

# CAN PREEMPTION PROTECT PUBLIC PARTICIPATION?

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A fundamental goal of the U.S. legal system is for ordinary people to have the practical ability to vindicate their rights in court. The right to access the judicial system is “one of the highest and most essential privileges of citizenship.”<sup>1</sup> Further, because “accurate and just results are most likely to be obtained through the equal contest of opposed interests,” broad access to the courts improves the quality of justice.<sup>2</sup> Institutions that offer free legal services therefore perform a public service by expanding access to the legal system—even if their clients’ cases are sometimes “in disfavor with the general public” or with politicians’ valued constituents.<sup>3</sup>

Expanded access to the legal system means that government agencies and private companies must pay attention to people they could otherwise ignore.<sup>4</sup> It results in enforcement of laws that otherwise could be violated with impunity. This is a plus in terms of good government and the rule of law, but it can annoy powerful people who are accustomed to getting their own way.

One reaction has been for state lawmakers to propose legislation—referred to here as “de-lawyering” laws—to limit access to legal representation.<sup>5</sup> The idea is to deny lawyers to people with points of

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<sup>1</sup> *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

<sup>2</sup> *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27–28 (1981); see also *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) (“[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error . . .”).

<sup>3</sup> Lon L. Fuller & John D. Randall, *Professional Responsibility Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958) (presenting a statement of the Joint Conference on Professional Responsibility, established by the American Bar Association and the Association of American Law Schools); see also MODEL RULES OF PROF’L CONDUCT pmb. ¶6 (“[A] lawyer should seek improvement of [*inter alia*] access to the legal system . . .”).

<sup>4</sup> See Arthur H. Bryant, Op-Ed., *Access to Justice at Risk*, NAT’L L.J. (D.C.), Mar. 28, 2005, at 22 (“In America, the courts are the one place where even the poorest, most powerless person can hold the richest, most powerful person or corporation accountable.”); see also Judith Resnik, *Courts In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 807 (2008) (“The function of courts as potentially egalitarian political venues can be seen in the efforts to avoid them.”).

<sup>5</sup> See David Luban, *Silence! Four Ways the Law Keeps Poor People from Getting Heard*

view that the legislators' favored constituents would rather not debate on the merits. De-lawyering proposals tend to target providers of free legal services, including universities with law school clinics. Lately, these proposals have taken the form of a threat to universities: either stop helping citizens express their points of view in court or face financial retaliation.<sup>6</sup>

This article argues that—in the context of environmental law—de-lawyering legislation would run afoul of the U.S. Constitution's Supremacy Clause, which preempts state laws that conflict with federal policy.<sup>7</sup> This article focuses on the primary purpose and likely impact of such de-lawyering bills: to hinder public participation in decisions about implementation and enforcement of environmental laws. That purpose is squarely at odds with an important goal of federal environmental statutes: to enhance ordinary people's ability to make their voices heard about those very issues.<sup>8</sup> Because de-lawyering would conflict with congressional mandates to encourage public participation, such laws would be vulnerable to challenge under the doctrine of conflict preemption.<sup>9</sup>

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*in Court*, LEGAL AFF., May-June 2002, at 54, 54 (noting that attacking lawyers is an attempt to “win legal arguments not by offering better ones, but by getting rid of the advocates who make the arguments for the other side”).

<sup>6</sup> See, e.g., Editorial, *A Good Kill*, NEW ORLEANS CITYBUSINESS., May 24, 2010, at 22 (noting that Louisiana Senate Bill 549 “would have effectively forced Tulane to decide between accepting state money and shutting down its law clinic,” even though the law school “receives virtually no public funding”); Editorial, *First, They Get Rid of the Law Clinics*, N.Y. TIMES, Apr. 12, 2010, at A24 (“Maryland’s lawmakers [had] been wrestling over a bill that threatened the funding of the University of Maryland’s law clinic . . . .”); Elizabeth Amon, *School Law Clinics Spark Hostility*, NAT’L L.J. (D.C.), Apr. 1, 2002, at A5 (reporting that in June 2001, Pennsylvania legislators amended the University of Pittsburgh’s appropriations bill “to bar the [University’s environmental law] clinic from using government money to fund the clinic”).

<sup>7</sup> U.S. CONST. art. VI, cl. 2. Legislative de-lawyering may be illegal for other reasons as well. See, e.g., *infra* note 44 and accompanying text (citing Louisiana’s constitutional guarantee of access to the courts); *infra* note 61 and accompanying text (noting that Louisiana law disfavors “special laws”); *infra* note 147 and accompanying text (noting the Louisiana Supreme Court’s exclusive authority to regulate legal practice); *infra* note 149 and accompanying text (discussing the limits of the Louisiana legislature’s police power); *infra* notes 162–65 and accompanying text (discussing first amendment issues).

<sup>8</sup> See, e.g., Clean Water Act §101(e), 33 USC § 1251(e) (2006) (“Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.”). Resource Conservation and Recovery Act § 7004(b) is almost identical. See 42 U.S.C. § 6974(b)(1) (2006) (quoted *infra* in text accompanying note 133).

<sup>9</sup> See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (holding that state laws are preempted if they “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

Part I of the article discusses the role of public participation in the regulatory process. Part II provides a history of Louisiana Senate Bill 549—a failed 2010 attempt to de-lawyer the Tulane Environmental Law Clinic’s (TELC’s) clients—and shows that such an attempt to stifle legal advocacy is a disreputable tactic. Part III analyzes Senate Bill 549 in light of the federal preemption doctrine, demonstrating that the bill conflicts with federal policy and that it cannot be justified in terms of legitimate state objectives. Part IV shows that bringing a preemption claim under 42 U.S.C. § 1983 may enable a prevailing plaintiff to recover attorney fees under 42 U.S.C. § 1988.<sup>10</sup> The article concludes in Part V that the preemption doctrine is a useful tool in the effort to stop de-lawyering of an environmental law clinic’s clients.

## I. PUBLIC PARTICIPATION AND THE REGULATORY PROCESS

When Congress mandated opportunities for the public to participate in environmental decisionmaking, 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.<sup>11</sup> When people violate the law and contaminate public resources, most people would agree that the violators should be held accountable.<sup>12</sup> To supplement

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<sup>10</sup> Section 1983 provides a remedy for people injured by being deprived of their constitutional or statutory rights “under color of” state law. 42 U.S.C. § 1983 (2006). Section 1988(b) provides for awards of attorney fees to prevailing § 1983 litigants. *Id.* § 1988(b).

<sup>11</sup> See *Mayes v. EPA*, No. 3:05-CV-478, 2008 WL 65178, at \*10 (E.D. Tenn. Jan. 4, 2008) (holding that Resource Conservation and Recovery Act regulations “create a continuing obligation of compliance”); *Sierra Club v. Young Life Campaign, Inc.*, 176 F. Supp. 2d 1070, 1081 (D. Colo. 2001) (“Young Life has an absolute duty to comply with its [Clean Water Act discharge] permit.”); *cf. Reilly v. City of Atlantic City*, 532 F.3d 216, 229 (3d Cir. 2008) (“[E]very citizen has a duty to comply with the rule of law.” (citing *United States v. Nixon*, 418 U.S. 683, 708–09 (1974))).

Similarly, administrative agencies should obey legislative mandates, including laws governing administrative procedures. See *EnSCO Offshore Co. v. Salazar*, No. 10-1941, 2010 WL 4116892, at \*5 (E.D. La. Oct. 19, 2010) (forbidding the U.S. Secretary of the Interior’s enforcement of a directive to offshore oil drillers because “[n]otice and comment were required by law. The government did not comply, and the NTL-05 is [therefore] of no lawful force or effect.”); see also *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) (“It is not the EPA’s prerogative to disregard statutory limitations on its discretion . . .”). For some laws, citizen litigation is the only realistic enforcement mechanism available. See *Maine v. Dep’t of the Navy*, 702 F. Supp. 322, 338 n.8 (D. Me. 1988) (“At oral argument . . . counsel for the United States took the position that the EPA itself had no authority to proceed against the federal government.”), *vacated on other grounds*, 973 F.2d 1007 (1st Cir. 1992); Oliver A. Houck, *The Secret Opinions of the United States Supreme Court on Leading Cases in Environmental Law, Never Before Published!*, 65 U. COLO. L. REV. 459, 499 (1994) (“[T]he Endangered Species Act . . . has no mechanism [to force] federal agency compliance except citizen suits.”).

<sup>12</sup> See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 271 (1975) (“[O]ur national experience [shows] that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances.”). *But see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 215 (2000) (Scalia, J., dissenting) (“The

government enforcement, Congress empowered “any person” to bring enforcement action under many modern antipollution laws, effectively deputizing members of the public to act as “private attorneys general” to help uphold the rule of law.<sup>13</sup> When this type of public participation helps identify and prosecute lawbreakers, what complaint can there be?<sup>14</sup>

Congress also gave ordinary citizens the right to participate in public dialogue about more complex, inherently debatable issues. Administrative proceedings about whether the government should issue particular environmental permits, for instance, can turn on difficult questions for which there are no clear, right or wrong answers. Here are some examples of issues with which Louisiana residents have grappled:

- Is a proposed industrial facility the right fit for the neighborhood in which its proponents seek to build?<sup>15</sup>
- Must an historic neighborhood be sacrificed to make way for the promise of a new medical complex?<sup>16</sup>

undesirable and unconstitutional consequence of today’s decision [upholding citizens’ standing to sue about Clean Water Act violations] is to place the immense power of suing to enforce the public laws in private hands.”)

<sup>13</sup> See *Bennett v. Spear*, 520 U.S. 154, 165 (1997) (“[T]he obvious purpose of the [Endangered Species Act’s citizen-suit provision] is to encourage enforcement by so-called ‘private attorneys general . . . .’”); see also James M. Hecker, *The Citizen’s Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both?*, NATURAL RES. & ENV’T, Spring 1994, at 31, 31 (“Fifteen federal environmental laws contain citizen suit provisions. Their basic function is to authorize citizens to enforce the mandatory requirements of those laws against any person when the government fails to do so.”).

<sup>14</sup> Actually, some academicians argue that breaking the law is a fine thing, so long as the violation is efficient, i.e., the benefits outweigh the costs. See Steven Landsburg, Op-Ed., *Highway Robbery*, WALL ST. J., Feb. 11, 2002, at A22 (“If you’re willing to pay \$500 to do 25 mph in a 20 mph zone, you ought to be speeding.”); cf. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985) (attempting “to derive the basic criminal prohibitions from the concept of efficiency”). But see Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1670 (1998) (acknowledging that attempts “to make economics a source of moral guidance . . . are doomed efforts”); James Grant, Book Review, *Price and Punishment*, WALL ST. J., Dec. 20, 2010, at A21 (dismissing “the school of legal thought” that adopts Judge Posner’s description of crime as “a class of inefficient acts” as follows: “On Planet Tenure, the Ten Commandments seem to have not made much of an inroad”).

<sup>15</sup> See, e.g., Mark Schleifstein, *Iron Plant Permits to Fuel Debate*, TIMES-PICAYUNE (New Orleans, La.), Dec. 27, 2010, at A1 (reporting that a proposed plant “will employ 150 people at an average salary of \$75,000” near a grain elevator whose owners “contend[ ] that the air pollutants could harm the elevator’s workers and contaminate the grain”); Kate Stevens, *DEQ Hears Nucor Comments*, ADVOC. (Baton Rouge, La.), Dec. 29, 2010, at 1B (reporting that “[m]ore than 100 people filled a St. James Parish Courthouse meeting room . . . to attend a public hearing” about the Nucor plant, and that a St. James Parish Economic Development Board representative said “‘It’s jobs, jobs and jobs, and that’s what we need,’” while a local pastor expressed concern “about the health of the people living near the site”).

<sup>16</sup> See *Nat’l Trust for Historic Pres. v. U.S. Dep’t of Veterans Affairs*, No. 09-5460, 2010

- Will a new levee system improve public safety in southern Louisiana or destroy the very wetlands we count on to cut down storm surges?<sup>17</sup>

- 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?<sup>18</sup>

- Should the government build a new highway through a downtown park in historic Lafayette?<sup>19</sup>

- Are the environmental burdens of industrialization shared fairly among communities of different racial composition?<sup>20</sup>

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."<sup>21</sup> The U.S. Supreme

WL 1416729, at \*28 (E.D. La. Mar. 31, 2010) (upholding the federal government's conclusion that tearing down a Mid-City neighborhood in New Orleans to clear a site for a Veterans Affairs Medical Center will not have significant environmental impacts).

<sup>17</sup> See Complaint at ¶ 25, *Save Our Wetlands v. Terrebonne Levee & Conservation Dist.*, No. 08-2159, 2008 WL 2436265 (E.D. La. Apr. 29, 2008) ("On March 13, 2006, sixteen coastal scientists and engineers wrote to Governor Blanco to warn that the current proposed project plans [for the Morganza to the Gulf Levee] 'rely on an engineering approach that carries high economic, structural and environmental risk, and threatens the sustainability of the very ecosystem we are all trying to save.'").

<sup>18</sup> See *Ex Parte* Application of Entergy Louisiana, LLC for Approval to Recover the Costs of the Little Gypsy Unit 3 Repowering Project in Retail Rates, Including Appropriate Ratemaking, and to Cancel the Project at 4, Docket No. U-30192 Phase III (La. Pub. Serv. Comm'n Oct. 27, 2009), <http://lpscstar.louisiana.gov/star/ViewFile.aspx?Id=63cba8f7-d013-42d4-9dfd-62f7ab7a03bf> (seeking approval to cancel conversion of a power plant to burn coal because "the Project was no longer expected to produce net benefits to customers").

<sup>19</sup> See *Concerned Citizens Coal. v. Fed. Highway Admin.*, 330 F. Supp. 2d 787, 800 (W.D. La. 2004) (upholding the planned location of the highway although "there will be drastic changes . . . occasioned by the construction of the interstate"), *aff'd per curiam*, 134 F. App'x. 760 (5th Cir. 2005).

<sup>20</sup> See Adam Babich, *Environmental Justice in Louisiana*, 51 LA. B.J. 90, 91 (2003) ("[M]any industrial facilities in Louisiana were built bordering pre-existing communities that freed slaves had established on the margins of plantations."); Robert E. Holden & Tad Bartlett, *Leaving Communities Behind The Evolving World of Environmental Justice*, 51 LA. B.J. 94, 94 (2003) ("Some anecdotes but little empirical data support [the] view" that "environmental burdens . . . fall disproportionately on minority communities.").

<sup>21</sup> See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 545 (2000) ("Since the New Deal . . . administrative law has been defined by the crisis of legitimacy . . . Agencies can claim, after all, only a dubious constitutional lineage—the Framers made no explicit provision for them, but instead divided power among the legislative and judicial branches and a unitary executive." (footnote omitted)). The "by the people" quote is from Abraham Lincoln's Gettysburg Address (Nov. 19, 1863). ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 536, 536 (Don E. Fehrenbacher ed. 1989).

Court has recognized that a gap in accountability can arise from government by administrative agency:

Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. 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.<sup>22</sup>

The ability of ordinary people 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."<sup>23</sup>

Public participation also helps to assure that the "agency will have before it the facts and information relevant to a particular administrative problem."<sup>24</sup> For example, one factor that may have contributed to the 2010 BP oil disaster in the Gulf of Mexico was the lack of public participation in approval of Gulf drilling plans. Permit appeals "are sometimes the only way to ferret out and fix problems in the government's voluminous environmental plans."<sup>25</sup> Thus, environmental groups' failure to challenge plans for Gulf drilling 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."<sup>26</sup>

Litigation in this context is not necessarily a struggle between good and evil. Nor does it always represent a failure of civilized

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<sup>22</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010).

<sup>23</sup> *MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (quoting Nat'l Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982)); see also Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 529 (1972) ("The cardinal fact that underlies the demand for broadened public participation is that governmental agencies rarely respond to interests that are not represented in their proceedings. . . . Noneconomic interests or those economic interests that are diffuse in character tend to be inadequately represented. . . ." (footnote omitted)); Adam Babich, *Citizen Suits: The Teeth in Public Participation*, 25 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10141, 10141 (1995) ("[O]pportunities for citizen litigation enhance the legitimacy of administrative decisionmaking.").

<sup>24</sup> *MCI Telecomms.*, 57 F.3d at 1141 (quoting *Nat'l Ass'n of Home Health Agencies*, 690 F.2d at 949); see also Oliver A. Houck, *Standing on the Wrong Foot: A Case for Equal Protection*, 58 SYRACUSE L. REV. 1, 17 (2007) (noting that the IRS recognized public-interest litigation as charity because it provides for representation of "a point of view not represented by private economic interests").

