Validity of Local Right-to-Work Ordinances under Federal and Missouri Law, The

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Comments

The Validity of Local Right-to-Work Ordinances under Federal and Missouri Law

I. INTRODUCTION

Section 8(a)(3) of the Taft-Hartley Act regulates union security agreements. Section 8(a)(3) prohibits closed shop agreements, but permits union shop and agency shop agreements that meet certain criteria. Closed shop agreements require employers to hire union members only. Union shop agreements allow employers to hire non-union employees, but require the

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It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.
employees to become members of the union soon after they are hired. Agency shop agreements do not require employees to become members of the union, but require them to pay the equivalent of union dues.\(^3\)

Section 14(b) of the Taft-Hartley Act allows states to enact laws that are more restrictive than federal law. Section 14(b) permits states to enact right-to-work laws, which prohibit union shop and agency shop agreements compelling employees to join or financially support a union.\(^4\) While section 14(b) makes it clear that federal law will not preempt a state’s power to enact right-to-work laws, courts disagree on whether federal law preempts a local government’s power to enact a right-to-work ordinance. Courts also disagree on whether a local government may enact a right-to-work ordinance when the state legislature has declined to do so.

Several Missouri cities and counties have sought to enact right-to-work ordinances, apparently trying to prevent industries from locating in neighboring right-to-work states. This Comment will consider the validity of local right-to-work ordinances under federal and Missouri law.

II. FEDERAL LAW

A. Legislative History

The debate over whether federal law permits local governments to enact right-to-work ordinances centers on congressional intent in enacting sections 8(a)(3) and 14(b) of the Taft-Hartley Act. Therefore, a review of the

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3. Oil, Chem. & Atomic Workers v. Mobil Oil, 426 U.S. 407, 410 n.1 (1976). The United States Supreme Court has held that the agency shop is permitted under § 8(a)(3) of the National Labor Relations Act (NLRA). Unions and employers may enter agreements requiring all employees to pay union dues regardless of whether they become union members, but may not require actual membership. "'Membership' as a condition of employment is whittled down to its financial core." NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). The Court also has held that the union may not exact or use money received from non-union members for activities unrelated to collective bargaining. Communication Workers of Am. v. Beck, 487 U.S. 735, 762, reh'g denied, 487 U.S. 1233 (1988). Additionally, the union must provide pre-collection disclosure and an advance reduction of a dissenting employee’s dues or fees to eliminate clearly nonchargeable costs. Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 305-06 (1986).

4. Labor Management Relations (Taft-Hartley) Act § 14(b), 29 U.S.C. § 164(b) (1988). "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." Id.
legislative history of these sections and the United States Supreme Court's interpretation of that history may shed some light on the issue.5

Prior to the enactment of the National Labor Relations Act (NLRA)6, state statutes and common law governed union security agreements. In 1935, Congress enacted the Wagner Act to regulate labor relations.7 Section 8(3) of the Wagner Act permitted closed shop agreements and placed few restrictions on union security agreements.8 This section was added to the bill to counteract the view that the National Industrial Recovery Act (NIRA)9 outlawed the closed shop.10 Section 8(3) of the Wagner Act was not intended to change state law in any regard, but rather to clarify congressional intent in the previously enacted NIRA.

In interpreting the language of section 8(3), the Supreme Court stated that rather than promoting the use of union security agreements, section 8(3) "merely disclaim[ed] a national policy hostile to the closed shop or other forms of union-security agreement."11 In forming this conclusion, the Supreme Court relied on a Senate Report that stated "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the status quo but leaves the way open to such agreements as might now be legally consummated . . . ."12 The Court also cited statements by Senator Wagner to the effect, "[t]he provision will not change the status quo."13 This language strongly supports

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5. The legislative history of sections 8(a)(3) and 14(b) were discussed in two Stanford Law Review articles in the late 1950s. For the argument that federal law does not preempt local right-to-work ordinances, see Berke & Brunn, Local Right to Work Ordinances: A New Problem in Labor and Local Law, 9 STAN. L. REV. 674 (1957). For the argument that federal law does preempt local right-to-work ordinances, see Finman, Local "Right to Work" Ordinances: A Reply, 10 STAN. L. REV. 53 (1957).


7. Id.

8. Section 8(3) of the Wagner Act states

> Provided, That nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a) . . . .


10. Algoma Plywood, 336 U.S. at 307-08 (citing S. REP. No. 573, 74th Cong., 1st Sess. 11-12 (1935)).

11. Id. at 307.

12. Id. at 308 (quoting S. REP. No. 573, 74th Cong., 1st Sess. 11-12 (1935)).

13. Id. at 310 (quoting 79 CONG. REC. 7673 (1935) (statement of Senator
a finding that there was no intent by Congress to preempt state laws banning union security agreements when it enacted section 8(3).

In the Taft-Hartley Act of 1947, Congress amended section 8(3) of the Wagner Act, adding restrictions to curb abuses of union security agreements. The new section, 8(a)(3), outlawed the closed shop and placed restrictions on agency and union shop agreements. By outlawing the closed shop, Congress intended to eliminate some of the abuses of compulsory unionism; for example, unions could no longer expel employees and then seek to have employers discharge them for reasons other than non-payment of dues. Congress continued to permit regulated agency and union shop agreements to assure the fears of union officials that employees who received the benefits of collective bargaining agreements would not pay their share of the costs.

With the amendments, the question again arose whether Congress was so heavily regulating union security agreements as to occupy the field and preempt state laws. The Supreme Court answered this question in Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, stating that because section 8(a)(3) strictly regulated union shop agreements, Congress added section 14(b) "to forestall the inference that federal policy was to be

Wagner).


Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later.

Id. Section 8(a)(3) also places restrictions on security agreements with the following language:

Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Id.

17. Id.
18. 336 U.S. 301 (1948).
Language from the conference committee report on section 14(b) supports the Supreme Court's conclusion. The conference committee report states, "[i]t was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field ... so as to deprive the States of their powers to prevent compulsory unionism." The Supreme Court's decision in Retail Clerks International Association v. Schermerhorn lends more support to the view that federal law defers to state policy on the issue of union security agreements. The Court, in explaining the legislative history of section 14(b), stated that Congress's "clear and unambiguous purpose" was to not preempt the field. The Court went on to say that Congress sanctioned conflict between state and federal laws and that state laws barring union security agreements must prevail. In addition, the Court stated that Congress "chose to abandon any search for uniformity in the problems of state laws barring the execution and application of [union security] agreements." The state's interest in preventing compulsory union membership is so strong that federal law must yield.

