty will ordinarily convert 'may reveal' into 'must reveal.'"

The one variation on Rule 1.6 that harbors significant practical consequences is the mandatory disclosure of future client misconduct that does not threaten death or serious bodily injury. Four states have adopted such a requirement. Two states, New Jersey and Wisconsin, require disclosure when a client threatens the substantial financial interests of another. The other two states, Florida and Virginia (in its revision of the Model Code), require disclosure of a client's intent to commit any crime. These more radical disclosure requirements suggest a markedly different view of the lawyer's role than that offered by even the expansive permissive disclosure of the Model Code.

The other principal area of substantial state variation falls under Part 7 of the Model Rules, "Information about Legal Services." The law of lawyer advertising and solicitation has

quire disclosure in the case of client conduct threatening death or serious bodily injury. See id. at 1263.

91. HAZARD & HODES, supra note 69, § AP4:103, at 1262.
92. Id.
93. Id. § AP4:104, at 1262.
94. See NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1997); WISCONSIN RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS Sup. Ct. Rule 20:1.6(b) (1997).
95. See FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-1.6(b)(1) (1997); VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D)(1) (1996). To appreciate the significance of these differences, suppose L represents C in connection with C's efforts to secure a bank loan. Shortly before the closing of the loan, L learns that C has materially overstated C's assets to the bank. Model Rule 1.6 would prohibit L from disclosing to the bank C's intended fraud, while Disciplinary Rule 4-101(c)(3) would permit, but not require, L to make such disclosure. The confidentiality rules adopted by Florida, New Jersey, Virginia, and Wisconsin, in contrast, would require disclosure to the bank.
been profoundly shaped by the commercial speech decisions of the United States Supreme Court. The Court has used lawyer advertising and solicitation as a significant vehicle in the development of commercial speech doctrine, and since 1977 has limited states’ ability to restrict the way lawyers seek to attract clients. The ABA responded to and attempted to account for the Court’s decisions both in the 1983 version of the Model Rules and in several subsequent amendments. The states have been somewhat less swift to respond, and their responses have ranged from the generally permissive to “regulating whatever it...[is] still constitutionally permissible to regulate.” Even among the states still aggressively regulating advertising and solicitation, there are important differences in detail, particularly with respect to mailings to prospective clients and claims of specialization in advertisements.

The foregoing focus on the two most widespread areas of state variation on the text of the Model Rules is not meant to suggest that there are not other noteworthy disparities. In the areas of conflicts of interest and imputed disqualification, for example, important state differences create potential choice-of-law problems for the multistate practitioner. The point is

96. See generally LOUISE L. HILL, LAWYER ADVERTISING 57-82 (1993) (analyzing Supreme Court decisions involving the commercial speech of lawyers).

97. See, e.g., Peel v. Attorney Registration and Disciplinary Comm’n of Illinois, 496 U.S. 91 (1990) (holding that a lawyer has a First Amendment right to advertise certification as a specialist as long as advertisement is not misleading); Shapero v. Kentucky Bar Ass’n, 486 U.S. 466 (1988) (holding that First Amendment bars prohibition of “targeted” mailings directed at persons “known to need legal services”); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (holding, inter alia, that an attorney cannot be disciplined for soliciting business through truthful, non-deceptive printed advertising); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (establishing that lawyer advertising is commercial speech entitled to some First Amendment protection).

98. See HILL, supra note 96, at 73-82.


100. See id. at 1267-69.

101. See Zacharias, supra note 7, at 347 n.55. For example, Model Rule 7.4 permits lawyers to advertise the fields in which they practice, while sharply limiting their ability to claim the status of “specialist.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 (1995). Some states, such as Delaware, place limits even on the advertisement of areas of practice. See, e.g., DELAWARE LAWYERS’ RULES OF PROFESSIONAL CONDUCT Rule 7.5(a) (1997) (requiring that field of practice claimed in advertisements constitutes at least 25% of the advertising lawyer’s practice).

102. See HAZARD & HODES, supra note 69, at § AP4:102; Roach, supra note
that we should be careful not to exaggerate the extent to which the substance of lawyer-conduct standards varies among the states. Most states' rules are close to identical, in substance if not in precise language.

b. **State Variations in Interpretation**

A fair description of the extent of the "balkanization" of ethics codes must include the contribution of inconsistent interpretation of identically or similarly worded rules. Even where two states (or virtually all states) have adopted the same language, judicial interpretation of that language may vary significantly from state to state. Perhaps the best example of such interpretive disparity is the no-contact rule—the venerable ban on *ex parte* communications by attorneys with adverse represented parties. Before it was amended in August 1995, Model Rule 4.2 provided: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Rule 4.2 was taken almost word-for-word from Model Code Disciplinary Rule 7-104(a), and while several states have amended the rule, inconsistent interpretations of identical language, rather than amendments to the model language, account for most of the rule's interstate nonuniformity. The range and history of those inconsistent interpretations has been well documented elsewhere, particularly in the context of the long and often bitter debate over whether and to what extent the no-contact rule

6, at 910-11, 913-14.


104. DR 7-104 provides in relevant part:

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.  


should apply to federal prosecutors. For present purposes, it is enough to note that courts have offered inconsistent interpretations of several aspects of the no-contact rule, including whether it applies at all to criminal litigation, whether it applies to investigative activity that precedes the filing of a complaint or indictment, how it applies to the employees and former employees of an adversary corporation, and what the rule means by "authorized by law." As a source of uncertainty for multistate practitioners, this interpretive disparity may be as important as the textual variation described above.

c. Federal Court Variations

The diversification of lawyer-conduct standards has not been confined to the states. Professor Daniel Coquillette, in a study for the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, has demonstrated the remarkably fragmentary nature of local federal district court rules governing attorney conduct. The majority of fed-


108. See Cramton & Udell, supra note 106, at 333-38 (describing inconsistent interpretations of the rule, particularly the terms "party" and "subject of the representation," to include and not include activity preliminary to the filing of an indictment or complaint).

109. See Bruce A. Green, Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?, 64 GEO. WASH. L. REV. 460, 525 n.328 (1996) (describing "range of inconsistent tests to determine which present and former officers and employees of a corporation may or may not be contacted under this rule").

110. Cramton & Udell, supra note 106, at 346-49 (describing inconsistent interpretations of the "authorized by law" exception to the rule).

111. See Green, supra note 109, at 524 (contending that "the professional literature addressing the problem of 'balkanization'... exaggerate[s] the extent to which the substance of ethical rules varies among jurisdictions and overlook[s] the greater extent to which 'balkanization' results from inconsistent interpretations of similarly worded rules").

112. See DANIEL R. COQUILLETTE, REPORT ON LOCAL RULES REGULATING ATTORNEY CONDUCT (July 5, 1995) [hereinafter COQUILLETTE REPORT] (on file with author); see also Amy R. Mashburn, A Clockwork Orange Approach to
eral district courts incorporate by local rule the conduct rules of the state in which they sit, thereby inheriting state-based balkanization.\textsuperscript{113} Other districts have taken a variety of approaches, including adoption of the ABA Model Rules or Model Code (even if different from the local state version), adoption of both an ABA model and state standards (without recognizing or resolving conflicts between the two), and failure to adopt any local rule at all.\textsuperscript{114} As a result, lawyers engaged in multistate practice must be aware not only of state-to-state disparity in conduct rules, but of state-federal and federal-federal disparity as well.

d. Disparity Outside the Rules

Finally, any assessment of lawyer uncertainty in an era of multijurisdictional practice should recognize that the ethics codes form only a small part of the law governing lawyers. The other relevant law includes not only that which applies specifically to lawyers, such as malpractice law and the rules of civil and criminal procedure, but also law of general applicability, like tort and criminal law. In our federal system, that “other” law is most often state law, and as such it frequently varies from jurisdiction to jurisdiction.\textsuperscript{115}

3. Increased Enforcement

At the same time that professional conduct standards were becoming both increasingly diverse and more “law-like,” professional discipline was becoming better funded and more professional, and civil suits for legal malpractice were becoming more common. In 1970, the ABA Clark Committee recommended dramatic changes in the undeveloped structure of disciplinary enforcement,\textsuperscript{116} which until then had been controlled


\textsuperscript{113} See \textit{Coquillette Report, supra} note 112, at 2.

\textsuperscript{114} See id. at 3-4.

\textsuperscript{115} See \textit{infra} Part II (explaining that interstate disparity in legal norms is both common and inevitable in the American federal system). The law of legal malpractice, perhaps the best example of “other” state-based law governing lawyers, is not entirely uniform. While in most respects states treat the action consistently, their treatment of at least three important issues—third-party claims, the relevance of professional rules, and the statute of limitations—varies widely. See Symposium, \textit{Legal Malpractice,} 61 TEMPLE L. REV. 1045 (1988).

\textsuperscript{116} See ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY EN-
by bar committees staffed by volunteer lawyers, and had fo-
cused largely on removing the few lawyers deemed unfit to
practice. Following the Clark Committee report, disciplinary
staffs became more professional, disciplinary rates and expen-
ditures per lawyer rose dramatically, and use of sanctions
short of disbarment became more prevalent. During the
same period, legal malpractice claims multiplied, as the
“professional conspiracy” against suing lawyers began to break
down. This increased enforcement of ethics norms has mark-
edly elevated the significance of the contemporaneous diversi-
fication of those ethics norms.

C. THE RESULTING PROBLEM AS PERCEIVED BY THE BAR AND
COMMENTATORS

According to the rhetoric of the organized bar, the increas-
ing diversity in conduct rules and the growth of multijurisdic-
tional practice have created an “increasingly serious problem”
that poses “grave difficulties” for multistate practitioners.
Lawyers’ inability to determine in advance which of several in-
consistent rules might later be applied to their conduct
“undermines compliance with legal ethics codes.” Comment-
tors, lamenting the “critical level of interstate disparity in
professional ethics,” complain that lawyers’ “ability to find
guidance in a single state’s code of conduct has virtually disap-
ppeared,” explain that law firms are “bedeviled” by conflicting
standards that might apply to a team of multiply-admitted

FORCERMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY EN-
FORCEMENT (1970) (named after its chair, retired Justice Tom C. Clark of the
United States Supreme Court).

117. See Ted Schneyer, Professional Discipline for Law Firms?, 77
CORNELL L. REV. 1, 20-22 (1991) (explaining that, prior to the Clark report,
disciplinary agencies were typically underfunded and discipline was thought
of largely as a way to purge the profession of particularly egregious offenders).

118. See id.

119. See John Leubsdorf, Legal Malpractice and Professional Responsibil-
and development of legal malpractice litigation).

120. See Hazard, supra note 40, at 715 (documenting the “emerging trans-
formation” of the legal profession in the late 1960s and early 1970s).

121. ABA Committee on Counsel Responsibility, supra note 6, at 1229,
1232.

122. Roach, supra note 6, at 908.

123. Developments in the Law—Lawyers’ Responsibilities and Lawyers’ Re-
 sponses, 107 HARV. L. REV. 1547, 1584 (1994) [hereinafter Responsibilities
and Responses].

124. Zacharias, supra note 7, at 344.
practitioners working on a single transaction,¹²⁵ and predict that inconsistency in state ethics rules will harm the attorney-client relationship.¹²⁶

These calls to alarm typically are justified by hypotheticals illustrating the few state ethical rules that are in direct conflict. By far the most popular scenario concerns inconsistent confidentiality rules and involves some variation of the following:

Lawyer L is admitted to practice in states A and B. L, representing a client that does business in both states, learns that the client intends to commit a fraud that could result in serious financial injury to a third party that also has contacts in both states. State A, like Delaware, has adopted Model Rule 1.6 without amendment, and so prohibits disclosure of the client’s intent. State B, like New Jersey, has adopted a version of Rule 1.6 that requires L to reveal this client fraud. If L complies with state A’s rule and remains silent, she may later be disciplined by state B for violation of its rule. If L decides to comply with state B’s rule and discloses the intended fraud, she may later be disciplined by state A.¹²⁷

Sometimes the facts are massaged to increase complexity, so for example L may become a team of lawyers with multiple admissions working for a multistate law firm.¹²⁸ But whatever the formulation, the hypothetical successfully illustrates that state-to-state disparity of confidentiality standards can create a situation where two potentially applicable rules create conflicting obligations. It is worth noting, however, that this sort of “conflict of obeisance”¹²⁹—where compliance with one state’s rule would mean violation of another state’s rule, and vice versa—is largely limited to the area of attorney-client confidentiality and exists only as a result of the rules in four states.¹³⁰ In other words, while the hypothetical ably captures

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¹²⁵. Daly, supra note 11, at 798.
¹²⁷. See the examples provided in ABA Committee on Counsel Responsibility, supra note 6, at 1233-34; Daly, supra note 11, at 717-18; Felleman, supra note 126, at 1500-01; Zacharias, supra note 7, at 347 n.52.
¹²⁸. See Daly, supra note 11, at 717.
¹³⁰. See supra Part I.B.2.a. Lawyers may face conflicts of obeisance in one
the fact that lawyers may on occasion face serious choice-of-law problems with respect to their own conduct (problems not unlike those they get paid to address for their clients), it does not describe a problem of epic proportions.

Of course, the other inconsistencies in state conduct rules—"two-hurdle" conflicts that do not create directly conflicting obligations—are not without cost. While generally lawyers can avoid violating two or more potentially applicable standards by complying with the more onerous standard (the higher hurdle), such compliance is at the expense of the policy of the state with the lower hurdle. So, for example, where one state makes the normative decision to give a lawyer discretion to disclose a particular client confidence, that policy choice is subverted if a multistate lawyer feels compelled by the rule of another state to keep the confidence. But here again, just because the problem is easy to illustrate with well-constructed hypotheticals does not mean that it has a significant impact on the lives of many lawyers.

D. EXISTING PROPOSED SOLUTIONS

The problem of uncertainty over which conduct rules to follow has generated two types of proposed solutions. The first seeks to eliminate the diversity of conduct standards by imposing uniform standards at the national level. The second attempts to minimize lawyer uncertainty by creating a model choice-of-law rule for state adoption.

1. Creating Uniform National Standards for All Lawyers

The relevant literature of the last several years includes increasing reference to the prospect of uniform national rules that would govern the conduct of all lawyers in all practice settings. A recent Developments Note in the Harvard Law Re-

other area—lawyer advertising. See infra note 381 (explaining that advertising raises particularly difficult issues, especially because it is often cross-jurisdictional).

131. Buxbaum, supra note 129, at 36.
132. See ABA Committee on Counsel Responsibility, supra note 6, at 1234.
133. Compare, e.g., PENNSYLVANIA RULE OF PROFESSIONAL CONDUCT Rule 1.6(c)(1) (1997) (permitting disclosure of confidences to prevent "the client from committing a criminal act that the lawyer believes is likely to result in death or substantial injury to the financial or property interests of another") with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1995) (permitting disclosure only to prevent "imminent death or substantial bodily harm").
view described "the idea of a federal code of ethics" as "an as yet undeveloped, but potentially promising reform."134 Stephen Burbank has suggested that it may be "time to think seriously of a national bar, governed by uniform federal norms of professional conduct in all practice contexts."135 Ted Schneyer has predicted the ultimate adoption of a "Federal Code of Lawyer ing" for all lawyers, along with a federally administered disciplinary system.136 Fred Zacharias has given full-length treatment to the subject of federalizing legal ethics.137 While not purporting to offer a detailed vision of the federalization of professional regulation, Zacharias effectively marshals the arguments in favor of federalization,138 anticipates and addresses objections to federalization,139 and concludes that "some form of standardized national regulation seems inevitable."140

The form of national regulation anticipated by these commentators, while not entirely clear, seems to be congressional adoption of a new, nationally applicable code of lawyer conduct. Such a code would be enforced at the national level, either through a newly created federal agency or by the Department of Justice.141 A national code would eliminate uncertainty problems created for lawyers by eliminating all disparities in state codes. Proponents further argue that a national code would serve to enhance the image of lawyers in the eyes of both clients and the public generally, because the current disparity compels inconsistent lawyer conduct that upsets client and public expectations.142

134. Responsibilities and Responses, supra note 123, at 1585-86 n.43.
135. Burbank, supra note 7, at 974. But see id. at 969 ("Federal legislation preempting state law of professional conduct is conceivable but hardly likely . . . .").
137. See Zacharias, supra note 7.
138. See id. at 345-73.
139. See id. at 373-79.
140. Id. at 380.
141. See id. at 378; see also Schneyer, supra note 136, at 125-29 (describing development of a national disciplinary agency).
142. See Zacharias, supra note 7, at 357-65.

In 1993, the ABA amended Model Rule 8.5 in an effort to address the problems of uncertainty faced by multistate lawyers. The original 1983 version of Rule 8.5 is a rule of jurisdiction, not choice of law. It simply states the uncontroversial proposition that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." The only references to ethical conflicts in multistate practice are confined to the comments to the rule, which state:

[2] If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

[3] Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation.

The amended version of Model Rule 8.5, entitled "Disciplinary Authority; Choice of Law," directly takes on the conflicts issue. According to the responsible committee, the purpose of the amended rule is to establish "relatively simple, bright-line rules" for the determination of which jurisdiction's rules should be applied to particular conduct.

Subsection (a) of the new Rule 8.5 covers the same ground as the original rule, providing that any admitting jurisdiction has authority to discipline its lawyers, no matter where the conduct in question occurs. Subsection (b) is entirely new, addressing choice-of-law problems in both the litigation and transactional contexts. For choice-of-law problems in litigation, the rules of the forum apply as long as the lawyer has been

144. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 cmts. 2, 3 (1983).
146. The Rule states: "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(a) (1993).
admitted in that jurisdiction.147 For "any other conduct," which presumably covers both transactional work and conduct related to litigation in a jurisdiction where the lawyer is not admitted, the choice-of-law rule depends on whether the lawyer is licensed in one or multiple jurisdictions. If the lawyer is licensed in only one jurisdiction, then the rules of that jurisdiction apply.148 If the lawyer is admitted in multiple jurisdictions, then the rules to be applied are those of the jurisdiction in which the lawyer "principally practices," unless "particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed," in which case the rules of that jurisdiction apply.149

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Proponents of federally promulgated uniform conduct standards and amended Model Rule 8.5 offer them as solutions to the uncertainty generated by the combination of multistate practice and diverse state norms. Parts III and IV of this Article examine these proposals in light of federalism principles. Before turning to the solutions, however, this Article assesses in Part II the relative seriousness of the problem that has given them life. Lawyers better than anyone should appreciate that normative variation, and the resulting uncertainty over which norms apply to what conduct, are inevitable components of the American federal system. Viewed through the lens of federalism, the uncertainty that now confronts lawyers appears

147. Rule 8.5(b)(1) states:
[F]or conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise.


148. Model Rule 8.5(b)(2)(i) provides that "if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(b)(2)(i) (1993).

149. Model Rule 8.5(b)(2)(ii) provides in full:
[If] the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

far less serious than many have suggested. At worst, it is not
more daunting than that faced much more often by clients.

