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## ACADEMIC COMMENTARY

# Sixth Circuit Undermines Labor Statute

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edited by [Ben Cohen](#)

JURIST Guest Columnist [Angela B. Cornell](#) of [Cornell Law School](#) discusses the implications that a recent case in Kentucky will have on labor relations and labor rights...

Departing from decades of labor and industrial relations practice in the U.S. and rejecting the firmly grounded understanding of the language of the [National Labor Relations Act \(NLRA\)](#), the Sixth Circuit recently waded into uncharted waters with its [decision to uphold a Kentucky county right to work ordinance](#) in [UAW Local 3047 v. Hardin County](#). The decision has wide-sweeping implications for labor relations and will undermine important labor rights.

Hardin County, Kentucky [passed an ordinance](#) that prohibits union security agreements. For those who are unfamiliar with labor law, a union security clause is the language in a collective bargaining



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agreement that requires those employees who benefit from the agreement to contribute dues/fees to the union. The sum has been whittled down for non-union members, who are only required to contribute to the core expenses related to collective bargaining, contract administration and grievance adjustment—not the union's political activities. The payment of dues or the reduced fees are a condition of employment in unionized bargaining units in states that do not prohibit union security agreements.

The Kentucky ordinance at issue also places restrictions on dues check off and hiring halls. The U.S. district court decision ruled that the entire ordinance was preempted by the NLRA, but the Sixth Circuit reversed as to the union security clause, finding that this part of the home-rule ordinance falls into the statutory exception that applies to states under the language of § 14(b) of the amended NLRA.

Section 14(b) creates an exception to the statute's protection of union security clauses and provides that:

Nothing in the 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.

**29 U.S.C. § 14(b).** This section has enabled states to pass so called right-to-work legislation and 27 states have done so, spurred on by conservative national organizations that also played a role in this effort. The parameters and permutations of union security in the private and public sector have been the subject of considerable challenge, including several important decisions at the U.S. Supreme Court that have chipped away at the foundation of labor rights. In February, the Court divided evenly in **Friedrichs v. California Teachers Association, 136 S.Ct 1083 (2016)**, leaving union security in place in the public sector, but the aggressive ideological campaign against the very core of Freedom of Association continues.

Despite the many ways in which union security has been challenged, in 70 years no court has interpreted the language in § 14(b) to apply to political subdivisions of the state. The local initiatives that sought to prohibit union-security agreements at the city or county level have been preempted by the federal statute, until this Sixth Circuit decision.

The NLRA establishes a comprehensive national labor policy for the private sector, under which union security agreements are valid as a matter of federal law and are highly regulated. The statute explicitly permits and regulates these agreements with the only exception to exclusive federal regulation being based on the language of § 14(b).

Accordingly, the issue before the Sixth Circuit was whether the Hardin County ordinance falls within the coverage of § 14(b)—despite being neither a State nor a Territory.

The Sixth Circuit panel upheld the ordinance by concluding that "State" in § 14(b) included political subdivisions, relying significantly on the U.S. Supreme Court's interpretation of similar language in completely distinct statutory schemes. The Court relied on *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) (Federal Insecticide, Fungicide, and Rodenticide Act does not preempt regulation of pesticides by local governments) and *City of Columbus v. Our Garage and Wrecker Service*, 536 U.S. 424 (2002) (Interstate Commerce Act that expressly excluded state safety regulatory authority from preemption was interpreted to permit local ordinance as well). Based on this authority, the Court broadly concluded that when Congress references the regulatory authority of a State, the statute will be interpreted to include political subdivisions unless there is a clear statement to the contrary.

