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## There Must be a Better Way: The Unintended Consequences of Missouri's Hancock Amendment. *Zweig v. Metropolitan St. Louis Sewer District*

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## NOTE

# There Must Be a Better Way: The Unintended Consequences of Missouri's Hancock Amendment

*Zweig v. Metropolitan St. Louis Sewer District*, 412 S.W.3d 223 (Mo. 2013) (en banc).

KIMBERLY HUBBARD\*

### I. INTRODUCTION

The Hancock Amendment to the Missouri Constitution<sup>1</sup> became law in November 1980 after fifty-five percent of voters approved it.<sup>2</sup> The amendment is a type of provision known as a “tax and expenditure limitation.”<sup>3</sup> The purpose of these provisions was “to restrict the growth of the state budget.”<sup>4</sup> Most people thought it meant that they would not have to pay higher taxes, and they were right to an extent.<sup>5</sup> What voters and Mel Hancock, the amendment’s namesake, did not contemplate were the numerous ill-effects of this constitutional amendment.<sup>6</sup>

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1. MO. CONST. art. X, §§ 16-24.

2. Dale Singer, ‘Simple’ Hancock Amendment Spawned Complex State Finances, ST. LOUIS BEACON (Apr. 8, 2011, 7:00 AM), [https://www.stlbeacon.org/#!/content/16491/simple\\_hancock\\_amendment\\_spawned\\_complex\\_state\\_finances](https://www.stlbeacon.org/#!/content/16491/simple_hancock_amendment_spawned_complex_state_finances). The Hancock Amendment states in pertinent part:

Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.

MO. CONST. art. X, § 22.

3. Dean Stansel, *Missouri’s Hancock II Amendment: The Case for Real Reform*, CATO INST. (Oct. 17, 1994), <http://www.cato.org/pubs/briefs/bp-020.html>.

4. *Id.*

5. See Singer, *supra* note 2.

6. See *id.*

One of the downsides of the amendment was brought to the forefront in the recent case of *Zweig v. Metropolitan St. Louis Sewer District*, decided by the Supreme Court of Missouri in November of 2013.<sup>7</sup> The Metropolitan St. Louis Sewer District (“MSD”) was using some of its sewer revenues to subsidize its stormwater operations, a practice that it described as “not sustainable.”<sup>8</sup> It proposed a “stormwater user charge” to raise sufficient revenues to maintain its core functions.<sup>9</sup> The Supreme Court of Missouri struck down the user charge, correctly reasoning that the Hancock Amendment prohibited MSD from imposing the charge because it was more characteristic of a tax.<sup>10</sup> Thus, under the Hancock Amendment, the stormwater user charge could not be levied without voter approval, which MSD did not get prior to instituting the charge.<sup>11</sup>

A result of the Hancock Amendment, perhaps unforeseeable at the time of its inception, is that government functions, such as the stormwater system, the sewage system, and the education system, are at the mercy of voters when it comes to increasing their funding. Voters do not often vote to raise taxes, as was evidenced by previous proposals to raise taxes on cigarettes.<sup>12</sup> Voters defeated those proposals three different times, most recently in 2012.<sup>13</sup> The ballot measures were unsuccessful even though the tax increase was only four cents,<sup>14</sup> and despite the supporters’ coalition, Missourians for Health and Education, outspending the opponents by more than two-to-one in advertising.<sup>15</sup>

Although properly decided, *Zweig* highlights several of the many concerns raised by the Hancock Amendment, among which are lack of quality and quantity of services due to lack of funding, extensive and expensive litigation brought under the amendment, and legislative workarounds that take decisions out of the hands of voters anyway.<sup>16</sup> This Note first discusses the

7. 412 S.W.3d 223 (Mo. 2013) (en banc).

8. *Id.* at 229.

9. *Id.* at 230.

10. *Id.* at 227, 244.

11. *Id.* at 244.

12. See Dale Singer, *Power to the People? Hancock Amendment Worked Both Ways*, ST. LOUIS BEACON (Apr. 10, 2011, 11:26 PM), [https://www.stlbeacon.org/#!/content/16477/power\\_to\\_the\\_people\\_hancock\\_amendment\\_worked\\_both\\_ways](https://www.stlbeacon.org/#!/content/16477/power_to_the_people_hancock_amendment_worked_both_ways).

13. Tim Barker, *Ballot Issues – Cigarette Tax Narrowly Fails*, ST. LOUIS POST-DISPATCH (Nov. 6, 2012, 11:19 PM), [http://www.stltoday.com/news/local/govt-and-politics/ballot-issues-cigarette-tax-narrowly-fails/article\\_299b37f2-284b-11e2-9111-0019bb30f31a.html](http://www.stltoday.com/news/local/govt-and-politics/ballot-issues-cigarette-tax-narrowly-fails/article_299b37f2-284b-11e2-9111-0019bb30f31a.html); see also Virginia Young, *Cigarette Tax Increase on Missouri Ballot for Third Time*, ST. LOUIS POST-DISPATCH (Nov. 1, 2012, 12:25 AM), [http://www.stltoday.com/news/local/govt-and-politics/political-fix/cigarette-tax-increase-on-missouri-ballot-for-third-time/article\\_fe244079-ee28-543a-92a1-e6e2be5c2da5.html](http://www.stltoday.com/news/local/govt-and-politics/political-fix/cigarette-tax-increase-on-missouri-ballot-for-third-time/article_fe244079-ee28-543a-92a1-e6e2be5c2da5.html).

14. See Singer, *supra* note 12.

15. Young, *supra* note 13.

16. See Singer, *supra* note 2.

*Zweig* case in detail and shows how the court's holding stands strongly on reasonable grounds under the Missouri Constitution. In Part III, this Note discusses the legal background surrounding the *Zweig* case, including the history of the Hancock Amendment and several cases that *Zweig* purports to overrule. Finally, this Note ends with a discussion of the possibly unforeseen consequences that have resulted from the Hancock Amendment and proposes that these consequences merit giving the amendment a second look. This Note does not suggest that the amendment be done away with entirely, as it has its merits; however, lawmakers and legal scholars in Missouri must begin an in-depth discussion of the amendment in order to decide the best course of action for the great state of Missouri and its future budget.

