

FEDERAL PREEMPTION OF LOCAL RIGHT-TO-WORK ORDINANCES

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Conservative organizations such as the Heritage Foundation and the American Legislative Exchange Council (ALEC) are promoting a national campaign encouraging municipal entities, such as counties and cities, to pass right-to-work (RTW) ordinances. The litigation concerning these ordinances is being followed closely across the nation because some view these ordinances as a necessary economic development tool, while others view them as an attempt to create havoc in labor-relations and undermine union power. But are these local ordinances preempted by a federal statute, the National Labor Relations Act (NLRA or Act)? That is the legal issue currently pending in the federal courts. This Article answers the question with a resounding “yes.” The Article contributes two distinct benefits to the negligible and outdated academic discussion of this important topic. First, the Article is an in-depth exploration of NLRA preemption, without consideration of state law, which permits the issue to be treated more completely than ever before. Second, it provides a modern view of an issue that has been largely ignored for twenty-five years.

The Article explains the various forms of union security that employers and unions have historically bargained for, emphasizing that under current federal law no employee is required to join a union. Each employee may instead pay a fee in an amount that simply covers the cost to represent that employee. The Article then explains the broad preemptive effect of the NLRA, which ensures uniformity in labor relations. The Article discusses how two preemption doctrines require an expert board to determine labor relations issues, foster predictability in bargaining, and maintain industrial peace. The Article next introduces a narrow exception to the comprehensive federal preemption of states’ ability to regulate in the area of labor relations—the ability of states to pass right-to-work laws. The necessary background having been covered, the Article then turns to the issue of local right-to-work (LRTW) ordinances. To support the conclusion that these local right-to-work ordinances are preempted by the NLRA, the Article first applies the two preemption doctrines to the enactment of these ordinances. The Article then explains how every court to address the issue, except one, has found the ordinances preempted and how labor law experts, including the vice president of the National Right to Work Committee, agree the ordinances are preempted. Next, the Article examines the language of the NLRA and the legislative history behind the passage of the section of the NLRA permitting states to pass right-to-work laws. Both the language and the legislative history of the statute support the conclusion that the local right-to-work ordinances are preempted. Finally, the Article compares and contrasts the NLRA’s broad preemption of local right-to-work ordinances to schemes of preemption under other federal statutes. The Article concludes by explaining that, given the federal preemption of local right-to-work ordinances, expending municipal

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funds to enact such ordinances is a poor use of taxpayer funds, and by suggesting areas for further research.

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I. INTRODUCTION

Since the 1970s income inequality in the United States, based on how much money households make in a year, has risen almost ten percent.¹ Wealth inequality, based on the total net worth of households, has risen from seven percent to 22 percent in the same period.² In contrast, the unionization

¹ Anthony Atkinson & Salvatore Morelli, *Chartbook of Economic Inequality*, CHARTBOOK OF ECONOMIC INEQUALITY, <http://www.chartbookofeconomicinequality.com/inequality-by-country/usa/> [https://perma.cc/Z74W-3TFB].

² Chris Matthews, *Wealth inequality in America: It's worse than you think*, FORTUNE, <http://fortune.com/2014/10/31/inequality-wealth-income-us/> [https://perma.cc/NFU9-XTL6].

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rate in the private sector has dropped from 24.6 percent³ to 6.7 percent.⁴ Of course, correlation is not causation. But many scholars agree that the decrease in unionization has likely contributed to the growing inequality. Also correlating with the drop in the unionization rate, is the growth in the number of states adopting right-to-work (RTW) legislation. Right-to-work laws prohibit unions and employers from entering into agreements that require employees represented by the union to pay for the costs of representing them, such as the cost of negotiation agreements about wages and the cost of hiring an attorney to represent a discharged employee. However, under the National Labor Relations Act, the benefits received under these collective bargaining agreements must flow to both union and non-union workers. The number of right-to-work states has increased from 12 to 28 since 1950.⁵ Although it is impossible to prove scientifically, many make a logical argument that when unions must represent employees who need not pay for the representation, they are likely to go out of business.⁶ Under this logic right-to-work has contributed to the dramatic decline in unionization and the corresponding rise in inequality. Yet others support right-to-work as providing freedom to workers from having to contribute to a union when the union advocates positions they do not support and as a means to attract business, fostering economic development. Advocates of right-to-work in particular conservative interest groups, like the Heritage Foundation, American Legislative Exchange Council (ALEC), and Americans for Prosperity, have recently turned to a previously rarely-used strategy of passing local right-to-work ordinances in states where passing right-to-work legislation has previously been unsuccessful.⁷

³ GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 22 (2004), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace [https://perma.cc/ZS9A-7YYU].

⁴ BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, UNION MEMBERS – 2016 at 5 (2016), <http://www.bls.gov/news.release/pdf/union2.pdf> [https://perma.cc/8UQA-JA66].

⁵ *Right-To-Work Resources*, Nat'l Conference of State Legislatures, <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> [https://perma.cc/QAW9-VYT6].

⁶ In fact, the Supreme Court has recognized that the legislature in enacting Section 8(a)(3) intended to permit union security so that employees would not reap the benefits of services for which they had not paid. *See* *Communication Workers v. Beck*, 487 U.S. 735, 748 (1988).

⁷ AMERICANS FOR PROSPERITY, *Americans for Prosperity announces \$50,000 grant to right-to-work legal defense fund*, <https://americansforprosperity.org/americans-for-prosperity-announces-50000-grant-to-right-to-work-legal-defense-fund/> [https://perma.cc/8EQW-C3GC]. 12 Kentucky counties have passed local-right-to-work ordinances. Chris Cooper, *Logan County right-to-work not enforceable*, NEWS DEMOCRAT & LEADER (Feb. 15, 2016) <http://newsdemocratleader.com/news/3544/logan-county-right-to-work-not-enforceable> [https://perma.cc/37TA-GZ6D]; Robert Iafolla, *Case to Watch: Judge to rule on Kentucky county's right-to-work law*, REUTERS LEGAL <http://www.reuters.com/Article/us-employment-righttowork-idUSL1N12K0JS20151020> [https://perma.cc/3C4N-ES2T]. Lincolnshire, a city in Illinois, has also passed one.

These organizations are pushing for passage of these ordinances in several states.⁸ If many different localities in several different states such as Illinois, Maine, Ohio, and Pennsylvania pass local right-to-work ordinances, it would require unions and employers to navigate a tapestry of right-to-work and non-right-to-work municipalities. Such a scheme would abrogate the intent of the National Labor Relations Act (NLRA or Act) to foster industrial peace. Yet, the validity of these laws under the NLRA is contested. This Article explains that local right-to-work laws are and were intended to be preempted by the NLRA.

This Article contributes two distinct benefits to the negligible and outdated academic discussion of this important topic. First, it is an in-depth exploration of NLRA preemption without consideration of state law. This approach allows for the subject to be treated more completely than ever before. Second, it provides a modern view of an issue that has gone largely ignored for 25 years. In July 1957, an article published in the *Stanford Law Review*, written in the wake of the adoption of local right-to-work ordinances by the City of Palm Springs and two California counties, argued that such ordinances were permissible under both the NLRA and California law.⁹ Then, in December of that year, during which time two more California counties adopted local right-to-work ordinances, the *Stanford Law Review* published a response that argued such laws were preempted by both the NLRA and California law.¹⁰ The issue faded into the background until in 1991, an article was written during a time when several Missouri cities and counties were considering passing local right-to-work ordinances.¹¹ The author ultimately concluded that, while such ordinances were not preempted by the NLRA, a Missouri Supreme Court decision rendered them unenforceable.¹² This Article will serve as a current, updated guide to local authorities considering passing such ordinances, unions and employers which may find themselves subject to them, and judges who have the occasion to consider them.

Section II explains the various forms of union security that employers and unions have historically bargained for, emphasizing that under current federal law no employee is required to join a union. Each employee may instead pay a fee in an amount that simply covers the cost to represent that employee. Section III then explains the broad preemptive effect of the NLRA, which insures uniformity in labor relations. The Article discusses

⁸ Iafolla, *supra* note 7 (noting that Ohio and Maine are states where conditions are favorable for passage of local right-to-work ordinances and that some counties in Pennsylvania may pass them).

⁹ Nathan Berke & George Brunn, *Local Right to Work Ordinances: A New Problem in Labor and Local Law*, 9 *STAN. L. REV.* 674, 689 (1957).

¹⁰ Ted Finman, *Local "Right to Work" Ordinances: A Reply*, 10 *STAN. L. REV.* 53 (1957).

¹¹ Pamela Rolfs, *The Validity of Local Right-To-Work Ordinances Under Federal and Missouri Law*, 56 *MO. L. REV.* 1015 (1991).

¹² *Id.* at 1040.

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how two preemption doctrines require an expert board to determine labor relations issues, foster predictability in bargaining, and maintain industrial peace. Section IV introduces a narrow exception to the comprehensive federal preemption of states' ability to regulate in the area of labor relations—the ability of states to pass right-to-work laws. The necessary background having been covered, Section V turns to the issue of local-right-to-work ordinances. To support the conclusion that these local right-to-work ordinances are preempted by the NLRA, Section VI first applies the two preemption doctrines to the enactment of these ordinances. Then, Section VI explains how every court to address the issue, except one, has found the ordinances preempted and how labor law experts, including the vice president of the National Right to Work Committee, agree the ordinances are preempted. Next, Section VI examines the language of the NLRA and the legislative history behind the passage of the section of the NLRA permitting states to pass right-to-work laws. Both the language and the legislative history support the conclusion that the local right-to-work ordinances are preempted. Finally, Section VI compares and contrasts the NLRA's broad preemption of local right-to-work ordinances to schemes of preemption under other federal statutes. The Article concludes by explaining that, given the federal preemption of local right-to-work ordinances, expending municipal funds to enact such ordinances is a poor use of taxpayer funds and by suggesting areas for further research.

II. UNION SECURITY IN THE PRIVATE SECTOR

The NLRA governs private sector labor relations. The Act is designed to further collective action and bargaining and maintain industrial peace.¹³ In the United States, the NLRA protects the internationally recognized human right¹⁴ to organize and join a union. The Act guarantees employees the rights to join a union, bargain collectively, and act concertedly regarding terms and conditions of employment.¹⁵ It also, however, guarantees employees the right to refrain from joining or supporting a union by forbidding discrimination by employers and unions against employees who elect not to join a union.¹⁶ In striking a balance between fostering collective action and guaranteeing individuals the right not to join a union, the Act permits some forms of union-security agreements, but not others.

¹³ National Labor Relations Act § 1, 29 U.S.C. §§ 151–68 (1984).

¹⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 23(4) (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/index.html> [https://perma.cc/2E9J-3YYZ]; Int'l Labour Org., Convention Concerning Freedom of Association and Protection of the Right to Organize, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:C087:NO [https://perma.cc/4CQ2-CAC2].

¹⁵ National Labor Relations Act § 7, 29 U.S.C. §§ 151–69 (1935); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–67 (1978).

¹⁶ National Labor Relations Act §§ 7–8(b)(2), 29 U.S.C. §§ 151–69 (1935).

A union-security agreement is an agreement bargained by a union and an employer, normally as part of a collective bargaining agreement. It provides security to the union and the employees the union represents by ensuring that employees join or pay for the resources the union provides them. Unions are required to represent all employees within the bargaining unit, whether members or not.¹⁷ Because of this, without a union security clause, a union might not have the resources it needs to effectively represent the bargaining unit's employees.¹⁸

Under current longstanding interpretation of the Act, forms of union security that require employees to join a union are unlawful. The only lawful form of union security is an agency shop that permits employees to elect not to join and to instead pay only the portion of union dues that covers the cost of representing the employees.¹⁹ An exception for religious objectors permits them to pay to a charity rather than the union that represents them.²⁰

a. Closed and union shops are unlawful

Before the passage of the Taft-Hartley Act in 1947, which guaranteed employees the right to elect not to join a union, closed and union shop security agreements were prevalent. A closed shop agreement required an employer to hire only workers who were members of the union representing the employer's employees.²¹ This permitted unions to determine the eligibility of job applicants.²² A union shop agreement required any person hired by an employer to join the union within a certain time period.²³ Even after the passage of the Taft-Hartley Act, many union security agreements remained union shop agreements requiring employees to join the union within 30 days, because 30 days was the outer limit set by the Act.²⁴ In 1988, the Supreme Court determined, however, that requiring employees to join a

¹⁷ While some have proposed that unions should be member only, meaning that unions should only represent those who join the union, the NLRB does not require an employer to bargain with a member-only union. Instead, the NLRB requires only that an employer recognize a union who represents a majority of the employees in the unit. Once certified as the exclusive representative, the union must represent all employees whether members or not.

¹⁸ See *Communication Workers v. Beck*, 487 U.S. 735, 748 (1988); *NLRB v. General Motors Corp.*, 373 U.S. 734, 740–41 (quoting S. REP. NO. 80-105, at 6 (TK)); *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954); *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976).

¹⁹ See *Mobil Oil*, 426 U.S. at 416 (“Congress’ decision to allow union-security agreements at all reflects its concern that, at least as a matter of federal law, the parties to a collective-bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them.”).

²⁰ National Labor Relations Act § 19, 29 U.S.C. §§ 151–69 (1935).

²¹ See Douglas E. Ray, Calvin William Sharpe, & Robert N. Strassfeld, UNDERSTANDING LABOR LAW §17.02 [A] at 366 (4th ed. 2014); *Beck*, 487 U.S. at 747.

²² David G. Sumner, *Plumbers and Pipefitters: The Need to Reinterpret the Scope of Compulsory Unionism*, 33 AM. U. L. REV. 493, 501 (1984).

²³ Ray, *supra* note 21, at 366.

²⁴ See National Labor Relations Act § 8(a)(3), 29 U.S.C. § 151–69 (1935); *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 100 (1963).

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union or pay full dues would violate the union's duty of fair representation because employees would be compelled to support political activities by the union with which they did not necessarily agree.²⁵ Thus, the Supreme Court determined that the strictest type of lawful union security agreement is an agency shop agreement.

b. Agency shop is lawful

The agency shop remains a lawful type of union-security arrangement, specifically protected by the NLRA.²⁶ An agency shop agreement, or fee-payer arrangement, requires that employees either join the union or, if they elect not to join, pay a fee equivalent to a portion of dues used to support representing the employees.²⁷ Employee representation costs include pay for lawyers and others representing the union during collective bargaining or at arbitration or supplies needed to file grievances²⁸ on behalf of employees. Amounts used for other purposes, such as lobbying or sponsoring a political candidate, need not be paid.

