Labor and Employment Law

Right to Work Laws are OK: Legal Challenges to Oklahoma's recently Enacted Right to Work Law

*By John R. Martin**

I. Introduction

Twenty-two states have Right to Work laws.[1] These laws prohibit compulsory unionism—usually an agreement between an employer and a union requiring all employees in a bargaining unit to pay union dues. F.A. Hayek endorsed Right to Work laws as a response to the special legal privileges, particularly monopoly bargaining, granted to unions by federal law.[2]

Oklahoma is the latest state to enact a Right to Work law. Federal and state courts have recently upheld this law against union challenges. The federal challenges in particular raised interesting preemption issues under the National Labor Relations Act. The federal challenges also brought to light drafting problems in the law, of which legislators in other states should be aware as they draft Right to Work laws for their own states.

II. Enactment of Oklahoma's Right to Work Law

In 2001, proponents of a Right to Work law, with strong support by then-Governor Frank Keating, had the votes in the Oklahoma legislature to enact it. To give organized labor "a fighting chance of defeating Right to Work,"[3] Senate President Pro Tempore Stratton Taylor, an opponent of the law, convinced the legislature to pass instead a resolution referring to the people for a vote a proposed Right to Work constitutional amendment under Oklahoma's referendum procedure.[4] A special election was set for September 25, 2001, sparking an unprecedented amount of spending by unions opposing the law and by proponents, with each side spending approximately $5 million.[5] The electorate approved State Question No. 695[6] by a vote of 447,072 to 378,465, a margin of 54% to 46%.[7] The law was codified as Article XXIII, Section 1A of the Oklahoma Constitution on September 28, 2001.[8]

III. Federal Preemption

A. The District Court's Opinion

The first legal challenge to the Right to Work law came on November 13, 2001, when seven unions operating in Oklahoma, and one unionized company, sued Governor Keating in federal district court seeking declaratory and injunctive relief rendering the law void as preempted by federal law.[9] The federal laws at issue were the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*; the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141 *et seq.*; the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*; the Civil Service Reform Act ("CSRA"), 5 U.S.C. § 7101 *et seq.*, and the Postal Reorganization Act ("PRA"), 39 U.S.C. § 1201 *et seq.* Also at issue were federal enclaves within Oklahoma over which the United States has exclusive jurisdiction.[10] Three Oklahoma workers, who would have been forced to pay dues to keep their jobs if the court had struck down the law, intervened as defendants.[11] The court decided the case on cross-motions for summary judgment.

1. Compulsory Unionism Under the NLRA

The district court noted that the NLRA permits some forms of compulsory unionism. While the NLRA abolished the "closed shop," where union membership is a prerequisite to employment, the NLRA permits lesser forms of compulsion, such as requiring all employees in a bargaining unit to pay union dues.[12] However, Congress explicitly grants to states the authority to limit compulsory unionism. NLRA Section 14(b) provides:

> 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.[13]

The district court explained: "As the plain language of section [14(b)] indicates, states are permitted to enact right-to-work laws which are at odds with federal laws authorizing union security agreements."[14]

The unions argued that NLRA Section 14(b) did not save the Right to Work law, because the law also attempted to regulate employees covered by the RLA, the CSRA, and the PRA, as well as employees working on exclusive federal enclaves.[15] The district court noted that determining whether a state law is in con-

flict with federal law requires "'a two-step process first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.'"[16] Applying the rule of statutory construction that laws are to be construed in such a way that they are not void by reason of preemption, the court held that the Right to Work law "does not apply to those individuals subject to the RLA, the CSRA, or the PRA," or employees on exclusive federal enclaves.[17] The unions' overly broad reading of the law's applicability was unreasonable. The court found that "it is simply not a reasonable construction to extend the scope of Oklahoma's right-to-work law to include those individuals subjected to regulation under the RLA, the CSRA, the PRA, and federal enclave jurisprudence."[18] These federal statutes therefore do not preempt the Right to Work law. The unions did not appeal this ruling of the district court.[19]

2. Hiring Halls and Dues Check-Off

The court next turned to the union's challenges to two specific subsections of the Right to Work law. The first, Subsection 1A(B)(5), prohibits a requirement that workers be "recommended, approved, referred, or cleared by or through a labor organization," an attempted ban of exclusive hiring halls. Governor Keating and the other defendants conceded that the NLRA permits exclusive hiring halls, as long as they do not discriminate against non-union members.[20] And defendants agreed that three United States Courts of Appeal have held that the NLRA does not permit states to ban exclusive union hiring halls.[21] The court, therefore, declared Subsection 1A(B)(5) to be "preempted by federal law as it is outside the grant of authority contained in section 164(b)."[22]

The second specific subsection at issue, Subsection 1A(C), provides:

> It shall be unlawful to deduct from the wages, earnings, or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization unless the employee has first authorized such deduction.