II. EXAMINING THE PROBLEM THROUGH THE LENS OF
FEDERALISM: DISPARITY AND UNCERTAINTY
IN THE AMERICAN FEDERAL SYSTEM

Even a superficial survey of the vast historical, political
science, economics, and legal academic literature on the topic of
federalism reveals that it is many things to many people.\textsuperscript{150}
While there may be some consensus on the broadest and most
basic description of what American federalism "is"—a system
of allocating normative responsibility between the national and
state governments—there has been extraordinary disagree-
ment from the framing of the Constitution until today over the
social, economic, political, and legal consequences of that fed-
eralism.\textsuperscript{151} In terms of the contemporary debate, the Supreme
Court's most eloquent tribute to American federalism came in
the relatively recent case of \textit{Gregory v. Ashcroft}.\textsuperscript{152} Justice
O'Connor's encomium to the virtues of federalism has been
matched by equally passionate descriptions of federalism's
vices. While \textit{Gregory} contends that federalism "increases op-
portunity for citizen involvement in democratic processes,"\textsuperscript{153}
critics respond that it merely entrenches local elites.\textsuperscript{154} While
\textit{Gregory} claims that federalism "makes government more re-
sponsive by putting the States in competition for a mobile citi-
zenry," and "assures a decentralized government that will be

\begin{itemize}
\item \textsuperscript{150} Larry Kramer has aptly likened talking about federalism to "joining
the proverbial blind men trying to describe an elephant." Larry Kramer, \textit{Under-
\item \textsuperscript{151} Of the foundational principles addressed in \textit{The Federalist— republi-
canism, separation of powers, federalism, and limited government—
federalism received the least systematic and most ambiguous treatment. \textit{See}
\textit{George W. Carey, The Federalist: Design for a Constitutional Re-
public} 96-125 (1989) (discussing difficulties of \textit{The Federalist} authors in ar-
ticulating a coherent explanation of federalism).
\item \textsuperscript{152} 501 U.S. 452 (1991).
\item \textsuperscript{153} \textit{Id.} at 458 (citing Michael W. McConnell, \textit{Federalism: Evaluating the
Founders' Design}, 54 U. CHI. L. REV. 1484, 1491-1611 (1987); Deborah Jones
Merritt, \textit{The Guarantee Clause and State Autonomy: Federalism for a Third
Century}, 88 COLUM. L. REV. 1, 3-10 (1988)); see also Lewis B. Kaden, \textit{Politics,
Money and State Sovereignty: The Judicial Role}, 79 COLUM. L. REV. 847, 853-
55 (1979) (asserting that federalism promotes public participation).
\item \textsuperscript{154} \textit{See, e.g.,} Edward L. Rubin & Malcom Feeley, \textit{Federalism: Some Notes
on a National Neurosis}, 41 UCLA L. REV. 903, 915 (1994) ("T\textit{he story of par-
cipation in state and local government regularly features low voter turnouts,
entrenched elites, and narrow-minded policies."));
\end{itemize}
more sensitive to the diverse needs of a heterogeneous society," critics answer that federalism instead creates races to the bottom at the state level and inhibits autonomy and variability at the local level. Gregory's assertion that federalism "allows for more innovation and experimentation in government" is met by the claim that federalism in fact discourages local experimentation because such experimentation is less likely without encouragement from the central authority. To the final and principal benefit of the federal system claimed by Gregory—that it serves (like the separation of powers) as "a check on abuses of government power" by diffusing power among separate sovereigns—critics respond that far from securing

155. 501 U.S. at 458; see also infra Part III.B.1.a (discussing the advantages of normative diversity among states).

156. See, e.g., William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L.J. 663 (1974) (arguing that state competition for corporate charters inhibits important regulatory efforts); Jerry L. Mashaw & Susan Rose-Ackerman, Federalism and Regulation, in THE REAGAN REGULATORY STRATEGY 111, 117 (George C. Eads & Michael Fix eds., 1984) (asserting that competition among states discourages social welfare programs); see also infra Part III.B.1.c (discussing the effects of competition among states).

157. See Rubin & Feeley, supra note 154, at 918-19.

158. 501 U.S. at 458. Justice Brandeis originated the classic formulation of the states-as-experimenters argument for federalism: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Charles Fried, Federalism—Why Should We Care?, 6 HARV. J.L. & PUB. POL'Y 1, 2-3 (1982) (arguing that decentralized political power leads to innovation); Kaden, supra note 153, at 854-55 (identifying a number of state programs that inspired changes in national policy); Merritt, supra note 153, at 9 (noting that states have validated Justice Brandeis' observation by pioneering new social and economic programs).

159. See Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After Garcia, 1985 SUP. CT. REV. 341, 411-12 (identifying obstacles to local innovation that are absent at the national level); Susan Rose-Ackerman, Risk Taking and Reelection: Does Federalism Promote Innovation?, 9 J. LEGAL STUD. 593, 614-16 (1980) (arguing that federalism can successfully promote local innovation only if the national government offers incentives to states).

160. 501 U.S. at 458. The Court explains this point by asserting that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." Id. As the Court recognized, the authors of The Federalist made the same point over two hundred years ago. See THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter, ed. 1961) ("If [the people's] rights are invaded by either [the state government or the general government], they can make use of the other as the instrument of redress."); Id. No. 51, at 323 (James Madison):
liberty, federalism both multiplies the opportunity for government tyranny and undermines individual rights by freeing states from the ameliorating authority of the national government. The impressive list of virtues recited in Gregory has been supplemented by recent communitarian scholarship, which claims that federalism promotes community. Federalism’s critics, on the other hand, contend that states are not effective “communities” in any meaningful sense; that the true social communities of neighborhoods, towns and civic groups are not enhanced by federalism; and that in the United States our one distinct political community is national.

Whether federalism is part of the problem or part of the solution, one unquestionable consequence of a federal system is normative variation. Lawmakers with independent authority are not going to treat every subject in the same way. In the United States, in virtually every area of the law, states have exercised their independent lawmaking authority to take different approaches to similar problems. Examples of diverse

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

See generally Federalism and Rights (Ellis Katz & G. Alan Tarr eds., 1996) (analyzing the relationship between federalism and the protection of individual rights).

161. See, e.g., William H. Riker, Federalism: Origin, Operation, Significance 142, 145 (1964) (using the example of southern opposition to different civil rights laws to highlight weaknesses of federalism); cf. Gary Jeffrey Jacobsen, Contemporary Constitutional Theory, Federalism, and the Protection of Rights, in Federalism and Rights, supra note 160, at 29, 43 (“Where rights are involved, local communities have become the problem, not the solution.”).


163. See Rubin & Feeley, supra note 154, at 936-51 (analyzing the efficacy of federalism in promoting different types of community).
state approaches are seemingly endless, and include important issues in criminal law and procedure, torts, products liability, property, family law, commercial law, and consumer protection.

For the proponents of federalism, the state-based diversity of norms is a good thing. A defense of this claim comes later, but whatever its merits, the tremendous normative variation in the American federal system is undeniable. Such variation creates the possibility that interstate actors will face inconsistent or contradictory commands from different jurisdictions, and may even have to seek legal counsel concerning difficult questions of choice of law. Indeed, it is the ubiquity of that variation, coupled with overlapping jurisdiction, that creates conflicts of laws and necessitates choice of law. Before proceeding to the radical cure of nationalizing legal ethics standards, commen-

164. In the area of constitutional criminal procedure, for example, many states have heeded Justice Brennan's call to grant greater protection to their citizens than that afforded by the United States Supreme Court. See William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 548 (1986). For a thorough discussion of the consequences of the resulting disparate state rules, see James W. Diehm, New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?, 55 Md. L. Rev. 223 (1996). For a review of the diverse state approaches to anti-stalking laws, see Laurie Salame, Note, A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others, 27 Suffolk U. L. Rev. 67, 71-83 (1993).


169. See infra Part II.A (discussing the lack of uniformity in states' adoption of the Uniform Commercial Code).


171. See infra Part III.B.1 (discussing the advantages of federalism).
tators and bar groups alarmed by the current nonuniformity of such standards would do well to compare them to the nonuniform state standards faced by nonlawyers every day. To illustrate the pressure toward normative variation exerted by the federal system, this Part briefly examines the nonuniformity of the Uniform Commercial Code, by reputation the most successful of the "uniform" state-based codes, and then reevaluates the significance of variations in state ethics codes.

A. FACTS OF LIFE IN A FEDERAL SYSTEM: NONUNIFORMITY AND THE UNIFORM COMMERCIAL CODE

The Uniform Commercial Code has been called "the most spectacular success story in the history of American law."172 The Code, a joint venture of the National Conference of Commissioners on Uniform State Laws and the American Law Institute, was the product of interest in broad and uniform commercial law reform and fear of federal encroachment on traditional state responsibility for the regulation of commercial law.173 As its name implies, a central goal of the Uniform Commercial Code was, and is, uniformity. The Code itself provides that one of its critical underlying purposes is "to make uniform the law among the various jurisdictions."174 According to William Schnader, the man who both "conceived the idea of a comprehensive commercial code" and sold the idea to the National Conference of Commissioners on Uniform State Laws,175 uniformity was an even more fundamental goal than reform:

The Code project was undertaken by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, to achieve UNIFORMITY in state laws regulating commercial transactions. It was not undertaken as a project merely to improve the law; the Act was promulgated not as a model act but as a uniform act.176

172. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 5 (3d ed. 1988).
173. See generally id. § 1 (discussing the history of the Code project); WILIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 278-85 (1973); William A. Schnader, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 U. MIAMI L. REV. 1, 4-5, 12 (1967) (discussing the interest in uniform commercial laws and noting the possibility that Congress could enact a federal commercial code to counteract non-uniform amendments to the UCC).
175. See 1 WHITE & SUMMERS, supra note 172, at 3.
176. Lawrence J. Bugge, Commercial Law, Federalism and the Future, 17
But despite the name, the goal, and the praise, "[t]he Uniform Commercial Code is not uniform."177 Indeed, both the reasons for and extent of the significant disparity in state versions of the UCC are instructive as we consider the same phenomenon in the field of conduct standards for lawyers.

While forty-nine states, the District of Columbia, and the Virgin Islands have all adopted some version of the UCC,178 every jurisdiction has modified the official text in some way.179 An entire volume of the leading UCC reporting service is devoted to state variations from the official text,180 and a brief review of that volume demonstrates the pervasiveness of those variations. One sort of variation from the current official text stems from the fact that there have been a host of amendments to the official text since the first one was issued in 1952.181 Some states adopting one official text have been unable or unwilling to upgrade to a newer version,182 much like the states that have retained the Model Code of Professional Responsibility rather than switching to the Model Rules.183 Similarly, state variations have been fostered by periodic amendments offered by the Permanent Editorial Board of the UCC, many of which have not been uniformly adopted.184 The options included in the official text of the Code itself further exacerbate the lack of uniformity among states.185


177. 1 WHITE & SUMMERS, supra note 172, at 7; see also Gerald T. McLaughlin, The Evolving Uniform Commercial Code: From Infancy to Maturity to Old Age, 26 LOYOLA L.A. L. REV. 691, 692-93 (1993) (discussing the lack of uniformity in commercial law despite the adoption of the UCC).

178. See 1 WHITE & SUMMERS, supra note 172, at 5. Louisiana, the only state not to have adopted the entire code, enacted Articles 1, 3, 4, 5, 7 and 8 of the 1972 Official Text in 1974. See id. It has since adopted Article 9 as well. See State UCC Variations, U.C.C. Rep. Serv. (CBC) at Louisiana—Page 1 (1996).

179. See McLaughlin, supra note 177, at 692 (discussing reasons for the lack of uniformity in states' treatment of the UCC).

180. State UCC Variations, supra note 178.


182. See 1 WHITE & SUMMERS, supra note 172, at 1 (listing the states that have enacted each of the official texts).

183. See supra Part I.B.1 (discussing the development of conduct codes in the legal profession).

184. See Bugge, supra note 176, at 25-29 (1992) (discussing the history of amendments to the UCC).

185. See 1 WHITE & SUMMERS, supra note 172, at 8 (explaining why the
ample, offers three alternative provisions concerning third party beneficiaries of warrantees, while section 7-403(1)(b) allows states to include optional language regarding the burden of proving a bailee's negligence. States have chosen freely among these and other official options, much as some states have adopted the official version of Model Rule of Professional Responsibility 1.6 while others have opted for the earlier Kutak Commission version.

Perhaps the most important source of UCC textual non-uniformity has been state amendment to the official text. After Pennsylvania promptly adopted the original Code without amendment, other states undertook independent study of the Code and made substantial revisions. Indeed, Pennsylvania was the only state to adopt the original code without amendment, and "[a]lready as early as 1967, the various jurisdictions enacting the Code had made approximately 775 separate amendments to it." Substantial state amendment to the official text has continued to the present. For example, Article 2A, which governs leases, was originally promulgated in 1987 and immediately became the subject of nonuniform state amendments.

UCC is nonuniform).

187. Id. § 7-403(1)(b). The Code contains a substantial number of additional optional provisions, and "[i]n almost every instance, some states have adopted one version while other states have adopted another." 1 WHITE & SUMMERS, supra note 172, at 8.
188. See State UCC Variations, supra note 178 (documenting the variations among states' versions of the UCC).
189. See supra Part I.B.2.a.
191. See Bugge, supra note 176, at 24-25 (describing how the Pennsylvania legislature enacted the Code without a dissenting vote).
194. 1 WHITE & SUMMERS, supra note 172, at 7 (citing Schnader, supra note 173, at 10).
In particular, California made substantial changes to significant portions of Article 2A, many of which were adopted by other states, and some of which found their way into the 1990 official revision of Article 2A.\textsuperscript{196} Of course, state-by-state deviation from the official text of the UCC parallels the similar state-by-state amendment of the official versions of the ABA Model Code and Model Rules.

Even where states enacted the official text of the UCC, inconsistent interpretations of that text produced another layer of nonuniformity. According to Professor Mooney, "inconsistent and poorly reasoned judicial opinions" may be the greatest cause of state-by-state variations in commercial law.\textsuperscript{197} Such interpretive nonuniformity stems from a number of sources. For example, the Code's open-ended terms, such as "good faith" and "commercial reasonableness,"\textsuperscript{198} have been subject to widely varying judicial constructions.\textsuperscript{199} In addition, the Code's occasional ambiguity, as well as plain old bad work by judges, have each produced inconsistent judicial interpretations.\textsuperscript{200} Here again, the interpretive nonuniformity of the UCC not only parallels but could also have served to predict the interpretive nonuniformity of the Model Rules.\textsuperscript{201}


\textsuperscript{197}Mooney, supra note 181, at 1352-53; see also John L. Gedid, U.C.C. Methodology: Taking a Realistic Look at the Code, 29 WM. & MARY L. Rev. 341 (1988) (asserting that the primary reason for nonuniformity is the lack of a standard methodology for interpreting and applying the Code).

\textsuperscript{198}1 White & Summers, supra note 172, at 8.


\textsuperscript{200}See Mooney, supra note 181, at 1352-53 (asserting that judicial interpretation has been a major reason for nonuniformity); Taylor, supra note 199, at 352-58 (arguing that poor drafting and flawed judicial interpretation have led to nonuniformity).

\textsuperscript{201}A final source of normative variation under the ambit of the UCC is the significant impingement of "other law." For example, within the UCC itself, section 1-103 provides that aspects of the common law of contracts, agency, estoppel, and fraud continue to apply unless displaced by particular
The state-by-state disparity in commercial law referenced above would have little practical significance if commercial transactions were wholly intrastate. They are not, of course, and commercial actors have to contend with the inconvenient reality that their transactions might ultimately be judged by the inconsistent laws of two or more jurisdictions. As a consequence, those commercial actors (and their lawyers) should be aware of and familiar with potentially applicable choice-of-law rules. The drafters of the UCC, unlike the drafters of the Model Code and the original version of the Model Rules, anticipated conflicts of law and included a rule designed to resolve such conflicts. Section 1-105 of the Code, which like the rest of the UCC has been through several versions, today grants contracting parties considerable authority to choose the law applicable to their transaction. That authority to choose is conditioned on the transaction bearing a "reasonable relation" to the state or nation whose law is chosen, and it does not extend to certain enumerated situations in which the parties' choice might adversely affect, or fail to take account of, the interests of third parties. Absent an effective choice by the parties or a specific selection by the Code, section 1-105 provides that forum law applies to transactions bearing an "appropriate relation" to the forum.

Not surprisingly, the facts of life that drive the need for choice-of-law rules—normative variation and interstate conduct in a federal system with overlapping jurisdiction—have

provisions of the Code. U.C.C. § 1-103 (1995). In addition, as with the ethics codes, law wholly outside the UCC, both state and federal, can affect substantial aspects of commercial transactions, thus generating another layer of potential nonuniformity. See Mooney, supra note 181, at 1350-51.


203. Section 1-105(1) provides:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.


204. See id.

205. See U.C.C. § 1-105(2) (1995); see also 1 HAWKLAND, supra note 202, § 1-105:05 (detailing situations in which mandatory choice-of-law rules govern).

affected the Code's choice-of-law rules as well. While every state has enacted a choice-of-law rule for its version of the Code, those rules themselves vary widely. Some states have retained the original text of section 1-105, others have adopted the 1972 official text, while still others have made their own nonuniform amendments to one text or the other.\textsuperscript{207} Added to this textual variation is considerable interpretive variation, which becomes particularly significant in those jurisdictions that read section 1-105 to call for application of the forum's own common law of choice of law.\textsuperscript{208} Thus, even where the Code's drafters and caretakers have tried to accommodate nonuniformity through a uniform choice-of-law rule, the result of their quest has been still more nonuniformity.\textsuperscript{209}

What's wrong with nonuniformity in commercial law? According to a past president of the National Conference of Commissioners on Uniform State Laws, nonuniformity tends to undercut certainty and predictability in commercial transactions, and thus "can impede economic development, complicate transactions, burden the legislature, deprive courts of useful precedent, increase the likelihood of federal preemption, and forego the benefit of a national consensus on important issues."\textsuperscript{210} Uniformity, on the other hand, reduces transaction costs by making the law more accessible and less confusing, and increases the confidence with which commercial endeavors can be undertaken by increasing the predictability of legal outcomes.\textsuperscript{211} Does that mean that the nonuniform UCC is (or should be) a dead letter, replaced by a code governing all commercial transactions enacted by the national government?

\textsuperscript{207} See State UCC Variations, supra note 178 (listing the amendments and variations for each state).

\textsuperscript{208} See 1 HAWKLAND, supra note 202, §1-105:04 (explaining that one of the approaches taken by the courts where the parties have not agreed on choice-of-law provisions is to apply the common law of conflicts); David D. Siegel, The U.C.C. and Choice of Law: Forum Choice or Forum Law?, 21 AM. U. L. REV. 494, 496 (1972) (reviewing courts' approaches to choice of law under the UCC).

\textsuperscript{209} More nonuniformity may be just around the corner. The UCC's sponsors, the American Law Institute and the National Conference of Commissioners on Uniform State Laws, are in the middle of a major reworking of the Code. See Jean Braucher, The UCC Gets Another Rewrite, A.B.A. J., Oct. 1996, at 66. If history is any guide, many states will either ignore or put their own mark on the new Code.

\textsuperscript{210} Bugge, supra note 176, at 30.

\textsuperscript{211} See Knippenberg & Woodward, supra note 190, at 2521-22 (arguing that uniformity facilitates transactions).
While the answer to that question depends on who you talk to,²¹² the Code is still praised as a “spectacular success,”²¹³ and is generally regarded even by its critics as “a useful framework within which a significant number of commercial transactions are efficiently and effectively conducted.”²¹⁴

Whatever the import of UCC nonuniformity, its existence demonstrates the inevitability of normative variation in the federal system, even where uniformity is a high priority and nonuniformity brings with it undeniable costs. When states have the authority to place their own mark on someone else’s draft, they will, based either on a perceived need to accommodate local interests or on a simple desire to improve the product generally. In a federal system, the UCC experience reminds us, balkanization happens.