Unions are required to provide notice to all represented employees that they have the right not to join and to inform all those who do not join of the right to pay only a fair share fee rather than an amount equivalent to dues.²⁹ Unions are also required to hire an external independent auditor to determine which amounts agency fee payers must pay.

Thus, employees have the right not to join the union that represents them. They also have the right to pay only their fair share so that not a cent of their money is spent on speech with which they do not agree.

c. Religious objectors may pay to a charity rather than the union

Moreover, those who have a bona fide religious objection to paying any amount, even their fair share, to a union are guaranteed the right to pay instead to a charity.³⁰ Thus, in every private sector workplace in the United States that is governed by the NLRA, religious employees are guaranteed their right to refrain from unionization and to refrain from paying any money to the union that represents them.

²⁵ See *Beck*, 487 U.S. at 762–63. People sometimes erroneously believe that the union shop is lawful because many CBAs continue to use union shop language. See *Marquez v. SAG*, 525 U.S. 33 (1998) (holding a union does not violate the duty of fair representation by negotiating for union shop language that tracks the language of the Act).

²⁶ *Schermerhorn*, 375 U.S. at 100.

²⁷ See *Ray*, *supra* note 21, at 366; *Schermerhorn*, 375 U.S. at 98; *Beck*, 487 U.S. at 759.

²⁸ A grievance is a complaint that the CBA has been violated.

²⁹ *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995), *enforced sub nom.* *International Association of Machinists v. NLRB*, 133 F.3d 1012 (1990).

³⁰ National Labor Relations Act § 19, 29 U.S.C. §§ 151–69 (1935).

III. NLRA'S PREEMPTIVE EFFECT

The NLRA is a federal statute intended to govern all private sector employment, other than certain areas excluded by the Act.³¹ The rationale behind having a federal statute is that labor relations rules will be consistent across state lines, enabling employers and unions, particularly multi-state employers and unions, predictability.³² Predictability enables parties to bargain with clear expectations and fosters industrial peace.³³ Additionally, the federal legislative scheme establishes the National Labor Relations Board (NLRB) as the agency that enforces the statute. The rationale behind having an agency rather than courts enforce the statute is that the agency is comprised of experts with knowledge of the relevant law and labor relations which generalist courts lack.³⁴

A second statute, the Labor Management Relations Act (LMRA), permits union-represented employees to sue for breach of contract. An employee can also sue a union for breaching the duty of fair representation, including for failing to provide notice of the right not to join the union and the right to pay an agency fee.³⁵

To ensure that federal law developed by the NLRB governs legal issues related to labor relations, the NLRA preempts state statutes and regulations related to collective bargaining and unfair labor practices. Similarly, the LMRA preempts state laws and regulations that require interpretation of a collective bargaining agreement. While a dissatisfied employee can file a cause of action in state or federal court, only federal law applies. Similar to the NLRA, the rationale for applying federal law is to ensure that interpretation of collective bargaining agreements is consistent across state lines, which fosters predictability and stability in labor relations.³⁶

To understand the limited nature of the exception to the NLRA's preemptive effect that permits state right-to-work-laws, it is necessary to understand the two types of preemption under the NLRA, *Garmon* preemption and *Machinists* preemption.

³¹ For instance, the NLRA excludes public-sector employees and agricultural and domestic workers from its coverage. NATIONAL LABOR RELATIONS BOARD, *Are You Covered?*, NLRB.GOV, <https://www.nlr.gov/rights-we-protect/whats-law/employees/i-am-represented-union/are-you-covered> [https://perma.cc/GJW7-99UU].

³² HENRY E. FARBER, ET AL., AM. BAR ASS'N, "YOU'RE NOT WELCOME HERE: NLRA PREEMPTION AND REMOVAL" 1 (2010), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/186.authcheckdam.pdf [https://perma.cc/W5P6-9EFT].

³³ Ray, *supra* note 21, at 313.

³⁴ *Id.*

³⁵ See Labor Management Relations Act § 301, 29 U.S.C. §§ 141–97 (1947); *Communication Workers v. Beck*, 487 U.S. 735 (1988).

³⁶ Ray, *supra* note 21, at 331.

a. Garmon preemption

The doctrine of preemption governing unfair labor practices is termed *Garmon* preemption after the seminal case in the area, *San Diego Building Trades Council v. Garmon*.³⁷ In *Garmon* the Court held that a California court could not award damages to an employer for a peaceful strike that the California court did not have authority to enjoin, due to federal preemption. The Court used the opportunity to summarize the principles of NLRA preemption. The Court began by noting that “Congress did not merely lay down a substantive rule of law” but instead delegated “primary interpretation and application of its rules to a specific and specially constituted tribunal.”³⁸

[C]entralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.³⁹

The Court further explained that even when it is unclear whether a particular activity is governed by Sections 7 or 8, the “determinations [must] be left in the first instance to the National Labor Relations Board.”⁴⁰ The Court concluded with the sentence that is generally used to summarize the *Garmon* doctrine to this day: “When an activity is arguably subject to Sections 7 or 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.”⁴¹

To ensure protection of employees’ rights to unionize, collectively bargain, and act in concert regarding terms and conditions of employment, the Act establishes a series of unfair labor practices.⁴² Among other practices, employers and unions are prohibited from coercing, restraining, or interfering with employees in the exercise of their rights and from discriminating based on union activity.⁴³ Notably, the Act specifies that requiring payment of an agency fee does not constitute unlawful discrimination.⁴⁴

To ensure consistent determinations about when unfair labor practices have been committed, the Act preempts any regulation by states or locali-

³⁷ 359 U.S. 236 (1959).

³⁸ *Id.* at 242.

³⁹ *Id.* at 242–43.

⁴⁰ *Id.* at 244–45.

⁴¹ *Id.* at 245.

⁴² National Labor Relations Act, §§ 7–8, 29 U.S.C. §§ 151–69 (1935).

⁴³ National Labor Relations Act, §§ 8(a)(1)–(b)(2), 29 U.S.C. §§ 151–69 (1935).

⁴⁴ National Labor Relations Act, § 8(b)(2), 29 U.S.C. §§ 151–69 (1935) (“or to discriminate . . . on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.”).

ties⁴⁵ that impact arguably protected or prohibited conduct under the NLRA.⁴⁶ States and localities are prohibited from establishing greater or lesser protections for employees or more significant remedies for commitment of unfair labor practices.⁴⁷ Preemption ensures that the NLRB, with its expertise, determines when a party has committed an unfair labor practice.⁴⁸ It ensures that employers and unions are aware of consistent rules that govern across all states. This ensures equal treatment of employees, not dependent on whether a state grants lesser or greater protections. It also ensures predictability in collective bargaining, which not only fosters industrial peace but also avoids spending many hours and resources determining applicable law for each particular employer location.

Narrow exceptions to *Garmon* preemption permit states and localities to regulate in certain circumstances. States and localities can exercise their police powers to enjoin violence or trespass during strikes or other protected activities.⁴⁹ They can also regulate in other areas of “deeply rooted” state interest that states have traditionally regulated that are of “peripheral concern” to federal labor law.⁵⁰ Thus states may regulate criminal or tortious conduct,⁵¹ such as assault and outrage.

Notably, unlike state right-to-work laws and payment of agency fees, the Act is silent on topics such as assault and defamation. The Supreme Court has explicitly held that actions by union-represented employees protesting termination for failure to pay dues are preempted.⁵² Moreover, as to topics directly addressed by the Act, Labor Law preemption is generally recognized as an example of the most comprehensive and complete federal preemption.⁵³

b. *Machinists* preemption

The doctrine of preemption governing collective bargaining is termed *Machinists* preemption after the seminal case in the area, *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Board*.⁵⁴ In *Machinists*, a Wisconsin Employee Relations Commission or-

⁴⁵ See *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986).

⁴⁶ See *San Diego Bldg. Trades Council, Millmen’s Union Local 2020 v. Garmon*, 359 U.S. 236, 244–45 (1959).

⁴⁷ See *id.* at 242.

⁴⁸ See *id.*

⁴⁹ See *Sears, Roebuck and Co. v. San Diego City District Council of Carpenters*, 436 U.S. 180 (1978).

⁵⁰ See *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61 (1966).

⁵¹ See *id.* at 53 (permitting defamation claim using heightened standard used for public figures); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (permitting IIED, outrage claim).

⁵² See *Amalgamated Assoc. of Street Employees v. Lockridge*, 403 U.S. 274, 285 (1971).

⁵³ See Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

⁵⁴ 427 U.S. 132 (1976).

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dered a union to cease and desist from a campaign where employees refused to work overtime during negotiation of a new collective bargaining agreement (CBA) with the employer. The Court held that although the refusal to work overtime was not arguably protected or prohibited by the NLRA, the Commission could not issue the cease and desist order because of federal NLRA preemption. The Court explained that in addition to *Garmon* preemption “a second line of pre-emption analysis has been developed in cases focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left ‘to be controlled by the free play of economic forces.’”⁵⁵ The Court explained:

There is simply no question that the Act’s processes would be frustrated in the instant case were the State’s ruling permitted to stand. The employer in this case invoked the Wisconsin law because it was unable to overcome the Union tactic with its own economic self-help means. Although it did employ economic weapons putting pressure on the Union when it terminated the previous agreement, it apparently lacked sufficient economic strength to secure bargaining demands under “the balance of power between labor and management expressed in our national labor policy. But the economic weakness of the affected party cannot justify state aid contrary to federal law for, as we have developed, the use of economic pressure by the parties to a labor dispute is not a grudging exception (under) . . . the (federal) Act; it is part and parcel of the process of collective bargaining. The state action in this case is not filling a regulatory void which Congress plainly assumed would not exist. Rather, it is clear beyond question that Wisconsin (entered) into the substantive aspects of the bargaining process to an extent Congress has not countenanced.”⁵⁶

The Act requires that employers and unions bargain in good faith.⁵⁷ As part of the bargaining process, the parties often bring economic strength to bear on the other party. For instance, employees may slow down their work, or an employer may lock out its employees.⁵⁸ The NLRB and courts have recognized that using economic weapons is part and parcel of the collective bargaining process.⁵⁹ It enables parties to move past impasse in negotiations and reach a mutually satisfactory agreement, which is imperative to long-term industrial peace. Any state or local action that interferes with the “free play of economic forces” and disturbs the balance of power between bar-

⁵⁵ *Id.* at 140.

⁵⁶ *Id.* at 148–49 (internal quotations and citations omitted).

⁵⁷ National Labor Relations Act §§ 8(a)(3)–8(a)(5), 29 U.S.C. §§ 151–69 (1935).

⁵⁸ Ray, *supra* note 21, at 322–23.

⁵⁹ See *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 495 (1960).

gaining parties is therefore preempted.⁶⁰ The premise of the Act is that employers, unions, and employees engage in self-governance and regulation with minimal intercession by the government. Were states to begin regulating parties' use of economic weapons, government mandates might replace self-governance.⁶¹ Self-governance and good faith bargaining should lead to long-term stable relationships because the parties have worked out the agreement on their own and are, therefore, invested in the smooth implementation and operation of the agreement.

Similar to *Garmon* preemption, narrow exceptions to *Machinists* preemption permit states or localities to regulate the balance of power between unions and employers in limited circumstances. States may set minimum terms of employment, such as health and safety regulations or severance pay for plant closings.⁶² States may also determine whether to award unemployment compensation to strikers, particularly in light of the federal Social Security Act.⁶³ Additionally, a state can act in its proprietary capacity as a consumer to require employers to hire union represented employees for certain projects.⁶⁴ This narrow exception does not apply to passage of an act or ordinance, such as a right-to-work ordinance, because such laws of general application do not result from proprietary state action.⁶⁵

IV. RTW: ONE OF THE FEW AREAS WHERE NLRA PERMITS STATES TO REGULATE

Against this backdrop of comprehensive federal preemption of the states' ability to regulate in the area of labor relations, the Act grants one narrow explicit exception. Section 14(b) states:

Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

In 1947 at the time the Taft-Hartley Act amended the NLRA and added this provision, few states had right-to-work laws which forbade unions and

⁶⁰ *Machinists*, 427 U.S. at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986).

⁶¹ See *Machinists*, 427 U.S. at 141; *Local 24, Int'l Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 294 (1959).

⁶² Ray, *supra* note 21, at 324 & n.52.

⁶³ See *N.Y. Tel. Co. v. N.Y. State Dep't. of Labor*, 440 U.S. 519, 546 (1979); *Baker v. Gen. Motors Corp.*, 478 U.S. 621, 635 (1986).

⁶⁴ See *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 233 (1993).

⁶⁵ See *Wis. Dep't. of Indus., Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 282, 288–91 (1986); *Chamber of Commerce of the U. S. v. Brown*, 554 U.S. 60, 69–75 (2008).

employers from contracting for a union, closed, or agency shop.⁶⁶ The provision ensured that neither Section 8(a)(3)'s provision permitting termination for failure to pay union dues, or any other part of the Act, would render such a state right-to-work law invalid under the Act or the Act's preemptive effect.⁶⁷ However, in the absence of state right-to-work legislation, Section 8(a)(3)'s proviso guaranteed unions and employers the ability to require union membership or payment of an agency fee. Indeed, the Supreme Court has recognized in multiple decisions that by enacting Section 8(a)(3) Congress intended to ensure that employees would not "reap the benefits" of the union's service without paying for it.⁶⁸

V. THE ISSUE OF LOCAL RIGHT-TO-WORK ORDINANCES

Today, 22 states have not passed right-to-work laws and permit unions and employers to require non-union members to pay the reduced agency fee that covers the union's costs representing those employees.⁶⁹ Prior to the passage of right-to-work legislation in Kentucky in January of 2017, beginning in 2014, around twelve Kentucky counties passed such ordinances.⁷⁰ More recently, an Illinois city, Lincolnshire, passed a local right-to-work-ordi-

⁶⁶ See *Section 14(b) of Taft-Hartley Act Held to Authorize State Court Enforcement of State Agency Shop Prohibition*, 62 COLUM. L. REV. 538, 542 (1962).

⁶⁷ *Retail Clerks Int'l Assoc. v. Schermerhorn*, 375 U.S. 96, 100–01 n.8 (1963) ("Since by the Labor Act Congress preempts the field that the act covers . . . the committee has provided expressly . . . that laws and constitutional provisions of any State that restrict the right of employers to require employees to become or remain members of labor organizations are valid.") (quoting H.R. REP. NO. 80-245, at 44 (1947)). "Territories" means sovereign areas such as Guam or the U.S. Virgin Islands. U.S. DEP'T OF STATE, 7 FAM 1120 ACQUISITION OF U.S. NATIONALITY IN U.S. TERRITORIES AND POSSESSIONS (Jan. 13, 2013), https://fam.state.gov/FAM/07FAM/07FAM1120.html#M1121_2_1 [<https://perma.cc/MMA2-3ZRU>].

