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BACKGROUNDER

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Local Governments Can Increase Job Growth and Choices by Passing Right-to-Work Laws

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Abstract

Union contracts often compel employees to pay union dues or lose their jobs. Twenty-four states have passed "right-to-work" (RTW) laws which prevent companies from firing workers who do not pay union dues. RTW laws expand personal freedom while boosting investment and job creation, but unions oppose them because they cost the unions money and members. The government should not force workers to pay for unwanted union representation. In this Heritage Foundation Backgrounder, *James Sherk and Andrew Kloster explain how RTW laws work, and clarify the legal confusion surrounding the validity of local RTW ordinances. Currently, only states have RTW laws on the books, but there is a good argument to be made that cities and counties in non-RTW states can pass their own RTW ordinances. Such ordinances would make these localities magnets within their state for business development.*

Key Points

- Unions negotiate contracts that force workers to pay dues or lose their jobs. Right-to-work (RTW) laws prohibit these coercive schemes and give workers the choice of whether to give money to unions.
- RTW laws reduce the aggressiveness of union organizers; voluntary dues mean that less money is at stake in unionization drives.
- RTW laws attract investment and jobs for the same reason. Companies want to know that unions will leave them alone if they treat their workers well.
- The Supreme Court has not ruled on whether federal law pre-empts local RTW ordinances. But since Congress has not clearly pre-empted them, localities are on strong legal footing to pass their own RTW ordinances.
- Cities and counties in states without RTW laws should pass local RTW ordinances. They would protect the freedom of their residents while leveling the playing field as they compete for investment with RTW states.

Union contracts often compel employees to pay union dues or lose their jobs. This forces workers to support the union financially even if the union contract has negative consequences for them or they oppose the union's agenda. Twenty-four states have passed "right-to-work" (RTW) laws which prevent companies from firing workers who do not pay union dues. RTW laws expand personal freedom while boosting investment and job creation, but unions oppose them because they cost the unions money and members. As many as three-quarters of Americans tell pollsters they favor voluntary union dues.[1]

Historically, only states have passed right-to-work laws; few cities and counties in the 26 non-RTW states have attempted to prohibit

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forced dues. However, the Supreme Court has ruled that the National Labor Relations Act (NLRA) does not regulate state limitations on forced union dues.[2] This ruling allowed states to pass their own RTW laws; its logic would also allow local governments to do so. Though the Supreme Court has not yet ruled on whether federal law pre-empts local RTW laws, the fact that Congress has not clearly prohibited such laws means that cities and counties have a good legal argument that they are free to pass them. Local governments should expand jobs and choices for their residents by passing RTW ordinances.

What Is "Right to Work"?

Unions often negotiate contracts requiring all workers to pay union dues—or to lose their jobs. While federal law prohibits the "closed shop," preventing employers from refusing to hire non-union workers,[3] unions can nevertheless often collect mandatory dues from all workers—union and non-union alike. Under these arrangements, workers must typically pay between 1 percent and 2 percent of their wages in dues whether they support the union or not.

Many workers oppose their unions' agendas. Some oppose them because their union contract prevents them from earning performance-based raises.[4] Others oppose their unions' political activities: Unions almost exclusively support Democrats, despite the fact that more than a third of their members voted for Republicans in the last midterm elections.[5] Still other workers oppose specific causes their union supports. In 2013, the Service Employees International Union (SEIU) gave $25,000 of its members' dues to Planned Parenthood, America's largest abortion provider. The United Food and Commercial Workers (UFCW) gave Planned Parenthood $10,000 that year.[6] Americans who oppose abortion do not want to subsidize something they consider the taking of innocent life.

To prevent unions from forcing workers to support them financially, 24 states have passed right-to-work laws. Such laws prevent companies from firing workers who do not pay union dues. Workers may still pay voluntarily, but unions cannot threaten their jobs if they do not.

Workers who feel mistreated have the right to unionize. Right-to-work laws encourage union organizers to restrict their attention to such workers.