19. Id. at 313. In Algoma, an employee was fired for refusing to join the union. The union security clause, under which the employee was fired, was invalid under Wisconsin law because no referendum was conducted to appoint the union as the workers' representative. The issue was whether the Wisconsin Employment Relations Board had jurisdiction to adjudicate this unfair labor practices claim or whether the NLRA preempted the state's jurisdiction. The Supreme Court interpreted § 8(3) of the Wagner Act and held that federal law was not preemptive: "section 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement." Id. at 307. States can enact and enforce laws on security agreements that are more restrictive than federal law. "Had the sponsors of the National Labor Relations Act meant to deny effect to State policies inconsistent with the unrestricted enforcement of union-shop contracts, surely they would have made their purpose manifest." Id at 306.

22. The issue in this case was whether a state court had jurisdiction to enforce state right-to-work laws or if the NLRB had exclusive jurisdiction. The Court held that states have jurisdiction, reasoning as follows: "Since it is plain that Congress left the States free to legislate in that field, we can only assume that it intended to leave unaffected the power to enforce those laws." Id. at 102.
23. Id. at 101 (citing H.R. REP No. 510, 80th Cong., 1st Sess. 60 (1947)).
24. Id. at 103.
25. Id.
B. Statutory Construction: "State or Territorial Law"

While section 14(b) and the Supreme Court cases make it clear that states may ban union security agreements, there is ambiguity about what is included in "state law." The Supreme Court often has dealt with issues that require defining "state law," and the type of law considered may determine the scope of the definition. There is ample support for the proposition that "state law" means all the laws of the state, including those determined by political subdivisions.

Prior to the Wagner Act, the Supreme Court decided the landmark case, 
Erie Railroad Co. v. Tompkins.26 Erie required the Court to define the "laws of the several states" as referred to in the Federal Judiciary Act of September 24, 1789.27 In Erie, the Court expressly overruled the earlier doctrine in Swift v. Tyson,28 which interpreted the "laws of the several states" to mean state statutes, but not common law. The Erie Court stated, "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in decision is not a matter of federal concern."29 The Court noted that under the Swift v. Tyson doctrine, federal courts had ignored state law, in contravention of the United States Constitution, which "recognizes and preserves the autonomy and independence of the states ... in their legislative ... and judicial departments."30 The Court stated in unequivocal terms that state law should prevail in the absence of controlling federal law.

In King Manufacturing Co. v. City Council of Augusta,31 the Supreme Court was asked to decide whether a city ordinance violated the United States Constitution. Before turning to the merits of the claim, the Court addressed the issue of jurisdiction.32 Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, stated that the Supreme Court had jurisdiction

26. 304 U.S. 64 (1938).
27. The Court stated that
[section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U.S.C. § 725 ... provides 'The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply."
Id. at 64-65 (quoting 28 U.S.C. § 725 (1936)).
28. 41 U.S. 1 (1842).
29. Erie, 304 U.S. at 78.
30. Id. at 79.
31. 277 U.S. 100 (1928).
32. Id.
to determine if the "statute of any state" was unconstitutional. The Court held that a city ordinance was a state statute within the meaning of section 237 and said the following about state statutes:

[I]t rests with each state to determine in what form and by what agency its legislative power may be exerted. It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide lawmaking functions and may delegate legislative authority to subordinate agencies such as municipal councils and state commissions. But whether this power be exerted in one form or another, or by one agency or another, the enactments put forth, whether called constitutional provisions, laws, ordinances or orders, are in essence legislative acts of the state . . . .

In District of Columbia v. John R. Thompson Co., the Supreme Court recognized that "decision after decision has held that the delegated power of municipalities is as broad as the police power of the state, except as that power may be restricted by terms of grant or by the state constitution."

In June 1991, the Supreme Court considered whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempted a town ordinance regulating pesticides. Section 24(a) of the Act gave states the power to regulate the sale or use of pesticides. The Court, in holding that political subdivisions were included in the meaning of "State," said

the exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers. Indeed, the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities.

33. Id. at 102.
34. Id. at 103-04 (quoting Standard Computing Scale Co. v. Farrell, 249 U.S. 571, 577 (1919)).
35. 346 U.S. 100 (1953).
36. Id. at 108-09 (citing E. MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 16.02 (3d ed. 1949)).
39. Wisconsin Public Intervenor, 111 S. Ct. at 2483.
Numerous other cases also have held that state statutes include municipal ordinances.\footnote{North Am. Cold Storage Co. v. Chicago, 211 U.S. 306, 313 (1908) (a municipal ordinance is "in effect a statute of the state, adopted under a power granted it by the state legislature"); New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co., 125 U.S. 18, 31 (1888) ("any enactment from whatever source originating, to which a State gives the force of law is a statute of the state; this includes a bylaw or ordinance of a municipal corporation"); Stevens v. Griffith, 111 U.S. 48 (1884) (a confederate enactment treated as law by the state of Tennessee is equivalent to a statute of Tennessee); Ford v. Surget, 97 U.S. 594, 603-04 (1878) ("an act of the confederate Congress, recognized and enforced as law in Mississippi must be . . . therefore, regarded by us as a statute of that State") Williams v. Bruffy, 96 U.S. 176, 183 (1877) ("[a]ny enactment from whatever source originating, to which a state gives the force of law, is a statute of the state").}

In short, states have the power to delegate authority to their political subdivisions. As long as a city ordinance does not violate the federal Constitution or federal laws, only the state may declare that the ordinance is invalid. Section 14(b) clearly says that federal law does not preempt a state's right to ban compulsory unionism. Therefore, only a state should have the authority to determine the validity of a municipal right-to-work ordinance. Because section 14(b) expressly negates any intent to imply federal preemption, it defies logic to infer that Congress intended to deny states full freedom to legislate bans on compulsory unionism at any level.

\section*{C. Federal Preemption Principles}

Congress has the power, within constitutional limitations, to preempt state laws.\footnote{See U.S. Const. art VI, § 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."} The source of federal preemption is the supremacy clause, which states that the laws of the United States shall be the supreme law of the land.\footnote{Pacific Gas, 461 U.S. at 203-04.} Courts dealing with preemption must determine whether Congress, in enacting legislation, intended to preempt state laws.\footnote{Maryland v. Louisiana, 451 U.S. 525, 746 (1981).} There is a presumption against finding that Congress intended to preempt state law.\footnote{Pacific Gas, 461 U.S. at 203-04.} This presumption is based on a public policy to protect state sovereignty against
federal encroachment. Therefore, unless Congress is explicit in its intent to preempt state laws, courts should not find federal preemption.