This provision is an attempt to regulate dues deductions ("check offs"). However, a provision of the NLRA already specifically regulates dues deductions. An employer may only deduct union dues from an employee if the employer has received written authorization from the employee.[23] And such authorizations shall not be irrevocable for more than one year.[24] The court found a conflict between Subsection 1A(C) and the NLRA's provision, because Subsection 1A(C) seemed to require that dues deduction authorizations be revocable at will, rather than allowing them to be irrevocable for up to one year.[25] Because of this conflict, the court held Subsection 1A(C) to be preempted by the NLRA.[26]

3. State Protection of the Rights to Join Unions and Not to Subsidize Them

The unions, in their motion for summary judgment and for the first time, attacked Subsections 1A(B)(1) and (B)(3) of the law as preempted by the NLRA. Perhaps because these challenges were not part of the original or amended complaint, the district court rather tersely rejected the unions' arguments as to Subsections 1A(B)(1) and (B)(3) in a footnote.[27]

Subsection 1A(B)(1) protects workers' rights to join and support unions.[28] The unions argued, ironically, that NLRA Section 14(b) only gave states the authority to prohibit conditioning employment on union membership, not the authority to protect the right to join or support a union.[29] The court rejected this argument because the U.S. Supreme Court had previously upheld Right to Work laws "which prohibit discrimination in employment based on both union membership and non-membership alike."[30]

Subsection 1A(B)(3) prohibits the requirement that employees pay any dues or fees to a union.[31] The unions argued that this provision is preempted by the NLRA because it attempts to regulate hiring hall fees.[32] The district court rejected this argument because Subsection 1A(B)(3) "clearly does not attempt to regulate any phase of the hiring process."[33] The unions did not appeal this ruling.

4. Severability

Having determined that two of the Right to Work law's provisions were preempted by the NLRA, the district court lastly addressed whether the preempted provisions were severable from the remaining valid provisions. The court correctly noted that severability is an issue of state law.[34] The Right to Work law does not contain a severability clause, but such a clause is not necessary under Oklahoma law.[35] Instead, a law's provisions are severable unless the valid provisions are dependent upon the invalid provisions, or the valid provisions cannot stand alone without the invalid provisions.[36] The court held that the valid provisions were not dependent on the invalid provisions, and that they could stand alone.[37]

In a passage that would become important on appeal, the court wrote:

> The core provisions of Oklahoma's right-to-work law can be found in subsections (B)(1) through (4), which ban union and agency shop provisions in collective bargaining agreements. These provisions are certainly capable of being carried out in the absence of subsections (B)(5) and (C), which deal with exclusive hiring halls and check-off arrangements.[38]

This formulation by the court was not entirely accurate. While Subsections 1A(B)(2) through (B)(4) of the law certainly do ban union and agency shop provisions in collective bargaining agreements, Subsection 1A(B)(1) does not. Subsection 1A(B)(1) bans prohibitions on joining and supporting unions. When the Tenth Circuit later held that Subsection 1A(B)(1) is in fact preempted,[39] the unions used the district court's inclusion of that subsection as a "core provision" to argue that the law should not be severed, and that the entire law was therefore invalid.

B. The Tenth Circuit's Opinion

The unions appealed only two aspects of the district court's decision: (1) the ruling that Subsection 1A(B)(1) is not preempted by the NLRA; and (2) that the preempted provisions of the law are severable from the remaining provisions.[40] The United States Court of Appeals for the Tenth Circuit agreed with the unions that Subsection 1A(B)(1) is preempted, and certified to the Oklahoma Supreme Court the question of whether the law is severable.[41]

1. State Protection of the Right to Join Unions

The Tenth Circuit began its discussion of preemption by noting that Subsection 1A(B)(1) and NLRA Sections 7 and 8 protect the same right: the right to join and support labor unions.[42] The question was whether NLRA Sections 7 and 8 preempt Subsection 1A(B)(1). The Tenth Circuit wrote that the Supreme Court in *Garner v. Teamsters Local Union 776*,[43] "made clear that the states could not adopt supplementary or alternative remedies to those set out in the NLRA."[44] Oklahoma's Right to Work law provided for criminal enforcement,[45] whereas the remedies provided under the NLRA for violations of NLRA Sections 7 and 8 are administrative in nature, *i.e.*, unfair labor practice proceedings before the National Labor Relations Board.[46]

The district court had relied "exclusively" on *Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co.*[47] and its companion case, *American Federation of Labor v. American Sash & Door Co.*[48] [49] The Tenth Circuit distinguished those as equal protection cases that never addressed the preemption issue. Those cases therefore did not indicate that a state's protection of the right to join and support unions is not preempted.[50]

The defendants argued that *Lincoln Federal* and *American Sash* at least showed that, if a state chose to enact a Right to Work law, that state would also have to protect the right to join and support unions, to avoid raising equal protection problems. The Supreme Court wrote in *Lincoln Federal*:

> It is also argued that the state laws do not provide protection for union members equal to that provided for non-union members. But in identical language these states forbid employers to discriminate against union and non-union members. Nebraska and North Carolina thus command equal employment opportunities for both groups of workers.[51]

That the states protected both union members and nonmembers equally was a factor in upholding these Right to Work laws, according to the defendants.