The union movement strongly opposes RTW laws. It has self-interested motives for doing so: Union membership often falls significantly after states pass RTW laws. When Oklahoma passed its RTW law in 2002, union membership in the state stood at 8.9 percent. By 2013, that figure had fallen one-sixth to 7.5 percent. When Idaho passed its RTW law in 1987, over 13 percent of its workers belonged to unions. That figure dropped to below 5 percent in 2013.[7] Wisconsin Governor Scott Walker restricted collective bargaining for most government employees in his state and made membership in those

1. Rasmussen Reports poll of 1,000 likely voters, conducted January 29–30, 2012. Margin of error + or – 3 percent. Rasmussen Reports, "74% Favor Right-to-Work Law Eliminating Mandatory Union Dues," January 31, 2012, http://www.rasmussenreports.com/public_content/business/jobs_employment/january_2012/74_favor_right_to_work_law_eliminating_mandatory_union_dues (accessed August 18, 2014).
2. Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 747 (1963).
3. 29 U.S.C. § 158.
4. *See, e.g.,* Giant Eagle, Inc., v. United Food & Commercial Workers Local 23 (3d Cir. 2012). The UFCW Local 23 fought in court to force Giant Eagle to rescind pay increases granted to two dozen employees because these individual raises exceeded those permitted by the union's seniority system.
5. Dalia Sussman, "Fewer Voters from Union Households in 2010," *The New York Times* Caucus Blog, February 28, 2011, http://thecaucus.blogs.nytimes.com/2011/02/28/fewer-voters-from-union-households-in-2010/ (accessed August 18, 2014), and "Labor: PAC Contributions to Federal Candidates," OpenSecrets.org, 2010, http://www.opensecrets.org/pacs/sector.php?cycle=2010&txt=P01 (accessed August 18, 2014).
6. U.S. Department of Labor, Office of Labor-Management Standards (OLMS), "Payer/Payee Search: Planned Parenthood," http://kcerds.dol-esa.gov/query/getPayerPayeeQry.do (accessed August 19, 2014).
7. Barry T. Hirsch and David A. Macpherson, "Union Membership and Coverage Database from the Current Population Survey," *Industrial and Labor Relations Review*, Vol. 56, No 2 (January 2003), pp. 349–354, http://www.unionstats.com (accessed August 18, 2014).

unions voluntary. Government unions in the Badger State lost between 30 percent and 60 percent of their members within two years.[8]

Most of the union-represented workers who stop paying dues when given the option are those who do not benefit from union contracts. Disproportionate numbers of highly educated workers, for example, choose not to pay—the very workers held back by union seniority systems.[9] Unions often cannot persuade these workers to pay dues without the threat of losing their jobs. Making union membership voluntary would save workers—and cost unions—a lot of money.

Right-to-Work Laws Reduce Unions' Aggressiveness. For the same reason, RTW laws reduce the aggressiveness of union organizers. Making union membership voluntary reduces the financial incentives for unions to target workplaces where they have lukewarm support. Even if they win, unions cannot force reluctant workers to pay dues. Research shows that, on average, union organizing falls 50 percent within five years of enacting a RTW law.[10] Workers who feel mistreated have the right to unionize. RTW laws encourage union organizers to restrict their attention to such workers.

Right-to-Work Laws Promote Investment and Growth. Making union organizers less aggressive should encourage business investment. Unionized firms earn lower profits, invest less, and create fewer jobs than comparable non-union firms.[11] In fact, research confirms that RTW laws attract investment and promote job creation.[12]

Boeing's decision to build a new plant in South Carolina—a RTW state—illustrates a larger trend. Businesses consider the presence (or absence) of a RTW law to be a major factor when deciding where to locate.[13] It was no accident that foreign automobile brands located their U.S. plants primarily in RTW states, such as Alabama, Mississippi, and Tennessee.

Unsurprisingly, this means more jobs in RTW states. In 2013, RTW states had lower unemployment rates (6.5 percent) than states without RTW laws (7.3 percent).[14] Econometric analysis controlling for other factors also finds a strong correlation between RTW laws and faster economic growth.[15]