The Supreme Court divides preemption analysis into three broad categories: express preemption; occupation of the field; and direct conflict. Express preemption occurs when Congress clearly indicates its intent to preempt state laws. Occupation of the field arises when there is a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it . . . ." Direct conflict involves situations where "compliance with both federal and state regulations is a physical impossibility." Conflict may also occur when state law discourages activities that federal law intends to promote. For example, in Nash v. Florida Industrial Commission, the Court struck down a state unemployment compensation law because it discouraged workers from filing unfair labor practice charges with the National Labor Relations Board (NLRB).

There is little authority on the issue of whether a city may enact a right-to-work ordinance. Only three cases have specifically addressed the issue and their responses have been contradictory. In Chavez v. Sargent, the California District Court of Appeals was asked to determine the validity of a right-to-work ordinance passed by San Benito County. The court held that state law preempted the ordinance. The court also discussed whether federal law would preempt such an ordinance. In analyzing the effect of federal law on the ordinance, the court did not find express preemption, federal occupation of the field, or direct conflict. The court stated, "Certainly the normal and customary construction of 'State Law' encompasses county ordinances. There is nothing in the legislative history of the Taft-Hartley Act

46. Id.
48. Id. at 203 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).
50. Id. at 204 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).
52. Id. at 239.
53. 329 P.2d 579 (Cal. Dist. Ct. App. 1958), vacated, 339 P.2d 801 (1959). On appeal, the Supreme Court of California only addressed the issue of whether the right-to-work ordinance conflicted with state law. The court said that because no allegation of interstate commerce was raised, federal preemption was not an issue.
54. Id. at 582-83.
55. Id.
or in the Act itself to indicate that Congress left the field open for state legislation but pre-empted it as to county legislation.\textsuperscript{56}

Two cases have decided that federal law preempts municipal right-to-work ordinances on the theories that Congress occupied the field and that there is direct conflict between the goals of the NLRA and a municipal right-to-work ordinance.

In \textit{Kentucky State AFL-CIO v. Puckett},\textsuperscript{57} labor organizations appealed a judgment upholding a city right-to-work ordinance. The Kentucky Court of Appeals reversed the judgment on the grounds that the NLRA preempted a city right-to-work ordinance. The court said that by enacting section 8(a)(3) Congress intended to preempt state laws involving union security agreements, and therefore, Congress added section 14(b) to carve a narrow exception to preemption.\textsuperscript{58} The court reasoned that if Congress did not intend to preempt state law, then section 14(b) would serve no purpose other than to restate that fact.\textsuperscript{59} The court, however, ignored legislative history cited by the United States Supreme Court in \textit{Retail Clerks International Association v. Schermerhorn},\textsuperscript{60} which stated that 14(b) was included only to prevent the interpretation that federal law was to be exclusive.\textsuperscript{61} The \textit{Puckett} court also stated that a municipal right-to-work ordinance is a "departure from the spirit and purpose of the NLRA," yet the court neglected to specify what purposes the ordinance contravened.\textsuperscript{62}

The \textit{Puckett} court did not cite specific legislative history in making its determination, but rather it spoke in broad terms about the purpose of the NLRA:

We think it is not reasonable to believe that Congress could have intended to waive other than to major policy-making units such as states and territories, the determination of policy in such a controversial area as that of union-security agreements. We believe Congress was willing to permit varying policies at the state level, but could not have intended to allow as many local policies as there are local political subdivisions in the nation.\textsuperscript{63}

\textsuperscript{56} Id. at 582 n.3.
\textsuperscript{57} 391 S.W.2d 360 (Ky. 1965).
\textsuperscript{58} Id. at 362.
\textsuperscript{59} Id.
\textsuperscript{60} 375 U.S. 96 (1963).
\textsuperscript{61} Id. at 101.
\textsuperscript{62} \textit{Puckett}, 391 S.W.2d at 362.
\textsuperscript{63} Id.
United Food & Commercial Workers Union Local 1564 v. Clovis\textsuperscript{64} is the most recent case holding that federal law preempts local right-to-work ordinances. The city of Clovis was a home-rule city, which under the New Mexico Constitution was granted all legislative powers not "expressly denied by general law or charter."\textsuperscript{65} Clovis enacted a right-to-work ordinance prohibiting employers from requiring employees to join or financially support a union as a condition of employment.\textsuperscript{66} Labor organizations sued, alleging that the NLRA preempted the city ordinance. The United States district court, using the theories of occupation of the field and direct conflict, held that the NLRA did preempt the city ordinance.\textsuperscript{67}

Starting with the premise that section 8(a)(3) comprehensively regulates union security agreements, the court reasoned that the terms "States or Territories" in section 14(b) create a narrow exception to preemption.\textsuperscript{68} The court also found direct conflict between local right-to-work ordinances and the purposes behind the NLRA. The court, citing a congressional purpose to "encourage bargaining on 'conditions of employment,'" stated that local right-to-work ordinances would discourage collective bargaining.\textsuperscript{69} The court found that subjecting a union to numerous laws would "create an administrative burden and an incentive to abandon union security agreements."\textsuperscript{70} The court did not rely on legislative history behind sections 8(a)(3) and 14(b) in reaching its decision because it found the legislative history could support either side of the issue, and thus was unhelpful.

The Puckett and Clovis courts reached the wrong result for several reasons. One reason is that the weight of legislative history shows there was no intent to preempt a state's right to ban union security agreements. The conference committee report on section 14(b) was very explicit:

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" proviso 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.

\textsuperscript{64} 735 F. Supp. 999 (D.N.M. 1990).
\textsuperscript{65} Id. at 1000 (quoting N.M. CONST. art. X, § 6(D)).
\textsuperscript{66} Id. at 1001.
\textsuperscript{67} Id. at 1003.
\textsuperscript{68} Id. at 1003-04.
\textsuperscript{69} Id. at 1003.
\textsuperscript{70} Id.

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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.\textsuperscript{71}

The Supreme Court's interpretation of the legislative history in \textit{Retail Clerks International Association v. Schermerhorn},\textsuperscript{72} also indicates that section 8(a)(3) was not meant to preempt state law. The Court stated that 14(b) was included in the act to make "clear and unambiguous the purpose of Congress not to preempt the field."\textsuperscript{73} The Court went on to say that the conflict between state and federal law on the issue of union security agreements is "sanctioned by Congress with directions to give the right of way to state laws barring the execution and enforcement of union-security agreements."\textsuperscript{74} Both the legislative history of sections 8(a)(3) and 14(b) and the Supreme Court opinions contradict the Clovis and Puckett courts' holdings that federal law is preemptive and that 14(b) carves a narrow exception for states to ban union security agreements. Section 14(b) is not a narrow exception to preemption, but rather is an explicit statement that no preemption was intended. Therefore, the words "State Law" in section 14(b) should be given their natural meaning—that is, all the laws of the state.