B. LAWYER-CONDUCT STANDARDS IN A FEDERAL SYSTEM

Viewed against the backdrop of UCC nonuniformity, the disparity in state lawyer-conduct standards seems somewhat less than earth shattering. Indeed, state variations on the UCC—deemed the most successful uniform statute in the history of American law²¹⁵—arguably match or exceed state variations on the Model Code and Model Rules. This is not to suggest that the ABA promulgation of model standards of lawyer-conduct constitutes another great success story in the annals of American law, or that state disparity in conduct standards is without cost. The salient points are simply that there is nothing particularly uncommon or alarming about conduct-standards disparity, and that such disparity need not be debilitating.

Given that our federal system and the consequent primacy of state regulation have always been in tension with uniformity and the values it promotes (predictability and reduced transaction costs), the recent discovery by lawyers and the ABA of the perils of nonuniformity seems somewhat belated. While clients have had to deal with those perils since the beginning of the republic,²¹⁶ lawyers have been forced to pay attention by

²¹⁵. See 1 WHITE & SUMMERS, supra note 172, at 5.
²¹⁶. Commentators have long recognized that a federalist system complicates transactions that cross state lines. John William Wallace, focusing on
the recent trend of "legalizing" lawyer-conduct standards. As conduct standards matter, states care about and tinker with their content. As states care about discipline, and discipline happens, lawyers become concerned with predictability and want protection.

Of course uniform national standards would make life easier for lawyers, just as uniform national commercial law standards would make life easier for many of their clients, and just as uniform national product liability standards would make life easier for manufacturers (and their insurers). But if arguments of convenience or tidiness were alone enough to warrant preemptive national legislation, then the federal government would have to take responsibility for vast areas of law now dominated by the states, including commercial law, criminal law, torts, consumer protection, and family law. There would, in short, be little left for the states to do. The lesson of the UCC experience is that at a fundamental level, the federal system continues to promise that normative variation will ordinarily trump uniformity.

commercial law, made the point in an 1851 address to the Law Academy of Philadelphia:

[O]ur law is essentially defective, when our people shall be safe in their business, while they are on one side of a river or surveyor's line, and not safe if they step across it; shall hold their debtor tight, if they can sue him here, and hold him not at all, if they must sue him there; shall find that justice as laid down in some State Courts, is injustice as laid down in other State Courts; and is not known as either in a court of all the States—The Union; . . . where in the North, professing the principles of the English common law, a merchant shall have a contract interpreted in one way in Pennsylvania, another way in New York, and a third way in Boston: and when he goes South with it next week, shall find it open to new constructions . . . .


217. See supra Part I.B (discussing the codification of lawyers' ethics standards and noting the potential problems for lawyers engaged in a multistate practice).

218. See generally NEW DIRECTIONS IN LIABILITY LAW (Walter Olson, ed. 1988) (exploring the reasons for the expansion of products liability litigation and posing ideas for reform); Harvey S. Perlman, Products Liability Reform in Congress: An Issue of Federalism, 48 OHIO ST. L.J. 503 (1987) (discussing products liability reform on a federal level).
III. FEDERALISM AND NATIONAL STANDARDS OF ATTORNEY CONDUCT

Our federal system is hostile to uniform regulation of most types of conduct. In some areas, of course, the national government intervenes and eliminates state-created disparity. While such national intervention can and does occur for a host of reasons, this Article's focus is on the normative question of when the desire for uniformity, or more precisely the desire for predictability and certainty, warrants intervention by the national government. In particular, do the problems of uncertainty and unpredictability posed by disparate state standards of lawyer conduct justify the creation of national, uniform standards? Generally this sort of question is not one of power, but rather of policy, for despite recent Supreme Court efforts to put some teeth into federalism, almost any area that can claim a cogent argument for national uniformity will be one that Congress has the authority to regulate. Nevertheless, because some proposals suggest the possibility of mandatory state enforcement of nationally-imposed lawyer-conduct standards, the question of congressional power is not free from doubt. This Part, therefore, begins with a brief evaluation of congressional authority both to preempt state standards of attorney conduct and to require state agencies to enforce the resulting national standards. It then proceeds to critically examine the claim that federalism values pose no serious obstacle, in terms of policy, to national intervention.

A. FEDERAL AUTHORITY TO IMPOSE NATIONAL STANDARDS OF ATTORNEY CONDUCT

For most of the last sixty years, there would have been little doubt about Congress's power under the Commerce Clause to set and enforce standards of attorney conduct. In a series of cases beginning with the 1937 decision in \textit{NLRB v. Jones \\& Laughlin Steel Corp.},\textsuperscript{219} the Supreme Court firmly established that federal legislation regulating conduct that "affects" interstate commerce would be sustained.\textsuperscript{220} Those cases also made

\textsuperscript{219} 301 U.S. 1 (1937).

\textsuperscript{220} See, e.g., Perez v. United States, 402 U.S. 146 (1971) (holding that local loansharking affects interstate commerce and therefore is within Congress' power to regulate); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding regulation of local restaurant's activities); Wickard v. Filburn, 317 U.S. 111 (1942) (sustaining statute regulating the production of wheat har-
clear that each transaction regulated need not itself have a substantial impact on commerce: "[W]here a general regulatory statute bears a substantial relation to commerce, the de minimus character of the individual instances arising under the statute is of no consequence."221 In light of this aggregation principle, illustrated most clearly by cases like Wickard v. Filburn222 and Perez v. United States,223 the activities of lawyers, individually and collectively, would surely be within Congress's reach. The Court's decision in Garcia v. San Antonio Metropolitan Transit Authority,224 in addition to overruling National League of Cities v. Usery,225 simply formalized what had been the practical consequence of these cases: Any meaningful protection for state interests must come not from the judiciary but from the national political process.226

The recent and somewhat surprising decision in United States v. Lopez,227 in which the Supreme Court struck down a law as beyond the commerce power for the first time in sixty

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221. Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968), overruled on other grounds by National League of Cities v. Usery, 392 U.S. 833 (1976); see also Perez, 402 U.S. at 156-57.

222. 317 U.S. 111, 127-28 (1942) (upholding regulation of wheat harvested for home consumption because of aggregate effect of such wheat on interstate commerce).

223. 402 U.S. at 154 (holding purely local loansharking subject to congressional regulation because it belongs to “class of activities” that affects commerce).

224. 469 U.S. 528, 531 (1985) (holding that wage and hour regulations for state employees did not violate the Tenth Amendment).

225. 426 U.S. 833, 851-52 (1976) (striking down federal wage and hour regulations as applied to state employees), overruled by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. at 551.

226. See Garcia, 469 U.S. at 556 (“The political process ensures that laws that unduly burden the states will not be promulgated.”). In adopting this “political process” view of federalism, the Court echoed the work of a number of scholars. See Martin Diamond, The Federalist on Federalism: Neither a National Nor a Federal Constitution, But a Composition of Both, 86 YALE L.J. 1273 (1977) (arguing that the political side of federalism is often forgotten in modern discussions of federalism but is vital to the American system); Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954) (arguing that state government and state influence in national government make federalism work). For a vigorous dissent from the view that the structural features of the federal government provide meaningful protection for state interests, see Kramer, supra note 150, at 1503-14 (asserting state influence in national government has diminished and that political safeguards meant to protect states “flimsy devices”).

years,228 generated new hope for proponents of judicially enforceable federalism limits on national regulatory authority. But even Lopez appears not to raise any serious question of Congress’s power to set national standards of attorney conduct. While a great deal of ink has been spilled over the meaning and import of Lopez,229 with some of it suggesting that the case portends a revolutionary change in Commerce Clause doctrine,230 Judge Louis Pollak aptly observed that “there is less in Lopez than meets the eye.”231 No member of the Court save Justice Thomas called for a fundamental reexamination of post-New Deal commerce power precedent.232 The first of the majority’s arguable doctrinal innovations—the requirement that the regulated activity “substantially affects” interstate commerce233—appears to be little more than “repackaging a test that [the Court] has recited in virtually every Commerce Clause case decided since 1937.”234 Even if the revitalized


231. Louis H. Pollak, Foreword: Reflections on United States v. Lopez, 94 MICH. L. REV. 533, 553 (1995). See also Fried, supra note 228, at 17 (arguing that the rhetoric of revolution in the Court’s decision is just rhetoric); Deborah Jones Merritt, The Fuzzy Logic of Federalism, 46 CASE W. L. REV. 685, 692 (1996) (arguing that the Lopez decision “will have very little practical effect”); Robert F. Nagel, The Future of Federalism, 46 CASE W. RES. L. REV. 643, 661 (1996) (reasoning that those who see Lopez as a portent of great change “are looking for the future in the wrong place”).

232. Lopez, 514 U.S. at 584 (Thomas, J., dissenting). It bears noting that the Court accomplished its seemingly radical result without expressly overruling any Commerce Clause precedent. See Lopez, 514 U.S. at 559 (concluding “substantial effects” test is consistent with the Court’s precedents).

233. Lopez, 514 U.S. at 559 (emphasis added).

234. Melvyn R. Durchslag, Will the Real Alfonzo Lopez Please Stand Up: A Reply to Professor Nagel, 46 CASE W. RES. L. REV. 671, 672 (1996). But see id. at 673 (arguing with Nagel that “substantial effects” test is the same, but arguing that there is evidence to support theories that the Court in Lopez began to modify its Commerce Clause doctrine).
“substantial effects” test turns out to have bite beyond situations such as Lopez (where Congress made no effort to justify its use of the commerce power), any reasonable assessment of the interstate effects of attorney conduct would find the test met. The other new twist offered by Lopez lies in its distinction between “commercial” and “noncommercial” activities, and its suggestion that Congress lacks (or possesses diminished) authority to regulate the latter. Whatever the merits, or workability, of this distinction, the conduct of lawyers would appear to fall comfortably on the “commercial” side of the line.

What happens, however, if Congress chooses to delegate enforcement of new national attorney-conduct standards to the states? Professor Fred Zacharias suggests this as a possible (though ultimately undesirable) alternative to federal enforcement that would “simultaneously minimize the federal expense and decrease the impact on state autonomy.” In two recent cases, however, the Supreme Court has drawn a sharp distinction between authority to make the rules and authority to require states to administer those rules.

235. See Pollak, supra note 231, at 552 (reasoning that Lopez is largely about “irresponsibility on the part of a Congress that has failed to make out even a minimally plausible case for utilizing the commerce power to undergird a new regulatory scheme”).

236. Lopez, 514 U.S. at 560-61, 564-66; see also id. at 580 (Kennedy, J. concurring) ("[H]ere neither the actors nor their conduct have a commercial character, and neither the purpose nor the design of the statute have an evident commercial nexus.").

237. See id. at 627-29 (Breyer, J., dissenting) (contending that distinction between commercial and noncommercial activities is unsupported and unworkable).

238. Zacharias, supra note 7, at 396; cf. id. at 378 (recognizing that “cost alone” of federal enforcement system “might be considered prohibitive as a political matter”). Indeed, if one accepts the need for national standards of attorney conduct, a strong argument can be made that requiring Congress to build a new national agency rather than relying on existing state agencies (that otherwise would be out of business) for enforcement would be needlessly costly and inefficient. Cf. Saikrishna Bangalore Prakash, Field Office Federalism, 79 VA. L. REV. 1957, 2033-35 (1993) (contending that framers intended to permit commandeering executive and judicial, but not legislative, branches of state government, in part for efficiency reasons).

239. Zacharias himself notes this distinction. See Zacharias, supra note 7, at 337 n.4 (citing New York v. United States, 505 U.S. 144, 176 (1992), for the proposition that “[i]f Congress were to require states to take particular actions, rather than simply preempt state law, states might have a colorable argument that Congress has interfered with state sovereignty.”).
In the first of these cases—New York v. United States\textsuperscript{240}—the Court struck down part of the Low-Level Radioactive Waste Policy Amendments Act of 1985, not because Congress lacked authority to set disposal standards, but because Congress had tried to "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."\textsuperscript{241} According to the Court, such "commandeering" violates the Constitution even where Congress could regulate the private conduct directly or could offer financial incentives to the states for acting.\textsuperscript{242} Requiring states to implement through state legislatures a federally established agenda, the Court said, interferes with the autonomous processes of state government, allows federal legislators to escape political accountability for their regulatory program, and unfairly holds state legislators accountable for someone else's program.\textsuperscript{243}

Just last term, in Printz v. United States,\textsuperscript{244} the Court built on its "no-commandeering" limit on Congress's commerce power by striking down that portion of the Brady Act that required local law enforcement officials to perform criminal records checks on prospective handgun purchasers. Declining the government's invitation to limit New York to the commandeering of state legislative and other policy-making processes, Justice Scalia's opinion for a five-justice majority "categorically"

\textsuperscript{240} 505 U.S. 144 (1992).
\textsuperscript{241} Id. at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).
\textsuperscript{242} Id. at 169-69. As to the constitutional source for policing "the division of authority between federal and state governments," the Court offered both the Tenth Amendment and the Commerce Clause. According to the Court, it matters not whether the Court asks "whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution," or "whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment." Id. at 155-56. "[T]he two inquiries are mirror images of each other." Id. at 156. For an effort to demonstrate the fallacy of this "mirror image" approach to constitutional federalism, see Martin H. Redish, Doing It with Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation, 21 Hastings Const. L.Q. 593 (1994) (arguing that the limits of federal power over the states are properly found in and defined by the enumerated powers of the Commerce Clause, and that the Court's Tenth Amendment analysis improperly revives the "enclave" model of federal power, which purports to identify defined areas of inviolate state sovereignty).
\textsuperscript{243} New York, 505 U.S. at 168-69.
\textsuperscript{244} 117 S. Ct. 2365 (1997).
concluded that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."\textsuperscript{245}

If Printz means what it says, then a requirement that states enforce federally mandated standards of attorney conduct could not survive. Were Congress to command the states to implement its regulatory program, with no opportunity to opt out, the impact on state treasuries, personnel, and control over their political agendas would surely qualify as prohibited "commandeering."\textsuperscript{246} The one clear message of New York and Printz is that the commerce power does not authorize the national government to order states to use their regulatory machinery in the service of national regulatory objectives.\textsuperscript{247} Congress might instead attempt to entice (rather than conscript) states into service of its goals through conditional preemption, giving states the choice between enforcing the national regulatory program (perhaps with financial incentives) and being ousted from regulatory jurisdiction by a nationally imposed enforcement system. Neither New York nor Printz calls into question Congress's power to offer states such a choice,\textsuperscript{248} although one might question the efficacy of a national scheme designed to create uniform standards that is administered by a patchwork of state agencies and federal substitutes. In any event, one nearly certain consequence of Printz is that any effort to create uniformity through nationally imposed standards of attorney conduct would require creation of some sort of national enforcement agency.\textsuperscript{249}

\textsuperscript{245} Id. at 2383 (emphasis added) (quoting New York v. United States, 505 U.S. at 188).

\textsuperscript{246} For an extended and thoughtful effort to apply the analysis of New York v. United States to a wide range of national health care reform proposals, see Candice Hoke, Constitutional Impediments to National Health Care Reform, 21 HASTINGS CONST. L.Q. 489 (1994).

\textsuperscript{247} Candice Hoke has noted that the Court's opinion in New York "mention[s] some version of [this point] a dozen times." Id. at 537 & n.213 (identifying relevant portions of the opinion).

\textsuperscript{248} "[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer states the choice of regulating that activity according to federal standards or having State law pre-empted by federal regulation." New York, 505 U.S. at 167. See generally Ronald D. Rotunda, The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions, 132 U. PA. L. RSV. 289, 306-22 (1984) (detailing the development of the conditional preemption doctrine).

\textsuperscript{249} One obvious irony of the no-commandeering rule is that Congress may choose instead to preempt the field altogether, thereby excluding all state involvement and arguably doing greater damage to state autonomy.
None of the proponents or prognosticators of national standards of attorney conduct actually advocate conscription of state agencies in the enforcement of such standards. Indeed, at least one proponent identifies substantial practical difficulties with such an approach and appears to reject it as little better than the current state-based system.\textsuperscript{250} The no-commandeering rule, like the Court's Commerce Clause jurisprudence generally, would pose no threat to nationally created standards as long as they were enforced by the national government. That fact, of course, does not end the inquiry, for the absence of a judicially enforceable federalism bar to a particular national action does not preclude the conclusion that federalism values should nonetheless prevent that action.

B. FEDERALISM VALUES AND NATIONAL STANDARDS OF ATTORNEY CONDUCT: DIVERSITY VERSUS UNIFORMITY

\textit{United States v. Lopez} and \textit{Printz v. United States} will continue to generate extensive debate over the future of judicially enforced federalism limits. Federalism values, however, operate much more pervasively at the level of policy and preference.\textsuperscript{251} This was a central message of \textit{Garcia v. San Antonio Metropolitan Transportation Authority},\textsuperscript{252} a message largely unaltered by \textit{Lopez} and \textit{Printz}. Proponents of national standards of attorney conduct bear the burden of establishing not only that the national government has the power to impose such standards but also that the exercise of such power is warranted in our federal system. In an effort to meet that burden, Fred Zacharias has offered both an affirmative case for nationally imposed uniformity and an anticipatory defense against federalism objections to such national intervention.

\textsuperscript{250} See Zacharias, supra note 7, at 396-97.

\textsuperscript{251} See, e.g., Harry N. Scheiber, \textit{Federalism and the Constitution: The Original Understanding}, in \textit{AMERICAN LAW AND THE CONSTITUTIONAL ORDER} 85, 89 (Lawrence M. Friedman & Harry N. Scheiber, eds. 1988) (explaining that the founders left settlement of disputes between states and Congress as much to informal political process as to decisions by Supreme Court); Samuel H. Beer, \textit{The Modernization of American Federalism}, \textit{PUBLIUS}, Spring 1973, at 51 (arguing that federalism influences the pattern of intergovernmental relations "[b]oth as a juristic devise and as an element of political culture"); cf. Diamond, supra note 226, at 1283 ("The Federalist . . . directs our attention to what may be called the political rather than the legal side of federalism.").

\textsuperscript{252} 469 U.S. 528 (1985). See supra notes 224-226 and accompanying text (discussing the significance and impact of the Supreme Court's holding in \textit{Garcia}).
As to the affirmative case for national standards, Zacharias argues that the current system of diverse state rules—in an era of national law practice and increasing multistate litigation and transactions—imposes unacceptable costs. Uniform national standards would eliminate the cost for lawyers of ascertaining in advance which of several inconsistent rules might later be applied to their conduct, and the individual and societal costs of inevitable noncompliance with applicable rules. Zacharias makes the additional claim that the current disparity in conduct standards compels inconsistent conduct that upsets client and public expectations, thereby diminishing the public image of lawyers. Uniformity, he argues, would thus serve to enhance that public image. As to potential federalism objections, Zacharias anticipates and dismisses two. First, he rejects the “states as laboratories for experimentation” argument on the twin grounds that states have not “produce[d] useful innovation in professional regulation” and that any innovation would be useless because “[n]either empirical study nor observation of the market will reveal which jurisdictions’ approaches to professional regulation maximize society’s interests.” Second, he contends that state autonomy cannot be justified on the ground that state regulation is more likely to be responsive to local characteristics and needs because most states are “professionally and demographically diverse” and “one cannot help doubting that local tailoring of the rules is taking place.”