8. Daniel Bice, "Membership in Public Worker Unions Takes a Hit under Act 10," *Milwaukee–Wisconsin Journal Sentinel*, July 20, 2013, http://www.jsonline.com/watchdog/noquarter/membership-in-public-worker-unions-takes-a-hit-under-act-10-b9957856z1-216309111.html (accessed August 18, 2014).
9. Richard Sobel, "Empirical Evidence on the Union Free-Rider Problem: Do Right-to-Work Laws Matter?" *Journal of Labor Research*, No. 16 (1995), pp. 347–365, found that 70 percent of workers who are covered by collective bargaining agreements but do not pay union dues value union coverage less than the amount of dues they must pay.
10. David Ellwood and Glenn Fine, "The Impact of Right-to-Work Laws on Union Organizing," *Journal of Political Economy*, No. 95 (April 1987), pp. 250–273.
11. David G. Blanchflower, Neil Millward, and Andrew J. Oswald, "Unionization and Employment Behavior," *Economic Journal*, Vol. 101, No. 407 (July 1991), pp. 815–834; Jonathan S. Leonard, "Unions and Employment Growth," *Industrial Relations*, Vol. 31, No. 1 (Winter 1992), pp. 80–94; Richard J. Long, "The Effect of Unionization on Employment Growth of Canadian Companies," *Industrial and Labor Relations Review*, Vol. 46, No. 4 (July 1993), pp. 691–703; Robert Connolly, Barry T. Hirsch, and Mark Hirschey, "Union Rent Seeking, Intangible Capital, and Market Value of the Firm," *Review of Economics and Statistics*, Vol. 68, No. 4 (November 1986), pp. 567–577; Stephen G. Bronars and Donald R. Deere, "Unionization, Incomplete Contracting, and Capital Investment," *Journal of Business*, Vol. 66, No. 1 (January 1993), pp. 117–132; Barry T. Hirsch, "Firm Investment Behavior and Collective Bargaining Strategy," *Industrial Relations*, Vol. 31, No. 1 (Winter 1992), pp. 95–121; Barry T. Hirsch, "Union Coverage and Profitability Among U.S. Firms," *The Review of Economics and Statistics*, Vol. 73, No. 1 (February 1991), pp. 69–77; and Stephen G. Bronars, Donald R. Deere, and Joseph S. Tracy, "The Effects of Unions on Firm Behavior: An Empirical Analysis Using Firm-Level Data," *Industrial Relations*, Vol. 33, No. 4 (October 1994), pp. 426–451.
12. Robert J. Newman, "Industry Migration and Growth in the South," *Review of Economics and Statistics*, Vol. 65, No. 1 (February 1983), pp. 76–86.
13. F. J. Calzonetti and Robert T. Walker, "Factors Affecting Industrial Location Decisions: A Survey Approach," in *Industry Location and Public Policy*, ed. Henry W. Herzog Jr. and Alan M. Schlottman (Knoxville, TN: University of Tennessee Press, 1991), pp. 221–240, and Roger W. Schmenner, Joel C. Huber, and Randall L. Cook, "Geographic Differences and the Location of New Manufacturing Facilities," *Journal of Urban Economics*, No. 21 (1987), pp. 83–104.
14. Heritage Foundation calculations using data from the Bureau of Labor Statistics, "Regional and State Unemployment." Figures are the average unemployment rate in 2013 for right-to-work states and non–right-to-work states. Data and calculations available from the authors upon request.
15. Richard Vedder and Jonathan Robe, "The High Cost of Big Labor: An Interstate Analysis of Right to Work Laws," The Competitive Enterprise Institute, 2014, http://cei.org/sites/default/files/Richard%20Vedder%20and%20Jonathan%20Robe%20-%20An%20Interstate%20Analysis%20of%20Right%20to%20Work%20Laws.pdf (accessed August 18, 2014).

Unions often claim that RTW laws lower wages. In theory, RTW laws have both upward and downward effects on wages. Unions restrict the supply of jobs in unionized companies. This reduces the pay of non-union workers—they do not have as many good job opportunities—while inflating the wages of union members. Unions also argue that companies will cut wages if they do not feel at risk of becoming unionized. Lower union membership caused by RTW laws would reduce these wage premiums, they claim. However, the additional business investment that a RTW law attracts would raise the demand for labor, leading to increased wages. Economic theory does not predict which of these will have the greater effect on wages.

Right-to-work laws attract investment and promote job creation.

