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## COMMENT

# Sustainable Constitutional Growth? The “Right to Farm” and Missouri’s Review of Constitutional Amendments

ANGELA KENNEDY\*

### INTRODUCTION

The Missouri River Basin is comprised of more than 100 million acres of cropland across nine states, including Missouri.<sup>1</sup> It produces nearly half of U.S. wheat, nearly a quarter of its grain corn, and over a third of its cattle, and in 2008, the value of these crops and livestock exceeded \$100 billion.<sup>2</sup> Missouri’s share in this revenue, however, contributed to less than three percent of Missouri’s gross domestic product (“GDP”) in 2013:<sup>3</sup> not what one would call the “foundation and stabilizing force of Missouri’s economy,” or even a “vital sector of Missouri’s economy.”<sup>4</sup> Yet these assertions are memorialized

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1. The basin is comprised of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, and Wyoming. *Decadal Climate and Impacts Prediction in the Missouri River Basin (MRB)*, MONTANA 1, [http://drought.mt.gov/Links/Documents/forecasting\\_decadal\\_climate\\_variability.pdf](http://drought.mt.gov/Links/Documents/forecasting_decadal_climate_variability.pdf) (last visited Jan. 11, 2016).

2. *Id.*

3. Mo. Econ. Research & Info. Ctr., *Gross Domestic Product Data Series, 2013 Estimates*, MO. DEP’T ECON. DEV., <http://www.missourieconomy.org/indicators/gsp/index.stm> (last visited Jan. 11, 2016). A figure of 1.7% included not only agriculture and forestry, but also hunting and fishing. *Id.*; see also MO. ECON. RESEARCH & INFO. CTR., MO. DEP’T ECON. DEV., MISSOURI ECONOMIC REPORT 4 (2014), [http://www.missourieconomy.org/pdfs/2014\\_mo\\_economic\\_report.pdf](http://www.missourieconomy.org/pdfs/2014_mo_economic_report.pdf) (putting “Natural Resources (including Agriculture) and Mining” at 2.3% of Missouri’s gross domestic product.). This figure was 7% in 2008. See Mo. Econ. Research & Info. Ctr., *Missouri Economic Impact Brief, Agricultural Industries*, MO. DEP’T ECON. DEV. (Oct. 2008), [https://www.missourieconomy.org/pdfs/missouri\\_ag\\_impact.pdf](https://www.missourieconomy.org/pdfs/missouri_ag_impact.pdf).

4. MO. CONST. art. I, § 35.

in the newly passed “right-to-farm” state constitutional amendment submitted to, and endorsed by, Missouri’s popular vote in August 2014:<sup>5</sup>

That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri’s economy. To protect this vital sector of Missouri’s economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.<sup>6</sup>

Historically, these assertions were certainly true of Missouri’s economy.<sup>7</sup> Even now, when they are rote platitudes more than assertions of present fact, Missouri does have an interest in protecting agriculture, both as a historically important sector and as a livelihood that supports many individual Missouri citizens. Missouri remains an important agricultural state, even as agriculture is dwarfed by industry.<sup>8</sup> However, the placement of this amendment in Missouri’s constitutional bill of rights, and its expansive constitutional language, warrants some concern as to its actual effect. This is not really a question of economics. Even if agriculture in Missouri produced twenty times the revenue it does now, the amendment still might privilege certain rights in Missouri at the expense of others – regardless of whether the majority of voting Missourians approved.

Indeed, while the amendment did receive a majority vote from Missouri citizens, it was perhaps the barest majority possible at 50.12%.<sup>9</sup> The controversial enactment of the right-to-farm amendment serves as a prime example through which to examine judicial review of state constitutional amendments both during and after the political process. The available legal challenges are divisible into two general categories: (1) challenges to the political constitutional amendment process and (2) substantive challenges to constitutional amendments themselves. This Comment will discuss these challenges as applied to the right-to-farm amendment.<sup>10</sup>

5. *Gov. Nixon Sets Election Dates for 2014 Ballot Measures*, OFF. MO. GOVERNOR JAY NIXON (May 23, 2014), <https://governor.mo.gov/news/archive/gov-nixon-sets-election-dates-2014-ballot-measures>.

6. MO. CONST. art. I, § 35.

7. Missouri, like many of the “Great Plains” states, was settled by farmers. ROBYN BURNETT & KEN LUEBBERING, *IMMIGRANT WOMEN IN THE SETTLEMENT OF MISSOURI* 95 (2005).

8. E-mail from Erin Morrow Hawley, Associate Professor of Law, Univ. of Mo. Sch. of Law, to author (Apr. 10, 2015, 7:25 PM) (on file with author).

9. *State of Missouri – Primary Election – August 5, 2014, Official Results*, MO. SECRETARY ST., <http://enrarchives.sos.mo.gov/enrnet/default.aspx> (click on the “Choose election type” dropdown box, then select “Primary Election – August 5, 2014” and click “Submit”) (last visited Jan. 31, 2016).

10. *See infra* Part II.D.

Part I discusses the historical background and enactment of the amendment. Next, Part II outlines the legal challenges available during the political constitutional amendment process, detailing what challenges were – or were not – made to the right-to-farm amendment during its enactment. Part III discusses how Missouri courts generally review legislatively-referred constitutional amendments and how they would likely review challenges brought under the right-to-farm amendment. Part IV discusses the adequacy of existing legal challenges to Missouri constitutional amendments – particularly on the front end – when these amendments are enacted via a single election. It also provides suggestions for the needed reform of this process. Even if the right-to-farm amendment just reaffirms rights already available to Missouri citizens, it was an expensive experiment on the state’s bill of rights. Ultimately, however, it seems to do more than that by foreclosing future legislative regulation of agriculture and possibly overturning existing statutory measures. While this Comment is not an indictment of farmers’ rights, it questions whether the existing constitutional amendment process, exemplified in the passage of the right-to-farm amendment, adequately corresponds to the foundational nature of the Missouri Constitution.

## I. HISTORICAL BACKGROUND

Conflicts between agriculture and urbanization in Missouri are nearly as old as the state itself. Following the Civil War, industrialization not only revolutionized urban centers, but it also changed the landscape of farming communities in Missouri.<sup>11</sup> New technologies like barbed wire, threshers, and baling machines dramatically decreased the labor and time required for producing crops.<sup>12</sup> This led to crop specialization and the formation of “bonanza farms,” and many small farmers were pushed off of their lands, unable to compete.<sup>13</sup> But farmers soon began to face additional competition beyond their fellow farmers. Throughout the mid- to late-nineteenth century, a number of farmers brought nuisance actions against businesses and cities, as the latter’s expansion damaged the farmers’ crops.<sup>14</sup>

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11. Angela Bell, *Lesson 2: The Urban North and the Rural West*, HIST. 1200: SURVEY OF AM. HIST. SINCE 1865, <http://online.missouri.edu/exec/data/courses/2626/public/lesson02/lesson02.aspx> (last visited Jan. 11, 2016).

12. *Id.*

13. *Id.*

14. *Smith v. City of Sedalia*, 53 S.W. 907 (Mo. 1899) (farmer brought nuisance claim against city, alleging that its sewer system contaminated the stream that he used for his livestock and other farming purposes); *Brown v. Chi. & Alton R.R. Co.*, 80 Mo. 457, 458 (1883); *Dickson v. Chi., Rock Island & P. R.R. Co.*, 71 Mo. 575, 576 (1880) (farmer brought action for nuisance against railroad for building a dam that flooded farmer’s property); *Van Hoozier v. Hannibal & St. Joseph R.R. Co.*, 70 Mo. 145, 146 (1879) (farmer brought action for nuisance against railroad for building a dam that flooded farmer’s property); *Pinney v. Berry*, 61 Mo. 359 (1875) (farmer brought action for nuisance against mill owner whose dam water-logged part of the

Over the next century, agriculture, cities, and business in Missouri continued to grow side-by-side at various paces. By 2012, the value of farms in Missouri was at record highs – up twenty-two percent since 2007.<sup>15</sup> That being said, the future of Missouri farms was, and still is, somewhat uncertain, as farmland continues to be lost to expanding “residential, commercial and industrial land uses.”<sup>16</sup> The number of farms in Missouri is decreasing,<sup>17</sup> and the amount of farmland in the state decreased by nearly one million acres between 2007 and 2012.<sup>18</sup> More worrisome still, as of 2012, seventy-one percent of Missouri farmers were over age fifty-five.<sup>19</sup> Only 12.6% of Missouri farmers were under age forty-four.<sup>20</sup>

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farmer’s property); *Smiths v. McConathy*, 11 Mo. 517, 518 (1848) (small farm brought action for nuisance against a large distillery and hog-farm operation for contaminating water); *Powers v. St. Louis, Iron Mountain & S. Ry. Co.*, 71 Mo. App. 540 (1897) (farmer brought claim for nuisance against railroad for building too small of a canal and causing his property to flood); *Thomas v. Concordia Cannery Co.*, 68 Mo. App. 350 (1897) (farmer brought nuisance against canning factory for spilling refuse onto his property, contaminating the water that ran through his property, and making his property unfit for farming and pasturing); *Kirchgraber v. Lloyd*, 59 Mo. App. 59, 60 (1894) (farmer brought nuisance action against brick kiln, alleging that its smoke and gases had destroyed his crops); *Carson v. City of Springfield*, 53 Mo. App. 289, 298 (1893) (farmer brought nuisance action against city for draining water onto and flooding his land); *McKee v. St. Louis, Keokuk & Nw. R.R. Co.*, 49 Mo. App. 174, 179 (1892) (farmer brought action for nuisance against railroad for building a dam that flooded farmer’s property).

15. *Table 1. Historical Highlights: 2012 and Earlier Census Years*, U.S. DEP’T AGRIC., [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Missouri/st29\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Missouri/st29_1_001_001.pdf) (last visited Jan. 11, 2016).

16. Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 90 n.22 (2006) (citing *Farming on the Edge: Sprawling Development Threatens America’s Best Farmland*, AM. FARMLAND TRUST (2002), <http://www.farmland.org/farmingontheedge/FarmingontheEdge.pdf>) (“From 1992–97, the United States converted more than 6 million acres of agricultural land to a more developed use. It has been estimated that our country loses two acres of farmland every minute.”).

17. *Table 1. Historical Highlights: 2012 and Earlier Census Years*, *supra* note 15. The number of farms has gone from 107,825 in 2007 to 99,171 in 2012 – a decrease of 8654 farms. *Id.*

18. *Id.*

19. *Id.* According to the 2012 agricultural census, only 0.7% of Missouri farmers are under age 25, 4.7% are between the ages of 25 and 34, 7.2% are between 35 and 44, 16.4% are between the ages of 45 and 54, approximately 26% are between the ages of 55 and 64, and approximately 45% are over age 65. *See Table 69. Summary by Age and Primary Occupation of Principal Operator: 2012*, U.S. DEP’T AGRIC., [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Missouri/st29\\_1\\_069\\_069.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Missouri/st29_1_069_069.pdf) (last visited Jan. 11, 2016).

20. *Table 1. Historical Highlights: 2012 and Earlier Census Years*, *supra* note 15.

Technological advancements have improved agricultural productivity, further reducing farm labor in the state by nearly twenty-nine percent between 2002 and 2007.<sup>21</sup> Indeed, contemporary agriculture operations involve “factory” more than “family” farms.<sup>22</sup> More animals are concentrated in fewer operations, and confinement is now the primary method of animal production.<sup>23</sup> For example, the number of *hogs* in the state of Missouri stayed roughly the same between 1982 and 2007, while the number of Missouri’s hog *farms* during that period dropped by nearly ninety percent.<sup>24</sup>

These concentrated animal operations pose increased environmental and health risks. As the U.S. General Accounting Office reported, “Nationwide, about 130 times more animal waste is produced than human waste—roughly 5 tons for every U.S. citizen—and some operations with hundreds of thousands of animals produce as much waste as a town or a city.”<sup>25</sup> This waste puts pollutants into the environment that are harmful to human health.<sup>26</sup> Similarly, the widespread application of pesticides, herbicides, and fertilizers to crops can also contribute to health problems, like birth defects, nerve damage,

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21. Mo. Econ. Research & Info. Ctr., *Missouri Economic Research Brief, Farm and Agribusiness*, MO. DEP’T ECON. DEV. (Mar. 2009), [https://www.missouri-economy.org/pdfs/missouri\\_farms\\_and\\_agribusiness.pdf](https://www.missouri-economy.org/pdfs/missouri_farms_and_agribusiness.pdf).

22. James S. Cooper, *Slaughterhouse Rules: How Ag-Gag Laws Erode the Constitution*, 32 TEMP. J. SCI. TECH. & ENVTL. L. 233, 233–35 (2013).

23. ROBBIN MARKS, NAT. RES. DEF. COUNCIL, CESSPOOLS OF SHAME, HOW FACTORY FARM LAGOONS AND SPRAYFIELDS THREATEN ENVIRONMENTAL AND PUBLIC HEALTH 4 (July 2001), <https://www.nrdc.org/water/pollution/cesspools/cesspools.pdf>. For example, from 1980 to 2011, the number of hog operations in the United States dropped from 666,000 to roughly 69,000, yet the number of hogs sold remains almost the same. *Id.*

24. *Compare Table 29. Hogs and Pigs—Inventory: 1982 and 1978*, U.S. DEP’T AGRIC.,

<http://usda.mannlib.cornell.edu/usda/AgCensusImages/1982/01/25/121/Table-29.pdf> (last visited Jan. 11, 2016) (22,859 farms with 3,186,443 hogs in 1982), *with Table 12. Hogs and Pigs—Inventory and Sales: 2012 and 2007*, U.S. DEP’T AGRIC., [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_2\\_US\\_State\\_Level/st99\\_2\\_012\\_012.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_US_State_Level/st99_2_012_012.pdf) (last visited Jan. 11, 2016) (2,999 farms with 3,101,269 hogs in 2007). There was an 87% decrease in farms, and only a 3% decrease in hogs. *See Table 29. Hogs and Pigs—Inventory: 1982 and 1978, supra; Table 12. Hogs and Pigs—Inventory and Sales: 2012 and 2007, supra.*

25. U.S. GEN. ACCT. OFFICE, ANIMAL AGRICULTURE, WASTE MANAGEMENT PRACTICES 1 (July 1999) (footnote omitted), <http://www.gao.gov/archive/1999/rc99205.pdf>.

26. *Animal Feeding Operations FAQs*, EPA, <http://www.epa.gov/npdes/animal-feeding-operations-afos> (last updated Jan. 5, 2016) (“Manure and wastewater from [animal feeding operations] have the potential to contribute pollutants such as nitrogen and phosphorus, organic matter, sediments, pathogens, heavy metals, hormones, antibiotics, and ammonia to the environment.”).

and cancer.<sup>27</sup> Thus, the inevitable industrialization of the farm has changed the agricultural landscape dramatically, yet states continue to take a “hands-off” approach to agriculture regulations.<sup>28</sup>

In 2010, it appeared that this approach might be changing. Missouri passed new, restrictive legislation that Missouri Farm Bureau president Blake Hurst called a “sort of a wake-up call to agriculture.”<sup>29</sup> Colloquially titled “Proposition B,” this statute imposed new requirements on dog breeders for more humane conditions.<sup>30</sup> It subjected offending breeders to fines and penalized repeat offenders with criminal citations.<sup>31</sup> Proposition B had been sponsored largely by out-of-state animal rights groups and was interpreted by some within the agricultural community as “outsiders” telling farmers how to raise their animals.<sup>32</sup>

On the heels of this major legislative blow to Missouri agricultural groups, a class of plaintiffs won an \$11 million odor nuisance suit against a northwestern Missouri hog farm.<sup>33</sup> In response, agricultural lobbyists and proponents marshalled to the cause of protecting the rights of Missouri ranchers and farmers from outsiders several generations removed from the farm.<sup>34</sup> Various Missouri legislators proposed bills to protect farmers’ rights to raise animals and perform other farming practices, and it was against this backdrop in January 2013 that Bill Reiboldt and Jason Smith in the Missouri House of Representatives introduced the bills that would become the right-to-farm

27. *Pesticides and Food: Health Problems Pesticides May Pose*, EPA, [http://facweb.northseattle.edu/twkaufman/NTR%20150/Helpful%20Links/EPA\\_Pesticides%20and%20health%20risks.htm](http://facweb.northseattle.edu/twkaufman/NTR%20150/Helpful%20Links/EPA_Pesticides%20and%20health%20risks.htm) (last updated Mar. 14, 2013).

