

## **A New Map of Right-to-work? Pushing the “Local Option” in Kentucky and Illinois**

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The map of "right-to-work" states largely took shape during the 40s and 50s. Since 2012, three additional states have adopted right-to-work rules, coinciding with an upswing in a range of state-level campaigns to undermine private and public sector unions. This report examines a recent and potentially disruptive version of right-to-work's resurgence: the emergence of the "local option," or the adoption by local governments of rules similar to conventional state-level right-to-work. Over the past year, the circulation of local right-to-work as a flexible policy concept reflects a strategy to exploit fuzzy interpretations of the NLRA and the pressures of economic competition at the local level for the purpose of disrupting the established parameters of right-to-work contests at the state level. The report reviews recent legislative campaigns in several Kentucky counties and in the Illinois legislature, where right-to-work advocates have strategically experimented with the "local option". The two cases serve to highlight the network of anti-union policy actors behind local right-to-work's emergence as well as the economic, legal, and political implications of these tenuous episodes in policy-making.

## INTRODUCTION

Until recently, the spread of “right-to-work” (RTW) legislation formed a fairly dormant chapter in the history of labor relations and state policy. By the conventional narrative, the state-by-state adoption of RTW rules represented a key front of postwar anti-union politics, helping to establish an uneven geography of workplace regulations, possibly contributing to the shift of manufacturing to the Sunbelt, and undermining union-dense production sectors in the Northeast and Midwest.<sup>1</sup> However, this once largely closed episode of economic restructuring has re-opened with three Midwestern states adopting RTW over the past three years and a broader uptick in related legislation in other states.<sup>2</sup> Focusing on one new front of anti-union legislative campaigns, this report examines the emergence of RTW law as a viable option for *local* governments. Beyond probing the limits of federal regulations, local RTW’s circulation as a flexible policy concept strategically exploits political and economic factors at the local scale that differ from the “rules of the game” established at the state level.

A review of two notable cases where the campaign for local RTW has gained traction during the past year, Kentucky and Illinois, highlights the conditions associated with the arrival of local RTW’s current moment as well as key actors behind this new legislative campaign. The narrative illustrates that the work of policy-making happens not only in the chambers of state legislatures but also in the networks of non-local actors and organizations that cut across discrete local jurisdictions.<sup>3</sup> Although local RTW might (correctly) be interpreted as political expediency, its parameters vary across sites. Operating from the bottom up in a context of strong home rule, several Kentucky counties have adopted RTW ordinances in rapid succession. Local RTW took a different track in Illinois, where a new governor elected on a “turnaround” platform has proposed enabling legislation to grant various types of local governments the authority to designate special RTW zones. The legality of both pathways under the National Labor Relations Act (NLRA) remains questionable.

The recent – and still tenuous – extension of state-level RTW politics into a “local option,” has been shaped by and carried along often weakly linked networks of policy actors and legislative advocacy organizations focused on adapting RTW to different geographic venues. The American Legislative Exchange Council (ALEC) has been instrumental in setting the legislative agenda, drafting model legislation,

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1 Barry Bluestone and Bennet Harrison, *The Deindustrialization of America: Plant Closings, Community Abandonment, and the Dismantling of Basic Industry*, New York: Basic Books (1982).

2 Gordon Lafer, “The Legislative Attack on American Wages and Labor Standards, 2011 – 2012,” Economic Policy Institute Briefing Paper 364 (October 31, 2013).

3 Eugene McCann and Kevin Ward, eds. *Mobile urbanism: cities and policymaking in the global age*. University of Minnesota Press (2011); Jamie Peck and Nik Theodore. “Mobilizing policy: Models, methods, and mutations.” *Geoforum* 41, no. 2 (2010): 169-174.

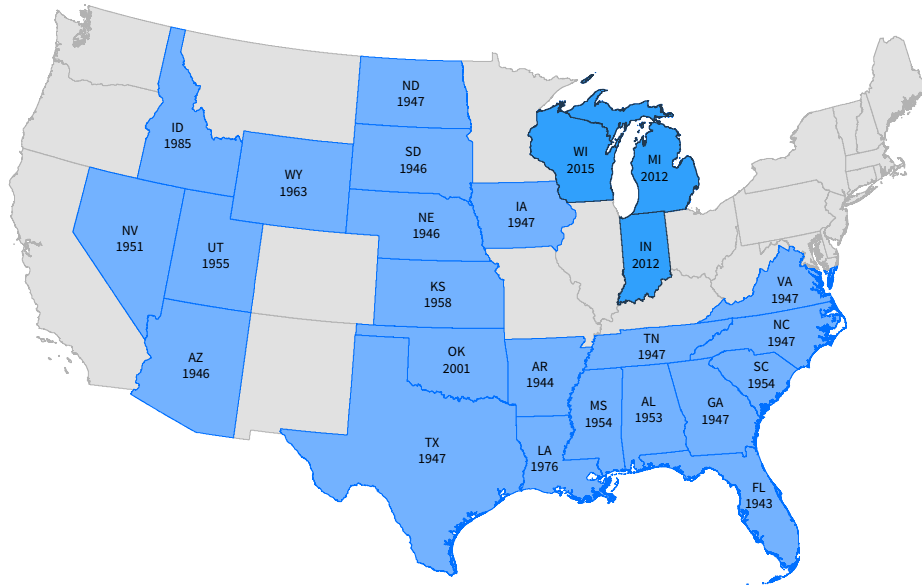


Figure 1: Right-to-work states, with recent adopters highlighted

and convening state and local policy makers. The advocacy group Protect My Check has pushed the “Local Option” where political barriers in state legislatures prevent RTW adoption and has pledged legal assistance to Kentucky county governments following this model. Think tanks have been equally as important. On the national level, the Heritage Foundation has produced and publicized research that extols the economic benefit of RTW and the legality of the “local option”. With a patina of policy expertise and analytical rigor, similar arguments have reverberated through a network of state-level conservative policy analysis institutes, e.g., the Illinois Policy Institute, the Mackinac Center, and the Bluegrass Institute.<sup>4</sup> In aggregate, this network of organizations, reform-minded governors, and state and local policy makers has amassed a fragmented but consistent agenda to undermine unions, with local RTW comprising only one potentially disruptive part.