The federalism objection to national standards of attorney conduct is both broader and deeper than the rendering offered by Zacharias. Normative variation is not only a necessary product of the federal system, but also perhaps the chief value of federalism. Diversity is, in other words, both inevi-

253. See Zacharias, supra note 7, at 345.
254. See id. at 345-57.
255. See id. at 357.
256. See id. at 357-65.
257. Id. at 373.
258. Id. at 374.
259. Id. at 375.
260. See supra Part II.
261. See FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 49 (1930) (“The very notion of our federalism calls for the free play of local diversity in dealing with local problems.”). For a critical analysis of Frankfurter’s approach to judicial federalism (the idea that federal courts must wield their power with deference to state judicial systems) and of his influence on today’s
table and good. As a consequence, the burden should rest with those who advocate uniformity through national preemption of state standards to demonstrate that the costs of diversity in the particular field are more severe than the costs of diversity generally. The case for national standards of attorney conduct fails to distinguish such standards from the broad range of conduct regulation that likewise varies from state to state. The federalism values that leave with the states primary (though not sole) responsibility for norm setting in areas such as real property law, commercial law, consumer fraud, criminal law and torts—despite congressional authority to exert national control—likewise counsel against a national effort to relieve states of their role as primary lawmakers in the area of lawyer conduct. The claim that the desire of lawyers for greater certainty in ordering their affairs justifies imposition of uniform national conduct standards translates into either a plea for special treatment for lawyers not afforded to their clients or a rejection of the notion that normative variation remains a central virtue of our federal system. Neither translation is particularly attractive.

1. Diversity as a Foundational Value of Federalism

The American federal system as constructed in 1787 plainly contemplated that the states, not the national government, would retain primary responsibility and authority for making and enforcing law. The states were defined by more than geography; they were distinct societies, with differing tastes and conditions that could best be served by decentralized decisionmaking. The powers of the new national government would respect state diversity by being "few and defined," while state power would "extend to all objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement,


262. See, e.g., Letters from the Federal Farmer, in 2 THE COMPLETE ANTI-FEDERALIST 230 (Herbert J. Storing, ed., 1981) ("[O]ne government and general legislation alone, never can extend equal benefits to all parts of the United States: Different laws, customs, and opinions exist in the different states, which by a uniform system of laws would be unreasonably invaded."); Essays by the Impartial Examiner, in id. at 180 ("For being different societies, though blended together in legislation, and having as different interests; no uniform rule for the whole seems to be practicable.").

and prosperity of the State.\textsuperscript{264} Of course much (some might say all) has changed since 1787, with the Civil War and the New Deal dramatically altering the state-federal balance,\textsuperscript{265} and modern developments in communication and travel diminishing interstate differences and increasing homogeneity. Nevertheless, while on occasion Congress has legislated to (or perhaps beyond) the limits of its Commerce Clause authority, vast areas arguably within Congress's power to regulate still rest largely in the control of the states. Federal law remains, in the words of Hart and Wechsler, "generally interstitial in its nature,"\textsuperscript{266} because federalism values still matter, even where they impose no (meaningful) judicially enforceable limits.

\textbf{a. Diversity and Individual Preference Satisfaction}

The most direct and enduring argument for federalism rests on the simple utilitarian principle that governmental policy should attempt to satisfy the greatest possible number of individual preferences.\textsuperscript{267} Because those preferences are unevenly distributed among the states, the diversity of policies produced by state-level decisionmaking can satisfy more people than could a single, central government. This insight, which

\begin{itemize}
\item \textsuperscript{264} Id. at 293. \textit{See also} Scheiber, \textit{supra} note 251, at 97 (discussing Madison's and Jefferson's "champion[ing] diversity as an instrument... for the pursuit of the 'common good'.")
\item \textsuperscript{265} \textit{See} BRUCE ACKERMAN, \textit{WE THE PEOPLE} (1991), in which Ackerman characterizes post Civil War Reconstruction and the New Deal as the two most significant events in the history of the American republic, the first transferring power from the states to the federal government and the second consolidating federal supremacy through economic centralization and executive authority. One need not subscribe to Ackerman's theory of "constitutional moments," \textit{cf.} Robert Justin Lipkin, \textit{The Anatomy of Constitutional Revolutions}, 88 \textit{NEB. L. REV.} 701 (1989) (articulating theory of "revolutionary" constitutional adjudication), to appreciate that those two events enormously broadened the scope of federal power at the expense of the states. As David Shapiro, among others, has observed, "the scope of the federal power today is in many respects far broader than even the most nationalistic of the Founders might have hoped." DAVID L. SHAPIRO, \textit{FEDERALISM: A DIALOGUE} 113 (1995).
\item \textsuperscript{266} PAUL M. BATOR ET AL., \textit{HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM} 533-34 (3d ed. 1988). For a defense of the continued vitality of this characterization, see \textit{SHAPIRO, supra} note 265, at 114.
\end{itemize}
was understood by the founding generation and which has been elaborated on by modern public choice theory and positive political theory, is captured in the following model. Assume that there are two states, A and B, with equal populations of 100 each. Assume further that eighty percent of the people in State A wish to permit contingent-fee arrangements in criminal cases, while only thirty percent of the people in State B wish to permit such arrangements. If the decision is made by the national government based on the preference of the majority, 110 people will be pleased, and ninety will be displeased. But if separate decisions are made by the majorities in each state, 150 people will be pleased, and just fifty will be displeased. Assuming that neither preference is independently prohibited, and that neither preference would have substantial negative spillover effects in the other state, the case for permitting the states to make independent choices is quite powerful.

268. See, e.g., sources cited supra note 262 (positing that a centralized government cannot accommodate the diversity of custom among the states). The point was later made by Tocqueville. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 161 (J.P. Mayer ed. 1969) ("In large centralized nations the lawgiver is bound to give the laws a uniform character which does not fit the diversity of places and of mores.").

269. See, e.g., OATES, supra note 267, at 11-13; VINCENT Ostrom, THE MEANING OF AMERICAN FEDERALISM 126-32 (1991) (discussing the insensitivity of a national legislature to the concerns of the various communities of interests that exist among the states); Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416, 418 (1956) (performing an efficiency analysis of consumption of public goods, which suggests that mobile consumer-voters optimally choose from a diverse group of local governments to satisfy their preferences); Gordon Tullock, Federalism: Problems of Scale, 6 PUB. CHOICE 19, 21 (1969) (analyzing the economic efficiency of local government units in responding to the informed choices of voters).


271. The model in text is a variation on models often employed to make the same point. See, e.g., Tullock, supra note 269, at 22; McConnell, supra note 153, at 1494.

272. See infra Part III.B.1.c.

273. See infra Part III.B.1.c.

274. See, e.g., OATES, supra note 267, at 11 ("A basic shortcoming of a unitary form of government is its probable insensitivity to varying preferences among the residents of the different communities.").
The preference-maximizing quality of federalism is enhanced by adding the mobility of citizens and capital to local decision-making. Citizens can express their preferences not only by having a voice in the decision-making process but also by exercising their "exit rights" and leaving the jurisdiction. In the model set out above, twenty citizens of State A and thirty citizens of State B were displeased by their respective states' decisions about the legality of contingent fees in criminal cases. If some of those citizens felt strongly enough about the matter, they might move to the other state, thereby further enhancing individual preference satisfaction. This point has obvious limitations, particularly the undeniable fact that many citizens are insufficiently mobile, informed, or motivated to vote with their feet. Nevertheless, substantial

275. See Albert O. Hirschman, Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States 108-19 (1970) (discussing the central role that exit has played in American cultural tradition); Amar, supra note 267, at 1237 (observing that diversity fostered by federalism offers citizens, through domicile shopping, a "true choice of laws"); Richard A. Epstein, Exit Rights Under Federalism, 55 Law & Contemp. Probs. 147 (1992) (explaining the check that federalism, through the exit remedy, creates on state governments).

276. Exit rights in the federal system not only serve to maximize individual preference satisfaction but also can promote individual liberty. David Shapiro offers as examples the Mormons escaping religious persecution by moving to Utah, and individuals expressing their objection to the homophobia or antipornography stance of a particular state by moving across the state line. See Shapiro, supra note 265, at 95. Of course, the story of states as liberty protectors paints a rather incomplete picture. American legal history is filled with instances of state institutions trampling individual rights, with ultimate protection coming from one or more branches of the national government. Slavery, civil rights, and abortion come quickly to mind. See infra Part III.B.1.c (examining the role of the national government in protecting individual rights). On the other hand, in recent years many states have gone notably farther than the federal government in protecting individual rights. See Shapiro, supra note 265, at 97-99. More fundamentally, the point is that oppressive policies at the state level are easier to avoid than are oppressive measures at the federal level. See McConnell, supra note 153, at 1503, who cites the "migration of homosexuals to cities like San Francisco, where they received official toleration, and the migration of individuals from Massachusetts to New Hampshire to escape high rates of taxation," as examples of that phenomenon.

277. See e.g., James M. Buchanan & Charles J. Goetz, Efficiency Limits of Fiscal Mobility: An Assessment of the Tiebout Model, 1 J. Pub. Econ. 25, 27-34 (1972) (evaluating the limitations of an efficiency analysis, which assumes all individuals have unlimited mobility).

278. See Michael H. Schill, Uniformity or Diversity: Residential Real Estate
empirical research by economists and sociologists has suggested that government policies have a measurable impact on migration patterns.\(^\text{279}\) Even if only relatively limited numbers of people (and firms) have a sufficient incentive to move to a competing state for a bundle of policies, the result will be both the furthering of individual preference satisfaction and the imposition of some discipline on state lawmakers. Moreover, whatever the barriers to interstate migration, they are substantially less than the barriers to moving out of the country in order to escape nationally imposed policy.

A fundamental and forceful objection to the argument that federalism's diversity maximizes preference satisfaction is that individual preferences are not unevenly distributed among the states. Advances in the technology of travel and communication, the argument runs, have rendered state boundaries meaningless for purposes of identifying and measuring individual preferences.\(^\text{280}\) While this objection accurately observes that social, economic, and cultural differences among states and regions are not as distinct as they once were,\(^\text{281}\) it ignores the wealth of political science research demonstrating that states and regions do retain distinctive political cultures and attitudes.\(^\text{282}\)

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\(^{280}\) See Rubin & Feeley, *supra* note 154, at 922 ("The United States, despite its federal structure and its self-image as a vast and variegated nation, is in fact a heavily homogenized culture with high levels of normative consensus.").


\(^{282}\) See, e.g., Schill, *supra* note 278, at 1303 (discussing the influence that cultural differences between states have on their real estate laws); id. at 1300 ("[I]t would be a grave error to conflate the trend of increasing national homogeneity with the conclusion that meaningful differences among states no longer exist.").
Beginning with the seminal work of Daniel Elazar in 1966, political culture studies have repeatedly found that economic, social, and cultural differences among states have lead to differences in political attitudes and ultimately to differences in public policy and law. Elazar's work has been ably described in the recent legal literature, and a full summary here is not warranted. Three points bear emphasis, however. First, despite increasing national homogeneity, meaningful differences among states continue to exist in terms of political culture, economy, and demographics. Second, although the

283. DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (1966). Elazar postulates the existence of three distinct state political cultures: the individualistic, the moralistic, and the traditionalistic, and discusses the impact that those cultures have on public policy choices. Id.

284. See, e.g., THOMAS J. ANTON, AMERICAN FEDERALISM AND PUBLIC POLICY: HOW THE SYSTEM WORKS 56 (1989) ("[C]areful students of state politics, from journalists to systematic empirical researchers, agree that state boundaries continue to define important differences of substance as well as style in American politics."); THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS 41 (1990) (finding, despite nationalizing influences, "no convincing evidence that the policy preferences of the states are becoming homogenized," and demonstrating that "the coefficients of variation for per capita state and local tax revenues, total expenditures, and expenditures for education, welfare, health, and highways have remained virtually unchanged over the past three decades").

Michael Schill has collected and described the significant studies that have assessed and built upon Elazar's thesis. See Schill, supra note 278, at 1301-04; see also Jonathan R. Macey, Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism, 76 VA. L. REV. 265, 281 (1990) ("The fifty states that comprise the union differ dramatically in history, demography, economic orientation, and natural endowment.").

285. See Shapiro, supra note 265, at 86-88 (discussing Elazar's thesis regarding the nation's three dominant subgroups, which are unevenly concentrated among the states); Schill, supra note 278, at 1301-04 (examining the utility of Elazar's theories in developing models for predicting political participation and policy formation).

286. See Virginia Gray, The Socioeconomic and Political Context of States, in POLITICS IN THE AMERICAN STATES 3, 24 (Virginia Gray et al., eds., 5th ed. 1990) ("[T]he states' economies vary in size, in which economic sector is [the] most important . . . , and in the major goods produced.").

287. As one commentator states:

Besides economic factors, states continue to vary along racial, religious, and cultural dimensions. Some states have large numbers of racial or ethnic minorities, while others are racially or culturally homogenous. Among states with large minority populations, the ethnic and cultural composition of the minority population varies dramatically from state to state. Large Hispanic populations live in California, Florida and the Southwest, while African-American households make up a significant proportion of the population in the South and
relationship between those differences and public policy may be uncertain, the differences often do translate into different bundles of state public policies. As Michael Schill concluded after a careful review of the relevant political culture studies, "American states retain their importance and vitality as distinctive forums for policy generation and legal rulemaking."288 Third, state boundaries may also define different attitudes toward the role of government and therefore different attitudes toward government innovation and proposals for change.289 In short, while interstate differences have been markedly diminished by citizen mobility and modern communications, significant and identifiable differences still exist, and those differences contribute meaningfully to the pervasive normative variation in the American federal system.290

b. Diversity, Competition, and Innovation

Diversity is also at the core of federalism's compliment to citizen choice—state competition for citizens and capital.291 By allowing a multiplicity of norms, federalism permits states to offer distinct policies and bundles of policies in an effort to attract productive citizens and productive investment.292 Unlike certain northeastern states. Kansas and Oklahoma remain in the Bible Belt whereas Jews still cluster in states with large urban populations.

Schill, supra note 278, at 1301; see also Calabresi, supra note 230, at 766-69 (discussing the demographic differences observed in the major geographic regions of the U.S. and their relation to interstate differences).

288. Schill, supra note 278, at 1303.

289. See SHAPIRO, supra note 265, at 87 (noting that a relationship likely exists between moral attitudes within a regional population and their receptivity to certain types of change); Schill, supra note 278, at 1301-02 (concluding that diverse political cultures among states dictate diverse public policies).

290. One additional claim for the benefits of distinct and varied bundles of state polices is that such variation promotes community. See infra note 345.


292. Thomas Dye put the argument as follows:

Competitive federalism envisions a marketplace for governments where consumer-taxpayers can voluntarily choose the public goods
a unitary national government, which reduces choice and is relatively unaffected by competition, state governments have an incentive to implement policies that not only maximize utility for a majority of voters already in the state but also serve to attract additional taxpayers. Michael McConnell put the point well:

If a community can attract additional taxpayers, each citizen's share of the overhead costs of government is proportionately reduced. Since people are better able to move among states or communities than to emigrate from the United States, competition among governments for taxpayers will be far stronger at the state and local than at the federal level. Since most people are taxpayers, this means that there is a powerful incentive for decentralized governments to make things better for most people. In particular, the desire to attract taxpayers and jobs will promote policies of economic growth and expansion.

In short, competitive federalism forces governments to be more efficient by improving services, reducing costs, and better assessing citizen preferences for public goods.

and service they prefer, at the cost they wish to pay, by locating in the governmental jurisdiction that best fits their policy preferences. In this model of federalism, state and local governments compete for consumer-taxpayers by offering the best array of public goods and services at the lowest possible costs. The preferences of all individuals in society are better met in a system of multiple governments offering different packages of services and costs than of a single monopoly government, even a democratic one, offering a single package reflecting the preferences of the majority. The greater number of governments to select from, and the greater the variance in public policies among them, the closer each consumer-taxpayer can come to realizing his or her own preferences.

DYE, supra note 284, at 14.

293. See McConnell, supra note 153, at 1498 ("A consolidated national government has all the drawbacks of a monopoly: it stifles choice and lacks the goad of competition.").

294. Id. at 1498-99. Some jurisdictions may decide to put less emphasis on the economic growth that comes from attracting individual and industry taxpayers from other states, and more emphasis on maintaining a particular quality of life for current residents. While federalism "structures competition between governments," Amar, supra note 267, at 1237, it does not require that governments pursue the same goals in that competition. Again, a central feature of federalism is that it permits states to choose different goals.

295. See DYE, supra note 284, at 14 (noting that a greater number of governments results in a greater number of policies, thereby providing consumer-taxpayers more choices). The interstate mobility of citizens, which, while limited, is undeniably greater than international mobility, serves as the market solution for determining citizen preferences. This was the insight of Charles M. Tiebout in A Pure Theory of Local Expenditures, supra note 269, at 424. See DYE, supra note 284, at 14-15; LeBoeuf, supra note 291, at 560. While unitary governments have difficulty accurately assessing the true value of their activities to their citizens, "competition among governments, offering
Competition in turn creates incentives for innovation. Product differentiation, after all, is at the heart of competition, and states seeking to attract the tax dollars of new residents and industry will want to distinguish themselves from their competitors by offering innovative policies.\(^{296}\) Justice Brandeis made the best-known version of this argument, dissenting in *New State Ice Co. v. Liebmann*\(^{297}\).

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.\(^{298}\)

Brandeis makes the important point that the costs of failed social and economic experiments at the state level are much smaller and more confined than the costs of failed experiments at the national level. Unfortunately, his laboratory metaphor captures only part of the story of state innovation in the federal system. By invoking the image of scientific testing, the laboratory metaphor suggests that the central benefit of state experimentation comes with the identification, after thorough testing, of a single, correct, national solution that all states (or the national government) will then adopt.\(^{299}\) Where such a single, correct, national solution exists, then its discovery is certainly a benefit of state experimentation. Justice O'Connor

different types and levels of public goods at different costs, provides a rough market solution to the information problems confronting public officials."

\(^{296}\) See OATES, supra note 267, at 12-13 (noting that a larger number of actors will result in a larger variety of policies); SHAPIRO, supra note 265, at 85-88 (theorizing that the sheer number of states and localities will result in experimentation and variation in policies); see also Fried, supra note 158, at 2-3 (arguing that states can serve as laboratories for innovation); Kaden, supra note 153, at 854-55 (providing examples of successful experimental state programs).

\(^{297}\) 285 U.S. 262 (1932).

\(^{298}\) Id. at 311 (Brandeis, J., dissenting). Justice Holmes also championed local experimentation. See Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (decrying use of the Fourteenth Amendment "to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States").