⁶⁸ *Communications Workers v. Beck*, 487 U.S. 735, 748 (1988); *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 740–41 (1963) (quoting S. Rep. No. 80-105, at 6 (1947)); *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976).

⁶⁹ See NAT'L CONFERENCE OF STATE LEGISLATURES, RIGHT-TO-WORK STATES (2017) <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> (noting that 28 states are currently right-to-work states) [<https://perma.cc/E28C-PGQ7>].

⁷⁰ The passage of Kentucky's right-to-work statute likely preempts the local ordinances. Cf. *Kentucky Restaurant Ass'n v. Louisville/Jefferson County*, 2015 SC 000371TG (Oct. 20, 2016) (ruling Louisville's minimum wage ordinance preempted by state law). The plaintiffs in the Hardin County law suit requested that the Sixth Circuit vacate the decisions as moot, but the Sixth Circuit rejected the motion to vacate. Braden Campbell, 6th Cir. Won't Vacate Ky. County Right-To-Work Ruling available at https://www.law360.com/employment/articles/902249/6th-circ-won-t-vacate-ky-county-right-to-work-ruling?nl_pk=6dee86de-417b-4d70-b3e9-7ff653636193&utm_source=newsletter&utm_medium=email&utm_campaign=employment. The court reasoned that the impact of the state law on the Hardin County ordinance "is a yet-to-be determined matter of state law that is beyond the scope of the instant appeal . . ." Order, *UAW V. Hardin Cnty.*, No. 16-5246 (March 15, 2017). The plaintiffs have filed a request to the Supreme Court to vacate the decisions as moot. Braden Campbell, 6th Cir. Won't Vacate Ky. County Right-To-Work Ruling available at https://www.law360.com/employment/articles/902249/6th-circ-won-t-vacate-ky-county-right-to-work-ruling?nl_pk=6dee86de-417b-4d70-b3e9-7ff653636193&utm_source=newsletter&utm_medium=email&utm_campaign=employment. The issue of whether a state law preempts local right-to-work ordinances is beyond the scope of this article.

nance. Illinois is not a right-to-work state. Municipalities in right-to-work states will continue to pass these ordinances in response to a concerted campaign by organizations such as the Heritage Foundation, the American Legislative Exchange Council (ALEC), and Protect my Check to render lawful agency shop agreements in non-right-to-work states ineffective.⁷¹

Counties are ostensibly passing these ordinances as a means to attract new business. Yet, some of these counties already have well-established unionized businesses that provide well-paying jobs for employees.⁷² These unions and the employees they represent believe passage of right-to-work ordinances will be very detrimental for several reasons. The ordinances will deter other unionized businesses from locating in these counties. They will impinge on the ability of employers and unions to enter into contracts benefiting their business and members. And the ordinances will create instability and confusion in collective bargaining, particularly where an employer and the union representing its employees operate across multiple county lines, some of which have and some of which have not passed local right-to-work ordinances.

Unions and unionized companies have fought against these ordinances by lobbying officials considering passage of a local-right-to-work ordinance.⁷³ They have also challenged these ordinances in court because the ordinances are preempted by the NLRA. The preemption of local right-to-work ordinances is likely headed for the Supreme Court. The legal status of such ordinances is important for several reasons. Passing preempted ordinances is a waste of tax-payer dollars and the valuable time of local officials. Companies wishing to enter into union-security agreements with their union represented employees must be able to do so without fear of violating a local ordinance. Unions, too must be able to enter agency-fee agreements without fear of violating local law. Unions are required to represent all employees in a unit, whether members or not, and need the resources provided by the agency fee to successfully represent non-members. Additionally, variation of rules governing collective bargaining within a single state creates the insta-

⁷¹ See Michael Bologna, *Conservative Groups Push Municipalities to Enact Local Right-to-Work Ordinances*, BLOOMBERG BNA DAILY LABOR REPORT (Jan. 8, 2015); JAMES SHERK & ANDREW KLOSTER, LOCAL GOVERNMENTS CAN INCREASE JOB GROWTH AND CHOICES BY PASSING RIGHT-TO-WORK LAWS, HERITAGE FOUND. (Aug. 26, 2014) http://thf_media.s3.amazonaws.com/2014/pdf/BG2947.pdf [<https://perma.cc/RXF9-4K76>]; Iafolla, *supra* note 7 (model local right-to-work ordinance developed by offshoot of ALEC).

⁷² Kristen Clark, *Oldham Considers 'Right-to-Work' Ordinance*, COURIER-JOURNAL (Feb. 24, 2015) (noting a unionized Corvette plant is in Warren County, which was the first Kentucky county to pass a local-right-to-work ordinance). Plaintiffs in the Hardin County suit include unions representing employees at Metals Structural Products, Inc., Dow Corning Corp., Kroger Limited Partnership, Mid South Division of Louisville, Bimbo Bakery, Irving Materials, Inc., and The Gates Corp., all companies located in Hardin County. *Compl., UAW v. Hardin Cty.*, 2016 U.S. Dist. LEXIS 12737 (W.D. Ky. Jan. 14, 2015) (No. 3:15-cv-66-DJH).

⁷³ One Kentucky County passed an ordinance affirming the ability of unions and employers to enter into agency fee agreements.

bility and unpredictability in bargaining that the NLRA aims to avoid.⁷⁴ Such instability and unpredictability results in having to expend resources to bargain multiple different union-security agreements, even by the same union and company when they operate across county lines. It also upends stable industrial relations and threatens to create the type of industrial strife the Act aims to avoid.

VI. LRTW ORDINANCES ARE PREEMPTED

Local-right-to-work ordinances are preempted by the *Garmon* doctrine because Section 7 arguably protects employees' rights to elect an exclusive representative, to act in concert, and to collectively bargain for union security arrangements. They are also preempted by the *Machinists* doctrine because they regulate the bargaining proposals available to employers and unions in an area left to the free play of the parties by the Act.

In fact, every court to address the issues, except one, has found local right-to-work ordinances preempted by the NLRA. Even the National Right to Work Committee concedes these ordinances are preempted. The Act provides only one narrow exception from the breadth of its preemptive effect, and that is for states, not localities, to enact right-to-work laws. Indeed, scrutinizing the language of the Act illustrates that the drafters of the Wagner Act, the original NLRA, and the amendments to it, used the term "State" to mean a state, and not a locality, and included terms such as "political subdivision" when they intended to include localities as well as states.

a. Preempted by Garmon

Local right-to-work ordinances are *Garmon* preempted. When employees, through their unions, collectively bargain with their employer to require an agency shop, they engage in precisely the type of bargaining protected by Section 7 of the Act. And when employees support the financial viability of their elected exclusive representative they engage in precisely the type of concerted action and union support protected by Section 7. When a locality passes an ordinance forbidding employers from entering into such agreements, it directly interferes with the NLRB's jurisdiction to protect Section 7 activity. Moreover, if an employer disciplined employees for seeking to bargain for an agency shop agreement, that action would be prohibited by Sections 8(a)(1) & (3). Indeed, Section 8(a)(3) explicitly protects an employer who requires employees to join a union or pay an agency fee.⁷⁵ Additionally,

⁷⁴ See Elliott Dube, *Local Right-to-Work Laws Could Set Stage for NLRA Battle*, BLOOMBERG BNA CONSTRUCTION LABOR REPORT (Apr. 14, 2016) (quoting Paul Secunda) (Local right-to-work-laws can result in "absolute chaos" because "the whole point of the National Labor Relations Act is to provide a uniform and predictable federal labor law . . .").

⁷⁵ See *Simms v. Local 1752, International Longshoremens Association*, 838 F.3d 613, 619–20 (5th Cir. 2016).

if an employer refuses to bargain over union security, in particular the agency shop, that is a violation of the Section 8(a)(5) duty to bargain in good faith.⁷⁶ Thus, when a locality passes an ordinance forbidding employers from entering into agency shop agreements, it directly interferes with the NLRB's jurisdiction to determine what activity is prohibited by the Act.⁷⁷

None of the established exceptions to *Garmon* preemption permit a locality to pass a right-to-work ordinance. Such an ordinance is not the exercise of a police power⁷⁸ or of the type of deeply-rooted state interest that permits state court actions for defamation, assault, or outrage.⁷⁹ The only pertinent exception is that of Section 14(b) which expressly permits states, but not localities, to enact right-to-work laws.⁸⁰

b. Preempted by Machinists

Local right-to-work ordinances are *Machinists* preempted. Even though conduct may not be protected or prohibited under the Act, regulation may still be preempted because the conduct has been left to the free play of economic forces.⁸¹ An ordinance, such as a local right-to-work ordinance, that changes the balance of power in negotiation is preempted.

Several cases involving *Machinists* preemption demonstrate that local-right-to-work ordinances are preempted. In *Chamber of Commerce of the United States v. Brown*, the state of California passed a statute that prohibited certain employers from using funds received from the state to “assist, promote, or deter union organizing.”⁸² The Court held that the statute was preempted under *Machinists* and was considered regulation of a zone that

⁷⁶ See *Pleaseantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 759 (6th Cir. 2003); *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 737, 744 (1963); *Gen. Motors Corp.*, 133 N.L.R.B. 451 (1961); JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 1386 (6th ed. 2012).

⁷⁷ *Cf. Amalgamated Association of Street Employees v. Lockridge*, 403 U.S. 274, 296 (1971) (finding a claim preempted when the “entire case turned upon the construction of the applicable union security clause, a matter as to which . . . federal concern is pervasive and its regulation complex.”).

⁷⁸ While in the context of the Railway Labor Act, the Supreme Court has referred to a state’s ability to prohibit the union or closed shop as a “police power,” the Court used the term “police power” in the sense that it is something states can regulate absent federal preemption. *Railway Emp. Dept. v. Hanson*, 351 U.S. 225, 233 (1956).

⁷⁹ The Supreme Court clearly holds in *Mobil Oil* that the NLRA preempts state regulation of union-security that does not fall within Section 14(b)’s exception. *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 413 n.7 (1976).

⁸⁰ *Cf. Simms*, 838 F.3d at 617–18 (holding that the narrow exception to *Garmon* preemption provided by 14(b) does not permit a state to prohibit payment of hiring hall fees).

⁸¹ See *Int’l Assoc. of Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132, 140, 149–50 (1976). As discussed above, local right-to-work ordinances are *Garmon* preempted, but even if they were not arguably protected conduct, the ordinances would be *Machinists* preempted.

⁸² *Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60, 62 (2008).

was protected for market freedom.⁸³ The Taft-Hartley Act amended the NLRA to allow employers and unions to engage in protected speech, as long as the speech is not considered coercive, such as a “threat of reprisal or promise of benefit.”⁸⁴ The regulation of the employer’s use of funds interfered with “a zone protected and reserved for market freedom.”⁸⁵ The California statute was a general law that was preempted similar to local right-to-work ordinances because it interferes with an area of law Congress did not intend to be regulated. The same reasoning applies to local right-to-work ordinances because Congress left negotiation of union security arrangements not prohibited by Section 8(a)(3) to be protected under the zone of market freedom. While Congress created the narrow 14(b) exemption for states to regulate, it did not intend for localities to pass these ordinances that interfere with “zones protected for market freedom.”

Moreover, the *Machinists* rationale applies equally to local regulation as to state regulation. In *Golden State Transit Corp. v. City of Los Angeles*, the city of Los Angeles refused to renew the franchise of a taxi company because its employees were conducting a strike.⁸⁶ The taxi company argued that the action taken by the city was preempted by the NLRA.⁸⁷ The Supreme Court used *Machinists* to determine that the actions taken by the city were preempted, because, “[t]his precludes state and municipal regulation concerning conduct that Congress intended to be unregulated.”⁸⁸ Local right-to-work ordinances are preempted in the same way that the actions taken in Los Angeles were preempted.

Machinists preemption was also discussed in *Teamsters Local 358 v. Des Moines Register*, which demonstrates its applicability to disputes involving union security. In *Teamsters*, a union member requested to his employer that a portion of his wages be allocated to the payment of his union dues according to an Iowa statute regarding wage assignments.⁸⁹ However, the employer refused.⁹⁰ The main issue between the employer and union was determining whether federal labor law preempted the Iowa statute. The union and employee sought a declaratory ruling to determine if the employer was obligated to accept wage assignments.⁹¹ The union and the employer had negotiated the subject of wage assignments, but did not agree to a provision and put it in their collective bargaining agreement.⁹² The collective bargain-

⁸³ *Id.* at 66 (quoting *Bldg. & Constr. Trades Council v. Associated Builders*, 507 U.S. 218, 227 (1993)).

⁸⁴ *Id.* at 67.

⁸⁵ *Id.* at 66 (quoting *Bldg. & Constr. Trades Council v. Associated Builders*, 507 U.S. 218, 227 (1993)).

⁸⁶ 475 U.S. 608 (1986).

⁸⁷ *Id.* at 611.

⁸⁸ *Id.* at 614 (internal citations omitted).

⁸⁹ *Teamsters Local 358 v. Des Moines Register*, 438 N.W.2d 598 (Iowa 1989).

⁹⁰ *Id.* at 598.

⁹¹ *Id.*

⁹² *Id.*

ing agreement also contained a “zipper” clause, which stated, “the agreement was intended to be a complete one, disposing of all bargainable issues, and would not be openable on any issue during the life of the agreement.”⁹³ Because of the zipper clause, the employer argued that since the agreement was in effect, there was not any obligation to discuss the issue of wage assignments.⁹⁴ The union “filed a motion to dismiss founded on lack of subject matter jurisdiction because of federal preemption.”⁹⁵ The Court affirmed the lower court’s ruling that the NLRB had jurisdiction because of *Machinists*, stating, “[a]n employer’s acceptance of a dues checkoff provision is one such area that Congress intentionally left unregulated. It has been deemed to be a mandatory bargaining issue, i.e. one on which a party is required to bargain in good faith.”⁹⁶ The court stated that this area was left up to the “free play of economic forces” and that state regulation requiring dues checkoff provisions deprives employers of a bargaining chip that Congress intended employers to have.⁹⁷ The court reasoned that, “a state statute attempting to regulate an area intentionally left open for the parties to negotiate would not merely fill a gap. Rather, it would impermissibly deny a party to an economic contest a weapon that Congress meant him to have available.”⁹⁸ Areas such as dues checkoff provisions that are related to collective bargaining for union security are considered preempted. The same idea is applied to local right-to-work laws because when an ordinance such as a local right-to-work ordinance is passed, these laws change the balance of power in negotiation between an employer and union. These areas were intended by Congress to be left up to the free play of economic forces and to be negotiated between parties, and are therefore preempted.

