

Protecting Public Participation

The Louisiana Chemical Association is trying to “de-lawyer” the clients of a clinic that provides pro bono representation. But trying to hinder access to the courts to prevent enforcement of laws on the books is not a responsible reaction to policy disagreements



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The preemption doctrine is famous among environmental professionals primarily for its powerful, if inconsistent, role in shielding businesses from state and local regulation that conflicts with federal law. The doctrine has prevented state and local governments from ratcheting down automobile pollution standards, banning PCB disposal, and recovering common-law damages for groundwater contamination. But preemption may also have a role in protecting the integrity of the administrative and judicial systems that implement environmental laws. More specifically, the doctrine empowers courts to overturn state laws — referred to here as “de-lawyering” laws — designed to strip legal representation from citizens who wish to participate in environmental decisionmaking as provided for in federal legislation.

But would a state legislator really try to strip legal representation from his or her state’s own citizens? That is what happened in Louisiana last spring, when State Senator Robert Adley introduced a bill to de-lawyer the clients of the Tulane Environmental Law Clinic. The clinic is a program of Tulane University that offers law school credit to students who provide free legal representation to clients on environmental issues. Adley told the *Baton Rouge Advocate* that his proposed legislation was “about sending a message that Louisiana is open for business.” He argued that because Louisiana funds some Tulane programs, the university is “biting the hand that feeds it,” explaining to the *National Law*

Journal: “If you’re going to take money from the taxpayers and the government, you ought not be able to sue the taxpayers and the government.”

Louisiana’s experience with de-lawyering began in 2009 when Louisiana Chemical Association President Dan Borne announced that the association would retaliate for lawsuits brought by the Tulane Environmental Law Clinic’s clients. Borrowing rhetoric from the world of organized crime, Borne threatened to “knee cap” Tulane University. Next — at the LCA’s behest — Adley introduced Senate Bill 549 in March 2010. That bill proposed to require “forfeiture of all state funding” by any university whose law school clinic sues a government agency, sues a business for damages, or brings a claim under Louisiana’s constitution in a civil case. Testifying in support of the bill, Borne explained: “Nothing in this bill would prohibit the law clinic from doing exactly what it’s doing today . . . but the university would then have to fund all of those services that it gets money from the state for now.” Those services include medical care for the indigent, research into prevention of cancer and sickle cell anemia, and other projects that benefit the entire state. The Tulane Environmental Law Clinic is not state funded.

“Adley and the LCA were, in effect, thumbing their noses at the law, judicial process, and regulation,” the *New Orleans Citybusiness* newspaper editorialized, noting that these were “all areas within the purview of the Legislature to change.” In other words, Adley and Borne did not try to relax the laws



that set environmental standards for the chemical industry. Nor did they seek to repeal or limit laws that afford Louisiana residents the right to comment on and appeal emission permits and agency regulations. They also did not attempt to amend Louisiana's constitution, which guarantees citizen access to the courts. Instead, Adley and Borne sought to leave public rights to participate in the regulatory system unchanged, but to hinder people's ability to exercise those rights by preventing the clinic from providing free legal representation.

Why try to take away people's lawyers? The short answer may be that nobody likes to be sued. Borne told the *New Orleans Times-Picayune* that the bill was a reaction to "two decades of lawsuits filed against chemical companies by clients represented by Tulane law clinic students." His argument to the *Baton Rouge Advocate* was that Tulane University "gives cover to its out-of-state student want-to-be lawyers and their job-killing lawsuits." Similarly, Adley (also the president of Pelican Gas Management, Inc.) told the *Times-Picayune* that Tulane is "a billion-dollar industry that recruits out-of-state kids to come in and sue us." In addition, both Adley and the LCA expressed a general resentment of Tulane University. Borne said, "The logic of

sending forty-seven million state dollars to Tulane when we're talking about shutting down Southern University of New Orleans does not work for me." Adley complained about the state "giving" \$45–47 million to "a private school — private not public — at a time while we're facing budget issues."