Empirical research suggests that these factors largely cancel each other out. Most studies show that RTW laws have little effect on wages in either direction.[16] RTW states do have lower average wages than non-RTW states, but this happens because they are located primarily in the South, which was once much less developed than the North and still has a lower cost of living. Research controlling for this difference shows that workers in RTW states have, if anything, slightly higher wages.[17]

Members-Only Contracts. In a free society, the government should not force workers to financially support organizations they oppose. Unions justify forced dues by arguing that the law requires them to represent non-members. They argue that RTW laws allow workers to "free ride" on union contracts—enjoying the benefits without paying the costs.[18]

This argument involves a selective interpretation of the law. Unions do not have to represent non-members. The Supreme Court has ruled that the NLRA allows them to negotiate contracts covering only dues-paying members.[19] The law requires unions to represent non-members only if they negotiate as "exclusive bargaining representatives."[20]

That status gives a union an effective monopoly over a workplace: No other union can bargain on behalf of workers, and non-union workers cannot bargain for themselves. If a union seeks this advantage, the law requires it to bargain fairly. If it wants this monopoly status, it cannot selectively negotiate, for example, one wage for workers who pay dues, and a lower wage for workers who do not. But unions do not have to claim exclusive representative status in the first place. The law allows unions to become exclusive representatives and to force *non*-members to accept a contract negotiated by the union. The law should not force non-members who dislike provisions in that contract to pay union dues anyway.

Union Influence Blocks State RTW Efforts. Currently, 26 states have not passed RTW laws. Despite the strong arguments for RTW laws, unions in these states have enough political influence to prevent them from passing the legislature. In large part this occurs because of the financial windfall that mandatory dues provide unions; they spend that money heavily on political campaigns, often for

16. William J. Moore, "The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature," *Journal of Labor Research*, No. 19 (Summer 1998), pp. 445–469, and Ozkan Eren and Serkan Ozbeklik, "Right-to-Work Laws and State-Level Economic Outcomes: Evidence from the Case Studies of Idaho and Oklahoma Using Synthetic Control Method," University of Nevada Department of Economics *Working Paper*, 2011, http://econpapers.repec.org/paper/nlvwpaper/1101.htm (accessed August 18, 2014).
17. W. Robert Reed, "How Right-To-Work Laws Affect Wages," *Journal of Labor Research*, Vol. 24, No. 4 (October 2003), pp. 713–730.
18. This argument features prominently in various cases where public-sector unions seek to compel dues. In those cases, however, not only economics or federal statute play a role—the First Amendment also comes into play. And "free-rider arguments … are generally insufficient to overcome First Amendment objections." Knox v. Service Employees Int'l Union, Local 1000, 132 S. Ct. 2277, 2289 (2012).
19. *See, e.g.,* Retail Clerks v. Lion Dry Goods, Inc., 369 U.S. 17 (1962). Writing for the Court, Justice Brennon concluded that the NLRA's coverage is "not limited to labor organizations which are entitled to recognition as exclusive bargaining agents of employees…. 'Members only' contracts have long been recognized."
20. Stan Greer, "Union 'Representation' Is Foisted on Workers—Not Vice-Versa," National Institute for Labor Relations Research, February 2004, http://www.nilrr.org/files/SKMBT_60009080411230.pdf (accessed August 18, 2014).

the very incumbents who have protected them by refusing to enact RTW laws.[21]

In the 2010 midterm elections, the American Federation of State, County, and Municipal Employees (AFSCME) headquarters spent a third of its $200 million budget on politics and lobbying.[22] In that election cycle unions operated 10 of the 20 largest political action committees[23]and made up three of the largest five outside spending groups (excluding the two major parties).[24] Nationwide, unions report that they spend over $600 million a year on politics and lobbying, and spent approximately $1.3 billion in the 2009–2010 election cycle.[25]

Unions use their money to attack governors and legislators who propose voluntary union dues. The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) has announced plans to spend heavily to defeat the governors of Michigan, Ohio, and Wisconsin in November 2014.[26] Governor Rick Snyder of Michigan signed a RTW law, while Governor Scott Walker of Michigan gave RTW to most state employees, and Governor John Kasich of Ohio unsuccessfully tried to do the same in Ohio. Well-funded opposition has deterred public officials in many other states from passing RTW laws.