The Tenth Circuit rejected this argument for two reasons. First, the court wrote: "The [Supreme] Court was not required to reach this ultimate question because the state schemes at issue in both cases provided mutuality of protection."[52] True enough, but the defendants had argued that the Supreme Court used the mutuality of protection as a factor in upholding the Right to Work laws.

Second, the Tenth Circuit pointed out that union members are not a protected class.[53] Therefore, the defendants had to show that it would be irrational for a state to protect nonmembers without protecting union members.[54] Given that the NLRA protects union member rights, the defendants could not make this showing.[55]

Therefore, the Tenth Circuit held that Subsection 1A(B)(1) of the Right to Work law is preempted by the NLRA.[56]

2. Severability

The Tenth Circuit decided to certify the issue of severability to the Oklahoma Supreme Court.[57] This decision probably saved the Right to Work law. During oral argument, Circuit Judges Seymour and Murphy

seemed inclined to hold that the law is not severable. No party filed a motion to certify the severability issue to the Oklahoma Supreme Court, although the intervening defendants' brief requested that the court do so if it was inclined to hold that the law was not severable—because severability is a state law issue. Circuit Judge Seymour asked each party's attorney at oral argument whether the severability issue should be certified to the Oklahoma Supreme Court, and the intervening defendants' attorney was the only one to answer in the affirmative.

IV. Severability: The Oklahoma Supreme Court Answers the Certified Questions

The Tenth Circuit certified the following questions:

> 1. Is severability analysis required in light of the preemption of article XXIII, § 1A(B)(1), § 1A(B)(5), § 1A(C), and § 1A(E) (insofar as it enforces § 1A(B)(1), § 1A(B)(5), § 1A(C)) as to workers covered by the NLRA, as opposed to the "invalidation" of those provisions?
>
> 2. If severability analysis is appropriate, are § 1A(B)(1), § 1A(B)(5), § 1A(C), and § 1A(E) (insofar as it enforces § 1A(B)(1), § 1A(B)(5), and § 1A(C)) severable from the non-preempted portions of § 1A?[58]

The wording of the first question was important, because it acknowledged that a provision of the Right to Work law could be preempted by the NLRA without being "invalid." The preempted provision could still apply to state and local government employees, for example, or to agricultural workers.[59]

In three opinions, the Oklahoma Supreme Court voted unanimously that the non-preempted portions of the Right to Work law are valid law despite the preempted portions.[60]

Six justices—the majority—held that severability analysis was unnecessary because the Right to Work law "contemplated that some of its provisions might be preempted by federal law."[61] The majority used the federal district court's holding that the Right to Work law did not apply to workers covered by the RLA, the CSRA, or the PRA, and applied that reasoning to provisions preempted by the NLRA.[62] Subsections 1A(B)(1), (B)(5), and (C) simply did not apply to workers covered by the NLRA. These subsections of the law still applied to state and local government workers, as well as agricultural workers, none of whom are under the NLRA.[63] In a separate concurrence, Justice Opala agreed that the Right to Work law had applications beyond NLRA-covered workers: "Drafters of the Oklahoma right-to-work amendment doubtless sought to regulate the window opened by [NLRA § 14(b)] as well as the federally unregulated field of labor-management relations within the state."[64]

The majority also relied on the principle of statutory construction that statutes are to be presumed valid, holding that this presumption also applies to constitutional amendments.[65] The unions failed to overcome that presumption. The majority did not buy the unions' argument that if the voters had known about the preempted provisions, they would have voted against it:

> Why would the people not approve a constitutional change that would protect workers from the involuntary payment of union dues simply because federal courts applying federal law might decide that some of its provisions would not apply to some but not all workers in clearly defined circumstances? We conclude that the possibility that the federal courts might hold that certain employees would not be subject to the right to work law cannot be assumed to be a factor which would have caused the people to vote against its passage.[66]

Pointing to the Tenth Circuit's Certified Question 1, the majority also asserted that "the federal courts in this matter have not declared any provision of the right to work law unconstitutional."[67] The majority concluded that "to hold the right to work amendment unconstitutional under the circumstances presented here would be to thwart the clearly expressed will of the people."[68]