## II. FACTS AND HOLDING

MSD was created in 1954 when voters in the City of St. Louis and parts of St. Louis County ratified MSD's charter pursuant to the Missouri Constitution.<sup>17</sup> Shortly after it was created, MSD owned and controlled all the public sewer and stormwater facilities throughout the metropolitan sewer district.<sup>18</sup> The district expanded in 1977 and, beginning in 1989, MSD was responsible for regulating all the facilities in the district, including those in the newly annexed area, and planned to "assume ownership of and control over designated facilities as funds became available."<sup>19</sup>

MSD operates and maintains a stormwater drainage system and also maintains sewer operations, which are completely separate from the stormwater drainage system.<sup>20</sup> A landowner does not have to be physically connected to MSD's stormwater drainage system in order to "use" the drainage system by having stormwater flow through MSD's system.<sup>21</sup> This is quite different from the sewer operations that MSD conducts, as a physical connection between the land and the sewer system is required in order for that landowner to use MSD's sewer system.<sup>22</sup> Due to this lack of a physical connection between a landowner's land and the stormwater drainage system, it is impossible for MSD to tell how much stormwater any single property discharges into the system or where water flowing through the system came from originally.<sup>23</sup>

Other stormwater services that MSD provides include some "stormwater oversight functions such as planning, permitting, and public education."<sup>24</sup>

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17. *Zweig v. Metro. St. Louis Sewer District*, 412 S.W.3d 223, 228 (Mo. 2013) (en banc).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

These oversight functions are not related to MSD's operation of the stormwater drainage system.<sup>25</sup> According to MSD's charter, MSD has the power to:

- (a) levy property taxes, provided the total levy for maintenance and operation does not exceed \$0.10 per \$100 assessed valuation; (b) levy special assessments for the construction, improvement, or extension of specific sewer or drainage facilities; and (c) establish a schedule of rates, rentals, and other charges, to be collected from all the real property served by the sewer facilities of the District.<sup>26</sup>

Before the implementation of the charge contested in this case, MSD funded its stormwater operations using several different taxes.<sup>27</sup> MSD levied taxes on real property within the district of \$0.02 per \$100 assessed valuation, collected an additional \$0.05 per \$100 assessed valuation for property within the district's original boundaries, and levied a surcharge for stormwater operations on each of its sewer customers of \$0.24 per month.<sup>28</sup> These taxes resulted in receipts for MSD totaling \$13.5 million for 2007.<sup>29</sup>

Unfortunately, MSD spent \$33 million on its stormwater operations in 2007, which meant it had to use \$19 million from its sewer revenues to subsidize the stormwater operations.<sup>30</sup> According to MSD, this subsidy was "not sustainable and, even if it was, a \$33 million budget was not adequate to fund the range of stormwater drainage and oversight services MSD [believed were] required."<sup>31</sup>

These budget issues caused MSD to propose the stormwater usage charge at issue in this case.<sup>32</sup> The proposed stormwater usage charge was meant to replace the existing property taxes and was based on the square footage of impervious area on each owner's property.<sup>33</sup> MSD determined that it would need to charge landowners \$2.29 per 100 square feet of impervious area per year in order to raise adequate revenue to maintain the availability of its stormwater services.<sup>34</sup> Ultimately, the \$2.29 annual rate was divided by twelve so that it could be charged monthly.<sup>35</sup> MSD estimated that

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25. *Id.*

26. *Id.* at 229 (internal quotation marks omitted).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 230-31.

33. *Id.* at 230. Some examples of impervious areas are roofs, patios, parking lots, streets, and sidewalks. *Id.*

34. *Id.* at 231.

35. *Id.*

once the proposed stormwater usage charge was fully implemented it would generate annual revenues of \$57 million.<sup>36</sup>

In December 2007, following public hearings, other proceedings, and a recommendation by MSD's rate commission that MSD implement the proposed stormwater usage charge, MSD adopted ordinances that would eliminate any existing stormwater taxes and replace them with a stormwater user charge in March 2008.<sup>37</sup> MSD planned to implement the new scheme gradually, starting with a charge of \$1.44 for each 100 square feet of impervious area annually in 2008, and increasing the fee annually so that landowners would pay the full rate of \$2.29 per 100 square feet of impervious land by 2014.<sup>38</sup>

MSD's implementation of the charge was successful until William Zweig and several other ratepayers ("Ratepayers") sued MSD in a class action.<sup>39</sup> The Ratepayers asserted that MSD's implementation of its stormwater user charge without prior voter approval violated Article X, Section 22(a) of the Missouri Constitution and sought declaratory, injunctive, and monetary remedies.<sup>40</sup>

The trial court agreed with the Ratepayers and enjoined MSD from future collection of the charge.<sup>41</sup> The court further ordered that MSD pay the Ratepayers' attorneys' fees and other expenses.<sup>42</sup> However, the Ratepayers were unsuccessful in obtaining monetary remedies for the unconstitutional stormwater user charges that they had already paid in 2008 and 2009.<sup>43</sup> The trial court did not order MSD to pay damages or to refund any charges already collected.<sup>44</sup>

The case that is the subject of this Note is the result of MSD's appeal of the trial court's decision regarding the Ratepayers' constitutional claim and the award of the Ratepayers' attorneys' fees and expenses.<sup>45</sup> Another issue in this case comes from the Ratepayers' cross-appeal of the trial court's decision not to award the Ratepayers monetary judgment for any amounts already

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36. *Id.* at 230.

37. *Id.* at 230-31.

38. *Id.* at 231.

39. *Id.* at 226.

40. *Id.* That Section of the Missouri Constitution "prohibits political subdivisions 'from levying any [new or increased] tax, license or fees' without prior voter approval . . . [but] does *not* prohibit a political subdivision from charging an individual user a fee in exchange for rendering a service to that user." *Id.* (first alteration in original) (emphasis added) (quoting MO. CONST. art. X, §22(a)). Sections 16 to 24 of the Missouri Constitution are collectively referred to as the Hancock Amendment. *Id.* at 231.

41. *Id.* at 226.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

collected by MSD.<sup>46</sup> The Supreme Court of Missouri granted transfer of the case in October 2012.<sup>47</sup>

MSD conceded that it had “no way to measure each landowner’s discharge into its drainage system during a storm,” and thus the stormwater user charge was “not charged in exchange for an individual land owner’s ‘use’ of MSD’s drainage system . . . or that landowner’s ‘use’ of MSD’s oversight functions.”<sup>48</sup> MSD instead argued that its stormwater user charge was constitutional because it was a “user fee paid for MSD’s service of ensuring the ‘continuous and ongoing’ availability of its stormwater drainage system (and oversight functions), rain or shine.”<sup>49</sup> MSD supported its argument that the stormwater user charge should be classified as a user fee by contending that the fee was “based on each landowner’s individual contribution to the overall need for MSD’s stormwater services.”<sup>50</sup>

The Supreme Court of Missouri affirmed the trial court’s decision that the stormwater user charge violated Section 22(a) of the Hancock Amendment.<sup>51</sup> After analyzing the stormwater user charge using the five criteria from *Keller v. Marion County Ambulance District*<sup>52</sup> and other relevant factors,<sup>53</sup> the court determined that the charge was not a user fee, but rather that MSD was actually levying a tax.<sup>54</sup> The court pointed out that, under the Hancock Amendment, voters must approve any new or increased taxes.<sup>55</sup> Therefore, the court found that MSD’s collection of the stormwater user charge violated the Hancock Amendment because it was a tax and the voters had not approved it.<sup>56</sup>

The Court also agreed with the trial court that the Ratepayers were not entitled to a refund of the amounts they had already paid to MSD as stormwater user charges.<sup>57</sup> The Ratepayers could not get a refund because according to the court, “nothing in [S]ection 22(a) or elsewhere in the Hancock Amendment expressly authorize[d] Missouri courts to order such a remedy.”<sup>58</sup> Ratepayers relied on language in three separate cases<sup>59</sup> to argue that

46. *Id.*

47. *Id.*

48. *Id.* at 227.