\(^{299}\) See Rubin & Feeley, supra note 154, at 923 (describing state experimentation as arguably valuable "because the variations may ultimately provide information about a number of governmental programs and enable us to choose the best one").
elaborated on this aspect of the laboratory model in her dissent in Federal Energy Regulatory Commission v. Mississippi:300

States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth. When Wyoming became a state in 1890, it was the only state permitting women to vote. That novel idea did not bear national fruit for another 30 years. Wisconsin pioneered unemployment insurance, while Massachusetts initiated minimum wage laws for women and minors. After decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation.301

But the benefits of state innovation do not depend on the existence of one right answer. In fact, "[t]he conclusion that states should retain a high degree of decision-making autonomy is stronger on the humble assumption that most governmental decisions are fairly debatable—that is, that there is no single compelling just answer to many questions of government."302 And if individual preferences and local conditions vary across jurisdictions, then state innovation may identify an answer that is "right" for a limited number of jurisdictions, and wrong for the rest.303

c. The Limits of Diversity and Decentralization

The foregoing description of the virtues of normative diversity made possible by federalism should not be misunderstood as a plea for mass decentralization (or nostalgia for the

300. 456 U.S. 742 (1982).
301. Id. at 788-89 (O'Connor, J., concurring in the judgment in part and dissenting in part).
302. McConnell, supra note 153, at 1507. David Shapiro discusses the states' record as experimental laboratories in terms of identifying both local and national solutions, as well as nonsolutions. See SHAPIRO, supra note 265, at 87-90 (giving as examples experiments in workers' compensation programs, welfare reform, health care, public education, taxation systems, penology and environmental protection).
303. Susan Rose-Ackerman has argued that federalism impedes innovation because local politicians in a federal system will be more risk-averse than politicians in a unitary national government. See Rose-Ackerman, supra note 159, at 593. But even if local politicians are more risk averse than national politicians, "there will be more innovation in a decentralized system as a whole, both because there are more actors and because individual constituencies will perceive risk and reward differently." McConnell, supra note 153, at 1498 n.58; see also SHAPIRO, supra note 265, at 85-86 ("It seems clear that over eighty thousand state and local governmental units, or even fifty state units (plus some other territorial units), are more likely to engage in experiments than one national unit, especially in a country with as many regional and social differences as ours."))
Articles of Confederation). The claim made here is only that there are significant benefits to the normative variation fostered by American federalism, and that where such variation exists it ought not be eliminated without sound reasons. To put it differently, state differences are worth preserving and so should be, other things being equal.\(^{304}\) Of course, sometimes other things are not equal, as when states make fundamentally unjust policy choices, or when interstate competition becomes destructive rather than constructive. Those circumstances provide strong reasons for national intervention.

Granting states the ability to set norms has often resulted not in useful innovation but rather in pernicious norms. Slavery, followed by a century of post-Civil War, state-sponsored racism, provides the most obvious and tragic example of federalism's more than occasional threat to individual liberty.\(^{305}\) Other examples abound, including in the areas of reproductive rights,\(^{306}\) criminal procedure,\(^{307}\) civil rights,\(^{308}\) free speech\(^{309}\) and freedom of religion.\(^{310}\) National intervention, by the courts or by Congress (or through the amendment process), has been and

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304. The following statement captures my position:

My own simpleminded view about the value of federalism is that, other things being equal, the states are entitled to be different—to have different views about the best solutions to their problems and even to have different views about what is a problem and what is not. Other things being equal, state differences should be protected.


305. See Shapiro, supra note 265, at 53-55 (criticizing the ability of states to protect individual and group rights, especially when dealing with slavery and racism).


308. This is one area in which Congress, rather than just the federal judiciary, has played a substantial role in protecting individual rights against state encroachment. See Shapiro, supra note 265, at 56 n.153 (collecting statutes).


will continue to be necessary where states make choices that are deemed fundamentally unjust by the national polity.\textsuperscript{311}

Similarly, while the argument that federalism's normative variation promotes social welfare is a powerful one, economic analysis also teaches that under certain circumstances interstate competition will produce suboptimal results and even be destructive.\textsuperscript{312} First, the mobility of citizens and capital that makes interstate competition possible also threatens the efficacy of state-based redistributive policies.\textsuperscript{313} Suppose a state is interested in correcting what it (and a majority of its citizens) perceives to be unjust disparities in economic well-being within the state, and so raises taxes to fund a more generous welfare program. Such a program immediately creates incentives for wealthy citizens to leave the state and potential recipients to enter the state, thereby threatening to lower the general welfare of the state and undermine the redistributive policy itself.\textsuperscript{314} The prospect of such doubly costly migration stands as a substantial impediment to state adoption of redistributive policies in the first place. As a result, "[w]here redistribution is the objective, . . . advocates should and do press for federal programs, or at least for minimum federal standards."\textsuperscript{315}

Second, decentralized regulation often suffers from the problem of either positive or negative externalities—the interjurisdictional spillover of costs and/or benefits. Some public goods, because they produce positive externalities that allow

\begin{itemize}
  \item \textsuperscript{311} See SHAPIRO, supra note 265, at 55-56 (describing examples of racial discrimination, criminal procedure, freedom of speech and freedom of religion).
  \item \textsuperscript{312} The framers well understood this point. See THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (describing the need for "[t]he interfering and unneighborly regulations of some States" to be "restrained by a national control").
  \item \textsuperscript{313} See SHAPIRO, supra note 265, at 46 (noting that redistributive policies provide incentives for the wealthy to leave to avoid costs and the poor to come to share in benefits); William N. Eskridge, Jr. & John Ferejohn, The Elastic Commerce Clause: A Political Theory of American Federalism, 47 VAND. L. REV. 1355, 1364 (1994) (noting that low mobility costs will cause beneficiaries to migrate in and payers to migrate out of a jurisdiction with a redistributive policy); McConnell, supra note 153, at 1499-1500 (arguing that migration of wealth out of a jurisdiction creates a disincentive for redistributive policies).
  \item \textsuperscript{314} See OATES, supra note 267, at 6-8 (describing the "free-rider" phenomenon in which individuals will seek to avoid the higher costs necessary to a redistribution system); PAUL PETERSON, CITY LIMITS 69-72, 77-79 (1981) (noting that the tax-benefit ratio of a state controls the degree to which it can redistribute).
  \item \textsuperscript{315} McConnell, supra note 153, at 1500 (footnote omitted).
\end{itemize}
out-of-staters to enjoy their benefits without sharing the costs, will either be underproduced or not produced at all by states acting independently. This was the justification offered by Hamilton in Federalist No. 25 for the control of defense by the national government; because a state-based defense system would be extraordinarily costly and would also serve to protect other states, no individual state would have an adequate incentive to provide a defense system against foreign intruders. The same argument can be made about state control over interstate highways, national parks, and medical and scientific research. Left to their own devices, states will devote suboptimal (or no) resources to those projects because, while all the costs will be borne by the providing state, a substantial portion of the benefits will fall outside that state. As a result, the national government ordinarily should take responsibility for both norm setting and revenue-raising in these areas.

The existence of substantial negative externalities attendant to state regulation can also justify national intervention. State legislation that exports a substantial portion of the costs to other jurisdictions but retains the benefits in-state is likely to be inefficient. Because the out-of-state costs are borne by individuals without a vote in the enacting state, the legislation

316. See Bednar & Eskridge, supra note 270, at 1474 (describing ways in which states may reap the benefits of federal redistributive policies but avoid the costs).
318. For an analysis of the collective action problems inherent in producing such public goods, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).
319. As one commentator has stated:
Rational local governments, like rational individuals, will produce public goods until the benefit of the good falling within the jurisdiction equals the marginal cost of supplying it. As the ratio of benefits falling outside the jurisdiction to those falling inside it increases, the community will produce decreasing amounts of the good, and the social gains attributable to the production of the good will be increasingly foregone. At the limit, when all or virtually all of the benefits of the good fall outside the jurisdiction, the jurisdiction will not produce the good at all, and all of the potential gains will be foregone. This is the case with pure public goods.
LeBoeuf, supra note 291, at 568-69 (footnote omitted).
320. See SHAPIRO, supra note 265, at 131-32 (noting that some public needs, by their nature, will not be satisfied unless addressed by a national authority).
321. See Schill, supra note 278, at 1288-91.
may be enacted even though its total costs substantially outweigh its total benefits. The most obvious examples of inefficient cost exportation occur where "the externalization of costs is an integral part of the legislative program,"\(^{322}\) as with tolls and tariffs against out-of-state products,\(^{323}\) and other barriers to trade.\(^{324}\) But "[i]n some cases the externalized costs are merely incidental to the achievement of state objectives."\(^{325}\) For example, State A may choose to maximize jobs and tax revenues by not regulating a particular industry, with the "incidental" effect that downstream (or downwind) states suffer from that industry's pollution emanating from State A. Whether the cost exportation is desired, intended, or merely incidental, the state policy may be suboptimal when viewed from the perspective of the economy as a whole. States engaged in trade wars (or in exporting pollution) are the victims of prisoners' dilemmas,\(^{326}\) adopting policies that may benefit

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322. Id. at 1289 n.142.
323. See Bednar & Eskridge, supra note 270, at 1469-70 (comparing state use of tolls and tariffs to a "prisoner's dilemma" in which all states lose).
324. See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (invalidating New York navigational restrictions as violative of the Interstate Commerce Clause). A more subtle (and much discussed) example may be state product liability legislation. See Michael W. McConnell, A Choice of Law Approach to Products Liability Reform, in New Directions in Liability Law 90 (Walter Olson, ed., 1988) (arguing that state rules tend to be one-sidedly pro-plaintiff because states can benefit in-state plaintiffs with protective liability rules, while imposing the cost of such rules largely on out-of-state defendants).
325. Schill, supra note 278, at 1289 n.142.
326. The prisoner’s dilemma, long the best-known paradigm of game theory, is now a familiar part of efforts in the legal literature to analyze strategic behavior and the problems of collective action. See DOUGLAS G. BARD ET AL., GAME THEORY AND THE LAW 31-35 (1994). The prisoner's dilemma is typically described as a two-person game captured by the story of two criminals charged with committing a serious crime. In its simplest form, this game involves an offer from the prosecutor that leaves each prisoner with two choices: (1) remaining silent, and (2) confessing and agreeing to testify against the other prisoner. Each prisoner is told that if one confesses and the other does not, then the confessor will go free and the silent prisoner will receive a long sentence (10 years). If both prisoners confess, then both will receive intermediate sentences (six years). And if both remain silent, then both will receive relatively short sentences (two years) for a lesser offense. The prisoner options and payoffs are set out in the following table, with Prisoner One's payoffs listed first.
their own coffers (at least temporarily) but only at the expense of overall general welfare. If all states adopted such policies, all states (or at least the states collectively) likely would be worse off. Only the authority of the national government can facilitate (or constitute) the collective action necessary to overcome this sort of mutually destructive competition.

A related manifestation of destructive competition is the familiar "race to the bottom." Most often employed in the contexts of environmental and corporate regulation, the "race to the

<table>
<thead>
<tr>
<th>PRISONER ONE</th>
<th>silent</th>
<th>confess</th>
</tr>
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<tbody>
<tr>
<td>silent</td>
<td>-2,-2</td>
<td>-10,0</td>
</tr>
<tr>
<td>confess</td>
<td>0,-10</td>
<td>-6,-6</td>
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Critical components of the game are that neither prisoner knows what the other will do, and each prisoner is interested only in minimizing his own jail time (and is indifferent both to how much time the other gets and to possible opprobrium that might attach to being a snitch). See id.

The central insight of the prisoner's dilemma is that while the best thing for the prisoners to do collectively is remain silent and receive a total of 4 years (2 years each), each prisoner acting rationally (in the absence of information about what the other will do) will choose to confess, resulting in a total of 12 years in jail for the pair (6 years each). See id. The classic prisoner's dilemma involves an optimal result that is better for both prisoners than the one they will reach acting independently. More complex versions include situations in which the optimal solution (in terms of collective payoff) might make one prisoner worse off, but only to an extent that is more than offset by the gain of the other prisoner. See LeBeouf, supra note 291, at 577 (describing variations of the classic prisoner's dilemma). In both the classic and modified prisoner's dilemma, the prisoners have a disincentive, acting independently, to choose a course of action that would benefit them collectively. See id. (describing choices available to participants in the prisoner's dilemma). See generally AVINASH DIXIT & BARRY NALEBUFF, THINKING STRATEGICALLY 11-14 (1991) (outlining the importance of the prisoner's dilemma in strategic planning); RUSSELL HARDIN, COLLECTIVE ACTION (1982) (discussing effective techniques for reaching common goals).

327. The existence of a race to the bottom in environmental regulation was first discussed in two seminal articles published in 1977. See Richard B. Stewart, The Development of Administrative and Quasi-constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act, 62 IOWA L. REV. 713, 745-50 (1977); Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 YALE L.J. 1196, 1199-1202 (1977) [hereinafter Stewart, Pyramids of Sacrifice?]. Stewart's analysis was recently challenged in Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation, 67
bottom" argument for national intervention posits that state competition for jobs, industry, and investment will lead states to adopt lower-than-optimal regulatory standards. Richard Stewart argued in the environmental context as follows:

Given the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards. If each locality reasons in the same way, all will adopt lower standards than they would prefer if there were some binding mechanism that enabled them simultaneously to enact higher standards, thus eliminating the threatened loss of industry or development.329

In other words, a state government acting strategically may rationally conclude that lax regulatory standards will increase its constituents' welfare (by increasing investment and employment) by an amount greater than any (in-state) costs resulting from the lower standards.330 Other states, however, will naturally relax their own standards in response, in order to get ahead themselves or not be left behind, "triggering a


329. Stewart, Pyramids of Sacrifice?, supra note 327, at 1212 (footnote omitted). See also Peterson, supra note 314, at 27-29 (explaining that federal environmental standards are necessary for effective control of industry).

330. See Shapiro, supra note 265, at 42 (arguing that negative externalities are not a necessary precondition for a race to the bottom); Esty, supra note 327, at 634 (cautioning that the risk of such a race is obviously far greater where a portion of the costs of lax regulation can be imposed on other jurisdictions).
downward regulatory spiral and nonoptimal results."331 Stewart’s "binding mechanism" for avoiding such destructive competition and ensuring rational collective action can best be supplied by the national government.332

Finally, the concept of scale economies suggests that national intervention may sometimes be warranted. In both the private and the public sector, there are advantages to size in terms of production, organization, purchasing, selling, and financing.333 Some government activities can’t be operated efficiently at the state level because they are characterized by enormous start-up costs and increasing returns to scale.334 While obvious instances like the space program and nuclear weapons are relatively rare, more subtle examples like the setting of pollution-control standards, which involves massive data collection and highly technical scientific analysis,335 are somewhat more plentiful. Nevertheless, for the bulk of government activities, such as the operation of schools, sanitary districts, police departments, and criminal justice systems, the advantages of scale come to an end long before reaching the national level.336 Moreover, depending on the product or service provided, size eventually becomes a disadvantage, with problems of administrative coordination and transportation overtaking any economies in production.337 In other words, many government activities are characterized by significant diseconomies of scale, making direction of those activities from a single, central source economically inefficient.

331. Esty, supra note 327, at 604.
332. Theoretically, states could escape the race to the bottom through negotiation in their collective interest. This was the insight of Ronald Coase in The Problem of Social Cost, 3 J.L. & ECON. 1 (1960). But the complexity of most problems of interjurisdictional spillover present insurmountable transaction costs to effective interstate bargaining. See OLSON, supra note 318; SHAPIRO, supra note 265, at 41; Esty, supra note 327, at 604; LeBoeuf, supra note 291, at 574.
334. Calabresi, supra note 230, at 780.
335. See Esty, supra note 327, at 613-17 (examining the technical areas likely to benefit from federal intervention); LeBoeuf, supra note 291, at 566 (discussing the benefits of economies of scale).
337. See Thomson, supra note 333, at 184-91 (advocating the importance of maintaining local economic control).
The foregoing arguments for national intervention—fundamentally unjust state policy choices, the disincentive for states to supply certain public goods, the destructive impact of certain types of interstate competition, and economies of scale—all are consistent with the basic premise of the American federal system that normative variation ordinarily should be valued and protected. They simply recognize that in a federal system there is an important and substantial role for the national government, a role that must account for the increasingly transjurisdictional nature of modern economic, political, and social life.

2. Diversity Versus Uniformity in Attorney-Conduct Standards

The affirmative case for normative diversity—maximizing individual preference satisfaction and fostering interstate competition and state innovation—applies to the general task of setting conduct standards for lawyers. Moreover, none of the arguments for national action discussed above support the across-the-board preemption of state ethics codes with national standards of attorney conduct. The advocates of national standards are left with the broad and general claim that the predictability and reduced transaction costs afforded by uniform, nationally-imposed legal standards generally outweigh the benefits of federalism’s diversity. But that claim, lacking as it does a demonstration that the costs imposed by diverse standards of attorney conduct are somehow unique, cannot support special treatment for the legal profession.

a. State-Level Norm Setting Satisfies Diverse Preferences

The current disparity in lawyer-conduct standards reflects important, though relatively confined, areas of normative conflict within and without the legal profession. Assuming that individual preferences about the appropriate resolution of those conflicts are unevenly distributed among the states, state-level norm setting satisfies more people than would im-

338. There may appear to be some tension between the suggestion made earlier that concern over state variation in conduct standards is overblown, see supra Part I.B.2, and the claim here that diversity in state regulation is the primary good to be preserved against federal intervention. But even if the practical significance of interstate variation for multistate practitioners is not great, the normative value of the variation is substantial.
position of a single rule by the national government.\textsuperscript{339} Again assume two states, A and B, with equal populations of one hundred persons each. Assume further that eighty people in A but only thirty people in B wish to permit lawyers to disclose the future financial fraud of a client. A decision by the national government based on majority preference will satisfy 110 people (eighty from A and thirty from B), while state-level decisions will satisfy 150 people (eighty from A and seventy from B).\textsuperscript{340}

The proffered response to the preference-satisfying claim for state-level norm setting is to assert that “[t]he primary changes that states have made [to the Model Code and the Model Rules] do not reflect their unique populations,” and that therefore “one cannot help doubting that local tailoring of the rules is taking place.”\textsuperscript{341} But while the existing normative variation in conduct rules may not track state differences in population density or industrialization—the only “unique” features identified as relevant\textsuperscript{342}—one should not lightly assume that the variation does not reflect local preferences. To the contrary, when Delaware adopts Model Rule 1.6 verbatim, thereby permitting disclosure of client information only to prevent a crime likely to result in imminent death or serious bodily injury,\textsuperscript{343} while New Jersey chooses to amend Rule 1.6 not just to permit but to require disclosure of a much wider range of threatening client conduct,\textsuperscript{344} those choices plainly reflect the

\textsuperscript{339} \textit{See supra} Part III.B.1.a.

\textsuperscript{340} I do not mean to suggest, of course, that the will of the people is directly reflected in the votes of their representatives, least of all in the context of lawyer-conduct rules. The claim has long been made that the ABA seeks to control the content of such rules in order to insure that other regulators, perhaps those with a closer connection to the will of nonlawyers, stay out of the game. \textit{See supra} note 57 (exploring the role of the ABA in setting lawyer-conduct rules). A similarly familiar claim about the ABA is that it is dominated by the elite corporate bar, \textit{see} JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976), and that that domination is evidenced in conduct rules that favor such elite lawyers and disfavor the rest of the profession, \textit{see} Philip Shuchman, Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code, 37 GEO. WASH. L. REV. 244, 268 (1968) (finding that the profession favors the interests of large firm attorneys more than the rest of its members). For a thorough and illuminating account of the contending political forces that shaped the Model Rules, see Schneyer, \textit{supra} note 61, at 701-24.

\textsuperscript{341} Zacharias, \textit{supra} note 7, at 375.

\textsuperscript{342} \textit{See id}.

\textsuperscript{343} DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1997).

\textsuperscript{344} New Jersey's rule provides:
fundamentally different normative choices of two jurisdictions. Permitting those different choices, and hence increasing individual preference-satisfaction, is one of the chief virtues of federalism.  