28. Nadia S. Adawi, *State Preemption of Local Control over Intensive Livestock Operations*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10506 (2014).

29. Jo Mannies, *Proposed ‘Right to Farm’ Constitutional Amendment Likely to End Up in Court*, ST. LOUIS BEACON (June 17, 2013, 6:13 AM), [https://www.stlbeacon.org/#!/content/31349/right\\_to\\_farm\\_061113\\_](https://www.stlbeacon.org/#!/content/31349/right_to_farm_061113_).

30. See, e.g., *Interests Outside of Missouri are Financing Proposition B*, MO. FARM BUREAU, <http://www.mofb.org/NewsMedia/News.aspx?articleID=103> (last visited Jan. 11, 2016).

31. *2010 Initiative Petitions Approved for Circulation in Missouri, Statutory Amendment to Chapter 273, Relating to Dog Breeders*, MO. SECRETARY ST., <http://www.sos.mo.gov/elections/2010petitions/2010-085> (last visited Jan. 11, 2016).

32. *Interests Outside of Missouri are Financing Proposition B*, *supra* note 30.

33. *Owens v. ContiGroup Cos.*, 344 S.W.3d 717 (Mo. Ct. App. 2011). The Western District Court of Appeals affirmed March 29, 2011. *Id.*

34. See, e.g., Ashley Jost, *Senate Passes ‘Right to Farm,’ House Unsatisfied*, MO. TIMES (Apr. 15, 2013), <http://themissouritimes.com/2353/senate-passes-right-to-farm-house-unsatisfied/>; Cyndi Young, *Right to Farm is not Us vs. Them*, BROWNFIELD AG NEWS FOR AM. (July 24, 2014), <http://brownfieldagnews.com/2014/07/24/right-to-farm-is-not-us-vs-them/>; Tyler Castner, *Smart Decision 2014: Analyzing Amendment One – The Right to Farm*, KOMU, <http://www.komu.com/news/smart-decision-2014-analyzing-amendment-one-the-right-to-farm/> (last updated Aug. 4, 2014, 1:42 PM).

amendment.<sup>35</sup> Their separate efforts were consolidated into a single bill,<sup>36</sup> which was revised<sup>37</sup> and reported to the Senate in March 2013.<sup>38</sup>

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35. Representative Bill Reiboldt introduced Joint House Resolution 11, which read:

That agriculture, which provides food, energy, and security, is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, it shall be the right of persons to raise livestock in a humane manner without the state imposing an undue economic burden on animal owners. No law criminalizing the welfare of any livestock shall be valid unless based upon generally accepted scientific principles and enacted by the general assembly.

H.R.J. Res. No. 11, 97th Gen. Assemb., Reg. Sess. (Mo. 2013), <http://www.house.mo.gov/billtracking/bills131/billpdf/intro/HJR00111.PDF> (last visited Jan. 11, 2016). Representative Jason Smith introduced Joint House Resolution 7, which read:

That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state. No law shall be enacted which abridges the right of farmers and ranchers to employ agricultural technology and modern livestock production and ranching practices. That the citizens of this state have a right to hunt, fish, and harvest wildlife. The control, management, restoration, conservation, and regulation of the bird, fish, game, forestry, and all wildlife resources of the state, and the administration of all laws pertaining thereto, is vested in a conservation commission, as provided in article IV, section 40, Constitution of Missouri. No law and no rule or regulation shall unreasonably restrict hunting, fishing, and harvesting wildlife or the use of traditional devices and methods. Laws, rules, and regulations authorized under this section shall have the purpose of wildlife conservation and management and preserving the future of hunting and fishing. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. This section shall not be construed to modify any provision of common law or statutes relating to trespass or property rights.

H.R.J. Res. No. 7, 97th Gen. Assemb., Reg. Sess. (Mo. 2013), <http://www.house.mo.gov/billtracking/bills131/billpdf/intro/HJR00071.PDF> (last visited Jan. 11, 2016).

36. A new joint resolution combined 11 and 7:

That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state. No law shall be enacted which abridges the right of farmers and ranchers to employ agricultural technology and modern livestock production and ranching practices.



The Missouri Senate, however, resisted language in the House's bill that barred initiative petitions<sup>39</sup> to regulate farming practices, and they offered their own substitute bill.<sup>40</sup> This was again amended<sup>41</sup> and voted on in its final form in May 2013.<sup>42</sup> More than eighty percent of House members supported

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H.R.J. Res. Nos. 11 & 7, 97th Gen. Assemb., Reg. Sess. (Mo. 2013), <http://www.house.mo.gov/billtracking/bills131/billpdf/commit/HJR0011C.PDF> (last visited Jan. 11, 2016).

37. The last sentence was revised as follows: "No state law shall be enacted which abridges the right of farmers and ranchers to employ agricultural technology and modern and traditional livestock production and ranching practices, *unless enacted by the General Assembly.*" Perfected H.R.J. Res. Nos. 11 & 7, 97th Gen. Assemb., Reg. Sess. (Mo. 2013) (emphasis added), <http://www.house.mo.gov/billtracking/bills131/billpdf/perf/HJR0011P.PDF> (last visited Apr. 25, 2015).

38. *Activity History for HJR 11*, MO. HOUSE REPRESENTATIVES, <http://www.house.mo.gov/BillActions.aspx?bill=HJR11&year=2013&code=R> (last visited Jan. 11, 2016).

39. Initiative petitions are constitutional amendments or statutes initiated directly by a state citizen and then put on the ballot for popular vote. MO. CONST. art. III, §§ 49–53; *id.* at art. XII, §2(b).

40. *Senate Substitute for House Committee Substitute for House Joint Resolution Nos. 11 & 7*, <http://www.house.mo.gov/billtracking/bills131/hlrbillpdf/0132S.03F.PDF> (last visited Jan. 11, 2016). The senate substitute ended with:

No state law shall be enacted which abridges the right of farmers and ranchers to engage in agricultural production and ranching practices, unless enacted by the General Assembly. *Nothing in this section shall be interpreted to abrogate the authority of political subdivisions to exercise powers vested therein by the laws of the state of Missouri.*

*Id.* (emphasis added).

41. *Journal of the Senate, Forty-Seventh Day*, MO. SENATE (Apr. 10, 2013), <http://www.senate.mo.gov/13info/Journals/RDay470410724-737.pdf#toolbar=1>. A proposed senate amendment was ultimately rejected: "This section shall not apply to animals. 'Animal' shall be defined as any dog or cat, which is being used, or is intended for use, for research, teaching, testing, breeding, or exhibition purposes, or as a pet." *Id.*

42. *Activity History for HJR 11*, *supra* note 38. The final joint house resolution, the language of which became effective as Section 35 of Article I of the Missouri Constitution, read as follows:

That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

Truly Agreed To and Finally Passed, H.R.J. Res. Nos. 11 & 7, 97th Gen. Assemb., Reg. Sess. (Mo. 2013), <http://www.house.mo.gov/billtracking/bills131/billpdf/truly/HJR0011T.PDF> (last visited Jan. 11, 2016).

the bill, and the Senate vote, also exceeding an eighty percent majority, carried the proposed constitutional amendment to the 2014 ballot.<sup>43</sup>

Proponents and opponents of the amendment then went to work advocating for their respective positions. Both sides spent millions of dollars campaigning on the internet, on television, and through mail and phone calls.<sup>44</sup> Proponents of the amendment claimed not only that it would protect family farms from out-of-state animal rights groups, but they also campaigned for its enactment on the grounds that it would increase revenue and food supplies and create jobs.<sup>45</sup> Opponents of the amendment worried about the amendment's broad, vague language and claimed instead that it would benefit large, foreign-owned corporate farms at the expense of small family farms.<sup>46</sup>

Governor Jay Nixon put the measure to a public vote on August 5, 2014,<sup>47</sup> where it passed by a margin of less than one percent.<sup>48</sup> Wes Shoemyer, a former member of the Missouri Senate,<sup>49</sup> petitioned for a recount of the votes under Missouri Revised Statutes Section 115.601, which provides that any "person whose position on a question was defeated by less than one-half of one percent of the votes cast on the question shall be allowed a recount."<sup>50</sup> On September 15, 2014, the Secretary of State's office confirmed that the amendment had been passed by a majority vote.<sup>51</sup> Mr. Shoemyer then filed an additional post-election challenge to the amendment with the Supreme Court of Missouri under Missouri Revised Statutes Section 115.557.<sup>52</sup>

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43. *Activity History for HJR 11*, *supra* note 38. The Missouri House of Representatives voted 132 to 25 in favor of the amendment and the Missouri Senate voted 28 to 6 in favor of the amendment. *Id.*

44. Intervenor Mo. Farmers Care Response Brief, *Shoemyer v. Kander*, 464 S.W.3d 171 (Mo. 2015) (en banc) (No. SC94516), 2015 WL 718363, at \*5–6.

45. Elizabeth Crisp, *Legislature Sends 'Right to Farm' to Missouri Voters*, ST. LOUIS POST-DISPATCH (May 14, 2013, 1:50 PM), [http://www.stltoday.com/news/local/govt-and-politics/legislature-sends-right-to-farm-to-missouri-voters/article\\_c9e4baa4-fd66-5fb4-adb6-d21f4375d5c2.html](http://www.stltoday.com/news/local/govt-and-politics/legislature-sends-right-to-farm-to-missouri-voters/article_c9e4baa4-fd66-5fb4-adb6-d21f4375d5c2.html).

46. Richard R. Oswald, *Missouri Amendment Could Hurt Family Farms*, ST. LOUIS POST-DISPATCH (Feb. 3, 2014, 3:00 PM), [http://www.stltoday.com/news/opinion/columns/missouri-amendment-could-hurt-family-farms/article\\_817e34b5-2913-5a3b-a7f6-b8c31d12e297.html](http://www.stltoday.com/news/opinion/columns/missouri-amendment-could-hurt-family-farms/article_817e34b5-2913-5a3b-a7f6-b8c31d12e297.html).

47. *Gov. Nixon Sets Election Dates for 2014 Ballot Measures*, *supra* note 5.

48. Intervenor Mo. Farmers Care Response Brief, *supra* note 44, at \*6.

49. SENATOR WES SHOEMYER, <http://www.senate.mo.gov/10info/members/mem18.htm> (last visited Jan. 11, 2016).

50. MO. REV. STAT. § 115.601 (Cum. Supp. 2013).

51. Aja J. Williams, *Recount Confirms Mo. Right to Farm Passage*, KSDK (Sept. 15, 2014, 10:41 PM), <http://www.ksdk.com/story/news/local/2014/09/15/missouri-right-to-farm-amendment-recount-passage/15700643/>.

52. *See* Plaintiffs' Brief in Support of Petition for Election Challenge, *Shoemyer v. Kander*, 464 S.W.3d 171 (Mo. 2015) (en banc) (No. SC94516), 2014 WL 7669492, at \*7.

## II. CHALLENGES TO MISSOURI CONSTITUTIONAL AMENDMENTS

Since 1875, the Missouri Constitution has given Missourians the power to directly adopt constitutional amendments proposed either by citizens (by “initiative”) or by the legislature.<sup>53</sup> Any such proposal may be enacted if approved in a statewide, majority-rule election.<sup>54</sup> These proposals and elections can be subject to judicial review,<sup>55</sup> though “[j]udicial intervention is not an appropriate substitute for the give and take of the political process.”<sup>56</sup> Chapters 115 and 116 of the Missouri Code govern this process.<sup>57</sup> They allow for procedural challenges specific to constitutional amendments “by initiative,” as well as broader procedural challenges for both types of amendments. This Part will discuss the procedural challenges available under Missouri statutes, the substantive challenges available constitutionally, and the application of these challenges to the right-to-farm amendment.

### A. *Procedural Challenges Specific to Constitutional Amendments by Initiative*

Petitions to amend the constitution by initiative require signatures of eight percent of legal voters in two-thirds of Missouri congressional districts.<sup>58</sup> These petitions must meet certain requirements as to form, circulation, and submission in order to be valid.<sup>59</sup> There are two specific challenges that can overcome the successful submission of an initiative petition: signature withdrawal and a challenge to the sufficiency of the petition.<sup>60</sup> The first is available only to those who have signed the petition, and the second is available to any citizen.<sup>61</sup>

Under Missouri Revised Statutes Section 116.110, signers of the petition may withdraw their signatures before the petition is submitted by filing a

53. See MO. CONST. art. III, §§ 49–53; *id.* at art. XII, §§ 2(a)–(b).

54. *Id.* at art. III, § 52(b); *id.* at art. XII, § 2(b). For an excellent description and analysis of initiative petitions in general in Missouri, see Nicholas R. Theodore, Comment, *We the People: A Needed Reform of State Initiative and Referendum Procedures*, 78 MO. L. REV. 1401, 1416 (2013).

55. *United Gamefowl Breeders Ass’n of Mo. v. Nixon*, 19 S.W.3d 137, 139 (Mo. 2000) (en banc).

56. *State ex rel. Humane Soc’y of Mo. v. Beetem*, 317 S.W.3d 669, 674 (Mo. Ct. App. 2010).

57. “This chapter shall apply to elections on statewide ballot measures. The election procedures contained in chapter 115 shall apply to elections on statewide ballot measures, except to the extent that the provisions of chapter 116 directly conflict, in which case chapter 116 shall prevail . . .” MO. REV. STAT. § 116.020 (2000).

58. See MO. CONST. art. III, § 50.

59. See, e.g., MO. REV. STAT. § 116.050; MO. ANN. STAT. §§ 116.040, .080, .332 (West 2016); *Mo. Roundtable for Life v. Carnahan*, 676 F.3d 665 (8th Cir. 2012).

60. MO. REV. STAT. § 116.110, .200.

61. *Id.*

statement with the Missouri Secretary of State.<sup>62</sup> After the petition has been submitted, however, withdrawal based on a changed opinion will not render a petition ineffective.<sup>63</sup> In *Rekart v. Kirkpatrick*, the Supreme Court of Missouri reasoned that petition signatures merely place proposed amendments before voters;<sup>64</sup> they do not signify support for the ultimate proposition.<sup>65</sup> Signors who have withdrawn support for the proposed amendment may simply vote against its adoption at election time.<sup>66</sup> After submission to the secretary of state, signatures may only be withdrawn on grounds of fraud, deceit, misrepresentation, duress, or similar allegations.<sup>67</sup>

Such grounds, as well as any technical deficiency, would also support a challenge to the petition as being otherwise “insufficient.”<sup>68</sup> Under Missouri Revised Statutes Section 116.200, any citizen may challenge the secretary of state’s determination that a petition is sufficient or insufficient.<sup>69</sup> This action must be filed within ten days of the secretary’s decision.<sup>70</sup> If the court decides that the petition is sufficient, the secretary of state must certify it as sufficient.<sup>71</sup> If the court decides the petition is not sufficient, it will enjoin the secretary from certifying the petition and enjoin “all other officers from printing the measure on the ballot.”<sup>72</sup> Any party may then appeal the court’s decision but must do so within ten days.<sup>73</sup>

#### *B. Procedural Challenges Available for Both Kinds of Constitutional Amendments*

Citizens may make the following challenges to a proposed amendment whether it was submitted by initiative, as described above, or by the legislature, whose proposed amendments require a simple majority vote by the Gen-

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62. *Id.* § 116.110. This statement must identify the signor’s name and address and the name of the petition signed. *Id.*

63. *Rekart v. Kirkpatrick*, 639 S.W.2d 606, 609 (Mo. 1982) (en banc).