49. *Id.*

50. *Id.*

51. *Id.* at 244.

52. 820 S.W.2d 301, 304 n.10 (Mo. 1991) (en banc).

53. The court also considered MSD’s lien for nonpayment, the other remedies MSD had if the fee was not paid, and the voters’ remedies in determining whether voter approval was required under the Hancock Amendment before MSD could collect its stormwater user charge. *Zweig*, 412 S.W.3d at 242-44.

54. *Id.* at 244.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

they were entitled to refunds of the stormwater user charges that they had already paid.<sup>60</sup> The court, however, did not find anything in those cases indicating that Article X, Section 23 authorized courts to award money damages as a remedy when a political subdivision levied a tax without the required prior voter approval.<sup>61</sup> Further, the court clarified its decision by stating that it was overruling those decisions to the extent they suggested that Section 23 authorized such a remedy to taxpayers.<sup>62</sup>

The Supreme Court of Missouri affirmed the trial court's award requiring MSD to pay \$4.3 million in attorneys' fees and \$470,000 in expenses to the Ratepayers because it found that the trial court had not abused its discretion in making the awards.<sup>63</sup> After affirming the trial court's judgment, the Court remanded the case so the trial court could consider the singular issue of whether the Ratepayers were entitled to appellate fees and costs.<sup>64</sup>

### III. LEGAL BACKGROUND

This section first discusses the Hancock Amendment and its history. It also explains the *Keller* decision and the criteria from that case, which the court used in *Zweig* to determine that the stormwater user charge was a tax and not a user fee. Finally, this section explains the *Beatty III*, *Ring*, and *City of Hazelwood* cases, which the Ratepayers in *Zweig* used to argue that they were entitled to a refund of the improperly levied stormwater user charges.

#### A. The Hancock Amendment

In 1980, Missouri voters approved Article X, Sections 16 to 24 of the Missouri Constitution, which are collectively referred to as the Hancock Amendment.<sup>65</sup> Missouri is one of several states to have passed a tax-limiting law like the Hancock Amendment.<sup>66</sup>

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59. Those three cases were *City of Hazelwood v. Peterson*, 48 S.W.3d 36 (Mo. 2001) (en banc), *Ring v. Metropolitan St. Louis Sewer District*, 969 S.W.2d 716 (Mo. 1998) (en banc), and *Beatty v. Metropolitan St. Louis Sewer District (Beatty III)*, 914 S.W.2d 791 (Mo. 1995) (en banc). *Zweig*, 412 S.W.3d at 246.

60. *Id.* at 246-49.

61. *Id.* at 248.

62. *Id.* at 248 n.17.

63. *Id.* at 249.

64. *Id.* at 252.

65. *Id.* at 231.

66. Jonathan G. Bremer, Note, *Pulling the Taxpayer's Sword from the Stone: The Appropriation Requirement of Missouri's Hancock Amendment*, 77 MO. L. REV. 481, 484 (2012). The state constitutions of Alaska, Arizona, Connecticut, Delaware, Florida, Hawaii, Louisiana, and South Carolina all include measures limiting state revenues or expenditures based on several different factors. Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 931 (2003). California and Michigan also require voter ap-



In the late 1970s, the American economy was experiencing a condition called “stagflation,” which occurs when “the economy [is] stagnant while inflation soar[s].”<sup>67</sup> This resulted in property tax revolts, which began in California and spread across the United States.<sup>68</sup> Mel Hancock, the leader of a group called the Taxpayers Survival Association, led the revolt in Missouri.<sup>69</sup> Mr. Hancock “wrote every Missouri state and federal legislator about the need for tax limitation,” but when the legislature failed to act, he started an initiative petition and authored his own constitutional amendment that “tie[d] state revenue increases to an equivalent rise in personal income.”<sup>70</sup>

The Hancock Amendment had the support of then-governor Joe Teasdale and the Missouri Farm Bureau, but otherwise had few institutional supporters.<sup>71</sup> Several early legal challenges almost succeeded in knocking the proposal from the ballot, and opponents of the measure contended that it was poorly written, which would arguably cause endless litigation regarding its provisions.<sup>72</sup> Critics argued that the Hancock Amendment “would not permit the legislature the flexibility needed to deal with an economic crisis.”<sup>73</sup> They also claimed that “legal restraints on fiscal spending were already in place in that Missouri’s constitution required the state to keep a balanced budget.”<sup>74</sup>

The main contention stressed by opponents of the Hancock Amendment was that only six states had lower per capita taxes than Missouri at the time the amendment was being pushed through the legislature, making the amendment seem unnecessary.<sup>75</sup> The *Kansas City Star* editorialized that the Hancock Amendment was the equivalent of “locking representative government in a straitjacket.”<sup>76</sup>

Despite what seemed obvious to critics – that a number-seven ranking in per capita taxes meant that no problem needed to be remedied – Missouri voters passed the Hancock Amendment with fifty-five percent of the vote.<sup>77</sup> Since its passage, loopholes in the Hancock Amendment have allowed lawmakers to “devise ways around its restrictions.”<sup>78</sup> Many still believe, howev-

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proval for new or increased local taxes, while other states including Montana, Washington, Arizona, Oregon, and Florida have proposed adding voter requirements. *Id.* at 932 & n.138.

67. Kenneth H. Winn, *It All Adds Up: Reform and the Erosion of Representative Government in Missouri, 1900-2000*, MO. SEC’Y OF STATE, <http://www.sos.mo.gov/archives/pubs/article/article.asp> (last visited Nov. 19, 2014).

68. *Id.*

69. *Id.*; Singer, *supra* note 2.

70. Winn, *supra* note 67.

71. *Id.*

72. *Id.* These critics are likely now happily retired and thinking, “I told you so.”

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* (internal quotation marks omitted).