<sup>25</sup> Mike Soraghan, *Enviro Groups Ignored Gulf Before BP Disaster*, N.Y. TIMES, Sept. 27, 2010, <http://www.nytimes.com/gwire/2010/09/27/27greenwire-enviro-groups-ignored-gulf-before-bp-disaster-96055.html>.

<sup>26</sup> *Id.*



discourse. Instead, it is part of an important dialogue—a process of involving affected people in decisions that will shape their futures.<sup>27</sup> It is the legal profession’s job to facilitate that dialogue.<sup>28</sup> And law school clinics can play an important role in helping the profession meet this responsibility.<sup>29</sup>

Public participation does not come without a price tag. Especially in the context of highly regulated industries, however, the U.S. Supreme Court has recognized that “the expense and annoyance” of legal processes “is part of the social burden of living under government.”<sup>30</sup> Courts take such burdens seriously, and one of the ongoing struggles of administrative law is to balance efficiency, fairness, and full consideration of relevant facts.<sup>31</sup> Reviewing courts strive to ensure that judicial review does not become “a forum to engage in unjustified obstructionism.”<sup>32</sup> Yet courts must also ensure that agency decisions are “based on a consideration of the relevant factors” and subject to “searching and careful” inquiry—even where the “ultimate standard of [judicial] review is a narrow one.”<sup>33</sup> Doubtless, the real-world balance that emerges is less than perfect.<sup>34</sup> But government rarely produces perfect solutions.<sup>35</sup>

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<sup>27</sup> See Resnik, *supra* note 4, at 806 (“[A]djudication is itself a democratic practice—an odd moment in which individuals can oblige others to treat them as equals as they argue—in public—about alleged misbehavior and wrongdoing.”).

<sup>28</sup> Lawyers contribute to confusion about their role when they analogize lawsuits—which are peaceful dispute-resolution mechanisms—to battle. See, e.g., Bret Rappaport, *A Shot Across the Bow How to Write an Effective Demand Letter*, 5 J. ASS’N LEGAL WRITING DIRECTORS 32, 33 n.9 (2008) (referencing “the 13 principles set forth in Sun Tzu’s *Art of War*”); Bennett H. Beach, *The Fastest Gun in the West Cowboy Attorney Gerry Spence Mows Down Corporate Giants*, TIME, Mar. 30, 1981, at 48. But a lawyer’s job is not to vanquish enemies but to achieve client goals. If the client’s opponents also achieve their goals, so much the better.

<sup>29</sup> See, e.g., Adam Babich, *Illegal Permit? Who Are You Going to Call? Your Local Environmental Law Clinic!* 39 ENVTL. L. REP. (ENVTL. L. INST.) 11051, 11051 (2009) (“Law school operated environmental law clinics—in addition to training students—can serve a vital function by expanding the public’s participation in environmental decisionmaking beyond the national precedent-setting cases typically litigated by public-interest law firms.”).

<sup>30</sup> *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (quoting *Petroleum Exploration, Inc. v. Pub. Serv. Comm’n*, 304 U.S. 209, 222 (1938)).

<sup>31</sup> See, e.g., Roland M. Frye, Jr., *Restricted Communications at the United States Nuclear Regulatory Commission*, 59 ADMIN. L. REV. 315, 325–26 (2007) (“[I]nherent conflict between efficiency and fairness has existed in American administrative law since at least the 1946 enactment of the Administrative Procedure Act (APA).” (footnote omitted)).

<sup>32</sup> *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978).

<sup>33</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>34</sup> See Theodore B. Olson, *Lay Off Our Judiciary*, WALL ST. J., Apr. 21, 2005, at A16 (“Many disputes are close calls, and the judge’s decision is bound to be unpopular with someone. But in this country we accept the decisions of judges, even when we disagree on the merits, because the process itself is vastly more important than any individual decision.”).

<sup>35</sup> Cf. Winston S. Churchill, Speech at the House of Commons (Nov. 11, 1947), in 2 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, at 7563, 7566 (Robert Rhodes James ed., 1974) (“[I]t has been said that democracy is the worst form of Government except all

## II. THE 2010 ATTEMPT TO DE-LAWYER TELC'S CLIENTS

### A. *The Lead-Up*

In November 2009, the Louisiana Chemical Association (LCA) heralded an attack on Tulane University aimed at de-lawyering TELC's clients. LCA President Dan Borné borrowed rhetoric from the world of organized crime to announce that LCA's goal was to "kneecap" Tulane University in retaliation for lawsuits brought by TELC's clients.<sup>36</sup> The result was Louisiana Senate Bill 549.<sup>37</sup> Louisiana Senator Robert Adley—the President of Pelican Gas Management, Inc., and past-president of ABCO Petroleum Corporation<sup>38</sup>—introduced the bill at LCA's behest on March 29, 2010.<sup>39</sup> Senate Bill 549 was not the first attempt to de-lawyer TELC's clients or those of other law school clinics.<sup>40</sup> It was, however, the first *legislative* attempt to force Tulane University to shut down its environmental law clinic.

LCA made no attempt to hide the source of its frustration: By expanding access to the legal system, TELC helps people from outside the chemical industry participate in decisions about implementation of environmental laws that can affect chemical

those other forms that have been tried from time to time . . . .").

<sup>36</sup> David Jacobs, *Louisiana Chemical Association President Don't Fund Tulane*, BUSINESSREPORT.COM (Nov. 25, 2009), <http://businessreport.com/news/2009/nov/25/louisiana-chemical-association-president-dont-fund>. "Kneecapping" is "the terroristic act or practice of maiming a person's knees (as by gunshot)." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 690 (11th ed. 2004).

<sup>37</sup> S. 549, 2010 Leg., Reg. Sess. (La. 2010).

<sup>38</sup> *Senator Robert Adley - District 36*, LOUISIANA STATE SENATE, <http://senate.legis.state.la.us/adley/biography.asp> (last visited on Apr. 5, 2011).

<sup>39</sup> Sonia Smith, *Bill Could Hobble Louisiana's Law Clinics*, 2THEADVOCATE.COM (May 10, 2010), <http://www.2theadvocate.com/news/oilspill/93290009.html> ("Adley said he offered his proposal after chemical and oil industry lobbyists complained to him about lawsuits brought by the Tulane environmental clinic, including a suit against the U.S. Environmental Protection Agency and state regulators that would require them to enforce clean air regulations in the Baton Rouge area."). At the May 19, 2010 hearing, Borné thanked "Senator Adley for introducing the bill on behalf of the business community and others in the state that have been sued by clients that are represented by the Tulane environmental law clinic." *Hearing on S.B. 549 Before the S. Comm. on Commerce, Consumer Prot. & Int'l Affairs*, 2010 Leg. Reg. Sess. (La. 2010), [hereinafter *La. Sen. Hearing Video*], available at <http://senate.legis.state.la.us/video/2010/May.htm#>.

<sup>40</sup> See Robert R. Kuehn & Peter A. Joy, "Kneecapping" *Academic Freedom Attacks on Law School Clinics*, 96 ACADEME (Nov.–Dec. 2010) ("More than thirty instances of interference in law school clinics have been publicized since the late 1960s"); Adam Babich, *How the Tulane Environmental Law Clinic Survived the Shintech Controversy and Rule XX Revisions Some Questions and Answers*, 32 *Envtl. L. Rep. (Envtl. L. Inst.)* 11476, 11476 (2002) (explaining how TELC survived an earlier de-lawyering attempt "as a viable member of Louisiana's legal community").



companies' bottom lines. Since at least 2004, LCA has published an "Economic Development Plan" that condemns TELC.<sup>41</sup> By its own terms, this plan has a narrow goal—to promote "*chemical industry retention and growth*"—not to advance the State of Louisiana's overall best interests.<sup>42</sup> Since at least 2004, LCA's plan has been to stop "the effect that lawsuits which are brought by clients represented by TELC have on the economy."<sup>43</sup>

Notably, LCA's plan does not seek to amend environmental laws to restrict public participation or to repeal Louisiana's constitutional guarantee that "[a]ll courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."<sup>44</sup> Instead, LCA would leave rights to participate on the books, but hinder people's exercise of these rights by eliminating TELC's ability to offer free legal representation. As far back as 2004, LCA identified its preferred strategy: threatening to "eliminate state funding of Tulane University."<sup>45</sup>

With Senate Bill 549, LCA and Senator Adley sought to cut Tulane University off from an estimated \$45 million per year in state funds unless the university shut down or crippled TELC.<sup>46</sup> LCA President Dan Borné explained that the bill was a reaction to "two decades of lawsuits filed against chemical companies by clients represented by Tulane law clinic students and attorneys."<sup>47</sup> He

<sup>41</sup> Under the heading "Civil Justice Reform," the 2004 LCA plan stated: "Tulane University - publicize the effect that lawsuits brought by clients who are represented by Tulane have on the economy and eliminate state funding of Tulane University." *LCA & LCIA Economic Development Plan* (Jan. 7, 2004) (on file with author) [hereinafter 2004 LCA Plan].

<sup>42</sup> *The 8 Point Plan*, LOUISIANA CHEM. ASS'N, [http://www.lca.org/AM/Template.cfm?Section=8\\_Point\\_Plan](http://www.lca.org/AM/Template.cfm?Section=8_Point_Plan) (last visited Apr. 5, 2011) [hereinafter 2010 LCA Plan] (emphasis added). Similarly, LCA expressed the overall goal of its 2004 plan as: "Develop a predictable business environment that reduces investment risk and is conducive to business retention and the creation and growth of innovative chemical companies." See 2004 LCA Plan, *supra* note 41.

<sup>43</sup> Under the heading "Make Louisiana Competitive: Reduce Hidden Costs," the 2010 LCA Plan says: "Make sure people know the harm Tulane Environmental Law Clinic (TELC) has caused. Publicize the effect that lawsuits which are brought by clients represented by TELC have on the economy." 2010 LCA Plan *supra* note 42; see also 2004 LCA Plan, *supra* note 41.

<sup>44</sup> LA. CONST. art. 1, § 22.

<sup>45</sup> See 2004 LCA Plan, *supra* note 41 at 6; Tom Guarisco, *An Industry Comes Out Swinging La. Chemical Lobby Targets Red Tape, Taxes and Tulane*, GREATER BATON ROUGE BUS. REP., Mar. 16, 2004, at 13 (noting that one of the plan's suggestions is "to cut off Tulane from state funding" because the "university's Environmental Law Clinic routinely represents poor families who sue when chemical plant operators try to locate new facilities nearby").

<sup>46</sup> See Jordan Blum, *Industry Targets Law Clinics*, ADVOC. (Baton Rouge, La.), May 14, 2010, at A4 ("Tulane currently receives close to \$45 million a year from in state funds for activities such as endowed professorships, cancer research, sickle cell clinics, medical residency training and state psychiatric care services, according to the university.").

<sup>47</sup> Bill Barrow, *Bill Targeting Tulane Clinic Fails Measure Dies in Senate Committee*,

claimed that lawsuits filed by TELC's clients "have cost the state thousands of jobs and untold millions of dollars in tax revenue" and that TELC "takes credit on its website for preventing hundreds of million dollars from coming to Louisiana."<sup>48</sup> Borné argued that Tulane University was giving cover to "out-of-state student want-to-be lawyers and their job-killing lawsuits"<sup>49</sup> and that TELC had filed a case on behalf of a client which could "make the Environmental Protection Agency impose millions of dollars in penalty fees" on industry.<sup>50</sup>

In the same vein, Senator Adley argued that Tulane is "a billion-dollar industry that recruits out-of-state kids to come in and sue us."<sup>51</sup> According to the Senator, he intended the bill to stop the University from "biting the hand that feeds it,"<sup>52</sup> explaining, "I'm opposed to taking taxpayer money and then turning around and suing taxpayers. 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."<sup>53</sup> He said the bill was "about 'sending a message' that Louisiana is open for business and taxpayer dollars should not go to institutions hurting economic development."<sup>54</sup> The Senator reportedly claimed that TELC "has been 'overly active' in bringing frivolous lawsuits against the government."<sup>55</sup> He did not, however, provide examples of frivolous lawsuits or explain why current laws that specify sanctions for frivolous lawsuits are insufficient.<sup>56</sup>

TIMES-PICAYUNE (New Orleans, La.), May 20, 2010, at A2. Borné argued that TELC's "mission seems to be to attack business development . . . in this state." *Id.*

<sup>48</sup> Dan Borné, *Justice for All*, ALLIANCE, Spring 2010, at 12, 14.

<sup>49</sup> Katherine Mangan, *Louisiana Bill Would 'Cripple' Law-School Clinics, Deans Say*, CHRON. OF HIGHER EDUC. (D.C.), May 11, 2010, <http://chronicle.com/article/Louisiana-Bill-Would-Cripple/65480>.

<sup>50</sup> Dan S. Borné, Letter to the Editor, *La. Needs Rules To Curb Abuse by Law Clinics*, LAFAYETTE DAILY ADVERTISER, May 16, 2010, available in part at <http://www.lanewslink.com/archives.php?id=17432>.

<sup>51</sup> Barrow, *supra* note 47, at A2.

<sup>52</sup> Editorial, *Beware Curtailing Law School Clinics*, SHREVEPORT TIMES, Apr. 27, 2010, at 6A.

<sup>53</sup> Karen Sloan, *Battleground Over Law School Clinics Moves To Louisiana*, NAT'L L.J. (D.C.), May 3, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202457607971&slreturn=1&hblogin=1>; see also Editorial, *supra* note 52, at 6A ("'Don't take tax money and then sue the same people you're taking money from,' was Adley's reasoning . . . [But] taxpayers spend millions each year for public defender offices to represent suspects against state criminal charges. The aim is to ensure competent counsel regardless of someone's ability to pay.'").

<sup>54</sup> See Jordan Blum, *Law Clinics Focus of Bill*, ADVOC. (Baton Rouge, La.), Apr. 7, 2010, at 1A [hereinafter Blum, *Law Clinics Focus of Bill*].

<sup>55</sup> Sloan, *supra* note 53.

<sup>56</sup> State and federal laws and court rules provide for sanctions when lawyers abuse the litigation process. See 28 U.S.C. § 1927 (2006) (authorizing sanctions against any attorney who

### B. Drafting Challenges

The de-lawyering bill presented challenges to its drafters. First, despite Senator Adley's "biting the hand that feeds it" rhetoric, the State of Louisiana does not fund TELC. At most, one might allege that some insignificant percentage of the approximately \$30,000 per year in capitation fees that Tulane Law School receives from the state contributes to TELC's budget. A threat to withhold some percentage of those fees, however, would hardly be enough to scare a major university into destroying a valued part of its curriculum. To make his threat realistic, therefore, Senator Adley had to widen it to include money that Louisiana pays to Tulane University for "endowed professorships, cancer research, sickle cell clinics, medical residency training and state psychiatric care services"<sup>57</sup>—the vast majority of which has nothing to do with Tulane Law School and much of which pays for direct benefits to the state. This created a credibility problem as the Senator continued to assert that his purpose was to prevent TELC from "taking public taxpayer money to file suits on any social issue or agenda that they may have."<sup>58</sup>

Second, in Louisiana "special laws"—*i.e.*, those that pertain to a particular institution (or clinic)<sup>59</sup>—are more difficult to enact than laws of general applicability. The Louisiana Constitution forbids some special laws, including those "[c]oncerning any civil or criminal actions," those "[r]egulating labor, trade, [or] manufacturing," or *inter alia*, "granting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity."<sup>60</sup> Even when

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"multiplies the proceedings in any case unreasonably and vexatiously"); FED. R. CIV. P. 11(b) & (c) (providing for sanctions and specifying that an attorney implicitly "certifies" that every filing has no "improper purpose," is "warranted by existing law or by a nonfrivolous argument for [change to existing law]," and has "evidentiary support or . . . will likely have evidentiary support after . . . a reasonable opportunity for further investigation or discovery"); LA. CODE CIV. P. art. 863(B) & (D) (codifying a Louisiana analogue to FED. R. CIV. P. 11); LA. CODE CIV. P. art. 2164 ("The appellate court . . . may award damages for frivolous appeal . . ."); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2009) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

<sup>57</sup> Jordan Blum, *Panel Derails Law Clinic Bill*, ADVOC. (Baton Rouge, La.), May 20, 2010, at 1A [hereinafter Blum, *Panel Derails Law Clinic Bill*].

<sup>58</sup> *See La. Sen. Hearing Video*, *supra* note 39.

<sup>59</sup> *See* BLACK'S LAW DICTIONARY 963 (9th ed. 2009) (defining a "special law" as a "law that pertains to and affects a particular case, person, place, or thing, as opposed to the general public"); *see also* Huntington Odom, *General and Special Laws in Louisiana*, 16 LA. L. REV. 768, 770 (1956) (A special law "grants privileges to some and denies them to others . . .").