Local Governments Should Pass RTW Ordinances

Not all political activity takes place at the federal or even the state level. There is a good argument to be made that cities, counties, and other political subdivisions of states can pass their own RTW ordinances. In states where RTW laws are unlikely to pass the legislature, counties and cities can and should experiment with their own laws.[27] Such local ordinances would allow residents to enjoy the benefits of RTW despite the absence of statewide legislation. They would protect the personal freedom of local residents to decide for themselves whether to support a union. They would also bring strong economic development benefits.

Many companies simply will not locate in states without an RTW law.[28] These employers want to know that if they treat their workers well, unions will leave them alone. They do not want to have to constantly fight repeated unionization campaigns. Counties in states without RTW laws cannot attract these employers. A local RTW ordinance would level the playing field. It would allow these counties to compete for businesses without the lack of a statewide RTW law driving potential employers away. Local RTW ordinances would also make cities and counties magnets for employers within their state. Businesses that plan to locate in Ohio or Kentucky anyway would have strong incentives to locate in RTW counties.

Federal Law Pre-empts Conflicting Laws ... Local RTW laws would protect workers' rights while increasing local job opportunities. Surprisingly, almost no cities or counties have passed local RTW ordinances since Congress modified the NLRA in 1947. Many local government officials believe, like-

21. Technically, unions must allow workers to opt out of the political portion of their union dues. However, unions make it very difficult for workers to exercise this right, and most union members remain unaware of it. See James Sherk, "What Do Workers Want? Union Spending Does Not Reflect Member Priorities," testimony before the State Government Committee of the Pennsylvania House of Representatives, July 15, 2014, http://www.heritage.org/research/testimony/2014/07/what-do-workers-want-union-spending-does-not-reflect-member-priorities.
22. U.S. Department of Labor, Office of Labor-Management Standards (OLMS), "Form LM-2 Labor Organization Annual Report," filed by the American Federation State, County, and Municipal Employees, 2010, File No. 000-289, http://www.unionreports.gov (accessed August 18, 2014).
23. "Top PACs: 2010," OpenSecrets.org, http://www.opensecrets.org/pacs/toppacs.php?cycle=2010&party=A (accessed August 18, 2014).
24. Brody Mullins and John McKinnon, "Campaign's Big Spender," *The Wall Street Journal*, October 22, 2010, http://online.wsj.com/news/articles/SB10001424052702303339504575566481761790288 (accessed August 18, 2014).
25. Tom McGinty and Brody Mullins, "Political Spending by Unions Far Exceeds Direct Donations," *The Wall Street Journal*, July 10, 2012, http://online.wsj.com/news/articles/SB10001424052702304782404577488584031850026 (accessed August 18, 2014).
26. Alexander Burns, "AFL–CIO aiming at GOP Governors in 2014," *Politico*, August 13, 2013.
27. Note that the reverse is probably not true. A statewide RTW law would likely pre-empt local governments from passing anti-RTW ordinances. Further, an express, statewide anti-RTW law would likely pre-empt local governments from passing their own RTW laws.
28. F. J. Calzonetti and Robert T. Walker, "Factors Affecting Industrial Location Decisions: A Survey Approach," in Henry W. Herzog Jr. and Alan M. Schlottmann, eds., *Industry Location and Public Policy* (Knoxville, TN: University of Tennessee Press, 1991), and Roger W. Schmenner, Joel C. Huber, and Randall L. Cook, "Geographic Differences and the Location of New Manufacturing Facilities," *Journal of Urban Economics*, Vol. 21, No. 1 (1987), pp. 83–104.

ly erroneously, that federal law prevents them from doing so.

In the United States, federal law is "the supreme law of the land."[29] In other words, where there is a conflict between a valid federal law and a state, local, tribal, or other law, federal law pre-empts that law.

Determining whether federal law pre-empts another law is difficult, and often leads to court cases, some of which end up in the Supreme Court of the United States. As the Supreme Court has noted, "the purpose of Congress is the ultimate touchstone in every pre-emption case."[30] And in determining the intent of Congress in any pre-emption case, federal courts look at what Congress expressly said or what Congress clearly implied. Put another way, there is a "presumption against pre-emption": Where Congress does not clearly pre-empt states in one area of the law, states are presumptively free to legislate in that area.[31] Sometimes, as in the case of the NLRA, certain parts of a federal law are intended as the last word on the subject, while other parts of a law are designed to allow states and locales to set their own rules.