64. *Id.*

65. *Id.*

66. *Id.* (“An individual’s signature on an initiative petition serves only to secure placement of a proposition before the voters; it does not foreclose the signatory’s right to vote his conscience for or against the proposition when it appears on a ballot.”)

67. *See* MO. REV. STAT. § 116.090 (Cum. Supp. 2013) (providing for penalties of those who falsify signatures); *Rekart*, 639 S.W.2d at 609.

68. MO. REV. STAT. § 116.200 (2000).

69. *Id.*; *see also* State *ex rel.* Halliburton v. Roach, 130 S.W. 689 (Mo. 1910) (discussing the secretary of state’s authority and role in this manner as purely ministerial, with no discretion).

70. § 116.200.3.

71. *Id.* § 116.200.1.

72. *Id.* § 116.200.2.

73. *Id.* § 116.200.3.

eral Assembly.<sup>74</sup> Missouri Revised Statutes Chapter 116 provides for one challenge specific to proposed constitutional amendments, and the remaining challenges are general challenge provisions applicable to all elections, found in Chapter 115.<sup>75</sup>

### 1. Pre-Election Ballot Title and Fiscal Note Challenges

Within ten days after the secretary's certification of a proposed constitutional amendment, any citizen may challenge the amendment's fiscal note or ballot title for insufficiency or unfairness by bringing a Missouri Revised Statutes Section 116.190 action in Cole County.<sup>76</sup> The fiscal note of an amendment estimates the amendment's "cost or savings, if any, to state or local governmental entities."<sup>77</sup> The ballot title of an amendment is what is presented to voters on the ballot.<sup>78</sup> It is comprised of the summary statement and fiscal note summary – either of which is challengeable under Section 116.190.<sup>79</sup>

The summary statement is "a true and impartial statement of the purposes of the proposed measure in language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure."<sup>80</sup> The summary "should accurately reflect the legal and probable effects of the proposed initiative."<sup>81</sup> Similarly, the fiscal note summary "summarizes the fiscal note prepared for the measure in language neither argumentative nor likely to create prejudice for or against the proposed measure."<sup>82</sup> Neither summary may exceed fifty words.<sup>83</sup>

The legislature may, but is not required to, prepare the fiscal note, fiscal note summary, and summary statement.<sup>84</sup> In the event the legislature proposes a constitutional amendment without a fiscal note or fiscal note summary, the state auditor will prepare these portions.<sup>85</sup> If the legislature proposes an amendment without a summary statement, the secretary of state will prepare that portion.<sup>86</sup>

74. MO. CONST. art. XII, § 2(a).

75. *See* MO. REV. STAT. Chapters 115 and 116.

76. MO. ANN. STAT. § 116.190 (West 2016).

77. MO. REV. STAT. § 116.175 (Cum. Supp. 2013).

78. MO. REV. STAT. § 116.155 (2000).

79. MO. ANN. STAT. § 116.190.3.

80. MO. REV. STAT. § 116.155.2 (2000).

81. *Seay v. Jones*, 439 S.W.3d 881, 889 (Mo. Ct. App. 2014) (quoting *Archey v. Carnahan*, 373 S.W.3d 528, 532 (Mo. Ct. App. 2012)).

82. § 116.155.3.

83. *Id.* § 116.155.2–3.

84. *Id.* § 116.160, .170.

85. *Id.* § 116.170; *see also* MO. REV. STAT. § 116.175 (Cum. Supp. 2013) (providing for judicial review or review by the attorney general).

86. MO. REV. STAT. § 116.160 (2000) (subject to review by the attorney general). For a discussion of this process, see *Theodore*, *supra* note 54.

A challenge brought under Section 116.190 must state why the amendment's fiscal note or ballot title summaries are insufficient or unfair.<sup>87</sup> Missouri courts have defined these terms in recent opinions: “[T]he words insufficient and unfair . . . mean to inadequately and with bias, prejudice, deception and/or favoritism state the [consequences of the initiative].”<sup>88</sup> Ultimately, the test is whether voters will be “deceived or misled”<sup>89</sup> or, similarly, whether language on the ballot “likely creates prejudice for or against the measure.”<sup>90</sup>

The Section 116.190 challenge must also request a different fiscal note or ballot title summary.<sup>91</sup> The court is empowered to certify the existing language to the secretary, change and then certify the language to the secretary, or remand a challenged fiscal note and summary to the auditor for preparation of a new fiscal note and summary.<sup>92</sup> Either party may appeal the court's decision to the Supreme Court of Missouri within ten days.<sup>93</sup> If the court orders a change to the ballot title language, the state bears the costs of reprinting.<sup>94</sup>

Courts serve the “limited function” in ballot title challenge cases of only evaluating and correcting the ballot language.<sup>95</sup> Indeed, the Supreme Court of Missouri has emphasized how little this statute allows the court to do: while it “authorizes an action to challenge the ballot title . . . it does not authorize an injunction to stop the election. If the ballot title challenge is timely filed, the court is authorized to do no more than certify a correct ballot title.”<sup>96</sup> In these cases, “the [c]ourts are editors, not executioners.”<sup>97</sup>

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87. MO. ANN. STAT. § 116.190 (West 2016).

88. *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. Ct. App. 2006) (alterations in original) (quoting *Hancock v. Sec’y of State*, 885 S.W.2d 42, 49 (Mo. Ct. App. 1994)). Note, however, that although this quote describes insufficient *and* unfair “the proper consideration is whether the ballot title is ‘insufficient *or* unfair.’” *Seay v. Jones*, 439 S.W.3d 881, 888 n.4 (Mo. Ct. App. 2014) (emphasis added) (quoting *Mo. Mun. League v. Carnahan*, 364 S.W.3d 548, 552 n.6 (Mo. Ct. App. 2011)).

89. *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. 1984) (en banc).

90. *Prentzler v. Carnahan*, 366 S.W.3d 557 (Mo. Ct. App. 2012) (quoting *State ex rel. Humane Soc’y of Mo. v. Beetem*, 317 S.W.3d 669, 674 (Mo. Ct. App. 2010)).

91. § 116.190.3.

92. *Id.* § 116.190.4. This statute was recently challenged as unconstitutional on the grounds that the statute gives the courts legislative power. *Dotson v. Kander*, 435 S.W.3d 643 (Mo. 2014) (en banc). In *Dotson*, the appellants contended that the statute violates the separation of powers doctrine by authorizing the judiciary to redraft legislation as a remedy. Opening Brief of Appellants Dotson and Morgan, *Dotson*, 435 S.W.3d 643 (No. SC94293), 2014 WL 3597956, at \*38.

93. § 116.190.4.

94. MO. REV. STAT. § 116.195 (2000).

95. *Prentzler*, 366 S.W.3d at 557 (quoting *Beetem*, 317 S.W.3d at 674).

96. *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 829 (Mo. 1990) (en banc); see Intervenor Mo. Farmers Care Response Brief, *supra* note 44, at \*11–12.

And this is if the courts even reach the challenge on the merits. Ballot title and fiscal note challenges have strict statutory limitations.<sup>98</sup> In *Knight v. Carnahan*, for example, Missouri citizens challenged the fiscal note and fiscal note summary of a ballot title, arguing that it did not fully account for and inform voters of revenue the state would lose under a proposed measure brought by initiative.<sup>99</sup> The secretary of state had certified the ballot title in February 2008 and then certified the sufficiency of the initiative petition in August 2008.<sup>100</sup> The citizens filed their challenge within ten days of the August initiative petition's certification, but the trial court dismissed the action as untimely.<sup>101</sup> The citizens appealed, alleging that their challenge was brought as to the sufficiency of the petition under Section 116.200.<sup>102</sup>

The Missouri Court of Appeals for the Western District held that because the citizens were challenging the sufficiency and fairness of the fiscal note and summary, their action was subject to the statutory limitation of ten days after the official ballot title was certified, rather than ten days after the general sufficiency of the petition was certified.<sup>103</sup> The court reasoned:

In section 116.190, the legislature provided a specific means and a specific remedy for challenges to the fiscal note summary—as well as a specific deadline. It is axiomatic that where two statutes address the same subject matter and there is a necessary repugnance, the specific controls over the general.<sup>104</sup>

Thus, the court affirmed the trial court's dismissal of the action, holding that the requirements of the specific statutory challenge controlled over the requirements of the more general challenge.<sup>105</sup>

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97. Thomas Rutherford, *The People Drunk or the People Sober? Direct Democracy Meets the Supreme Court of Florida*, 15 ST. THOMAS L. REV. 61, 171 (2002).

98. *See, e.g.*, § 116.190.

99. 282 S.W.3d 9, 18–19 (Mo. Ct. App. 2009).

100. *Id.* at 20.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

[U]nder the principle of *lex specialis derogat legi generali*, section 116.190.1's specific deadline would control. Correspondingly, we must presume that the legislature acts with purpose and does not insert idle verbiage into a statute. Here the legislature provided a deadline in 116.190.1 for pre-election challenges to the fiscal note summary; we do not read its language as superfluous. Consequently, Appellants' challenge to the fiscal note summary was time-barred . . . .

*Id.* at 20–21 (citing *Civil Serv. Comm'n of City of St. Louis v. Members of Bd. of Aldermen of City of St. Louis*, 92 S.W.3d 785, 788 (Mo. 2003) (en banc)).

The legislature made a similar rule of construction explicit regarding Chapter 115 challenges, which apply to general elections.<sup>106</sup> Chapter 116 provides that “[t]he election procedures contained in chapter 115 shall apply to elections on statewide ballot measures, except to the extent that the provisions of chapter 116 directly conflict, in which case chapter 116 shall prevail . . . .”<sup>107</sup> Thus, if Chapter 115 and Chapter 116 challenges conflict, the Chapter 116 provision will control.

## 2. Post-Election Irregularity Challenges

Unlike pre-election challenges, courts will not strike an already-enacted amendment down “upon a mere technicality.”<sup>108</sup> As mentioned above, Chapter 115 deals with general election procedure, and it currently provides two post-election remedies: a recount and a new election.<sup>109</sup> Unless it is a very close election, these challenges must allege some level of irregularity in the election process.

Missouri Revised Statutes Section 115.583 authorizes courts to order a recount upon “a prima facie showing of irregularities which place the result of any contested election in doubt.”<sup>110</sup> This challenge may be brought by one or more voters registered where the contested election was held,<sup>111</sup> by any candidate for election to any office,<sup>112</sup> or by the election authority.<sup>113</sup>

106. MO. REV. STAT. § 115.001 (2000) (the chapter is known as the “Comprehensive Election Act of 1977”).

107. MO. REV. STAT. § 116.020 (2000); Intervenor Mo. Farmers Care Response Brief, *supra* note 44, at \*10.

108. *Barnes v. Bailey*, 706 S.W.2d 25, 28 (Mo. 1986) (en banc). *See also* 16 AM. JUR. 2D *Constitutional Law* § 41 (“Although the procedure outlined in a state’s constitution for the adoption of a constitutional amendment is mandatory and must be followed, the courts are reluctant to declare a constitutional amendment which has been adopted by the people invalid on technical grounds. Thus, if a proposed constitutional amendment is published, submitted to a vote of the people, and adopted without any question having been raised prior to the election as to the method by which the amendment gets before them, a favorable vote by the people will cure defects in the form of the submission. The test for determining whether technical defects will invalidate an otherwise valid amendment is whether the cumulative effect of the technical defects is harmless or fatal to the ballot or amendment.”).

109. *Landwersiek v. Dunivan*, 147 S.W.3d 141, 149–50 (Mo. Ct. App. 2004); *Bd. of Election Comm’rs of St. Louis Cty. v. Knipp*, 784 S.W.2d 797, 798 (Mo. 1990) (en banc) (“The election law provides two remedies in an election contest when irregularities are shown: Section 115.583, RSMo 1986, permits the circuit court to order a recount; Section 115.593, RSMo 1986, authorizes the circuit court to order a new election.”).

110. § 115.583.

111. *Id.* § 115.553.2.

112. *Id.* § 115.553.1.

113. *Id.* § 115.600. The election authority is only permitted to seek recount, not a new election. *Knipp*, 784 S.W.2d at 798.



Alternatively, Missouri Revised Statutes Section 115.601 allows a person who supported a measure that was defeated in an election to request a recount of all of the votes on that measure.<sup>114</sup> This challenge may only be brought when the margin of defeat was less than one percent, allowing for one additional count of the votes.<sup>115</sup>

The second, more drastic challenge for statewide constitutional amendment elections under Chapter 115 allows a voter to contest the result of any election on any question by alleging “irregularities.”<sup>116</sup> This election contest must be filed directly in the Supreme Court of Missouri within thirty days of the official announcement of the election’s result.<sup>117</sup> The Supreme Court of Missouri is empowered under Section 115.593 to order a new election.<sup>118</sup> It will do so if there are “irregularities of sufficient magnitude to cast doubt on the validity of the initial election.”<sup>119</sup>

But the term “irregularity” in this statute is not defined, nor have courts definitively interpreted it.<sup>120</sup> Existing Missouri precedent has only ever found the “violation of an election statute”<sup>121</sup> to be an irregularity for purposes of an election contest, reasoning that “following the legislature’s dictates would be regular and deviation irregular.”<sup>122</sup> Thus, while the term “irregularities” refers to procedural problems, and not the substantive language of a proposed measure,<sup>123</sup> these irregularities must be “more than petty procedural infirmi-

114. MO. REV. STAT. § 115.601 (Cum. Supp. 2013).

115. *Id.*

116. MO. REV. STAT. § 115.553 (2000).

117. “[A]ll contests to the results of elections on constitutional amendments, on state statutes submitted or referred to the voters, and on questions relating to the retention of appellate and circuit judges subject to article V, section 25 of the state constitution shall be heard and determined by the supreme court.” *Id.* § 115.555; *see also id.* § 115.557. This is as opposed to primary election contests, which are brought in circuit court under other sections. *Id.* § 115.529; MO. REV. STAT. § 115.531 (Cum. Supp. 2013).

118. MO. REV. STAT. § 115.593 (2000). As are all Missouri courts. *Id.*

119. *Id.*; *see also id.* § 115.553.

120. *Gerrard v. Bd. of Election Comm’rs*, 913 S.W.2d 88, 89 (Mo. Ct. App. 1995).

121. *Id.*; *see also Marre v. Reed*, 775 S.W.2d 951 (Mo. 1989) (en banc); *Eversole v. Wood*, 754 S.W.2d 27 (Mo. Ct. App. 1988); *Gasconade R–III Sch. Dist. v. Williams*, 641 S.W.2d 444 (Mo. Ct. App. 1982); *Clark v. Trenton*, 591 S.W.2d 257 (Mo. Ct. App. 1979).

122. *Gerrard*, 913 S.W.2d at 90; *see also* Brief of the State, *Dotson v. Kander*, 464 S.W.3d 190 (Mo. 2015) (en banc) (No. SC94492), 2014 WL 7642036, at \*15 (“The term ‘irregularity’ - which is never used in chapter 116 but used several times in chapter 115 - always refers to problems in the process, and not in the substantive provisions under consideration (or the ballot title for that matter).”).

123. *See supra* note 120 and accompanying text.

ties.”<sup>124</sup> Furthermore, the court must be “firmly convinced” that these irregularities actually affected the outcome of the election.<sup>125</sup>

Indeed, a new election is a drastic remedy and is “to be used sparingly.”<sup>126</sup> Unlike the recount, which affects the “result” of an election – that is, the official announcement of the outcome<sup>127</sup> – a new election “tosses aside the aggregate of the citizens’ votes, both those properly and improperly cast, and for that reason, a new election remedy is appropriate where the validity of the *entire* election is under suspicion, not simply the *result* of the election.”<sup>128</sup>

At present, while election contests have been successfully brought for local elections,<sup>129</sup> the Supreme Court of Missouri has never ordered a new election for state-wide election contests, such as for a constitutional amendment or statute referred to voters.<sup>130</sup>

124. *Barks v. Turnbeau*, 573 S.W.2d 677, 682 (Mo. Ct. App. 1978) (“[Absentee voting irregularities were] more than petty procedural infirmities but abuses of the election law which cannot be ignored. . . . In this case there are just too many instances of actions dissonant with the directives of the ‘Comprehensive Election Act’ to be disregarded or considered immaterial to the fundamental purposes of the Act.”).