## THE RIGHT-TO-WORK STATUS QUO

The familiar map of RTW states (see Figure 1) reveals the patchwork of different rules governing union organizing across the states. The enactment of state RTW legislation began in the early 1940s, before its protection by the passage of the 1947

<sup>4</sup> Even north of the border, the Fraser Institute has intensified a push extending back decades for Canadian provinces to consider US-style RTW reforms. See Fazil Mihlar (Ed.), *Unions and Right to Work Laws*, Fraser Institute: Vancouver (1997); Jason Clemens and Niels Veldhuis, “Should Right-to-work Come to Canada?” *Fraser Forum* (November/December 2013); Richard Vedder, “Right-to-work Laws and Economic Growth,” *Fraser Forum* (September/October 2010).

Taft-Hartley amendments to the 1935 NLRA. Among various limitations to the power of unions, Section 14(b) of the NLRA sanctioned the ability of “any State or Territory” to legislatively prohibit membership in or financial contribution to a labor organization as a condition of employment. At the discretion of individual states, such prohibitions structurally undermine the stability of membership and, by extension, the bargaining power of unions.<sup>5</sup> In creating the “free-rider problem,” workers in a union or agency shop are allowed to benefit from union representation without contributing a “fair share” of the cost of collective bargaining in the form of union dues or agency fees. While federal law requires unions to represent all workers, state law since 1947 may exempt workers from the requirement of contributing to the cost of that representation. Around this legal regulatory provision, a polarizing rhetoric of RTW debates emerged, framing a broadly individualistic (and misleadingly labeled) “right to work” against a specific loophole governing union security clauses that threatens the capacity of unions to organize and bargain effectively. Echoes of these debates continue to dominate the discussion around RTW in the present day.

Most RTW states are located in the South and West regions of the U.S. The Houston-based Christian American Association championed the early use of the “right-to-work” slogan, which gradually found sympathy with efforts by the US Chamber of Commerce and the National Association of Manufacturers to stem the dramatic spread of unionization during the Second World War.<sup>6</sup> Bolstered by overlapping interests between northern manufacturers wanting to weaken unions and conservative organizations hoping to preserve the political status quo in the South, Taft-Hartley coincided with the swell of RTW legislation. Before 1947, only five states had adopted RTW laws. As shown in Figure 2, RTW statutes and constitutional amendments diffused rapidly in the wake of Taft-Hartley before leveling off in the early 1960s. By then, 18 states had adopted RTW rules.<sup>7</sup> RTW’s momentum began to stall in the late 1950s. However, as a response to union organizing drives in the South, RTW’s heyday had succeeded in effectively containing the spread of unionization within narrow geographical and industrial confines.<sup>8</sup>

From the 1970s to the 2000s, additional states enacted RTW legislation at rate of one per decade, a trickling pace compared to the 1940s, 50s, and 60s. This pattern roughly conforms to a routine “S-curve” of diffusion: early adopters are followed by a wave of majority adopters, who are in turn trailed by lagging adopters as the rate of

5 W. Robert Reed, “How Right-to-Work Laws Affect Wages,” *Journal of Labor Research* Vol. 24 No. 4 (2003): 713-730; William J. Moore, “The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature,” *Journal of Labor Research* Vol. 19 No. 3 (1998): 449-469.

6 Mark Dixon, “Limiting Labor: Business Political Mobilization and Union Setback in the States,” *The Journal of Political History*, Vol. 19 No. 3: 313-344 (2007).

7 Figure 2 only reports RTW adoption among states that currently have RTW rules. During the 40s and 50s peak, Delaware, New Hampshire, Indiana, and Louisiana all passed and later repealed RTW.

8 Ibid.

After a heyday spanning from Taft-Hartley through the 1950s, the rate at which states adopted “right-to-work” slowed dramatically — until 2012.

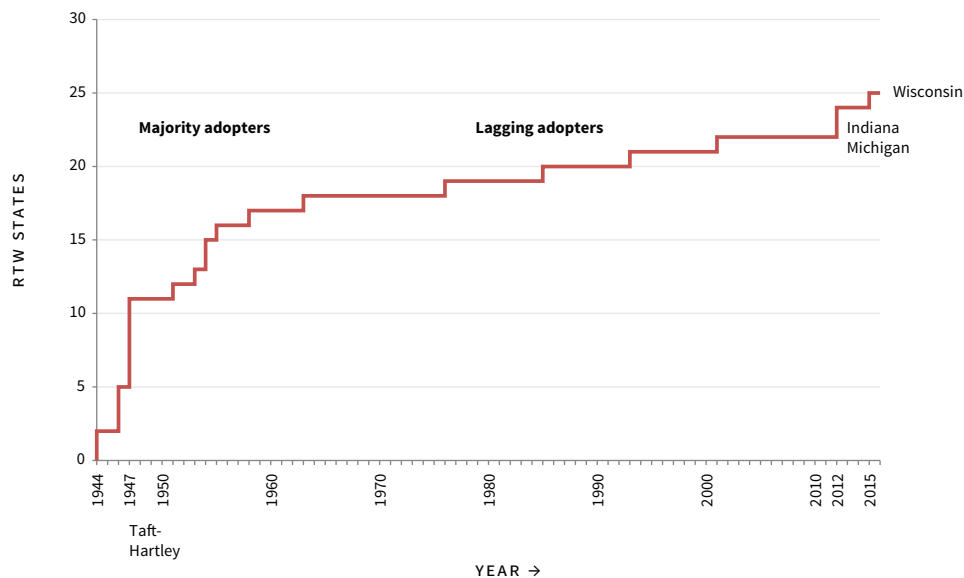


Figure 2: Adoption curve of right-to-work at the state level

diffusion flattens. Before the 2010s, RTW had reached a period of relative stasis. Only a single state adopted RTW in the previous decade (Oklahoma in 2001).

The inertia ended in 2012 when Indiana and Michigan brought RTW to the Midwest industrial heartland. As the home of UAW and one of the most union-dense states, Michigan’s RTW conversion delivered a particularly symbolic blow to unions. In 2014, legislatures in twenty states introduced legislation related to RTW.<sup>9</sup> In 2015, Wisconsin adopted RTW legislation, and Missouri Governor Jay Nixon vetoed a RTW bill passed by the state legislature.