Congress has not clearly pre-empted local RTW laws: With this ambiguity as the legislative background, locales should feel free to experiment with their own RTW ordinances.

… but Congress Renounced Pre-emption of State RTW Laws … After passage of the NLRA, it was not clear whether states could pass RTW statutes. In a 1945 decision, the Supreme Court invalidated a Florida law placing certain requirements on the business agents of unions.[32] At the time, this decision could have fairly been read to suggest that the NLRA *did* prohibit state RTW laws. Partially as a result of this confusion, Congress clarified the law two years later as part of the Taft–Hartley Act.[33]

That amendment to the NLRA, now codified as 29 U.S.C. § 164, remains good law today and expressly renounces pre-emption of RTW laws: "Nothing 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 by State or Territorial law." In other words, clear statutory language in the NLRA as amended allows states and territories to pass RTW laws.

But what about cities, counties, or tribal governments? Would 29 U.S.C. § 164 prevent these entities from passing RTW laws? Does silence on this point indicate that Congress in 1947 sought to make clear that these entities could *not* pass RTW laws, or did Congress intend no federal preemption of RTW policies at the local level or on tribal territories? Certainly many local government leaders have simply assumed the former.

… and Local RTW Ordinances Are Not Clearly Pre-empted … In fact, a *Stanford Law Review* article in 1957 raised this very question, which the Supreme Court has not resolved in the intervening 57 years.[34] The article concluded that the NLRA did not prevent local governments from passing RTW ordinances.

To begin with, the article notes that Taft–Hartley was passed "to forestall the inference that federal policy [in the RTW space] was to be exclusive."[35] Indeed, the *Congressional Record* account of the Taft–Hartley Act clearly indicated the intent of Congress not to pre-empt the field of RTW laws, at least with respect to state laws. As the Supreme Court noted in *Retail Clerks Local 1625 v. Schermerhorn*:

> In other words, Congress undertook pervasive regulation of union-security agreements, raising in the minds of many whether it thereby preempted the field under the decision in Hill v. Florida, and put such agreements beyond state control. That is one reason why a section, which later became § 14(b), appeared in the House bill —a provision described in the House Report as making clear and unambiguous the purpose of Congress not to preempt the field. That purpose

29. U.S. Const. Art. 6, cl. 2.
30. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).
31. Wyeth v. Levine, 555 U.S. 555, 574-75 (2009).
32. Hill v. State of Florida, 325 U.S. 538 (1945).
33. 61 Stat. 151 (June 23, 1947).
34. Nathan R. Berke and George Brunn, *Local Right to Work Ordinances: A New Problem in Labor and Local Law,* 9 Stan. L. Rev. 674 (1957).
35. Ibid. (citing Algoma Plywood & Veneer Co. v. Wisconsin Empl. Rel. Bd., 336 U.S. 301, 314 (1949)).

> was restated by the House Conference Report in explaining § 14(b). Senator Taft in the Senate debates stated that § 14(b) was to continue the policy of the Wagner Act and avoid federal interference with state laws in this field. As to the Wagner Act he stated, "But that did not in any way prohibit the enforcement of State laws which already prohibited closed shops."[36]

Given this express congressional intent to avoid pre-empting pre-existing RTW policies, the argument against local RTW laws would likely have to be *either* that the Congress that passed the original NLRA in 1935 did, *sub silentio*, seek to pre-empt RTW ordinances by state subdivisions but that the same silence did not indicate a desire to pre-empt state RTW laws, *or* that the Congress that clarified the NLRA by passing Taft–Hartley did intend to leave locales within the pre-emptive ambit of the NLRA. Neither argument seems convincing. Yet even if this all-too-subtle scheme was the intent of Congress, it is far from clear: Again, locales are presumptively free to pass RTW ordinances.

As the Supreme Court has noted, and as Congress made clear, the NLRA was never intended to supplant state right-to-work laws.