125. *Gerrard*, 913 S.W.2d at 90 (citing *Bd. of Election Comm’rs v. Knipp*, 784 S.W.2d 797, 798 (Mo. 1990) (en banc)).

126. *Id.* See also *Landwersiek v. Dunivan*, 147 S.W.3d 141, 149–50 (Mo. Ct. App. 2004); *Mickels v. Henderson*, 642 S.W.2d 661, 663 (Mo. Ct. App. 1982) (“[E]lection irregularities seldom result in a new election as there are other provisions available to punish and deter those who intentionally and purposefully tamper with the election process.”); *Turnbeau*, 573 S.W.2d at 681 (“[T]he decision to overturn an election and thereby disenfranchise the voters should not be taken lightly.”).

127. *Landwersiek*, 147 S.W.3d at 149–50 (“The term ‘result’ as used in section 115.583 refers to the official announcement of the winning candidate and not the *conduct* of the election.”).

128. *Knipp*, 784 S.W.2d at 799 (citing *Nichols v. Reorganized Sch. Dist. No. 1 of Laclede Cty.*, 364 S.W.2d 9, 13 (Mo. 1963) (en banc) (distinguishing between validity of election as a whole and the legality of individual ballots or category of votes). *But see* *Marre v. Reed*, 775 S.W.2d 951, 954 (Mo. 1989) (en banc) (“The latter section [of 115.583] declares that ‘[w]here the issue is drawn over the validity of certain votes cast, a *prima facie* case is made if the validity of a number of votes equal to or greater than the margin of defeat is placed in doubt.’ Without question the legislature intended that when the validity of a number of votes equal to or greater than the margin of defeat is placed in doubt, then the election result is cast in doubt and a *prima facie* case is made justifying a recount under § 115.583. By the same token such finding constitutes ‘irregularities of sufficient magnitude to cast doubt on the validity of the initial election’ justifying a new election under § 115.593. Both statutes require that a showing of irregularities place the result of the election *in doubt*. These statutes, *in pari materia*, are clearly in harmony and readily bespeak the showing necessary to justify the remedy authorized therein.”).

129. See, e.g., *Landwersiek*, 147 S.W.3d at 149–50.

130. MO. REV. STAT. § 115.555 (2000).

### 3. New Interpretations of these Rules: *Dotson v. Kander*

In 2014, the Supreme Court of Missouri's opinion in *Dotson v. Kander* suggested that these strict statutory provisions might be open to a more liberal construction.<sup>131</sup> Samuel Dotson, a Missouri citizen, brought a ballot title challenge to a legislatively-referred constitutional amendment that was put on the same August 2014 ballot as the right-to-farm amendment.<sup>132</sup> He brought this challenge in mid-June, approximately six weeks before the election.<sup>133</sup> The trial court dismissed the challenge as moot because under Missouri Revised Statutes Section 115.125.2, "[n]o court shall have the authority to order an individual or issue be placed on the ballot less than six weeks before the date of the election."<sup>134</sup> In that case, the trial court entered its judgment a week into the six-week period.<sup>135</sup>

On appeal, while the Supreme Court of Missouri affirmed that it was not empowered to make any changes to the ballot title, rendering the claim moot, it opened the door to possible post-election ballot title challenges.<sup>136</sup> It dismissed Dotson's concern that the trial court's interpretation would totally foreclose judicial review of ballot titles, reasoning:

This concern does not justify abandoning a settled construction of this provision, *particularly in light of the fact that judicial review of a claim that a given ballot title was unfair or insufficient (when not pre-*

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131. 435 S.W.3d 643, 645 (Mo. 2014) (en banc).

132. *Id.* at 644.

133. *Id.*

134. *Id.* (quoting MO. REV. STAT. § 115.125.2 (Cum. Supp. 2013)).

The legislature's decision to establish a 'bright line' rule prohibiting court-ordered changes to the ballot within six weeks of an election was not arbitrary. It coincides with the printing and availability of absentee ballots, which is to begin six weeks prior to an election. In addition, overseas military ballots are to be printed and made available 45 days before an election.

If ballot titles are modified after the six-week pre-election time frame, local election authorities would have to reprint ballots. Also, absentee and overseas military voters would be voting on a different ballot title than in-person voters. Further, a candidate is not permitted to withdraw after six weeks before the election, nor will a disqualified candidate's name be removed from a ballot outside the same time frame.

*Id.* at 645 (citations omitted).

135. *Id.* at 644 ("[T]his six-week period prior to the August 5 election ended on June 24, a date that already had passed when the trial court entered its judgment on July 1.").

136. *Id.*

*viously litigated and finally determined) is available in the context of an election contest should the proposal be adopted.*<sup>137</sup>

Indeed, Dotson subsequently brought a post-election challenge to the ballot title of the constitutional amendment, which was approved by voters in August 2014.<sup>138</sup> A similar challenge has been brought against the right-to-farm amendment, which will be discussed in Part II.D.

In Dotson's post-election ballot title challenge, the Supreme Court of Missouri explicitly confirmed what it had only intimated before: that ballot titles may be challenged post-election.<sup>139</sup> For such a challenge, the vote will only be overturned if there is an election irregularity of the kind discussed in Part II.B.2. Although the court did hear Dotson's claim on the merits, it ultimately did not find that his claim met this standard.<sup>140</sup> In Dotson's case, the court held that the ballot title was sufficient and fair, with no election irregularity and no new election called for.<sup>141</sup>

By retaining the same standard applied to other post-election challenges – that of “irregularities of sufficient magnitude to cast doubt on the validity of the election” – most post-election ballot title challenges will likely go the way of *Dotson* and be upheld. But the court's opinion in *Dotson* is an open invitation for a disgruntled voter to attempt to overturn any measure when it doesn't go his or her way. In the words of Judge Laura Denvir Stith, it also “invites sandbagging – waiting to see if a measure passes and only challenging the ballot title if the measure does pass, when it is too late to correct the ballot title.”<sup>142</sup> It seems to create more problems than it might address, as will be discussed in Part IV.

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137. *Id.* at 645 (emphasis added) (citing MO. REV. STAT. § 115.555 (2000); *State ex rel. Brown v. Shaw*, 129 S.W.3d 372, 374 n.2 (Mo. 2004) (en banc) (“After the six-week deadline of section 115.125.2, judicial relief is limited to an election contest.”)).

138. *Docket Summaries*, SUP. CT. MO. (Feb. 25, 2015), <http://www.courts.mo.gov/SUP/index.nsf/fe8feff4659e0b7b8625699f0079eddf/2a7a6f05e839fc0d86257dab006f4387?OpenDocument>.

139. *See supra* note 137 and accompanying text.

140. *Dotson v. Kander*, 464 S.W.3d 190, 199 (Mo. 2015) (en banc).

141. *Id.* Judge Teitelman would have called for a new election. *Id.* at 215–16 (Teitelman, J., dissenting in part and concurring in part).

142. *Shoemyer v. Mo. Sec'y of State*, 464 S.W.3d 171, 176 (Mo. 2015) (en banc) (Stith, J., dissenting).

*C. Substantive Challenges to Missouri Legislatively-Referred  
Constitutional Amendments*

Beyond procedural challenges to constitutional amendment elections and enactments, amendments can also be challenged based on content.<sup>143</sup> Such substantive challenges are typically brought post-election, as will be discussed below.

1. Pre-Election Substantive Challenges

While Missouri provides strict procedural rules and challenges for constitutional amendments before their enactment, there is little authority for the *substantive*, pre-enactment judicial review of a constitutional amendment's content.<sup>144</sup> In Missouri's seminal case on election law, *State ex rel. Halliburton v. Roach*, the Supreme Court of Missouri held that the secretary of state's authority to review initiative petitions did not include reviews for unconstitutionality.<sup>145</sup> Chapter 116 challenges relate to the legal sufficiency of a proposed constitutional amendment – and this legal sufficiency is used only in the sense of meeting legal procedural requirements.<sup>146</sup> Similarly, judicial review under a Chapter 115 election contest evaluates “irregularity,” or problems in the *process*, not problems in the constitutionality of the substantive proposed provision.<sup>147</sup> As the court stated in *Buchanan v. Kirkpatrick*: “[A]t no place in either the Missouri Constitution or in the implementing statutes is any court granted the power to enjoin an amendment from being placed on the ballot upon the ground that it would be unconstitutional if passed and adopted by the voters.”<sup>148</sup>

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143. See *infra* Part II.C.1.

144. These might be brought as declaratory judgment petitions. *City of Kan. City v. Chastain*, 420 S.W.3d 550 (Mo. 2014) (en banc). Or perhaps writs of prohibition or mandamus. *State ex rel. City of El Dorado Springs v. Holman*, 363 S.W.2d 552 (Mo. 1962) (en banc).

145. *State ex rel. Halliburton v. Roach*, 130 S.W. 689, 696 (Mo. 1910).

146. See *id.* (Graves, J., concurring) (describing the secretary of state's job as “ministerial,” that is, without discretion, so that the secretary of state does not have the discretion to, for example, evaluate that substance of the provision); Theodore, *supra* note 54.

147. See MO. REV. STAT. § 115.583, .593 (2000); see also Brief of the State, *supra* note 122, at \*15.

148. 615 S.W.2d 6, 11–12 (Mo. 1981) (en banc). See also *State v. Burns*, 172 S.W.2d 259, 265–66 (Mo. 1943) (holding that available challenges to a *proposed* amendment will not reach any substantive defects in the proposed amendment, but are preliminary and go only to the procedural errors in proposing it); *Moore v. Brown*, 165 S.W.2d 657, 660 (Mo. 1942) (en banc).

Thus, it is entirely possible for states to vote on and pass “unconstitutional” constitutional amendments.<sup>149</sup> Under the doctrine of preemption, the state constitutional amendment must still comply with the federal constitution.<sup>150</sup> But justiciability doctrines make prospective review of a state constitutional amendment problematic. Teresa Stanton Collett, a professor at the University of St. Thomas School of Law wrote:

Evaluation of the constitutionality of an amendment based on the likely consequences of its enactment . . . requires courts to consider all possible applications and weigh their relative merits. Such a process requires a much broader base of evidence and is inherently speculative; as a result, it is more likely to provoke claims of judicial activism or politicization.<sup>151</sup>

Therefore, substantive challenges to the constitutional amendment before its adoption are not typically viable. The Supreme Court of Missouri said it this way: “Courts do not sit in judgment on the wisdom or folly of proposals. Neither will courts give advisory opinions as to whether a particular proposal would, if adopted, violate some superseding fundamental law, such as the U.S. Constitution.”<sup>152</sup>

But Article I, Section 3 of the Missouri Constitution *only* permits citizens to amend the constitution on the condition that “such change be not repugnant to the Constitution of the United States,”<sup>153</sup> and Missouri *has* allowed an exception to the general rule against pre-election substantive challenges.<sup>154</sup> In *Knight v. Carnahan*, the Missouri Court of Appeals for the Western District addressed “the propriety of the trial court’s pre-election dismissal of substantive constitutional claims as an issue capable of repetition yet avoiding review.”<sup>155</sup> It held that Missouri courts may review allegations that a proposed constitutional amendment is “facially unconstitutional.”<sup>156</sup>

149. Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L.J. 327, 327–31 (2010).

150. Article VI of the U.S. Constitution mandates that it “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI.

151. Collett, *supra* note 149, at 342.

152. *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824 (Mo. 1990) (en banc). *See also* *Cures Without Cloning v. Pund*, 259 S.W.3d 76 (Mo. Ct. App. 2008) (regarding free speech and equal protection challenges to a ballot’s summary statement, brought under both state and federal constitutions, where the court held that constitutional claims were not ripe for consideration), *holding modified by* *Seay v. Jones*, 439 S.W.3d 881 (Mo. Ct. App. 2014).

153. MO. CONST. art. I, § 3.

154. *Knight v. Carnahan*, 282 S.W.3d 9, 21–22 (Mo. Ct. App. 2009).

155. *Id.* at 21.

156. *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. 1984) (en banc).

This means, “[T]he constitutional violation in a proposed measure is so obvious as to constitute a matter of form.”<sup>157</sup> But this is a very high standard to meet. Precedent suggests that if the asserted unconstitutionality is facially apparent, it will not be “debatable.”<sup>158</sup> Missouri courts, while holding that this is a possible claim, have never upheld such a claim.

## 2. Post-election Substantive Challenges

Post-election substantive challenges,<sup>159</sup> on the other hand, have occasionally met with success.<sup>160</sup> For example, in 1999, the U.S. Court of Appeals for the Eighth Circuit struck one Missouri constitutional amendment in its entirety,<sup>161</sup> holding that it violated the Free Speech Clause of the First Amendment, the Speech and Debate Clause, the Qualifications Clause, and Article V of the U.S. Constitution.<sup>162</sup> Still, post-election substantive challenges also carry a heavy burden. If “the people have demonstrated their will” by adopting the amendment, courts will “seek to uphold it if possible.”<sup>163</sup>

In reviewing a constitutional challenge to a constitutional amendment, courts will uphold the amendment “over a provision of the constitution or earlier amendment inconsistent therewith, since an amendment to the constitution becomes a part of the fundamental law, and its operation and effect cannot be limited or controlled by previous constitutions or laws that may be in conflict with it.”<sup>164</sup> The courts will seek to “give effect, if at all possible, to the will of the people in passing the amendments.”<sup>165</sup>

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157. *Carnahan*, 282 S.W.3d at 21 (citing *State ex rel. Hazelwood Yellow Ribbon Comm. v. Klos*, 35 S.W.3d 457, 468–69 (Mo. Ct. App. 2000)).

158. *Carnahan*, 282 S.W.3d at 22.

159. These might be brought as § 1983 claims or declaratory judgment claims. *Gralike v. Cook*, 191 F.3d 911 (8th Cir. 1999) (prospective congressional candidate brought § 1983 action against Missouri Secretary of State, challenging constitutionality of initiative amending Missouri Constitution), *aff’d*, 531 U.S. 510 (2001).

160. *See, e.g.*, *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100 (Mo. 1997) (en banc); *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 17 (Mo. 1981) (en banc); (Rendlen, J., dissenting); *Household Finance Corp. v. Shaffner*, 203 S.W.2d 734 (Mo. 1947) (en banc).

161. *Gralike*, 191 F.3d at 911 (holding that the Court of Appeals would not sever the unconstitutional portions but strike the amendment in its entirety, as severance would require micromanagement entangling the Court of Appeals in state law issues).

162. *See id.*; *see also* *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999).

163. *Buchanan*, 615 S.W.2d at 12.

164. *State ex rel. Bd. of Fund Comm’rs v. Holman*, 296 S.W.2d 482, 491 (Mo. 1956) (en banc).

165. *Barnes v. Bailey*, 706 S.W.2d 25, 28 (Mo. 1986) (en banc).