In short, RTW has resurged in the theater of state policy. In reality, RTW reflects only one weapon in a broader arsenal of opposition to collective bargaining and labor standards among private employers and, especially, in the public sector.<sup>10</sup> On a normative level, supporters of RTW avoid framing their position as anti-union and instead favor a view of RTW as a protection of voluntary association, while opponents tend to highlight the blatantly anti-union politics at work. On a pragmatic level, contemporary RTW drives either sail through or run aground on economic

<sup>9</sup> <http://www.ncsl.org/research/labor-and-employment/2014-right-to-work-legislation.aspx>

<sup>10</sup> Gordon Lafer, “The Legislative Attach on American Wages and Labor Standards, 2011-2012,” EPI Briefing Paper 364 (October, 2013).

arguments. While supporters claim unambiguous economic benefit to RTW (behind a flexible and often shaky set of claims regarding fiscal solvency and economic competitiveness), opponents warn of harm to job quality, safety, and compensation, especially for the middle class.

The evidence on whether RTW actually creates jobs or increases aggregate earnings remains inconclusive.<sup>11</sup> Separating causation from correlation provides an elusive challenge in evaluating economic development policy in general, and RTW is no exception. For instance, the historical association of RTW's geographical spread with the shift of manufacturing to the Sunbelt is tempered by the contemporaneous adoption of air conditioning and investment in the interstate highway system.<sup>12</sup> Moreover, while the National Right to Work Committee's research shows that RTW states have also gained more jobs on average in recent years, these averages are driven by a small handful of high-growth states, like Texas and Arizona.<sup>13</sup> With more mixed experiences across the majority of RTW and non-RTW states, any secular trend associating RTW with growth remains ambiguous. However, the extant literature has more consistently found a negative impact of RTW legislation on the rate of unionization among private workers.<sup>14</sup>

Recent research has stressed causal ambiguities, particularly absent the ability to separate the effect of RTW from that of other "pro-business" policies and structural economic conditions.<sup>15</sup> To the extent that RTW rules might have enticed manufacturing away from northern regions in past decades, this effect has almost certainly diminished with time.<sup>16</sup> However, the perception that RTW laws continue not only to signal but to actively construct a business-friendly, growth-inducing climate echoes the prevalence of similar myths regarding the effect of incentives on economic development.<sup>17</sup> This ambiguity is further traced through the logic of business location decisions. In annual surveys by *Area Development* magazine, managers and site selectors repeatedly report that factors like RTW and tax incentives trail far behind access

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11 Gordon Lafer and Sylvia Allegretto, "Does 'Right-to-work' Create Jobs? Answers from Oklahoma," EPI Briefing Paper 300 (March, 2011).

12 Raymond Arsenault, "The End of the Long Hot Summer: The Air Conditioner and Southern Culture," *Journal of Southern History* Vol. 50 No. 4 (1984): 597-628. See also [http://www.mlive.com/opinion/index.ssf/2013/01/guest\\_column\\_right\\_to\\_work\\_is.html](http://www.mlive.com/opinion/index.ssf/2013/01/guest_column_right_to_work_is.html)

13 Lafer and Allegretto (2011).

14 Reed (2003), Moore (1998)

15 Lonnie K. Stevans, "The Effect of Endogenous Right-to-Work Laws on Business and Economic Conditions in the United States: A Multivariate Approach," *Review of Law and Economics* Vol. 5, No.1 (2009): 595-614; Thomas J. Holmes, "The Effect of State Policies on the Location of Manufacturing: Evidence from State Borders," *Journal of Political Economy* Vol. 106, No. 4 (August 1998): 667-705.

16 Lafer and Allegretto (2011), p. 5.

17 David Schultz, "The Truth about Taxes – They Don't Matter Much," *American Politics in the Age of Ignorance: Why Lawmakers Choose Belief over Research*, New York: Palgrave MacMillan (2013).

to infrastructure and human capital as concerns in location decisions.<sup>18</sup> However, survey authors stress that RTW may function as a first-screening condition for consideration of some types of facilities, particularly in the manufacturing sector. These examples illustrate that, although states are often vaunted as laboratories of policy innovation, they also act as machines of policy replication, habitually precluding the rational and evidence-based evaluation of policy alternatives.<sup>19</sup> Under the pressure of economic competitiveness, the speed and momentum of policy replication is perhaps even greater at the local level.

## RIGHT-TO-WORK'S LOCAL FRONTIER

When compared with state governments, municipal and county governments have different capacities for governance and more varied mechanisms of revenue generation. For example, structural factors, such as the policy-making process and the industrial composition of the economy, vary more widely across localities than across states. With the exception of large cities, smaller local economies tend to be less diverse than larger state economies and more specialized around certain industries. With relatively less diversity than larger units of government, localities also tend to face more acute development challenges. The structural dependence of both place-based businesses and local government tax revenues on sustained economic expansion leads local governance to prioritize policies that signal a friendly business climate over other alternatives.<sup>20</sup> As consequence of these constraints, competition disciplines entrepreneurial local governments into mimicking other jurisdictions in a bid to send alluring signals to outside investment, to sell “place” as an input to productive economies.<sup>21</sup> In stressing RTW's questionable capacity to lure outside investment, the architects of local RTW have embedded an attack on unions within a policy narrative tailor-made to stoke the entrepreneurial furnace of local governance.

RTW has traditionally been interpreted as a matter of state discretion. Local RTW effectively re-scales labor protections down to the jurisdiction of local governments. According to proponents of this shift, localizing RTW moves governance closer to the needs and preferences of individual local communities, where these concerns

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18 Ibid., Lafer and Allegretto (2011), p. 5. See also recent surveys from *Area Development* magazine, e.g., <http://www.areadevelopment.com/Corporate-Consultants-Survey-Results/Q1-2015/annual-corporate-executive-business-expansion-survey-287775.shtml?Page=2>

19 Schultz (2013).

20 John R. Logan and Harvey L. Molotch, *Urban fortunes: The political economy of place* (Second Ed.), Univ of California Press (2007); Peterson, Paul E. *City limits*. University of Chicago Press (1981).

21 Harvey, David. "From managerialism to entrepreneurialism: the transformation in urban governance in late capitalism." *Geografiska Annaler. Series B*, (1989): 3-17.



are likely to be far more homogeneous than at the state level.<sup>22</sup> If state rules create a perceived inhibition to business expansion and job growth, smaller units of government should have flexibility to create the desired context for a healthy local economy. The economic development argument for local RTW thus closely parallels normative notions of local choice that are somewhat illusory given the constraints of fiscal retrenchment, inter-jurisdictional competition for investment, and exposure to trade with a global span.