<sup>60</sup> LA. CONST. art. 3, § 12(A)(3), (6) & (7).

not forbidden, Louisiana courts disfavor special laws and the state constitution imposes cumbersome procedures on their enactment.<sup>61</sup>

In an effort to craft a law of general applicability, Senate Bill 549's drafter(s) created a blunt instrument that would have gutted most litigation clinics in Louisiana. The bill would have forbidden clinics—other than those practicing criminal law—from 1) filing “a petition, motion, or suit against a government agency;” 2) “seeking monetary damages;” or 3) “raising state constitutional challenges in state or federal court.”<sup>62</sup> It also would have required that all law school clinics “be subject to oversight by the House Committee on Commerce and the Senate Committee on Commerce, Consumer Protection and International Affairs.”<sup>63</sup> Senator Adley offered a last minute amendment to limit the bill to “environmental law clinics public and private” during the May 19, 2010 hearing on the bill before the Louisiana Senate Commerce Committee.<sup>64</sup> The Committee, however, declined to consider that proposal. One committee member expressed concerns about the proposed amendment's even-handedness, wondering why defendants to environmental lawsuits would merit legislative relief but not defendants in divorce cases or prosecutors annoyed by motions filed in defense of alleged criminals.<sup>65</sup>

### C. *Testimony and Decision*

The May 19, 2010 hearing began with Senator Adley, Borné, and Louisiana Oil & Gas Association President Don Briggs sitting together at a witness table to argue for the bill.<sup>66</sup> They focused their presentation on the following points:

- Adley argued that because Tulane University accepts state funding, it is improper for TELC to represent clients who challenge the government on “social issues;”<sup>67</sup>

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<sup>61</sup> See *id.* § 13 (requiring, *inter alia*, publication of notice of intent before introducing a bill to enact a special law); see also *Rajnowski v. St. Patrick's Hosp.*, 564 So. 2d 671, 679 (La. 1990) (“Special laws that seek to confer extraordinary benefits or liabilities on specific classes of persons are disfavored, because it is presumed that the legislature always bears in mind its obligation to treat similarly situated persons in a similar manner.”).

<sup>62</sup> S. 549, 2010 Leg., Reg. Sess. (La. 2010).

<sup>63</sup> *Id.*

<sup>64</sup> See *La. Sen. Hearing Video*, *supra* note 39.

<sup>65</sup> *Id.* (remarks of Daniel Martiny, Louisiana State Sen.).

<sup>66</sup> See Steven Mufson, *America's Petro-State*, WASH. POST, July 18, 2010, at B1 (“During hearings, [LCA]’s president, Dan Borné, sat side by side with the bill’s sponsor, state Sen. Robert Adley (R), who also owns Pelican Gas Management.”). Adley testified that he was “not ashamed of the people that are sitting around me. They built these schools; they built our roads.” *La. Sen. Hearing Video*, *supra* note 39.

<sup>67</sup> Adley testified that he was not “in favor of taking public taxpayer money to file suits on

- Borné stated that—although he does not “specifically charge” that TELC engages in barratry—“academic freedom of the classroom is no defense for committing barratry in the Courtroom.”<sup>68</sup>
- Without providing evidence or examples, Borné claimed that lawsuits filed by TELC’s clients have resulted in lost jobs and investments;<sup>69</sup>
- Briggs complained that when he had a private meeting with a Louisiana Supreme Court Justice to object to a lawsuit against one of his association’s members, “she pointed out very clearly to me that this is an issue that she can’t be involved with and has any oversight whatsoever because the lawsuit was filed in a federal court and not a state court.”<sup>70</sup>
- Adley argued that it is unethical for TELC to recover litigation costs and attorney fees in settlements of federal citizen suits;<sup>71</sup> and
- Both Borné and Adley fell back on generalized resentment of Tulane University. Borné argued Tulane University should not receive state money while Southern University, a state school,

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any social issue or agenda that they may have.” *Id.* Adley ducked Senator Gautreaux’s question: “does it boil down to whether or not they’re using public funds to file these lawsuits.” *Id.* Adley’s non-answer was: “I think the issue is simple. That to the University, they’re receiving public funds and part of the things that the University does is file lawsuits against businesses and government.” *Id.* In other words, Adley did not say that TELC’s advocacy of clients is state funded, which it is not.

<sup>68</sup> *Id.*

<sup>69</sup> He stated: “Where businesses have been attacked directly, jobs have been lost. . . . Where the attack has centered on DEQ, the permitting time many times has been extended so that companies simply look elsewhere to make investments that have to hit that window of economic opportunity squarely in order to make a clear return on investment.” *Id.*; see also Blum, *Panel Derails Law Clinic Bill*, *supra* note 57 (reporting that Borné argued that “[j]obs have been lost”).

<sup>70</sup> *La. Sen. Hearing Video*, *supra* note 39. Some might be gratified to know that lawsuits are not resolved in Louisiana through private meetings between trade association representatives and Supreme Court justices. See *In re Bengé*, 2009-1617, pp. 28–29 (La. 11/6/09); 24 So. 3d 822, 839 (holding that a judge “violated Canon 1 of the Code of Judicial Conduct by failing to decide [a] case on the evidence and testimony presented at trial and further, violated Canon 2A by allowing outside influences to dictate her decision in the case”). If a defendant believes that a lawsuit is unjustified, the appropriate response is to move the court for dismissal of case, FED. R. CIV. P. 12(b); LA. CODE CIV. P. art. 921–34, and/or to seek sanctions, see *supra* note 56; see also FED. R. CIV. P. 7(b)(1) (“A request for a court order must be made by motion.”); LA. CODE CIV. P. art. 961 (“An application to the court for an order, if not presented in some other pleading, shall be by motion which, unless made during trial or hearing or in open court, shall be in writing.”).

<sup>71</sup> *La. Sen. Hearing Video*, *supra* note 39. Adley also introduced testimony by an officer of EnerVest Operating, L.L.C., who complained about paying attorney fees. *Id.*; see also *infra* note 180 for a description of the *EnerVest* case.

faced the possibility of closure due to budget cuts.<sup>72</sup> 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.”<sup>73</sup>

At the hearing, neither Borné nor Adley came up with *any* evidence to support past assertions that TELC caused the loss of thousands of jobs and millions of dollars.<sup>74</sup> Apparently, their theory is that these things are self-evident—that any insistence on compliance with environmental laws necessarily equates to economic damage.<sup>75</sup> Adley also offered no evidence to back up past claims (which he did not repeat at the hearing) of “frivolous lawsuits.”<sup>76</sup> Borné never explained what he meant when, leading up to the hearing, he charged that TELC “takes credit on its website for preventing investments and jobs from coming to Louisiana.”<sup>77</sup> He appears to have simply made up that allegation and assumed that if he said it enough times people would believe him.

Borné did discuss his “barratry” allegation, clarifying that he based it solely on a 19-year-old article by a now-deceased former Dean of Tulane Law School.<sup>78</sup> At the hearing, Borné appeared to concede that this claim was weak, noting “we recognize that this was published [in the *Tulane Lawyer*] almost twenty years ago,” and cautioning that

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<sup>72</sup> Borné concluded his prepared testimony as follows: “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 and I don’t think it should work for anyone in the Louisiana State Senate.” *La. Sen. Hearing Video*, *supra* note 39.

Borné and Adley raised other accusations that they did not develop. Specifically, Borné provided a list of defendants and projects that have been the subject of litigation handled by TELC, apparently to suggest that these lawsuits affected popular projects and good corporate citizens; Adley also argued that TELC was “hiding behind poor people” because it represented clients such as Sierra Club; and Adley argued that Tulane donors were among the list of defendants that TELC’s clients had sued. *Id.*

Borné’s implication that lawyers should not assist clients who are opposed to popular projects is contrary to basic principles of the U.S. legal system. *See infra* note 95 (citing, *inter alia*, MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 5 (2009)). Further, regardless of Adley’s “hiding behind poor people” rhetoric, there is no legitimate state interest in preventing law school clinics in private universities from representing public interest organizations such as Sierra Club. *See In re N.H. Disabilities Rights Ctr., Inc.*, 541 A.2d 208, 216 (N.H. 1988) (Souter, J.) (finding that the state could not justify barring nonprofits from providing “legal services to the nonindigent”). I provide a detailed rebuttal of the argument that clinics should not represent clients in disputes with university donors in another article. *See Adam Babich, Controversy, Conflicts, and Law School Clinics*, 17 CLINICAL L. REV. 469, 474–83, 510–12 (2011)

<sup>73</sup> *See La. Sen. Hearing Video*, *supra* note 39.

<sup>74</sup> *See Blum, Law Clinics Focus of Bill*, *supra* note 54.

<sup>75</sup> *But see infra* note 169 (discussing costs and benefits of environmental regulation).

<sup>76</sup> Sloan, *supra* note 53.

<sup>77</sup> Borné, *supra* note 50.

<sup>78</sup> I explained the origin of the “barratry” allegation in Adam Babich, *The Apolitical Law School Clinic*, 11 CLINICAL L. REV. 447, 459 n.43 (2005).



“that is not what I specifically charge” but asserting that “Tulane has never retracted this statement.”<sup>79</sup> A more recent issue of the *Tulane Lawyer*, however, states: “The Clinic has never engaged in barratry,” which would seem to retract the statement.<sup>80</sup> Further, during the late 1990s the Louisiana Supreme Court conducted an investigation of all Louisiana clinics that did not result in any findings of barratry.<sup>81</sup>

At the May 19, 2010 hearing, residents of communities that have relied on the Clinic overflowed the Senate’s hearing room.<sup>82</sup> A broad roster of witnesses—from the Louisiana State Bar Association President to a fireman from the Paincourtville Volunteer Fire Department—signed up to testify in support of the Clinic, although not many got the chance to speak. Testimony from Tulane University President Scott Cowen reaffirmed Tulane’s commitment to public service even in the face of a threatened loss of \$45 million in state funding. Cowen explained that if Tulane were to shut down its clinics to preserve state funding, “we [would] throw under the bus every indigent person in this state . . . and say we will not represent you because the money is more important. . . . [T]hat is what America is not about.”<sup>83</sup> Emphasizing the unfairness of seeking “to punish or severely limit the rights of individuals and organizations who try to enforce regulations and laws,” Cowen did not mince words: “This bill creates a black eye, a serious black eye, for any industry that supports it. . . . [It is] antithetical to everything that is the foundation of a civil society.”<sup>84</sup>

The Louisiana Senate Commerce Committee voted unanimously to “defer”—*i.e.*, effectively kill—Bill 549.<sup>85</sup>

<sup>79</sup> See *La. Sen. Hearing Video*, *supra* note 39.

<sup>80</sup> Adam Babich, *The Apolitical Clinic*, TULANE LAW., Spring-Summer 2004, at 12. Senator Adley nonetheless revived the barratry charge in a Fall 2010 article for LCA, adding the ridiculous (and false) claim that “TELC bragged about committing Barratry . . . on its web-site.” Robert Adley, *Ambulance Chasing on the Bayou . . . Legal Extortion*, ALLIANCE, Fall 2010, at 33.

<sup>81</sup> In 1997–98, the Louisiana Supreme Court investigated all Louisiana clinics but did not report any findings of wrongdoing. Louisiana Supreme Court Justice Bernette J. Johnson stated, “[a]n exhaustive review of all Louisiana law clinics failed to uncover any violations of the Law Student Practice Rule.” La. Sup. Ct., Resolution Amending and Reenacting Rule XX, (Johnson, J., dissenting) (1999) at 1, available at <http://www.lasc.org/rules/supreme/xxbjj.PDF>; see also *La. Sen. Hearing Video*, *supra* note 39 (statement of Stephen M. Griffin, former Tulane Law School Interim Dean) (arguing that the Louisiana Supreme Court’s investigation should be viewed as cutting off earlier allegations of barratry).

<sup>82</sup> See Blum, *Panel Derails Law Clinic Bill*, *supra* note 57, at 1A (“Former law clinic clients, supporters and opponents filled the state Senate Committee on Commerce, Consumer Protection and International Affairs hearing and overflowed into two other rooms.”).

<sup>83</sup> *La. Sen. Hearing Video*, *supra* note 39.

<sup>84</sup> *Id.*

<sup>85</sup> See John Maginnis, *Oil Puts Lawmakers on Slippery Slope*, TIMES-PICAYUNE (New Orleans, La.), June 9, 2010, at B7 (“When the Louisiana Chemical Association pushed its bill

#### D. *De-Lawyering Is a Disreputable Tactic*

De-lawyering proponents would sacrifice fundamental values underlying our legal system to advance narrow interests of constituents.<sup>86</sup> The press got this right when reporting on Bill 549: “Adley and the LCA were, in effect, thumbing their noses at the law, judicial process and regulation—all areas within the purview of the Legislature to change.”<sup>87</sup> If a legislator disagrees with environmental laws, he or she is free to seek their repeal. Similarly, if the legislator thinks it is a mistake for environmental laws to empower citizens to participate in permitting decisions or sue violators, the legislator is free to seek amendment of those provisions. Attempting to repeal environmental laws or eliminate the public’s legal standing to sue might be unpopular, but it would still be part of a legitimate dialogue about social policy. But de-lawyering legislation is an attempt to end-run that dialogue by silencing opponents and denying them the practical ability to vindicate legal rights.<sup>88</sup>

Trying to silence people with inconvenient opinions is characteristic of a “banana republic” approach to government that is contrary to U.S. legal traditions.<sup>89</sup> Indeed, our “Pledge of Allegiance” does not celebrate “liberty and justice for some,” but for *all*—even people with whom our legislators’ most valued constituents disagree.<sup>90</sup> The U.S. legal tradition of affording even people we disagree with an opportunity to vindicate their rights is at least as old as the nation itself.<sup>91</sup> More than a century ago, the U.S. Supreme

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aimed at impeding the Tulane Environmental Law Clinic from suing state agencies or businesses on behalf of poor citizens, it experienced the rare sensation, usually reserved for its opponents, of being ganged up on in committee and sent packing.”); Barrow, *supra* note 47, at A2 (noting that the outcome was “a rare defeat for the chemical, oil and gas industries.”).

<sup>86</sup> See David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 245 (2003) (“When politics impinges on the imperative to hear both sides, the adversary system threatens to dissolve into farce or fraud.”); Fuller & Randall, *supra* note 3, at 1216 (“Under our system of government the process of adjudication is surrounded by safeguards evolved from centuries of experience. . . . All of this goes for naught if the man with an unpopular cause is unable to find a competent lawyer courageous enough to represent him.”).

<sup>87</sup> Editorial, *A Good Kill*, *supra* note 6, at 22.

<sup>88</sup> See generally Luban, *supra* note 86, at 245 (“Silencing doctrines raise the prospect of an adversary system in which one set of adversaries . . . is relentlessly squeezed by political opponents who would rather muzzle them than argue against them.”).

<sup>89</sup> See *supra* notes 1–3.

<sup>90</sup> Bryant, *supra* note 4 (“In the United States of America, we don’t pledge allegiance to liberty and justice ‘for some.’ We must keep the courthouse doors open—and preserve access to justice—for all.”).

<sup>91</sup> See Peter Elikann, *Commentary: Attacks on Detainees’ Lawyers Show Lack of Understanding*, R. I. LAW. WKLY., March 22, 2010 (“[T]he American tradition of zealous representation of unpopular clients is at least as old as John Adams’ representation of the British

Court recognized that the right to participate in the legal system “lies at the foundation of orderly government.”<sup>92</sup> It “is the right conservative of all other rights.”<sup>93</sup> Imperfect and frustrating as it may be, litigation is a dispute resolution mechanism that serves as “the alternative of force” and violence.<sup>94</sup>

U.S. lawyers live by a code under which one of the “highest services the lawyer can render to society” is to represent people with unpopular or controversial points of view—even when the lawyer does not personally agree with those points of view.<sup>95</sup> This is why ethical lawyers from both sides of the political spectrum condemned political attacks on government lawyers for having formerly represented Guantanamo detainees, as well as attacks on a former solicitor general for representing supporters of the federal Defense of Marriage Act.<sup>96</sup> The Wall Street Journal editorialized, “To drop a case under political pressure is especially unethical.”<sup>97</sup> American Bar Association President Carolyn Lamm has urged “those who would

soldiers charged in the Boston massacre [in 1770].”)

<sup>92</sup> *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907); see also Olson, *supra* note 34, at A16 (“Our courts are essential to an orderly, lawful society.”).

<sup>93</sup> *Chambers*, 207 U.S. at 148.

<sup>94</sup> *Id.*; see also Bryant, *supra* note 4 (“Extremely emotional and heated disputes are resolved nonviolently in the courts every day.”).