The Clovis and Puckett courts' argument that numerous right-to-work ordinances would create an administrative burden for unions may be correct. However, despite potential administrative burdens, Congress has sanctioned non-uniformity in banning union security agreements. Congress made it clear that nonuniform policies within a state are permissible when it included section 9(e) in the NLRA.\textsuperscript{75} Even in states without a right-to-work law, employees in a bargaining unit have the right under section 9(e) to "deauthorize" the union security agreement. Thus, not only does Congress sanction varying policies among the states, but it sanctions varying policies among bargaining units within a state. Section 9(e) lends further support to the view that local right-to-work ordinances should be valid under federal law.

\textsuperscript{71} H.R. REP. NO. 510, 80th Cong., 1st Sess. 60 (1947).
\textsuperscript{72} 375 U.S. 96, 99-103 (1963).
\textsuperscript{73} Id. at 101.
\textsuperscript{74} Id. at 103.
\textsuperscript{75} 29 U.S.C. § 159(e) (1988). Section 9(e) of the NLRA provides the following: Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

RIGHT-TO-WORK ORDINANCES

The argument that local right-to-work laws violate the spirit of the NLRA also is incorrect. Section 14(b) is an acknowledgement by Congress that union security agreements are somewhat intrusive on individual rights, and therefore, Congress left it to the states to outlaw such agreements as against public policy. The Supreme Court has stated that "Congress chose not to establish a uniform national rule permitting the union shop. States were to be left free to determine that security arrangements of any sort were against the public interest." Congress left states "free to outlaw union-security agreements in the interest of a perceived policy of keeping industrial relations more individualistic, open and free." Additionally, the *Puckett* and *Clovis* courts failed to note a Supreme Court trend against finding preemption in labor cases.

D. Labor Preemption Trends

In the past twenty-five years the Supreme Court consistently has cut back on the labor preemption doctrine. This trend, which has been significant, further indicates that the Supreme Court would hold that federal law does not preempt local right-to-work ordinances.

The leading labor preemption case is *San Diego Building Trades Council v. Garmon*. The issue in *Garmon* was whether a California court had jurisdiction to award damages for conduct constituting an unfair labor practice under state law. The Supreme Court, emphasizing the need for broad principles rather than case-by-case analysis, held that federal preemption applied if a labor activity was arguably protected by section 7 or prohibited by section 8 of the NLRA. The Court also held that only the National Labor Relations Board, not the federal courts, could determine whether conduct was protected or prohibited. *Garmon*'s preemption doctrine was so strong that if the NLRB declined jurisdiction, the plaintiff would have no forum available.

The *Garmon* Court permitted at least two narrow exceptions to preemption: (1) peripheral matters—states continued to have power to regulate conduct that was peripheral to the goals of the NLRA; and (2) local

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77. *Id.* at 429-30.
80. *Id.* at 245.
81. *Id.* at 244-45.
82. *Id.* at 243-44.
concerns—states could regulate conduct that "touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the court] could not infer that Congress had deprived the States of the power to act."\textsuperscript{83} Also subsumed under local concerns were threats to public order—states could regulate violent conduct that presented "imminent threats to the public order."\textsuperscript{84}

Since Garmon, the labor preemption doctrine has been reined in significantly.\textsuperscript{85} In Linn v. United Plant Guard Workers Local 114,\textsuperscript{86} the Court broadened the exceptions to the Garmon preemption doctrine to include defamation. The Court held that the NLRB did not have exclusive jurisdiction, and the NLRA did not prevent a court from awarding damages for defamation under state law.\textsuperscript{87} In Linn, sections 8 and 9 of the NLRA arguably applied because the NLRB could have found that intentional false statements during an organization campaign were so coercive or damaging that there were unfair labor practices or that the election was invalid.\textsuperscript{88} Also, section 7 arguably protected statements that were not defamatory.\textsuperscript{89} Under Garmon, only the NLRB has jurisdiction to determine whether arguably prohibited or protected conduct is indeed covered by the Act. In Linn, however, the Supreme Court determined that preemption should not apply, reasoning that the defamation claim was peripheral to the concerns of the NLRA and that it involved interests "deeply rooted in local feeling and responsibility."\textsuperscript{90}

Probably the most significant erosion of the Garmon preemption doctrine occurred in Farmer v. United Brotherhood of Carpenters Local 25,\textsuperscript{91} and Sears, Roebuck & Co. v. San Diego County District Council of Carpenters.\textsuperscript{92} In Farmer, a union member sued the union and its officers for intentional infliction of emotional distress.\textsuperscript{93} The issue was whether federal law preempted a claim under state tort law. The Supreme Court held there was

\begin{itemize}
  \item 83. Id. at 244.
  \item 84. Id. at 247 (citing United Auto. Workers v. Russell, 356 U.S. 634 (1957); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954)).
  \item 85. For a broad-ranging summary of Supreme Court decisions on the Garmon doctrine, see Gregory, supra note 78.
  \item 86. 383 U.S. 53 (1966).
  \item 87. Id. at 61-67.
  \item 90. Linn, 383 U.S. at 62.
  \item 91. 430 U.S. 290 (1977).
  \item 92. 436 U.S. 180 (1978).
  \item 93. Farmer, 430 U.S. at 293.
\end{itemize}
no preemption.\textsuperscript{94} The Court conceded that the conduct of the officers might constitute an unfair labor practice under section 8 of the Act; however, the Court did not support applying "a rigid application of the Garmon doctrine."\textsuperscript{95} Instead, the Court used a balancing test to weigh the interference with federal labor policy against the "legitimate and substantial interest of the State in protecting its citizens."\textsuperscript{96}

In \textit{Sears}, the Court held that state courts have jurisdiction to enforce trespass laws against union picketers.\textsuperscript{97} Picketing was "arguably protected" by section 7 of the NLRA, and so under \textit{Garmon}, preemption would have applied. The Court stated that "the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected."\textsuperscript{98}

The \textit{Sears} case trimmed \textit{Garmon}'s preemption doctrine even more than the \textit{Farmer} case. \textit{Farmer} dealt with a tort claim—a subject that the NLRA did not address. \textit{Sears}, however, dealt with picketing, which is regulated in sections 7 and 8 of the Act. \textit{Sears} was a much stronger case than \textit{Farmer} for applying \textit{Garmon}'s preemption doctrine, yet the Court declined to find preemption.