Given external constraints, local discretion over RTW creates compelling conditions for an accelerated “race to the bottom” among jurisdictions, where governments act primarily under pressure to resist sending the wrong signals to the market.<sup>23</sup> Moreover, the availability, feasibility, and validity of policy alternatives are not determined by detached rational evaluation but by heavily mediated networks of exchange, which are increasingly traced through policy entrepreneurs, partisan repositories of expertise and authority, and the circulation of policy models deemed successful and adaptable.<sup>24</sup> Within this context, politicians, policy and research experts, practitioners, consultants, and think tanks often selectively interpret evidence, as with the politically inflected reading of the conflicting ambiguities of the academic literature on RTW’s impacts. The desired effect is to validate RTW as a low-cost, high-benefit job creation policy rather than an ideologically driven attack on union bargaining and political influence.

In constructing the “local option,” RTW advocates have sought to create a patchwork of varied but scaled-back labor market regulation, one capable of replication and adaptation across uneven local and state regulatory contexts. As described below, within Kentucky and Illinois, localizing RTW enables weakened collective bargaining regimes to be more geographically extensive, specifically in states where conventional RTW drives have failed to pass the state legislature. However, for reasons both political and legal, local RTW may simply fade away as a failed policy. At the time of this writing, Kentucky’s new RTW counties face legal contest, and Illinois’ proposed enabling legislation has stalled after withering in the last legislative session. Even a stillborn local right-to-work movement signals important new strategic dimensions in the expansion of right-to-work and related attacks on worker protections. As more progressive interventions in labor market regulation leverage issue-based coalitions to create laboratories for improving the bargaining power of workers in the contemporary economy, the local stage becomes increasingly important for regulating the future of work. With a multitude of local governments potentially considering

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22 A common justification for local RTW gestures toward more general geographical efficiency arguments in the vein of Tiebout’s mechanism of “voting with their feet” to better match preferences with public policy. See Charles Tiebout, “A Pure Theory of Local Expenditures,” *The Journal of Political Economy* Vol. 64, No. 5 (1956), pp. 416–424.

23 Hank V. Savitch and Paul Kantor. *Cities in the international marketplace: The Political Economy of Urban Development in North America and Western Europe*, Princeton (2002).

24 Peck and Theodore (2010), McCann and Ward (2010).

some version of RTW, labor would face the prospect of fighting a political battle on radically multiplied fronts.

## **RIGHT-TO-WORK ORDINANCES IN KENTUCKY COUNTIES**

With twelve counties passing right-to-work ordinances since December 2014 and four more counties currently deliberating about local ordinances, Kentucky has swiftly emerged as the site of local RTW's toehold as a viable policy concept. Consequently, the state's counties also form the testing ground for the legality of local RTW under NLRA rules.

On August 28th, 2014 (Labor Day), the Heritage Foundation hosted an event entitled "New Possibilities for Right-to-Work: City and County Laws" in Washington, D.C., featuring several legal experts from the Heritage Foundation, ALEC, Americans for Tax Reform, and the National Right to Work Legal Defense Foundation.<sup>25</sup> The purpose of the event was to deliberate on the legality and method for enacting local right-to-work ordinances. By conventional interpretation, local government officials assume local ordinances are pre-empted by the NLRA. However, according to an interpretation floated by a recent Heritage Foundation report entitled "Local Governments Can Increase Job Growth and Choices by Passing Right-to-Work Laws," the NLRA does not prevent cities or counties from passing local ordinances.<sup>26</sup> The authors of the report claim the legality of local ordinances is based on a broad interpretation of the NLRA's sanctioning of the power of "States or Territories" to prohibit agreements requiring membership in a labor union as a condition of employment. Drawing on an article from Stanford Law Review in 1957, the authors state that the phrase "any State or Territory" leaves open-ended the application to municipalities and counties. As a result, "...it is unlikely Congress intended to pre-empt local RTW laws when it expressly disavowed pre-emption of the only RTW laws then on the books."<sup>27</sup> Accordingly, the Heritage Foundation has initiated a campaign to engender and exploit ambiguity in the NLRA to promote the passage of local right-to-work ordinances as a means to circumvent the challenges associated with passing state legislation.

Local RTW is not a completely new idea in Kentucky. In fact, an early ordinance in Shelbyville was overturned by the Kentucky Court of Appeals in 1965.<sup>28</sup> However, a new set of actors has motivated the current agenda. ALEC is one of the main architects behind the current adoption of local ordinances in Kentucky. At the August event, the director of the American City County Exchange (ACCE), a major

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25 <http://www.heritage.org/events/2014/09/right-to-work>

26 [http://www.heritage.org/research/reports/2014/08/local-governments-can-increase-job-growth-and-choices-by-passing-right-to-work-laws#\\_ftn27](http://www.heritage.org/research/reports/2014/08/local-governments-can-increase-job-growth-and-choices-by-passing-right-to-work-laws#_ftn27)

27 Ibid, p. 7

28 [http://www.nytimes.com/aponline/2014/12/19/business/ap-us-right-to-work.html?\\_r=0](http://www.nytimes.com/aponline/2014/12/19/business/ap-us-right-to-work.html?_r=0)

initiative of ALEC, rallied behind the application of ordinances for municipal or county governments: “The possibilities of rolling out a local RTW [campaign] in a non-RTW state deserved a full-court press by those of us who care about free market economics and allowing communities to make the best decisions for their people.”<sup>29</sup> One of the main strategies of the ACCE to advance local RTW ordinances is the development and dissemination of model policy scripts for municipal governments to utilize in drafting ordinances.<sup>30</sup> During a meeting in December, ALEC outlined a plan to aid city and county governments in Washington, Kentucky, Montana, Wisconsin, Ohio and Pennsylvania with passing local RTW ordinances.<sup>31</sup>

In partnership with the Heritage Foundation, ACCE diverted more attention toward targeting county officials in Kentucky who might facilitate favorable strategic demonstration sites for local ordinances.<sup>32</sup> As Kentucky borders three states with RTW legislation, ACCE and Heritage Foundation also find geographic situation and local political culture to be highly conducive to their campaign. More importantly, the legal standing for counties to adopt RTW rules is strengthened by a 1978 “County Home Rule” law delegating significant authority to county governments to promote economic development and to regulate commerce. With strong home rule, Kentucky has structural advantages as a testing ground for local RTW.