#### D. Challenges to the Right-to-Farm Amendment

This broad framework for election contests and other challenges to legislatively-referred constitutional amendments was applicable to the right-to-farm amendment before and after its enactment. As a legislatively-referred constitutional amendment, it was not susceptible to the challenges for initiative petitions.<sup>166</sup> But the only pre-election challenge available to the amendment, the ballot title challenge under Missouri Revised Statutes Section 115.190, was not brought either. Instead, because of the narrow margin of defeat in the election, Wes Shoemyer sought a recount under Section 115.601.<sup>167</sup> When the recount confirmed the amendment's enactment, Shoemyer, along with others, filed a post-election challenge seeking a new election.<sup>168</sup> In the wake of *Dotson*, decided only a few months earlier, Shoemyer alleged that the Supreme Court of Missouri had jurisdiction to hear a post-election challenge to a constitutional amendment's ballot title.<sup>169</sup> This raised the novel issue before the Supreme Court of Missouri whether this kind of review, without any pre-election action as in *Dotson*, was permissible.<sup>170</sup>

The ballot title for the right-to-farm amendment read: "Shall the Missouri Constitution be amended to ensure that the right of Missouri citizens to engage in agricultural production and ranching practices shall not be infringed?"<sup>171</sup> Shoemyer argued that the summary statement of the amendment's ballot title was "unfair, insufficient, deceptive, and misleading" because it "omitted a significant limitation of the right to farm (legislation by local government) and incorrectly stated the class of persons who benefitted from the newly-created right."<sup>172</sup> This, Shoemyer alleged, "caused irregularities in the results"<sup>173</sup> of the election.<sup>174</sup>

Specifically, Shoemyer argued that the ballot title did not inform voters of the limitation on the right to farm contained in the amendment's language:<sup>175</sup> the right to farm would be "subject to . . . the powers, if any, conferred by article VI."<sup>176</sup> Shoemyer asserted that this omission misled voters

166. See *supra* Part II.A.

167. Intervenor Mo. Farmers Care Response Brief, *supra* note 44, at \*6.

168. Plaintiffs' Brief in Support of Petition for Election Challenge, *supra* note 52, at \*9.

169. *Id.* at \*7.

170. See Shoemyer v. Mo. Sec'y of State, 464 S.W.3d 171, 176 (Mo. 2015) (en banc) (Stith, J., dissenting).

171. Plaintiffs' Brief in Support of Petition for Election Challenge, *supra* note 52, at \*8.

172. *Id.* at \*13.

173. Curiously, this is the standard for demanding a *recount*, and not a new election. See *supra* notes 107 and 126 and accompanying text.

174. Plaintiffs' Brief in Support of Petition for Election Challenge, *supra* note 52, at \*13.

175. *Id.* at \*17.

176. MO. CONST. art. I, § 35.



“to believe that the right to farm would be protected from any infringement whatsoever . . . .”<sup>177</sup>

Additionally, he argued that the ballot title deceived voters by stating that the right-to-farm amendment would grant rights to Missouri citizens “when it actually provides rights only to ‘farmers and ranchers.’”<sup>178</sup> He cited political opponents of the amendment who suggested “the terms ‘farmers and ranchers’ are broad enough to include any entity that is engaging in farming or ranching in the state of Missouri regardless of their state or country of residency.”<sup>179</sup>

However, Shoemyer did not present evidence of any voter irregularities beyond the language of the ballot title and arguments about why it would fail under the pre-election standards.<sup>180</sup> The Supreme Court of Missouri held that the ballot title language was sufficient and fair and that there were no election irregularities, and held the results of the election and the validity of the provision.<sup>181</sup>

Having failed on procedural election challenges, the only other alternatives remaining for Dotson, or others opposing the amendment, would be substantive ones. Dotson’s petition for a new election included a constitutional challenge to Missouri Revised Statutes Section 115.593,<sup>182</sup> which might have an impact on the pending challenge to the right-to-farm amendment under that statute. In Shoemyer’s right-to-farm challenge, the State seemed to suggest that Section 115.555 is unconstitutional, which would only have the effect of upholding the election and nullifying the election contest.<sup>183</sup>

Aside from constitutional challenges to the election statutes, substantive challenges may be brought against the amendment’s content.<sup>184</sup> An affected citizen might challenge the right-to-farm amendment as violative of the Equal Protection Clause of the Fourteenth Amendment if, for example, farmers receive some privilege under this amendment that other classifications of people do not. However, under federal constitutional jurisprudence, this would receive rational-basis scrutiny and would likely fail.<sup>185</sup> Additionally, an affected citizen might challenge the right-to-farm amendment as violative

177. Plaintiffs’ Brief in Support of Petition for Election Challenge, *supra* note 52, at \*17.

178. *Id.*

179. *Id.* at \*18.

180. *See* Brief of the State, *supra* note 122, at \*18 (“The only supposed ‘evidence’ of irregularities submitted by the Plaintiffs was the bare summary statement of the ballot title.”).

181. *Shoemyer v. Mo. Sec’y of State*, 464 S.W.3d 171, 175 (Mo. 2015) (en banc).

182. Plaintiffs’ Brief in Support of Petition for Election Challenge, *supra* note 52, at \*26.

183. *Id.* at \*28 (“Contestees essentially argue that § 115.555 is unconstitutional as it applies to elections on Constitutional Amendments.”).

184. *City of Kan. City v. Chastain*, 420 S.W.3d 550, 554 (Mo. 2014) (en banc).

185. *Romer v. Evans*, 517 U.S. 620, 642 n.1 (1996).

of the Takings Clause if, for example, it allowed a farmer's property to create a constructive takings through nuisance.<sup>186</sup> This might be successful as applied to a certain situation, but would likely not result in the amendment's being stricken wholesale, given its broad language.

It seems that the right-to-farm amendment, having been upheld on all procedural challenges, is here to stay. It would likely not fail the kind of facial substantive challenge that would remove it from the constitution. And the Supreme Court of Missouri has affirmed on numerous occasions the authority of a state to "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."<sup>187</sup> The question then becomes how Missouri courts review challenges not *to* the amendment, but *arising* from it.

### III. HOW MISSOURI COURTS REVIEW CONSTITUTIONAL AMENDMENTS

The overarching rule of interpretation for a Missouri constitutional provision is that, while "every word employed in the constitution is to be expounded in its plain, obvious, and common-sense meaning,"<sup>188</sup> it "should never be construed to work confusion and mischief unless no other reasonable construction is possible."<sup>189</sup>

The Supreme Court of Missouri has established that its method of constitutional construction is essentially one of broad statutory construction. Constitutional provisions "are subject to the same rules of construction as other laws, except that constitutional provisions are given a broader construction due to their more permanent character."<sup>190</sup> Just as statutory interpretation looks to legislative intent, the court's analysis of constitutional amendments has emphasized the intent of the drafters: "[A] court must undertake to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted."<sup>191</sup>

There have been some recent debates, however, as to what this "broad statutory construction," coupled with deference to drafter-intent, looks like in

186. *See, e.g.*, *Bormann v. Bd. of Supervisors in & for Kossuth Cty.*, 584 N.W.2d 309 (Iowa 1998) (holding that nuisance immunity provision in agricultural land preservation statute was unconstitutional).

187. *See, e.g.*, *Mills v. Rogers*, 457 U.S. 291, 300 (1982); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

188. *Akin v. Mo. Gaming Comm'n*, 956 S.W.2d 261, 263 (Mo.1997) (en banc) (quoting *State ex inf. Dalton v. Dearing*, 263 S.W.2d 381, 385 (Mo. 1954) (en banc)).

189. *Theodoro v. Dep't of Liquor Control*, 527 S.W.2d 350, 353 (Mo. 1975) (en banc) (citing *State ex rel. Moore v. Tobermann*, 250 S.W.2d 701 (Mo. 1952) (en banc)).

190. *Neske v. City of St. Louis*, 218 S.W.3d 417, 421 (Mo. 2007) (en banc), *overruled on other grounds by King-Willmann v. Webster Groves Sch. Dist.*, 361 S.W.3d 414 (Mo. 2012) (en banc).

191. *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. 2002) (en banc).

practice. Missouri's first Constitution was drafted in 1820 and underwent a series of revisions in its first hundred years of existence.<sup>192</sup> The current Missouri Constitution is the result of a 1943–1944 constitutional convention and was formally adopted in 1945.<sup>193</sup> In *American Federation of Teachers v. Ledbetter*, the Supreme Court of Missouri construed a 1945 constitutional amendment protecting the right of teachers to meet and bargain collectively.<sup>194</sup> The court examined debates of the 1943–1944 constitutional convention, the “American history” of the particular term at issue, and the statutory interpretations of the term at the time it was adopted.<sup>195</sup> It reached the result that this constitutional right included a corresponding duty on the part of the *school board* to meet with teachers.<sup>196</sup>

For the purposes of interpreting state constitutional amendments submitted to popular vote *after* 1945,<sup>197</sup> Missouri seems to have adopted a similar constitutional analysis: “[T]he primary rule is to ‘give effect to the intent of the voters who adopted the Amendment’ by considering the plain and ordinary meaning of the word.”<sup>198</sup> The plain and ordinary meaning is “that meaning which the people commonly understood the words to have when the provision was adopted.”<sup>199</sup> To determine this, the court will look to the meaning found in the dictionary.<sup>200</sup>

The court has reasoned that it cannot determine voters’ intent “if a word has more than one dictionary definition that applies in the context of the provision.”<sup>201</sup> If there is “duplicity, indistinctness or uncertainty of meaning of an expression,” the constitutional amendment is ambiguous.<sup>202</sup> To resolve

192. See William F. Swindler, *Missouri Constitutions: History, Theory and Practice*, 23 MO. L. REV. 32 (1958).

193. William F. Swindler, *Missouri Constitutions: History, Theory and Practice (continued)*, FACULTY PUBLICATIONS, Paper 1617, 157 (1958), <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2632&context=facpubs>.

194. 387 S.W.3d 360, 366 (Mo. 2012) (en banc).

195. *Id.* at 364–64.

196. *Id.* at 367. However, the dissent to this opinion emphasized the amendment’s plain language and referred to previous interpretations of the constitutional provision as reaching an opposite result. *Id.* at 370 (Fisher, J., dissenting). The dissent argued that the principal opinion raised serious separation of power concerns, that it could not rely on changes to the term at issue that were enacted by statutes, and that it could not change terms “by judicial mandate based on a judicial philosophy that changes the meaning of a state constitutional provision over time.” *Id.*

197. This is when Missouri last held its constitutional convention. Swindler, *supra* note 192.

198. *Johnson v. State*, 366 S.W.3d 11, 25 (Mo. 2012) (en banc) (quoting *Keller v. Marion Cty. Ambulance Dist.*, 820 S.W.2d 301, 302 (Mo. 1991) (en banc)).

199. *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. 1983) (en banc).

200. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 902 (Mo. 2006) (en banc).

201. *Johnson*, 366 S.W.3d at 25.

202. *J.B. Vending Co. v. Dir. of Revenue*, 54 S.W.3d 183, 188 (Mo. 2001) (en banc) (quoting *Lehr v. Collier*, 909 S.W.2d 717, 721 (Mo. Ct. App. 1995)).

any ambiguity in a constitutional provision, the court will apply rules of statutory interpretation.<sup>203</sup> Ultimately, then, the interpretation of both the original constitutional text and post-1945 amendments are methodically the same, but one looks to the “drafters”’ intent, while the other looks to the “voters”’ intent. Both rely on plain and ordinary meaning, using dictionary definitions to determine intended meaning and, in cases of ambiguity, default to the canons of statutory construction.<sup>204</sup>

Finally, all state constitutional provisions are “‘preempted and have no effect’ to the extent they conflict with federal laws.”<sup>205</sup> They must therefore be interpreted to comply with, for example, the Equal Protection Clause, and all other provisions of the U.S. Constitution, and with all provisions of, for example, federal environmental regulations.

### A. *Probable Interpretations of the Right-to-Farm Amendment*

By understanding Missouri’s broad constitutional interpretory framework, one can make some reasonable conjectures about how Missouri courts might interpret the recently adopted right-to-farm amendment.

#### 1. “Agriculture”

As a preliminary matter, it must be determined what exactly the voters intended to protect when they enacted this language – or rather, what the courts will likely determine the voters intended to protect by this language.

The plain and ordinary meaning of “agriculture” is: “The science or art of cultivating soil, harvesting crops, and raising livestock.”<sup>206</sup> Typically, “agriculture” is understood as encompassing more than “farming.”<sup>207</sup> As stated in Black’s Law Dictionary: “[W]hile [agriculture] includes the preparation of soil, the planting of seeds, the raising and harvesting of crops, and all their incidents, it also includes gardening, horticulture,<sup>208</sup> viticulture,<sup>209</sup> dairying, poultry, bee raising, and ranching.”<sup>210</sup>

203. *Johnson*, 366 S.W.3d at 26.

204. *Howard v. City of Kan. City*, 332 S.W.3d 772, 787 (Mo. 2011) (en banc) (quoting *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. 2009) (en banc)).

205. *Johnson*, 366 S.W.3d at 26–27 (quoting *State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 148 (Mo. 2010) (en banc)).

206. *Agriculture*, BLACK’S LAW DICTIONARY 83 (10th ed. 2014).

207. 3 AM. JUR. 2D *Agriculture* § 1.

208. *Horticulture*, OXFORD ENGLISH DICTIONARY ONLINE (“The cultivation of a garden; the art or science of cultivating or managing gardens, including the growing of flowers, fruits, and vegetables.”).

209. *Viticulture*, OXFORD ENGLISH DICTIONARY ONLINE (“The cultivation of the vine; vine-growing” – i.e., to produce grapes and wine).

210. *Agriculture*, *supra* note 206; *see also* *St. Louis Rose Co. v. Unemployment Comp. Comm’n*, 159 S.W.2d 249 (Mo. 1941) (construing horticulture as agriculture).

Indeed, the Missouri legislature's definition of "agricultural products" has become increasingly inclusive. Missouri Revised Statutes Section 265.010, enacted in 1939 and last amended in 1949, deals with the regulation and marketing of agricultural products.<sup>211</sup> These are defined to "include horticultural, viticultural, dairy, bee, and any farm product."<sup>212</sup> In 1982, the legislature enacted Missouri Revised Statutes Section 537.295, the right-to-farm statute discussed above.<sup>213</sup> As used in that section, the term agricultural operation included "any facility used in the production or processing for commercial purposes of crops, livestock, swine, poultry, livestock products, swine products, or poultry products."<sup>214</sup> In 2013, the legislature enacted the most inclusive language yet, defining an "agricultural product" for purposes of urban agricultural zones in Missouri Revised Statutes Section 262.900 as:

[A]n agricultural, horticultural, viticultural, or vegetable product, growing of grapes that will be processed into wine, bees, honey, fish or other aquacultural product, planting seed, livestock, a livestock product, a forestry product, poultry or a poultry product, either in its natural or processed state, that has been produced, processed, or otherwise had value added to it in this state.<sup>215</sup>

Similarly, Title XVII of the Missouri Revised Statutes, "Agriculture and Animals," has come to include chapters on agritourism, apiaries, pesticides, seeds, stockyards, grain, poultry, livestock, and treated timber products.<sup>216</sup> Livestock includes not only cattle, swine, sheep, equine, goats, and poultry, but also "ostrich and emu, aquatic products . . . llamas, alpaca, buffalo, elk . . .<sup>217</sup> and exotic animals."<sup>218</sup>

The terms of the constitutional amendment, however, are narrower than general "agriculture" and protect only "[t]hat agriculture which provides food, energy, health benefits, and security."<sup>219</sup> For example, although greenhouses for the production and sale of roses and other flowers have been held to be agricultural in Missouri courts,<sup>220</sup> they probably would not be protected under this amendment.

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211. MO. REV. STAT. § 265.010 (2000).

212. *Id.*

213. MO. REV. STAT. § 537.295 (2000).

214. *Id.*

215. MO. ANN. STAT. § 262.900 (West 2016).

216. MO. STAT. tit. XVII, chs. 262, 264, 266, 276, 277, 280, and 281.

217. Elk are livestock insofar as they are "documented as obtained from a legal source and not from the wild and raised in confinement for human consumption or animal husbandry." MO. REV. STAT. § 277.020 (Cum. Supp. 2013).

218. *Id.*

219. MO. CONST. art. I, § 35.

220. *St. Louis Rose Co. v. Unemployment Comp. Comm'n*, 159 S.W.2d 249, 249, 250–51 (Mo 1941).

Crops that are grown for food and livestock, including fisheries, would obviously be protected under this amendment. This would include large-scale, confined animal feeding operations (“CAFOs”)<sup>221</sup> and also extend to those operations raising exotic animals or elk and buffalo for the purposes of human consumption. This might also include someone’s backyard garden that produces food, though as will be discussed below, there may be some economic contribution threshold before such an operation would be protected by this statute.