<sup>95</sup> Fuller & Randall, *supra* note 3, at 1216; see also MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 5 (2009) (“Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval.”); *id.* R. 1.2(b) (“A lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”); *id.* pmb. ¶ 1 (“A lawyer, as a member of the legal profession, is . . . a public citizen having a special responsibility for the quality of justice.”); *id.* pmb. ¶ 6 (“A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.”); MODEL CODE OF PROF’L RESPONSIBILITY EC 2-27 (1980) (“Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.”); *id.* EC 2-28 (“The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment.” (footnote omitted)); ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1208 (1972) (“Lawyer-members a governing body of [a] legal aid clinic should seek to establish guidelines that encourage, not restrict, acceptance of controversial clients and cases . . .”).

<sup>96</sup> See John Schwartz, *Conservatives Split Deeply Over Attacks on Justice Dept. Lawyers*, N.Y. TIMES, Mar. 10, 2010, at A1 (“Many conservatives, including members of the Federalist Society . . . say [the attack] violates the American legal principle that even unpopular defendants deserve a lawyer.”); Steve Visser, *Lawyers Question Firm’s Withdrawal*, ATLANTA J. CONST., April 27, 2011, at A3 (“U.S. Attorney General Eric Holder . . . said [Paul] Clement is ‘doing that which lawyers do’ by representing the lawmakers [in support of the Defense of Marriage Act].”). That act purports, *inter alia*, to relieve states of the obligation to give full faith and credit to proceedings of other states “respecting a relationship between persons of the same sex that is treated as a marriage.” 28 U.S.C. § 1738C (2006).

<sup>97</sup> Editorial, *Knave and Spalding*, WALL ST. J., Apr. 26, 2011, at A16.

undermine clinical law school programs to step back and remember that the rule of law cannot survive if pressure prevents lawyers from fulfilling their responsibilities to their clients.”<sup>98</sup> The principle that everyone deserves a chance to vindicate his or her rights in the legal system is too important for legislators to sacrifice for the sake of sparing constituents in highly regulated fields the annoyance of hearing opposing voices.<sup>99</sup>

There is, of course, a huge gap between the principle that every citizen should have access to the legal system and the reality of the U.S. legal-services market.<sup>100</sup> Professor Gene R. Nichol has noted that more than “eighty percent of the legal need of the poor and the near poor—a cohort including at least ninety million Americans—is unmet. As a result, these economically marginalized citizens are left outside the bounds of the effective use of our adjudicatory systems, state and federal.”<sup>101</sup> Further, many people who are not poor could not afford the legal fees it would take to bring an enforcement action against a major corporation or to effectively challenge issuance of a permit that might transform the quality of life in a community.<sup>102</sup> Just because we fall short of living up to our ideals, however, is no reason for abandoning those ideals entirely.

### III. FEDERAL LAW WOULD PREEMPT STATE DE-LAWYERING OF ENVIRONMENTAL LAW CLINICS’ CLIENTS

#### *A. The Supremacy Clause Preempts State Obstruction of a Federal Statutory Purpose*

The Supremacy Clause establishes that the “Constitution, and the Laws of the United States . . . made in Pursuance thereof . . . shall be

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<sup>98</sup> *First, They Get Rid of the Law Clinics*, *supra* note 6, at A24.

<sup>99</sup> See Luban, *supra* note 86, at 246 (arguing that steps to combat limitations on access to justice “should be regarded as matters of fundamental procedural justice, not partisan politics”); Fuller & Randall, *supra* note 3, at 1162–216 (presenting the Joint Conference on Professional Responsibility’s conclusion that lawyers have “an affirmative duty to help shape the growth and development of public attitudes toward fair procedures and due process”).

<sup>100</sup> Deborah Rhode & James Sokolove, *We Must Do Better*, NAT’L L.J. (D.C.), Dec. 22, 2008, at 23 (“It is a shameful irony that the nation with the world’s largest concentration of lawyers does such an abysmal job of making legal assistance available to those who need it most.”).

<sup>101</sup> Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RES. L. REV. 325, 327–28 (2010) (footnote omitted).

<sup>102</sup> See Cramton, *supra* note 23, at 538 (stating, in 1972, that “[p]articipation in a major FTC case would probably cost an active intervenor \$100,000 or more if the work were not handled on a *pro bono publico* basis”); see also DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* 27 (2005) (“[A] wide gap remains between the rights available in theory and those available in practice.”).

the supreme Law of the Land.”<sup>103</sup> Because federal law is paramount, it preempts inconsistent state and local law.<sup>104</sup> Further, federal administrative regulations have “no less pre-emptive effect than federal statutes.”<sup>105</sup> Preemption jurisprudence is built on two fundamental principles. The first is that “the purpose of Congress is the ultimate touchstone in every pre-emption case.”<sup>106</sup> The second is that courts begin their analyses with a “presumption against pre-

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<sup>103</sup> U.S. CONST., art. VI, cl. 2.

<sup>104</sup> See *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (“Under the Supremacy Clause, state laws that ‘interfere with, or are contrary to the laws of congress, made in pursuance of the constitution’ are invalid.” (citation omitted) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824))); *Sperry v. Florida*, 373 U.S. 379, 383–84 (1963) (“[T]he law of the State, though enacted in the exercise of powers not controverted, must yield’ when incompatible with federal legislation.” (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 211)); see also JAMES T. O’REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION* 5 (2006) (“Alexander Hamilton was sadly incorrect when he predicted that ‘it will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities.’” (quoting THE FEDERALIST NO. 17)).

<sup>105</sup> *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (quoting *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153–54 (1982)); see also Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 739 (2004) (“When faced with an agency interpretation addressing a statute’s preemptive effect, courts have trod unevenly in reconciling *Chevron* deference with the *Rice* presumption against preemption.” (citing *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837 (1984))); see also Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 883 (2008) (arguing that when courts “review an agency’s interpretation of a federal statute’s preemptive effect . . . the presumption against preemption may conflict with the *Chevron* rule, which requires courts to defer to agency interpretations of the statute”).

<sup>106</sup> *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 & n.3 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Scholars tend to be critical of the Court’s approach to determining Congress’ purpose. See, e.g., THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* 51 (2008) (“[T]he Court has crafted an ornate, and often inconsistent, body of law to decide whether Congress has *impliedly* preempted state law.”); David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 510 (2008) (“[I]mplied preemption inquiries ask the federal courts to answer a wholly hypothetical question: if Congress had spoken directly and unambiguously to the precise preemption question at hand, which it did not, what would it have said?”); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085 (2000) (“[T]he Supreme Court’s numerous preemption cases follow no predictable jurisprudential or analytical pattern.”); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 716 (1991) (“[P]liant standards governing the degree of clarity with which Congress or an agency must speak for a rule to be preemptive . . . [lead to a] substitution of judicial policymaking for political decision.”); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 741 (2008) (“[T]he doctrine . . . systematically exaggerates the role of congressional intent, attributing to Congress judgments that are in fact grounded in judicial perceptions about the desirability of displacing state law in any given area.”); Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 515 (2010) (“Judicial preemption doctrine is thin and confusing.”); Susan Raeker-Jordan, *The Pre-Emption Presumption that Never Was Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1388 (1998) (“[O]nce courts delve into the murky realm of congressional purposes to ascertain whether Congress intended to displace state law, it naturally follows that courts may overstep the federalism line . . .”).

emption,” *i.e.*, “the assumption that the historic police powers of the States were not to be superseded.”<sup>107</sup>

Preemption of state and local laws may occur in one of three ways.<sup>108</sup> Most obviously, Congress can preempt state law directly, by legislative mandate.<sup>109</sup> A finding of preemption “is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”<sup>110</sup> Also, when Congress occupies an “entire field” with federal law, it necessarily preempts state and local laws in that area.<sup>111</sup> Finally, “even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law.”<sup>112</sup> Conflict preemption arises when a state or local law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>113</sup> The federal objective must be

<sup>107</sup> *Wyeth*, 129 S. Ct. at 1194–95 (quoting *Lohr*, 518 U.S. at 485).

<sup>108</sup> *But see* Merrill, *supra* note 106, at 739–40 (noting that “the exact number [of preemption categories] depend[s] on who is doing the counting” and arguing for four “express, field, conflict, and frustration”). Conflict and frustration, however, both fit nicely into the “conflict” category.

<sup>109</sup> *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989) (“It is accepted that Congress has the authority, in exercising its Article I powers, to pre-empt state law.”); *see also* *Bruesewitz v. Wyeth*, 131 S. Ct. 1068, 1074–75 (2011) (holding that the National Childhood Vaccine Injury Act of 1986 “expressly eliminates liability for a vaccine’s unavoidable, adverse side effects,” including “those resulting from design defects”).

<sup>110</sup> *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *see also* *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 30–31 (1996) (“[When] explicit pre-emption language does not . . . directly answer the question . . . courts must consider whether the federal statute’s structure and purpose, or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent.” (internal quotation marks and citations omitted)).

<sup>111</sup> *See Barnett Bank*, 517 U.S. at 31 (“A federal statute, for example, may create a scheme of federal regulation ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

<sup>112</sup> *ARC Am. Corp.*, 490 U.S. at 100; *see also Barnett Bank*, 517 U.S. at 31 (“Alternatively, federal law may be in irreconcilable conflict with state law.” (quotation marks omitted)).

<sup>113</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). For example, a state law that weakens a federal law’s protections of health and the environment would stand as an obstacle to the accomplishment and execution of that act’s purposes and objectives. *See Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1270 (11th Cir. 2000) (“[The Resource Conservation and Recovery Act] sets a floor for regulation of hazardous waste and to allow the Florida program to restrict or limit the federal remedy would lower that floor.” (citation omitted)).

Courts also note that conflict preemption arises when “compliance with both federal and state regulations is a physical impossibility.” *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963). But because creation of a physical impossibility would obstruct accomplishment of Congress’ full purposes, the “obstruction” test would presumably resolve any allegations of impossibility. *Cf. Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 n.4 (2009) (explaining that it is permissible to skip the first part of the *Chevron* test for statutory interpretation in administrative law (*i.e.*, “whether Congress has directly spoken to the precise question at issue”) and move directly to the test’s second step (*i.e.*, whether the agency’s interpretation is reasonable) because “if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.”) (citing *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837 (1984)).



“significant.”<sup>114</sup> Whether a state attempts to impede such an objective by direct regulation or by using its spending power presents “a distinction without a difference.”<sup>115</sup> Federal statutory policy still trumps conflicting state laws.<sup>116</sup> Further, neither an express preemption provision nor a saving clause in the federal statute at issue “bar[s] the ordinary working of conflict pre-emption principles.”<sup>117</sup>

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<sup>114</sup> *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1137 (2011) (“Like the regulation in *Geier* [v. *Am. Honda Motor Co.*, 529 U.S. 861 (2000)], the [seatbelt] regulation here leaves the manufacturer with a choice. And, like the tort suit in *Geier*, the tort suit here would restrict that choice. But unlike *Geier*, we do not believe here that choice is a significant regulatory objective.”).

<sup>115</sup> *Wis. Dep’t. of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 287 (1986); *see also id.* at 289 (“To uphold the Wisconsin penalty simply because it operates through state purchasing decisions therefore would make little sense. . . . [B]y flatly prohibiting state purchases from repeat labor law violators Wisconsin simply is not functioning as a private purchaser of services; for all practical purposes, Wisconsin’s debarment scheme is tantamount to regulation.” (citation omitted) (internal quotation marks omitted)).

<sup>116</sup> *See Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2411 (2008) (holding that the Wagner Act preempts a state law that “prohibits certain employers that receive state funds—whether by reimbursement, grant, contract, use of state property, or pursuant to a state program—from using such funds to assist, promote, or deter union organizing” (citation omitted) (internal quotation marks omitted)).

<sup>117</sup> *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 352 (2001) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)); *see also Geier*, 529 U.S. at 870 (“[T]his Court has repeatedly ‘decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.’” (quoting *United States v. Locke*, 529 U.S. 89, 106 (2000))); *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1248 (10th Cir. 2006) (rejecting “[a]n interpretation of the saving clauses” in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that “would seriously disrupt CERCLA’s principle aim of cleaning up hazardous waste”). *But see Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992) (“Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.”); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (“The fact that an express definition of the pre-emptive reach of a statute ‘implies’—*i.e.*, supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption.”); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (“If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.”). *See generally* Sandi Zellmer, *When Congress Goes Unheard Savings Clauses’ Rocky Judicial Reception*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION* 144, 144 (William W. Buzbee ed., 2009) (“Preemption is particularly troublesome when Congress has included a savings clause in the federal statute at issue.”).

Savings clauses in environmental laws are typically addressed to regulation of pollution, not public participation. For example, Clean Water Act § 510 protects state authority to “adopt or enforce” standards “respecting discharges of pollutants” and “requirement[s] respecting control or abatement of pollution” so long the state rules are not “less stringent” than federal law. 33 U.S.C. § 1370 (2006). Resource Conservation and Recovery Act § 3009 expressly preempts “any requirements less stringent than those authorized under this subchapter” and preserves state authority to impose “any requirements, including those for site selection, which are more stringent than those imposed by such [federal] regulations.” 42 U.S.C. § 6929 (2006). Clean Air Act § 116 provides that the Act does not “preclude or deny the right of any State . . . to adopt or enforce . . . any standard or limitation respecting emissions of air pollutants” unless the standard is “less stringent” than a standard that is effective under federal law. 42 U.S.C. § 7416 (2006).

Even state laws “designed to protect vital state interests” are subject to preemption.<sup>118</sup> Nonetheless, Supremacy Clause doctrine contains ample room for consideration of state legislative purposes.<sup>119</sup> This is largely because the presumption against preemption’s impact can vary with the nature of the state interest involved.<sup>120</sup> The presumption has particular force in fields that have traditionally been the states’ province.<sup>121</sup> In *Wyeth v. Levine*—a 2009 case holding that federal Food and Drug Administration labeling requirements did not preempt a state-law failure-to-warn claim—the Supreme Court clarified that the presumption does not depend on a *recent* tradition of state primacy in the regulatory area at issue.<sup>122</sup> Instead:

[The Court relies] on the presumption because respect for the States as “independent sovereigns in our federal system” leads us to assume that “Congress does not cavalierly pre-empt state-law causes of action.” The presumption thus

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<sup>118</sup> *De Canas v. Bica*, 424 U.S. 351, 357 (1976); *see also* *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (“[U]nder the Supremacy Clause, [the Court’s] office is not to pass judgment on the reasonableness of state policy.” (citation omitted)); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (“[A]ny state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.” We therefore reject petitioner’s argument that the State’s interest in licensing various occupations can save [state regulation of workplace safety] from OSH Act pre-emption. . . .” (citations omitted) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988))); *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 766 (1982) (“[I]t has always been the law that state legislative and judicial decisionmakers must give preclusive effect to federal enactments concerning nongovernmental activity, no matter what the strength of the competing local interests.”).

<sup>119</sup> *See* *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 518 (1989) (“Where state law impacts on matters within FERC’s control, the State’s purpose must be to regulate production or other subjects of state jurisdiction, and the means chosen must at least plausibly be related to matters of legitimate state concern.”). In *Hines v. Davidowitz*, the Court analyzed the relative strength of the state and federal interests at issue, noting that the legislation at issue was “in a field which affects international relations” and that the state’s power was “not bottomed on the same broad base as is its power to tax.” 312 U.S. 52, 68 (1941); *see also* *Rollins Envtl. Servs., Inc. v. Parish of Saint James*, 775 F.2d 627, 635 (5th Cir. 1985) (“At the very least, an exercise of legislative rulemaking authority must be a reasonable means of attaining legitimate governmental objectives. Here, of course, the question is . . . whether [the challenged ordinance] trenches impermissibly upon a field preempted by Congress. Nevertheless, the two analyses are related.” (citations omitted)).

<sup>120</sup> *See, e.g., Locke*, 529 U.S. at 108 (“[A]n ‘assumption’ of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence”).

<sup>121</sup> *See* *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663–64 (1993) (“[A] court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.”).

<sup>122</sup> *Wyeth v. Levine*, 129 S. Ct. 1187, 1195 n.3 (2009) (rejecting the argument that the presumption should not apply “because the Federal Government has regulated drug labeling for more than a century”).

accounts for the historic presence of state law but does not rely on the absence of federal regulation.<sup>123</sup>

In general, presumptions are strange and unpredictable things.<sup>124</sup> Sometimes they merely assign the burden of producing evidence to the disfavored party but do not affect the burden of proof.<sup>125</sup> This is the “bursting bubble” presumption that, once rebutted, vanishes and no longer affects the outcome.<sup>126</sup> If that was what the presumption against preemption were about, it would not be very significant.<sup>127</sup> Other presumptions, however, change the burden of persuasion.<sup>128</sup> Still others behave like a thumb on the scale of justice, serving throughout the lawsuit to add a vague persuasive force to the favored party’s evidence.<sup>129</sup> The nature and effect of the presumption against preemption in this regard remains unclear.<sup>130</sup>

Whether there is a presumption or not, of course, state law “must yield” if the Court finds that it is “incompatible with federal legislation.”<sup>131</sup> Whether a particular obstacle is “sufficient” to trigger

<sup>123</sup> *Id.* (citation omitted) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

<sup>124</sup> See D. Craig Lewis, *Should the Bubble Always Burst? The Need for a Different Treatment of Presumptions Under IRE 301*, 32 IDAHO L. REV. 5, 5 (1995) (“Scholars, courts, and legislators have disagreed for decades about how the law of evidence should deal with legal presumptions, a question that remains challenging.”).