Another case that backs away from federal preemption is \textit{New York Telephone Co. v. New York State Department of Labor}.\textsuperscript{99} In \textit{New York Telephone}, there was no claim that the state tried to regulate conduct protected or prohibited by the NLRA, so the \textit{Garmon} analysis did not apply. One of the issues, however, was whether the \textit{Machinists} doctrine applied.\textsuperscript{100} The \textit{Machinists} doctrine requires a court to find state action preempted when "Congress intended that the conduct involved be unregulated . . . [and] left ‘to be controlled by the free play of economic forces.’\textsuperscript{101}

\textsuperscript{94} \textit{Id.} at 295-306.
\textsuperscript{95} \textit{Id.} at 302.
\textsuperscript{96} \textit{Id.} at 304.
\textsuperscript{97} \textit{Sears}, 436 U.S. at 190-98.
\textsuperscript{98} \textit{Id.} at 188.
\textsuperscript{100} Lodge 76, Int'l Assoc. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1975).
\textsuperscript{101} \textit{Id.} at 140 (citing NLRB v. Nash-Fince Co., 404 U.S. 138, 144 (1971)). In \textit{Machinists}, an employer filed an unfair labor practices charge with the NLRB and with the Wisconsin Employment Relations Board because during negotiations for a new collective bargaining agreement, union members refused to work overtime. \textit{Id.} The NLRB dismissed the claim stating that the refusal to work overtime was not covered by the NLRA. \textit{Id.} The Wisconsin Employment Relations Board, however, held that
In *New York Telephone*, petitioners claimed that New York's unemployment compensation statute was invalid because it was in direct conflict with the policies of the NLRA and the Social Security Act. New York had an unemployment insurance system, financed by employers, that compensated workers who were unemployed due to a strike. Petitioners claimed this statute changed the economic balance of power between employers and labor, and thus conflicted with the NLRA. The petitioners claimed that the statute forced them to finance strikes against themselves.

The Supreme Court held that the statute was not preempted by the NLRA or the Social Security Act. The Court cited the legislative history of those Acts and reasoned that because the statute was a law of general application and because it did not seek to govern labor-management relations, federal preemption could not easily be presumed. The Court said that state unemployment compensation programs should be treated with the same deference ... afforded analogous state laws of general applicability that protect interests 'deeply rooted in local feeling and responsibility.' With respect to such laws, we have stated 'that in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."

The Court could have struck down the New York statute under the *Machinists* doctrine because the statute covered conduct that "Congress implicitly intended to be governed only by the free play of economic forces." *Machinists* was cited for the proposition that the "crucial inquiry" is "whether the exercise of state authority to curtail or entirely prohibit self-help would frustrate the effective implementation of the policies

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105. *Id.* at 527-46.
106. *Id.* at 540-45.
107. *Id.* at 540 (citing San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959)).
108. *Id.* at 531.
of the National Labor Relations Act." 109 Here the employer's self-help, withholding wages, was undercut by its having to pay unemployment benefits. However, the Court distinguished Machinists by stating the statute did "not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field." 110 Rather, the statute's purpose was to provide an efficient means of insuring employment security in the state.

The plurality opinion's interpretation of the Machinists doctrine was controversial. Justice Blackmun's concurrence states

the plurality appears to be saying that there is no pre-emption unless 'compelling congressional direction' indicates otherwise. The premise is therefore one of assumed priority on the state side. In Machinists on the other hand, the Court said, I thought, that there is pre-emption unless there is evidence of congressional intent to tolerate the state practice. That premise, therefore, is one of assumed priority on the federal side. 111

New York Telephone came down heavily on the side of state rights, signalling that the Court would no longer presume federal labor preemption.

Considering the reasons behind the erosion of the labor preemption doctrine may be helpful in determining how the Supreme Court would rule on the validity of local right-to-work ordinances. When Congress enacted the NLRA in 1935, it effected a major change in national labor policy. 112 Prior to the enactment of the NLRA, union activity was considered a conspiracy and was discouraged. 113 The NLRA legalized and encouraged collective bargaining as a mechanism to prevent work stoppages. Because the NLRA instituted new and controversial policies, there was concern that "hostile and relatively uninformed" state and federal courts might frustrate congressional purposes behind the Act. 114 Therefore, federal preemption of state law was readily found. Now that collective bargaining has matured, the earlier caution is no longer required, and the Court is willing to use a flexible balancing test. The Court looks at the equities of the situation, weighing the potential for state interference with national labor policy against the state interest.

If the Supreme Court were to consider the issue of whether federal law preempts local right-to-work ordinances, it would likely find against

109. Id.
110. Id. at 532.
111. Id. at 549 (Blackmun, J., concurring) (emphasis in original).
113. Id. at 217 (Brennan, J., dissenting).
preemption. Certainly, the right to not join a union is firmly rooted in local interests, which is one of the exceptions to the Garmon doctrine. The Court also has made it clear that absent explicit Congressional intent to preempt state law, preemption will not be found easily. In the case of right-to-work ordinances, there is an explicit statement in section 14(b) that "any state" law is not preempted. This statement suggests that Congress has left states complete freedom to ban union security agreements through any law recognized as valid by the state, including local ordinances. Because of the presumption against preemption, there is no reason to interpret "state law" narrowly.

E. Conclusion

Federal law should not be found to preempt a local right-to-work ordinance. The legislative histories of sections 8(a)(3) and 14(b) reveal a congressional intent not to infringe on a state's power to ban union security agreements. States have authority to delegate power to local governments; therefore, state law includes municipal laws that the state has approved or recognized. Principles of federalism require effect to be given to all state laws that are within the bounds of the United States Constitution.

Additionally, the Supreme Court is moving away from a rigid analytical approach in which it nearly always found federal preemption toward a more equitable balancing approach. Because the congressional policies behind the NLRA are now widely accepted, they are less likely to be contravened by hostile lower courts. As a result, courts more capably can weigh competing interests, and a finding of federal preemption is less likely to result.

III. MISSOURI LAW

If a local right-to-work ordinance is not preempted by federal law, the ordinance must still clear the hurdle of state preemption to be valid. The power of a local government to enact ordinances is derived from the Missouri Constitution and statutes. The Missouri Constitution and statutes provide for several forms of local government, including constitutional charter cities,115 constitutional charter counties,116 third class cities,117 and fourth class cities.118 Constitutional charter cities are given greater powers than other forms of local government. This Comment focuses only on the power of a constitutional charter city to enact a right-to-work ordinance.