A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1997).

345. An additional virtue claimed for state-level norm setting is that it promotes community. See supra notes 162-163 and accompanying text. While serious flaws mar that contention when broadly made, in the narrower context of lawyer regulation it may have some merit.

Rubin and Feeley, supra note 154, at 936, state that recent communitarian scholarship claims the fostering of community as a benefit of federalism, but then attack the claim as romantic or fanciful. See id. at 936-51. While federalism appears to play no more than a minimal role in the work of contemporary community theorists, others have noted its potential to reinforce the unity of citizens in their local communities. Justice Frankfurter, for example, wrote of the "special relations between a State and its citizens," Toomer v. Witsell, 334 U.S. 385, 408 (1948) (Frankfurter, J., concurring), and that these relations fostered "[a] binding tie of cohesive sentiment," Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 596 (1939), overruled by West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), on grounds unrelated to Frankfurter's quoted comments. From Frankfurter's perspective, citizens gain an important part of their identity from the states in which they live. See Robert C. Post, Justice Brennan and Federalism, 7 CONST. COMMENTARY 227, 234 (1990) (contrasting Frankfurter's views of federalism with those of Justice Brennan).

This perspective has at least superficial appeal. To the extent that problems and preferences are unevenly distributed among states, citizens in a particular state may develop a sense of both social and political kinship with fellow state citizens. Many of us root for our state-university sports teams, take pride in the successes of state government, businesses, and individuals, and cringe when our state is subject to national ridicule or disrespect. Federalism, particularly in its promotion of both interstate diversity and citizen participation, is a critical precondition to the maintenance of whatever state-level community in fact exists. The limits of the community-promoting claim for federalism, on the other hand, are substantial. See Rubin & Feeley, supra note 154, at 940-41 (contending that even the smallest states are far too large to permit state-wide feelings of personal or emotional connection). The states lack what some have described as "affective community." Id. at 937 (citing ROBERT P. WOLFF, THE POVERTY OF LIBERALISM 187-92 (1968)). In terms of defining "political communities"—groups engaged in collective political decisionmaking—states may be less relevant than local governmental units or the national government. See id. at 937-47 (contending that true political community in United States is national).
b. State-Level Norm Setting Permits Useful Innovation

Proponents of nationalization admit the existence of "some experimentation in ethics codes," but then dismiss its value. Zacharias, for example, contends that experimentation to date has been narrow and not useful, and that the legal profession has failed to develop (and the market cannot provide) a meaningful technique for measuring the success of any experiments that do take place. He concludes that "because experiments by definition are prone to failure, it makes little sense to rely on them if the results cannot, or will not, be analyzed. Federal lawmakers are better off simply attempting to discern the best rule." This argument understates the significance of existing (and potential) state experimentation, and takes the laboratory metaphor too far by dismissing as useless an experiment accompanied by proof of its results.

While state experimentation, expressed as deviations from the ABA model, may be relatively limited, that deviation has been extensive enough to cause alarm about the

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For lawyers, however, federalism may indeed promote community. State-based regulation, geographic boundaries confining practice, and relatively limited population combine to create for many lawyers bonds of attachment, both political and emotional, with other in-state lawyers. While I know of no empirical studies that identify or measure interstate differences in the culture of lawyers, anecdotal evidence of such differences is at least interesting. A recent and notable example is the celebrated conflict between Texas lawyer Joe Jamail and the Delaware Supreme Court. See Benjamin Weiser, Are Too! Am Not! Are Too! Am Not!: Judges Try to Impose a Civil Tone as Depositions Get Increasingly Down and Dirty, WASH. POST, Thursday, March 10, 1994, at B10 (documenting the growing intolerance of the judiciary toward unprofessional behavior on the part of the practicing bar). In a scathing addendum to its opinion in Paramount Communications v. QVC Network Inc., 637 A.2d 34, 51-57 (Del. 1993), the Court attacked Jamail's conduct in a deposition as "outrageous and unacceptable," id. at 55, and contended that the Delaware courts would not tolerate such behavior from Delaware lawyers, see id. One Delaware lawyer later observed that lawyer conduct tolerated elsewhere would result in "swift sanctions" after the first instance of misconduct in Delaware. William E. Wiggin, Uncivil Procedure, DEL. LAWYER, Spring 1996, at 40. Wiggin also noted that "our bar is made up overwhelmingly of ladies and gentlemen." Id.

I should add that the promotion of community is not an unqualified good. One way that communities are defined is through exclusion, and attempts to define state citizenship, or membership in a state professional community, may be unfairly or harmfully exclusive.

346. Zacharias, supra note 7, at 373.
347. See id. at 373-74.
348. See id. at 374.
349. Id. at 374-75.
"balkanization" of ethics norms.\textsuperscript{350} Moreover, at least in the area of the relationship between client confidentiality and intended client financial fraud, state deviation from the ABA norm has resulted in a new dominant norm.\textsuperscript{351} Nor has all state experimentation been modest. New Jersey, for example, has undertaken an approach to client confidentiality that Professors Hazard and Hodes rightly characterize as "an openly radical experiment."\textsuperscript{352} In addition to amending Rule 1.6 to mandate disclosure when "substantial injury to the financial interest... of another [is threatened],"\textsuperscript{353} New Jersey has made significant amendments to other confidentiality-related provisions of the Model Rules. Those amendments include: (1) creating a meaningful requirement that lawyers correct their clients' material misstatements to third parties by eliminating Model Rule 4.1(b)'s gaping confidentiality exception,\textsuperscript{354} (2) amending Rule 1.6 to require revealing threatened client perjury;\textsuperscript{355} and

\begin{itemize}
\item \textsuperscript{350} See supra Part I.C (describing the concern of attorneys and commentators over variations in state standards).
\item \textsuperscript{351} See Wolfram, supra note 83, at 901. Wolfram explains:
\begin{quote}
The states have been, if modestly, laboratories of experimentation, much more interesting in the articulation of standards on many issues than the ABA. Some states have shown both a measure of independence and creativity in doing their own tinkering in adopting and modifying their version of the Model Rules. That tinkering has produced, in some instances, a set of national norms entirely different from those first pressed on the profession by the ABA. Id.
\end{quote}
\item \textsuperscript{352} Wolfram goes on to cite as "[t]he most obvious example... the overwhelming rejection in almost all jurisdictions of the ABA's initial and present position on extreme client confidentiality in the face of intended financial harm." Id. at 901 n.137
\item \textsuperscript{353} Hazard & Hodes, supra note 69, § AP4:104, at 1265.
\item \textsuperscript{354} New Jersey Rules of Professional Conduct Rule 1.6(b)(1) (1997).
\item \textsuperscript{355} Model Rule 4.1 provides in relevant part:
\begin{quote}
In the course of representing a client a lawyer shall not knowingly:
\begin{itemize}
\item (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
\end{itemize}
\end{quote}
\item \textsuperscript{355} New Jersey Rules of Professional Conduct Rule 1.6(b) (1997) provides in relevant part:
\begin{quote}
A lawyer shall reveal such information to the proper authorities as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client:
\begin{itemize}
\item (2) from committing a criminal, illegal or fraudulent act that the
perhaps most significantly (3) adding a new provision to Rule 3.3 barring "failure to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure." 356 While perhaps not quite revolutionary, these changes taken together offer a notably different vision of both client confidentiality and the adversary system than do the Model Rules.

The claim that experiments like New Jersey's are valueless, on the ground that neither empirical study nor the market is likely to measure their costs and benefits, fails in several respects. First, the remedy for the admitted dearth of empirical studies of diverse conduct rules is not to abandon diversity in favor of national intervention, but rather to conduct and continue to encourage useful studies. 357 Second, while alternative lawyer-conduct norms may not generate easily quantifiable costs and benefits, they are not fundamentally different from many other norms that involve abstract interests. Competitive federalism does not depend on individual citizens engaging in elaborate calculations of the costs and benefits of particular policies, but simply on the citizen rights of voice and exit conveying to government decisionmakers information about what bundle of policies will best satisfy citizen preferences. The claim is not that government policies are just like widgets and that officials and voters act just like manufacturers and consumers, but only that "competition among governments, offering different types and levels of public goods at different costs, provides a rough market solution to the information problems confronting public officials. 358

356. NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(5) (1997). This factual equivalent of the lawyer's obligation to disclose adverse legal authority, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1995), has potentially radical consequences. Imagine a lawyer who learns of a witness whose testimony would establish a material fact damaging to her client. Ordinarily, the lawyer would have no obligation (absent an appropriate discovery request) to reveal the witness to the other side or to the court. Indeed, the lawyer might win the case by allowing the court to find that the other side had not established the material fact in question. Under New Jersey Rule 3.3, however, the lawyer apparently would be obligated to reveal the witness, or admit the fact, to the court. See HAZARD & HODES, supra note 69, at 1264 n.4.

357. Zacharias himself conducted one of the few relevant empirical studies, see Zacharias, supra note 77, at 379-96, and has been a consistent advocate for more testing of the various mechanisms for professional regulation. Zacharias, supra note 7, at 374 n.172.

358. DYE, supra note 284, at 14-15 (emphasis added).
Third, and most important, rigorous testing of the effects of innovative legal norms should not (and often cannot) be a necessary precondition of innovation. Such testing of course is generally desirable, and in the case of technical innovation in areas like pollution control it may well be necessary.359 But common law courts, legislatures, and other norm setters regularly make policy choices based on imperfect information about the consequences of those choices, and often rely on unscientific observations about conditions in other jurisdictions. Indeed, the conclusion to the dismissal of the benefits of experimentation in legal ethics—that “[f]ederal lawmakers are better off simply attempting to discern the best rule”360—begs the question of how those lawmakers are supposed to go about “discerning” the best rule, if not at least in part by observing competitive rules in operation. Even if the results of New Jersey’s “radical experiment” with client confidentiality are not scientifically tested, other jurisdictions should still learn something useful from the experience.361

c. The Case for National Preemption Has Not Been Made

As discussed in the preceding section, the benefits of normative variation should give way to some measure of national control when states make fundamentally unjust or otherwise impermissible normative choices, when states lack adequate incentive to supply a needed public good, and when state-based regulation generates significant inefficiencies, either through destructive competition or lost economies of scale. None of those arguments for national intervention, however, support complete national preemption of state-generated standards of attorney conduct.

National intervention has been necessary, on occasion, to remedy impermissible choices in the regulation of lawyers, made either by individual states or by the legal profession as a

359. See Esty, supra note 327, at 613-17.
360. Zacharias, supra note 7, at 375.
361. Hazard and Hodes express the concern that New Jersey’s approach may represent such a dramatic departure for lawyers trained in the traditional adversary ethic that the new rules will be widely ignored. HAZARD & HODES, supra note 69, § AP4:104, at 1265. If that concern proves valid, other states can take it into account in deciding both whether and how to deviate from the traditional norms. If, on the other hand, lawyers generally comply with New Jersey’s new rules, if courts, litigants and third parties feel protected by them, and if there is no demonstrable harm to attorney-client relationships, then other states may decide to follow New Jersey’s lead.
whole. Residency requirements and restrictions on lawyer advertising and solicitation provide prominent examples. But those instances, addressed by Supreme Court articulation of constitutional limits on state options, clearly do not warrant national takeover of the whole enterprise of regulating lawyers. And while many other lawyer-conduct standards have generated controversy, and even passionate disagreement, they have not constituted the sort of fundamentally unjust norms that so offend the national polity as to require national intervention.

Nor do any of the economic arguments for national intervention apply to the establishment of comprehensive standards of attorney conduct. First, there is no evidence of an interstate race to the bottom in lawyer-conduct standards. Many commentators have observed, of course, that the regulation of lawyers suffers from a marked bias in favor of protecting the interests of lawyers over the interests of other members of society. Whatever the flaws in existing standards, the point is that states are not engaging in lax regulation of the legal profession in order to attract more lawyers.

Second, lawyer-conduct rules do not generally suffer from the ills associated with significant externalities. Despite the inevitable interstate spillovers attendant to the increasingly

362. See supra note 23 (discussing the constitutionality of residency requirements in light of the Privileges and Immunities Clause).
363. See supra note 96 and accompanying text (discussing constitutional limitations on regulation of lawyer advertising).
364. As discussed above, the proper relationship between client confidentiality and the interests of nonclients has long been the subject of intense debate. Neither the extraordinarily expansive position taken by the ABA in Model Rule 1.6 nor New Jersey's radical revision, however, comes close to any constitutional line. Senator Arlen Specter was sufficiently troubled by Model Rule 1.6 that even before its adoption by the ABA House of Delegates he introduced a bill that would have preempted the rule. See infra note 381 (describing legislation introduced by Senator Specter but not passed by Congress).
365. See, e.g., Rhode, supra note 61, at 692 ("Both the Code of Professional Responsibility and the Canons of Ethics it replaced consistently resolved conflicts between professional and societal objectives in favor of those doing the resolving. So too,... one would expect the Model Rules to serve first and foremost the interests of the bar."); see also id. at 692 n.15 (citing earlier works making the same point).
366. The underproduced public good argument for national intervention, see supra notes 316-320 and accompanying text, plainly does not apply to lawyer-conduct regulation. Lawyer-conduct rules are not like the interstate highway system or the space program—public goods characterized by internalized costs and externalized benefits that therefore would not be supplied without national policy making and funds.
multijurisdictional nature of law practice,\textsuperscript{367} the fact remains that the bulk of the relevant costs and benefits of lawyer regulation remain in state. Depending on the rule, costs and/or benefits are generally borne by someone likely (though not certain) to be a resident of the regulating state, be it the regulated lawyer, the client, a court, or an affected third party.\textsuperscript{368} Of course, some costs (and benefits) will be exported to the out-of-state clients of multijurisdictional practitioners, or to out-of-state third parties, but they are likely to be small both in absolute terms and in relation to internal costs (and benefits). Unlike barriers to interstate trade or the exportation of pollution,\textsuperscript{369} state-based lawyer-conduct rules are not generally skewed by a realizable desire to internalize benefits and externalize costs. The mere fact of some spillover of costs, an inevitable component of much state regulation, does not justify national preemption of the benefits of diversity.

Finally, national intervention may occasionally be justified by the argument that state-level regulation causes lost economies of scale. Zacharias, for example, makes the modest suggestion that "a national enforcement scheme might have economies of scale,"\textsuperscript{370} offering as examples a reduced need for experts on state law, an increase in accessible information on multistate practitioners, and fewer multiple prosecutions of the same lawyer.\textsuperscript{371} Even if those examples represent actual prob-

\begin{footnotes}
\item[367] See supra Part I.A.
\item[368] For example, the costs associated with the rule governing the safekeeping of client property, MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.15(a) (1995), fall on the in-state lawyers holding client funds, while the clients, most of whom will be state residents, will reap the bulk of the benefits. When a state decides to strengthen the rule's protection of clients, such as by adding detailed accounting requirements, see DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 1.15 & Interpretive Guideline No. 2 (1997), the additional costs and benefits will likewise be largely internalized. Similarly, both the client beneficiaries of the strict confidentiality principle embodied in Model Rule 1.6 and the rule's cost-bearers—third parties harmed by client conduct or courts deprived of relevant information—will ordinarily be state residents. When a state weakens the confidentiality principle by taking greater care to protect the interests of third parties or courts, the benefits and the costs imposed by the change will likewise remain chiefly within the state. The same assessment would apply to stricter and milder versions of most conduct standards, including the no-contact rule, and the rules governing conflicts of interest.
\item[369] See supra notes 321-326 and accompanying text (discussing the exportation of costs due to state regulation).
\item[370] Zacharias, supra note 7, at 371.
\item[371] See id. at 371 n.165.
\end{footnotes}
lems that could be remedied by a national enforcement system, they hardly warrant dismantling the existing state systems and starting from scratch. Moreover, the size disadvantages of a national lawyer-regulation bureaucracy, in terms of both efficiency and effectiveness, would surely outweigh the minimal scale economies claimed for such a system.

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At bottom, the argument for nationally imposed standards of attorney conduct is a complaint about the transaction costs associated with state-level norm setting. Lawyers engaged in conduct with multijurisdictional consequences may find that diverse state norms have a potential claim to govern that conduct. Prudent lawyers will therefore incur costs researching the potentially applicable lawyer-conduct rules of multiple ju-

372. Another possible argument for federal regulation bears mention, one not made by commentators concerned chiefly with predictability for lawyers. At the time of the founding, perhaps the most fully developed argument for centralization was made by Madison in The Federalist. According to Madison, a large republic offers greater protection from the tyranny of faction than do the smaller polities of states, chiefly because of the inevitable dilution of, and competition between, factional interests. THE FEDERALIST No. 10, at 82-84 (James Madison) (Clinton Rossiter ed., 1961). In small republics, "a self-interested private group could easily seize political power and distribute wealth or opportunities in its favor," Cass Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 39 (1985) (describing Madison's theory), while the "greater variety of parties and interests" in a large republic would "make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens," THE FEDERALIST No. 10, supra, at 83.

An argument might well be constructed that the interests to be served by lawyer-conduct regulation could be corrupted by factional power, either because lawyers possess a disproportionate power adverse to the public interest, cf. Rhode, supra note 61, at 692 ("[B]oth the Code of Professional Responsibility and the Canons of Ethics it replaced consistently resolved conflicts between professional and societal objectives in favor of those doing the resolving. So too,... one would expect the Model Rules to serve first and foremost the interest of the bar.")], or because a faction within the legal profession dominates other subsets of the profession, see supra note 340. If such factional corruption exists, and if it would be less likely to prevail at the national than at the state level, then nationalization of lawyer-conduct regulation might be warranted. Exploration of this as-yet unmade argument for nationalization, which would have to address the relative state- and national-level influence of lawyers generally, of the ABA and other professional organizations, and of various subsets of the profession, will have to await another day. For the moment, I'll simply observe that commentators concerned with predictability for lawyers have posited loss of the profession's ability to set its own standards as an argument against nationalization. See, e.g., Daly, supra note 11, at 784 (contending that "the proposal for a national bar threatens the independence of the legal profession" and "would inevitably place lawyers under the thumb of Congress").
risdictions, costs that would be materially lower if the research could be confined to a single set of national rules. This observation of increased transaction costs for lawyers, while accurate, fails to distinguish the nature or magnitude of those costs from the transaction costs inherent in federalism generally. Indeed, lawyers undoubtedly spend dramatically more time and energy addressing the multijurisdictional problems of their clients than they do their own. Given that the practice of law is still far more state-based than many aspects of modern commercial life, and that the significant disparity in lawyer-conduct rules is relatively confined, the case for national preemption of lawyer-conduct standards is in fact far weaker than the case for national standards in many areas still dominated by state law.