<sup>125</sup> See FED. R. EVID. 301 (“[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence . . . but does not shift to such party the burden of proof . . .”); see also *A.C. Aukerman Co. v. R.L. Chades Const. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992) (“[A] presumption . . . completely vanishes upon the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact.”); *Phillips Petroleum Co. v. Fed. Energy Regulatory Comm’n*, 902 F.2d 795, 802 (10th Cir. 1990) (“Once the party against whom the presumption operates produces evidence challenging the presumed fact . . . the presumption bursts and is eliminated from the analysis.”).

<sup>126</sup> MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE 821 (Edward W. Clearly ed., 2d ed. 1972) (These presumptions are “like bats of the law flitting in the twilight, but disappearing in the sunshine of actual facts.” (quoting *Mackowik v. Kan. City, St. James & Council Bluffs R.R. Co.*, 94 S.W. 256, 262 (Mo. 1906))).

<sup>127</sup> But see *Merrill*, *supra* note 106, at 728 (arguing that the “presumption, if consistently applied, would also shift authority for making preemption decisions from the courts to Congress”).

<sup>128</sup> See, e.g., *Fischer v. S/Y Neraida*, 508 F.3d 586, 595 (11th Cir. 2007) (describing a presumption as “‘strong’ in the sense of imposing a burden of persuasion upon the defendant, and not just a burden of production or of going forward”).

<sup>129</sup> See, e.g., *United States v. Palmer-Contreras*, 835 F.2d 15, 18 (1st Cir. 1987) (“[E]ven after a defendant has introduced some evidence to rebut the flight presumption, the presumption does not disappear, but rather retains evidentiary weight—the amount depending on how closely defendant’s case resembles the congressional paradigm—to be considered along with all the other relevant factors.” (citation omitted)).

<sup>130</sup> See *Hoke*, *supra* note 106, at 733 (describing the U.S. Supreme Court’s approach to its presumptions as “fickle”).

<sup>131</sup> *Sperry v. Fla.*, 373 U.S. 379, 384 (1963) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (internal quotation marks omitted); see also *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (“[E]ven if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.”).

preemption, however, “is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”<sup>132</sup>

*B. De-Lawyering Is an Obstacle to Accomplishment  
of Congress’ Purpose*

Under the “conflict preemption” doctrine, the argument that federal law would have preempted Louisiana Senate Bill 549 is not a difficult sell. Major federal environmental laws unambiguously mandate that states facilitate public participation. The following language from the federal hazardous waste statute—known as the Resource Conservation and Recovery Act—is almost identical to language in the Clean Water Act:

Public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, *encouraged, and assisted* by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish minimum guidelines for public participation in such processes.<sup>133</sup>

Senator Adley designed his bill as “an obstacle to the accomplishment and execution” of that congressional mandate.<sup>134</sup> This is because Senator Adley’s proposal was for Louisiana to do the exact opposite of encouraging and assisting public participation. Louisiana Senate Bill 549 would have discouraged public participation by de-lawyering law clinics’ clients. The purpose was to “send[ ] a message that Louisiana is open for business” by sending a message that public opposition would be restricted.<sup>135</sup> The fact that Bill 549 relied primarily on conditions attached to state spending would not have saved the bill because “it is not permissible for a State to use its spending power to advance an interest that . . . frustrates [a] comprehensive federal scheme.”<sup>136</sup> Indeed, the U.S. Supreme Court

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<sup>132</sup> *Crosby*, 530 U.S. at 373; *see also* *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (noting that there is no “rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress”).

<sup>133</sup> Resource Conservation and Recovery Act § 7004(b)(1), 42 U.S.C. § 6974(b)(1) (2006) (emphasis added); Clean Water Act § 101(e), 33 U.S.C. § 1251(e) (2006) (quoted *supra* note 8).

<sup>134</sup> *Hines*, 312 U.S. at 67.

<sup>135</sup> *See* Blum, *Law Clinics Focus of Bill*, *supra* note 54, at 1A (internal quotation marks omitted).

<sup>136</sup> *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2417 (2008).

has ruled, analogously, that “a state rule predicating benefits on refraining from conduct protected by federal labor law poses *special dangers* of interference with congressional purpose.”<sup>137</sup> For a state to confer benefits only on those universities that forgo rights under federal law would have a “direct tendency to frustrate the purpose of Congress and, if not pre-empted, would defeat or handicap a valid national objective.”<sup>138</sup>

Not only was Bill 549 intended to stand as an obstacle to Congress’ purpose, the bill’s de-lawyering approach—if enacted and upheld—would have been an effective obstacle.<sup>139</sup> Meaningful participation by the public in government administration of regulatory laws is not possible without the practical ability to litigate. EPA has recognized that “[w]hen citizens are denied the opportunity to challenge executive decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as through public comments and public hearings on proposed permits, may be seriously compromised.”<sup>140</sup> The U.S.

<sup>137</sup> *Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994) (emphasis added). The benefit at issue in *Livadas* was state enforcement of a penalty claim for an employer’s refusal to pay wages promptly upon discharge. *Id.* at 110.

<sup>138</sup> *Id.* (quoting *Nash v. Fla. Indus. Comm’n*, 389 U.S. 235, 239 (1967) (internal quotation marks omitted)).

<sup>139</sup> See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 105 (1992) (“In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature’s professed purpose and have looked as well to the effects of the law.”). *But see Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 216 (1983) (accepting “California’s avowed economic purpose” for enacting a law that halted construction of nuclear energy plants and holding, therefore, that “the statute lies outside the occupied field of nuclear safety regulation” (emphasis added)). *Pacific Gas & Elec. Co.*, however, involved field preemption, not conflict preemption. See *id.* The case distinguished *Perez v. Campbell*, 402 U.S. 637 (1971). See *Pac. Gas & Elec. Co.*, 461 U.S. at 216 n.28. *Perez* had involved “an actual conflict between state and federal law.” *Pac. Gas & Elec. Co.*, 461 U.S. at 216 n. 28. See *Perez*, 402 U.S. at 651–52 (“We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration.”). In contrast, in *Pacific Gas & Electric Co.*, “Congress ha[d] left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons.” 461 U.S. at 223; see also *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440–41 (2010) (rejecting the approach of evaluating “conflict based on the subjective intentions of the state legislature” because under that approach “one State’s statute could survive pre-emption . . . while another State’s identical law would not, merely because its authors had different aspirations”); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984) (“[R]eview of the same legislative history which prompted our holding in *Pacific Gas & Electric*, coupled with an examination of Congress’ actions with respect to other portions of the Atomic Energy Act, convinces us that the pre-empted field does not extend as far as *Kerr-McGee* would have it.”); Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, in *PREEMPTION CHOICE*, *supra* note 117, at 119, 133 (“*Pacific Gas and Electric* . . . is exemplary in comprehending that while Congress surely has objectives for statutes when it enacts them, it may well not want those objectives pursued ‘at all costs.’”).

<sup>140</sup> *Virginia v. Browner*, 80 F.3d 869, 880 (4th Cir. 1996) (quoting EPA’s Preamble to Proposed Rule: Amendment to Requirements for Authorized State Permit Programs Under

Court of Appeals for the Fourth Circuit explained, “[t]he 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.”<sup>141</sup> Further, without legal assistance, access to the courts is nearly always meaningless.<sup>142</sup>

The clear mandates of the Resource Conservation and Recovery Act and the Clean Water Act provide the most powerful bases for a preemption attack on a bill like 549. It is difficult to imagine how a de-lawyering bill that targeted an environmental law clinic could survive a conflict with federal hazardous waste and clean water laws, since a large percentage of such a clinic’s docket is likely to involve programs under these statutes. Plaintiffs may nonetheless wish to base additional arguments for preemption on other federal environmental laws, which use different language, to establish federal policy that favors participation of the public in environmental decisions.<sup>143</sup> For example, the Clean Air Act requires that state’s permit programs provide for “public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions . . . including an opportunity for judicial review.”<sup>144</sup> This is

Section 402 of the Clean Water Act, 60 Fed. Reg. 14588, 14589 (Mar. 17, 1995)).

<sup>141</sup> *Id.*

<sup>142</sup> See Nichol, *supra* note 101 at 345-46; *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 28 (1981) (noting that if one side to a dispute is unrepresented by counsel “the contest of interests may become unwholesomely unequal”); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (“[L]awyers are essential to the primary governmental function of administering justice . . .”).

<sup>143</sup> Congress’ unambiguous determination that public participation serves the public interest is analogous to its decision allowing workers a relatively free hand in labor disputes. In that context, the U.S. Supreme Court explained that “[f]or a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to [authorize picketing] for purposes or by methods which the federal Act prohibits.” *Garner v. Teamsters Local 776*, 346 U.S. 485, 500 (1953). *But see* Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J.L. & PUB. POL’Y 83, 120 (2009) (arguing that “much federal labor law preemption doctrine ignores [the] general principle of the broader law of preemption” that a “‘clear and manifest’ or ‘clear and unambiguous’ indication of congressional intent [is required] to preempt state law”).

<sup>144</sup> Clean Air Act § 502(b)(6), 42 U.S.C. § 7661a(b)(6) (2006); *see also id.* § 160(5), 42 U.S.C. § 7470(5) (2006) (stating that Part C of the Clean Air Act’s purpose is “to assure that any decision to permit increased air pollution in any area [that already meets federal standards] is made only . . . after adequate procedural opportunities for informed public participation in the decisionmaking process”). *See also* Surface Mining Control and Reclamation Act § 102, 30 U.S.C. § 1202 (2006) (“It is the purpose of this chapter to . . . assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this chapter . . .”); Coastal Zone Management Act § 306, 16 U.S.C. § 1455(d)(14) (2006) (“Before approving a management program submitted by a coastal state, the Secretary shall find [that the] . . . program provides for public participation in permitting processes, consistency determinations, and other similar decisions.”).

A claim that the Coastal Zone Management Act preempted a state’s failure to “allow for



part of a statutory scheme in which “Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests.”<sup>145</sup>

### C. *De-Lawyering Fails to Rationally Advance State Interests*

Given the potential for the state’s interest to affect the presence and strength of the presumption against preemption, it is worth establishing that Senate Bill 549 had no reasonable relationship to a legitimate state purpose. States, of course, have “a substantial interest in regulating the practice of law” within their borders.<sup>146</sup> In Louisiana, however, the state Supreme Court “has exclusive and plenary power to define and regulate *all* facets of the practice of law.”<sup>147</sup> Senator Adley, therefore, could not have been invoking the state’s authority over the bar. Instead, as an attempt to shield a favored constituency from the risks of litigation, Bill 549 must have been based on the state’s general police power.

The Louisiana Legislature’s police power is broad.<sup>148</sup> It is not, however, unlimited. The Louisiana Supreme Court has explained that the police power only extends to “reasonable” measures:

A measure taken under the state’s police power is reasonable when the action is, under all the circumstances, reasonably necessary and designed to accomplish a purpose properly falling within the scope of the police power. Thus, to sustain

public participation before authorizing the private construction of wind farms” was unsuccessful, in part because “nothing in the Act expressly requires Texas to provide for public participation and consistency reviews in wind farm construction.” *Coastal Habitat Alliance v. Patterson*, 385 F. App’x 358, 360–61 (5th Cir. 2010). That case, however, did not concern a de-lawyering effort and did not involve a mandate that public participation “shall be provided for, encouraged, and assisted by . . . the States.” See *supra* note 8 (quoting Clean Water Act § 101(e)) and note 133 (quoting Resource Conservation and Recovery Act § 7004(b)).

<sup>145</sup> *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976).

<sup>146</sup> *Sperry v. Florida*, 373 U.S. 379, 383 (1963); see also *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (“States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.”); *Konigsberg v. State Bar*, 353 U.S. 252, 273 (1957) (“We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association.”).

<sup>147</sup> *Succession of Wallace*, 574 So. 2d 348, 350 (La. 1991) (emphasis added).

<sup>148</sup> See *Polk v. Edwards*, 626 So. 2d 1128, 1132 (La. 1993) (“The powers of the United States Congress are specifically delineated in the United States Constitution. Conversely, the Louisiana Legislature, as with the legislatures of the other states of the Union, has all powers which have not been denied it by the state constitution.”).

an action under the state's police power, courts must be able to see that its operation tends in some degree to prevent an offense or evil or otherwise to preserve public health, safety, welfare or morals. Further, an exercise of the state's police power "does not justify an interference with constitutional rights which is entirely out of proportion to any benefit redounding to the public."<sup>149</sup>

So the question is whether Senator Adley's de-lawyering bill would have tended "in some degree" to "preserve public health, safety, welfare or morals" and whether any purported benefit was "out of proportion" to the bill's interference with Louisiana's constitutional guarantee of open access to justice.<sup>150</sup>

None of Senator Adley's stated purposes for Senate Bill 549 offer a reasonable prospect for public benefit. First, his "[d]on't take tax money and then sue the same people you're taking money from"<sup>151</sup> argument is inconsistent with state policy and, as he would apply the argument, is unlawful under first amendment doctrine.<sup>152</sup> The State of Louisiana—like many states—provides money and other subsidies to a host of recipients. For example, on October 21, 2010, "State officials unanimously agreed . . . to give Nucor Corp. \$30 million toward building an iron facility in St. James Parish."<sup>153</sup> In 2009, the state "pitch[ed] in \$50 million" to help California-based Foster Farms buy and renovate a chicken plant in Farmerville, Louisiana, and

<sup>149</sup> *Morial v. Smith & Wesson Corp.*, 15 2000-1132 (La. 4/3/01), 785 So. 2d 1 (emphasis added) (citations omitted) (quoting *City of Baton Rouge v. Williams*, 95-0308, p. 6 (La. 10/16/95), 661 So. 2d 445, 449).

<sup>150</sup> LA. CONST. art. 1, § 22; see *Crier v. Whitecloud*, 496 So. 2d 305, 310 (La. 1986) ("The constitutional guarantee providing for open courts and insuring a remedy for injuries does not warrant a remedy for every single injury; it applies only to those injuries that constitute violations of established law which the courts can properly recognize."); cf. *Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983) (holding that the "right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution" and that "Courts have required that the access be 'adequate, effective, and meaningful'" (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977))).

<sup>151</sup> Editorial, *supra* note 52.

<sup>152</sup> A brief discussion of these first amendment issues appears *infra*, at notes 162-65 and accompanying text.

<sup>153</sup> Michelle Millhollon, *State Officials Approve Nucor Funding*, ADVOC. (Baton Rouge, La.), Oct. 21, 2010, at A6; Robert Travis Scott, *Local Projects Are Cut to Make Room for Nucor*, TIMES-PICAYUNE (New Orleans, La.), Oct. 22, 2010, at A4 ("The State Bond Commission . . . removed \$22 million worth of projects from the state's construction budget to make way for an incentive package for a Nucor Corp. iron plant near Convent."). The state has also agreed to pay the New Orleans Hornets, a basketball team, "subsidies which kick in whenever the team does not meet certain annual revenue benchmarks." Associated Press, *Gov. Jindal Anticipates La. Payment to Hornets*, WASHINGTONTIMES.COM, (Mar. 15, 2011, 4:27 AM), <http://www.washingtontimes.com/news/2011/mar/15/gov-jindal-anticipates-la-payment-to-hornets/print>.