The de-lawyering battle came to a head during a hearing last May before the Louisiana Senate's Commerce Committee. Residents of communities that have relied on the clinic overflowed the Senate's hearing room. Tulane University President Scott Cowen testified, reaffirming his university's commitment to public service. He explained that if Tulane shut down its clinics to preserve state funding, the message to people who cannot afford lawyers would be: "We will not represent you because the money is more important." That, he said, "is what America is not about." President Cowen called the bill "antithetical to everything that is the foundation of a civil society." Shortly after that, the committee voted to kill the bill.

Meanwhile, the University of Maryland environmental law clinic survived a similar onslaught. These are only the latest in a long history of political attacks on law school clinics, so chances are we have not seen the last of proposed de-lawyering bills.

What is wrong with trying to de-lawyer opponents? The bottom line is that such behavior is out of step with our nation's values. The Supreme Court held in 1907 that the right to vindicate legal rights in court is "one of the highest and most essential privileges of citizenship." Access to the court system "is the right conservative of all other rights." The Court held that, as the alternative to force, this right "lies at the foundation of orderly government." People are entitled to seek legal redress regardless of whether their points of view are politically correct. Indeed, a joint report of the American Bar Association and Association of American Law Schools found, "One of the highest services the lawyer can render to society is to appear in court on behalf of clients whose causes are in disfavor with the general public." In this context, efforts to bar people with inconvenient opinions from accessing the courts are an embarrassment, reminiscent of a banana-republic approach to government.

What federal laws would preempt state efforts to hinder citizens' access to lawyers? The answer lies in a federal mandate for public participation in environmental decisionmaking. Congress expressed this mandate most powerfully in the Resource Conservation and Recovery Act, Section 7004(b), which commands that the Environmental Protection Agency and the states "shall" encourage and assist public participation in "development, revision, implementation, and enforcement" of the act's regulatory programs. Clean Water Act Section 101(e) is nearly identical. Other environmental laws, including the Clean Air Act and Superfund, contain less forceful, but nonetheless unambiguous mandates for public participation.

When Congress required opportunities for public participation in environmental law, it opened a wide-ranging dialogue. Some of the issues involved are relatively cut-and-dried. For example: in a nation governed by the rule of law, industrial facilities should comply with their permits and agencies should follow legislative mandates. To supplement government enforcement and ensure that violators

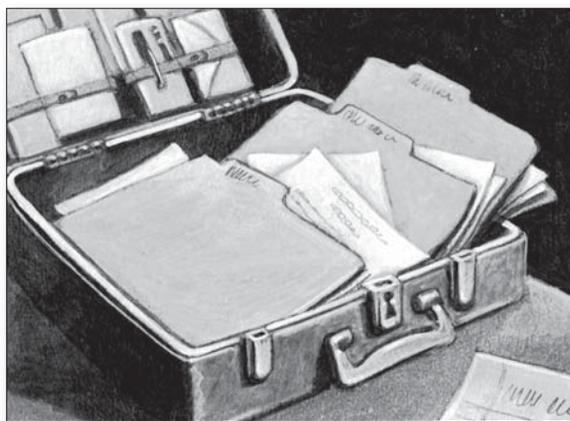
are held accountable, Congress provided for citizen enforcement suits, deputizing ordinary people to act as "private attorneys general" to help uphold the rule of law. When this type of public participation helps identify and prosecute lawbreakers, why would anyone but the violator complain?

But Congress's mandate for public participation also provides for a public dialogue about inherently debatable issues. Here are some examples of issues with which Louisiana residents have grappled:

- Is an industrial facility the right fit for the neighborhood in which its owners seek to build?
- Are the environmental burdens of industrialization shared fairly among communities of different racial composition and economic status?
- Will a new levee system improve public safety in southern Louisiana or destroy the very wetlands we count on to cut down storm surges?
- With the southern part of the state at risk from rising sea levels, should Louisianans expand use of greenhouse gas-emitting fuels, such as coal and petroleum coke?