Exceptions to *Machinists* preemption do not apply to the passage of local right-to-work laws.⁹⁹ Local right-to-work laws do not fall within established exceptions for government acting as a “market participant” or establishing minimum terms of employment.¹⁰⁰ The market participant exception is not applicable to local right-to-work laws because these laws are ones of general application made through a regulatory capacity, rather than specific decisions made in a proprietary capacity as a consumer, or as a market participant.¹⁰¹

Enacting right-to-work ordinances is not within the traditional purview of states and localities to set minimum terms of employment. In *Metro. Life*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 600.

⁹⁷ *Id.*

⁹⁸ *Id.* (internal citations omitted).

⁹⁹ See Robert Rachal, *Machinists Preemption Under the NLRA: A Powerful Tool to Protect an Employer’s Freedom to Bargain*, 58 LA. L. REV. 1065, 1071 (1998) (discussing the exceptions to *Machinists* preemption).

¹⁰⁰ *Id.* at 1073–74.

¹⁰¹ See *Bldg. & Constr. Trades Council v. Associated Builders*, 507 U.S. 218, 232 (1993).

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Ins. Co. v. Massachusetts, the Court held that the NLRA does not restrict state laws setting minimum safety and health labor standards, and a state statute requiring minimum health benefits was not preempted.¹⁰² The court reasoned that, “Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety.”¹⁰³ Right-to-work laws do not similarly relate to health and safety or any other area of particular local interest. Right-to-work ordinances regulate the heart of the conduct federally regulated by the NLRA—negotiating a collective bargaining agreement. These ordinances directly conflict with the parties’ ability to bargain for their own terms and conditions, unlike permissible state and local regulation of minimum terms such as health and safety, severance pay, or unemployment compensation.¹⁰⁴

Moreover, the Supreme Court’s decision exempting from broad NLRA preemption a court action to address a common law claim brought by “innocent third parties” does not apply to local right-to-work ordinances. In *Belknap Inc. v. Hale* the plaintiffs argued that *Machinists* prevented Kentucky courts from applying state law in areas that Congress intended to be unregulated.¹⁰⁵ Replacement workers were promised they would have permanent positions, but were later laid off to reinstate the strikers per the terms of a collective bargaining agreement with the Union representing the striking employees.¹⁰⁶ The Supreme Court held that the replaced workers’ tort and misrepresentation claims against the employer were not preempted.¹⁰⁷ The Court recognized that federal law intends to “leave the employer and the union free to use their economic weapons against one another,” but determined they could not “injure innocent third parties without regard to the normal rules of law governing those relationships.”¹⁰⁸ Local right-to-work ordinances involve legislation by a local entity and not court action to address common law claims. Moreover, preemption of local right-to-work ordinances does not deprive “innocent third parties” of contractual rights; in fact, the ordinances themselves deprive unions and employers of the ability to enter into federally sanctioned contractual rights to further union security.

¹⁰² *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). This case involved a statute that required minimum benefits be provided to those who were insured under a general health insurance or employee health-care policy that covered hospital and surgical expenses. See Rachal, *supra* note 98, at 1072.

¹⁰³ *Metro. Life*, 471 U.S. at 756.

¹⁰⁴ *N.Y. Tel. Co. v. N.Y. State Dep’t. of Labor*, 440 U.S. 519 (1979); *Baker v. Gen. Motors Corp.*, 478 U.S. 621 (1986).

¹⁰⁵ 463 U.S. 491, 499 (1983).

¹⁰⁶ *Id.* at 496.

¹⁰⁷ *Id.* at 512.

¹⁰⁸ *Id.* at 500.

c. Every court to address the issue, except one, has found the ordinances preempted

Almost every court to address the issue of local right-to-work ordinances has found them preempted by the NLRA. Most recently, the Federal District Court for the Northern District of Illinois found a local right-to-work ordinance enacted by the city of Lincolnshire preempted by the NLRA.¹⁰⁹ The court begins by noting that the NLRA “largely displaced state regulation of industrial relations,” with a single exception created by Section 14(b).¹¹⁰ The court then reasons that when a statute, like the NLRA, preempts a particular field, an exception authorizes “only a narrow set of state regulation, in which case it makes sense that only states and not their subdivisions would benefit from this limited authorization.”¹¹¹ The court reviews the language of the NLRA, noting that Section 14(a), in contrast to Section 14(b), includes the phrase “for the purpose of any law, either national or local.” The court concludes that Congress used more specific language when including local ordinances, and did not so intend by Section 14(b)’s use of only the term “State.” As further support that Congress intended to preempt the field of union security agreements, the Court reviews the Supreme Court decision in *Schermerhorn*, wherein the Supreme Court cited the House Report stating “by the Labor Act Congress preempts the field that the act covers.”¹¹² The Court notes that *Schermerhorn* held only that States could exercise laws “barring the execution and application” of certain union-security agreements. *Schermerhorn* “therefore does not contradict the conclusion that Congress intended to preempt the field of union security agreements, leaving an exception only for regulation by the states.”¹¹³ The Court concludes by pointing out that “[t]he dispositive question is not whether Congress intended to preempt state authority to delegate governmental power.”¹¹⁴ Instead, “the question is whether Congress intended to preempt legislation in general in the field of union security agreements.”¹¹⁵ Because Congress did so intend, the 14(b) exception must be narrowly restricted to actions by a State.¹¹⁶

Additionally, in early 2015, several unions filed suit to challenge the Hardin County, Kentucky local right-to-work ordinance. The Federal District

¹⁰⁹ *International Union of Operating Engineers Local 399 v. Village of Lincolnshire*, No. 16 C 2395, 2017 WL 75742 (Jan. 7, 2017).

¹¹⁰ *Id.* at 7 (internal citations omitted).

¹¹¹ *Id.*

¹¹² *Id.* at 8 (citing *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 100–01 n. 8 (1963), which quotes H.R. REP. NO. 510, at 44 (1947). Section VI.f discusses this report in more detail.

¹¹³ *Id.*

¹¹⁴ *International Union of Operating Engineers Local 399 v. Village of Lincolnshire*, No. 16 C 2395, 2017 WL 75742, at 10 (N.D. Ill. Jan. 7, 2017).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

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Court for the Western District of Kentucky ruled the ordinance was void and unenforceable and stayed its implementation pending an appeal to the Sixth Circuit Court of Appeals.¹¹⁷ The court reasoned that Section 14(b) uses the word state twice, and it would be illogical to read the language “any State” to mean “any State or political subdivision thereof.” Because the two uses of “State” must be consistent, laws of political subdivisions prohibiting union security arrangements do not fall within the 14(b) exception.¹¹⁸ The court further reasoned that Congress enacted Section 14(b) simply to ensure pre-existing state right-to-work laws and Constitutional provisions remained valid in the face of the “NLRA’s broad preemptive effect.”¹¹⁹ Finally, the court reasoned that Section 8(a)(3) of the NLRA protects union-security agreements, and, “[t]hus, barring any exceptions, state and local regulation of union-security agreements is preempted by the NLRA.” Because Section 14(b) is the only exception, local right-to-work ordinances remain preempted.¹²⁰

On appeal, a panel of the Sixth Circuit Court of Appeals decided the Hardin County ordinance is not preempted by the NLRA.¹²¹ It is the only court in over 50 years of decisions to find the NLRA does not preempt a local right-to-work ordinance. It directly conflicts with a decision from Kentucky’s highest court from 1965, discussed below.¹²² The Court of Appeals reasoned that the term “State” in Section 14(b) encompasses political subdivisions, rather than only states.¹²³ The court would read Section 14(b) to permit right-to-work in “any State, [subdivision of a State,] or Territory in which such execution or application is prohibited by State, [subdivision of a State,] or Territorial law.” The court relied on two cases outside the field of labor law, *Mortier* and *Ours Garage*,¹²⁴ to establish a principle of construction requiring the term “State” to include political subdivisions unless the statute specifies otherwise.¹²⁵ In each of those cases, however, the Supreme Court completed a thorough analysis of legislative intent, whereas the Court

¹¹⁷ *UAW v. Hardin Cty.*, 160 F. Supp. 3d 1004, 1008 (W.D. Ky. 2016).

¹¹⁸ *Id.* (“Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”) (emphasis added).

¹¹⁹ *Id.* at 1011.

¹²⁰ *Id.* at 1014.

¹²¹ *UAW v. Hardin Cty.*, 842 F.3d 407 (6th Cir. 2016). The Sixth Circuit denied a petition, filed by the plaintiffs, for rehearing en banc and a petition to vacate the decisions due to the passage of the Kentucky State right-to-work law in January 2017. The union plaintiffs plan to appeal to the Supreme Court to vacate the decisions. Braden Campbell, 6th Cir. Won’t Vacate Ky. County Right-To-Work Ruling available at https://www.law360.com/employment/articles/902249/6th-circ-won-t-vacate-ky-county-right-to-work-ruling?nl_pk=6dee86de-417b-4d70-b3e9-7ff653636193&utm_source=newsletter&utm_medium=email&utm_campaign=employment.

¹²² *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360, 362 (Ky. 1965).

¹²³ *Id.*

¹²⁴ *See infra* Section VI.g.

¹²⁵ *Hardin Cty.*, 842 F. 3d at 413–17.

of Appeal's decision does not review the legislative history of the NLRA or the Taft-Hartley amendments adding Section 14(b). Nor does the decision review any other provisions of the NLRA to determine whether including political subdivisions within the term "State" would create inconsistencies in the laws. Both the language of the Act and the legislative history strongly support the argument that the right-to-work exception is limited to States, and not their political subdivisions.¹²⁶

The decision dismisses the relevance of *Garmon* preemption by arguing that because 14(b) permits localities, through the term "State," to pass right to work ordinances that it need not address whether the local right-to-work ordinances would be otherwise preempted.¹²⁷ The somewhat circular reasoning fails to adequately consider the effect of *Garmon* preemption. The broad field preemption in labor law due to *Garmon*, and additional extensive authority, indicates that any exception like that in 14(b) should be construed narrowly. Courts should not expand the exception by adding words, such as "political subdivisions," that are not supported by the language of or legislative intent behind the law. While the Court of Appeals' decision focuses on preserving state rights, as a practical matter, permitting local right-to-work ordinances ensures the NLRB and Federal Courts will have to address many state law issues they have not before addressed because the local ordinances are preempted. For instance, any time a union files an unfair labor charge against an employer that refuses to bargain over union security in reliance on a local right-to-work ordinance,¹²⁸ the NLRB will have to determine whether the state, via home-rule or some other statute, actually delegated the ability to pass right-to-work to the locality. Alternatively, an employee could file a court action jointly against an employer for breach of a CBA, and a union for breach of its duty of fair representation, arguing that the union and employer discriminated against the employee when the employee refused to pay an agency fee because of a local right-to-work ordinance. The Federal District Courts will then have to determine whether the State had actually delegated the ability to pass right-to-work to the locality. The NLRB and Board will, thus, be called upon to determine complex issues about state law delegations of authority and preemption.¹²⁹ Before the current push to pass local right-to-work ordinances, a few municipalities had done so, and every court had ruled the ordinances were invalid and unenforceable. In 1990, a New Mexico city passed such an ordinance. The Federal District Court for New Mexico reasoned that the NLRA requires unions and employers to bargain

¹²⁶ See *infra* Section VI.e. & f.

¹²⁷ *Hardin Cty.*, 842 F.3d at 417.

¹²⁸ If an employer refuses to bargain over union security, the employer violates the NLRA Section 8(a)(5) duty to bargain in good faith. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 744 (1963); *Gen. Motors Corp.*, 133 N.L.R.B. 451 (1961). See Section VI.a for further discussion of the types of conduct that violate the NLRA.

¹²⁹ A recent Kentucky case about a local wage and hour ordinance demonstrates the type of complexity the analysis of state law might involve. See *Kentucky Restaurant Association v. Louisville/Jefferson Cty. Metro Gov't*, 501 S.W.3d 425 (Ky. 2016).

collectively, expressly permitting union-security agreements that conform to Section 8(a)(3)'s provision.¹³⁰ The court then discussed how the "Congressional regulation of union security agreements is comprehensive and pervasive" and preempts union-security agreements from state legislation "except to the extent specifically permitted" by Section 14(b).¹³¹ The court reasoned that Congress "contemplated diversity of regulation throughout the country on the subject of union security agreements," to the extent the 50 states might adopt different regulations.¹³² The court explained that Congress did not contemplate the "qualitatively different" diversity of regulation that would arise if local entities "throughout the country were free to enact their own regulations."¹³³ The resultant "crazy-quilt of regulations within the various states" would administratively burden employers and unions trying to negotiate one collective bargaining agreement because they would be subject to "numerous regulatory schemes."¹³⁴ Further, such diversity of regulation within one state would create "an incentive to abandon" the very type of union-security agreement sanctioned by the NLRA and would discourage, rather than encourage, collective bargaining.¹³⁵ The court concluded that Congress did not intend for home rule authority to provide localities the ability to enact right-to-work ordinances.¹³⁶ A state home-rule-statute cannot fall within 14(b)'s exemption because it is not a law prohibiting union-security agreements.¹³⁷ The plain language of the Act permits only State regulation of union security agreements.¹³⁸

And much earlier in Kentucky, the City of Shelbyville passed a right-to-work ordinance. The then-highest Kentucky Court, the Court of Appeals of Kentucky, found the ordinance invalid. The court reasoned that Section 14(b) is a "special exception out of" the full preemption by the NLRA of states and localities regulating union-security agreements.¹³⁹ As an exception departing from "the overall spirit and purpose of the Act," Section 14(b) must be "strictly and narrowly construed."¹⁴⁰ The court reasoned that Congress did not intend to "allow as many local policies as there are local politi-

¹³⁰ *New Mexico Federation of Labor v. City of Clovis*, 735 F. Supp. 999 (D.N.M. 1990).

¹³¹ *Id.* at 1002.

¹³² *Id.*

¹³³ *Id.* at 1003.

¹³⁴ *Id.* at 1002, 1003.

¹³⁵ *Id.* at 1003.

¹³⁶ *New Mexico Federation of Labor v. City of Clovis*, 735 F. Supp. 999, 1004 (D.N.M. 1990).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360, 362 (Ky. Ct. App. 1965); *see also* *Oil Workers International Union v. Mobil Oil Corp.*, 426 U.S. 407, 413 n. 7 (1976) ("There is nothing in either Section 14(b)'s language or legislative history to suggest that there may be applications of right-to-work laws which are not encompassed under Section 14(b) but which are nonetheless permissible.").