“agreed to spend up to \$37 million in state economic development funds” on a ConAgra Foods sweet potato facility in Delhi, Louisiana.<sup>154</sup> Other than direct appropriations, state subsidies to qualifying businesses include the Industrial Ad Valorem Tax Exemption Program (a ten-year abatement of local property taxes on qualifying investments),<sup>155</sup> Film Production Transferable Tax Credits,<sup>156</sup> and the Enterprise Zone Program,<sup>157</sup> among others.<sup>158</sup>

Can you imagine what would happen if a legislator introduced a bill to prohibit all recipients of these subsidies from 1) filing “a petition, motion, or suit against a government agency,” 2) “seeking monetary damages,” or 3) “raising state constitutional challenges in state or federal court”?<sup>159</sup> There are no such restrictions on industrial recipients of Louisiana’s largesse.<sup>160</sup> In fact, the state itself is not shy about simultaneously accepting federal subsidies and suing federal agencies.<sup>161</sup> Senator Adley has offered no justification for applying his “biting the hand” principle to require universities to give up—as a price for doing business with the state—privileges enjoyed by other

<sup>154</sup> Gary Perilloux, *Efforts to Grow La. Economy Keep State Officials Busy*, ADVOC. (Baton Rouge, La.), Jan. 3, 2010, at F1; Michelle Millhollon, *Officials Agree to Funding for Fries*, ADVOC. (Baton Rouge, La.), Aug. 29, 2009, at B6; Michelle Millhollon, *Lawmakers will Spend Megafund, Funds Go to Chicken, NASA Plants*, ADVOC. (Baton Rouge, La.), May 14, 2009, at A9.

<sup>155</sup> See LA. CONST. art. VII, pt. II, § 21(F); see also *Robinson v. Ieyoub*, 97-2204, p. 5 (La. App. 1 Cir. 12/28/98); 727 So. 2d 579, 582 (limiting the exemption to facilities that “meet the definition of a manufacturing establishment”); Oliver A. Houck, *This Side of Heresy Conditioning Louisiana’s Ten-Year Industrial Tax Exemption upon Compliance with Environmental Laws*, 61 TUL. L. REV. 289, 292 (1986) (arguing that the “ten-year industrial tax exemption is the closest thing to a sacred cow in Louisiana” (footnote omitted)).

<sup>156</sup> See LA. REV. STAT. ANN. § 47:6007(C)(5) (2009) (“Any motion picture tax credits not previously claimed by any taxpayer against its income tax may be transferred or sold to another Louisiana taxpayer or to the office, subject to the following conditions . . .”).

<sup>157</sup> See *id.* § 51:1781–1791 (providing, *inter alia*, for tax rebates on qualifying investments in enterprise zones).

<sup>158</sup> See Jan Moller, *Critics Blast La. Tax Breaks*, TIMES-PICAYUNE (New Orleans, La.), Nov. 19, 2010, at A3 (reporting that Louisiana loses “more than \$7 billion a year in potential revenue” due to “more than 300 exemptions to Louisiana’s sales and income-tax laws”).

<sup>159</sup> See *supra* note 62 and accompanying text (quoting Senate Bill 549).

<sup>160</sup> See, e.g., *Bunge N. Am., Inc. v. Bd. of Commerce & Indus. & La. Dep’t of Econ. Dev.*, 2007-1746 (La. App. 1 Cir. 5/2/08), 991 So. 2d 511, 516–17 (noting that the recipient of an Industrial Ad Valorem Tax Exemption “filed suit against the Board and the Department seeking a declaratory judgment of its rights under the contract and challenging the Board and/or the Department’s ability to restrict, alter, or modify the terms of the contract [granting the exemption]”).

<sup>161</sup> For example, Louisiana has joined a court challenge to federal health-care legislation. See Complaint at 3, *Florida v. U.S. Dep’t of Health & Human Servs.*, No. 10-cv-91 (N.D. Fla. Mar. 23, 2010). Yet Louisiana receives millions in federal subsidies. See Jonathan Tilove and Bruce Alpert, *GOP Group’s Cuts Would Hit La.*, TIMES-PICAYUNE (New Orleans, La.), Jan. 21, 2011, at A1 (reporting on suggested federal budget cuts that would, *inter alia*, “cost Louisiana up to \$200 million in Medicaid financing for the first six months of 2011”).

Louisiana residents, without imposing the same rule on others who receive taxpayer dollars.

Further, legislation that conditions government benefits on the sacrifice of first amendment rights is problematic under the U.S. Constitution.<sup>162</sup> When a government is actually funding the program it seeks to regulate, the government may have a say in how that program's directors spend government money.<sup>163</sup> Even that principle is limited when the government seeks to undercut the independence of lawyers with private clients.<sup>164</sup> In any event, the State of Louisiana does not fund TELC, and cannot lawfully exercise control over TELC's advocacy by imposing conditions on the funding of other university programs.<sup>165</sup>

Second, Adley's argument that TELC has behaved unethically by recovering attorney fees in settlements of environmental cases is demonstrably wrong. Courts award attorney fees under environmental

<sup>162</sup> See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[E]ven though a person has no ‘right’ to a valuable governmental benefit . . . [the Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”); see also Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 502 (2000) (“The First Amendment becomes implicated when the government attempts to restrict private speech as part of its benefit package.”); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1506 (1989) (arguing that the “unconstitutional conditions doctrine . . . guards against . . . government overreaching[,] . . . bars redistribution of constitutional rights as to which government has obligations of evenhandedness[,] . . . [and] prevents inappropriate hierarchy among rightholders”).

<sup>163</sup> See generally *Rust v. Sullivan*, 500 U.S. 173 (1991). *Rust* declined to apply *Perry* where “the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.” *Id.* at 196. The *Rust* Court upheld regulations that “do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.” *Id.* Also, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held that “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen” because it “simply reflects the exercise of employer control over what the employer itself has commissioned or created.” *Id.* at 421–22; see also Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 44 (2008) (“[W]hen the government hires personnel to speak for it, the government is entitled to regulate the content and even the viewpoint reflected in such speech.”).

<sup>164</sup> See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (overturning a law prohibiting Legal Services Corporation lawyers from raising constitutional challenges to state or federal laws because, *inter alia*, “the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power”); *id.* at 542 (“[T]here is an ‘assumption that counsel will be free of state control.’” (quoting *Polk Cnty. v. Dodson*, 454 U.S. 312, 321–22 (1981))).

<sup>165</sup> See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990) (“What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.”). Borné made the nature of the threat clear in his testimony: “Nothing in this bill would prohibit the law clinic from doing exactly what it’s doing today, nothing, but the university would then have to fund all of those services that it gets money from the state for now.” *La. Sen. Hearing Video*, *supra* note 39.

laws because federal and state laws provide specifically for such awards.<sup>166</sup> Indeed, the Louisiana Supreme Court rule that governs student practice confirms that law clinics may “be awarded attorney’s fees and costs for the services rendered by the student attorney and supervising attorney in those cases where the awarding of attorney’s fees and costs is provided by statute.”<sup>167</sup> The American Bar Association’s model ethical rules for the legal profession make it clear that attorneys may recover statutory attorney fees in *pro bono* cases.<sup>168</sup>

Third, Adley and Borné have never offered evidence to support their assertion that TELC’s advocacy harms the state by causing the loss of jobs and investments. In fact, many scholars believe that, on balance, environmental protection is good for economic development.<sup>169</sup> Further, the evidence is strong that adherence to the

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<sup>166</sup> See Adam Babich, *The Wages of Sin: The Violator-Pays Rule for Environmental Citizen Suits*, 10 WIDENER L. REV. 219, 248 (2003) (“To encourage citizens to file environmental enforcement suits . . . Congress needed to provide a practical way for citizens to pay lawyers. Thus, . . . Congress authorized citizen enforcers to seek recovery of their reasonable litigation costs, including attorney fees, from violators of environmental laws.”); see also Louisiana Environmental Quality Act, LA. REV. STAT. ANN. § 30:2026A(3) (2000) (“The court . . . may award costs of court including reasonable attorneys and expert witness fees to the prevailing party.”).

<sup>167</sup> LA. SUP. CT. R. XX § 3(a).

<sup>168</sup> MODEL RULES OF PROF’L CONDUCT Rule 6.1 cmt. 4 (“[T]he award of statutory attorneys’ fees in a case originally accepted as *pro bono* would not disqualify such services from inclusion under this section.”).

<sup>169</sup> See Lisa P. Jackson, *The EPA Turns 40*, WALL ST. J., Dec. 2, 2010, at A17 (arguing that “the last 40 years show no evidence that environmental protection hinders economic growth” and that environmental regulations have “sparked a home-grown environmental protection industry that employs more than 1.5 million Americans”). The EPA has analyzed the costs and benefits of regulation under the Clean Air Act and concluded that from 1970 to 1990 benefits exceeded costs “by a factor of 10 to 100 times.” EPA-410-R-99-001, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT 1990 TO 2010 1 (1999). For the 1990 to 2010 period, the agency projected that benefits would exceed costs “by a factor of four to one.” *Id.* at 105. EPA’s benefit calculation included avoiding more than \$ 4 billion in reduced worker productivity and \$ 3.9 billion in reduced agricultural yields due to effects of ground level ozone. See *id.* at 97.

Professor David M. Driesen argues that “empirical literature shows that environmental regulations . . . have caused a small net increase, not a decrease, in jobs.” David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L.Q. 545, 573 (1997) (footnote omitted); see also Sanford E. Gaines, *Rethinking Environmental Protection, Competitiveness, and International Trade*, 1997 U. CHI. LEGAL F. 231, 288 (1997) (“The facts show a solid basis for a convergence of interests, rather than a conflict, between strong environmental protection efforts and competitive economic development.”). Professor Richard B. Stewart disagrees, arguing that “stringent environmental regulation and liability rules may harm . . . international competitiveness, even though most empirical studies have not established a strong causal association between the two.” Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2041 (1993). Professor Stewart warns that “questions about the relation between environmental standards, international competition, and welfare are laden with uncertainties.” *Id.* at 2105. Professors Frank Ackerman and Lisa Heinzerling illustrate the limitations of cost-benefit analysis by describing a tobacco industry-funded study which relied on “conventional cost-benefit analysis” to find that “smoking was a financial boon for the [Czech Republic

rule of law is a better strategy for sustained economic growth than attempting to shortcut the law to benefit favored industries.<sup>170</sup>

Borné has argued that because TELC represents clients who participate in permit proceedings, “the permitting time many times has been extended so that companies simply look elsewhere” and “this type of activity . . . helps to prove the point that we have one of the most inhospitable legal climates in the nation.”<sup>171</sup> But the process for judicial review of Louisiana permits is remarkably streamlined and rarely suspends the effectiveness of permits.<sup>172</sup> Further, a 2010 study “ranked Louisiana ninth among U.S. states for its business climate.”<sup>173</sup> Louisiana’s “executive survey rank” was seventh<sup>174</sup>—a

government]—partly because . . . it caused citizens to die earlier and thus reduced government expenditure on pensions, housing, and health care.” Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1553–54 (2002) (footnote omitted); see also Editorial, *Obama’s Rule-Making Loophole*, WALL ST. J., Jan. 24, 2011, at A16 (complaining that cost-benefit analyses which include consideration of “equity, human dignity, fairness, and distributive impacts” will create a “values loophole” that “boils down to a preference for bigger government” (internal quotation marks omitted)).

<sup>170</sup> See Olson, *supra* note 34, at A16 (“[A] robust and productive economy depends upon a consistent, predictable, evenhanded, and respected rule of law.”); John N. Drobak, *A Comment on Privatization and Democratization*, 50 ST. LOUIS U. L.J. 783, 784 (2006) (“One of the reasons that the rule of law is so important is its protection of competition in both economic and political markets. With a regime of laws, not people, with transparent and predictable rules, everyone has the opportunity to compete on a level playing field (putting aside wealth disparities).”).

<sup>171</sup> See *La. Sen. Hearing Video*, *supra* note 39.

<sup>172</sup> Permit appeals are “devolutive,” rather than “suspensive” and, thus, do not normally delay permit issuance. LA. REV. STAT. ANN. §§ 30:2050.21(A), 49:964(C). *But see, e.g., id.* § 30:2050.22(B) (providing that “the secretary may grant, or the court may order, a stay with appropriate terms”); *Div. of Admin. v. Dep’t of Civil Serv.*, 345 So.2d 67 (La. App. 1 Cir. 1976) (discussing the standard for stays). Citizens have only thirty to sixty days to appeal most environmental permits after the agency provides notice of their issuance. LA. REV. STAT. ANN. §§ 30:12(A)(2) (most Department of Natural Resources appeals - sixty days), 30:2050.21(A) (most Department of Environmental Quality appeals - thirty days), 49:964(B) (Louisiana Administrative Procedure Act - thirty days); see also *In re Natural Res. Recovery, Inc.*, 1998-2917 (La. App. 1 Cir. 2/18/00), 752 So. 2d 369 (discussing the requirements for notice of issuance). The law generally confines review to the administrative record. LA. REV. STAT. ANN. §§ 30:12(B)(4), 49:964(F) (incorporated by *id.* § 30:2050.21(F)). The agency usually has either thirty or sixty days to transmit the record to the court. *Id.* §§ 30:12(B)(2) (thirty days), 30:2050.21.D (sixty days), 49:964(D) (thirty days). For Department of Environmental Quality permit appeals, the law requires a court ruling by ninety days after filing of the administrative record. *Id.* § 30:2050.21(G); *In re. Westlake Petrochemicals Corp.*, 99-1726 (La. App. 1 Cir. 11/3/2000), 769 So. 2d 1278 (analyzing the ninety-day requirement). The courts employ a relatively deferential standard of review. LA. REV. STAT. ANN. §§ 30:12(B)(5), 49:964(G) (incorporated by *id.* § 30:2050.21(F)). Louisiana law provides tight deadlines for most administrative permit decisions. See LA. REV. STAT. ANN. §§ 30:26, 30:2022(B)(2), 30:2022(C), 49:214.30(C)(2), 56:6(26).

<sup>173</sup> *Business Climate Ranked*, TIMES-PICAYUNE (New Orleans, La.), NOV 3, 2010, at C6 (Louisiana’s Economic Development Secretary credited the results in large part to “recent economic competitiveness improvements in Louisiana, such as business tax cuts, governmental ethics reform, the creation of Louisiana FastStart and our focus on business retention and



remarkable achievement considering publicity about hurricane risks. According to the study's survey of corporate real estate executives, the key factors in site selection are: "1) work force skills, 2) state and local tax scheme, 3) transportation infrastructure, 4) flexibility of incentive programs, 5) & 6) availability of incentives and utility infrastructure, 7) land/building costs and supply, 8) state economic development strategy, 9) permitting and regulatory structure, and 10) higher education resources."<sup>175</sup>

Even if Adley and Borné's unsubstantiated claims of economic damage were taken seriously, de-lawyering lower-income Louisiana residents would not be a responsible reaction. If environmental laws are excessively stringent, or public participation rights are too extensive, the appropriate response is to amend those laws, not to deny lawyers to people seeking to vindicate rights that the law grants them.<sup>176</sup>

In addition, harming a major university would not be a reasonable response to fears about losing jobs or investments. Tulane University President Cowen explained that Tulane is "the largest private employer in Orleans Parish and one of the largest in the state. . . . To think that anyone would advocate damaging one of the largest employers in the state, that is an anti-economic development agenda if I've ever seen one."<sup>177</sup> Putting aside the importance of Tulane as an employer, educational institutions are important drivers of economic development. Damaging the curriculum and reputation of a major university would be an irrational approach to improving the economy.<sup>178</sup>

expansion, as well as our enhanced focus on small business development."). The rankings are based on "a survey of site selection consultants and corporate executives who make location decisions for major business investment projects" and on "quantitative measures linked to a database of new and expanded business activity." *Id.*

<sup>174</sup> Mark Arend, *One Piece at a Time*, 55 SITE SELECTION 830, 831 (2010).

<sup>175</sup> *Id.* at 835 (numbering format and capitalization style modified) (numbers 5 and 6 were tied). A serious attempt to improve the hospitality of Louisiana's legal climate would presumably address the fact that Louisiana is the only state that has failed to adopt Article II of the Uniform Commercial Code. See A.N. Yiannopoulos, *Requiem for a Civil Code A Commemorative Essay*, 78 TUL. L. REV. 379, 400-01 (2003) ("The enactment of all but one of the articles of the Uniform Commercial Code . . . was a critical moment in Louisiana's legal history. . . . What is missing now is the adoption of article 2 of the U.C.C. that governs sales of goods.").

<sup>176</sup> See *supra* note 87 and accompanying text (quoting NEW ORLEANS CITYBUSINESS' statement that "Adley and the LCA were, in effect, thumbing their noses at the law, judicial process and regulation—all areas within the purview of the Legislature to change." Editorial, *A Good Kill*, *supra* note 6, at 22).

<sup>177</sup> Sonia Smith, *Tulane Is Targeted by Lobbying Group Environmental Law Clinic Under Attack*, TIMES-PICAYUNE (New Orleans, La.), May 15, 2010, at A2.