77. *Id.*

78. Singer, *supra* note 2.

er, that the Hancock Amendment has “unnecessarily harmed the effectiveness of state government.”<sup>79</sup>

There are two sections of the Hancock Amendment that are applicable in *Zweig*. Section 16 states, “Property taxes and other local taxes . . . may not be increased above the limitations specified herein without direct voter approval as provided by this constitution.”<sup>80</sup> Additionally, Section 22(a) states that:

[c]ounties and other political subdivisions are hereby prohibited from levying any tax, license or fees . . . or from increasing the current levy of an existing tax, license or fees . . . without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.<sup>81</sup>

As the court stated in *Zweig*, “Article X, [S]ection 22(a) of the Missouri Constitution prohibits political subdivisions from levying any [new or increased] tax, license or fees without prior voter approval.”<sup>82</sup> The court further stated, citing the *Keller* opinion, that Section 22(a) “does not prohibit a political subdivision from charging an individual user a fee in exchange for rendering a service to that user, so long as this charge is not simply a tax by another name.”<sup>83</sup>

### B. *The Keller Case and Criteria*

In *Zweig*, the court acknowledged the influence of the *Keller* case in determining whether a source of revenue is a tax that would require voter approval under the Hancock Amendment or a “charge[] . . . for actual services rendered” that would not require such approval.<sup>84</sup> The court in *Zweig* used the five criteria from *Keller* to help decide that the stormwater user charge was an unconstitutional tax because it was levied without voter approval.<sup>85</sup>

In *Keller*, the Marion County Ambulance District (“District”) established a new schedule of charges for its services in February 1989, most of which were increases over previous charges.<sup>86</sup> A group of taxpayers who lived in the District sued, “claiming that these increases violated Article X,

79. Winn, *supra* note 67.

80. MO. CONST. art. X, § 16.

81. MO. CONST. art. X, § 22(a).

82. *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 226 (Mo. 2013) (en banc) (alteration in original) (internal quotation marks omitted).

83. *Id.* (citing *Keller v. Marion Cnty. Ambulance Dist.*, 820 S.W.2d 301, 305 (Mo. 1991) (en banc)).

84. *Id.* at 232-33 (quoting *Keller*, 820 S.W.2d at 302, 304 n.7, 305) (internal quotation marks omitted).

85. *Id.* at 232-42.

86. *Keller*, 820 S.W.2d at 302.

[Section] 22(a) of the Missouri Constitution” because none of the charges had been submitted for voter approval.<sup>87</sup>

The *Keller* court first stated that “there are two types of local revenue increases: those subject to the Hancock Amendment and those not subject to the Hancock Amendment.”<sup>88</sup> The court determined that among those revenue increases not subject to the Hancock Amendment were “fee increases which are general and special revenues but not a tax,”<sup>89</sup> or, in other words, user fees that constitute “specific charges for services actually provided by a government entity.”<sup>90</sup> The *Keller* court’s opinion focused on determining that such user fees did not constitute revenue subject to the Hancock Amendment, but in dicta laid out the five criteria that it deemed critical in determining “whether a revenue increase by a local government is an increase in a tax, license or fees [sic] that requires voter approval under the Hancock Amendment.”<sup>91</sup>

The first criterion is to determine when the fee is paid.<sup>92</sup> According to the court, “[f]ees subject to the Hancock Amendment are likely due to be paid on a periodic basis while fees not subject to the Hancock Amendment are likely due to be paid only on or after provision of a good or service to the individual paying the fee.”<sup>93</sup>

The court stated that its second criterion is to determine who pays the fee.<sup>94</sup> Fees subject to the Hancock Amendment are those that are billed to every resident or almost every resident of the political subdivision.<sup>95</sup> On the other hand, the court stated that fees not subject to the Hancock Amendment are “likely to be charged only to those who actually use the good or service for which the fee is charged.”<sup>96</sup>

The court then articulated that the third criterion is ascertaining if the amount of the fee to be paid is “affected by the level of goods or services provided to the fee payer.”<sup>97</sup> A conclusion that a fee is not dependent on the level of goods or services provided to the fee payer weighs in favor of the fee being subject to the Hancock Amendment, while a conclusion that the fee is dependent on the goods or services provided to the fee payer weighs in favor of the fee not being subject to the Hancock Amendment.<sup>98</sup>

The fourth criterion is to determine what is being provided.<sup>99</sup> According to the court, “[i]f the government is providing a good or a service, or permis-

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87. *Id.*

88. *Id.* at 303.

89. *Id.* (internal quotation marks omitted).

90. *Id.* at 305.

91. *Id.* at 304 n.10 (internal quotation marks omitted).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

sion to use government property, the fee is less likely to be subject to the Hancock Amendment.”<sup>100</sup> On the contrary, “[i]f there is no good or service being provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government is probably subject to the Hancock Amendment.”<sup>101</sup>

Finally, the court stated that the fifth criterion is to determine if the activity is one that has been historically and exclusively provided by the government.<sup>102</sup> If it is a fee of that nature, then it is probably subject to the Hancock Amendment, whereas “[i]f the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to the Hancock Amendment.”<sup>103</sup>

The court stated that, “[b]ased on [the above-mentioned] criteria, property taxes, sales taxes, franchise taxes, and income taxes, among others, are subject to the Hancock Amendment.”<sup>104</sup> Further, the court noted that no single criterion was controlling to determine “whether the charge is closer to being a ‘true’ user fee or a tax denominated as a fee,” and that this determination should be made by using all the criteria together.<sup>105</sup>

Many courts have used the *Keller* criteria to determine if a fee is subject to the Hancock Amendment, but the court in *Zweig* reiterated what the Supreme Court of Missouri had already emphasized about the criteria several times: “the *Keller* criteria are to be used only as reliable indicators, not constitutional divining rods.”<sup>106</sup> Therefore, the *Keller* criteria remain in use, but merely serve as an “aid” to courts attempting to apply the court’s “long-standing, traditional test for distinguishing fees and taxes: [f]ees or charges prescribed by law to be paid by certain individuals to public officers for services rendered in connection with a specific purpose ordinarily are not taxes.”<sup>107</sup>

### C. Cases Effectively Overruled by the Refund Decision of *Zweig*

The Ratepayers in *Zweig* argued that the court’s ruling regarding a refund conflicted with the court’s earlier holdings in *Beatty v. Metropolitan St. Louis Sewer District* (“*Beatty III*”),<sup>108</sup> *Ring v. Metropolitan St. Louis Sewer District*,<sup>109</sup> and *City of Hazelwood v. Peterson*.<sup>110</sup>

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100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 233 (Mo. 2013) (en banc).

107. *Id.* at 234 (quoting *Keller*, 820 S.W.2d at 303-04) (internal quotation marks omitted).

108. 914 S.W.2d 791 (Mo. 1995) (en banc).

109. 969 S.W.2d 716 (Mo. 1998) (en banc).