As the Supreme Court has noted, and as Congress made clear, the NLRA was never intended to supplant state RTW laws—and, at the time, these were the only types of RTW laws in effect. Local RTW policies were likely not contemplated at the time of the NLRA. In other words, it is unlikely Congress intended to pre-empt local RTW laws when it expressly disavowed pre-emption of the only RTW laws then on the books. But can one infer intent *not* to pre-empt local RTW laws from the same intent with respect to state laws?

....Local RTW Ordinances Might Even Be Clearly Allowed. The 1957 article does note several places where political entities use the term "state" to mean both "state and local." For example, in *North American Cold Storage Co. v. City of Chicago*, the Supreme Court held that a local ordinance was an act of the state for 14th Amendment purposes because the Illinois State legislature granted the City of Chicago its powers.[37]

The Supreme Court has continued to interpret "state" in federal statutes to refer to both state and local governments. In 1991, the court ruled: "Mere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority ... the exclusion of political subdivisions cannot be inferred from the express authorization to the 'State' because political subdivisions are components of the very entity the statute empowers."[38] In other recent cases, the court has reached similar conclusions.[39] So there is a strong legal argument that the express allowance of state RTW laws also encompasses laws passed by local subdivisions of a state.

It might seem counterintuitive to consider local RTW ordinances "state law" for the purposes of 29 U.S.C. § 164. However, *North American Cold Storage Co. v. City of Chicago* and successive cases demonstrate good reason to hold that actions of locales are impliedly those of the state: Local governments are creations of the state and only have the powers the state authorizes them to have.

The important thing to remember is that congressional intent with respect to the term "state" might be on a sliding scale. A city established prior to statehood that enacts a RTW ordinance might be less connected to the "state" for the purposes of 29 U.S.C. § 164. Since in passing the NLRA, Congress did not seek to upset state laws, including state–local division of political powers, these traditional cities might have a weaker argument against pre-emption. Of course, political subdivisions might be prohibited from passing RTW ordinances if the state legislature prohibits them.[40]

36. Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 747 (1963).
37. North American Cold Storage Co. v. City of Chicago Citations, 211 U.S. 306 (1908).
38. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991).
39. *See, e.g.,* City of Columbus v. Ours Garage & Wrecker Service, 536 U.S. 424 (2002).
40. Pamela A. Rolfs, *The Validity of Local Right-to-Work Ordinances Under Federal and Missouri Law*, 56 Mo. L. Rev. 1015 (1991). http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3060&context=mlr (accessed August 18, 2014).

On the other hand, many states have "charter" or "home rule" counties and cities. State legislatures expressly delegate their lawmaking authority to these localities. Home rule cities may pass any law that the legislature has not expressly forbidden them from enacting. Such localities would have a stronger argument that their laws constitute "state" action under 29 U.S.C. § 164.

Local RTW Laws Do Not Conflict with the NLRA's Purpose

While it is possible that Congress meant to allow local RTW ordinances when it passed section 164, it is more likely that Congress simply did not contemplate local RTW ordinances at all. In this case, that leaves the presumption against pre-emption, and is a clear indication that Congress did not intend to pre-empt the field.

But would local RTW ordinances defeat the purpose of the NLRA? This seems a difficult argument to make. Local actions would allow more RTW laws, but Congress contemplated at least 50 potentially conflicting state RTW laws. How would adding dozens more undermine its purpose? Further, 50 different legislative schemes are rare in the policy world: Even with thousands of formal jurisdictions, more locales and states will follow one or another model legislation. Beyond that, an advocate trying to draw a line in the sand about why RTW laws varying among locales would defeat the purpose of a law in a way that state variation does not would have a hard time articulating a principle distinguishing the two situations.

Previous Federal Court Cases. Only two federal courts have examined whether localities can pass RTW laws. Their decisions seem mutually inconsistent and incorrect, but for different reasons. In *New Mexico Federation of Labor v. City of Clovis*,[41] a federal district court invalidated an ordinance of the City of Clovis, New Mexico, which had prohibited employers from requiring membership in a labor organization as a condition of employment. Clovis was a home rule municipality in New Mexico, delegated "all legislative powers and ... functions not expressly denied by general law or charter."[42] In 1989, the city passed a RTW ordinance, which was immediately challenged by labor organizations as pre-empted by the NLRA.