The Bluegrass Institute for Public Policy Solutions operates at the state level to promote the enactment of local ordinances based on the recommendations and policy scripts of ACCE and the Heritage Foundation. As a member of the State Policy Network, the Bluegrass Institute is dedicated to the promotion of deregulation and pro-business policies through lobbying local and state officials in Kentucky. Given their mission, ACCE, the Heritage Foundation, and the newly formed non-profit Protect My Check began pushing for local RTW ordinances last year.<sup>33</sup>

For each of the past two legislative sessions, Kentucky lawmakers have failed to pass conventional state RTW proposals. Following failure at the state level, Warren County became the first local government to enact RTW ordinances in December 2014.<sup>34</sup> According to Warren County Judge-Executive Mike Buchanon, the new ordinance is a necessity for economic development since Kentucky counties are continually losing projects to nearby counties in Tennessee and Indiana, both RTW states.<sup>35</sup> Buchanon founds his justification for RTW in its apparent impact on business recruitment:

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29 <http://www.thenation.com/article/are-cities-next-front-rights-war-labor/>

30 <http://www.alec.org/model-legislation/local-right-work-ordinance/>

31 [http://inthesetimes.com/working/entry/17514/kentucky\\_right\\_to\\_work\\_law](http://inthesetimes.com/working/entry/17514/kentucky_right_to_work_law)

32 <http://www.politico.com/morningshift/1214/morningshift16492.html>

33 [http://www.nytimes.com/2014/12/19/us/politics/foes-of-unions-try-their-luck-in-county-laws.html?\\_r=0](http://www.nytimes.com/2014/12/19/us/politics/foes-of-unions-try-their-luck-in-county-laws.html?_r=0)

34 Warren County is home to a GM plant where the Corvette is manufactured, a UAW shop employing 800 workers.

35 <http://www.naco.org/articles/kentucky-counties-chart-own-right-work-path>

I know of one [site selection decision] that we lost to Cartersville, Ga., that was a big prospect... They were coming here and we're getting ready to go to their board of directors to get it approved. And then someone brought up that we weren't right-to-work. We all of a sudden got an email that said "We're rethinking this now."<sup>36</sup>

Warren's stint as Kentucky's only RTW county was extraordinarily short. Within days, Simpson and Fulton counties passed the first and second readings of local RTW ordinances. Despite an advisory opinion from Kentucky's Attorney General on December 19th, 2014, which stated that local governments may not enact such ordinances, nine additional Kentucky counties successfully enacted local RTW ordinances, and four more counties have introduced ordinances for deliberation at the time of this writing. The Attorney General's opinion was derived from the 1965 appeals court decision to overturn Shelbyville's RTW law, as well as the interpretation that the NLRA pre-empts political subdivisions of a state from enacting RTW laws.<sup>37</sup> A letter signed by two former Kentucky Supreme Court justices disagreed on the grounds that the 1965 decision preceded the broad extension of economic development powers to Kentucky counties.<sup>38</sup>

Judge-Executive Harry Berry of Hardin County, the fifth county to enact RTW, echoed the economic development rationale of his counterpart in Warren County: "We think it will help economic growth and promote commerce in our community."<sup>39</sup> A pending federal lawsuit against Hardin County falls at the center of the legal contest over counties' capacity to enact RTW rules, with implications for jurisdictions weighing similar interpretations of the NLRA outside of Kentucky. On January 14th, nine labor unions, including the AFL-CIO and UFCW, filed a lawsuit in federal court claiming local RTW ordinances are pre-empted by NLRA.<sup>40</sup> According to the lawsuit, the local ordinance is invalid because Hardin County is not a state or territory as contemplated in the NLRA. In April, the National Labor Relations Board came out in support of the lawsuit by stating the local ordinances are pre-empted by the language of the NLRA.<sup>41</sup> However, Hardin County remains committed to the ordinance with legal support from the Protect Your Check organization. The county claims the ordinances are not pre-empted by the NLRA based on the rationale of the Heritage Foundation report from the previous August. Representatives of the county further claim the NLRA's protection of state rights extends to political

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36 <http://www.npr.org/2015/03/18/393555453/kentucky-right-to-work-battle-shifts-to-counties>

37 [http://www.nytimes.com/aponline/2014/12/19/business/ap-us-right-to-work.html?\\_r=0](http://www.nytimes.com/aponline/2014/12/19/business/ap-us-right-to-work.html?_r=0)

38 Ibid.

39 <http://www.courier-journal.com/story/news/local/2015/01/16/right-work-movement-kentucky-elsewhere/21890143/>

40 <http://www.law360.com/articles/612113/unions-file-suit-to-block-ky-county-s-right-to-work-law>

41 <http://www.bna.com/nlrb-files-brief-n17179925497/>

subdivisions, such as county governments.<sup>42</sup> The plaintiffs in the lawsuit remain optimistic about their case given the ruling in *New Mexico Federation of Labor v. City of Clovis*, where court noted the language within the NLRA does not allow for local experimentation.<sup>43</sup> On April 17, the NLRB filed an amicus brief urging the federal district court to throw out the Hardin ordinance on the basis of the NLRA's preemption and precedent from the earlier New Mexico and Kentucky decisions – as well as the inclusion of additional regulations not permitted by the NLRA.<sup>44</sup>

On August 4<sup>th</sup>, oral arguments were heard in the U.S. District Court in Louisville, although the timeline for a decision is not clear at the time of this writing.<sup>45</sup> The outcome of this case should determine the legality of local RTW ordinances, with implications for whether this new local RTW campaign could succeed in other cities and counties outside of Kentucky. More generally, while such lawsuits are costly for cities, labor, and advocates of RTW alike, driving legal challenges up through the federal courts certainly occupies a component of the strategy of Heritage, ALEC, and other proponents of local RTW laws in Kentucky.