As in *Zweig*, MSD was the defendant in *Beatty III*, and residents of the district brought an action against it because of an ordinance it enacted that increased wastewater charges for one year.<sup>111</sup> Similar to the holding in the *Zweig* case, the court had held in the earlier *Beatty II*<sup>112</sup> decision that the charges were subject to Article X, Section 22(a) of the Hancock Amendment and, therefore, “could not be increased without prior voter approval.”<sup>113</sup> On remand, the trial court held that MSD must refund the increased charges to all affected customers by crediting their future bills.<sup>114</sup> The court’s decision in *Beatty III* was rendered in order to determine if the trial court’s ruling that MSD needed to refund the amounts was proper.<sup>115</sup> The court decided that the plaintiffs<sup>116</sup> were entitled to a refund in the form of a “set-off” applied to later bills from MSD.<sup>117</sup> This decision, however, was based on an ordinance passed by MSD and not on the language of the Hancock Amendment.<sup>118</sup> The court expressly refused to decide whether plaintiffs were entitled to a direct refund under the Hancock Amendment of the taxes improperly collected that were later found to be unconstitutional.<sup>119</sup>

The plaintiffs in *Ring v. Metropolitan St. Louis Sewer District* brought a class action seeking the same remedy from MSD as that in *Beatty III*.<sup>120</sup> The ruling in *Beatty III* was clear that only the named plaintiffs in that case could recover the overpayments through a credit on their subsequent bills.<sup>121</sup> The issue in *Ring* was whether a class action suit against MSD was the correct vehicle for all taxpayers within the district to recover their overpayments, and, if it was, whether the members of the class had a cause of action.<sup>122</sup> The court in *Ring* determined that a taxpayer’s action to enforce Section 22(a) arises in one of two ways.<sup>123</sup> First, a taxpayer can attempt to obtain an injunction to enjoin the collection of a tax until a court determines the constitu-

110. 48 S.W.3d 36 (Mo. 2001) (en banc).

111. *Beatty III*, 914 S.W.2d at 793.

112. *Beatty v. Metro. St. Louis Sewer Dist. (Beatty II)*, 867 S.W.2d 217, 221 (Mo. 1993) (en banc).

113. *Beatty III*, 914 S.W.2d at 794 (citing *Beatty II*, 867 S.W.2d at 221).

114. *Id.*

115. *Id.* at 792.

116. It is important to note that in *Beatty III* the set-off remedy was given only to the *named* plaintiffs because the plaintiffs had not sought to “pursue [the] litigation on behalf of any defined class of individuals other than themselves.” *Id.* at 797. The court declined to decide if “the remainder of MSD customers [were] entitled to any setoffs in accordance with [the] MSD [ordinance].” *Id.*

117. *Id.* at 796.

118. *Id.*

119. *Id.*

120. *Ring v. Metro. St. Louis Sewer Dist.*, 969 S.W.2d 716, 717 (Mo. 1998) (en banc).

121. *Id.* (citation omitted).

122. *Id.* at 717-18.

123. *Id.* at 718.

tionality of the tax.<sup>124</sup> The second scenario for enforcing Section 22(a) arises only if the first scenario is not available,<sup>125</sup> making Section 22(a) enforceable “only by a timely action to seek a refund of the amount of the unconstitutionally-imposed increase.”<sup>126</sup>

Accordingly, the court determined that the case in *Ring* fell into the second category and held that Article X, Section 23 “operates as a waiver of sovereign immunity and permits taxpayers to seek a refund of increased taxes previously collected by a political subdivision in violation of [A]rticle X, [S]ection 22(a).”<sup>127</sup> The *Zweig* court disagreed with the *Ring* court’s decision that the case fell into the second category, distinguishing and expressly overruling *Ring* in its decision.<sup>128</sup>

The third case the Ratepayers cited in *Zweig* for the authority that they were entitled to obtain refunds from MSD was *City of Hazelwood v. Peterson*.<sup>129</sup> In *City of Hazelwood*, several citizens and the City of Hazelwood collectively brought “two lawsuits to recover excess tax payments made to the Florissant Valley Fire Protection District.”<sup>130</sup> The Supreme Court of Missouri affirmed in part and reversed in part the trial court’s decision that “the District collected a certain tax increase in violation of [A]rticle X, [S]ection 22(a) of the Missouri Constitution,” and the court’s order that “the District . . . return all overpayments made by the individual taxpayers and by the city of Hazelwood.”<sup>131</sup>

The court determined that the plaintiffs in *City of Hazelwood* were entitled to a refund, based not on the language of the Hancock Amendment, but on the language of an election contest statute that enabled a district to collect a new tax after official results of an election were tabulated.<sup>132</sup> Although the tax itself was unconstitutional under the Hancock Amendment, the court held that the refund was still authorized by the election contest statute.<sup>133</sup> As the *Zweig* court pointed out, the Ratepayers’ reliance on the *City of Hazelwood* case in *Zweig* was misplaced because the case dealt with the “proper construction and application of Missouri’s election contest statutes, not the Hancock Amendment.”<sup>134</sup>

The Hancock Amendment was the constitutional provision at issue in *Zweig*, and the Supreme Court of Missouri, like many courts before it, used

124. *Id.*

125. *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 247-48 (Mo. 2013) (en banc).

126. *Ring*, 969 S.W.2d at 718-19 (emphasis added).

127. *Id.* at 719.

128. *Zweig*, 412 S.W.3d at 246-48, 248 n.17.

129. 48 S.W.3d 36 (Mo. 2001) (en banc).

130. *Id.* at 37.

131. *Id.* at 37-38.

132. *Id.* at 40 (citing MO. REV. STAT. § 115.595.2 (Supp. 2012)).

133. *Id.*

134. *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 248 (Mo. 2013) (en banc).

the *Keller* criteria to help determine if the stormwater user charge was subject to the Hancock Amendment. *Beatty III*, *Ring*, and *City of Hazelwood* set the stage for the Ratepayers' valiant, but misplaced, argument that the court's ruling regarding Ratepayers' lack of entitlement to a refund in *Zweig* was contrary to prior precedent of the Supreme Court of Missouri.

#### IV. INSTANT DECISION

In *Zweig v. Metropolitan St. Louis School District*, the Supreme Court of Missouri held that MSD's stormwater user charge was unconstitutional because it was a tax that needed voter approval in order to be levied, but had not received such approval.<sup>135</sup> The court also held that the Ratepayers were not entitled to refunds of "stormwater user charges" they had already paid because nothing in the Hancock Amendment authorized the court to order such refunds.<sup>136</sup>

Judge Paul Wilson's analysis of the case began by explaining the Hancock Amendment and the *Keller* decision.<sup>137</sup> The court explained that *Keller*'s holding determined the difference between revenues subject to the Hancock Amendment and revenues not subject to it.<sup>138</sup>

Despite the court's opinion that "[t]he holding and reasoning of *Keller* ha[d] been overshadowed to some degree by the list of five criteria offered,"<sup>139</sup> the court next launched into describing the five criteria and evaluating the stormwater user charge under each criterion to determine if it was a revenue subject to the Hancock Amendment.<sup>140</sup> The court did not evaluate the criteria in numerical order as they were set out in *Keller* because it reasoned that "judicial frustration with the *Keller* criteria may lie more with the order of those criteria than with their substance."<sup>141</sup>

Starting with the fourth criterion, which focused on whether the service was provided in exchange for a fee, the court determined that "MSD did not impose the charge in exchange for an individual's actual use of . . . services."<sup>142</sup> The decision on this criterion weighed in favor of the stormwater user charge being subject to the Hancock Amendment because it looked more like a tax than a user fee.<sup>143</sup> The court next evaluated the second *Keller* criterion, determining who pays the fee.<sup>144</sup> The court's determination that owners,

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135. *Id.* at 244.