Three of the justices concurred with the result but filed a separate opinion, written by Justice Summers, arguing that severability analysis was necessary—and that the law is severable.[69] Justice Summers disagreed with the majority's assertion that the preempted provisions were not held unconstitutional: "Preempted state law is struck down as unconstitutional—it violates the supremacy clause of the U.S. Constitution."[70] Justice Summers quoted *Crosby v. National Foreign Trade Council*[71]: "'[The state law] is preempted, and *its application* is unconstitutional, under the Supremacy Clause.'"[72] This disagreement

between Justice Summers and the majority is purely semantic, because both agreed that a law can be partially preempted and still be applicable aside from the preemption. Justice Summers wrote: "It is the *partial application* of state law that is preempted and thus unconstitutional."[73]

It was significant to Justice Summers that the entire Right to Work law did not apply to workers covered by the RLA, CSRA, and PRA, whereas only portions of the Right to Work law did not apply to workers covered by the NLRA. For this reason, he thought severability analysis was necessary to show that the preempted provisions are severable from the remaining provisions.[74] Nevertheless, Justice Summers found that the law is severable.[75]

Nothing in the Right to Work law indicated an attempt to overturn federal law.[76] Like the majority, Justice Summers noted the presumption of validity.[77] The lack of a severability clause does not create a presumption that the law is not severable.[78] The preempted provisions of the law did not interfere with the remaining provisions, and the non-preempted provisions are capable of enforcement without the preempted provisions.[79] Justice Summers concluded: "[T]he preempted portions are severable from the non-preempted portions. . . . The non-preempted parts of the Right to Work Amendment are the law of Oklahoma."[80]

Based on the Oklahoma Supreme Court's answers to the certified questions, the Tenth Circuit affirmed the district court's judgment that the Right to Work law is valid to the extent that it is not federally preempted.[81] The unions' attempt to kill the Right to Work law's prohibitions of compulsory unionism had failed. The unions had appealed only two issues to the Tenth Circuit: (1) whether Subsection 1A(B)(1) is preempted; and (2) whether the law is severable. The unions succeeded on the first. Whether severability is necessary, however, is a matter of state law, and when the Oklahoma Supreme Court answered that no severability analysis was needed to uphold the law, there was nowhere the unions could appeal that answer.

V. The State-Law Challenge to the Right to Work Law

In May 2003, an Oklahoma trades council quietly filed suit in Tulsa County District Court claiming that the Right to Work law violated Oklahoma's Constitution.[82] The lawsuit seemed to be collusive—the defendant was a unionized contractor who did not oppose agreeing to a compulsory unionism clause in his collective bargaining agreement, and the defendant's lawyer was a prominent Tulsa union lawyer. The attorney for the intervening defendants in *Keating* learned about the state court case when the trades council filed an amicus brief with the Tenth Circuit in *Keating* which noted in passing its lawsuit filed in Tulsa. One of the intervening defendants in *Keating*, Stephen Weese, quickly moved to intervene in the state case.

The trades council claimed that the Right to Work law violated the Oklahoma Bill of Rights, specifically the right to life, liberty and the pursuit of happiness,[83] as well as the right to due process of law.[84] The council also claimed that the law violated Oklahoma Constitution, article 24, § 1, which states that no proposed constitutional amendment submitted to the voters may embrace more than one general subject. Finally, the council claimed that the Right to Work law violated the rule against "special" laws.[85]

At first, without ruling on Weese's motion for intervention, the court erroneously granted the council summary judgment on the ground that the employer had not timely opposed the council's motion for summary judgment.[86] After the National Right to Work Legal Defense Foundation alerted the Oklahoma press to this outrageous development,[87] the court vacated its judgment and scheduled the motion for summary judgment for hearing.[88] In the meantime, Weese moved for summary judgment upholding the Right to Work provision and opposed the council's motion, and the court permitted Weese to intervene.

Ultimately, the Tulsa County District Court denied the trades council's motion for summary judgment and granted Weese's motion for summary judgment. After the court denied the council's motion for reconsideration, it appealed.[89] On December 16, 2003, the same day it issued its opinion in *Keating*, the Oklahoma Supreme Court issued its opinion affirming the district court's judgment.[90]

Relying on an Oklahoma Supreme Court decision that it is unconstitutional to require attorneys to represent indigent criminal defendants without adequate compensation,[91] the trades council argued that the Right to Work law violated the due process and equal protection clauses of Oklahoma's Constitution, because an exclusive bargaining agent is required to represent all workers in its bargaining unit, including nonmembers who decline to pay dues.[92] The Oklahoma Supreme Court responded that the due process and equal protection clauses in the state

constitution provide the same protections as are provided in the Fourteenth Amendment of the U.S. Constitution.[93] The court noted that the U.S. Supreme Court upheld state Right to Work laws against due process and equal protection challenges in *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.*[94] and *American Federation of Labor v. American Sash & Door Co.*[95] Consequently, "the Council has no right to relief under the Oklahoma Constitution just as other unions making similar arguments were held by the U.S. Supreme Court to have no right to relief under the federal constitution."[96]