These are not simple questions and it would be unrealistic to expect all well-meaning people to agree about them.

Why should members of the public have a voice on these types of issues at all? The answer lies partly in the U.S. administrative law system's goal to temper the power of unelected bureaucrats in what is supposed to be a government "by the people." As recently as last year, the Supreme Court recognized that an accountability gap can arise from government by administrative agency, noting that the "growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people." In its 1995 *MCI Telecommunications Corporation* case, the D.C. Circuit recognized that citizens' ability to comment on and challenge agency decisions helps "reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies."



Free to Sue on The Public Dime

More prosaically, the *MCI Telecommunications* court noted that public involvement helps ensure an “agency will have before it the facts and information relevant to a particular administrative problem.” For example, one factor that may have contributed to the Deepwater Horizon oil disaster in the Gulf of Mexico was the lack of public participation in approval of gulf drilling plans. A September 27, 2010, *New York Times* web posting explained that environmental groups’ failure to participate meant that the federal Minerals Management Service “had little to fear if they rubber-stamped oil companies’ plans, even if they included claims that now seem ridiculous.”

Congress’s mandate for public participation is rarely directly enforceable by citizens. For example, environmental laws do not provide for citizen suits to force states to encourage public participation in “development, revision, implementation, and enforcement” of environmental law. But courts should find that state laws designed to frustrate such mandates are preempted under the U.S. Constitution, Article VI, Clause 2 — the Supremacy Clause — which provides that the “Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.”

Courts have derived three types of preemption from the Supremacy Clause: express, field, and conflict preemption. First, and most obviously, Congress can preempt state law with an express legislative mandate. Second, field preemption occurs when federal laws occupy an entire field. Any state and local laws that purport to regulate within a fully occupied field are preempted.

Per a noisy outcry lately, law school clinics are under legislative “assault” from targets of their lawsuits, thus menacing their “freedom to decide how to educate students” (as the *New York Times* rumbles). Whether or not the tone of breathless embattlement is justified, the clinics’ role raises hard issues that can’t be laid to rest just by insisting that mean lawmakers stop picking on noble clinics.

Both of the best-known recent controversies arose after environmental clinics picked fights with dominant industries in their states. Tulane’s clinic had blocked a plastics plant on grounds of “environmental justice,” though many local black residents had worked hard to attract it. Maryland’s clinic had sued a family-owned chicken farm and aligned itself with the litigation strategy of a prominent private group, Waterkeeper, whose spokesman Robert F. Kennedy Jr. is nationally famed for contentious rhetoric.

Given how often clinics charge into sensitive areas, it’s actually remarkable how seldom they face legislative backlash. Clinics have fought popular welfare reforms in New York, California, and elsewhere; pushed in various states to transfer school funding authority from voter-accountable officials to courts; and filed countless suits against popular governors and mayors.

Yet seldom do they run into serious statehouse opposition. Even in Louisiana — pretty much a worst-case scenario if you’re looking for states inclined to favor industrial development over academia — the problematic bill hasn’t made it out of committee, while in Maryland the chicken interests soon fell back in disarray, the university success-

fully asserting that it would improperly violate its independence even to reveal the names of its clinic’s clients.

Let’s stipulate that it’s generally a bad idea for lawmakers to intervene a la carte in clinics’ work, especially since they’ll often exercise such oversight not on any grand philosophical basis but to advance perceived constituent or district interests. And further problems arise when a case has already been filed, at which point restrictions may hamper clinics’ ability to represent real-life clients.

But who would we be kidding if we pretend that clinics just take a random selection of poor clients or otherwise unrepresented causes as they walk in the door? Even the most thoughtfully run clinic’s docket will be shaped at least in part by some ideological premises, and quite a few pursue strong, undisguised law-reform agendas that are at vigorous odds with the views of other citizens as to how the law should develop. Yet some of the same profs who assure their students in class that law is inescapably political seem willing to strike a pose of “Ideological? Who, us?” in defending clinics.