136. *Id.* at 248-49.

137. *Id.* at 231-33.

138. *Id.* at 232.

139. *Id.* at 233.

140. *Id.* at 233-42.

141. *Id.* at 234.

142. *Id.* at 236.

143. *Id.* at 234-36.

144. *Id.* at 236.

and not users, were the ones paying the fee weighed strongly in favor of the fee being subject to the Hancock Amendment.<sup>145</sup>

Continuing with its analysis of the *Keller* criteria, the court next determined that the first criterion – when the fee is paid – weighed in favor of the fee being categorized as a tax subject to the Hancock Amendment rather than a user fee not subject to the Hancock Amendment.<sup>146</sup> The court stated that this first criterion weighed heavily in favor of deeming the stormwater user charge a tax because it was impossible to determine to whom MSD’s services were being supplied: there were no individual users of the services – MSD’s services were rendered to the entire district.<sup>147</sup>

Next, the court evaluated criterion three, which consisted of determining how much was paid.<sup>148</sup> If the fee is “dependent on the level of the goods or services provided to the fee payer,” then the fee is more likely a user fee than a tax subject to the Hancock Amendment.<sup>149</sup> The court concluded this criterion also weighed in favor of categorizing the charge as a tax and not a user fee.<sup>150</sup>

The fifth and final *Keller* criterion – whether the service is historically and exclusively a service rendered by the government – came out much the same way for the court as did the first four criteria.<sup>151</sup> The court stated, “[p]roviding for [stormwater] drainage and sewerage is a governmental function and an exercise of the police power of the state.”<sup>152</sup> As such, the court found that “the fifth *Keller* criterion suggest[ed] that MSD was levying a tax – not merely setting a price – when it imposed the stormwater user charge without prior voter approval.”<sup>153</sup>

The court also considered some additional characteristics of the stormwater user charge in determining whether “the political subdivision ha[d] levied a new or increased tax without prior approval of its voters.”<sup>154</sup> First, the court articulated, “[t]he fact that MSD has given itself a lien as a remedy for nonpayment of the stormwater user charge suggests that MSD was levying a tax when it implemented that charge.”<sup>155</sup> According to the court, this was because “[a]bsent an agreement by the debtor, only the government (and

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145. *Id.* at 237-38.

146. *Id.* at 238-39.

147. *Id.* at 239.

148. *Id.*

149. *Id.*

150. *Id.* at 239-41.

151. *Id.* at 241-42.

152. *Id.* at 241 (second alteration in original) (quoting *State ex rel. Dalton v. Metro. St. Louis Sewer Dist.*, 275 S.W.2d 225, 230 (Mo. 1955) (en banc)) (internal quotation marks omitted).

153. *Id.* at 242.

154. *Id.*

155. *Id.* at 243.



those creditors it elects to favor with this remedy by statute) enjoy the benefits of a lien arising solely from the nonpayment of an obligation.”<sup>156</sup>

Another factor the court found to weigh in favor of the stormwater user charge being a tax and not a user fee was “that MSD can use nonpayment of [the] charge as a justification to withhold services having nothing to do with stormwater services.”<sup>157</sup> “Such remedies,” the court reasoned, “are more characteristic of the way in which governments collect unpaid taxes than the manner in which private parties collect unpaid prices or user fees.”<sup>158</sup> Although the court “sympathize[d] with MSD’s predicament,” because of the *Keller* criteria and the other relevant factors the court considered, it ultimately concluded that “MSD levied the stormwater user charge without prior voter approval in violation of [S]ection 22(a).”<sup>159</sup>

The court went on to consider whether to refund the “approximately \$90 million in stormwater user charges collected between April 2008 and the date of the trial court’s judgment on the merits.”<sup>160</sup> First, the court articulated the principle that “[a]bsent special circumstances . . . it is well-established that a taxpayer is not entitled to a refund of illegal taxes unless the refund is authorized by law.”<sup>161</sup> The court made it clear that those special circumstances were absent in this case.<sup>162</sup> Therefore, the refunds would need to be authorized somehow by law.<sup>163</sup>

The court first looked at the plain language of the Hancock Amendment’s remedies provision in Section 23 and determined that, “[b]y its plain language, the only monetary relief courts are authorized to give under [S]ection 23 is an award of expenses and attorneys’ fees.”<sup>164</sup> Further, the court stated that the principal relief authorized under that Section “is declaratory and not remedial.”<sup>165</sup>

Next, the court determined that the sections of the Hancock Amendment at issue in the present case – Sections 16 and 22(a) – did not authorize the use of refunds as a remedy.<sup>166</sup> This was true, the court reasoned, because “[t]he framers of the Hancock Amendment knew how to authorize this remedy when appropriate and chose to restrict its use only to violations of [S]ection 18(a) and not [S]ection 22(a).”<sup>167</sup> The court also indicated a policy reason to explain why the Hancock Amendment should limit the use of refunds, essen-

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156. *Id.* at 242.

157. *Id.* at 243.

158. *Id.*

159. *Id.* at 244.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (citing *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 923 (Mo. 1995) (en banc)).

165. *Id.*

166. *Id.* at 245.

167. *Id.*

tially suggesting that most government entities could not operate monetarily if they were forced to refund such large amounts of money.<sup>168</sup>

The court held that “the Hancock Amendment does not expressly authorize Missouri courts to order a political subdivision to refund taxes collected in violation of [S]ection 22(a)” and stated that ordering such refunds without express authority would “infer or imply that a waiver of sovereign immunity extends to remedies that are not essential to enforce the right in question.”<sup>169</sup>

The Ratepayers’ argument that this holding conflicted with the court’s earlier holdings in *Beatty III*, *Ring*, and *City of Hazelwood* was unsuccessful.<sup>170</sup> The court plainly stated that *Beatty III* expressly declined to reach the issue of whether the Hancock Amendment authorizes refunds when a political subdivision violates Section 22(a).<sup>171</sup> The court was also able to distinguish its holding from its earlier holdings in *Ring* and *City of Hazelwood*, despite the Ratepayers utilizing some language from the decisions that might have indicated otherwise.<sup>172</sup> The court stated that “[r]ead carefully, nothing in *Beatty III*, *Ring*, or [*City of*] *Hazelwood* holds that [A]rticle X, [S]ection 23, by itself, authorizes courts to award money damages in the form of refunds . . . as a remedy” in this situation.<sup>173</sup> In dicta, the court then determined that the *Beatty III*, *Ring*, and *City of Hazelwood* cases were all being overruled by the decision in *Zweig* “to the extent they suggest[ed] that [S]ection 23, by itself, authorizes courts to award refunds or other money damages.”<sup>174</sup> The court was clearly setting out its own principle that Section 23 of the Hancock Amendment, by itself, did not authorize courts to award refunds or other money damages “as a remedy for a political subdivision levying a tax without the prior voter approval required by [S]ection 22(a).”<sup>175</sup>