<sup>178</sup> See *Hearing Before the S. Comm. on Budget* (2009), 111th Cong. 4 (testimony of Peter

After the defeat of his bill, Senator Adley published an article in LCA's trade magazine that makes new and wildly inaccurate allegations about TELC.<sup>179</sup> None of these new allegations hold water, however, and none establish a legitimate state interest in de-lawyering TELC's clients.<sup>180</sup>

R. Orszag, Director, Office of Mgmt. & Budget ("If we do not invest in education and clean energy, our prospects for long-term economic growth will be diminished."), [http://www.whitehouse.gov/sites/default/files/omb/assets/testimony/031009\\_budget.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/testimony/031009_budget.pdf); U.S. CONG., JOINT ECONOMIC COMM., INVESTMENT IN EDUCATION: PRIVATE AND PUBLIC RETURNS, at abstract (Jan. 2000) ("There is a strong consensus among economists that formal education is an important determinant of individual earnings as well as economic growth."), <http://www.house.gov/jec/educ.pdf>.

<sup>179</sup> Adley, *supra* note 80.

<sup>180</sup> Adley claims without basis that "over one third of the cases filed by TELC have been deemed frivolous and a waste of time and resources by the courts." Adley, *supra* note 80 at 33. But he has not come up with a single example of such a case. He also claims that "[a] quick look at the donors list provided by Tulane shows companies that were sued by Tulane and have now magically become financial supporters." *Id.* at 34. But TELC never accepts or even discusses contributions to Tulane University as part of the settlement of a case.

In his article, Adley recounts a phony story in which TELC supposedly sued a company that had already "completed [a cleanup] in accordance with law"—"running up legal costs needlessly" and saying "it would drop the law suit 'only' if the company would pay a settlement to Tulane." *Id.* at 34. Adley's story would be shocking if it were true, but it is not. Adley claims his story is "a summary of testimony before the Louisiana legislature." *Id.* Instead, his account distorts the testimony by the only representative of a private company who testified at the May 19, 2010 hearing—Bill Page, a Vice President of EnerVest Operating, L.L.C. To show that Adley's allegations are wrong, the remainder of this footnote contrasts those allegations with Bill Page's testimony and with the facts of the EnerVest case.

The case was about mercury contamination in Louisiana's Union, Ouachita, and Morehouse parishes. The state had issued warnings about "unacceptable levels" of mercury in the area. La. Dep't of Health & Hospitals, News Release: Mercury and Fish Advisories Issued for 10 Waterways (May 29, 2003) (on file with author). Mercury is a neurotoxin, and a listed hazardous waste. *See* Preamble to Proposed Rule: National Emission Standards for Hazardous Air Pollutants, 67 Fed. Reg. 44672, 44672 (July 3, 2002); 40 C.F.R. § 261.33(f) (2010) (waste code U151). Some gas producers nonetheless allow mercury to leak onto soils and wetlands from outdated meters that measure pressure in gas pipelines. One of these producers, EnerVest, owned more than 400 mercury meters in the Monroe Gas Field.

Adley claims that EnerVest "found mercury contamination and notified [the Louisiana Department of Environmental Quality (LDEQ)] for guidance and supervision" and "notified TELC so that it could be satisfied the law was being followed." Adley, *supra* note 80, at 34. EnerVest's Bill Page testified, however, that EnerVest began purchasing mercury-meter sites in the Monroe Gas Field in 1998 and he made no claim to have notified LDEQ before 2006—eight years later—or to have notified TELC at all. La. Sen. Hearing Video, *supra* note 39 (asserting that "EnerVest initiated discussions with the Louisiana DEQ in 2006 to work out a cooperative agreement"). A search of LDEQ records does not reveal any EnerVest notification to LDEQ until after TELC's clients sent EnerVest a demand letter in December 2006. *See* LDEQ Electronic Document Management System (EDMS) (search under Agency Interest No. 149272—the first EnerVest letter on point is dated Feb. 21, 2007).

On December 7, 2006, TELC sent its clients' demand letter to EnerVest, LDEQ, and EPA, providing notice that EnerVest was violating the federal hazardous waste law by allowing mercury to leak from its meters into the environment. *See* Notice of Endangerment and Intent to File Suit, dated Dec. 7, 2006, Complaint Ex. A, Gulf Restoration Network et al. v. EnerVest Operating, L.L.C., No. 07-cv-00817 (W.D. La. May 9, 2007), ECF No. 1. After receiving TELC's demand letter, EnerVest proposed a cleanup agreement to LDEQ. *See* Letter from

*D. Preemption of De-Lawyer Laws Is Consistent  
with the Cooperative Federalist Scheme*

Congress enacted modern antipollution laws against the backdrop of an historical tradition of state primacy in regulation to protect public health and safety.<sup>181</sup> Congress only stepped in to require an extensive federal response to environmental degradation after years of frustration with states' failure to grapple effectively with the problem.<sup>182</sup> Even while federalizing many of the basic policy

Jimmy Pardue, EnerVest District Manager, to Keith Casanova, LDEQ Administrator Remedial Services (Feb. 21, 2007) (available as LDEQ EDMS Doc. No. 5691828).

Adley claims that a cleanup "was completed in accordance with law" and that: "None-the-less, TELC filed a law suit against the company." Adley, *supra* note 80 at 34. These statements are not true. There was no "completed" cleanup in place when TELC's clients filed suit on May 9, 2007. See Complaint, Gulf Restoration Network v. EnerVest Operating, L.L.C., No. 07-cv-00817 (W.D. La. May 9, 2007), ECF No. 1. Indeed, it was not until the next January that EnerVest and LDEQ even agreed on a cleanup plan. That plan would have allowed EnerVest more than 9 years to replace its leaking mercury meters and to clean up contaminated sites. See Cooperative Agreement for Area of Concern Remediation of Former Mercury Meter Measuring Stations in Louisiana, LDEQ Agency Interest No. 149272 (Jan. 3, 2008) (available as LDEQ EDMS Doc. No. 6017036) (setting a cleanup standard of 2.3 parts per million (ppm)).

After negotiations, TELC's clients settled with EnerVest. That settlement tightened the cleanup standard by more than one third (to 1.5 ppm) generally and by more than one half (to 1 ppm) in sites located near wetlands. It also speeded up replacement of the mercury meters. See Stipulated Judgment, Gulf Restoration Network v. EnerVest Operating, L.L.C., No. 07-cv-00817 (W.D. La. July 2, 2009), ECF No. 41, ¶¶ 11, 15, 28. EnerVest's Bill Page confirmed in his testimony that the settlement resulted in "more stringent soil remediation standards" and "the program was accelerated." La. Sen. Hearing Video, *supra* note 39 (Page claimed that the standards were only "a little" more stringent). The facts, therefore, show that far from "running up legal costs needlessly," as Adley charges, TELC's clients achieved significant results by reducing the concentrations of a neurotoxin in Louisiana's environment and speeding up the replacement of the meters that were leaking mercury.

Bill Page also testified that TELC insisted on payment of attorney fees as a condition of the settlement. *Id.* This is presumably why Adley accuses TELC of "legalized extortion." Adley, *supra* note 80 at 34. But both Page's testimony on this point and Adley's accusation are wrong. TELC proposed to leave the attorney-fees issue open—for the parties or the court to resolve after settlement of the merits. See Email from Adam Babich, TELC, to Leonard L. Kilgore, counsel for EnerVest Operating, L.L.C. (Mar. 26, 2009, 11:44 a.m. CST) (attaching the proposal) (on file with author). It was EnerVest—not TELC—that insisted on resolving the attorney-fees issue as part of the settlement. See Email from Leonard L. Kilgore, counsel for EnerVest Operating, L.L.C., to Adam Babich, TELC (Mar. 30, 2009, 3:47 p.m. CST) (on file with author) ("My client does not want to leave that issue open."). Further, at the conclusion of negotiations, EnerVest agreed that the settlement about which Adley now complains was "fair, reasonable and equitable." See [Proposed] Stipulated Judgment, Gulf Restoration Network v. EnerVest Operating, L.L.C., No. 07-cv-00817 at 14 (W.D. La. June 30, 2009), ECF No. 40-2.

<sup>181</sup> See J. William Futrell, *The History of Environmental Law*, in SUSTAINABLE ENVIRONMENTAL LAW 3, 38 (Celia Campbell-Mohn et al., eds., 1993) ("Congress was concerned about the scope of the commerce clause as a basis for regulation impacting behavior of such an individual nature. The Supreme Court's vindication of the 1964 Civil Rights Act opened the door for sweeping environmental health and safety regulation.").

<sup>182</sup> See *Train v. Nat'l Res. Def. Council*, 421 U.S. 60, 64 (1975) (describing Congress' first use of environmental cooperative federalism (in the Clean Air Act Amendments of 1970) as

decisions behind modern environmental regulatory programs, Congress employed a system of cooperative federalism to preserve at least a semblance of state primacy.<sup>183</sup> The basic outline of this system is that EPA promulgates minimum federal standards and then provides funding and oversight for state implementation of those standards through EPA-approved state regulatory programs.<sup>184</sup> One policy justification for this system is that it allows room for state variation and creativity within the latitude afforded by federal mandates.<sup>185</sup> It is fair to ask, therefore, whether Congress' employment of a cooperative federalist scheme in environmental programs suggests that courts should be reluctant to find state law preempted.

To some extent, the answer is yes, although how much this adds to the presumption against preemption is open to question. When interpreting statutes structured to advance cooperative federalism, the Supreme Court has "not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims."<sup>186</sup> Similarly, the Court has held that "[w]here coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one."<sup>187</sup> But a bill like Senator Adley's is *not* part of a "pursuit of common purposes." Senate Bill 549's backers did not purport to find a creative approach to achievement of a federal statutory purpose. Instead, they openly

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Congress "taking a stick to the States" as a reaction to the states' disappointing response to "increasing congressional concern with air pollution").

<sup>183</sup> See Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1532 (1995) ("Cooperative federalism holds the promise of allowing the states continued primacy and flexibility in their traditional realms of protecting public health and welfare, while ensuring that protections for all citizens meet minimum federal standards.").

<sup>184</sup> See Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part Two Statutory Preclusions on EPA Enforcement*, 29 HARV. ENVTL. L. REV. 1, 10 (2005) ("Beginning with the CAA, Congress modeled complicated 'cooperative federalism' constructs as the bedrock of its environmental programs. It envisioned that state laws, approved by EPA and meeting federal requirements, would be the cores of the statutes.").

<sup>185</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("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."); see also Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 184 (2006) (noting that federal preemption can leave "the responsibility of generating policy ideas to the federal government alone").

<sup>186</sup> *Wis. Dept. of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002).

<sup>187</sup> *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973).

advertised the bill for what it was: an attempt to limit the ability of ordinary citizens to mount legal challenges to environmental permits.<sup>188</sup> The fact that Congress' mandates for public participation are part of a cooperative federalist regulatory scheme should not give states license to enact legislation in direct conflict with them.<sup>189</sup>

The Resource Conservation and Recovery Act and the Clean Water Act each provide a direct mandate for public participation *and* also a command that EPA promulgate regulations "specifying minimum guidelines for public participation."<sup>190</sup> EPA uses these regulations as guidance and to determine whether to approve state proposals for state implementation (and federal funding) of water discharge and hazardous waste programs.<sup>191</sup> A fair question, then, is whether Congress intended its mandates for public participation to be subsumed in this approval process or whether they have independent force. For two reasons, the answer must be that the mandates have direct preemptive force.

First, EPA's regulations do not fully implement Congress' mandates for public participation because of the regulations' limited scope. EPA can only enforce the regulations within the context of EPA-approved state regulatory programs.<sup>192</sup> The regulations do not

<sup>188</sup> Blum, *Law Clinics Focus of Bill*, *supra* note 54, at 8A.

<sup>189</sup> The U.S. Supreme Court "has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures." *Haywood v. Drown*, 129 S. Ct. 2108, 2114 (2009).

<sup>190</sup> See *supra* note 8 (quoting Clean Water Act § 101(e)); *supra* note 133 (quoting Resource Conservation and Recovery Act § 7004(b)(1)).

<sup>191</sup> See 40 C.F.R. pt. 25 (2010) (regulations applicable to programs under the Clean Water, Resource Conservation and Recovery, and Safe Drinking Water Acts); *id.* § 123.30 (Clean Water Act regulations); *id.* § 271.14(x),(y),(z),(aa) (Resource Conservation and Recovery Act regulations); see also *Akiak Native Cmty. v. EPA*, 625 F.3d 1162, 1167 (9th Cir. 2010) ("The EPA interprets [40 C.F.R. § 123.30] to offer a safe harbor for what is permissible . . . . If judicial review of a permitting decision by the State is less than what would be available in federal court, the EPA argues that the agency can exercise its discretion in determining whether the state program meets the general standard."). In *Akiak Native Community*, the Ninth Circuit upheld EPA approval of Alaska's Clean Water Act discharge regulatory program despite the fact that Alaska employs a 'loser-pays' rule about attorney fees. See *id.* at 1167–70. But "Alaska provided, as part of its application to assume control over the NPDES program, a declaration that it will not seek attorney's fees from permit challengers who pursue unsuccessful appeals 'unless the appeal was frivolous or brought simply for purposes of delay.'" *Id.* at 1170.

<sup>192</sup> Environmental laws allow EPA to withdraw approval of state programs that stop meeting minimum federal criteria, including programs that fail to comply with public participation requirements. See, e.g., 33 U.S.C. § 1342(c)(3) (2006) (Clean Water Act); 40 C.F.R. § 123.63(a)(2)(iii) (2010) (Clean Water Act regulations); 42 U.S.C. § 6926(e) (2006) (Resource Conservation and Recovery Act); 40 C.F.R. § 271.22(a)(2)(iii) (2010) (Resource Conservation and Recovery Act regulations); 42 U.S.C. §§ 7410(a)(2)(H), (c)(1) & (k)(5), 7509, 7661a(i) (2006) (Clean Air Act); 40 C.F.R. § 52.31 (2010) (Clean Air Act regulations). Further, some regulations require that EPA "respond in writing to any petition to commence withdrawal proceedings." *Id.* § 123.64(b)(1) (Clean Water Act regulations); *id.* § 271.23(b)(1) (Resource Conservation and Recovery Act regulations). Also, environmental laws often give EPA authority to block illegally issued state permits. See, e.g., *id.* § 271.19(e) (providing EPA

prevent states from obstructing public participation in *federal* administrative proceedings. And Senate Bill 549 would have forbidden clinics from helping clients file a petition or suit “against a government agency”—language that includes federal agencies.<sup>193</sup> Thus, even EPA withdrawal of the state’s authority to implement federal environmental regulatory programs would not have stopped this de-lawyering bill—if enacted and upheld—from obstructing Congress’ goal of enhanced public participation.<sup>194</sup>

Second, Congress crafted mandates for public participation using “the language of command”—putting them in terms of what EPA *and the states* “shall” do—not merely as a preface to an authorization to promulgate rules.<sup>195</sup> In construing a statute, courts “give effect, if possible, to every word Congress used.”<sup>196</sup> There is no way to give effect to language that says “[p]ublic participation . . . shall be provided for, encouraged, and assisted by . . . the States,”<sup>197</sup> without recognizing that states may not lawfully obstruct public participation.

#### *E. Mandates for Public Participation Are Within Congress’ Authority*

When Congress uses the word “shall” to shape state regulatory programs, it is natural to ask whether Congress has respected the bounds of the Tenth Amendment. Tenth Amendment doctrine prohibits Congress from “commandee[ring] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”<sup>198</sup> Thus, if Congress’ mandates that states encourage public participation were simple commands that states use their legislative and administrative processes to advance federal policy, the constitutionality of the statutes would be shaky at best. But in the context of the cooperative federalism system that the Resource Conservation and Recovery Act and the Clean Water Act employ, the seemingly mandatory “shall” language does not

authority to “terminate” an illegal state-issued hazardous-waste permit); Clean Water Act § 402(d), 33 U.S.C. § 1342(d)(2) (2006) (providing EPA authority to block illegal permits); Clean Air Act § 505(b), 42 U.S.C. § 7661d(b) (2006) (same).

<sup>193</sup> See *supra* note 62 and accompanying text (quoting Senate Bill 549).

<sup>194</sup> See *supra* note 192 (providing citations to regulations governing EPA withdrawal of states’ authority to implement federal programs).

<sup>195</sup> See *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (“The word ‘shall’ is ordinarily the language of command.” (quoting *Anderson v. Yungkao*, 329 U.S. 482, 485 (1947)) (internal quotation marks omitted)).

<sup>196</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

<sup>197</sup> 42 U.S.C. § 6974(b)(1) (2006).

<sup>198</sup> *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n.*, 452 U.S. 264, 288 (1981)).



commandeer anything.<sup>199</sup> As explained below, neither law offends the Tenth Amendment.