In striking down the RTW ordinance, the district court concluded that a "myriad of local regulations would create obstacles to Congress' objectives under the NRLA." Allowing 50 states to pass 50 different regulatory regimes was one thing: Allowing cities, counties, and other local governmental entities the ability to regulate was "qualitatively different." This is hardly informative or persuasive. How many jurisdictions are too many? Where is the line drawn? Does pre-emption ebb and flow with the number of locales that happen to enact similar schemes? In other words, if 49 states prohibit RTW laws, would this allow the 50th state to enable a local patchwork? After all, this could plausibly lead to fewer than 50 separate frameworks.

The court in *City of Clovis* further noted that the plain language and structure of 29 U.S.C. § 164 appear not to allow for local experimentation. Other parts of the NLRA, the court recognized, explicitly reference local subdivisions, making the absence in 29 U.S.C. 164 telling. For example, the court noted that 29 U.S.C. § 152(2) defines employer with reference to "any State or political subdivision thereof…." In other words, because Congress explicitly noted "political subdivision" in that context, the judge contends that Congress clearly meant to leave it out of 29 U.S.C. § 164. However, in that very example, Congress might have explicitly mentioned political subdivisions, but it left out "territory." This case would be odd, because it would mean that the NLRA would exempt government employees from the NLRA, except for territorial employees. Yet that is not the case—the NRLA does not regulate territorial employees.[43] This example indicates poor drafting rather than any congressional intent to partially occupy the field of RTW ordinances. After all, as the Supreme Court has noted, the *Congressional Record* clearly indicates Congress's intention not to pre-empt RTW laws.

Another problem with the court's decision in *City of Clovis* is that it necessarily implies that tribes cannot enact their own RTW laws on tribal lands.

41. 735 F. Supp. 999 (D.N.M. 1990).

42. N.M. Const. Art. X, § 6(D).

43. "The Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level." National Labor Relations Board, "Jurisdictional Standards," http://www.nlrb.gov/rights-we-protect/jurisdictional-standards (accessed August 18, 2014).

However, the United States Court of Appeals for the Tenth Circuit, which governs New Mexico, ruled in *N.L.R.B. v. Pueblo of San Juan*,[44] that the silence in 29 U.S.C. § 164 with respect to Indian tribes did *not* mean that Congress intended to pre-empt tribes from passing their own RTW ordinances.

In other words, the Tenth Circuit seems to have implicitly overruled *City of Clovis*.[45] It certainly appears hard to reconcile its decision with the analysis undertaken by the judge in *City of Clovis*. It might be the case that the Congress that passed the pre-emption exception in 1947 was sloppy in how it expressed its intention to disclaim pre-emption of RTW laws by only mentioning states and territories. It seems highly implausible, however, that Congress, in listing states and territories, intended to *include* Indian tribes but *exclude* locales.

The *City of Clovis* decision is on questionable ground. Local governments should not let it deter them from passing their own RTW ordinances.

Conclusion

The government should not force workers to pay for unwanted union representation. In a free society, workers alone should make that choice. Right-to-work laws also make good economic sense. They reduce the incentive for union organizers to target companies that treat their workers well. Since unions often hurt businesses, less-aggressive union organizing attracts investment—and jobs.

In states without RTW laws, localities should pass their own. There is a good argument that federal law does not prohibit these laws. Absent clear state law to the contrary, counties, cities, and other political subdivisions of states should feel free to experiment with RTW regimes. At the worst, such experiments would invite discussion and could help federal courts clarify this area of the law. At best, this would protect the rights of and create jobs for their residents.

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44. 276 F. 3d 1186 (10th Cir. 2002).
45. To be sure, *Pueblo of San Juan* dealt with canons of statutory interpretation peculiar to Indian law, namely, that federal statutes are to be read "so far as is reasonable to do in favor of Indians." Robert Reich v. Great Lakes Indian Fish and Wildlife Comm., 4 F.3d 490, 493 (7th Cir. 1993). The statutory canon that requires federal courts to bend over backwards in favor of Indian tribes, in *Pueblo of San Juan*, could be read to have overruled even the plain language of 29 U.S.C. § 164. If this were the case, the pre-emption exception in 29 U.S.C. § 164 might be extended, in the Tenth Circuit at least, to Indian tribes, but not to subdivisions of state governments. This result seems highly improbable.