Moreover, the Oklahoma Supreme Court also held that, even if there were a conflict between the Right to Work provision and the due process and equal protection clauses of the state constitution, the newly enacted constitutional amendment would prevail over the old provision: "We fail to understand how an amendment to the Oklahoma Constitution could be found to violate that constitution."[97] The court applied this reasoning to all of the trades council's claims that the Right to Work constitutional amendment somehow violated the very constitution that it amended.[98]

Oklahoma Constitution, article.5, § 59 provides: "Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted." The trades council argued that the Right to Work law violates this provision, because it applies only to unions, not all situations where membership in an organization is mandatory and dues are required, such as homeowner's associations, the Oklahoma Bar association, and the Oklahoma medical association. Rejecting this argument, too, the court held that the rule against special laws does not apply to constitutional amendments, only to statutes passed by the legislature.[99]

The council also argued that the Right to Work amendment embraced multiple subjects, in violation of Oklahoma Constitution, article 24, § 1. That section provides: "No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject . . . ." The court held that this constitutional provision does not apply to amendments that are already codified, like the Right to Work law, only to proposed amendments.[100] In any event, the court concluded that the Right to Work law did not embrace more than one general subject, because all of its provisions "relate to the regulation of union activity *vis a vis* workers employed or seeking employment in unionized workplaces."[101]

Finally, the court rejected the council's argument that the ballot title for the referendum "was so vague and confusing that the right to work amendment must be declared unconstitutional."[102] The court found "nothing about [the ballot title] that is either confusing or misleading."[103] Moreover, "a referendum approved by the people . . . will not be declared unconstitutional after the fact because of claimed deficiencies in the ballot title."[104]

VI. Lessons for Drafting Right to Work Laws

The most obvious lesson from Oklahoma's experience is that a Right to Work law should include a severability clause. Although *Keating* demonstrates that a severability clause is not necessary, and a lack of one does not presume legislative intent against severability,[105] including a severability clause leaves no doubt that the legislature intended that any preempted provisions are to be severed.

The second lesson is that a Right to Work law should include a clause that says something like: "None of the provisions in this Act apply where they would otherwise conflict with, or be preempted by, federal law." It is hard to imagine how unions could attack such a law as preempted.

In *Keating*, Justice Opala extrapolated the Oklahoma Right to Work law's drafters' intent from the law's silence concerning federal law:

> The drafters of Oklahoma's right-to-work amendment reasonably contemplated and expected the limiting effect of applicable federal law. This is evidenced by the absence of an express or implied intention to avoid conforming or tailoring the text to applicable federal law. . . . Because federal labor law is neither stagnant nor mummified in its present form, the drafters understood the outer boundaries of right-to-work amendment must be flexible to remain in conformity with present as well as future federal re-definitions. The restrictions imposed by the [federal] district court's pronouncement clearly articulate specific limitations on Oklahoma's right-to-work amendment while allowing the entire text of the amendment to stand available for application in conformity with extant federal law.[106]

An explicit submission to federal law within a Right to Work law would make clear that the legislators had no intention to avoid or subvert any federal

law. By disavowing any potential conflict with federal law, none of the Right to Work law's provisions could be preempted, and a severability analysis would be unnecessary.

Of course, inclusion of both recommended clauses would not be a guarantee against litigation. As *Pitts* demonstrates, unions and their lawyers are not shy about challenging new Right to Work laws on even the flimsiest of grounds.

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Footnotes

[1] Ala. Code §§ 25-7-30–35; Ariz. Const. art. XXV; Ariz. Rev. Stat. Ann. §§ 23-1301–1307; Ark. Const. amend. 34; Ark. Code Ann. §§ 11-3-301–304; Fla. Const. art. 1, § 6; Fla. Stat. Ann. § 447.17; Ga. Code Ann. §§ 34-6-20–28; Idaho Code §§ 44-2001–2009; Iowa Code Ann. §§ 731.1–731.8; Kan. Const. art. 15, § 12; Kan. Stat. Ann. § 44-831; La. Rev. Stat. Ann. §§ 23:981–987; Miss. Const. art. 7 § 198-A; Miss. Code Ann. § 71-1-47; Neb. Const. art. XV, §§ 13–15; Neb. Rev. Stat. §§ 48-217–219; Nev. Rev. Stat. §§ 613.230, 613.250–300; N.C. Gen. Stat. §§ 95-78–84; N.D. Cent. Code §§ 34.01.14–14.1; Okla. Const. art. XXIII, § 1A; S.C. Code Ann. §§ 41-7-10–90; S.D. Const. art. VI, § 2, S.D. Codified Laws §§ 60-8-3–8-8; Tenn. Code Ann. §§ 50-1-201–204; Tex. Codes Ann. tit. 3 §§ 101.003, .004, .052, .053, .102, .111, .121, .122, .124; Utah Code Ann. §§ 34-34-1–17; Va. Code Ann. §§ 40.1-58–69; Wyo. Stat. Ann. §§ 27-7-108–115.