The court concluded its opinion with the hope that, in light of its decision, future Hancock Amendment cases could be “resolved quickly, accurately, and without undue expense or delay.”<sup>176</sup> After affirming the trial court’s judgment in all respects, the case was remanded in order for the trial court to render a decision on Ratepayers’ motion for appellate fees and costs.<sup>177</sup>

Through its decision in *Zweig*, the court made clear that a fee collected by a government entity is a tax for purposes of the Hancock Amendment when several factors are present: (1) a government charge is not collected in exchange for a particular service; (2) the charge is paid by owners and not

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168. *Id.*

169. *Id.* at 245-46 (emphasis omitted) (quoting *Fort Zumwalt*, 896 S.W.2d at 923) (internal quotation marks omitted).

170. *Id.* at 246.

171. *Id.*

172. *Id.* at 246-48.

173. *Id.* at 248.

174. *Id.* at 248 n.17.

175. *Id.* at 248.

176. *Id.* at 252.

177. *Id.*

users; (3) the charge is paid regularly and not after use; (4) the amount of the charge is a fixed rate and not based on use; (5) the service is historically and exclusively governmental; (6) the government entity assessing the charge can obtain a lien on property if the charge is not paid; and (7) the remedy for non-payment does not coincide with the service for which the fee is being collected.<sup>178</sup> If several of those factors are present, a court will likely find that the fee is a tax and violates the Hancock Amendment if it is being charged without prior voter approval.<sup>179</sup> The court's decision also set out the principle that when a tax is unconstitutionally levied under the Hancock Amendment without prior voter approval, a court cannot order a refund of those taxes because the Hancock Amendment does not grant courts that authority.<sup>180</sup>

## V. COMMENT

The Supreme Court of Missouri in *Zweig* determined that MSD's stormwater user charge was an unconstitutional tax because it was levied without voter approval. It is unclear, however, what will happen next. This question, and many others left in the aftermath of the Hancock Amendment, shows the need for lawmakers and legal scholars in Missouri to consider the ramifications of this nearly thirty-five-year-old constitutional amendment and to determine if it is time for a change.

### A. Critiques of the Hancock Amendment

At its passage, the Hancock Amendment barely gathered a majority of support from voters.<sup>181</sup> Officials and institutions within the state were unopposed of the Hancock Amendment as well.<sup>182</sup> Even the Hancock Amendment's namesake, Mr. Mel Hancock, was unhappy with the way that courts and legislators treated the Amendment over the years.<sup>183</sup> While the Hancock Amendment has been successful in limiting Missouri's tax revenue, as Mr. Hancock originally intended, the implications of the Amendment and that limitation are abundantly negative.

First, litigation surrounding the Hancock Amendment has been plentiful and expensive.<sup>184</sup> *Zweig* is just one example. Over three years passed between the trial court's determination that the fee was unconstitutional and MSD's exhaustion of its final judicial remedy with the review by the Supreme Court of Missouri.<sup>185</sup> MSD was also ordered to pay \$4.3 million in

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178. *Id.* at 234-44.

179. *See id.*

180. *Id.* at 244-45.

181. Singer, *supra* note 2.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Zweig*, 412 S.W.3d at 231.

attorneys' fees and \$470,000 in expenses, as well as the attorneys' fees calculated on remand for the appeal to the Supreme Court of Missouri.<sup>186</sup> This amount is unfortunate, considering MSD was already operating its storm-water system using its sewer system revenues. Ironically, the taxpayers ultimately footed the bill for the litigation.

Second, in spite of court rulings such as the one in *Zweig*, lawmakers have managed to find ways around the Hancock Amendment's limitations.<sup>187</sup> There has been an increased use of tax credits by lawmakers – decisions that are now made behind closed doors.<sup>188</sup> Also, the Hancock Amendment has caused an increase in the number of initiative petitions, which can “give disproportionate influence to rich individuals who are willing to spend their money to advance their political philosophy.”<sup>189</sup>

Finally, the Hancock Amendment has resulted in exactly what its name-sake wanted: a limitation on Missouri's revenue.<sup>190</sup> This limitation, however, comes with the consequences of inadequate services and a decrease in state jobs: “Missouri remains in a budget hole, even after hundreds of millions of dollars in budget cuts since the economy went off the cliff in 2008. Because the state must have a balanced budget every year, reductions in state workers and services were inevitable.”<sup>191</sup> With the requirement that voters must approve any taxes, only some government programs can be funded. According to David Valentine, former Director of the Division of Research at the Missouri Senate, Missourians will usually vote for things like public education, law enforcement, and economic development, while other programs, like the state prison system and public assistance, will not get enough votes to raise the money that they need to operate.<sup>192</sup>

Voters may be more likely to vote to approve higher taxes for public services like education, but data regarding Missouri's actual spending on services is indicative that a change must be made: In 2006, Missouri was 37th and 45th in the nation on per capita state and local investment in elementary and secondary education and higher education, respectively.<sup>193</sup> Mr. Valentine's statement regarding the prison system not getting enough votes to raise

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186. *Id.* at 249, 252.

187. Singer, *supra* note 12.

188. *Id.*

189. *Id.*

190. See Singer, *supra* note 2.

191. *Id.*

192. Dale Singer, *Low Taxes? Low Services? Hancock Contributed to Legacy*, ST. LOUIS BEACON (Apr. 13, 2011, 10:40 AM), [https://www.stlbeacon.org/#!/content/16451/low\\_taxes\\_low\\_services\\_hancock\\_contributed\\_to\\_legacy](https://www.stlbeacon.org/#!/content/16451/low_taxes_low_services_hancock_contributed_to_legacy).

193. AMY BLOUIN & TOM KRUCKEMEYER, MO. BUDGET PROJECT, COMPARING MISSOURI'S TAX AND SPENDING WITH THE NATION: WHERE MISSOURI RANKS IN 2009 3 (2009), available at <http://www.mobudget.org/files/Where%20Missouri%20Ranks%20in%20Tax%20and%20Spending%202009-3.pdf>.

the money it needs to operate is evidenced by the fact that Missouri was ranked 44th for state and local spending per capita on corrections in 2006.<sup>194</sup>

### B. Critiques of the Zweig Case

The *Zweig* opinion raises concerns regarding the Hancock Amendment's lack of redress for taxpayers who have paid unconstitutional taxes in the past.<sup>195</sup> If the government levies an unconstitutional tax, taxpayers are left with only one option: to enter into extensive litigation to keep from having to pay the tax in the future. Under a cynical view of government, this situation lends itself to a possible scenario where the government entity levies a tax in bad faith without voter approval to reap its rewards until a taxpayer decides it is worth the time and cost to litigate the unconstitutional tax.