¹⁴⁰ *Puckett*, 391 S.W.2d at 362.

cal subdivisions in the nation,” and concluded that Congress preempted from cities the ability to regulate union security agreements.¹⁴¹

The first cases to address the issue of local right-to-work ordinances were a series of cases from California decided in 1959 and 1960, well after the passage of the Taft-Hartley amendments: *Chavez v. Sargent*,¹⁴² *Retail Clerks' Union Local No. 1364 v. Superior Court*,¹⁴³ and *Stephenson v. City of Palm Springs*.¹⁴⁴ In these cases, the California Supreme Court did not consider the argument that the NLRA preempted the ordinance, and so neither endorsed nor rejected such preemption.

d. Labor Experts, including the National Right to Work Committee agree local right-to-work ordinances are preempted

Not only has every court, but one, found local right-to-work ordinances preempted by the NLRA, labor law experts agree with that conclusion. As stated by one labor law professor, “[a]nyone who understands labor law preemption will tell you that local and municipal right-to-work laws are preempted by the National Labor Relations Act.”¹⁴⁵ Perhaps most tellingly, the National Right to Work Committee concedes that the NLRA preempts local right-to-work ordinances.¹⁴⁶ The National Right to Work Committee has been the leading engine behind the ever-increasing number of state right-to-work laws. Yet, even the vice president of the organization concedes, “we are pretty confident that a locality that tries to pass its own right to work ordinance would find it preempted by the NLRA.”

e. The language of the NLRA only permits states to pass right-to-work laws

Statutory construction and interpretation are critical when addressing issues of preemption. A review of every section of the Act which uses the term “State” demonstrates that the language of the NLRA only permits states to pass right-to-work laws. Section 14(b) of the Taft-Hartley Act is titled, “[a]greements requiring union membership in violation of State law.”¹⁴⁷ The text of Section 14(b) reads “[n]othing in this [subchapter] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited

¹⁴¹ *Id.*

¹⁴² 52 Cal. 2d 162 (Cal. 1959).

¹⁴³ 339 P.2d 839 (Cal. 1959) (overruled in part on other grounds by *Petri Cleaners, Inc. v. Automotive Emps.* 349 P.2d 76 (Cal. 1960)).

¹⁴⁴ 340 P.2d 1009 (Cal. 1959).

¹⁴⁵ Dube, *supra* note 74 (quoting Paul Secunda, “a Marquette University Law School professor who directs the school’s Labor and Employment Law Program”).

¹⁴⁶ Bologna, *supra* note 71.

¹⁴⁷ Labor Management Relations (Taft-Hartley) Act §14(b), 29 U.S.C. §164(a) (2012).

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by State or Territorial law.”¹⁴⁸ Nowhere does the section reference “political subdivisions” or some equivalent designation for localities.

The term “State” should not be read to include political subdivisions in the context of Section 14(b) for three key reasons. First, including political subdivisions within the term “State” would introduce complications and contradictions to Section 14(b). Because “State” appears twice within the text of the section, political subdivisions would have to be read into both instances if read into one. As a result, right-to-work ordinances would be authorized in any state or territory where any locality passes a local right-to-work ordinance. The intention of the section was not to give localities such a level of control over state law. Second, to include political subdivisions within the term “State” would render other sections of the Act unnecessarily convoluted and, in some cases, contradictory. Finally, sections of the Act that were intended to address political subdivisions do so in explicit terms. A review of each instance when “State” is used within the Act will demonstrate this proposition.

Section 14(a) was passed into law at the same time as Section 14(b) in 1947 as part of the Taft-Hartley amendments. Section 14(a) specifically uses the term “local” when referring to “law.” It ensures that no “national or local” law will require employers to collectively bargain with supervisors.¹⁴⁹ The use of “local” to encompass state and municipal laws illustrates that the Act uses words other than “state” when including municipal law. The distinction is particularly evident because these different words are used as part of the same Section of the Act, Section 14. If the Act had intended to use “local” and “State” synonymously, then the language would be consistent throughout Section 14.

The Act consistently uses the term “State” to refer only to states, not including political subdivisions, and uses the term “political subdivision” or an equivalent when localities or subdivisions are included. For instance, Section 2(2) of the Wagner Act defines the term “employer” and specifies that the term does not include any “State or political subdivision.”¹⁵⁰ Indeed, this is the only time the phrase “political subdivision” appears in the Act. To claim that the term “State” includes political subdivisions would render the latter term’s inclusion in Section 2(2) needlessly and singularly duplicative.

¹⁴⁸ Section 14(b) is thoroughly discussed in Section VI.c.

¹⁴⁹ The complete text of Section 14(a) reads: “Nothing herein shall prohibit an individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, related to collective bargaining.”

¹⁵⁰ “The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.” National Labor Relations (Wagner) Act §2(2), 29 U.S.C. §152(2) (2012).

Section 202(c) of the Taft-Hartley Act does not include the “political subdivision” language, but makes a similar distinction. Part of Section 202(c) allows the Federal Mediation and Conciliation Director to “establish suitable procedures for cooperation with State and local mediation agencies.”¹⁵¹ The inclusion of the term “local” is as illustrative of the intent of the authors as the use of “political subdivision” in Section 2(2). If the term “State” included political subdivisions, then mentioning local mediation agencies would be redundant. The language’s inclusion here also reflects the lack of the local distinction in Section 8(d)(3), which is addressed below.

Section 203(b), also part of Taft-Hartley, instructs the Federal Mediation and Conciliation Service and its Director to avoid mediating disputes with “only a minor effect on interstate commerce if State or other conciliation services are available to the parties.”¹⁵² The inclusion of “or other” has similar effects and implications as “local” in Section 202(c).

Because Sections 202(c) and 203(b), like the addition of Section 14(b) to the NLRA, were part of the Taft-Hartley Act, they were introduced at the same time by the same legislators as Section 14(b). Furthermore, because the sections make explicit distinctions between a “State” and its political subdivisions (via the use of “local” and “or other,” respectively), the authors were clearly aware of the differences between the two. This demonstrates that the authors of Taft-Hartley included language referring to political subdivisions where appropriate, and that the use of “State” should therefore not be interpreted to include its subdivisions. The inclusion of the term “political subdivision” in Section 2(2) indicates that this interpretation can be applied to the Wagner Act as well. Indeed, in each appearance of the term “State” (excluding “United States”) in the NLRA, interpreting the term to include political subdivisions would add confusion and complication.

Because Section 14(b) was part of the Taft-Hartley Act, other uses of “State” in Taft-Hartley are demonstrative of its meaning. Section 8(d)(3), which deals with the obligation to bargain collectively, requires that a party seeking the modification or termination of a contract notify mediation services of both the Federal Government and those of “the State or Territory where the dispute occurred” within thirty days of a dispute. If the term “State” here includes political subdivisions, the passage becomes much more complex. If a county’s mediation agency is notified, need the state’s be notified as well? Should the county’s agency be notified if the state’s is? If a contract is negotiated in a county other than that in which it is performed, which county’s mediation agency should be notified (where did the dispute “occur”)? If “State” does not include political subdivisions, there is no such confusion. Furthermore, given the specific references to “local” mediation agencies in 202(c) and “other” mediation agencies in 203(b), the exclusion

¹⁵¹ Labor Management Relations (Taft-Hartley) Act §202(c), 29 U.S.C. §172(c) (2012).

¹⁵² Labor Management Relations (Taft-Hartley) Act §202(c), 29 U.S.C. §173(b) (2012).

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of any language indicating political subdivisions (and therefore local mediation agencies) here was clearly deliberate.

Other sections of the Act would be similarly complicated by a definition of “State” that includes political subdivisions. Section 10(a) as modified by the Taft-Hartley Act allows the Board to turn over jurisdiction of unfair labor practice claims to “any agency of any State or Territory,” with certain conditions and exceptions, “unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act.” If “State” only refers to states, then a simple comparison of state law and the NLRA will determine if jurisdiction can be granted to the agency. The U.S. Supreme Court’s decision in *Algoma Plywood & Veneer Co. v. Wisconsin Empl. Rels. Bd.* supports this view.¹⁵³ In this case, the Court stated that under Section 10(a), “cession of jurisdiction is to take place only where State and federal laws have parallel provisions. Where the State and federal laws do not overlap, no cession is necessary because the State’s jurisdiction is unimpaired.”¹⁵⁴ If political subdivisions are included, however, then a question arises of how state versus county (or other subdivision) labor law differences should be treated with respect to this section. If the state’s law does not contradict the NLRA, but the county’s does, can the state’s agent assume jurisdiction? Or, more problematically, what if the state’s law contradicts the NLRA but the county’s does not? Can the NLRB bypass the state and give jurisdiction directly to an agent of the county? It is difficult to imagine that such a step would have been not only contemplated but intended by Congress.

Section 206, also part of Taft-Hartley, allows the President to appoint a Board of Inquiry into “a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in . . . commerce . . . among the several States or with foreign nations.” An interpretation of the word “States” that includes political subdivisions is clearly excluded here by the “among the several” language.¹⁵⁵ Again part of Taft-Hartley, Section 208(a)(i) includes the same “among the several States” language as Section 206.

The term “State” is used in two other parts of the Act. In Section 2(6), part of the Wagner Act, the Act uses the language “commerce” as being among “the several States.” Jurisdiction is appropriate under the Commerce Clause precisely because the regulated businesses engage in business across state lines. To interpret “several States” to include localities like counties would mean assertion of jurisdiction over businesses that only operate within one state but across county lines. Section 2(6) also includes com-

¹⁵³ *Algoma Plywood & Veneer Co. v. Wis. Emp. Relations Bd.*, 336 U.S. 301 (1949).

¹⁵⁴ *Id.* at 313.

¹⁵⁵ The focus of these provisions is on interstate commerce providing the federal government the authority to intervene. That focus accounts for the “among the several” language to indicate an event affecting commerce across state lines.

merce between states and territories, foreign countries and states, or points within “the same State but through any other State or any Territory or the District of Columbia or any foreign country.” Because the Act specifies that commerce between counties in the same state must pass through another body that is not that state, direct intrastate commerce between counties is explicitly excluded. To interpret “several States” to include political subdivisions of states would therefore make Section 2(6) inherently contradictory, initially acknowledging operations between counties in one state as commerce only to then reject the same proposition.

Finally, Section 14(c) was added as part of the Labor Management Reporting and Disclosure Act of 1959. Under 14(c)(1), the Board can decline to assert jurisdiction over matters when their effect on “commerce” is not, in the Board’s opinion, “sufficiently substantial.” Section 14(c)(2) clarifies that “any agency or the courts of any State or Territory” are not prevented from asserting jurisdiction over cases that the Board declines pursuant to Section 14(c)(1). If, for purposes of these provisions, the term “State” only refers to states, then there is no ambiguity, as all courts are either federal or state (or territorial) courts. Including the phrase “political subdivisions” would thus create the problem of defining some courts as local as opposed to being of the state, and determining what such a distinction means. Furthermore, given the Act’s definition of “commerce” in Section 2(6), Section 14(c)(1) is most likely to apply in situations like that explicitly outlined in 2(6): business between two counties in the same state that travels through another state or territory. There, the effect on “commerce” might not be “sufficiently substantial.” Reimagining the term “State” to include political subdivisions for purposes of this section would thus implicate the Section 2(6) contradiction discussed above.

Because three Sections of the Act—2(2), 202(c), and 203(b)—all include specific designations when a unit within a state is intended (“political subdivision,” “local,” and “other” respectively), there is clear evidence that Congress used specific language when it intended subdivisions to be included. Assuming that political subdivisions are included within the term “State” would render the use of “State” in these three Sections redundant. The fact that 202(c) and 203(b) were both part of Taft-Hartley gives even more weight to the specific claim that political subdivisions are not included when the term “State” is used in Section 14(b). A review of every other section of the NLRA which includes the term “State,” excluding instances of “United States,” demonstrates that an interpretation of the word that includes political subdivisions only complicates and adds contradictions to the Act. A claim that the term “States” includes political subdivisions in the context of Section 14(b) would thus render it wholly unique.

f. The legislative history suggests that LRTW ordinances are preempted

The legislative history behind the addition of Section 14(b) includes no mention of local right-to-work ordinances, and nothing suggests Congress contemplated them. Indeed, absolutely no evidence supports the notion that local right-to-work ordinances existed in 1947 and were authorized by Congress. Rather, the addition of Section 14(b) was prompted solely to permit states that had right-to-work laws to continue enforcing them without running afoul of the broad preemptive effect of the NLRA on labor relations.¹⁵⁶

The legislative history contemplates only state, and not local, right-to-work laws and lends support to the proposition that local right-to-work ordinances were not in existence at the time when Taft-Hartley was passed.¹⁵⁷ As noted previously by the Supreme Court,¹⁵⁸ Congress was well aware of existing state right-to-work statutes at the time Taft-Hartley was enacted as demonstrated by a review of the legislative history. The House report clarifies:

[a]t least 12 States (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Louisiana, Minnesota, Nebraska, North Dakota, South Dakota, and Tennessee) have laws forbidding compulsory unionism. Four others (Colorado, Kansas, Utah, and Wisconsin) allow agreements compelling union membership only after the employees authorize such agreements by large majorities. California, Connecticut, Delaware, Iowa, Kansas, Maine, Massachusetts, Missouri, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, and Texas have under consideration laws forbidding compulsory unionism.¹⁵⁹

¹⁵⁶ See *Retail Clerks International Association v. Schermerhorn*, 375 U.S. 96, 100–01 n. 8 (1963) (“Since by the Labor Act Congress preempts the field that the act covers . . . the committee has provided expressly . . . that laws and constitutional provisions of any State that restrict the right of employers to require employees to become or remain members of labor organizations are valid.” (quoting H.R. REP. NO. 80-245, at 44 (1947))).

¹⁵⁷ See S. REP. NO. 79-1858 (1946); H.R. REP. NO. 80-331, at 1 (1947). A message from President Harry Truman expresses his disapproval of the new bill for multiple reasons including public policy and that it would “conflict with important principles of our democratic society,” however, there is no mention of any existence of current local right-to-work laws that would be affected by the bill. See H.R. REP. NO. 80-245 (1947); H.R. REP. NO. 80-510 (1947); S. REP. NO. 80-986 (1948). A review of all legislative history related to the passage of the Taft-Hartley amendments confirms that local right-to-work statutes were not being contemplated at the time of 14(b)’s passage; therefore, these local right-to-work ordinances could not have existed.

¹⁵⁸ See *Schermerhorn*, 375 U.S. at 100; *UAW v. Hardin Cty.*, 160 F. Supp. 3d 1004, 1011 n. 4 (W.D. Ky. Feb. 3, 2016) (“The *Schermerhorn* Court noted that “[b]y the time § 14(b) was written into the Act [in 1947], twelve states had statutes or constitutional provisions outlawing or restricting the closed shop and related devices” (i.e., right-to-work laws) and that “Congress seems to have been well informed” of such laws when it debated the 1947 amendments.”).