[2] F.A. Hayek, The Constitution of Liberty 279 (1960).

[3] Kirk Shelley, *How Oklahoma Was Won*, Labor Watch, Apr. 2002, at 1, 3 (quoting Letter from Sen. Taylor to constituents posted on Okla. Democratic Party web site (2001) (on file with the National Institute of Labor Relations Research)). Senator Taylor's letter conceded that supporters of a Right to Work statute had "a majority" in both houses of the Oklahoma legislature.

[4] S.J. Res. 1, 48th Leg., 1st Sess. (Okla. 2001).

[5] Randy Krehbiel *et al.*, *Right to Work Becomes Newest Law*, Tulsa World, Sept. 26, 2001, at A1. Shelley, *supra* note 3, comprehensively describes the campaign.

[6] SQ 695 as it appeared on the ballot read:

> STATE QUESTION NO. 695
> LEGISLATIVE REFERENDUM NO. 322
>
> The measure adds a new section to the State Constitution. It adds Section 1A to Article 23. The measure defines the term "labor organization." "Labor organization" includes unions. That term also includes committees that represent employees.
>
> The measure bans new employment contracts that impose certain requirements to get or keep a job. The measure bans contracts that require joining or quitting a labor organization to get or keep a job. The measure bans contracts that require remaining in a labor organization to get or keep a job. The measure bans contracts that require the payment of dues to labor organizations to get or keep a job. The measure bans contracts that require other payments to labor organizations to get or keep a job. Employees would have to approve deductions from wages paid to labor organizations. The measure bans contracts that require labor organization approval of an employee to get or keep a job.
>
> The measure bans other employment contract requirements. Violation of this section is a misdemeanor.
>
> SHALL THE PROPOSAL BE APPROVED?
>
> FOR THE PROPOSAL - YES
> AGAINST THE PROPOSAL - NO

[7] Local 514, Transp. Workers Union v. Keating, 212 F. Supp. 2d 1319, 1322 (E.D. Okla. 2002), *aff'd*, 358 F.3d 743 (10th Cir. 2004).

[8] Article XXIII, Section 1A provides:

> Section 1A.
>
> A. As used in this section, "labor organization" means any organization of any kind, or agency or employee representation committee or union, that exists for the purpose, in whole or in part, of dealing with employers concerning wages, rates of pay, hours of work, other conditions of employment, or other forms of compensation.
>
> B. No person shall be required, as a condition of employment or continuation of employment, to:
>
> 1. Resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization;
>
> 2. Become or remain a member of a labor organization;
>
> 3. Pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization;
>
> 4. Pay to any charity or other third party, in lieu of such payments, any amount equivalent to or pro rata portion of dues, fees, assessments, or other charges regularly required of members of a labor organization; or

> 5. Be recommended, approved, referred, or cleared by or through a labor organization.
>
> C. It shall be unlawful to deduct from the wages, earnings, or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization unless the employee has first authorized such deduction.
>
> D. The provisions of this section shall apply to all employment contracts entered into after the effective date of this section and shall apply to any renewal or extension of any existing contract.
>
> E. Any person who directly or indirectly violates any provision of this section shall be guilty of a misdemeanor.

[9] The district court declined to exercise supplemental jurisdiction over the unions' state constitutional claims. *Keating*, 212 F. Supp. 2d at 1321.

[10] The federal courts have held that state Right to Work laws do not apply on exclusive federal enclaves. *E.g.*, Lord v. Local 2088, Electrical Workers, 646 F.2d 1057 (5th Cir. 1981) (2-1 decision as to property ceded to federal government after enactment of Right to Work law).

[11] *Keating*, 212 F. Supp. 2d at 1321 n.3.

[12] *Id.* at 1323-24. Unions describe compulsory unionism as "union security." The permitted agreements are called "'union shops', where the employee is required to join the contracting union within a certain period after hire, and 'agency shops', where the employee is not required to join the union but must pay union dues. . . ." *Id*. at 1324. However, even in a so-called union shop, "an employee can satisfy the membership condition merely by paying to the union an amount equal to the union's initiation fees and dues," not actually joining the union. Marquez v. Screen Actors Guild, 525 U.S. 33, 37 (1998). Moreover, there are limits on the fee that can be exacted pursuant to forced unionism. The Supreme Court has held that the NLRA, like the RLA, "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" Communications Workers v. Beck, 487 U.S. 735, 762-63 (1988) (quoting Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984)).