115. Mo. Const. art. VI, § 19.
116. Id. § 18.
118. Id. §§ 79.010-550.
Missouri has had constitutional charter provisions (home rule provisions) since 1875.\textsuperscript{119} Originally, home rule charters were limited by the condition that they be "consistent with and subject to the Constitution and the laws of the State . . . ."\textsuperscript{1120} This provision appeared to mean state statutes would always prevail over conflicting local ordinances. The Missouri Supreme Court held, however, that in some circumstances home-rule ordinances should prevail over state statutes, and it developed tests to determine if the subject of the ordinance was local or municipal in character.\textsuperscript{121} If the ordinance regulated matters that were local or municipal, the ordinance prevailed over conflicting state statutes; if the ordinance regulated matters of statewide concern, it was held invalid. The tests created confusion because of the difficulty in determining whether activities were primarily of local or statewide concern.\textsuperscript{122} The result of this confusion was that home-rule cities, unsure of the scope of their powers, often opted not to enact ordinances unless there was a specific grant of power from the state legislature.\textsuperscript{123} Thus, the purposes behind home rule charters—to provide local autonomy and to distribute power between state and local governments\textsuperscript{124}—were undermined.\textsuperscript{125}

In 1971, Missouri voters elected to amend the state constitution by adding article VI, section 19(a), which gave constitutional charter cities "all powers which the general assembly . . . has authority to confer upon any city."\textsuperscript{1126} The purpose behind this amendment was to broaden and clarify the powers of home-rule cities.\textsuperscript{127} The legislative history of the amendment stated that home-rule cities' powers would be "coextensive with the power of the state legislature as long as the state legislature [did] not take positive steps to deny specific powers."\textsuperscript{1128} The amendment limited the powers of the city with the provision "provided such powers are consistent with the constitution of this

\begin{itemize}
  \item 119. See Mo. Const. art. VI, §§ 18(a), 19, 31 (1875).
  \item 120. Id. art. IX, § 16.
  \item 121. Sterchi, State-Local Conflicts Under the New Missouri Home Rule Amendment, 37 Mo. L. Rev. 677 (1972).
  \item 122. Id. at 679-770.
  \item 123. Westbrook, Municipal Home Rule: An Evaluation of the Missouri Experience, 33 Mo. L. Rev. 45 (1968).
  \item 125. 1968 REPORT OF GOVERNOR’S ADVISORY COUNCIL ON LOCAL GOVERNMENT LAW: CONSTITUTIONAL CHARTER CITIES at 60-64.
  \item 126. Mo. Const. art. 6, § 19(a).
  \item 127. 1968 REPORT OF GOVERNOR’S ADVISORY COUNCIL ON LOCAL GOVERNMENT LAW: CONSTITUTIONAL CHARTER CITIES at 64-66.
  \item 128. Id. at 63.
\end{itemize}
state and are not limited or denied either by the charter so adopted or by statute. Therefore, the amendment changed the status of the city charter from an instrument of grant, in which the city had only those powers specified in the charter, to one of limitation in which the city had all powers except those prohibited by its charter or the state constitution or statutes.

The constitutional amendment was intended to extinguish court tests determining if ordinances covered subjects of local or statewide concern and to shift the courts' focus to whether there was conflict between a local ordinance and the state constitution or statutes. The legislative history states that ordinances could be struck down because of actual conflict between state and local legislation or because the state legislation was so comprehensive that it "indicate[d] a clear intent" to occupy the field.

No Missouri cases have discussed whether a charter city has the power to enact a right-to-work ordinance. Yet under the broad power given charter cities, it seems logical that a right-to-work ordinance should stand if it does not conflict with a state statute, a statutory scheme, or the constitution. Missouri does not have a labor relations act, but it has two provisions in the constitution that relate to labor relations. Article I, section 2 states that "all persons shall have... the enjoyment of the gains of their own industry...
The Missouri Supreme Court has held that article I, section 2 does not prohibit union security agreements. Article I, section 29 of the Missouri Constitution provides "[t]hat employees shall have the right to organize and to bargain collectively through representatives of their own choosing," While this provision has not been interpreted to prohibit union security agreements.

129. Mo. Const. art. 6, § 19(a).
130. 1968 REPORT OF GOVERNOR'S ADVISORY COUNCIL ON LOCAL GOVERNMENT LAW: CONSTITUTIONAL CHARTER CITIES at 64. See also Westbrook, supra note 123, at 46-50.
131. 1968 REPORT OF GOVERNOR'S ADVISORY COUNCIL ON LOCAL GOVERNMENT LAW: CONSTITUTIONAL CHARTER CITIES at 64.
132. Id. at 56.
133. The Missouri Attorney General's office has issued a memorandum and an opinion on the issue. The opinion letter addressed the issue of whether a local governmental body, such as a county commission or city council, could enact a right-to-work ordinance. Op. Att'y Gen. 78-86 (1986). The memorandum addressed the issue of whether a charter city or county could enact a right-to-work ordinance. Mem. Att'y Gen. (March 11, 1987) (response to opinion request 135-86). In both the opinion letter and the memorandum, the attorney general expressed the opinion that federal law preempts local right-to-work ordinances.
134. Missouri does have a labor relations statute covering public employees. See Mo. Rev. Stat. §§ 105.500-.530 (1986).
135. Independent Stave Co. v. Higdon, 572 S.W.2d 424 (Mo. 1978).
agreements, it has been cited as indicating a strong public policy to protect employees from coercion to join in union activity for collective bargaining.\textsuperscript{137} It does not appear that a local right-to-work ordinance would conflict with either constitutional provision because a right-to-work law does not prevent employees from organizing and bargaining collectively. A right-to-work law simply prevents employers and unions from forcing employees to join a union.

In the cases following the passage of article VI, section 19(a), the Missouri Supreme Court generally has followed legislative intent in determining whether a city has the power to enact a particular ordinance.\textsuperscript{138} In Cape Motor Lodge v. City of Cape Girardeau,\textsuperscript{139} the court stated

Under section 19(a), the emphasis no longer is whether a home rule city has the authority to exercise the power involved; the emphasis is whether the exercise of that power conflicts with the Missouri Constitution, state statutes or the charter itself. Conflicts between local enactments and state law provisions are matters of statutory construction. Once a determination of conflict between a constitutional or statutory provision and a charter or ordinance provision is made, the state law provision controls.