¹⁵⁹ H.R. REP. NO. 80-245 pt. 1, at 34 (1947); ARIZ. CONST. ART. XXV (Addition approved election Nov. 5, 1946, eff. Nov. 25, 1946); Ark. Code Ann. § 11-3-303 (1947); Ark. Code Ann. § 11-3-303 (1947); Fla. Stat. Ann. § 447.03 (West) (Credits Laws 1943, c. 21968, § 3; Laws 1974, c. 74-100, § 1.); Ga. Code Ann. § 34-6-22 (1947); Idaho Code Ann. § 44-2003(3);

These existing laws were all state laws. The legislative history in House Report 245 from 1947 makes no mention of any local right-to-work ordinances in existence, furthering the argument that these laws were not contemplated.¹⁶⁰ The Committee on Education and Labor submitted the House Report to the Committee of the Whole House on the State of the Union. This legislative history states that the Act bans compulsory unionism, and further mentions that voluntary agreements between employees and employers to become and remain union members after employment are only valid if state law does not prohibit the agreement, but closed-shop union-security agreements are invalid.¹⁶¹ Congress is referencing the existing state right-to-work laws, while local right-to-work ordinances were not contemplated.¹⁶² In addition, House Report 245 states,

“[s]ince by the Labor Act Congress preempts the field that the act covers . . . the committee has provided expressly in section 13 [the current Section 14(b)] that laws and constitutional provisions of any State that restrict the right of employers to require employees to become or remain members of labor organizations are valid, notwithstanding any provision of the National Labor Relations Act.”¹⁶³

The House Report, in discussing the amendments to the Act, specifically mentioned in Section 10 that the Board has exclusive jurisdiction regarding unfair labor practices, stating, “[a]s under the present act, the power of the Board under the amended act in the matter of unfair labor practices is exclusive. This rule has necessitated a special provision . . . to give the States a concurrent jurisdiction in respect of closed-shop and other union-security arrangements.”¹⁶⁴ These passages indicate that Congress was aware of the broad preemptive effect of the NLRA and intended an exemption that would only permit state laws restricting union security to be valid.

A Conference Report in 1947 affirmed that the reasoning behind the passage of 14(b) was to make sure that the Act did not conflict with prior

La. Gen. Stat. 4379.5 (1934), LA Gen. Stat. 4379.6 (1934) (Louisiana’s right-to-work statutes lasted until a 1950 rewrite of the General Statutes into what became the Revised Statutes); Neb. Rev. Stat. § 48-217 (1947); N.D. Cent. Code § 34-01-14.1 (Codifications R.C. 1943, 1957 Supp., §34-0114); S.D. CONST. ART. VI, § 2 (Amendment proposed by SL 1945, approved Nov. 1946); S.D. Codified Laws § 60-8-3; Tenn. Code Ann. § 50-1-203 (1947).

¹⁶⁰ H.R. REP. NO. 80-245 pt. 1, at 34 (1947).

¹⁶¹ *Id.* at 30.

¹⁶² *Id.* at 34. In the section titled “Title I- Amendment of National Labor Relations Act”, the Report establishes that Congress was informed that twelve states had state level right-to-work ordinances.

¹⁶³ H.R. REP. NO. 80-245, at 44 (1947). *See also* Finman, *supra* note 10. This law review article is a response to Nathan R. Berke & George Brunn, *Local Right to Work Ordinances: A New Problem in Labor and Local Law*, 9 STAN. L. REV. 674 (1957). It argues that state and federal laws preempt local right-to-work ordinances and the meaning of “State” law does not include localities or political subdivisions.

¹⁶⁴ H.R. REP. NO. 80-245, at 40 (1947); *see also* Finman, *supra* note 10, at 65 n. 61.

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existing state right-to-work laws.¹⁶⁵ The Report focused on the discussion that the Act was not changing the states' currently existing laws regarding compulsory unionism. There is no evidence that local right-to-work ordinances were contemplated. The report explains:

Many states have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called "closed shop" provision in section 8(3) of the existing act nor the union shop and maintenance of membership proviso in section 8(a)(3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a provision having the same effect.¹⁶⁶

This passage assumes the broad preemptive effect of the National Labor Relations Act. It then explains how, in the face of this broad preemption, the Act and 14(b) were simply designed to permit an exception for the states to pass right-to-work laws. If these local ordinances existed, the Act would have mentioned their legality and existence when confirming that states had the right to pass these laws. There is no mention that local right-to-work ordinances were in existence or that they were contemplated during the passage of 14(b). Therefore, local right-to-work ordinances were not contemplated during the passage of the Act.

The framework discussed in House Report 245 and Conference Report 510 demonstrates that Congress intended that union security in the form of the agency shop was the default unless a state decided to pass a state level right-to-work law.¹⁶⁷ Congress did not intend for a state to have to pass state level laws to override a local right-to-work ordinance whenever a locality enacted one. Rather, Congress intended that in states which did not adopt right-to-work laws, the federal law of the NLRA would automatically apply.¹⁶⁸

¹⁶⁵ See H.R. REP. NO. 80-510, at 60 (1947).

¹⁶⁶ *Id.*

¹⁶⁷ See H.R. REP. NO. 80-254, at 9 (1947) ("Under carefully drawn regulations it permits an employer and union voluntarily to enter into an agreement requiring employees to become and remain members of the union a month or more after the employer hires them . . . Such agreements are lawful, however, only if . . . the agreement is not prohibited by State law."); H.R. REP. NO. 80-510, at 60 (1947).

¹⁶⁸ There is no Senate report on the Labor Relations Management Act because the House bill became law. A report on a related Senate Bill, the Federal Labor Relations Act of 1947,

Moreover, a Senate Report by the Joint Committee on Labor-Management Relations was published after the passage of Taft-Hartley in 1948 in order to discuss the purpose and involvement of the Joint Committee on Labor-Management Relations and the improvements that the committee had observed after the successful passage of the Act.¹⁶⁹ The Report states that “[t]he closed shop which requires preexisting union membership as a condition of obtaining employment was abolished by the [A]ct.”¹⁷⁰ However, the committee mentions agreements that existed subsequent to the passage of the Act, stating:

The committee’s attention has been called to a few agreements entered into subsequent to the effective date of the act having features of compulsory membership which are of doubtful legality. We are referring to provisions wherein the employer binds himself to recruit new employees only from the graduates of certain trade schools or only among former employees of the industry. None of such contracts have as yet been considered by the Board. The issue will probably arise when an otherwise qualified worker is denied employment and files a charge with the Board.¹⁷¹

For the committee to discuss provisions and contracts that they asserted were unlawful without a case yet being brought before the Board, these types of agreements must have been in existence. Yet the committee’s apparently well-informed discussion about right-to-work, down to the details of existing CBAs, makes no mention of local right-to-work ordinances. If local right-to-work ordinances had existed, they would have been contemplated and mentioned alongside the agreements involving the closed shop. However, the legislative history only mentions state right-to-work laws. In addition, the Report discusses the passage of 14(b) and explains: “[m]any States now have statutes forbidding or limiting the execution and enforcing of compulsory membership contracts.”¹⁷² The conspicuous absence of any mention of local ordinances again shows that the only right-to-work laws contemplated existed at the state level, even soon after the passage of the Act.

In a few instances, remarks in the legislative history have been used against the argument that local right-to-work laws are preempted. For instance, an amicus brief filed by nine Kentucky counties in the Hardin County lawsuit quotes a Supreme Court case referencing the legislative history of the NLRA and the Taft-Hartley amendments to argue that local right-to-work ordinances are not preempted.¹⁷³ In a Stanford Law Review article

also mentions the intent that state right-to-work laws not be preempted. It does not mention local right-to-work laws. *See* S. REP. NO. 80-105, at 6 (1947).

¹⁶⁹ *See* S. REP. NO. 80-986, at 2–4 (1948).

¹⁷⁰ *Id.* at 24.

¹⁷¹ *Id.* at 27.

¹⁷² *Id.* at 31.

¹⁷³ Amended Memorandum Submitted *Amicus Curiae* in Support of Defendant Hardin County by Counties Who Have Passed Similar Ordinances: Warren, Simpson, Fulton, Rock-

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from 1957, the authors cite directly to the Conference Report from the House and the Senate: “[m]any States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism.”¹⁷⁴ The authors used this quotation to argue that Congress would not have given states, and not their subdivisions, the power to regulate.¹⁷⁵ Instead, the statement quoted in full above addressed the otherwise broadly preemptive effect of the NLRA. The authors also argued that the legislative history of Taft-Hartley does not “show that Congress planned a partial occupation of the field which would exclude city and county ordinances but not state statutes.”¹⁷⁶ However, the argument that Congress intended both states and their subdivisions to pass right-to-work laws is unsupported. For the reasons just discussed, the most persuasive interpretation is that local right-to-work laws were not contemplated during the passage of Taft-Hartley. Without any specific mention of counties or subdivisions in the legislative history, Congress could not have intended to exempt their power to pass local right-to-work laws. Such ordinances are therefore preempted.

Moreover, the proposition that states had delegated the authority to pass right-to-work ordinances to localities which the Wagner Act and Taft-Hartley did not disturb is unsupported. A Senate Judiciary Committee Report from 1946 evaluating a proposed constitutional amendment, for instance, focuses on the rights of an employee to bargain freely with an employer, but does not mention right-to-work laws at all, let alone local right-to-work ordinances.¹⁷⁷ The report mentions municipal laws while discussing the idea of freedom to contract free of union membership and the freedom to contract collectively. The report neither mentions any existing right-to-work laws nor differentiates between state and local laws, furthering the idea that Congress knew how to distinguish between these two types of laws.¹⁷⁸ Because local ordinances and local newspaper articles from 1947 are not available to the authors, legislative history focused on union security provides the best indication of whether local right-to-work ordinances existed. As just discussed, the legislative history of the Taft-Hartley Act makes no mention of local right-to-work ordinances. The only cases addressing local right-to-work or-

castle, Whitley, Butler, Logan, Monroe, and Boone Counties in Kentucky at 8, *UAW Local 3047 v. Hardin Cty., Ky.*, No. 3:15-cv-66-DJH (W.D. Ky. Apr. 24, 2015).

¹⁷⁴ Nathan R. Berke & George Brunn, *Local Right to Work Ordinances: A New Problem in Labor and Local Law*, 9 *STAN. L. REV.* 674, 677 (1957) (citing H.R. REP. 80-510, at 60 (1947)).

¹⁷⁵ *See id.* at 678.

¹⁷⁶ *Id.*

¹⁷⁷ *See S. REP.* NO. 79-1858 (1946).

¹⁷⁸ *See id.*

dinances arise at least a decade after the passage of the Taft-Hartley Act.¹⁷⁹ Each case determined the local right-to-work ordinances were preempted and invalid.¹⁸⁰ Nothing shows that local right-to-work ordinances existed in or before 1947, and no party produced such evidence in litigation.¹⁸¹ As the NLRB stated in its amicus curiae brief in *United Auto. Workers of Am. Local 3047 v. Hardin Cty.*, “Congress had no intention of permitting any governments other than states or territories to prohibit union security. If it had, at the very least, Congress would have discussed political subdivisions during Section 14(b)’s drafting.”¹⁸² Undoubtedly, if Congress had intended local counties and political subdivisions to be able to pass local right-to-work ordinances, they would have expressly stated this. Therefore, these laws could not have been contemplated during the passage of 14(b).¹⁸³

g. The NLRA is more broadly preemptive than many other statutes

The Supreme Court has explicitly recognized the broad preemptive effect of the NLRA in the context of union security. In support of broad preemption, the Court reasoned that Congress provided the NLRB “jurisdiction to enforce federal law regulating the use of union security clauses” for a

¹⁷⁹ See *Chavez v. Sargent*, 329 P.2d 579 (Cal. App. 1958), *vacated*, 339 P.2d 801 (Cal. 1959); *Ky. State AFL-CIO v. Puckett*, 391 S.W.2d 360 (Ky. 1965); *UFCW Local 1564 v. Clovis*, 735 F. Supp. 999 (D.N.M. 1990); *UAW Local 3047 v. Hardin Cty.*, No. 3:15-cv-66-DJH (W.D. Ky. Feb. 3, 2016). When conducting a search on LexisNexis and Westlaw, using the phrases “local right to work,” “local right-to-work,” and “local-right-to-work” the results determine that there are only these cases on the topic.

¹⁸⁰ See *supra* Section VI-c.

¹⁸¹ See, e.g., Brief for Appellees, *UAW Local 3047 v. Hardin Cty.*, No. 16-5246 (6th Cir. June 13, 2016); *Amicus Curiae* Brief of Kentucky Senate President Robert Stivers, *UAW Local 3047 v. Hardin Cty.*, No. 3:15-cv-66-DJH (W.D. Ky. Apr. 24, 2015); Amended Memorandum Submitted *Amicus Curiae* in Support of Defendant Hardin County by Counties Who Have Passed Similar Ordinances: Warren, Simpson, Fulton, Rockcastle, Whitley, Butler, Logan, Monroe, And Boone Counties in Kentucky, *UAW Local 3047 v. Hardin Cty.*, No. 3:15-cv-66-DJH (W.D. Ky. Apr. 24, 2015); Defendants’ Response Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment, *UAW Local 3047 v. Hardin Cty.*, No. 3:15-cv-66-DJH (W.D. Ky. Apr. 3, 2015). A review of case history regarding local ordinances shows that no party to a case has confirmed that local right-to-work laws were in existence before 1947. In the petitioner brief and amicus briefs filed in the currently appealed Kentucky case, no party in support of the defendant and local right-to-work laws mentioned that local right-to-work laws existed before 14(b)’s passage.

¹⁸² Brief of the National Labor Relations Board as *Amicus Curiae* in Support of the Plaintiffs at 10, *UAW Local 3047 v. Hardin Cty.*, No. 3:15-cv-66-DJH (W.D. Ky. Apr. 24, 2015). This brief supports the argument that Congress would have mentioned local right-to-work statutes when passing 14(b) in 1947 if they were in existence at the time, and would have clearly mentioned that political subdivisions and local entities could pass right-to-work ordinances.