Scholars of statutory interpretation have issued strong warnings about the risks of relying on unrelated statutes to interpret meaning because the pertinent context is essential for statutory interpretation. Lawrence M. Solan, *The Language of Statutes: Laws and Their Interpretation*, 75-76 (Univ. of Chicago 2010)(citations omitted) ("Searching for ordinary meaning in contexts remote from the one in dispute seems doomed to cause misinterpretations.") ("Somewhat more problematic are inferences drawn from how statutes remote from the one in dispute use the same word."); Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction*, § 53.5, § 46.5 (7th ed. 2007) (citations omitted) ("Caution must be exercised in applying the rule that one statute will be interpreted to correspond to analogous but unrelated statutes because an inclusion or exclusion may show an intent or convey a meaning exactly contrary to that expressed by analogous legislation")("The interpretation of one statute by reference to an analogous but unrelated statute is considered an unreliable means to discern legislative intent.")("Two statutory provisions containing similar or identical language are not necessarily subject to the same interpretation, as there are other interpretative factors such as purpose and content of the legislative history.").

Relying on unrelated statutes to interpret the term "State" is flawed not only in this context, but its broad application in the circuit can distort statutory interpretation in other areas as well. Instead of focusing on the touchstone of statutory interpretation, the intent of Congress, with an eye toward the statute's purpose and context, it interposes this artificial definition.

With regard to § 14(b) of the NLRA, the focus on unrelated statutes diverts the Court from the more grounded canons of statutory construction, like the: 1) "plain meaning rule," 2) the intentionality of language in one section of a statute, but

omitted in another, 3) exceptions like § 14(b) are to be interpreted strictly and narrowly, and 4) statutory language should not be interpreted in a way that undermines the purpose of the statute. The Court did rely on one rule of statutory construction, citing *Powerex Corp. v. Reliant Energy Servs, Inc.*, 551 U.S. 224, 232 (2017) (that identical words in the same statute be given the same meaning), however, the lower court also relied on this case to reach the opposite conclusion.

Furthermore, relying on the unrelated statutes to interpret the word "State" in this context is particularly problematic because it will make it very difficult for business and labor to have functioning collective bargaining agreements across counties. The very purpose of the statute is to "encourage the practice and procedure of collective bargaining." Potentially thousands of different policies on union security will be a nightmare for the parties to a collective bargaining agreement and a significant challenge to the enforcement of these agreements. The Sixth Circuit decision fails to consider how collective bargaining, and labor and industrial relations more generally, function in the U.S.

Unfortunately, union security is often misunderstood and distorted in these right-to-work struggles. When a majority of employees in a bargaining unit choose to be organized collectively and represented by a union, a collective bargaining agreement is negotiated to improve wages, benefits and provide these employees with a contractual right to "just cause" for discipline, as well as address other issues of concern. The collective bargaining agreement will also contain a union security agreement in states that do not restrict them. Employees who benefit from the agreement and the union's work in obtaining and enforcing it are required to contribute to those expenses and the union is legally obliged to represent everyone fairly—even non-members.

In right-to-work states, non-union members are exempt from all union dues, creating what is known as the "free-rider" problem. As the Supreme Court acknowledged: "Congress' decision to allow union-security agreements at all reflects concern that the parties to collective bargaining agreements be allowed to provide that there be no employees who are getting the benefit of union representation without paying for them." *Communications Workers v. Beck*, 487 U.S. 735, 750 (1988). The union still has a legal duty to represent those employees who contribute nothing and that can be a costly endeavor, potentially jeopardizing the financial integrity of the union.

Ultimately the Sixth Circuit decision undermines the very core of what the NLRA sought to enhance—workers' collective rights. The statute, passed on the heels of the Great Depression, sought to bolster the bargaining strength of workers. By joining together workers could enhance their ability to negotiate for better terms and conditions of employment and by doing so the American middle class was created. Now the middle class is shrinking as the gulf between the very rich and everyone else widens. It is worth remembering that labor law serves broader societal interests in very important ways as expressed by the statute's sponsor, Senator Robert Wagner: "The struggle for a voice in industry through the process of collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America." Now more than ever we need the language and purpose of the statute to be enforced by our judiciary.

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