Does academic freedom enter into it? Maybe at some point. But let’s not imagine that it’s an easy or obvious jump from the freedom of research or the freedom of classroom discussion to the freedom to sue anyone in hot pursuit of ideology, on the public dime and with zero oversight. It’s not.

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Walter Olson

Third, in 1941 the Supreme Court explained in *Hines v. Davidowitz* that federal law will preempt a state or local law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

In a 2009 case, *Wyeth v. Levine*, the Supreme Court reviewed the two fundamental principles that guide preemption jurisprudence. The first is that Congress’s purpose is “the ultimate touchstone.” Second, courts begin their analyses with a “presumption against preemption,” that is an “assumption that the historic police powers of the states were not to be superseded.” Despite the presumption, of course, a state law must yield if it is incompatible with federal legislation.

Under the “conflict preemption” doctrine, the argument that federal law would have preempted Louisiana Senate Bill 549 is not a difficult sell. Senator Adley designed the bill as an obstacle to Congress’s mandate for public participation: restricting the public’s ability to participate in order to send “a message that Louisiana is open for business.” The proposition that de-lawyering hinders public participation is uncontroversial. In 1996, the Fourth Circuit explained in *Virginia v. Browner* that “the comment of an ordinary citizen carries more weight if officials know that the citizen has the power to seek judicial review of any administrative decision harming him.” And without legal assistance, access to the courts is nearly always meaningless. In 1963, the Supreme Court recognized in *Gideon v. Wainwright* that a right to be heard can be “of little avail” without a lawyer. Further, the fact that Bill 549 would have relied primarily on the state’s spending power rather than direct regulation presents — in the words of a 1986 Supreme Court case — “a distinction without a difference.”

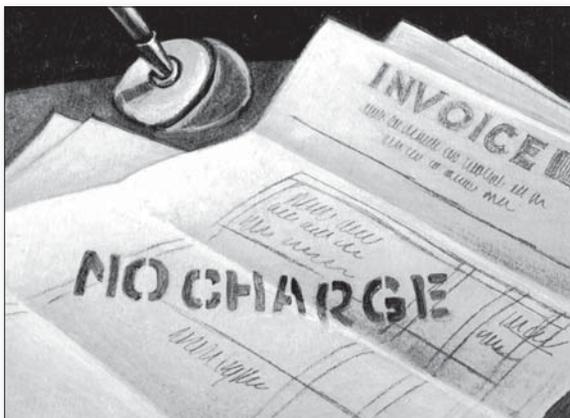
But what about a state’s interest in regulating its own affairs? Evaluating the legitimacy of Senator Adley’s justifications for Bill 549 is arguably unnecessary, since the Supremacy Clause does not create exceptions for “legitimate state interests.” Nonetheless, on some occasions the Court has allowed the nature of the state interests at stake to influence the strength and application of the presumption

against preemption. It is worth pointing out, therefore, that de-lawyering bills fail entirely to advance any legitimate state interest.

Senator Adley’s most persistent explanation of the rationale behind Bill 549 is summed up by his “biting the hand that feeds it” rhetoric to the *Shreveport Times*: “Don’t take tax money and then sue the same people you’re taking money from.” But Louisiana provides money and other subsidies to a host of recipients, none of whom lose their rights to litigate as a result. In the last few years, Louisiana has offered up \$30 million to attract a pig iron plant to St. James Parish, \$50 million to save

a chicken plant in Union Parish, and \$37 million to subsidize sweet potato processing in Richland Parish. The state itself has joined a court challenge to federal health-care legislation despite accepting millions in federal Medicaid financing. Further, any law that forbade litigation by recipients of state funds could quickly run afoul of the principle — enunciated in cases

such as *Perry v. Sindermann* — that government may not grant or deny benefits on a basis that infringes on constitutionally protected rights.