This probably does not include the procurement of food through hunting or gathering, as the statutory language and plain meaning of agriculture entails preparation and not just collection. That is, it would protect the raising of cattle and growing of crops, and not just the harvest of them. Therefore, an operation that hunts wild elk and sells their meat would not be included in this framework, but an operation that raises domesticated elk and sells their meat would likely be.<sup>222</sup>

## 2. “Farmers and Ranchers”

The plain and ordinary meaning of the term “farmer” is somewhat circular, referring most plainly to one who engages in farming.<sup>223</sup> Black’s Law Dictionary defines it specifically as “a person whose *business* is farming.”<sup>224</sup> Missouri’s statutory definitions related to the term “farmer” operate, unsurprisingly, on the assumption that a farmer is one who runs a farm.<sup>225</sup> Thus, “farm” is the term that requires more investigation here.

The Supreme Court of Missouri reasoned that one who produced farm products was a farmer.<sup>226</sup> Missouri Agricultural Statistics Services defines farms as places with \$1000 or more in annual sales of agricultural products.<sup>227</sup> However, Missouri Revised Statutes Section 288.034’s definition of

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221. *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 185 (Mo. Ct. App. 2012); *Bd. of Dirs. of Richland Twp. v. Kenoma, LLC*, 284 S.W.3d 672 (Mo. Ct. App. 2009).

222. MO. REV. STAT. § 277.020 (Cum. Supp. 2013).

223. *Farmer*, BLACK’S LAW DICTIONARY 723 (10th ed. 2014).

224. *Id.* (emphasis added).

225. MO. REV. STAT. §§ 150.030, 350.010 (2000); MO. REV. STAT. §§ 348.500, 288.034 (Cum. Supp. 2013).

226. *Kan. City v. Rosehill Gardens, Inc.*, 542 S.W.2d 776, 777 (Mo. 1976) (en banc) (“We have concluded that defendant is a ‘farmer’ and a producer of ‘farm products’ in growing products classified both as horticultural and floracultural [sic] as well as bedding plants. We see no logical reason why a definition of farm products should be limited to products that can be consumed by either human beings or animals.”), *overruled by Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907 (Mo. 1997) (en banc).

227. Mo. Econ. Research & Info. Ctr., *supra* note 21.

“agricultural labor” contemplates farms that are not operated for profit.<sup>228</sup> Ultimately, then, a farmer seems to be involved in introducing some sort of agricultural product to the market, whether or not the farm is operated for profit, and thus might include an individual’s backyard garden.<sup>229</sup>

On the other end of the spectrum, large corporations would probably be included as “farmers.” Missouri has a corporate farm statute that limits the ability of corporations to operate farms in some circumstances – but its exceptions are quite inclusive.<sup>230</sup> It allows “family farm corporations” or corporations incorporated for the purpose of owning and farming agricultural land, to farm so long as at least one-half of the stockholders in the company are members of a family related to each other within the third degree (including spouses), the family members own at least one-half of the stock, and one of the family members resides on or actively operates the farm.<sup>231</sup> It also allows “authorized farm corporations”: a corporation comprised of shareholders who are all “natural persons,” not further corporations or organizations, and which receives two thirds or more of its net income from farming.<sup>232</sup> Indeed, regardless of this statute, the broadness afforded to constitutional provisions might mean that this term includes any corporation that produces farm products.

Similarly, “ranchers” are, plainly, those who engage in ranching, and thus the term “ranching” requires more inquiry.<sup>233</sup> A ranch is typically understood as “a large farm or estate for breeding cattle, horses, or sheep.”<sup>234</sup> Missouri offers no real statutory guidance on who ranchers might be,<sup>235</sup> or on what “ranching” entails.

Opponents of the amendment expressed concern that the right to farm for “farmers and ranchers,” as opposed to “Missouri citizens,” would privilege foreign corporations who own or operate farms or ranches in Missouri.<sup>236</sup> At present, a Missouri statute limits foreign ownership of agricultur-

228. It defines agricultural labor as one of five different possibilities of working on “farms,” and only one possibility includes working “on a farm operated for profit.” MO. REV. STAT. § 288.034(12)(1)(a)(e) (Cum. Supp. 2013).

229. See Table 1. *Historical Highlights: 2012 and Earlier Census Years*, supra note 15. Indeed, a number of traditional farmers are turning to second, off-farm jobs. *Id.*

230. MO. REV. STAT. § 350.015 (Cum. Supp. 2013).

231. MO. REV. STAT. § 350.010(5) (2000).

232. *Id.* § 350.010(6).

233. *Ranch*, OXFORD ENGLISH DICTIONARY ONLINE.

234. *Id.*

235. Though some statutes apply to “farm or ranch” alike. MO. REV. STAT. §§ 135.679, 348.015, 578.005 (Cum. Supp. 2013). One Missouri case discussed a “wild game ranch.” *High Adventure Game Ranch, Inc. v. Dir. of Revenue*, 824 S.W.2d 905, 905 (Mo. 1992) (en banc).

236. See, e.g., Chris Kardish, *Missouri’s ‘Right-to-Farm’ Vote Isn’t as Simple as it Sounds*, GOVERNING (Aug. 1, 2014), <http://www.governing.com/topics/transportation-infrastructure/gov-right-to-farm-missouri-ballot.html>.

al land to one percent of the total agricultural acreage in the state.<sup>237</sup> Under this statute, a foreign business is one in which a controlling interest is owned by people who are not citizens or residents of the United States.<sup>238</sup> But while the statute only refers to ownership of land, it would prevent a foreign business from repurposing existing land to use agriculturally once that one percent limit is met.<sup>239</sup> This would seem a clear legislative infringement on the right of farmers and ranchers in Missouri. It is possible that a Missouri court might uphold the statute under the new right-to-farm amendment. In looking at the intent of voters, the court may consider the ballot title language describing the right of “Missouri citizens” to farm and ranch.<sup>240</sup> But this might not overcome the clear arguments the other way.

### 3. Duly Authorized Powers

Perhaps the most intriguing language of the amendment is its limitation that provides the right to farm is “subject to duly authorized powers, if any, conferred by Article VI of the Constitution of Missouri.”<sup>241</sup> The right-to-farm amendment is the only section in the Bill of Rights, and in the Missouri Constitution for that matter, that includes this limitation. It will most probably be interpreted to mean that the right to farm is subject to local government but not the legislature.

Article VI of the Constitution of Missouri establishes local government: counties, cities, and other municipal organizations.<sup>242</sup> Counties are classified as first-, second-, or third-class based on their property values.<sup>243</sup> Counties, cities, and other municipal organizations may enact local ordinances, but this

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237. MO. ANN. STAT. § 442.571 (West 2016). But a recent bill effectively creates a loophole to the one percent limitation, only requiring real estate transactions to be submitted to the director of the department of agriculture “if there is no completed Internal Revenue Service Form W-9 signed by the purchaser.” S. 12, 98th Gen. Assemb., Reg. Sess. (Mo. 2015) (amending § 442.571). In other words, foreign corporations can purchase agricultural land through American subsidiaries, circumventing regulation because state regulators’ approval is no longer necessary.

238. MO. REV. STAT. § 442.566(2), (5) (2000).

239. *Id.* § 442.591.

240. H.R.J. Res. Nos. 11 & 7, 97th Gen. Assemb., Reg. Sess. (Mo. 2013), <http://www.house.mo.gov/billtracking/bills131/billpdf/commit/HJR0011C.PDF>.

241. MO. CONST. art. I, § 35. For a legal analysis of this phrase, which was of great value to the analysis here, see David Cosgrove, *Legal Analysis of Missouri Right to Farm Constitutional Amendment 1 (HJ Res. Nos. 11 & 7)*, COSGROVE L. GROUP, LLC,

<http://cosgrovelawllc.com/legal-analysis-of-missouri-right-to-farm-constitutional-amendment-1-hj-res-nos-11-7/> (last visited Jan. 11, 2016).

242. MO. CONST. art. VI.

243. *See* MO. REV. STAT. § 48.010 (2000) (“[A]ssessed valuation’ shall mean the valuation of all real and personal property as determined and finally established by the state agency charged with the duty of equalizing assessments.”); MO. REV. STAT. § 48.020 (Cum. Supp. 2013).



power is limited by the legislature through the *Dillon* rule.<sup>244</sup> This rule was first stated in 1868 by Iowa's Supreme Court Chief Justice John Dillon,<sup>245</sup> and it essentially limits municipalities' power to act absent existing statutory authority.<sup>246</sup>

Current legislation restricts counties' abilities to enact ordinances regulating agricultural operations. For example, under Missouri Revised Statutes Section 64.620, second- and third-class counties are authorized to impose building restrictions, *excluding* farm buildings or structures.<sup>247</sup> Similar provisions are found in Missouri Revised Statutes Section 64.890, which exempt building and land-use restrictions of alternative counties from applying to "the raising of crops, livestock, orchards or forestry."<sup>248</sup> Additionally, Missouri Revised Statutes Section 49.650 gives first-class counties authority to adopt ordinances, including for nuisance abatement, but *excluding* agricultural property.<sup>249</sup> It also authorizes counties to enact ordinances for storm water control – but again excludes agricultural properties from this provision.<sup>250</sup> Finally, Section 49.650.5 forbids third-class counties from enacting *any* new ordinances relating to agricultural operations.<sup>251</sup> Charter counties,<sup>252</sup> on the other hand, are not so limited. They may enact any ordinance that does not conflict with state law.<sup>253</sup>

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244. See Cosgrove, *supra* note 241. See also *Christian Cty. v. Edward D. Jones & Co.*, 200 S.W.3d 524, 527 (Mo. 2006) (en banc); *Babb v. Mo. Pub. Serv. Comm'n*, 414 S.W.3d 64 (Mo. Ct. App. 2013); *Damon v. City of Kan. City*, No. WD 75363, 2013 WL 6170565 (Mo. Ct. App. Nov. 26, 2013); *State v. Ostdiek*, 315 S.W.3d 758 (Mo. Ct. App. 2011); *Borron v. Farrenkopf*, 5 S.W.3d 618, 620 (Mo. Ct. App. 1999).

245. *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455 (1868).

246. Kenneth D. Dean, Comment, *The Dillon Rule – a Limit on Local Government Powers*, 41 MO. L. REV. 546, 546–47 (1976).

247. MO. REV. STAT. § 64.020 (2000).

248. *Id.* § 64.890. An "alternative county" is defined in statute:

The county commission of any county of the first class not having a charter form of government, or of any county of the second, third or fourth class may, after approval by vote of the people of the county, create a county planning commission to prepare a county plan for all areas of the county outside the corporate limits of any city, town or village which has adopted a city plan in accordance with the laws of this state.

*Id.* § 64.800.1.

249. MO. REV. STAT. § 49.650.1 (Cum. Supp. 2013).

250. *Id.* § 49.650.1(4).

251. *Id.* § 49.650.5.

252. The only charter counties are Jackson, Jefferson, St. Charles, and St. Louis counties. Cosgrove, *supra* note 241.

253. MO. CONST. art. VI, § 19(a); see also *Barber v. Jackson Cty. Ethics Comm'n*, 935 S.W.2d 62, 66 (Mo. Ct. App. 1996).

The legislature has given cities and towns more authority to regulate agricultural operations.<sup>254</sup> It has authorized third- and fourth-class cities to enact any ordinance not in conflict with federal and state laws.<sup>255</sup> It has prohibited townships, however, from creating regulations “with respect to the erection, maintenance, repair, alteration or extension of *farm buildings or farm structures*.”<sup>256</sup> Missouri courts have consistently enforced this provision, striking down township zoning ordinances related to CAFOs’ buildings and structures.<sup>257</sup>

When it comes to health and safety regulations, however, counties are authorized to make “orders, ordinances, rules or regulations . . . as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county.”<sup>258</sup> These local regulations are superseded by state health rules and regulations, but they are not limited with reference to agriculture.<sup>259</sup> A farm challenged a county ordinance created under this statute, and the Missouri Court of Appeals for the Western District upheld it as being “rationally related” to public health.<sup>260</sup>

This merely reflects the current state of affairs. The legislature can always amend these statutes, or it can enact new statutes granting local governments more powers. But if history is any indication, there have only been attempts to further limit counties’ abilities to enact health regulations.<sup>261</sup> There have been no recent attempts to relax these limitations or otherwise expand local governments’ powers.

At the same time, the specific language of the amendment seems to imply that it is *only* subject to regulation by local governments under Article VI: the right to farm is “subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri,”<sup>262</sup> with no additional limitations. Traditional statutory interpretation would render any other construal probably

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254. Cosgrove, *supra* note 241.

255. MO. REV. STAT. §§ 77.590, 79.110 (2000).

256. *Id.* § 65.677 (emphasis added).

257. *See* Cosgrove, *supra* note 241 (citing Bd. of Dirs. of Richland Twp. v. Kenoma, LLC, 284 S.W.3d 672 (Mo. Ct. App. 2009); Premium Standard Farms, Inc. v. Lincoln Twp. of Putnam Cty., 946 S.W.2d 234 (Mo. 1997) (en banc)).

258. MO. REV. STAT. § 192.300 (2000).

259. *Id.*

260. *Borron v. Farrenkopf*, 5 S.W.3d 618 (Mo. Ct. App. 1999); *see also* *Milton Const. & Supply Co. v. St. Louis Sewer Dist.*, 352 S.W.2d 685, 692 (Mo. 1961) (en banc) (“A regulation designed to promote the health and welfare of the people does not infringe on constitutional guaranties of personal rights and due process ‘unless the regulation passes the bounds of reason and assumes the character of arbitrary power.’”).

261. *See, e.g.*, S. 364, 94th Gen. Assemb. 1st Reg. Sess. (Mo. 2007); H.C.S. S.C.S. S. 692 (Mo. 2012); H.C.S. S.C.S. S. 9, H.C.S. S. 342 (Mo. 2013); H.R. 1728 (Mo. 2014); H.R. 2210 (Mo. 2014).

262. MO. CONST. art. I, § 35; *see also* Cosgrove, *supra* note 241.

against the plain and ordinary meaning of the provision.<sup>263</sup> Therefore, it will probably not be subject to Article III of the Missouri Constitution – regulation by the legislature. Although the legislature would have the power to expand or restrict local governments’ abilities to regulate farmers’ and ranchers’ right to farm, it seems it would have no ability to compel the enactment of an ordinance if a local government chose simply not to regulate farmers and ranchers in a certain way.

*B. Implications of the Right-to-Farm Amendment’s Placement in the Bill of Rights*

The interpretation of the right-to-farm amendment might also be nuanced by its placement in the bill of rights section of the Missouri Constitution, Article I, as opposed to the other articles of that document. The Supreme Court of Missouri has held that provisions in the state constitution’s bill of rights can grant citizens affirmative rights, imposing affirmative duties.<sup>264</sup> In *Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield* (“*Lodge 15*”), the court overruled a previous case, *Quinn v. Buchanan*.<sup>265</sup> It held that *Quinn* was based on the “erroneous inference” that “a Bill of Rights, in this case the Missouri ‘Declaration of Rights’ found in article I of its constitution, does not grant ‘new’ rights; it merely declares those rights that the people already possess, regardless of whether they are the subject of a governmental grant.”<sup>266</sup>

Instead, *Lodge 15* affirmed that a bill of rights *can* grant new rights and does not merely “declare” existing rights.<sup>267</sup> These new rights can give rise to new, affirmative duties for the state or other parties.<sup>268</sup> For example, in *Ledbetter*, the court concluded that a constitutional amendment protecting the

263. Cosgrove, *supra* note 241. Indeed, Cosgrove notes that “if the right were ‘subject to’ laws enacted (or regulations promulgated) pursuant to state and/or local power, this clause would not be needed.” *Id.*

264. *E. Mo. Coal. of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield (Lodge 15)*, 386 S.W.3d 755, 762 (Mo. 2012) (en banc) (“Moreover, inclusion in Missouri’s ‘Declaration of Rights’ does not mean that a provision cannot grant an affirmative right. The people of Missouri may place anything they wish within their constitution so long as it is not contrary to the federal constitution.”); see *State ex rel. St. Louis Fire Fighters Ass’n Local No. 73 AFL–CIO v. Stemmler*, 479 S.W.2d 456, 458 (Mo. 1972) (en banc) (“[W]hen the people of the State of Missouri write or amend their constitution, they may insert therein any provision they desire, subject only to the limitation that it must not violate restrictions which the people have imposed on themselves and on the states by provisions which they have written into the federal constitution.”).