The test for determining if a conflict exists is whether the ordinance "permits what the statute prohibits" or "prohibits what the statute permits."\textsuperscript{140}

The court also addressed the issue of state statutes that are so comprehensive they occupy the field of legislation.\textsuperscript{141} The court implied that occupation of the field should not be found easily, and it advocated a cautious approach in finding that statutes granting power to non-home-rule cities impliedly limit the powers of home-rule cities.\textsuperscript{142} The court stated that section 70.220 of the Missouri Revised Statutes and article VI, section 16 of the Missouri Constitution (dealing with cooperation between political subdivisions) do not indicate that the "express enumeration of the entities

\textsuperscript{137} Quinn v. Buchanan, 298 S.W.2d 413 (Mo. 1957); Tallman Co. v. Latal, 365 Mo. 552, 284 S.W.2d 547 (1955); Bellerive Country Club v. McVey, 365 Mo. 477, 284 S.W.2d 492 (1955).

\textsuperscript{138} Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208 (Mo. 1986); Frech v. City of Columbia, 693 S.W.2d 813 (Mo. 1985); Hannah ex rel. Christ v. City of St. Charles, 676 S.W.2d 508 (Mo. 1984); St. Louis Children's Hosp. v. Conway, 582 S.W.2d 687 (Mo. 1979).

\textsuperscript{139} 706 S.W.2d 208 (Mo. 1986).

\textsuperscript{140} Id. at 211 (citing St. Louis Children’s Hosp., 582 S.W.2d at 691; Hannah, 676 S.W.2d at 513) (citations omitted).

\textsuperscript{141} Id. at 212.

\textsuperscript{142} Id.
named are to be considered as the exclusion of others not named.\textsuperscript{143} The court decisions interpreting section 19(a) home-rule powers show judicial willingness to uphold city ordinances unless there is a strong showing of legislative intent not to permit such ordinances. Under this reasoning, a home-rule city should have authority to enact a right-to-work ordinance absent a showing of a conflicting state statute or statutory scheme. Because Missouri does not have a labor relations act, it would seem less likely that conflict would exist between a local right-to-work ordinance and a state statute.

This conclusion, however, is clouded by a recent decision of the Missouri Supreme Court. The case, \textit{Yellow Freight Systems, Inc. v. Mayor's Commission},\textsuperscript{144} concerned an ordinance enacted by the City of Springfield. The ordinance established an administrative agency, the Mayor's Commission on Human Rights, to hear cases and give relief to plaintiffs suffering discrimination in employment and housing.\textsuperscript{145} The ordinance provided a right of appeal in the county circuit court or in the city municipal court.\textsuperscript{146} An employee of Yellow Freight Systems, Inc. (Yellow Freight) filed a complaint alleging unlawful discrimination and the Commission ordered Yellow Freight to reinstate the employee and to give her back pay.\textsuperscript{147} Yellow Freight appealed.\textsuperscript{148}

The Missouri Supreme Court, sitting \textit{en banc}, struck down the ordinance. First, the court held that the ordinance conflicted with article V, section 23 of the Missouri Constitution, which requires "[a] municipal judge [to] hear and determine violations of municipal ordinances . . . ."\textsuperscript{149} The court held that the Mayor's Commission had no jurisdiction to adjudicate discrimination claims.\textsuperscript{150} Then the court, while admitting it could have struck down the ordinance on the jurisdictional ground alone, went on to discuss the scope of home-rule power in Missouri.\textsuperscript{151}

The court cited \textit{Marshall v. Kansas City},\textsuperscript{152} which dealt with a pre-19(a) home-rule ordinance prohibiting race discrimination in restaurants and hotels. In \textit{Marshall}, the Missouri Supreme Court, sitting \textit{en banc}, upheld the ordinance by concluding that Kansas City's police powers included the right to regulate businesses, and therefore, the city had the right to prohibit

\begin{footnotes}
\footnotetext{143}{\textit{Id.}}
\footnotetext{144}{791 S.W.2d 382 (Mo. 1990).}
\footnotetext{145}{\textit{Id.} at 383.}
\footnotetext{146}{\textit{Id.}}
\footnotetext{147}{\textit{Id.}}
\footnotetext{148}{\textit{Id.}}
\footnotetext{149}{\textit{Id.} at 384-85.}
\footnotetext{150}{\textit{Id.} at 383-84.}
\footnotetext{151}{\textit{Id.} at 385.}
\footnotetext{152}{355 S.W.2d 877 (Mo. 1962).}
\end{footnotes}
discrimination in those businesses. The plaintiffs in Marshall contended that a municipality could not enact civil rights legislation because it could not "create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves." The court responded by stating there was little support for this rule and that even if the rule were correct, the Kansas City ordinance expressly stated that it did not "add to nor detract from any civil remedies now available to persons subjected to racial discrimination."

The Yellow Freight court did not overrule Marshall, but it gave much greater weight to the rule that an ordinance cannot impose liability between private persons. The court stated that "[i]t has been repeatedly ruled in this state that a city has no power, by municipal ordinance, to create a civil liability from one citizen to another, nor to relieve one citizen from that liability by imposing it on another." In support of its holding, the Yellow Freight court cited prior decisions that held that home-rule cities possess "all power which the legislature is authorized to grant" and "all powers which are not limited or denied by the constitution, by statute or by the charter itself." These decisions clearly reflected the legislative intent behind the section 19(a) amendment. The court then stated that the amount of power the General Assembly may confer is subject to some limitation. In setting the limitation, the court held that the "power of the municipality to legislate shall be confined to

153. Id. at 881.
154. Id. at 882 (citing 6 E. McQuillen, Municipal Corporations § 22 (3d ed. 1949); Nance v. Mayflower Tavern, 106 Utah 517, 150 P.2d 773 (1944) (only case supporting this theory)).
155. Marshall, 355 S.W.2d at 883 (citing Kansas City, Mo. Code § 39.261, para. (f) (1960)).
156. Yellow Freight Sys. v. Mayor's Comm'n, 791 S.W.2d 382, 384 (Mo. 1990). The court's decision that the Springfield Mayor's Commission "had no power to determine the respondent [employer] had violated an ordinance of the city" was based on a holding that even a charter city ordinance cannot create a private cause of action enforceable by the city itself. Id. at 387. Under this principle, however, Missouri courts have held that where the ordinance is penal in nature, it does not create a new liability, but rather it merely defines the duty already owed at common law to the public or the injured party. See State ex rel. Wells v. Mayfield, 365 Mo. 238, 281 S.W.2d 9, 13 (1955); Grimes v. Standard Oil Co., 370 S.W.2d 627, 634 (Mo. Ct. App. 1963).
157. Yellow Freight, 791 S.W.2d at 385 (citing St. Louis Children's Hosp. v. Conway, 582 S.W.2d 687, 690 (Mo. 1979)).
158. Id. (citing Hannah ex rel. Christ v. City of St. Charles, 676 S.W.2d 508, 512 (Mo. 1984)).
159. Id.
municipal affairs.\textsuperscript{160} This holding contradicts the legislative history of section 19(a) which states as one of its purposes the rejection of "state-local tests" used by the courts.\textsuperscript{161} The legislative history expresses the view that limits on home-rule power should come from the legislature: "the legislature could override any substantive provision in a charter or ordinance."\textsuperscript{162}