Zacharias, while conceding that "[s]ome of the rationales for federalizing professional regulation track arguments one could make for federalizing other areas of state law, including commercial law, environmental law, consumer fraud and torts," contends that "the problem of disuniformity in the professional responsibility field is exceptionally serious." What makes it so? For Zacharias, the chief distinguishing feature is that disparate attorney-conduct standards undermine the public perception of lawyers. His argument proceeds as follows. Lay persons are exposed through the mass media to inconsistent conduct by attorneys. While that inconsistent conduct is in fact attributable to diverse state norms, lay persons mistakenly attribute it to disregard by some attorneys of governing standards. That mistaken perception fosters costly disrespect for the legal profession, disrespect that could be

373. Many lawyers, of course, would devote precisely the same resources to research in the two situations—none.
374. Two ready examples are commercial law, see supra Part II.A, and products liability, see generally NEW DIRECTIONS IN LIABILITY LAW, supra note 219.
375. Zacharias, supra note 7, at 371; see also id. at 372 ("The professional responsibility field may not present a unique case for federal intervention, but it does present one of the strongest.").
376. Id. at 371.
377. See id. at 372 (explaining that "[a]s the legal profession becomes more visible, it becomes important for each jurisdiction to enforce its standards. Failure to do so breeds distrust of the profession."); see also id. at 357-65 (asserting that if professional regulation codes affect the public's perception of lawyers, a federal code is necessary to eliminate inconsistencies that may undermine that perception).
ameliorated by a national code.\textsuperscript{378} But to the extent that lawyer-conduct standards have an effect on the public perception of lawyers, I suspect that dissatisfaction with the substance of the rules has a much greater impact than confusion over inconsistent state standards. Who likes client-attorney confidentiality besides clients and lawyers?

I do not dispute that we are at a point of great upheaval in the legal profession, with rapidly declining public confidence and increasing lawyer dissatisfaction.\textsuperscript{379} Nor do I dispute that the combination of multijurisdictional practice and inconsistent state ethics codes creates uncertainty and hence transaction costs for lawyers, costs that undoubtedly are shared by lawyers with their clients. What I \textit{do} dispute is that a national code, premised on the idea that lawyers need special treatment to cope with the uncertainty of operating in a federal system, is a sensible response. To the contrary, now is precisely the time to encourage different approaches to problems that the profession has yet to resolve. In many areas, including efforts to strike the proper balance between client and third-party interests, the profession has yet to (and may never) develop any uniquely right answers. We should therefore celebrate, and pay close attention to, New Jersey's "radical experiment" in reshaping client confidentiality,\textsuperscript{380} rather than lament the fact that it may create uncertainty for some multistate practitioners. We may ultimately conclude that New Jersey's approach is right or wrong, or that a range of permissible approaches exists. But unless we are confident that we have uncovered the right an-

\textsuperscript{378} See Zacharias, supra note 7, at 357-65. In fairness, Zacharias does take some care not to overstate his case, noting that client perceptions are affected by a host of factors and that the effect of a national code on such perceptions would be indirect. \textit{See id.} at 364-65. Nevertheless, he places significant weight on this "perception" component of his argument when seeking to distinguish attorney-conduct standards from other state-based regulation. \textit{See id.} at 372 (noting that "the other candidates for federalization do not depend on lay perception of the law for their effectiveness").

\textsuperscript{379} See generally ANTHONY T. KRONMAN, THE LOST LAWYER (1993) (discussing the decline of the lawyer-statesman and the current "crisis" in the legal profession); Symposium, A Nation Under Lost Lawyers: The Legal Profession at the Close of the Twentieth Century, 100 DICK. L. REV. 477 (1996) (providing several perspectives on the state of the legal profession and discussing proposed responses to these challenges); Edward D. Re, The Causes of Popular Dissatisfaction with the Legal Profession, 68 ST. JOHN'S L. REV. 85 (1994) (outlining potential causes of dissatisfaction with the legal profession).

\textsuperscript{380} See supra notes 352-356 and accompanying text (summarizing New Jersey's experimental changes to the confidentiality provisions of the Model Rules).
answer to this and other difficult problems of lawyer-conduct regulation, or that the costs of multiple answers are simply too great to bear, it would be a serious mistake to freeze attorney-conduct standards in a single federal code.\(^{381}\)

381. An alternative to a comprehensive national code of attorney conduct, particularly given that significant state variation is confined to a relatively limited number of issues, see supra Part I.B.2, would be selective national intervention confined to subject areas where the problems posed by nonuniformity are particularly acute. See Zacharias, supra note 7, at 397-99 (stating that federal regulations for the most controversial issues may solve current problems, but contending that such a narrow approach to ethics regulation may be inappropriate).

Senator Arlen Specter proposed limited federal intervention in 1983 when he introduced legislation that would have made it a crime for lawyers not to disclose confidences where necessary to prevent crime or fraud. See S. 485, 98th Cong. (1983). Specter's bill, which was motivated by concern over the substance of Model Rule 1.6, not by concerns over nonuniformity, died quietly. See generally The Lawyer's Duty of Disclosure Act: Hearings on S. 485 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong. (1983). As noted above, most states shared Senator Specter's unhappiness with Model Rule 1.6 and included in their versions of the rule a great deal more room for disclosure. See supra Part I.B.2 (comparing versions of Rule 1.6 that states have adopted). Moreover, the negative externalities associated with diverse confidentiality rules are sufficiently slight, and the benefits of experimentation sufficiently large, that national intervention for the sake of uniformity seems unwarranted.

One area that may be uniquely suited to national regulation is advertising. Advertising, whether broadcast, print, or on the Internet, very often cannot be contained within a single jurisdiction. See Louise L. Hill, Speech to Delaware State Bar Association (Jan. 31, 1997) (on file with author) (discussing the multijurisdictional nature of Internet web sites developed by law firms). Advertising and solicitation rules, though driven by a series of commercial speech decisions of the United States Supreme Court, vary considerably in matters of important detail. See supra notes 96-101 and accompanying text. Conflicting advertising rules pose particular problems for multiple-licensed lawyers practicing in border cities. Their advertisements on television and radio, in newspapers, and even in telephone books, frequently cross state lines. See, e.g., Iowa Ethics Op. No. 89-24 (1989) (concluding that lawyer admitted in Iowa and Illinois, but who maintained his office in Illinois, nonetheless had to conform to Iowa advertising rules for ad in telephone directory that was distributed in both states).

It may often be difficult, or even impossible, for these lawyers to conform their advertisements to the rules of all the states to which their advertisements inevitably travel. Factoring in the inherently ajurisdictional character of the Internet, see Hill, supra, we may have reached the point that effective state-based regulation of lawyer advertising and solicitation is a practical impossibility. See Zacharias, supra note 7, at 347-50 (exploring the complications that local advertising codes pose to national firms); Daly, supra note 11, at 797 (concluding that "state-based regulation of lawyer advertising and solicitation in a national economy is impossible as a practical matter").

One alternative to uniform, national rules for advertising and solicitation would be to provide that lawyer marketing, unless false or misleading, be
IV. FEDERALISM AND A CHOICE-OF-LAW RULE

In a federal system that fosters normative variation and includes overlapping jurisdiction, multistate actors are bound to confront uncertainty and hence incur costs. The federal system's response to these long-familiar problems is not typically the radical one of nationally-imposed uniformity but rather resort to choice-of-law rules. Such rules are designed, among other things, to give adjudicators a method for determining which jurisdiction's rules to apply to a particular problem, and to give multistate actors a method for making sensible predictions about what those adjudicators will do later. This Part first examines the ABA's effort to create a uniform choice-of-law rule for attorney ethics by amending Model Rule 8.5, noting the legitimate criticisms of the rule's substance and scope but emphasizing the collective-action obstacles to the rule ever being widely adopted. It then briefly explores the possibility of a federal choice-of-law rule as a solution to those collective action problems, explaining that the federalism objections to national intervention discussed above would not apply, and that such a rule would be fully consistent with the federal government's role as interstate umpire.

A. AMENDED MODEL RULE 8.5

As propounded by the ABA in 1983, the Model Rules were premised on the assumption of uniform state adoption, despite the recent history of state variations on the Model Code. The 1983 version of Model Rule 8.5 was merely a rule of jurisdiction, and no provision was made there or elsewhere in the Model Rules for resolving interstate conflicts in lawyer-conduct measured only against the rules of the state of origin, and not against the rules of the receiving state. Cf. Daly, supra note 11, at 797-98 (suggesting that most states have adopted this solution sub silentio). This alternative would permit states to enforce their own vision of lawyer marketing and consumer protection in most cases, while preventing inconsistent state rules from strangling such marketing. On the other hand, lawyers in a state with particularly restrictive rules might be placed at a competitive disadvantage when multistate lawyers can market more aggressively from across the border. Moreover, if lawyer marketing on the Internet grows at the rate that some predict, the problem of identifying the home state may itself become insolvable. See Hill, supra, at 4-7 (questioning what advertising rules would apply to a lawyer admitted to practice in numerous jurisdictions who publishes a web site on the Internet).

382. See supra Part I.B.1 (describing state amendments to the Model Code).
standards. Such conflicts did arise, however, and the ABA, spurred by a request from its own business law components, belatedly produced a choice-of-law rule in the form of amended Model Rule 8.5.

The ABA committee responsible for the amended rule described the objective of the revision as follows:

[T]o bring some measure of certainty and clarity to the frequently encountered, and often difficult, decisions a lawyer must make when encountering a situation in which the lawyer is potentially subject to differing ethical requirements of more than one jurisdiction. . . . The problem of lack of clear guidance that this proposal seeks to address is exacerbated by the fact that existing authority as to choice of law in the area of ethics rules is unclear and inconsistent. . . . The proposed amendment to Rule 8.5 seeks to provide clear answers to these problems in nearly all cases.

In order to accomplish this objective, the committee added subsection (b) to the original version of the rule, directly addressing choice-of-law problems for both litigators and transactional lawyers.

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383. But see Model Rules of Professional Conduct Rule 8.5 cmts. 2, 3 (1983) (suggesting that under some circumstances, choice-of-law principles "may apply").

384. See ABA Committee on Counsel Responsibility, supra note 6, at 1236 (1990).


386. Subsection (b) provides:

Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

1. Substantive Criticisms

While commentators generally welcomed the ABA's effort to address the problem of choice of law in attorney discipline, most have been quite critical of amended Model Rule 8.5's particulars. The criticisms have centered on perceived flaws in both drafting and underlying policy. As to drafting, critics have focused on the rule's reference to the law of the "jurisdiction in which the lawyer principally practices" and the exception to the choice of that state's law when "[the lawyer's] particular conduct clearly has its predominant effect in another jurisdiction." They contend that this language is insufficiently determinate to give lawyers or adjudicators adequate guidance in selecting the applicable law. Given the increasingly multijurisdictional nature of law practice and law firms, they argue, the jurisdiction in which a lawyer "principally practices" often will be difficult to identify. Likewise, neither the rule nor the comment provides useful guidance on the meaning of "predominant effect." Critics have also observed that the rule's distinction between conduct "in connection with a proceeding in a court" and "any other conduct" likewise fails to draw a bright line, particularly with respect to conduct preliminary to litigation.

More fundamentally, commentators have questioned the rule's lawyer-centered focus. "Rather than balancing the interests of clients, third parties, lawyers, and the legal system, the rule embodies chiefly the purpose of protecting the private interests (financial and professional) of lawyers—those being regulated." Indeed, the express purpose of the rule is to

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388. See Daly, supra note 11, at 760-61 ("[I]n the real world of practice, applying subsection (b)(2) may prove more complicated than its simple language suggests."); Jeffrey L. Rensberger, Jurisdiction, Choice of Law, and the Multistate Attorney, 36 S. TEX. L. REV. 799, 834-37 (1995) (contending that Rule 8.5 does not sufficiently define "principally practices" and "predominant effect").
389. See Edward A. Carr & Allan Van Fleet, Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street, 36 S. TEX. L. REV. 859, 892-93 (1995); see also Daly, supra note 11, at 758-60 (criticizing Rule 8.5 for its vagueness); Rensberger, supra note 388, at 833-34 (asserting that the rule's language is ultimately too vague to serve as a useful guide).
provide predictability to lawyers, and neither the rule, nor the comments, nor the committee report pay much attention to just and predictable treatment of clients or the interests of competing jurisdictions in having their law applied in particular cases. These and similar observations have led to a range of proposals for amending or rewriting Model Rule 8.5, including looking to the state of residence of the client, an affected third party or an interested court, giving presumptive effect to choice-of-law clauses in lawyer-client contracts, and selecting the law of the jurisdiction that has "the most significant relationship" to the representation or in which the entire attorney-client relationship has its "predominant effect."

391. See supra note 385 and accompanying text.

392. For example, the rule's limitation to multiple admission situations, either through multiple licensure or admission pro hac vice, can have the effect of dismissing the interests of clients, third parties, and jurisdictions in which an attorney is not admitted. An attorney admitted only in State A can nonetheless cause substantial consequences in State B, as by disclosing (or not) a client's intent to commit a financial fraud in State B. Because the attorney is admitted only in State A, amended Model Rule 8.5(b)(2) would not look to State B's version of Model Rule 1.6, even if the client or the potential victim resided in State B. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(b)(2)(i) (1993) (for non-litigation-related conduct, "if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction").

A related criticism of the rule is its equation of jurisdiction to discipline with licensure. Model Rule 8.5(a) grants authority to discipline only to states in which a lawyer has been admitted, leaving other states without jurisdiction, no matter what contacts the attorney might have or harm she might cause there. Cf. Daly, supra note 11, at 787-89 (arguing that Model Rule 8.5 should subject lawyers to the jurisdiction and ethical codes of the state in which they offer legal services, whether or not they are admitted to practice in that state).

393. See Rensberger, supra note 388, at 844-45 (arguing that "it is more sensible to require lawyers to conform their conduct and expectations to the law of the state of their clients or third parties").

394. See Daly, supra note 11, at 793-95 (discussing the option of allowing a client and law firm to decide which jurisdiction's ethical standards will govern the relationship):

395. Id. at 792-93.

396. Felleman, supra note 126, at 1524 (proposing that the "predominant effects" test supplemented by a jurisdictional test based on minimum contacts would resolve the choice-of-law dilemma). The literature also includes more modest proposals to "fine-tune" amended Model Rule 8.5. See, e.g., David Luban, A Friendly Amendment to Model Rule 8.5, 36 S. TEX. L. REV. 1015, 1019 (1995) (proposing that where multiple lawyers are working together on a single matter, "whichever ethics rules apply to the primary lawyer responsible for a client's matter apply to all the other lawyers working on the same matter").
Finally, at least one commentary has made reference to the fact that Rule 8.5, as part of the Model Rules, applies only to disciplinary matters, not to the wide range of "other law" that governs lawyer conduct.\textsuperscript{397} Even if the rule were a model of clarity and accommodated all relevant interests, it would not address two of the three contexts in which lawyers' conduct is most often challenged—motions to disqualify for conflicts of interest and civil litigation for improper conduct—contexts in which courts might well employ a choice-of-law approach different from Rule 8.5.\textsuperscript{398} Indeed, a lawyer could carefully conform her conduct to the disciplinary rules of the state to which Rule 8.5 points, and thus avoid discipline, only to face malpractice or other civil liability for failing to follow another state's conflicting rule.

2. No Version of Amended Model Rule 8.5 Will Be Widely Adopted

The foregoing criticisms of amended Model Rule 8.5, while hardly exhaustive, do capture the general tenor of the rule's reception. But whatever the merits of proposals for expanding, rewriting or fine-tuning the rule, the practical value of those proposals is dramatically diminished by the likelihood that neither the rule as currently formulated, nor any re-worked version of it, will ever be adopted by a sufficient number of jurisdictions to materially increase predictability. First, interstate variations on ABA themes created the problem in the first place, sending the ABA scrambling to find a choice-of-law solution.\textsuperscript{399} No one has offered any reason to believe that the same diversifying pressures will not apply to state consideration of a new choice-of-law rule.\textsuperscript{400} Indeed, the original version of Rule 8.5, which merely addressed jurisdiction to discipline, experienced some measure of predictable interstate variation in the adoption process;\textsuperscript{401} the more controversial 1993 version, if

\textsuperscript{397} See Carr & Van Fleet, supra note 389, at 868 (observing that "[n]ew Model Rule 8.5 includes a choice-of-law framework for professional discipline, but does not address other contexts").

\textsuperscript{398} See id. at 891-92.

\textsuperscript{399} See supra Part I.B.2 & Part I.D.; Fred C. Zacharias, A Nouveau Realist's View of Interjurisdictional Practice Rules, 36 S. Tex. L. Rev. 1037, 1042 (1995) (describing the possibility of widespread adoption of Model Rule 8.5 as a "fantasy").

\textsuperscript{400} See supra notes 207-209 and accompanying text (discussing state modifications to choice-of-law provision in the Uniform Commercial Code).

\textsuperscript{401} Several jurisdictions have modified their version of the rule to provide
adopted at all, will surely generate even greater interstate variation. Unless all or most states adopt amended Rule 8.5 without material variation, it will fail to accomplish its stated purpose of promoting lawyer certainty. Second, more than four years after the ABA sent the amended rule out to the states, just three jurisdictions have adopted it and few others appear poised to do so.402

Third, and most important, a reasoned assessment of individual states’ interests and information when considering the amended rule, or even a better crafted version of the rule, suggests that few states will opt for adoption. The original version of Model Rule 8.5, enacted largely intact by a majority of states, provides that “[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.”403 While the comments contain two unilluminating references to the possibility that the jurisdiction might apply some law other than its own,404 the underlying assumption of the rule itself appears to be that the jurisdiction ordinarily will apply its own conduct rules to lawyers it has licensed, no matter where they are practicing.405 In contrast, amended Model Rule 8.5 expressly provides that the enacting jurisdiction, under certain

that their disciplinary authority governs out-of-state lawyers practicing within the jurisdiction, whether licensed there or not. See, e.g., ALASKA RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1994); CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 1-100(D) (1992); MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1995); MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1995); NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1994).


404. See id. cmts. 2, 3.

405. This is the position that has been taken, for example, by states seeking to discipline federal prosecutors for violation of the state’s anticontact rule, even where all relevant conduct occurs out-of-state. See supra notes 106-108 and accompanying text.
circumstances, will apply to the conduct of its own lawyers the conduct rules of another state. The same presumably would be true of any more refined version of the rule. That relinquishment of authority to apply forum law may well make sense, when the favor is returned by other states that have adopted the same choice-of-law rule and apply under similar circumstances in *their* courts the conduct rules of the original jurisdiction. The substantial obstacles to effective interstate bargaining over choice-of-law norms, however, leave states in a prisoner’s dilemma that generates considerable pressure to reject a proposed choice-of-law rule that surrenders authority to apply forum law.\textsuperscript{406}

Assume two states, A and B, and a refined version of Model Rule 8.5 that accommodates competing interests in a way that would be satisfactory to both states.\textsuperscript{407} In other words, assume a refined rule that captures each state’s interests in asserting application of its law in the cases it cares most about, while ceding to the norms of the other state cases of a lower priority.\textsuperscript{408} Assume further that each state’s current rule would apply local law to its licensed lawyers in virtually all cases, or at least in more cases than under the proposed rule. If States A and B both adopt the refined version of Model Rule 8.5, their joint utility will be maximized, and their individual utility will be better than it was, even though the forum state may apply local law less often. If neither adopts the rule, choice-of-law questions will be resolved by each state’s current law, which we have assumed generates lower total utility than the refined rule. If one state rejects the new rule while the

\textsuperscript{406} For an insightful application of economic game theory to the problems of interstate cooperation in the adoption of choice-of-law rules, see Brilmayer, supra note 1, at 169-218.

\textsuperscript{407} Given the inability of courts and scholars to develop choice-of-law rules that make all states better off, this may be a heroic assumption. See Brilmayer, supra note 1, at 218.

\textsuperscript{408} The reference to “cases” in text may suggest an unduly narrow conception of the relationship between choice-of-law rules and state interests. States adopt choice-of-law rules not only to decide cases in court (or before disciplinary boards) but also to influence out-of-court conduct. See Brilmayer, supra note 1, at 199-202.