One solution that could deter this outcome is a law mimicking the *Zweig* court's decision that would require the government to pay attorney's fees when a tax is deemed unconstitutional under the Hancock Amendment.<sup>196</sup> There are two problems with this solution, however. The government entity required to pay the attorneys' fees would go even deeper into debt due to the lack of revenue coupled with the payment of expensive attorneys' fees for litigation. Additionally, this burden would be shouldered by the taxpayers as well because taxpayers pay for governmental entities' expenses.

There is no doubt that the Hancock Amendment is fulfilling its original purpose: it limits Missouri's revenues, a concept Mel Hancock believed was "easy to understand."<sup>197</sup> Limiting Missouri's revenues comes with an array of less than desirable consequences, however. Missouri lawmakers circumvent the Hancock Amendment with tax credits and initiatives.<sup>198</sup> While these credits raise the needed money for some government programs and services, they also remove tax decisions from Missouri voters' purview, which is where the Hancock Amendment originally placed them.<sup>199</sup> Expensive litigation ensues, costing the taxpayers even more time and money.<sup>200</sup> Possibly the

194. *Id.*

195. *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 248-49 (Mo. 2013) (en banc).

196. *Id.* at 249-52.

197. Singer, *supra* note 12.

198. *Id.* Wealthy individuals provide the government with the needed funds for programs in exchange for tax credits. *See id.* Using tax credits, the necessary funds are raised without having to seek voter approval under the Hancock Amendment. *Id.* As a result, people who receive refunds would simply get a slightly smaller refund. *Id.* Noting this growth in tax credits, Governor Jay Nixon assembled a review commission to study the tax credit programs. *Id.* The commission found an increase of over 400%, from \$102.7 million in 1998 to \$521.5 million in 2010, in the tax credit programs it reviewed. *Id.* The rate of redemption of the credits for the same time period grew over 400% from 1.7% to 7.7%. *Id.*

199. *See id.*

200. *See, e.g., Zweig*, 412 S.W.3d at 249-52.

most important negative consequence to consider is that Missouri's government services are in some cases abysmal or non-existent.<sup>201</sup> Surely Mr. Hancock did not intend these effects that stem from limiting Missouri's revenues when he proposed the Hancock Amendment almost thirty-five years ago.

### C. Proposed Changes

Lawmakers and legal scholars should carefully and seriously reconsider the Hancock Amendment. A discussion regarding possible changes to or a repeal of the Hancock Amendment could improve Missouri tax policy for the better without increasing taxes by a burdensome amount. Regardless of what provision replaces it, Section 16 of the Hancock Amendment, which requires voter approval for new or increased taxes, cannot remain unchanged. There are several options that could provide voters and lawmakers with an acceptable solution. The first two options proposed in this Note would be adopted in place of Section 16, while the third proposes changes to Section 16.

The first option is to enact a constitutional amendment wherein only increases in a specific tax would require voter approval. This change would require voter approval for only changes to the following types of taxes: income tax, sales tax, or property tax. With this measure, the state's revenue and spending is still limited in some instances, hopefully to the satisfaction of voters, but the state is not completely out of options if voters refuse to pass a proposed new or increased tax.

The second option is to adopt something similar to the measures that appear in the constitutions of Arizona, Alaska, Connecticut, Delaware, and Florida.<sup>202</sup> Such a measure could require the Missouri legislature to impose revenue or expenditure limitations based on a variety of factors, including "growth in state population, the cost of living, or some combination of these measures relative to a baseline year."<sup>203</sup> Under this provision, altering or exceeding the limits would require a legislative super majority, rather than approval by voters.<sup>204</sup> This provision would also provide voters with the desired limitations on state government spending without the stringent restrictions of the Hancock Amendment that have caused problems for government services such as the problems faced by MSD in the *Zweig* decision.

The third option would be to keep Section 16 of the Hancock Amendment but place within it some caveats, or "escape" provisions. While voter approval could still be sought for new or increased taxes, those taxes that were unsuccessful at the ballot box could ultimately be levied after approval by a super majority of both houses of the legislature and the governor's signature. People unhappy with new or increased taxes which they voted against

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201. See Singer, *supra* note 192.

202. See *supra* note 66.

203. See Briffault, *supra* note 66, at 931. The baseline year could be kept from the current Hancock Amendment as 1980.

204. See *id.* at 916.

and which were later levied due to this proposed caveat could voice their disapproval in the next election. This option would give voters a say, but would also allow the legislature the opportunity to determine if some revenue must be raised regardless of voters' opinions. Once the taxes have been levied, voters could then evaluate the actual effects and determine if the result of the government's "override" of their vote was wise and whether it returned a favorable result. If not, voters could voice their opposition once more simply by voting to "throw the bums out"<sup>205</sup> at the next election.

The Supreme Court of Missouri's decision in *Zweig* highlighted several problems and unintended consequences of the current Hancock Amendment. The solutions proposed in this Note could solve these problems while simultaneously satisfying Missouri citizens with restrictions on government revenues and spending. These proposals are a good starting point in the conversation about whether the Hancock Amendment should be kept as is, amended, or repealed.

## VI. CONCLUSION

Nobody likes paying taxes, but is the Hancock Amendment the right way to limit state revenue and spending? Lawmakers continuously find ways around its requirements. Litigation involving the Hancock Amendment then ensues, taking up large amounts of the court system's time and resources and costing the government, and in turn the taxpayers, millions of dollars.<sup>206</sup> Additionally, the revenue limit causes a noticeable decline in the quality of services that the government provides. Although a complete overhaul of the Hancock Amendment may not be necessary, these implications, some brought to the forefront by *Zweig v. Metropolitan St Louis Sewer District*, weigh in favor of lawmakers and legal scholars taking a second look at the Hancock Amendment. With all of the negative implications of the Hancock Amendment in practice, there must be a better way.

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205. This was a common phrase used by Carl H. Esbeck, former R.B. Price Professor Emeritus of Law and former Isabelle Wade & Paul C. Lyda Professor Emeritus of Law at the University of Missouri School of Law; J.D. with distinction 1974, Cornell University. Professor Esbeck often used this phrase in Constitutional Law to illustrate the most basic, and sometimes only, remedy that citizens have to redress an actual or perceived government abuse of power.

206. See, e.g., *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 249-52 (Mo. 2013) (en banc).