265. 298 S.W.2d 413 (Mo. 1957) (en banc), *overruled by Lodge 15*, 386 S.W.3d 755.

266. *Lodge 15*, 386 S.W.3d at 761 (quoting *Quinn*, 298 S.W.2d at 417).

267. *Id.* at 762.

268. *Id.*

right of teachers to meet and bargain collectively implied a corresponding duty on the part of the *school board* to meet with teachers.<sup>269</sup>

Given the Court's holdings in *Lodge 15* and *Ledbetter*, some might believe that farmers and ranchers would be able to independently assert their new right to farm – wielding that right as a sword by imposing affirmative duties on other parties in addition to defensively raising it as a shield when other parties infringe that right. But the amendment seems to simply “declare” a right that the people already possess. Thus, the only new “right” might be protection from the legislature. This is made clear when examining the right to farm against other traditionally recognized rights: the right to work and the right to use property.

### 1. The Right to Farm and the Right to Work

Although it does not have a textual basis in either the U.S. or the Missouri constitutions, the right to work at a lawful occupation is an essential component of liberty.<sup>270</sup> Farmers already share in this right.<sup>271</sup> Some states' constitutional jurisprudences have specifically explored and guaranteed this right,<sup>272</sup> and the Supreme Court of the United States has reasoned that “the

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269. *Am. Fed'n of Teachers v. Ledbetter*, 387 S.W.3d 360 (Mo. 2012) (en banc).

270. *Truax v. Raich*, 239 U.S. 33, 41 (1915).

271. *Id.*

272. *See, e.g., Kafka v. Hagener*, 176 F. Supp. 2d 1037, 1043 (D. Mont. 2001) (quoting *Wadsworth v. State*, 911 P.2d 1165, 1172 (Mont. 1996)) (“The inalienable right to pursue life’s basic necessities is stated in the Montana Declaration of Rights and is therefore a fundamental right; while not specifically enumerated in the terms of Montana’s constitution, the opportunity to pursue employment is, nonetheless, necessary to enjoy the right to pursue life’s basic necessities.”); *Mont. Cannabis Indus. Ass’n v. State*, 286 P.3d 1161 (Mont. 2012) (“While the right to the opportunity to pursue employment is not specifically enumerated in the Montana Constitution, it is a fundamental right, because it is a right without which other constitutionally guaranteed rights would have little meaning.”); *Wadsworth*, 911 P.2d at 1174 (“[T]he right to the opportunity to pursue employment is itself a fundamental right and is encompassed within the right to pursue life’s basic necessities as declared under Article II, section 3 of Montana’s constitution. Because the opportunity to work and to make a living is a fundamental right, it is incumbent upon the state to *demonstrate* a compelling interest before it may constitutionally infringe upon that right. Necessarily, *demonstrating* a compelling interest entails something more than simply saying it is so.”). *See, e.g., McCool v. City of Phila.*, 494 F. Supp. 2d 307, 328 (E.D. Pa. 2007) (citing *Hunter v. Port Auth. of Allegheny Cty.*, 419 A.2d 631, 635 (Pa. 1980)) (“The Pennsylvania Supreme Court has interpreted Article I, § 1 of the Pennsylvania Constitution as guaranteeing an individual’s right to engage in any of the common occupations of life.”). *See, e.g., D’Amico v. Bd. of Med. Exam’rs*, 520 P.2d 10, 18 (Cal. 1974) (in bank) (quoting *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971)) (the right to pursue a lawful occupation is fundamental if the employment sought is a “common occupations of the community”).

right to work for a living in the common occupations<sup>273</sup> of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”<sup>274</sup> Indeed, “[T]he right of an individual to engage in a lawful occupation . . . is embraced within the constitutional guaranties of life, liberty, property, and the pursuit of happiness.”<sup>275</sup>

At the same time, however, several courts have noted that this right is not “fundamental,”<sup>276</sup> nor does it guarantee the right to a *particular* occupation<sup>277</sup> (except in the limited context of the Privileges and Immunities Clause,<sup>278</sup> when a state restricts the employment opportunities of residents of other states).<sup>279</sup> This general right to pursue a livelihood is subject to regulation, and it may be limited by reasonable measures promoting the general welfare under the federal constitution.<sup>280</sup> Any such occupational regulation is reviewed under the rational basis standard.<sup>281</sup>

273. Even if farming and ranching are considered some of these “common occupations,” however, the right to pursue farming or ranching, specifically, is not fundamental or guaranteed. See *infra* note 278 and accompanying text.

274. *Truax*, 239 U.S. at 41.

275. 16A C.J.S. *Constitutional Law* § 832 (footnotes omitted).

276. *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 380 (1979) (“[T]his Court has never held that the right to any particular private employment is a ‘right of national citizenship,’ or derives from any other right created by the Constitution.”); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 317 (1976) (“[T]he Court finds that the right to work is not a fundamental right.”).

277. See *Madarang v. Bermudes*, 889 F.2d 251, 253 (9th Cir. 1989) (for purposes of the Equal Protection Clause, the right to pursue a calling or profession is not a fundamental right); *Koelfgen v. Jackson*, 355 F. Supp. 243, 250 (D. Minn. 1972), *aff’d*, 410 U.S. 976 (1973) (employment not a fundamental right protected by Fourteenth Amendment’s equal protection); *Townsend v. Cty. of L.A.*, 49 Cal. App. 3d 263, 267 (Cal. Ct. App. 1975) (there is no fundamental right to work for a particular employer, public or private).

278. U.S. CONST. art. IV, § 2.

279. The Supreme Court has characterized the ability to pursue a particular line of employment as a fundamental right in the limited context of the privileges and immunities clause, where a state government has attempted to limit employment opportunities to state or municipal residents. *Okla. Educ. Ass’n v. Alcoholic Beverage Laws Enf’t Comm’n*, 889 F.2d 929, 932 (10th Cir. 1989) (citing Supreme Court of N.H. v. Piper, 470 U.S. 274, 279–80 (1985)) (limiting bar admission to state residents)).

280. See, e.g., *Schwartz v. Bd. of Bar Exam’rs of State of N.M.*, 353 U.S. 232, 238–39 (1957) (citations omitted) (“A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant’s fitness or capacity to practice law.”).

281. *Id.* at 239.

It might seem that Missouri's new right-to-farm amendment expands this general "declarative" right to pursue an occupation to include the *particular* occupations of farming or ranching. The language of the amendment protects "the right of *farmers and ranchers* to engage in farming and ranching practices,"<sup>282</sup> and any citizen engaging in farming or ranching practices is, at least based on Missouri's judicial history,<sup>283</sup> a farmer or rancher. This may not extend, however, to those who are not already farmers or ranchers or who do not have the means to become so. By this language, a citizen does not have the right to "become" a farmer or rancher, or to begin to engage in farming or ranching practices. Instead, those who otherwise exercise their general right to pursue a livelihood and lawfully become farmers or ranchers are then protected with a more particular right to continue to pursue that livelihood.

But practically, it does not seem that this would play out. A terminated farm employee could not compel his employer to keep him on because of his "right-to-farm." Nor could a farmer compel her off-the-farm employer to grant her an extended leave of absence during harvest season because of her right to bring in crops. Therefore, in terms of farming as an occupation, the amendment does not seem to grant a "new" right to Missouri citizens who are or who become ranchers and farmers and does not seem to raise new, corresponding duties. Instead, it would protect farmers from adverse legislation that would interfere with their right to pursue the occupation of farming, shielding farmers from such legislation.

## 2. The Right to Farm and the Right to Use Property

Put another way, the right to farmland seems simply to be a declarative right in terms of using one's own property in the manner one would like. A property owner has the fundamental right to use and enjoy his or her private property.<sup>284</sup> The traditional view is that "[e]very proprietor of land, where not restrained by covenant or custom, has the entire dominion of the soil and the space above and below to any extent he may choose to occupy it, and in this occupation he may use his land according to his own judgment . . . ."<sup>285</sup>

John Locke considered the protection of private property one of the most important purposes of government – indeed, the primary reason that independent beings could feel compelled to subject themselves to the "dominion and control" of government power.<sup>286</sup> Thus, property rights have long

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282. MO. CONST. art. I, § 35 (emphasis added).

283. See *supra* Part III.A.2 (discussing the definition of "farmer" and "rancher" in Missouri statutory and judicial history).

284. 2 TIFFANY REAL PROP. § 582.5 (3d ed.).

285. *Id.*

286. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 184, §123 (Thomas I. Cook ed., Hafner Publishing Co. 1947); see also 16B AM. JUR. 2D *Constitutional Law* § 629 ("[T]he protection of [the right of property] is one of the most important objects of government. It is said that the right of property lies at the foundation of our constitu-

been guaranteed at common law, though they are also protected by state and federal constitutions.<sup>287</sup> In the constitutional sense, a “property right” refers to “the right to possess, use, enjoy, and dispose of property.”<sup>288</sup> The government cannot take property without adequate justification<sup>289</sup> or without just compensation in the case of eminent domain.<sup>290</sup> These constitutional protections “should be liberally construed in favor of the right of property.”<sup>291</sup> Thus, property owners have long enjoyed the right to use their property as they saw fit – including using their property to farm or ranch. Still, this right has also traditionally been subject to certain usage requirements. For example, even at common law, one could enjoy his or her own property only insofar as it was not a nuisance to another’s property.<sup>292</sup> More recently, and especially in the context of state and local government, zoning laws significantly restrict how property owners may use their property.<sup>293</sup>

In Missouri, for example, zoning is a *local* legislative act.<sup>294</sup> It is a county’s or municipality’s legislative body, not the state’s, that has the power to zone property.<sup>295</sup> They have broad discretion, so long as their zoning “bears a substantial relation to the public welfare.”<sup>296</sup> As the Missouri Court of Appeals for the Eastern District explained, “[i]f the public welfare is not served by the zoning or if the public interest served by the zoning is greatly outweighed by the detriment to private interests, the zoning is considered to be arbitrary and unreasonable and, therefore, violative of [constitutional] due process . . . .”<sup>297</sup>

Most constitutional zoning challenges in Missouri, up to this point, have been brought as constitutional due process challenges.<sup>298</sup> However, a challenge under the right-to-farm amendment would not be the first time a Missouri-specific constitutional provision was additionally used to challenge a zoning ordinance. In 1875, the Missouri Constitution was amended to forbid not only the “taking” of private property without just compensation, but also

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tional government and is necessary to the existence of civil liberty and free institutions, and that such right is essential in our conception of freedom.”).

287. 16A C.J.S. *Constitutional Law* § 742.

288. 16B AM. JUR. 2D *Constitutional Law* § 629.

289. U.S. CONST. amend. V, XIV (Substantive Due Process Clauses).

290. *Id.* at amend. V.

291. 16A C.J.S. *Constitutional Law* § 845.

292. *See, e.g.*, 58 AM. JUR. 2D *Nuisances* § 47.

293. *See* Stephen L. Kling et al., *Zoning As A Tool of Land Use Control an Analysis of the Use of Zoning As A Land Use Control*, 64 J. MO. B. 230 (2008).

294. *Hoffman v. City of Town & Country*, 831 S.W.2d 223 (Mo. Ct. App. 1992); *see generally* *State ex rel. Helujon, Ltd. v. Jefferson Cty.*, 964 S.W.2d 531, 536 (Mo. Ct. App. 1998).

295. *Allen v. Coffel*, 488 S.W.2d 671, 673 (Mo. Ct. App. 1972) (citing MO. REV. STAT. §§ 89.020–.060 (1969)); *see also* MO. REV. STAT. ch. 64.

296. *Loomstein v. St. Louis Cty.*, 609 S.W.2d 443, 447 (Mo. Ct. App. 1980).

297. *Id.*

298. *See, e.g., Hoffman*, 831 S.W.2d 223; *Allen*, 488 S.W.2d at 673.

“damage to private property without fair compensation.”<sup>299</sup> In the 1927 case of *State v. Christopher*, plaintiffs argued that even if zoning did not qualify as an unconstitutional taking under the federal constitution, it did qualify as damage under Missouri’s constitutional provision.<sup>300</sup> The Supreme Court of Missouri rejected this interpretation.<sup>301</sup> It was “unimpressed by the change in the wording in the 1875 Constitution, dismissing it as an attempt to remedy an error of construction contained in earlier decisions which had ascribed an unduly narrow definition to the phrase ‘taking of private property.’”<sup>302</sup> The court conducted traditional due process analysis, and it held that the zoning ordinance was a “valid exercise” of the state’s police power as it was a “reasonably appropriate means” of accomplishing specific public objectives.<sup>303</sup>

The test is similar today and probably would not change for the right-to-farm amendment. As a recent article in the Missouri Bar Journal explained, “[i]n measuring the reasonableness of a zoning regulation, Missouri courts weigh the benefit to the general public against any private detriment by considering several factors,” including “(i) adaptability of the property to its zoning, (ii) significant reduction in value of the property based upon the zoning, (iii) incompatibility of the zoning with surrounding uses, and (iv) conformity of the zoning to the local government’s comprehensive plan.”<sup>304</sup>

Missouri courts presume that zoning ordinances are valid, meaning that the challenger must prove that the zoning ordinance is unreasonable.<sup>305</sup> In evaluating the ordinance, courts employ a “fairly debatable” standard of review: “[I]f the reasonableness or constitutionality of a zoning regulation is fairly debatable, the zoning regulation will stand.”<sup>306</sup>

Given the amendment’s express limitation to Article VI powers, the right-to-farm amendment would probably have no effect on these provisions. Again, the amendment merely protects an existing property right from future, state legislative infringement.

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299. 18 MO. PRAC., REAL ESTATE LAW--TRANSACT. & DISPUTES § 24:3 (3d ed. 2015).

300. *State ex rel. Oliver Cadillac Co. v. Christopher*, 298 S.W. 720, 725 (Mo. 1927) (en banc).

301. *Id.*

302. 18 MO. PRAC., *supra* note 299, at § 24:3. “In view of the foregoing it is clear that the addition of the word ‘damaged’ to that of ‘taken’ in the eminent domain clause of our Constitution did not broaden its limitation. The amendment operated to correct an error of construction and nothing more.” *Christopher*, 298 S.W. at 723.

303. *Christopher*, 298 S.W. at 724.

304. Kling et al., *supra* note 293, at 235.

305. *Id.*

306. *Id.*



### C. How the Amendment Might Affect Missouri Law

The principles of preemption that apply at the federal constitutional level are also applicable at the state level in Missouri.<sup>307</sup> Therefore, a constitutional amendment can preempt state and local laws.<sup>308</sup> In Missouri, a statute is assumed to be constitutional and will only be held unconstitutional when a plaintiff proves that it “clearly and undoubtedly contravene[s] the constitution.”<sup>309</sup> A court will uphold a statute unless it “plainly and palpably affronts fundamental law embodied in the constitution,”<sup>310</sup> and “[d]oubts will be resolved in favor of the constitutionality” of the statute.<sup>311</sup>

The right-to-farm amendment may render some existing Missouri statutes unconstitutional as applied to farmers. For example, Missouri Revised Statutes Section 523.010 allows public utilities to condemn land for the purposes of “the manufacture or transmission of electric current for light, heat or power . . . .”<sup>312</sup> If a public utility company and a farmer could not agree on the proper compensation to be paid for the farmer’s land in such a case, this statute would allow the public utility company to condemn the farmer’s property.<sup>313</sup> This might very well be construed as “plainly and palpably” affronting the farmer’s right to farm.