[13] 29 U.S.C. § 164(b).

[14] *Keating*, 212 F. Supp. 2d at 1324.

[15] *Id.*

[16] *Id.* at 1325 (quoting Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981)).

[17] *Id.*

[18] *Id.* at 1326.

[19] Local 514 Transp. Workers Union v. Keating, 358 F.3d 743, 756 n.14 (10th Cir. 2004).

[20] *See* Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961).

[21] *See* Laborers' Int'l Union Local 107 v. Kunco, Inc., 472 F.2d 456, 458-59 (8th Cir. 1973); NLRB v. Tom Joyce Floors, Inc., 353 F.2d 768, 770-71 (9th Cir. 1965); NLRB v. Houston Chapter Ass'd Gen'l Contractors, 349 F.2d 449, 451 (5th Cir. 1965).

[22] *Keating*, 212 F. Supp. 2d at 1327

[23] 29 U.S.C. § 186(c)(4).

[24] *Id.*

[25] *Keating*, 212 F. Supp. 2d at 1327 (citing SeaPak v. Industrial Technical & Prof'l Employees, 300 F. Supp. 1197, 1200 (S.D. Ga. 1969), *aff'd*, 423 F.2d 1229 (5th Cir. 1970), *aff'd*, 400 U.S. 985 (1971) (federal preemption if state attempts to make dues deduction authorizations revocable at will)).

[26] *Id*.

[27] *Id.* at 1327 n.6.

[28] Subsection 1A(B)(1) provides: "No person shall be required, as a condition of employment or continuation of employment, to . . . [r]esign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization."

[29] *Keating*, 212 F. Supp. 2d at 1328 n.6.

[30] *Id.* (citing Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949)). Interestingly, twenty of the twenty-two state Right to Work laws protect the right to join and support labor unions as well as the right to refrain from doing so.

[31] Subsection 1A(B)(3) provides: "No person shall be required, as a condition of employment or continuation of employment, to . . . [p]ay any dues, fees, assessments, or other charges of any kind or amount to a labor organization."

[32] *Keating*, 212 F. Supp. 2d at 1328 n.6.

[33] *Id*.

[34] *Id.* at 1328 (citing Panhandle E. Pipeline Co. v. State of Okla. *ex. rel*. Comm'rs of the Land Office, 83 F.3d 1219, 1229 (10th Cir. 1996)).

[35] *Id.* (citing Ethics Comm'n v. Cullison, 850 P.2d 1069, 1077 (Okla. 1993)).

[36] *Id.* (citing Okla Stat. tit. 75, § 11a).

[37] *Id.* at 1329.

[38] *Id.*

[39] Local 514 Transp. Workers Union v. Keating, 358 F.3d 743, 754 (10th Cir. 2004).

[40] *Id*. at 745-46.

[41] *Id*. at 754-55.

[42] *Id.* at 751 (quoting 29 U.S.C. §§ 157, 158(a)(1).

[43] 346 U.S. 485 (1953).

[44] *Keating,* 358 F.3d at 751 *(*citing *Garner,* 346 U.S. at 498-99*)*

[45] Okla. Const. art. XXIII, § 1A(E).

[46] *Keating*, 358 F.3d at 751-52.

[47] 335 U.S. 525 (1949).

[48] 335 U.S. 538 (1949).

[49] *Keating*, 358 F.3d at 752.

[50] *Id.* at 753 ("It is readily apparent that the Court in *Lincoln Federal* and *American Sash* was focused on the very narrow question of whether the state provisions at issue violated the Equal Protection Clause of the Fourteenth Amendment. There is absolutely no discussion of the question of preemption and, hence, no indication that provisions like article XXIII, § 1A(B)(1) are not preempted by the NLRA.").

[51] 335 U.S. at 532.

[52] *Keating*, 358 F.3d at 754.

[53] *Id.* (citing City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283, 286 (1976)).

[54] *Id.*

[55] *Id.* (citing Alabama State Fed'n of Labor, Local Union No. 103 v. McAdory, 325 U.S. 450, 472 (1945) (state may exclude from regulation those it has reason to believe are already appropriately regulated by federal legislation)).