Like most environmental laws, the Resource Conservation and Recovery Act and the Clean Water Act make state participation in the regulatory process strictly voluntary.<sup>200</sup> Most modern antipollution laws give states a choice: One option is to run environmental programs that implement minimum federal standards and to receive federal funding for those programs.<sup>201</sup> This is why congressional mandates for public participation refer to programs “under this chapter,” *i.e.*, programs that implement *federal* law, whether it is the states or EPA that run those programs.<sup>202</sup> The states’ other option is to stand aside and watch EPA run antipollution programs that preempt inconsistent state regulations.<sup>203</sup> In other words, “if a State . . . simply stops regulating in the field, it need not even entertain the federal proposals.”<sup>204</sup> This type of scheme—where Congress inspires states to advance federal policy with threats of preemption and by attaching conditions to related federal benefits—does not offend Tenth

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<sup>199</sup> See *City of Abilene v. EPA*, 325 F.3d 657, 662 (5th Cir. 2003) (holding that even if Cities’ “permits require them to implement a federal regulatory program, the Cities cannot establish a Tenth Amendment violation without demonstrating that they had no other option but to regulate according to federal standards”); see also *Env’tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 847 (9th Cir. 2003) (“[W]hile the federal government may not *compel* them to do so, it may *encourage* States and municipalities to implement federal regulatory programs. . . . [But] the State or municipality must retain ‘the ultimate decision’ as to whether [it] will comply with the federal regulatory program.”).

<sup>200</sup> 42 U.S.C. § 6926(a) (providing for EPA approval of state applications to apply state hazardous waste regulations in lieu of EPA’s program); 33 U.S.C. § 1342(b) (2006) (providing a mechanism for EPA authorization to a state “desiring to administer its own [Clean Water Act discharge] permit program”).

<sup>201</sup> States can “largely control the regulatory programs delegated to them” subject to “immutable federal standards.” David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1812 (2008).

<sup>202</sup> See, e.g., Adam Babich, *Is RCRA Enforceable by Citizen Suit in States with Authorized Hazardous Waste Programs?*, 23 *Env’tl. L. Rep. (Env’tl. L. Inst.)* 10536, 10537 (1993) (“[The] EPA’s approval of a state’s application ‘to administer and enforce a hazardous waste program pursuant to this subchapter [Resource Conservation and Recovery Act, subchapter III]’ causes state [hazardous waste] requirements to ‘become effective pursuant to this chapter.’” (endnotes omitted) (quoting 42 U.S.C. §§ 6926(b), 6972(a)(1)(A) (2006))).

<sup>203</sup> See 42 U.S.C. § 7416 (2006) (“State[s] . . . may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such [Clean Air Act] plan or section.”); *id.* § 6929 (“[N]o state or political subdivision may impose any [hazardous waste regulatory] requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations . . . .”); 33 U.S.C. § 1370 (2006) (“[S]tate[s] . . . may not adopt or enforce any effluent limitation, or other limitation . . . which is less stringent than [Clean Water Act standards] . . .”).

<sup>204</sup> Fed. Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 764 (1982); see also Joseph F. Zimmerman, *Preemption in the U.S. Federal System*, 23 *PUBLIUS*, Fall 1993, at 1, 8 (“A distinction must be drawn between a congressional mandate and a condition-of-aid. . . . A condition-of-aid can be avoided by not applying for a grant; in contrast, a mandate cannot be avoided.”).

Amendment doctrine.<sup>205</sup> No matter that “it may be unlikely that the States will or easily can abandon regulation of [the activity at issue] to avoid [the federal law’s] requirements.”<sup>206</sup> Environmental cooperative federalism may not be among the gentler forms of federal-state interaction, but it is fully consistent with the Tenth Amendment.

#### IV. ARE ATTORNEY FEES AVAILABLE?

A Supremacy Clause claim, standing alone, states a federal question sufficient to invoke the jurisdiction of the federal courts under 28 U.S.C. § 1331.<sup>207</sup> The weight of authority is that the Supremacy Clause also creates a private cause of action.<sup>208</sup> Whether to also include a claim under 42 U.S.C. § 1983 is a judgment call,

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<sup>205</sup> *New York v. United States*, 505 U.S. 144, 167 (1992) (“[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.”). Further, “Congress may attach conditions on the receipt of federal funds” that “bear some relationship to the purpose of the federal spending” and where “the recipient of federal funds is a State . . . [these conditions] may influence a State’s legislative choices.” *Id.* (citations omitted) (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

<sup>206</sup> *Fed. Energy Regulatory Comm’n*, 456 U.S. at 767; see also *City of Abilene v. EPA*, 325 F.3d 657, 662 (5th Cir. 2003) (“[T]he fact that the alternative is difficult, expensive or otherwise unappealing is insufficient to establish a Tenth Amendment violation.”).

<sup>207</sup> See *Verizon Md., Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 642 (2002) (“We have no doubt that federal courts have jurisdiction under § 1331 to entertain such a suit.”); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (“A plaintiff who seeks injunctive relief . . . on the ground that [state] regulation is pre-empted by a federal statute . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.”); *Rollins Env’tl. Servs. (FS), Inc. v. Parish of St. James*, 775 F.2d 627, 631 (5th Cir. 1985) (“The most obvious source of federal jurisdiction in this [federal preemption] case is 28 U.S.C. § 1331 . . .”).

<sup>208</sup> See *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1055–56 (9th Cir. 2008) (“[T]he [U.S. Supreme] Court has consistently assumed—without comment—that the Supremacy Clause provides a cause of action to enjoin implementation of allegedly unlawful state legislation.”); *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 334 & n.47 (5th Cir. 2005) (holding it to be “well-established” that “there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision”); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004) (“A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law.”); *Wright Elec., Inc. v. Minn. State Bd. of Elec.*, 322 F.3d 1025, 1028 (8th Cir. 2003) (“[A] claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law.” (citation omitted) (internal quotation marks)); *Burgio & Campofelice, Inc. v. N.Y. State Dept. of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997) (“[W]e agree with those commentators who have concluded that [t]he best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.” (second alteration in original) (citations omitted) (internal quotation marks omitted)). *But see* *Legal Env’tl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 643 (11th Cir. 1990) (finding no cause of action because “[t]he Supremacy Clause does not secure rights to individuals” (quoting *Andrews v. Maher*, 525 F.2d 113, 119 (2d Cir. 1975))).

since it would likely complicate the issues before a court. The advantage of such a claim is that plaintiffs who prevail under § 1983 are eligible for attorney-fee awards under 42 U.S.C. § 1988.<sup>209</sup> As insurance against the chance that a court will dismiss the § 1983 claim, however, the plaintiff's complaint should also allege federal-question jurisdiction created by the Constitution itself.<sup>210</sup>

To make a case under § 1983, "a plaintiff must first show a violation of the Constitution or of federal law, and then show that the violation was committed by someone acting under color of state law."<sup>211</sup> Somewhat confusingly, the U.S. Supreme Court has ruled that "the Supremacy Clause, of its own force, does not create rights enforceable under § 1983."<sup>212</sup> Instead, that clause "secure[s] federal rights by according them priority whenever they come in conflict with state law."<sup>213</sup> A violation of the statute with preemptive effect is not, however, required for § 1983 to apply. This is because § 1983 "speaks in terms of 'rights, privileges, or immunities,' not violations of federal law."<sup>214</sup> In other words, although plaintiffs cannot use § 1983 to enforce the Supremacy Clause in the abstract, they *can* use § 1983 to enforce that clause's effect of preventing conflicting state laws from compromising their enjoyment of rights under federal law.<sup>215</sup>

Section 1983 is available to enforce *rights*, *i.e.*, "obligations 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce' [and which are] intended to benefit the putative plaintiff."<sup>216</sup> Congress' commands that EPA and the states provide

<sup>209</sup> In contrast, "[a]ttorney's fees are not available in an action under the Supremacy Clause." *United States v. Manning*, 527 F.3d 828, 841 (9th Cir. 2008).

<sup>210</sup> *See Chamber of Commerce v. Edmondson*, 594 F.3d 742, 756 n.13 (10th Cir. 2010) (holding that because the plaintiffs "have a valid right of action under the Supremacy Clause, we need not address the [defendant's] § 1983 argument" (internal quotation marks omitted)).

<sup>211</sup> *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 252–53 (5th Cir. 2005).

<sup>212</sup> *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989) (footnote omitted).

<sup>213</sup> *Dennis v. Higgins*, 498 U.S. 439, 450 (1991) (alteration in original) (quoting *Golden State Transit Corp.*, 493 U.S. at 107); *see also Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 348–49 n.12 (4th Cir. 2001) ("As the holder of [federal] licenses [with which a state law would interfere], [the plaintiff] has standing to assert its Supremacy Clause claim under § 1983.").

<sup>214</sup> *Golden State Transit Corp.*, 493 U.S. at 106.

<sup>215</sup> *See id.* at 112 ("The violation of a federal right that has been found to be implicit in a statute's language and structure is as much a 'direct violation' of a right as is the violation of a right that is clearly set forth in the text of the statute."); *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994) ("Having determined that the Commissioner's policy is in fact pre-empted by federal law, we find strong support in our precedents for the position taken by both courts below that *Livadas* is entitled to seek relief under 42 U.S.C. § 1983 . . .").

<sup>216</sup> *Golden State Transit Corp.*, 493 U.S. at 108 (citation omitted) (quoting *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 432 (1987)). The U.S. Supreme Court has "reject[ed] the notion that [its] cases permit anything short of an unambiguously conferred

for, encourage, and assist the public's participation should be "specific and definite" enough to clear this hurdle. The statutory language is not "so manifestly precatory that it could not fairly be read" as binding.<sup>217</sup> Further, Congress must have intended these mandates to benefit, at least in part, members of the public who wish to participate.<sup>218</sup>

Section 1983 is not available if its use would bypass "remedial devices provided in a particular Act" when those devices are "sufficiently comprehensive."<sup>219</sup> In the *National Sea Clammers Ass'n* case, the Court ruled that the Clean Water Act and Marine Protection, Research, and Sanctuaries Act's comprehensive enforcement mechanisms—including citizen-suit provisions—barred the plaintiffs from using § 1983 to sue for damages from water pollution.<sup>220</sup> But a challenge to de-lawyering legislation would not be a lawsuit about pollution; instead, it would enforce the right, secured by the Supremacy Clause, to participate in implementation of federal law without interference from conflicting state action.<sup>221</sup> There is no

right to support a cause of action brought under § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). A court, therefore, "must first determine whether Congress *intended to create a federal right*." *Id.* "For a statute to create such private rights, its text must be 'phrased in terms of the persons benefited.'" *Id.* at 284 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 692 n.13 (1979)). But § 1983 plaintiffs "do *not* have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Id.* (emphasis added); *see also* *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 978–79 (9th Cir. 2010) ("Congress's intent to benefit the plaintiff must be 'unambiguous.'" (quoting *Gonzaga*, 536 U.S. at 283)).

<sup>217</sup> *Livadas*, 512 U.S. at 132.

<sup>218</sup> *See* *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 503 (2d Cir. 2005) ("Congress clearly intended to guarantee the public a meaningful role in the implementation of the Clean Water Act."); *Costle v. Pacific Legal Found.*, 445 U.S. 198, 216 (1980) (noting that the Clean Water Act's legislative history provides that "[t]he public must have a genuine opportunity to speak on the issue of protection of its waters" (quoting S. Rep. No. 92-414, p. 72 (1971), U.S.C.C.A.N. 1972, p. 3668) (alteration in original)).

<sup>219</sup> *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.")

<sup>220</sup> *Id.* at 20–21. Courts are unlikely, however, to hold that citizen-suit provisions provide a remedy for state violations of a mandate for public participation. *See, e.g.*, *Clean Water Act § 505(a)*, 33 U.S.C. § 1365(a) (2006) (authorizing citizen suits to enforce "an effluent standard or limitation" and EPA duties that are not discretionary); *see also* *Holy Cross Neighborhood Ass'n v. U.S. Army Corps of Engineering*, No. 03–370, 2011 WL 1226237, at \*5 (E.C. La. Mar. 29, 2011) (reviewing case law that citizen suits are "a means by which private parties may enforce the substantive provisions of [environmental laws] against regulated parties" but not "an alternative avenue of judicial review of the . . . implementation of the statute." (internal quotation marks and citation omitted)).

<sup>221</sup> *See* *Golden State Transit Corp.*, 493 U.S. at 106–09 (allowing a § 1983 claim about preemption under the National Labor Relations Act, which has no such "comprehensive enforcement scheme" with respect to "state interference with federally protected labor rights" and noting that "Section 1983 speaks in terms of 'rights, privileges, or immunities,' not

reason to believe that Congress intended federal environmental laws to provide a remedy for violation of this right.<sup>222</sup> Accordingly, 42 U.S.C. § 1983 may be available to fight de-lawyering laws.

Under 42 U.S.C. § 1988(b): “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee” in an action to enforce § 1983. Despite the discretionary tone of this language, prevailing plaintiffs generally receive a fee award if they achieve “some degree of success on the merits” beyond “trivial . . . or purely procedural” success.<sup>223</sup> On the other hand, prevailing defendants generally cannot recover fees “unless a court finds that [the plaintiffs’] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.”<sup>224</sup> Accordingly, plaintiffs threatened by

violations of federal law”). In *Golden State Transit Corp.*, the Court noted, “[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right.” *Id.* at 107 (internal quotation marks omitted) (quoting *Wright*, 479 U.S. at 423–24). “The burden to demonstrate that Congress has expressly withdrawn the remedy is on the defendant.” *Id.* Specifically, the defendant must show that allowing a § 1983 action “would be inconsistent with Congress’ carefully tailored scheme.” *Id.* (citation omitted) (internal quotation marks omitted). *But see* *Lone Star Sec. & Video, Inc. v. City of L.A.*, 584 F.3d 1232, 1237 (9th Cir. 2009) (approvingly citing *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 850 (9th Cir. 1985), which held—pre-*Golden State Transit Corp.*—“preemption of state law under the Supremacy Clause—at least if based on federal occupation of the field or conflict with federal goals—will not support an action under § 1983.”).

<sup>222</sup> *See* *Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 129 S. Ct. 788, 794 (2009) (In cases alleging a constitutional violation, “lack of congressional intent” to preclude § 1983 claims “may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights.”); *Charvat v. E. Ohio Reg’l Wastewater Auth.*, 246 F.3d 607, 615 (6th Cir. 2001) (“In sum, the defendants have failed to prove that Congress intended for the whistleblower provisions of the CWA and SDWA [*i.e.*, the Safe Drinking Water Act] to preclude the enforcement of constitutional rights through § 1983.”). *But see* *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (noting that “the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not” and that “in *all* of the cases in which we have held that § 1983 is available for violation of a federal statute, we have emphasized that the statute at issue . . . did not provide a private judicial remedy . . . for the rights violated”); *cf.* *Verizon Md., Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 643 (2002) (“The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others.”) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)).

<sup>223</sup> *See* *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 n.9 (1983); *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (explaining that a prevailing party is one who “changes the legal relationship between itself and the defendant” and is awarded “at least some relief on the merits of his claim” (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987))); *Saint John’s Organic Farm v. Gem Cnty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1063–64 (9th Cir. 2009) (holding that a “court’s discretion to deny a fee award to a prevailing plaintiff is narrow” (citations omitted) (internal quotation marks omitted)).

<sup>224</sup> *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); *see also* *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983) (“A prevailing defendant may recover an attorney’s fee

unconstitutional de-lawyering laws who prevail under § 1983 should be able to recover their attorney fees from the offending state actor.

## V. CONCLUSION

Society is unlikely to develop a consensus soon about the appropriate balance between environmental protection and other goals. So disputes about environmental issues will likely continue to frustrate members of the regulated community, environmentalists, grass roots activists, and their lawyers. We will sometimes become angry with one another. Nonetheless, at bottom, the effort to protect communities from environmental degradation is a struggle to persuade our fellow citizens, not to defeat some “other” side. We are engaged in a dialogue—not warfare—and if we conduct that dialogue well, we will achieve results that should be viewed as legitimate. Conducting the dialogue well means allowing all sides to participate, in accordance with our laws and with respect for each other and 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 that affect their lives. Those interested in upholding U.S. legal traditions and the rule of law should 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”<sup>225</sup>—who stepped up to ensure that even British soldiers who participated in the Boston massacre were afforded legal representation without regard for the inevitable “clamor and popular suspicions and prejudices.”<sup>226</sup> 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.

Congress’ mandates for public participation in environmental implementation are the law of the land. The U.S. Constitution’s Supremacy Clause should therefore preempt conflicting state de-lawyering laws and provide one tool for keeping the public dialogue about environmental protection going.

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only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant.”).

<sup>225</sup> LINCOLN, *supra* note 21, at 536.

<sup>226</sup> See DAVID MCCULLOUGH, JOHN ADAMS 66 (2001) (“As a lawyer, his duty was clear. That he would be hazarding his hard-earned reputation and, in his words, ‘incurring a clamor and popular suspicions and prejudices’ against him, was obvious . . .”).