¹⁸³ See Rolfs, *supra* note 11, at 1023 (confirming the limited case history regarding local right-to-work laws and citing *Chavez*, 329 P.2d 579; *Puckett*, 391 S.W.2d 360; and *UFCW*, 735 F. Supp. 999). The article mentions that at the time it was published, only three cases had specifically addressed the topic of local right-to-work ordinances, and these cases held that the ordinances were preempted, adding to the argument that right-to-work ordinances were only in existence at the state level at the time 14(b) was passed, and local right-to-work ordinances did not exist.

purpose, and further identified the “wide ranging” legislation as proof that Congress intended to preempt state court determinations regarding union security.¹⁸⁴ Moreover, the Court reasoned that states cannot administer different remedies from those provided by the NLRB. For instance, a state court cannot punish a union with punitive damages when the NLRB provides only for back pay because that defeats the purpose of a “centralized agency.”¹⁸⁵ While some federal acts, such as the Fair Labor Standards Act (FLSA), explicitly allow both state and local action, the NLRA does not. Other federal acts, such as the Sherman Act, do not explicitly address intrastate or local action, and like the NLRA permit state but not local action. Finally, some federal acts, like the Federal Railway Safety Act (FRSA), explicitly permit states to act as an exception to preemption, but do not permit local action. The NLRA falls into this third category of statutes.

With a number of high-profile instances in which localities have passed living wage ordinances that set a higher minimum wage requirement than under federal and state wage and hour law,¹⁸⁶ some may mistakenly believe that local right-to-work ordinances are similarly permitted.¹⁸⁷ However, a completely different statute, the FLSA, sets the minimum wage requirements at the federal level. The FLSA does not exhaustively preempt state regulation of wages and hours in the private sector in the way that the NLRA exhaustively preempts regulation of labor rights and collective bargaining. Rather, the FLSA sets baseline requirements governing wages and hours and encourages states to set higher minimum standards. Section 218 of the FLSA, titled “Relation to Other Laws,” deals with potential preemption claims. That section rejects preclusion of “any Federal or State law or municipal ordinance” which establishes a higher minimum wage, a lower maximum workweek, or a higher child labor standard than those provided in the FLSA.¹⁸⁸ Thus, almost every state regulates its minimum wage¹⁸⁹ and acts concurrently with the Department of Labor in monitoring compliance and pursuing wage and hour violations.¹⁹⁰ And nothing in the FLSA preempts a locality from likewise setting higher standards than the federally established

¹⁸⁴ *Amalgamated Assoc. of Street Employees v. Lockridge*, 403 U.S. 274, 288 n. 5 (1971).

¹⁸⁵ *Id.*

¹⁸⁶ See *Minimum Wage Tracker*, Economic Policy Institute, <http://www.epi.org/minimum-wage-tracker/> [perma.cc/2DLJ-R9DS]. Albuquerque, New Mexico; Berkeley, California; New York, New York; and Seattle, Washington are examples of such localities.

¹⁸⁷ See Melissa Greenberg, *The Politics of Preemption and Local Labor Laws: From Minimum Wage to “Right to Work”*, ONLABOR (May 25, 2016), <https://onlabor.org/2016/05/25/the-politics-of-preemption-and-local-labor-laws-from-minimum-wage-to-right-to-work/> [perma.cc/YXP8-WSTP] (explaining interest groups’ conflicting or seemingly conflicting positions on various types of local ordinances).

¹⁸⁸ 29 U.S.C. § 218(a) (2012).

¹⁸⁹ As of 2014, twenty-seven states had minimum wages higher than that required by federal law. MARK A. ROTHSTEIN, LANCE LIEBMAN, & KIMBERLY A. YURACKO, *EMPLOYMENT LAW CASES AND MATERIALS* 439 (8th ed. 2015).

¹⁹⁰ See Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J.L. & SOC. PROBLEMS 495, 508 (2006).

floor. In fact, the Act explicitly permits such regulation using the clear terms “municipal ordinance;” only a state or local regulation that set a lower minimum wage or other lesser standards than the FLSA would be preempted.¹⁹¹

In contrast to acts, such as the FLSA, which explicitly address the permissibility of laws created by political subdivisions, some acts address neither intrastate regulation nor regulation by localities. While those arguing against the preemption of local right-to-work ordinances may claim that such situations result in states and their political subdivisions being equal with regard to the permissibility of state and local action, the Supreme Court has held otherwise in the antitrust context. The Sherman Act, for instance, is silent as to whether or not states are permitted to pass antitrust laws. The Supreme Court has held, however, that the Act does not restrain state regulatory action with anticompetitive effects.¹⁹² In *Parker*, a California raisin company challenged the validity of a state agricultural marketing program as violating the Sherman Act.¹⁹³ Despite the Court’s assumption that Congress could have chosen to preempt such a program, it was unwilling to read such a limitation into the Sherman Act.¹⁹⁴ Furthermore, because California was acting in a regulatory capacity, rather than participating in “combinations to restrain competition and attempts to monopolize by individuals and corporations,” the program was permissible.¹⁹⁵ This holding created what became known as the state action exemption to the Sherman Act.

Comparing the NLRA’s preemptive effect to the *Parker* state action exemption reveals that the NLRA is more broadly preemptive than the Sherman Act.¹⁹⁶ Under *Parker*, states were exempted from preemption by the Sherman Act, leaving the State unrestrained as to antitrust law.¹⁹⁷ The NLRA, by contrast, created a federal scheme that preempted state action in the entire field of private-sector labor law, save a few express exceptions. Therefore, a state requires a specific carve-out, such as in Section 14(b) of the NLRA, to legislate in the area of labor law.

Political subdivisions, such as localities, do not enjoy the same freedom given to states by the *Parker* state action exemption. In *Cnty. Commc’ns. Co. v. Boulder*, Community Communications provided television services for a section of the City of Boulder and, aided by technological advancement in the field, told the City Council that it planned to significantly expand its

¹⁹¹ 29 U.S.C. § 218(a) (2012).

¹⁹² See *Parker v. Brown*, 317 U.S. 341, 351 (1943).

¹⁹³ *Id.* at 344.

¹⁹⁴ *Id.* at 350.

¹⁹⁵ *Id.* at 351.

¹⁹⁶ While the *Parker* decision uses terms indicating a preemption argument, the majority decision in *Cnty. Commc’ns Co. v. Boulder*, 455 U.S. 40 (1982), frames the discussion as about a state action exemption, rather than preemption. As the dissent points out, however, the analysis is based upon preemption, and the majority clearly rejects the argument that because state regulation is not exempted or preempted neither is local regulation. *Id.* at 62 (Rehnquist, J., dissenting).

¹⁹⁷ 317 U.S. at 351.

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service area.¹⁹⁸ When the Boulder Communications Co. (BCC) requested a permit to do the same, the City Council put a three-month moratorium on Community's expansion in order to draft a new television ordinance to allow other businesses to enter the market before Community could move into the new territory.¹⁹⁹ Community then sought an injunction on the moratorium, claiming that it violated the Sherman Antitrust Act.²⁰⁰ The Court granted the injunction, finding that the state action exemption to the Sherman Act permits states, but not localities, to engage in anti-competitive regulation, unless that action is taken pursuant to clearly articulated state policy.

After its review of the *Parker* state action exemption, the Court in *Community Communications* explained that localities are not exempt from the coverage of the antitrust laws. The Court relied on precedent holding that subdivisions are not the "equivalents of the States themselves" and are not entitled to the federal deference granted to States.²⁰¹ The Court noted that given "the serious economic dislocation which could result if cities were free to place their own parochial interest above the Nation's economic goals," it was particularly "unwilling to" exempt local action as a form of state action.²⁰² The Court has read the Sherman Act's silence regarding preemption of state action as an exemption for states, but not localities. The NLRA's explicit specification of an exemption for States, but not localities, therefore provides an even stronger basis for granting deference only to the States. The 14(b) exception operates in the context of broad NLRA preemption of the entire field of private-sector labor law, whereas the Sherman Act's silence leaves the state unrestrained as to antitrust law. Moreover, the same "serious economic dislocation" concern is applicable in the local right-to-work context. The NLRA fosters uniformity and labor peace, and having multiple different laws governing bargaining and union security within one state creates difficulty for companies and workers.

The Court in *Community Communications* also rejects the City of Boulder's claim that its action constitutes a state action in light of the Colorado Constitution's Home Rule Amendment.²⁰³ The City argued that under the Home Rule Amendment, the state passed all of its power over local affairs to the relevant locality and that, as a result, local actions taken pursuant to that authority constituted state actions.²⁰⁴ The Court wholly rejects this proposition, stating that under the federalism principle underlying the *Parker* state-action exemption, only the federal and state governments maintain sovereign authority.²⁰⁵ The authority of localities is not independent of these institu-

¹⁹⁸ 455 U.S. at 44–45.

¹⁹⁹ *Id.* at 45–46.

²⁰⁰ *Id.* at 46–47.

²⁰¹ *Id.* at 51 (citing *City of Lafayette, La. v. La. Power & Light Co.*, 435 U.S. 389, 412 (1978)).

²⁰² *Cmty. Communications Co. v. Boulder*, 455 U.S. 40, 51 (1982).

²⁰³ *Id.* at 52.

²⁰⁴ *Id.* at 53.

²⁰⁵ *Id.* (citing *United States v. Kagama*, 118 U.S. 375, 379 (1886)).

tions but rather derived from them. The grant of authority contained in the Home Rule Amendment was thus found insufficient for purposes of the state-action exemption to the Sherman Act. Identical reasoning necessitates the same conclusion in the context of the NLRA. Because Section 14(b) permits states to pass right-to-work legislation but does not mention localities, the mere presence of general legislative power granted pursuant to Home Rule authority should not allow for the passage of local right-to-work ordinances.²⁰⁶ While the breadth of home rule statutes varies by state, the NLRA seeks to ensure relatively uniform labor relations. State-by-state determinations on whether a locality has the ability to pass an ordinance is contrary to this overriding goal. The tapestry of right-to-work laws which would result should such ordinances be permitted would erase any semblance of uniformity. Furthermore, to do so would be to ignore the “federalism principle of limited state sovereignty.”²⁰⁷

The Court in *Community Communications* acknowledged a second potential way to uphold the City of Boulder’s moratorium, stating that localities that “acted pursuant to a clearly articulated and affirmatively expressed state policy” could make use of the state-action exemption.²⁰⁸ However, the Colorado Home Rule Amendment was found insufficient for this purpose, as the clear articulation requirement “is not satisfied when the State’s position is one of mere neutrality respecting the municipal actions challenged as anticompetitive.”²⁰⁹ Given the much broader preemption of the NLRA, this municipal use of the state-action exemption pursuant to clear state policy is not appropriate in the local right-to-work context. Even if it theoretically existed, imagining a state with “a clearly articulated and affirmatively expressed state policy” with respect to right-to-work—apart from simply having its own right-to-work law—is difficult. Ultimately, not only has the Supreme Court generally refused to treat states and their political subdivisions as equivalents in the context of the less-broadly-preemptive Sherman Act, but its limited exception to that treatment makes little sense when applied to local right-to-work ordinances and the NLRA.

An examination of preemption under the FRSA is also illustrative. In *Donelon v. New Orleans Terminal Co.*,²¹⁰ some officials of the Parish of Jefferson, Louisiana filed suit against the New Orleans Terminal Company seeking to require it to properly repair and maintain its tracks.²¹¹ This action was taken pursuant to a resolution passed by the Jefferson Parrish Council in the wake of two train derailments.²¹² The New Orleans Terminal Company

²⁰⁶ Brief for Appellees at 18-20, *UAW v. Hardin Cty.*, No. 16-5246 (6th Cir., filed June 13, 2016).

²⁰⁷ *Cnty. Communications*, 455 U.S. at 54.

²⁰⁸ *Id.* (citing *City of Lafayette*, 435 U.S. at 394).

²⁰⁹ *Id.* at 55.

²¹⁰ 474 F.2d 1108 (5th Cir. 1973).

²¹¹ *Id.* at 1110.

²¹² *Id.*

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argued that the actions of the Jefferson Parrish Council were wholly preempted by the FRSA.²¹³ The Fifth Circuit acknowledged two statutory “exceptions” to the express preemption of the FRSA, both of which referred specifically to “a State.”²¹⁴ As a political subdivision, however, Jefferson Parrish did not qualify for either.²¹⁵ The Fifth Circuit made clear that “individual officials are without authority under the Federal Railroad Safety Act of 1970 to require the Railroad to meet any safety standard beyond those provided for in the national Act.”²¹⁶ Because the case concerned the actions of officials on behalf of a locality rather than “an attempt by the State of Louisiana to regulate railroad safety,” neither exception was applicable.²¹⁷ This FRSA preemption decision provides a useful comparison to the NLRA under Section 14(b). Both provide limited exceptions for State law in certain circumstances to their otherwise broad preemption in their respective subject matters. Neither mentions localities or political subdivisions in its preemption clause. Thus local right-to-work ordinances, like local rail safety ordinances, should be preempted.

While the Supreme Court has not yet addressed the issue of FRSA preemption of local ordinances, many courts have followed the Fifth Circuit’s reasoning.²¹⁸ A number of courts, including the Sixth Circuit in the *Hardin County* case, have refused to follow the Fifth Circuit’s approach, relying instead on *Mortier* and *Ours Garage*.²¹⁹ As discussed below, NLRA preemption is more expansive than that at issue in those Supreme Court cases and preempts local action.

Neither *Wisconsin Pub. Intervenor v. Mortier*²²⁰ nor *City of Columbus v. Ours Garage & Wrecker Serv.*,²²¹ two cases cited by those supporting passage of local right-to-work ordinances, support an interpretation of “State” which includes political subdivisions. In *Mortier*, plaintiffs challenged a town ordinance, adopted via traditional police powers,²²² creating a permit requirement for pesticide use in certain situations, as preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).²²³ Plaintiffs’ preemption arguments ultimately failed, and the Court upheld the ordinance.²²⁴

²¹³ *Id.* at 1111.

²¹⁴ *Id.* at 1112.

²¹⁵ *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973).

²¹⁶ *Id.* at 1113.

²¹⁷ *Id.* at 1112.

²¹⁸ *Norfolk S. Ry. Co. v. City of Alexandria*, 2009 U.S. Dist. Lexis 31732 (E.D. Va. 2009), vacated for mootness by 608 F.3d 150 (4th Cir. 2010); *Norfolk S.R. Co. v. Hapeville*, 779 F. Supp. 601, 603 (N.D. Ga. 1991); *Vill. of Mundelein v. Wis. Cent. RR*, 367 Ill. App.3d 417, 431 (2006); *Grand T.W.R. Co. v. Merrillville*, 738 F. Supp. 1205, 1207 (N.D. Ind. 1989).

²¹⁹ *UAW v. Hardin County*, No. 16-5246, at 11–12 (6th Cir. Nov. 18, 2016); *Burlington N.R. Co. v. Connell*, 811 F. Supp. 1459, 1463–64 (E.D. Wash. 1993).

²²⁰ 501 U.S. 597 (1991).

²²¹ 536 U.S. 424 (2002).

²²² 501 U.S. at 597.

²²³ *Id.* at 602.

²²⁴ *Id.* at 606.