From anecdotes of local politicians to the policy positions advanced by think tanks, proponents of local RTW have framed these ordinances as a way to promote economic development. This reasoning positions RTW as an asset in the toolbox of distressed localities. Whether this RTW generates economic benefits remains highly contested in the empirical literature. Still, localities with indicators of distress – such as a high unemployment rate – may be expected to adopt aggressive, experimental regulatory changes like local RTW in the bid to compete for outside investment and to create jobs. Holding all else equal, counties afflicted with the highest levels of unemployment would be expected to be the first to adopt RTW.

To explore this assertion, Figure 3 adapts an infographic produced by the *Daily Signal*, a publication of the Heritage Foundation,<sup>46</sup> to compare county-level unemployment rates with the location of Kentucky's new RTW counties and highlights several preliminary implications. First, while high unemployment counties are concentrated in the eastern portion of the state, these areas are not closely correlated with the location of the early RTW adopters. Advocates tout local RTW as a job creation strategy, but Kentucky counties that have adopted model legislation do not closely reflect the geography of relative economic distress in Kentucky – at least as measured by unemployment rates. Second, a clustering pattern is evident. Cross-border diffusion may be due to political similarity, to direct policy exchanges across county lines, or to the competitive influence of neighboring counties. Third, since the clusters are located near Kentucky's borders with RTW states Indiana

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42 <http://www.law360.com/articles/648245/ky-county-right-to-work-ordinance-preempted-unions-say>

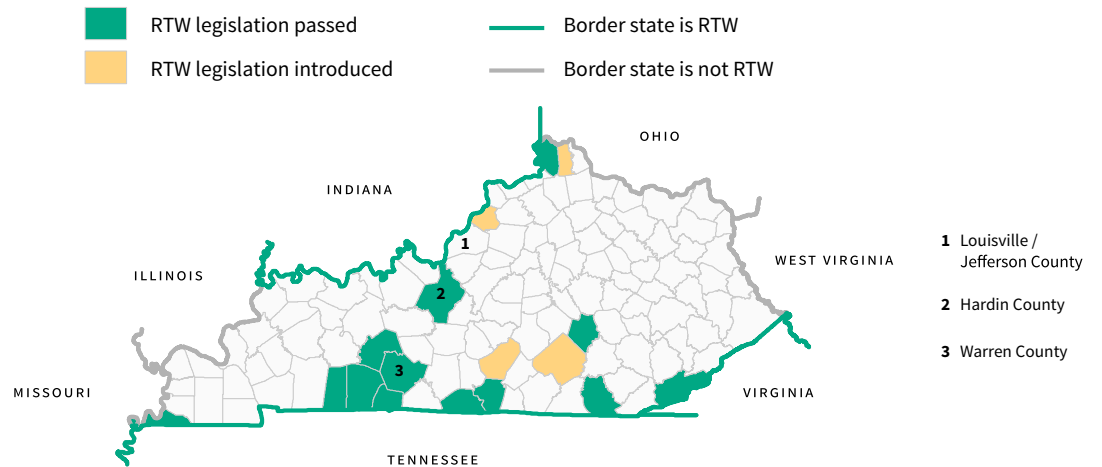
43 <https://casetext.com/case/new-mexico-federation-of-labor-v-city-of-clovis>

44 <http://www.bna.com/nlrb-files-brief-n17179925497/>

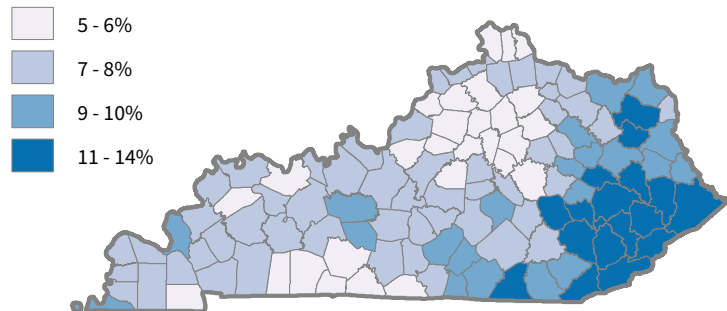
45 <http://www.thenewsenterprise.com/content/arguments-made-right-work-suit>

46 <http://dailysignal.com/2015/03/09/25-states-now-right-work-states/>

While advocates tout local right-to-work as a job creation strategy, Kentucky counties that have adopted right-to-work legislation generally fall outside of the state's most economically distressed regions.



#### Unemployment rate, 2014



Sources: BLS Local Area Unemployment Statistics, Sherk (March 9, 2015).

Figure 3: Right-to-work counties and unemployment in Kentucky

and Tennessee, the pattern also suggests the influence of competition with nearby states, a common rationale among RTW supporters. As measured by unemployment rate, economic distress does not correlate with the rapidly forming map of RTW in Kentucky counties. Rather, the initial geographical pattern of county-level RTW in Kentucky lends credence to the argument that relational competition and political factors – not relative economic development stress – is driving the adoption of local RTW.

## **“EMPLOYEE EMPOWERMENT ZONES” IN ILLINOIS**

The emergence of the “local option” creates opportunities to tweak not only the scale but also the branding of RTW in states where traditional campaigns would encounter resistance, such as Illinois, a Democratic stronghold with a relatively high union density. In 2014, republican Bruce Rauner’s successful campaign platform in the race against incumbent Governor Pat Quinn included a number of proposals that were hostile toward organized labor in the attempt to “shake up Springfield”.<sup>47</sup> Along with weakening public sector unions, Rauner has proposed the adoption of RTW-like policies at the discretion of county and municipal government and at the aldermanic ward level in the case of Chicago.

The proposal represents just one element of governor Rauner’s “Turnaround Illinois” agenda, a suite of programs to address the state budget through economic growth, cuts to the public sector, and tweaks to state taxation and revenue streams. In the case of economic growth, many of the “Turnaround” proposals aim to improve the state’s business climate through an increasingly conventional playbook of attacks on workers. These include reforming unemployment insurance, limiting prevailing wage requirements and project-labor agreements, and the creation of “employee empowerment zones” – Illinois’ version of local RTW.

Despite the name modification,<sup>48</sup> the blueprint for “employee empowerment zones” structurally conforms to RTW laws. Within such a zone, workers would have the “right to voluntarily join, or refrain from joining, a union,” without predicated that decision on the obligation to pay union-related dues. The difference is that, rather than covering the entire state, the proposed legislation aims to disperse decisions over RTW rules through the tapestry of local governments in Illinois.