Additionally, the statute that allegedly catalyzed the movement toward this amendment, Proposition B, might also be affected.<sup>314</sup> It is difficult to know exactly how because the amendment does not include a standard of review. For example, another bill of rights provision recently passed in Missouri states that gun laws will be subject to strict scrutiny.<sup>315</sup> The right-to-

307. *See id.*

308. *See id.*

309. *Mo. Prosecuting Att’ys v. Barton Cty.*, 311 S.W.3d 737, 740–41 (Mo. 2010) (en banc). *See St. Louis Cty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. 2011) (en banc).

310. *Barton Cty.*, 311 S.W.3d at 741 (quoting *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. 2004) (en banc)).

311. *Id.* (quoting *Mo. Prosecuting Att’ys & Circuit Att’ys Ret. Sys. v. Pemiscot Cty.*, 256 S.W.3d 98, 102 (Mo. 2008) (en banc)).

312. MO. REV. STAT. § 523.010 (Cum. Supp. 2013) (“[F]or the manufacture or transmission of electric current for light, heat or power, including the construction, when that is the case, of necessary dams and appurtenant canals, flumes, tunnels and tailraces and including the erection, when that is the case, of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations or any oil, pipeline or gas corporation engaged in the business of transporting or carrying oil, liquid fertilizer solutions, or gas by means of pipes or pipelines laid underneath the surface of the ground, or other corporation created under the laws of this state for public use . . . .”).

313. *Id.*; *see also* MO. REV. STAT. § 228.342 (2000) (giving landowners right to seek widening of other’s private road).

314. MO. REV. STAT. § 273.345 (Cum. Supp. 2013) (the “Canine cruelty prevention act”).

315. MO. CONST. art. I, § 23.

farm amendment provides no such guidance. On the one hand, the Missouri courts might defer to the legislature, as any doubts about whether farmers can still farm while treating their animals poorly would be resolved in favor of the constitutionality of the statute. On the other hand, the courts might well say that what is currently animal abuse falls within the purview of “farming and ranching practices” and strike these and other provisions down as applied to farmers and ranchers.<sup>316</sup>

However, where public health is involved, statutes may still be upheld even if they require farmers and ranchers to farm or ranch in a particular way. For example, farmers will probably be required to continue to dispose of dead animals in the same way and to quarantine sick animals.<sup>317</sup> Similarly, where state inspection is required and certain standards must be met before putting farm products on the market for human consumption, the right to farm would probably not supersede.<sup>318</sup> Where the public benefit is not so clear, however, such as Missouri Revised Statutes Section 266.430’s requirement that farmers cook garbage before feeding it to swine, farmers might win a challenge.<sup>319</sup>

Additionally, the amendment will likely broaden the statutory protections already in place for nuisance. Missouri has had a “right-to-farm” statute since 1982, which essentially designates farms as “permanent” nuisances, protected from public or private nuisance claims.<sup>320</sup> It allows them *reasonable* expansion without fear of new nuisance suits.<sup>321</sup> For more dramatic expansion, this statute effectively creates a twelve-month statute of limitations from the time any new operation began that might change conditions for surrounding properties.<sup>322</sup> This essentially immunizes farmers from nuisance claims if none are filed within one year.<sup>323</sup> Any agricultural operation that

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316. See also MO. REV. STAT. § 578.013 (Cum. Supp. 2013) (relating to videotapes or digital recording of farm animal abuse or neglect).

317. MO. REV. STAT. § 267.590 (2000) (required quarantine of animal or herd by state veterinarian); MO. REV. STAT. § 577.076 (2000) (penalty for littering with carcasses); MO. ANN. STAT. § 577.076 (West 2016) (effective Jan. 1, 2017) (penalty for the unlawful disposition of a dead animal).

318. See, e.g., MO. REV. STAT. § 196.935 (2000) (requiring the pasteurization of milk before selling to public, but allowing direct sales of raw, unpasteurized milk).

319. MO. REV. STAT. § 266.430 (2000) (requiring a permit for feeding livestock garbage).

320. MO. REV. STAT. § 537.295 (2000) (enacted 1982, amended 1990); *Fact Sheet, Right-to-Farm Laws*, AM. FARMLAND TRUST (Sept. 1998), [http://www.farmlandinfo.org/sites/default/files/FS\\_RTF\\_9-98\\_1.pdf](http://www.farmlandinfo.org/sites/default/files/FS_RTF_9-98_1.pdf). Missouri’s adoption of this statute was part of a wider national movement for agricultural protection. *Id.* Between 1963 and 1994, every state enacted some form of right-to-farm nuisance law, in hopes of protecting farmers from litigious neighbors and also to document the importance of farming to the community. *Id.*

321. § 537.295.

322. *Id.*

323. *Id.*

qualifies for protected status under this statute may assign this protected status: it is alienable and inheritable.<sup>324</sup>

Missouri's right-to-farm statute is still subject to the farm's compliance with "all county, state, and federal environmental codes, laws, or regulations."<sup>325</sup> Furthermore, a farm's reasonable expansion may not include any changes that create "a substantially adverse effect upon the environment," "a hazard to public health and safety," or "a measurably significant difference in environmental pressures upon existing and surrounding neighbors because of increased pollution."<sup>326</sup> A farmer is also still liable for any nuisance claim arising from negligent or improper agricultural operations and for any injuries arising from pollution, water contamination, or overflow from the agricultural operation.<sup>327</sup>

Thus, although this statute protects farmers in Missouri, it has clear limiting principles. It is also narrowly addressed to nuisance claims.<sup>328</sup> The right-to-farm *amendment* differs from the statute in that it, theoretically, provides much broader protections applicable to all sorts of claims and includes fewer limitations. For example, forestry and urban operations are not currently covered by the statute, but very well could be by the constitutional amendment.<sup>329</sup> Additionally, the right-to-farm amendment may lift some of the restrictions of the statute – though this is only if the court does not rely on statutory tradition in its own construal of the provision.

Many other statutes or regulations that might approach "plainly and palpably" affronting the amendment's general premise are specifically allowed to, based on the amendment's final clause asserting that the right to farm is subject to duly authorized county powers.<sup>330</sup> As discussed above, counties may exercise the general police power in enacting local laws and ordinances.<sup>331</sup>

Other statutes would probably not be affected. Missouri Revised Statutes Section 441.280 allows a landlord to put a lien on his tenant farmer's crops for rent.<sup>332</sup> It seems very unlikely that this could be successfully challenged under the right-to-farm amendment. The right to "engage in farming and ranching practices," while it may encompass putting agricultural products on the market, would not supersede other contractual obligations, or suddenly entitle farmers and ranchers to top dollar or affirmative market advantages simply because of the nature of their product.<sup>333</sup>

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *See id.*

329. *See id.*

330. *See supra* Part III.A.3. *See also* MO. REV. STAT. § 243.240 (2000) (county commissions to maintain efficiency and have management and control).

331. *See supra* Part III.A.3.

332. MO. REV. STAT. § 441.280 (2000) ("Landlord's lien on crops for rent").

333. MO. CONST. art. 1, § 35.

Similarly, statutes allowing state public health boards to access farms and ranches would probably still be considered consistent with the right conferred by the amendment. For example, Missouri Revised Statutes Section 196.555 gives the state milk board access to all Missouri dairy farms.<sup>334</sup> Such access probably does not clearly contravene the right to engage in farming practices. And as far as environmental regulations are concerned, federal statutes would obviously preempt here, so farmers and ranchers will still need to comply with federal regulations.

Some additional areas of interest moving forward might be in the dissolution of marital relationships or partnerships: How might a court divide marital or partnership property when one or more parties are farmers or ranchers? Additionally, how might conflicts between two farmers be resolved? For example, if one farmer wanted to grow organic produce and the neighboring farmer used pesticides that contaminated the other's organic operation, whose right would prevail? That is, the right-to-farm amendment guarantees the right to "farm," but in what way? These questions are difficult to answer at this point.

#### IV. NEEDED REFORM

The Supreme Court of Missouri has explained that procedural requirements for constitutional amendments are intended to "(1) promote an informed understanding by the people of the probable effects of the proposed amendment, or (2) prevent a self-serving faction from imposing its will upon the people without their full realization of the effects of the amendment."<sup>335</sup> The available statutory challenges reflect similar goals.<sup>336</sup> But these statutory challenges may need some revision to actually effect their purpose given the changing state of political affairs.

For example, Section 116.190, which allows ballot title challenges, was enacted in 1980.<sup>337</sup> In 2014 alone, appellate courts reviewed three times as many Section 116.190 cases as in the first decade following its enactment.<sup>338</sup> This is probably due in large part to an increase in the number of initiative petitions being submitted, with only sixteen in 2004, but 143 in 2012 – a sig-

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334. MO. REV. STAT. § 196.555 (2000).

335. *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 11–12 (Mo. 1981) (en banc).

336. *See id.*

337. MO. ANN. STAT. § 116.190 (West 2016).

338. They reviewed a single case between 1980 and 1990. *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402 (Mo. 1984) (en banc). And three cases in 2014. *Seay v. Jones*, 439 S.W.3d 881 (Mo. Ct. App. 2014); *Sinquefield v. Jones*, 435 S.W.3d 674 (Mo. Ct. App. 2014); *State ex rel. Dienoff v. Galkowski*, 426 S.W.3d 633 (Mo. Ct. App. 2014).

nificant increase in the number of ballots available to challenge.<sup>339</sup> This is therefore a timely and developing issue.

With lobbyists becoming more involved in the petition initiative process and correspondingly in the judicial contest process,<sup>340</sup> Missouri may need legislative reform of its election laws – or perhaps amendments to constitutional provisions governing amendment procedure. Certainly, the answer is not to prohibit direct democracy, but rather, this Comment questions the adequacy of the existing legal challenges to Missouri constitutional amendments when these amendments are enacted via a single election. The enactment of the right-to-farm amendment showed how politically-charged campaigns fueled by interest groups could directly affect Missouri’s Bill of Rights. Existing legal challenges in Missouri may not be sufficient to protect the constitution from future, similarly political amendments that might be more harmful to Missourians and contribute to governmental dysfunction.<sup>341</sup> Missouri is at present a relatively easy forum for enacting state constitutional amendments, which might attract interest groups seeking a test site for national proposals,<sup>342</sup> or foreign corporations seeking favorable venues to conduct business. Missourians should be able to subject such amendments to strict procedural requirements, requiring judicial review if necessary to ensure compliance.

Shoemyer’s and Dotson’s challenges to recent constitutional amendments highlight current inadequacies in the constitutional amendment process. In particular, the statutory limitation of ten days to bring a ballot title challenge,<sup>343</sup> but the (necessary) difficulty of bringing a post-election challenge, leaves ballot title challengers between a rock and a hard place. Because voters rely so heavily on ballot titles and summaries on election day – with many voters not informed about the issues until they arrive at the ballot box – judicial review of ballot titles may be one of the most important checks on the political process.<sup>344</sup>

Perhaps to address the issue of mootness, in 2013 the legislature amended Section 116.190, governing ballot title challenges to automatically extinguish any action brought under that section that is not fully and finally adju-

339. Theodore, *supra* note 54, at 1421–22 “Of the 143 petitions filed in 2012, sixty-one came from one of three entities and addressed one of three topics, giving an appearance of ballot title shopping.” *Id.* at 1422.

340. See SELDEN BIGGS & LELIA B. HELMS, *THE PRACTICE OF AMERICAN POLICY MAKING* 146 (2007).

341. See, e.g., Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 MONT. L. REV. 325, 326–27 (2010) (quoting the Chief Justice of California, who observed in 2009 that “in times of fiscal crisis ‘Frequent amendments--coupled with the implicit threat of more in the future--have rendered our state government dysfunctional’”).

342. See John Slavin, *The Future of Initiative and Referendum in Missouri*, 48 MO. L. REV. 991 (1983).

343. MO. ANN. STAT. § 116.190 (West 2016).

344. See Slavin, *supra* note 342; Theodore, *supra* note 54.

licated, including appeals, within 180 days of its filing.<sup>345</sup> It provides an exception for good cause, but *only* for court-related scheduling issues and not any of the parties' good cause claims.<sup>346</sup> This section only seems to compound the difficulties of those who file a ballot title claim.

Judicial review during the political process should be limited, and the answer to these issues does not seem to be allowing *additional* statutory challenges. The answer is also not to open up post-election challenges more broadly, as the court did in *Dotson*. This undermines voter confidence and creates the added expense of not only more post-election challenges, but also the expense of ordering new elections.

But perennially moot challenges to ballot titles are not challenges at all. If the legislature has recognized the importance of this judicial challenge by codifying it in Section 116.190, they should also enable it to be legitimately adjudicated. One way to do so might be to require that constitutional amendments roll over to the next year's ballot or require that they be certified for a certain number of months before allowed onto the ballot.

Other options for reform not related to judicial review might be to heighten the standards for constitutional amendment passages, though these options would first require constitutional amendments, not simple statutory amendments.<sup>347</sup> The constitution might limit the governor's authority to order a special election, which reduces the amount of time available for reviewing and challenging ballot titles.<sup>348</sup> For legislatively-referred constitutional amendments, Missouri might require a majority vote from both legislative houses for two sessions in a row.<sup>349</sup> Another way might be to require a supermajority popular vote, not a simple majority.<sup>350</sup> Given the differences between a constitution and a statute, Missouri would do well to ensure that changes to its constitution are the result of an informed and reasoned democracy and not a rushed and uninformed mobocracy.<sup>351</sup>

## CONCLUSION

The right-to-farm amendment may just reaffirm rights already available to Missouri citizens. Even if it was intended to be largely symbolic, however, the amendment may actually put a stop to future legislative regulation of farming and ranching in Missouri, may overturn some existing legislation, and may impose unforeseen affirmative duties on non-farming and ranching

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345. 2013 Mo. Legis. Serv. H.R. 117 (West); § 116.190.

346. § 116.190.

347. *See* MO. CONST. art. XII, § 2(b).

348. *Id.*

349. *See id.* at art. III, § 52.

350. *See id.* at art. XII, § 2(b).

351. *See generally* Aaron Zelinsky, *Constitutional Amendment by Popular Vote: Bad for Switzerland and California*, HUFFINGTON POST (May 25, 2011, 2:50 PM), [http://www.huffingtonpost.com/aaron-zelinsky/constitutional-amendment\\_b\\_374683.html](http://www.huffingtonpost.com/aaron-zelinsky/constitutional-amendment_b_374683.html).

Missourians. It may well be the “wake-up call” for Missourians at large that Proposition B was for the Missouri Farmers Bureau.<sup>352</sup>

A constitution is different from other sources of law in both authority and subject matter. It is the highest source of law, as it is the creation of “the people” themselves, and it embodies that people’s fundamental values.<sup>353</sup> In practice, while Missouri’s constitution is its highest source of law, its subject matter is becoming increasingly devoted to the mundane, not the essential and fundamental. For example, Missouri’s state constitution concerns itself not just with Missourians’ freedoms of speech and religion, but also includes a provision legalizing “charitable bingo” and provisions for establishing water pollution control.<sup>354</sup>

Now Missourians have also enacted a pre-emptory “right to farm” by a bare majority vote. At the end of the day, the amendment is probably more of an assertion or priority to farm rather than an absolute right. Still, even if it only memorializes farmers’ right to farm as insurance against the possibility of unfavorable legislation in the future, that could play out to be a significant change. The enactment of the right-to-farm amendment threw a rock into the lake of Missouri law, and no one knows for certain what its ripple effects will be.

Direct democracy should be available to the people to enact such change, but more public deliberation is needed *before* the enactment of the provision. Because substantive review of a constitutional amendment is neither feasible nor desirable before an election, procedural safeguards must be strictly followed to ensure that the Missouri Constitution is not unintentionally altered. At present, the legislature does not allow sufficient time for judicial review of the political process, based on strict procedural challenges, as was made clear by *Dotson*. Additional time for the ballot preparation and political process would allow for more reasoned and informed voters and a more legitimate constitutional amendment process.

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352. Mannies, *supra* note 29.

353. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 814 (1992)

354. MO. CONST. art. III, §§ 39(a), 37(b).