\textsuperscript{409} Larry Kramer has explained that “[e]ach state presumably cares more about some true conflicts than others, because some true conflicts affect more important purposes of the state’s laws or affect these purposes in more important ways.” Kramer, supra note 1, at 2144. As a result, choice of law is “a variable-sum game in which some solutions may leave states better off than others by calling for the application of their laws in more of the cases they care about.” Id.
other adopts it, however, the rejecting state will maximize its utility (by applying its law to a higher number of in-state cases, and having its law applied more often by the other state). At the same time, the adopting state's utility will be minimized, since its law is being applied less often both in-state and out-of-state. The state options and utility payoffs are set out in the following table, with A's payoffs listed first.

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The insight of the prisoner's dilemma is that if States A and B cannot communicate, and therefore cannot know what the other will do, each has an incentive to reject the new rule in an effort to maximize individual utility. They have a disincentive, in other words, to choose the course of action that would benefit them collectively. Of course, in a world where A and B can bargain effectively, they likely will agree to adopt the new rule and thus maximize their total utility. The problem lies in the fact that we have fifty states, not two. The obstacles to reaching agreement in a fifty-sided bargaining exercise—including basic communication difficulties and free-rider and hold out problems—are close to insurmountable. Perhaps had the ABA included a choice-of-law rule in the original version of the Model Rules, states might have had sufficient confidence in each other's plans to adopt the rule in large numbers. As a stand-alone amendment to the Rules, however, amended Rule 8.5 (or even a more satisfactory version of it) leaves states in the position of incommunicado prisoners, with a disincentive to adopt the rule. In short, game theory tends to confirm what the experience thus far with amended Model Rule 8.5 suggests—states are unlikely to adopt it in sufficient numbers to enhance predictability.

410. See supra note 326 (describing the prisoner's dilemma).
411. See BRILMAYER, supra note 1, at 170 (citing OLSON, supra note 318, at 35) ("It would be very difficult if not impossible for the fifty states to actually bargain their way to a choice-of-law agreement.").
3. What's Wrong With Relying on Existing Choice-of-Law Principles?

The prediction that states will not adopt a uniform choice-of-law rule for lawyer-conduct standards raises the question, should we care? What would be wrong with consigning lawyers to consult on their own behalf the same body of conflicts law they consult on behalf of clients? To put the question affirmatively, are there good reasons to insist on a special choice-of-law rule for the regulation of lawyer conduct? Two reasons might support such special treatment for lawyers. First, several commentators have observed that the existing authority in the area is neither well-developed nor clear. Second, the severity of the disciplinary sanction ought not be imposed absent clear advance guidance about which state's rule will be applied, guidance that current choice-of-law principles do not provide. While not without some force, neither reason seems to warrant panic over the absence of a uniform choice-of-law rule.

Mary Daly recently has researched the "universe of judicial decisions and state bar association opinions specifically addressing how to resolve ethical conflicts in multijurisdictional practice" and found it "strikingly small: approximately three cases and eleven opinions, totaling fewer than one hundred pages." Others have suggested that what law exists is "confusing and inconsistent." The relative scarcity of relevant opinions, rather than being cause for a new rule, might instead suggest that interstate ethical conflicts have not (yet) created a severe practical problem. The lack of consistency

412. See, e.g., Report of the ABA Standing Committee on Ethics and Professional Responsibility in Support of Amended Rule 8.5 (1993) ("The problem of lack of clear guidance that this proposal seeks to address is exacerbated by the fact that existing authority as to choice of law in the area of ethics rules is unclear and inconsistent."); Roach, supra note 6, at 918 ("The few decisions of disciplinary panels and courts that dealt with choice-of-law issues were confusing and inconsistent.").

413. See Kathleen Clark, Is Discipline Different? An Essay on Choice of Law and Lawyer Conduct, 36 S. Tex. L. Rev. 1069, 1072 (1995) (suggesting that lawyer discipline warrants clear rules, and thus perhaps a special choice-of-law rule, but then observing that "any number of the other disciplinary rules are anything but clear").

414. Daly, supra note 11, at 764; see also id. at 764-74 (cataloging and describing opinions).

415. Roach, supra note 6, at 918; see also id. at 919-21 (describing unresolved issues in choice of law for legal ethics).

416. Daly suggests that the recent development of multijurisdictional
in the law that does exist is not surprising, and hardly serves to distinguish this little corner of choice of law from the rest of the "dismal swamp." Should the problem become as severe as some suggest, then the law will surely develop to the point that lawyers will have as much guidance on the law governing their multistate conduct as does everyone else.

Fairness undoubtedly dictates that the disciplinary sanction, like criminal penalties, not be imposed without reasonable notice of what conduct is prohibited. If current choice-of-law principles fail to provide such notice, then perhaps a special choice-of-law rule is warranted. Of course, the Model Rules have been roundly criticized for failing to provide clear answers to a host of substantive questions; a lack of precision in choice of law probably falls rather far down the list of reasons for lawyer uncertainty.\textsuperscript{417} Moreover, there is no evidence that lawyers are being taken by surprise in disciplinary proceedings by unpredictable choice-of-law decisions.\textsuperscript{418} When the rules of more than one state might legitimately be applied to the same conduct, lawyers should not be (and thus far have not been) disciplined if their conduct conformed to the rule they reasonably thought applicable.

In sum, the prediction that few states are likely to adopt any uniform choice-of-law rule, no matter how well-crafted, should not be terribly troubling. Those few courts and bar associations that have faced interstate conduct-rule conflicts have looked to general choice-of-law principles and not appeared totally at sea.\textsuperscript{419} In the malpractice context, where conflicts have arisen with somewhat more frequency, courts have likewise employed the same choice-of-law principles they use in other types of litigation.\textsuperscript{420} Again, if lawyers increas-

\textsuperscript{417} See, e.g., Clark, supra note 413, at 1072 & n.10 (discussing as an example the treatment of disclosing client fraud under the Model Rules).

\textsuperscript{418} One possible exception arises in the unusual context of state efforts to discipline federal prosecutors for violation of the state's anti-contact rule. See supra Part I.B.2.b. Even there, however, any unfairness stems not from a lack of clear notice (the state's choice of its own law is quite predictable), but from the prosecutor's arguably reasonable reliance on contrary statements of DOJ policy.

\textsuperscript{419} See Daly, supra note 11, at 764-74.

\textsuperscript{420} See Clark, supra note 413, at 1071.
ingly face interstate conflicts in conduct rules, then choice-of-law doctrine will develop in court and bar association opinions and lawyers will gain increased guidance.\footnote{421} If current choice-of-law doctrine proves insufficiently determinate for lawyer comfort, then the solution is not to seek a special rule that solves the problem for lawyers, but to improve choice of law generally.

B. A FEDERAL CHOICE-OF-LAW RULE

The foregoing discussion suggests that the current and future absence of a state-based uniform choice-of-law rule for lawyer conduct should be neither surprising nor alarming. But the absence of justifiable alarm does not sanctify the status quo. When predictable obstacles to collective action prevent states from bargaining their way to optimal solutions, national intervention may be warranted. I have argued at length that national preemption of attorney-conduct standards is unwarranted. A more modest (and frankly obvious) role for the national government would be to create a choice-of-law rule governing interstate conflicts of attorney-conduct standards. Such a rule would have the virtue of preserving interstate diversity in conduct norms while at the same time providing uniform guidance in the resolution of interstate conflicts.

A generation ago, prominent conflicts scholars called for a national solution to the problems generated by state control of choice of law.\footnote{422} Neither Congress nor the Supreme Court seemed to pay much attention, however, and calls for federal

\footnote{421. That increased guidance may be of limited value, however, if courts and bar associations take diverse paths in the development of relevant doctrine. See Michael E. Solimine, An Economic and Empirical Analysis of Choice of Law, 24 GA. L. REV. 49, 54 & n.32 (1989) (discussing surveys and concluding that 23 states follow the Second Restatement approach to choice of law, 14 follow the First Restatement, four use the better law approach, two employ comparative impairment, two presume that forum law applies, and six use some undefined version of interest analysis).

intervention fell out of fashion. More recently, Michael Gottesman has argued that a host of factors—the increased volume of multistate activity leading to litigation, the growing diversity in state substantive law, the growing disparity in state choice-of-law rules, and the Supreme Court's relaxation of constitutional constraints on both state court jurisdiction and application of forum law—have combined to increase dramatically the need for a federal solution. Gottesman contends that in order to eliminate the resulting costs of indeterminacy and non-neutrality, Congress should declare choice-of-law rules for those categories of disputes that frequently implicate the interests of multiple states. His initial list of candidates includes products liability, vehicular and common carrier accidents, medical malpractice, and toxic torts. A reasonable case might be made for the inclusion of lawyer-conduct standards on that list, though perhaps not too close to the top. A federal rule would have obvious advantages over even an ideal version of Model Rule 8.5—it would need to be enacted by only a single jurisdiction and it would not be subject to varying state amendments or interpretation.

Congress undoubtedly has the power to enact preemptive choice-of-law statutes governing not only the subjects listed by Gottesman but also interstate conflicts in attorney-conduct standards. Part III.A discussed Congress's authority under the Commerce Clause to set national standards of attorney conduct. That greater authority should also encompass the lesser measure of a conflicts rule, particularly where the purpose of that rule is to promote predictability in interstate

423. See Gottesman, supra note 422, at 22 (stating that the prior clamor over choice of law has been abandoned).
424. See id. at 28-29.
425. See id. at 16. Before Gottesman, a few commentators suggested enactment of a federal choice-of-law rule specific to particular problems. See id. at 17 n.58 (discussing proposals concerning products liability, and multi-party multi-state tort suits in federal court).
426. As with any federal law, of course, there undoubtedly would be interpretive variation in lower courts. In this case, the authoritative interpreters would include not only lower federal courts but also state courts and disciplinary bodies. One serious practical concern over federalizing choice of law is the ability of the Supreme Court to devote sufficient attention to resolving interpretive conflicts. See Gottesman, supra note 422, at 37-41 (discussing potential problems and concluding that if rules are sufficiently determinate, added burden on Supreme Court would be minimal).
427. See supra Part III.A.
transactions and hence foster interstate commerce. Moreover, Gottesman and others have made a persuasive case that the Full Faith and Credit Clause grants Congress the power to enact preemptive choice-of-law rules. In particular, its second sentence gives Congress the authority to prescribe "[the] 'effect' to be given in one state to the 'public Acts, records, and judicial proceedings'" of every other state.

The existence of congressional authority, of course, does not render wise the exercise of such authority. If normative diversity in attorney-conduct rules is worth preserving (to promote individual preference satisfaction, interstate competition and innovation), is not normative variation in conflict rules worth preserving for the same reasons? The answer is "no." While state-based choice-of-law rules might better promote individual preference satisfaction than would a single national rule, they are an ineffective way to resolve interstate

428. Gottesman questions the existence of Commerce Clause authority to enact conflicts rules, contending that "there is something incongruous about Congress declaring that a matter so affects commerce that it warrants congressional attention, yet resolving it simply by refereeing among state-made alternatives (and, quite likely, refereeing with a yardstick that does not purport to search for the state law that best effectuates interstate commerce)." Gottesman, supra note 422, at 23 (concluding that Commerce Clause authority is "fairly debatable"). But the point of national conflicts rules is not to select the state substantive law that best promotes commerce; it is to promote commerce by reducing the transaction costs generated by interstate conflicts.

429. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

430. See Gottesman, supra note 422, at 24-28; see also Donald T. Trautman, Toward Federalizing Choice of Law, 70 Tex. L. Rev. 1715, 1726 (1992) (asserting that Congress has power to federalize choice of law under the Full Faith and Credit Clause and under the Fourteenth Amendment).

431. Gottesman, supra note 422, at 24. Gottesman admits that his position is not free from doubt, particularly when viewed from the perspective of original intent. While there is general consensus that the framers intended to give Congress the power to dictate when states must enforce the legislation of other states, "[n]othing in the proceedings of the Constitutional Convention indicates that the framers purposefully intended to empower Congress to compel one state to apply the common law rulings of another. . . ." Id. at 25-26 (emphasis added). Nevertheless, I am confident that either under the Commerce Clause or the Full Faith and Credit Clause, Congress could find (and the Supreme Court would affirm) the authority to prescribe choice-of-law rules to govern interstate conflicts of law, particularly since such authority would allow Congress to fulfill one of the central roles of the national government—umpiring interstate disputes.

432. See supra Part III (arguing that despite the existence of congressional authority, federalization of attorney-conduct standards would be unwise).
disputes and ignore the umpireal role of the national government in the federal system. Perhaps the central difficulty in choice of law is the lack of an “external point of reference from which to judge one state right and the other wrong.” At least with respect to interstate conflicts, the national government seems to be the obvious external reference point.

Federalism embodies more than just preserving state authority. It also permits the national government to act when national action is warranted. "To resolve squabbling between states over the primacy of their laws is a uniquely appropriate federal role, and . . . one that the framers envisioned Congress would fill." Both Hamilton and Madison spoke of the need for a "superintending authority" to address interstate conflicts, and Madison referred to the national government as a "disinterested umpire." The Supreme Court’s more recent observation that “[a] State cannot be its own ultimate judge in a controversy with a sister State,” while made in the context of interpreting an interstate compact, applies with equal force to interstate choice of law. The normative diversity and overlapping jurisdiction of our federal system inevitably generate conflict between states over the reach of their laws. A coherent legal system requires a consistent and predictable method of resolving those disputes, something that the national government is in the best position to deliver, particularly where collective action problems prevent states from resolving them on their own. If the problems of uncertainty caused by

433. Kramer, supra note 1, at 2143; see also Brilmayer, supra note 1, at 1 (describing the “fundamental and unavoidable problem of choice of law” as deciding whether courts should decide choice-of-law questions based on some external and objective perspective or on the internal perspective of one of the involved states).

434. See Kramer, supra note 150, at 1502 (explaining that there are two sides to federalism: preserving state authority and allowing the federal government to operate nationally when needed). The term federalism includes not only the relationship between the states and the federal government, but also the “interrelationships among the states.” Black’s Law Dictionary 612 (6th ed. 1990).

435. Gottesman, supra note 422, at 32.

436. The Federalist No. 42, at 268 (James Madison) (Clinton Rossiter ed. 1961) (describing the “necessity of a superintending authority” over interstate conflicts); see also id. No. 80, at 477-78 (Alexander Hamilton) (“Whatever practices may have a tendency to disturb the harmony between the states are proper objects of federal superintendence and control.”).


inconsistent state choice-of-law rules are serious enough, then the adoption of national choice-of-law rules makes perfect sense.

In addition, a national choice-of-law rule is fundamentally different from national standards of conduct in terms of intrusion on state authority. A national choice-of-law rule, unlike national conduct standards, would allow states to retain complete control over the law to be applied in matters entirely internal to one state. In matters that are not entirely internal, the current system of state-based choice-of-law rules already deprives states of control over application of their law. Moreover, obstacles to effective collective action prevent states from bargaining their way to a uniform choice-of-law rule that would be in their collective interest. The national government is the actor perfectly (and designedly) positioned to remove those barriers.

One forceful objection to a national choice-of-law rule, for attorney-conduct standards or for anything else, is that neither judges nor conflicts scholars have yet identified the "best" choice-of-law rule. We ought to let state experimentation continue rather than prematurely freeze the law's development with a single national rule. There are three related weaknesses in this position. First, generations worth of experimentation apparently have not gotten us any closer to discovering the "best" conflicts rule. Second, given the fundamentally opposed conceptions of the right approach to choice of law (let alone the right particulars), consensus in this lifetime appears inconceivable. Third, in the realm of choice of law, the benefits of having one adequate rule (as opposed to a range of rules both better and worse) are likely to outweigh the cost of suboptimal results in occasional cases. In short, while perhaps we cannot trust Congress to enact ideal choice-of-law rules (whether governing attorney-conduct standards, products liability, or anything else), a competent national rule might be preferable to the current state of affairs.

439. See Gottesman, supra note 422, at 30-32 (asserting that a national choice-of-law statute would not intrude on traditional state autonomy).
440. Id. at 31.
441. See supra Part IV.A; BRILMAYER, supra note 1, at 181-218.
442. See sources cited supra note 1 (describing the current disarray and confusion in the realm of choice of law).
443. See Gottesman, supra note 422, at 33.
444. See id.
I offer the argument for a national choice-of-law rule governing conflicts in attorney-conduct standards chiefly to suggest that if Congress decides to address the problems associated with those standards, it does so through choice of law and not a national code of conduct. I hasten to point out that the case for national intervention in other areas—such as products liability, mass torts, and toxic torts—is far stronger than it is for lawyer conduct. If Congress ever gets into the business of choice of law, which as an outsider to the field I am convinced it should, then a rule addressing conflicts in lawyer-conduct standards should be somewhere on its agenda. Lawyers would do themselves and their clients a service by applying their considerable lobbying skills to putting choice of law on the national agenda. If the legal profession believes its problems are sufficiently severe to warrant being addressed first, perhaps it can package its claim as volunteering to serve as experimental guinea pig.

CONCLUSION

As Holmes observed, prediction is much of what lawyers do.445 Whether about the reach or meaning of a statute, the import or efficacy of a clause in a document, the reaction or plans of government regulators and investigators, or the resolution of a conflict of laws, the ability to make reasonably accurate predictions allows lawyers to make a living. The clients who pay lawyers to make those predictions, often about law that is inevitably indeterminate, may be surprised to learn that their hired prognosticators are complaining now that that indeterminacy has begun to affect them. In these difficult times for the legal profession, a claimed need for special treatment, in the form of uniform national lawyer-conduct standards, threatens to do further damage to the already tarnished public image of lawyers.

Lawyers better than anyone should appreciate that the normative variation about which they complain is the inevitable and beneficent product of the federal system. Federalism fosters interstate diversity in legal standards, both to enhance individual preference satisfaction and to enable valuable inter-

445. See Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 457 (1897) (stating that the business of lawyers “is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”).
state competition. Admittedly, state-level norm setting does often produce serious harms, such as pernicious norms and destructive competition, that warrant national intervention. But lawyer discomfort over diverse conduct standards, like the similar discomfort often felt by clients, is an inevitable and hardly debilitating consequence of normative diversity. It does not warrant the radical cure of national preemption of conduct standards. States, as decentralized competitors and innovators, are the appropriate vehicles for norm setting in the field of legal ethics.

The diversity generated by state control of lawyer-conduct norms, coupled with overlapping jurisdiction to discipline, creates conflicts and necessitates choice of law. The ABA's failure to include a choice-of-law provision in the original Model Rules, apparently premised on the belief that the Rules would be uniformly adopted, cost it an opportunity to control choice of law in legal ethics. Amended Model Rule 8.5, representing a belated recognition of the diversifying forces of the federal system, is doomed to failure. Not only does the rule suffer from significant substantive flaws, but obstacles to interstate communication and bargaining would render even an ideal version of the rule an unlikely candidate for widespread adoption.

One incidental benefit of the uncertainty generated by the diversification of ethics standards and the growth of multistate practice is that lawyers may now better understand the problems of their clients. Multistate actors have long had to cope with diverse and sometimes inconsistent state standards, a problem exacerbated by inconsistent state choice-of-law rules. In recent years there have been renewed calls for national control of choice of law. Perhaps lawyers, newly educated about the costs of inconsistent state approaches, will strike a blow for their clients and themselves by supporting that effort.