[56] *Id*. Significantly, the author of the opinion, Circuit Judge Murphy, had previously made clear that he construes the NLRA as having maximum preemptive force. Judge Murphy was the lone dissenter in *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (*en banc*), which held that a tribal council could enact a Right to Work law to govern its tribal lands, even though NLRA Section 14(b) does not mention Indian reservations. The majority reasoned that, because states were permitted to have Right to Work laws prior to the enactment of Section 14(b), states would have the authority to enact Right to Work laws if Section 14(b) did not exist. *Id*. at 1197-98. That Section 14(b) does not refer to Indian tribes, which are sovereigns on their tribal lands, does not thereby divest them of the authority to enact Right to Work laws. *Id*. at 1198. Judge Murphy vigorously disagreed. He argued that state Right to Work laws would be preempted by NLRA Section 8(a)(3) if Section 14(b) did not exist: "Congress intended to regulate union security agreements when it enacted § 8(a)(3) of the Taft-Hartley Act, restoring a small portion of that regulatory power only to states and territories when it enacted § 14(b)." *Id*. at 1208 (Murphy, J., dissenting).

[57] *Keating*, 358 F.3d at 755.

[58] *Id.*

[59] *See* 29 U.S.C. § 152(a) ("employer" does not include the states or their political subdivisions); § 152(b) ("employee" does not include agricultural workers).

[60] Local 514 Transp. Workers Union v. Keating, 83 P.3d 835 (Okla. 2003).

[61] *Id*. at 840-41.

[62] *Id.* at 838-39.

[63] *Id.* at 839.

[64] *Id*. at 842 (Opala, J., concurring); *see also id*. at 842 n.5 ("Oklahoma's right-to-work amendment has more than a single mission. It is intended to govern two different types of employment relationships (1) those that fall within the narrow window authorized by [§ 14(b)], and (2) those entirely unaffected by federal labor law.").

[65] *Id.* at 839.

[66] *Id.* at 840.

[67] *Id.*

[68] *Id.* at 841.

[69] *Id.* at 846-47 (Summers, J., concurring in result).

[70] *Id.* at 846.

[71] 530 U.S. 363, 388 (2000).

[72] *Keating*, 83 P.3d at 846 (emphasis altered).

[73] *Id.* at 847 (emphasis added); *see also id.* at 844 (Opala, J., concurring) ("[T]he district-court determination operates to condition or restrict the application of the provision instead of rendering it void.").

[74] *See id.* at 847-49.

[75] *Id.* at 849-51.

[76] *Id.* at 849.

[77] *Id.* at 849-850.

[78] *Id.* at 850 ("Mere legislative silence on the issue of severability may not control the presumption that legislative acts will be enforced to the extent they are valid.").

[79] *Id.* at 851.

[80] *Id.*

[81] *Keating*, 358 F.3d at 745.

[82] Eastern Okla. Bldg. & Constr. Trades Council v. Pitts, No. CJ-2003-3084 (Tulsa County Dist. Ct., filed May 13, 2003).

[83] Okla. Const. art. 2, § 2.

[84] *Id.* § 7. Oklahoma's due process protections contain an equal protection component. Eastern Okla. Bldg. & Constr. Trades Council v. Pitts, 82 P.3d 1008, 1012 (Okla. 2003) (citing Oklahoma Ass'n for Equitable Taxation v. Oklahoma City, 901 P.2d 800, 805 (Okla. 1995)).

[85] Okla. Const. art. 5, § 59.

[86] *Pitts*, Order filed June 26, 2003.

[87] National Right to Work Legal Defense Foundation News Release, *Tulsa Judge Declares Oklahoma's Right to Work Law Unconstitutional in Rigged Lawsuit* (June 27, 2003), *at* http://www.nrtw.org/b/nr.php3?id=231; *see*, *e.g.*, Randy Krehbiel, *Labor Ruling Likely Not Final Word*, Tulsa World, June 28, 2003, at A17.

[88] *Pitts*, Order filed June 30, 2003.

[89] Eastern Okla. Bldg. & Constr. Trades Council v. Pitts, 82 P.3d 1008, 1010 (Okla. 2003).

[90] *Id*.

[91] State v. Lynch, 796 P.2d 1150 (Okla. 1990).

[92] *Pitts*, 82 P.3d at 1013.

[93] *Id*. at 1012.

[94] 335 U.S. 525 (1949).

[95] 335 U.S. 538 (1949).

[96] *Pitts*, 82 P.3d at 1012.

[97] *Id.*

[98] *See*, *e.g.*, *id.* at 1013 ("Because we hold that any conflict between the right to work amendment and a provision in the original constitution would have to be resolved in favor of the most recent amendment, we could not reasonably hold that Okla. Const. art. 5, § 59 somehow trumps the more recently passed right to work amendment.")

[99] *Id.*

[100] *Id.* at 1014.

[101] *Id.*

[102] *Id.*

[103] *Id*.

[104] *Id*. at 1015.

[105] *See also* Electrical Workers Local 415 v. Hansen, 400 P.2d 531, 537-38 (Wyo. 1965) (3-1 decision) (preempted section of Wyoming's Right to Work law severable despite no "separability clause").

[106] *Keating*, 83 P.3d at 845-46 (Opala, J., concurring).