Adley and Borne also asserted that the clinic’s advocacy damages the state’s economy, resulting in lost jobs and investment. They never offered proof of this damage, apparently believing it to be self-evident that any insistence on compliance with environmental laws equates to economic harm. But former U.S. Solicitor General Theodore B. Olson, who served in the George W. Bush administration, has explained, that “a robust and productive economy depends upon a consistent, predictable, evenhanded, and respected rule of law.” If environmental laws are too stringent, therefore, the solution is not to hinder citizen enforcement but to amend the laws directly.

Borne argued that when the clinic represents clients who participate in permit proceedings, “the permitting time many times has been extended so that companies simply look elsewhere” and that

“this type of activity . . . helps to prove the point that we have one of the most inhospitable legal climates in the nation.” But Louisiana permit appeals do not automatically suspend permits’ effectiveness and are governed by statutory time limits. And as the Supreme Court has long recognized “the expense and annoyance” of legal processes “is part of the social burden of living under government.” The balance that administrative law strikes between efficiency, fairness, and full consideration of relevant facts may sometimes be less than perfect. But government rarely produces perfect results. Moreover, despite Borne’s assertion that Louisiana’s legal climate is “inhospitable,” a 2010 study by *Site Selection Magazine* ranks Louisiana ninth among all U.S. states for business climate — a remarkable achievement considering publicity about hurricane risks.

Adley also accused the clinic of “hiding behind poor people,” because it represents environmental organizations — such as the Sierra Club — in addition to indigent individuals. But Louisiana’s Rules of Professional Conduct, like the ABA model rules, define pro bono publico service to include representation of community organizations, especially on matters “designed primarily to address the needs of persons of limited means.” In general, a clinic operates within a zone that the legal profession recognizes as public service as long as it represents low-income individuals, government, or public-interest organizations. Indeed, Justice David Souter, writing for the New Hampshire Supreme Court in 1988, found that the state could not justify barring non-profits from providing “legal services to the non-indigent.”

Adley and Borne have also accused the clinic of filing “frivolous” litigation, but they have never come up with an example of a clinic lawsuit that a court found to be frivolous. In any event, both state and federal laws empower courts to sanction attorneys who abuse the litigation process. Borne recited a slogan: “Academic freedom of the classroom is no defense for committing barratry in the courtroom.” But he offered no examples of barratry (stirring up litigation), admitting “that is not what I specifically charge.” The clinic has clari-

fied several times that it does not engage in barratry.

Adley complained that the clinic behaved unethically by recovering attorney fees after obtaining a settlement that speeded up abatement of mercury contamination in Union, Ouachita, and Morehouse parishes. But the federal law at issue in that case — the Resource Conservation and Recovery Act — provides specifically for fee recoveries. If Senator Adley disagrees with these types of legal provisions, he is free to campaign to have them changed. But trying to hinder peoples’ access to lawyers to prevent enforcement of laws that are on the books is not a responsible reaction to policy disagreements.

Emotions sometimes run high in disputes about environmental policy. Nonetheless, at bottom, the effort to protect communities from environmental degradation while building a thriving economy involves persuading our fellow citizens, not defeating some “other” side. We are engaged in a dialogue — not a battle — and when we conduct that dialogue well, we achieve legitimate results. Conducting the dialogue well means allowing all sides to participate, in accordance with our laws and with respect for U.S. legal traditions.

De-lawyering is not dialogue. It is an attempt to end discussion by blocking people’s ability to use laws that entitle them to a voice in decisions which affect their lives. Those interested in upholding U.S. legal traditions and the rule of law should therefore join in stripping any veneer of respectability from de-lawyering efforts. We should hew to the example of John Adams —

one of the founders of the U.S. experiment in government “by the people” — who stepped up to ensure that even British soldiers who participated in the Boston massacre were afforded legal representation, undeterred by what he called “clamor and popular suspicions and prejudices.” In the United States of America, reputable members of society seek to advance their interests under the law — not by “kneecapping” those who provide legal representation to people they disagree with. •