The court's departure from its past holdings and its disregard of the legislative intent behind section 19(a) is puzzling, and it raises serious problems for any home-rule city that wishes to enact a right-to-work ordinance. Under \textit{Yellow Freight}, a right-to-work ordinance may not change legal obligations between private parties. If a collective bargaining agreement contains a union security clause requiring employees to join the union, and a city ordinance invalidates that security clause, the legal obligations of the parties are changed. If a city has a right-to-work ordinance and an employer violates the ordinance by firing employees who refuse to join the union, the most likely remedies for an employee would be reinstatement and back pay. But under \textit{Yellow Freight}, the municipality does not have the power to determine the ordinance was violated and to require reinstatement and back pay for the employee.

In addition, \textit{Yellow Freight} only permits the city to enact ordinances affecting local concerns. Is the right to work primarily a local concern, or a statewide concern? Certainly there are strong arguments for both sides, making the right-to-work issue a prime example of the definitional problem section 19(a) was designed to eliminate. Under \textit{Yellow Freight}, the courts will now have to apply the state-local test, and cities, uncertain of the scope of their powers, probably will choose not to act.

The \textit{Yellow Freight} court rejected Springfield's attempt to use Missouri Revised Statute section 213.020.3\textsuperscript{163} to retroactively validate its 1982 ordinance.\textsuperscript{164} Section 213.020.3 permits local governments, prior to August 13, 1986, to enact ordinances creating human relations commissions with "the power and authority to seek to eliminate and prevent discrimination in employment."\textsuperscript{165} The court said that section 213.020.3 did not give local

\begin{footnotes}
\item[160] Id. (quoting Kansas City, Mo. v. J.E. Case Threshing Mach. Co., 337 Mo. 913, 923, 87 S.W.2d 195, 200 (1935)).
\item[161] 1968 REPORT OF GOVERNOR’S ADVISORY COUNCIL ON LOCAL GOVERNMENT LAW: CONSTITUTIONAL CHARTER CITIES at 63.
\item[162] Id. at 64.
\item[163] MO. REV. STAT. § 213.020.3 (1986).
\item[164] \textit{Yellow Freight}, 791 S.W.2d at 387.
\item[165] MO. REV. STAT. § 213.020.3 (1986) (emphasis added).
\end{footnotes}
governments the power to "create an agency to determine and enforce a violation" of human rights ordinances. It contrasted section 213.020.3 with Missouri Revised Statute section 213.030, which creates the State Commission on Human Rights. The court said the State Commission was expressly granted power to "hold hearings and pass upon complaints of violations of state law," but a local commission was granted power only to "seek to eliminate discrimination as an advisory commission."

There are currently efforts in the Missouri General Assembly to adopt legislation to legitimize local human rights commissions. If the General Assembly amends section 213.020.3 and authorizes charter cities to adopt ordinances protecting the civil rights of employees, and if it gives the cities or private citizens the right to enforce those ordinances, then a right-to-work ordinance may be enforceable under article 6, section 19(a) of the Missouri Constitution.

Under the current statutes, a Missouri charter city may enact a right-to-work ordinance to express the community's attitude about union security agreements. The NLRB recently held that where the city of Caruthersville, Missouri, a third class city, had enacted a right-to-work ordinance, it was not unlawful for an employer to post a notice concerning the ordinance. The union claimed that posting the ordinance demonstrated the employer's intention not to bargain in good faith for a union security clause. The NLRB ruled that the employer did not indicate it would not bargain in good faith, but merely posted the notice to show that the ordinance existed, and presumably to show the community's attitude about union security agreements.

Federal law does not compel an employer to agree to a union security clause; it only requires employers to bargain in good faith. The NLRB has ruled that it is not a per se violation of an employer's bargaining duty to power and authority to seek to eliminate and prevent discrimination in employment, housing and public accommodation and to establish other related programs.

Id. 166. Yellow Freight, 791 S.W.2d at 387.
168. Yellow Freight, 791 S.W.2d at 387 (citing Mo. REV. STAT. § 213.030 (1986)).
169. Id. at 387.
171. The union stated that in light of the Missouri Attorney General opinion and memorandum stating the conclusion that federal law preempted right-to-work ordinances, the employer showed bad faith by continuing to post the ordinance. Id. at 1098. See supra note 2.
take a strong stand against including a union security clause in the collective bargaining agreement, even if the clause existed in a previous agreement.\footnote{Spingfield Elec. Serv. Co., 285 N.L.R.B. 1305, 127 L.R.R.M. (BNA) 1103, 1106 (1987).}

IV. CONCLUSION

It seems clear that a charter city in Missouri could enact a local right-to-work ordinance to express the community's attitude against union security agreements. There should be no basis for a claim of federal preemption of right-to-work ordinances. Section 14(b) of the NLRA expressly disclaims any intention to preempt state right-to-work laws. "State laws" under section 14(b) should be construed broadly to include local ordinances.

In view of \textit{Yellow Freight}, it is unlikely that a right-to-work ordinance could be used other than to show that the community disapproves of union security agreements. Right-to-work ordinances may help employers resist demands for union security agreements by showing community support for their position. Employers have a duty to consider union security agreements in good faith, but they have no duty to concede to union demands on this issue. An employer can legally reject a demand for a union security clause as a matter of principle without violating the duty to bargain in good faith.

If the Missouri General Assembly grants broad powers to local governments to adopt and enforce human rights ordinances, local right-to-work ordinances may become enforceable. Until then, right-to-work ordinances may be useful only as an expression of community disapproval of compulsory unionism. This expression of disapproval may be helpful to communities wishing to attract industries that are considering locating in states where right-to-work laws are in force.

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