The Court said that “even when considered together, the language and the legislative materials relied on below are insufficient to demonstrate the necessary congressional intent to pre-empt.”²²⁵ Plaintiffs argued that because “political subdivisions” were explicitly addressed in some parts of FIFRA but not others, all instances of “State” without additional modifiers must be limited strictly to the States; the Court dismissed this argument, noting that this reading would result in contradictions within FIFRA.²²⁶ The Court also emphasized that no implied preemption resulted from the FIFRA’s provisions and that the town was acting pursuant to traditional police powers.²²⁷ Furthermore, “mere silence, in this context, cannot suffice to establish a clear and manifest purpose to pre-empt local authority.”²²⁸ Ultimately, the weak textual support and the ambiguous legislative history were not enough to convince the Court of preemption. The FIFRA, unlike the NLRA, did not implicitly field preempt the entire area of regulation, and the grant of authority to the States at issue did not hand back powers otherwise preempted.²²⁹ Of course, the NLRA preempts the field of labor management relations, and Section 14(b) hands back to the states a power otherwise held by the federal government. Unlike the situation in *Mortier*, where a contradiction was created by reading the plain meaning of “state” to mean a state, the use of the word “State” consistent with its plain meaning to refer only to the state in Section 14(b) creates no contradiction in the Act.²³⁰ In fact, reading “State” to include localities creates a conflict in Section 14(b) because interpreting state to mean localities when modifying the term law means that the provision authorizes right-to-work in any state where a locality passes a local right-to-work ordinance. Common sense dictates that the language “in any State” does not refer to a political subdivision of a state.

In *Ours Garage*, the Court again addressed a claim that a local ordinance was preempted by federal legislation: the Interstate Commerce Act.²³¹ The Columbus ordinance imposed licensing and other standards on tow trucks that operated within the city. The Court explicitly compared the case to *Mortier* and acknowledged that “[t]his case is a closer call,” largely because other provisions in the same section addressed States and political subdivisions, while the one at issue merely referred to “States.”²³² Here, like in *Mortier*, an interpretation of “state” that did not include political subdivisions would have introduced a logical contradiction.²³³ In addition, the ordinance in *Ours Garage* was considered a safety provision and therefore fell within “our federal system’s traditional comprehension of ‘the safety regula-

²²⁵ *Id.* at 607.

²²⁶ *Id.* at 608.

²²⁷ *Id.* at 614.

²²⁸ *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607 (1991).

²²⁹ *Id.* at 605, 614.

²³⁰ *See supra* section VI e.

²³¹ 536 U.S. 424, 429 (2002).

²³² *Id.* at 433.

²³³ *Id.* at 436.

tory authority of a State.”²³⁴ In order to exercise this traditional state power, states were permitted to divide their authority as they saw fit. Legislative history offered no help to the plaintiffs’ arguments, and the ordinance was upheld. Unlike the situations in *Ours Garage* and *Mortier*, a right-to-work ordinance is neither a health and safety issue traditionally left to the States, nor adopted via traditional police powers. Instead, the NLRA explicitly permits states to pass right-to-work statutes because the field of labor relations is otherwise a matter of federal and not state concern. The states are not permitted to divide this granted authority on this federal topic as they see fit.

Mortier and *Ours Garage* do not stand for the bare proposition that the term “State” must always include political subdivisions. Instead, they demonstrate that the language of the Act, its legislative history, and Congressional intent are key to determining what is meant by “State” in a given provision.²³⁵ Each of these factors is addressed extensively in other sections of this Article.²³⁶ The language of the NLRA and Taft-Hartley amendments plainly differentiate between instances involving political subdivisions and localities and those that do not. The legislative history indicates that Congress contemplated only state right-to-work laws, and not local ordinances. Finally, the Supreme Court has clarified on more than one occasion that Congress intends to broadly preempt state and local labor-relations statutes and ordinances, except when the Act expressly permits an exception. It is clear that in the context of Section 14(b), Taft-Hartley, and likely the entire NLRA, the choice of when to specify political subdivisions (or some similar term) and when to exclude them was deliberate, and therefore that political subdivisions are not given the authority to prohibit agency shop agreements.

VII. LRTW ORDINANCES ARE A POOR USE OF COUNTY FUNDS

No evidence suggests businesses relocate to states, let alone counties, with right-to-work laws or ordinances.²³⁷ Counties pass local right-to-work

²³⁴ *Id.* at 437.

²³⁵ *Ours Garage*, 536 U.S. at 428; *Mortier*, 501 U.S. at 607.

²³⁶ *See supra*, Sections VI e & f.

²³⁷ *See* ANNA BAUMANN, KENTUCKY CENTER FOR ECONOMIC POLICY, WHAT THE RESEARCH SAYS ABOUT “RIGHT-TO-WORK” LAWS, EMPLOYMENT, AND WAGES 2 (2015), at 2, <http://kypolicy.org/dash/wp-content/uploads/2015/04/What-the-Research-Says-about-RTW-Laws-Employment-and-Wages.pdf> [<https://perma.cc/XW9K-K498>]; Indiana University News Release, *Right-to-work law not the best catalyst for economic growth: IU expert* (Jan. 31, 2012), <http://newsinfo.iu.edu/news-archive/21055.html> [<https://perma.cc/DNE6-75SJ>] (stating that three studies show that “right-to-work legislation has no effect on economic growth.”); *cf.* NILRR STAFF, NATIONAL INSTITUTE FOR LABOR RELATIONS RESEARCH, NEW FEDERAL RESERVE STUDY OF IDAHO ECONOMY RECONFIRMS THAT RIGHT TO WORK LAWS PROMOTE PROSPERITY (June 17, 2002), <http://www.nilrr.org/2002/06/17/new-federal-reserve-study-idaho-economy-reconfirms-right-work-laws-promote-prosperity/> [<https://perma.cc/36BX-VNBR>] (citing Emin M. Dinlersoz & Ruben Hernandez-Murillo, *Did ‘Right-to-Work’ Work for Idaho*, FEDERAL RESERVE BANK OF ST. LOUIS REVIEW (May/June 2002)) (claiming that Idaho “experienced a significant . . . growth in manufacturing employment” post passage of a right-to-work law).

ordinances because they believe businesses will be attracted to locations where unionization is difficult.²³⁸ Yet, when surveyed, businesses do not list unionization as a primary consideration in site selection, instead identifying such factors as location relative to supply routes, proximity to other businesses, especially suppliers or buyers, level of taxation or tax breaks, and availability of an educated and skilled workforce.²³⁹ While no evidence suggests right-to-work attracts business, some evidence suggests wages are lower in right-to-work states than in non-right-to-work states.²⁴⁰ Thus, counties passing right-to-work ordinances may be expending funds to lower the wages of their constituents without attracting additional jobs.

Additionally, local right-to-work ordinances cause exactly the type of uncertainty about collective bargaining that the Act is intended to avoid, which is harmful to businesses and employees alike. As noted by the Federal District Court of New Mexico, the resultant “crazy-quilt of regulations within the various states” would administratively burden employers and unions trying to negotiate one collective bargaining agreement because they would be “subject to numerous regulatory schemes.”²⁴¹ Employees working in different localities often work for the same company and are represented by the same union. Simply including a provision of the CBA that authorizes an agency fee agreement where permitted does not lessen the administrative burden. Employers and unions will still have to research what type of union security is permissible based on each local jurisdiction’s ordinances. Researching hundreds of local ordinances is qualitatively different than staying current on which of 50 states have passed right-to-work laws. Local right-to-work ordinances undermine the uniformity that the NLRA is designed to ensure, and incentivize unions and companies to abandon union security altogether rather than expend money and time researching, and risking running afoul of, myriad different local ordinances.²⁴²

²³⁸ See Joseph Gerth, *Kentucky counties take up own ‘right-to-work’ laws*, Kentucky Courier-Journal, Jan. 17, 2015, <http://kypolicy.org/dash/wp-content/uploads/2015/04/What-the-Research-Says-about-RTW-Laws-Employment-and-Wages.pdf> [<http://perma.cc/6C79-RLG8>] (“‘We think it will help economic growth and promote commerce in our community,’ said Harry Berry, judge-executive of Hardin County, which passed a law Tuesday. He argues that by passing its ordinance, the county put itself in line to lure business that earlier wouldn’t have considered locating in the county.”).

²³⁹ Wuyang Hu et. al, *Understanding Firms’ Relocation and Expansion Decisions Using Self-Reported Factor Importance Rating*, 38 Rev. of Regional Stud. 67, 81 (2008) (“[T]he availability of materials, transportation options, and high-tech support are found to be key factors . . . Local supply of skilled labor, local tax structures, and lower relative labor costs are found to be significant in firms’ future relocation /expansion decisions but are not significant in their actual past behavior.”); GREG LEROY, *THE GREAT AMERICAN JOBS SCAM: CORPORATE TAX DODGING & THE MYTH OF JOB CREATION* 48 (2005).

²⁴⁰ ELISE GOULD & WILL KIMBALL, ECONOMIC POLICY INSTITUTE, “*Right to Work*” States Still Have Lower Wages, at 2 (Apr. 22, 2015) (finding wages in right-to-work states are 3.1 percent less than in non-right-to-work states).

²⁴¹ *N.M. Federation of Labor v. City of Clovis*, 735 F. Supp. 999 (D.N.M. 1990).

²⁴² *Id.* at 1003.

Moreover, even if litigation resulting from right-to-work ordinances is funded by out-of-state conservative interests, passage of such ordinances takes away time from county officials. The time spent in researching, passing, and implementing the ordinances is not ameliorated by litigation defense. Additionally, it is not clear that even where promised, pro-right-to-work groups rather than county taxpayers will foot the litigation bill. A Florida-based political group, Protect My Check, assured the twelve Kentucky counties that passed local-right-to-work ordinances that the group would fund all resultant litigation expenses.²⁴³ Yet, the litigation focused on Hardin County's right-to-work ordinances has required the counties' insurer to expend time and funds defending the claims. The cost to defend the suit against Hardin County in the federal district court (in the Western District of Kentucky) was actually assumed by the Kentucky Association of Counties (KACo), the insurer of 113 Kentucky counties.²⁴⁴ This means that in addition to the taxpayer dollars that fund Hardin County's insurance premium payments, taxpayer dollars that fund premiums for counties across the state are being used to pay to defend these preempted ordinances. It is unknown whether KACo is paying for the appeal to the 6th Circuit. Either they are, in which case the cost of the litigation is footed by Kentucky tax payers, or they are not, in which case the litigation defense will be paid for by an out-of-state conservative group. But either way, KACo has stated that Hardin County's legal insurance premiums will rise because it has "rack[ed] up legal bills after diving into unknown legal waters."²⁴⁵

VIII. CONCLUSION

As more municipalities pass local right-to-work ordinances, understanding the legal implications of such ordinances becomes increasingly necessary. Each time the issue of local right-to-work ordinances has been brought before a court, except in one case, the court has found the ordinance preempted. However, many municipalities continue to pass these ordinances, and the litigation is now in the United States Circuit Courts of Appeal and likely headed to the Supreme Court. This Article updates the negligible and outdated academic discussion of this important topic. It serves as a guide to local legislatures considering passing such ordinances, unions and employers which may find themselves subject to them, and judges who have the occasion to consider them.

This Article first discussed the history of union security agreements under the NLRA, detailing how both closed-shop and union-shop security

²⁴³ Editorial, *12 counties have enacted anti-union laws, but 113 counties are paying to defend them through insurance premiums*, LEXINGTON HERALD LEADER (Feb. 11, 2016), <http://www.kentucky.com/opinion/editorials/article59899671.html#storylink=cpy> [<https://perma.cc/J82U-LH69>]; Bologna, *supra* note 71.

²⁴⁴ 12 counties, *supra* note 249.

²⁴⁵ *Id.*

agreements were held to be unlawful after the passage of Taft-Hartley. Currently, only the agency shop remains lawful, and it guarantees private-sector employees the right not to join the union that represents them. The article then discusses the NLRA's broad preemptive effect under two types of NLRA preemption, *Garmon* and *Machinists*. The Article next introduced a narrow exception to the comprehensive federal preemption of states' ability to regulate in the area of labor relations—the ability of states to pass right-to-work laws.

The necessary background having been covered, the Article then turned to the issue of local right-to-work ordinances. To support the conclusion that these local-right-to-work ordinances are preempted by the NLRA, the Article first applied the two preemption doctrines to the enactment of these ordinances. The Article then explains how every court, except one, to address the issue has found the ordinances preempted and how labor law experts, including the vice president of the National Right to Work Committee, agree the ordinances are preempted. Next, the analysis of NLRA preemption was examined using both the language and legislative history of the Act. The language of the Act supports the idea that local right-to-work laws are preempted because of the differentiation in language used. The Act uses specific language when Congress intended subdivisions or municipalities to be included, and uses other specific language when it intends only states to be affected. The legislative history further confirms the idea that local right-to-work laws are preempted because Congress did not contemplate local right-to-work laws during the consideration of Taft-Harley. Finally, the Article compared and contrasted the NLRA's broad preemption of local right-to-work ordinances to schemes of preemption under other federal statutes.

In addition to federal preemption, local right-to-work ordinances raise several other legal hurdles that constitute areas ripe for future research. The issues of whether any particular home-rule statute even permits a local right-to-work ordinance remains to be explored. Additionally, whether any state statute preempts a local-right-to-work ordinance must be addressed. Also the issue of whether local right-to-work ordinances constitute an unconstitutional taking, under either a state constitution or the U.S. Constitution, has not yet been addressed in the academic literature.²⁴⁶

Conservative organizations will continue to push municipalities across the nation to pass local-right-to-work ordinances, and some municipalities will continue to do so. Municipal authorities, unions, employers, and the courts will continue to be confronted with the task of deciding if these laws

²⁴⁶ The argument that a state right-to-work law is an unconstitutional taking has been recognized by several courts and half of the Seventh Circuit judges, including Judge Posner. Order at 1, *Sweeney v. Pence*, No. 13-1264, 767 F.3d 654 (7th Cir. 2014); Temporary Injunction 8/11/16, *W.Va. AFL-CIO v. Tomblin*, W. Va. Cir. Ct., No. 16-C-959 (unreported); *Int'l Ass'n v. Wis.*, 2016 Wis. Cir. LEXIS 1, at *9, 11–14 (Wis. Cir. Ct. Apr. 8, 2016); *but see Int'l Union of Operating Eng'rs Local 370 v. Wasden*, No. 4:15-CV-00500-EJL-CWD, 2016 U.S. Dist. LEXIS 146966 (D. Idaho Oct. 24, 2016).

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are preempted under the NLRA. This Article will aid them in making an accurate determination—that the ordinances are preempted by the NLRA.