Rauner frames his proposed adaptation of RTW as an assertion of local regulatory autonomy: “I’m not advocating Illinois’ becoming a right-to-work state, but I do advocate [for] local governments being allowed to decide whether they’re right-to-

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47 <http://www.washingtonpost.com/news/storyline/wp/2014/11/14/why-public-sector-unions-lost-big-in-illinois/>

48 The term “empowerment zone” recalls a federal program of tax incentives and grant awards to economically distressed communities that began in 1993.

work zones.”<sup>49</sup> In his first state-of-the-state address, Governor Rauner established and frequently referenced local “empowerment” as a theme of his reform agenda. This notion also contributes to the official name of his local right-to-work proposal as “employee empowerment zones”:

We must also empower voters to decide for themselves whether they want their communities to become employee empowerment zones. These zones will give employees the freedom to choose whether or not they want to join a union. Local communities – local voters – deserve this option so that they can compete with other states and other nations for new businesses and new investment. Employee empowerment zones will increase jobs for residents, increase economic activity for local businesses and generate more tax dollars for local governments. It’s a win-win-win proposal.<sup>50</sup>

“Win-win-win” notwithstanding, the evidence remains murky on the efficacy of RTW for economic development. Contrary to Rauner’s claims, Manzo and Bruno synthesized existing research to project that Rauner’s proposal would harm union membership, reduce worker earnings and primarily benefit wealthy employers.<sup>51</sup> Randomly selecting half of Illinois counties (excluding Cook County) as hypothetical RTW zones, the study found that such a conversion would cause an economic contraction of \$1.5 billion and a loss of \$80 million in state and local tax revenues.

As in Kentucky, more than the contested balance sheet of costs and benefits, state contextual factors explain the feasibility for local policy experimentation. Although Rauner’s staff and ALEC have not been in direct contact, the proponents of local RTW in Illinois are closely watching Kentucky. Likewise, many of the most vocal outside supporters of Kentucky’s RTW counties, including ALEC and Protect Your Check, have identified Illinois as the next battleground.<sup>52</sup> According to Jon Russell, director of ALEC, Illinois “is not California. It’s not New York. People there tend to be a bit more open (to the idea). You get outside of Chicago and most of Illinois is just like Indiana.”<sup>53</sup> Without a viable possibility of state RTW in Illinois, local RTW would instead exploit political difference across the state, the pressing fiscal issues faced by the state and many of its local governments, and economic development challenges that are not exclusively conflated with labor issues.

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49 Kerry Lester, “Rauner previews ‘right-to-work zones’ as first-year priority,” Associated Press, January 28, 2015.

50 Chicago Sun Times, “Full text of Gov. Bruce Rauner’s State of the State address,” February 2, 2015, available at <http://chicago.suntimes.com/politics/7/71/344389/full-text-gov-bruce-rauners-state-state-address>.

51 Frank Manzo and Robert Bruno, *The Impact of Local “Right-to-Work” Zones: Predicting Outcomes for Workers, the Economy, and Tax Revenues in Illinois*, Illinois Economic Policy Institute (April 6, 2015).

52 <http://www.chicagobusiness.com/article/20150405/NEWS02/150409881/test-case-for-rauners-local-right-to-work-idea-kentucky>

53 <http://www.chicagobusiness.com/article/20150405/NEWS02/150409881/test-case-for-rauners-local-right-to-work-idea-kentucky>



The proposition of “employee empowerment zones” also invites comparison with Illinois’ long and extensive history of designating of special “districts” for the purpose of fostering economic development. Illinois’ pioneering renewal legislation in the 40s and 50s provided a model for the design of federal urban renewal legislation, which carved out specially designated zones of depressed inner cities as targets for subsidized redevelopment, often with disastrous effects.<sup>54</sup> The state’s communities have more recently continued to exploit special localized designations for the purposes of economic development through the extensive use of tax increment financing districts unmatched by other states.

In the contemporary era of extreme inter-governmental fragmentation, Illinois is exemplary. With the inclusion of special purpose authorities, Illinois contains more local governments within its boundaries than any other state.<sup>55</sup> The implication is that, while local RTW has been articulated at the county level in Kentucky, its proposed expression in Illinois includes municipalities, school districts, and even Chicago’s wards in an envisioned patchwork of differential labor regulation. Alongside Rauner’s “turnaround” agenda, the state’s demonstrated history of carving up its geographies into special areas for the purpose of economic development substantiates the viability of the concept that RTW zones could be adopted extensively by various jurisdictions across the state.

Legislative democrats and organized labor mounted determined opposition to Rauner’s designs, highlighting the hostility of “employee empowerment” to unions and middle-class jobs. As the first strategy, opponents claim that such local RTW designations face the same legal barriers as they face in Kentucky. As a result, the Kentucky episode will surely shape the fate of Illinois’ version of local RTW. Recognizing that Rauner’s proposal will play out on both the state and the local level, unions have advocated against the policy at the state level and have also organized around local hearings on the issue, announcing an intention sue if localities try to enact employee empowerment zones.<sup>56</sup> A second front of the opposition has occurred in the state legislature, where local RTW emerged as a lightning rod for partisan conflicts between Democrats, who also control the state legislature, and Rauner’s “turnaround” ambitions. Despite a record of hostility to public sector and teachers’ unions, Chicago’s Democratic Mayor Rahm Emanuel also has voiced his opposition to employee empowerment zones.<sup>57</sup>

Illinois Attorney General Lisa Madigan wrote in an opinion that the NLRA “preempts counties and municipalities, as well as other political subdivisions of the State, units of local government, and school districts, from adopting local ordinances

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54 Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940-1960*, University of Chicago Press (1998).

55 <http://www.governing.com/gov-data/number-of-governments-by-state.html>

56 [http://www.bettergov.org/rauners\\_long\\_shot\\_right-to-work\\_zones/](http://www.bettergov.org/rauners_long_shot_right-to-work_zones/)

57 The sketch of local RTW singled out individual wards of Chicago as potential territories for the adoption of employee empowerment zones.

that regulate the use of union security agreements in all instances that impact interstate commerce.”<sup>58</sup> Instead of merely urging localities to pursue such laws, the Governor intended to rely on a new state law to circumvent federal pre-emption of local laws.<sup>59</sup> In other words, the proposal hinges on the first *state*-level legislation to enable *local* RTW.

However, Rauner’s strategy fizzled in the legislature earlier this year. With the session nearing completion without a bill on the table, Democratic House Speaker Michael Madigan scheduled a vote on a similarly structured “employee empowerment zone” bill, House Bill 1286, for May 14, without bipartisan backing.<sup>60</sup> Madigan’s maneuver was calculated to demonstrate a lack of support for the concept and to stymie the momentum of Rauner’s turnaround ambitions. The bill gained zero votes, with 37 voting “present,” and a handful of Republicans taking a walk outside during the vote in protest.<sup>61</sup> Although Republican legislators derided the “sham bill,” the tactic worked as a first step in a ramping down of Rauner’s reform plans, as he pulled the issue from the agenda for the legislative session.<sup>62</sup>

With local RTW off of the table, the Rauner administration turned to compromising on other turnaround proposals, as the Governor and House Speaker Madigan face off over the state’s budget, tax freezes, and redistricting. It remains to be seen whether the employee empowerment zone concept will return in the future.

## CONCLUSION

As explored above, one recent strategy pursued by the anti-union movement has been to break up political contests over RTW laws into smaller pieces, preventing the unfolding frontier of RTW from running aground at state borders. The Kentucky case illustrates the use of county home rule to test the interpretative gray area of whether the NLRA preempts subdivisions of state governments from passing RTW rules. Rallying behind a new governor’s “turnaround” ambitions, Illinois RTW advocates have taken a different means – state-enabling legislation for “employee empowerment zones” – to facilitate a similar end. Both strategies aim to exploit economic competition with neighboring RTW states in the short term, to foster

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58 Lisa Madigan, “Letter to Senate Labor Committee and House Labor and Commerce Committee (File No. 15-001),” Illinois Office of the Attorney General (March 20, 2015).

59 Monique Garcia, “AG Madigan says no to Rauner right-to-work zones,” *Chicago Tribune* (March 20, 2015). <http://www.chicagotribune.com/news/local/politics/chi-ag-madigan-says-no-to-rauner-righttowork-zones-20150320-story.html>

60 Mark Fritton, “Madigan puts Rauner on the clock; right to work comes up for vote in a week,” *Illinois News Network* (May 7, 2015): <http://ilnews.org/4678/madigan-puts-rauner-on-the-clock-right-to-work-comes-up-for-vote-in-a-week/>; <http://www.ilga.gov/legislation/>

61 Natasha Korecki, “Right-to-work goes down in flames in Illinois House with zero yes votes,” *Chicago Sun Times* (May 14, 2015).

62 Natasha Korecki, “Gov. Rauner says he has pulled some of his agenda items off the table,” *Chicago Sun Times* (May 14, 2015).

recursive competition among jurisdictions within the state in the longer term, and ultimately to radically multiply the fronts for legal and political contests over RTW. Just as importantly, whereas the emergence of local RTW in Kentucky and Illinois depends on distinctive contextual features of each respective state, a network of anti-union policy organizations intends to leverage the outcomes of these experiments for more general applicability.

The portability of local RTW raises economic, legal, and political questions. Economically, RTW proponents cite gains in jobs and investment, whereby any downward pressure on wages as a result of RTW's erosion of union bargaining is counterbalanced by an increase in labor demand. To quote Governor Rauner, for example, "states that are already growing don't force unionization into their economy."<sup>63</sup> Reports by the Heritage Foundation reference studies such as Newman's 1983 analysis of industry migration to southern states to justify the claim that differential rates of unionization have influenced location decisions.<sup>64</sup> The National Right to Work Committee claims that, during the 2000s, "non-agricultural employment in Right to Work states grew twice as fast compared to that in non-Right to Work states."<sup>65</sup> These claims belie that the evidence remains murky at best with respect to any conclusions regarding the economic benefits of RTW legislation. A small cohort of high-growth states like Arizona, Texas, and Nevada accounts for the majority of growth within RTW states, and RTW may imply fiscal costs on already stressed state and local budgets.<sup>66</sup>

In legal terms, the viability of local RTW turns on whether political subdivisions of state governments are pre-empted by the NLRA's classification of "any State or Territory". As noted by Sherk and Kloster in the original Heritage report, the Supreme Court has interpreted "state" in similar federal statutes to refer to local governments as well as to state governments.<sup>67</sup> In commenting on the issue, Benjamin Sachs noted how even the leading case law texts note the inconsistencies of the interpretation.<sup>68</sup> This inconsistency makes predicting the legality of local RTW ordinances challenging. Given the experimental nature of local RTW, probing this uncertainty precisely forms the broader objective for RTW advocates. Should the legality of local RTW be upheld, unions would face the prospect of mounting a multitude of opposition

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63 Lester (2015).

64 Sherk, James and Andrew Kloster, "Local Governments Can Increase Job Growth and Choices by Passing Right-to-Work Laws," The Heritage Foundation Backgrounder No. 2947, August 26, 2014; Newman, Robert J. "Industry migration and growth in the South." *The Review of Economics and Statistics* (1983): 76-86.

65 Quoted in Lafer, Gordon, and Sylvia Allegretto, "Does 'Right-to-Work' Create Jobs? Answers from Oklahoma," EPI Briefing Paper #300 (March 16, 2011).

66 Lafer and Allegretto (2011); Manzo and Bruno (2015).

67 Sherk and Kloster (2014).

68 <http://onlabor.org/2014/12/04/local-labor-law/>.

campaigns to dramatically de-centralized RTW drives, draining organizing resources and capacity.

From a political perspective, this report has suggested that local governments face a different landscape of constraints and opportunities than state governments. Advocates for workers have seized on the local level as a space of opportunity for generative experimentation, as forging houses for more equitable modes of labor market regulation. The recent interest in local RTW laws illustrates that local governments also serve as laboratories for innovative mechanisms for rolling back long-established labor regulations. These approaches suffered a major blow in Illinois, and the legality of Kentucky county decisions remains to be determined. Regardless of the ultimate outcome of these tenuous experiments, both cases suggest that the local level is likely to continue to provide an arena for experimentation in undermining conventional rules governing the capacity of unions to organize and bargain, with troubling implications for workers. The travels of local RTW as a policy concept traces a strategically experimental logic that cuts across scales and territories of governance to calculatedly disrupt the established parameters of RTW struggles.

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