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Too Close for Comfort: Protecting Agriculture in an Urban Age

Maggie Gibson

NOTE

Too Close for Comfort: Protecting Agriculture in an Urban Age

Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319 (Mo. 2015) (en banc).

Maggie Gibson[*]

I. INTRODUCTION

Every American has a daily, intimate, and continuous relationship with agriculture. For most people, this takes the form of the food they eat and the clothes they wear. For others, it extends to the work they do every day to produce these things. But what happens when agriculture gets too close for comfort? Many urbanites, and even other farmers, deal with this problem on a daily basis when neighboring farms create a nuisance to them and their property. This problem occurs all over the country but has recently become an especially hot topic in Missouri. The recent passage of the Right to Farm amendment will affect this issue, but another, often overlooked, development in this struggle was the ruling in *Labrayere v. Bohr Farms* and the court's interpretation of Missouri Revised Statutes section 537.296.

Part II of this Note introduces issues in *Labrayere v. Bohr Farms*, the instant case that upheld agricultural protections against nuisance damages. Part III of this Note presents some of the historical trends that led to the court's decision in *Labrayere*. It also examines Missouri's closely related Right to Farm constitutional amendment. Finally, in Part IV, the court's reasoning is dissected and future implications of the decision are considered.

II. FACTS AND HOLDINGS

Bohr Farms owns and operates a Concentrated Animal Feeding Operation ("CAFO").[1] It began this operation in September of 2011 with an oper-

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[*] B.A., Tulane University, 2014; J.D. Candidate, University of Missouri School of Law, 2017; Lead Articles Editor, *Missouri Law Review*, 2016–2017. I am grateful to Professor Anne Alexander for her guidance and support during the writing of this Note, to the *Missouri Law Review* for editorial assistance, and to my family for their support.

1. Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319, 325 (Mo. 2015) (en banc). Concentrated Animal Feeding Operations are defined as operations where animals "have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period," and "[c]rops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23 (2016).

ating capacity of more than 4000 hogs.[2] Cargill Pork LLC owns the hogs and contracted with Bohr Farms to raise them.[3] The operation site includes a sewage disposal system and a composting system for dead hogs.[4]

Several surrounding landowners and other individuals ("landowners") filed suit for damages relating to temporary nuisance, negligence, and conspiracy because of the odors coming from Bohr Farms.[5] They alleged offensive odors, hazardous substances, particulates, flies, manure, and pathogens had come onto their property from the CAFO.[6] The damages for the temporary nuisance charge came solely from the landowners' loss of use and enjoyment of their property, not from medical expenses or loss of property value.[7]

The landowners also alleged that Bohr Farms was operating negligently. Cargill was included in the suit because the landowners believed it to be vicariously liable for Bohr Farms's nuisance and negligence.[8] The landowners also alleged that Cargill and Bohr Farms were involved in a conspiracy to cause the odors.[9] The circuit court entered summary judgment for Bohr Farms because the landowners were barred from asserting a claim for loss of use and enjoyment damages under section 537.296.[10] The circuit court found that section 537.296 was constitutional and that it did not authorize a damage award for the loss of use and enjoyment of the landowners' property.[11] The court went on to deny recovery on both the negligence and civil conspiracy claims.[12] The landowners appealed to the Supreme Court of Missouri, arguing, *inter alia*, that section 537.296 was unconstitutional.[13]

The landowners argued seven claims on appeal. First, they argued that section 537.296 was unconstitutional because it authorized a private taking.[14] Second, the plaintiffs contended that section 537.296 was unconstitutional because it allowed a taking for public use and did not require just compensation.[15] Third, they claimed that section 537.296 was unconstitutional because it violated both the state and federal constitutions' Equal Protection Clauses.[16] Fourth, the plaintiffs argued that section 537.296 was unconstitutional be-

2. *Labrayere*, 458 S.W.3d at 326.
3. *Id.*
4. *Id.*
5. *Id.* at 325.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 327.
11. *Id.* at 326.
12. *Id.*
13. *Id.* at 326–27.
14. *Id.* at 326.
15. *Id.*
16. *Id.*

cause it denied substantive due process.[17] Fifth, they contended that section 537.296 violated the separation of powers under the Missouri Constitution because it defined "standing," usurping the judiciary's role.[18] Sixth, the plaintiffs claimed that section 537.296 violated the open courts provision of the Missouri Constitution.[19] Seventh, they argued that section 537.296 was a special law and therefore violated the prohibition of special laws in the Missouri Constitution.[20] Because it found neither a taking without proper compensation nor a violation of equal protection, the Supreme Court of Missouri held that section 537.296 was constitutional.[21]

III. LEGAL BACKGROUND

There are several important issues in this case that are discussed in relation to section 537.296. This case was the first to narrowly challenge section 537.296.[22] However, the doctrines discussed in relation to this statute, including eminent domain and equal protection, have significant independent legal histories, as will be discussed in this Part. This Part begins with a discussion of the actual laws at issue here – section 537.296 and article I, section 35 of the Missouri Constitution, commonly known as the "Right to Farm" amendment. Next, it examines the legal theory of eminent domain. The last section of this Part discusses equal protection.

A. Section 537.296 and the Right to Farm Amendment

Section 537.296 became effective on August 28, 2011.[23] This statute limits private nuisance damages when an agricultural enterprise causes the nuisance.[24] Section 537.296.2 only allows compensatory damages when the cause of the nuisance is animal or crop production on land used primarily for that purpose.[25] Permanent nuisance damages are measured by the fair market value reduction of the property caused by the nuisance.[26] Temporary nuisance damages are measured by the "diminution in the fair rental value" of the property due to the nuisance.[27] Only documented medical conditions caused by the nuisance are permitted to receive compensatory damages.[28]

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 326–27.
22. *Id.* at 326.
23. *See* MO. REV. STAT. § 537.296 (Cum. Supp. 2013).
24. *Id.* § 537.296.2.
25. *Id.*
26. *Id.* § 537.296.2(1).
27. *Id.* § 537.296.2(2).
28. *Id.* § 537.296.2(3).

Any judgment for a landowner's permanent nuisance claim binds all successor landowners to the remedy awarded.[29] The only people who have standing to bring a private nuisance action against property primarily used for animal or crop production are those who have an ownership interest in the affected property.[30] The statute does not prohibit a person from receiving damages for discomfort, annoyance, sickness, or emotional distress, so long as those damages are awarded based on some other cause of action, independent of the nuisance claim.[31] So, for example, a farmer who accidentally ran through a neighbor's fence with his tractor, hitting and injuring his neighbor, could still be liable for damages based on a negligence or similar claim.

In the intervening time between the passage of section 537.296 and the *Labrayere* case, Missouri voters passed a Right to Farm amendment. This amendment was created in response to new limits on agriculture being imposed in other states.[32] In the months leading up to the vote, there was much debate over the proposed amendment, even within the farming community.[33] While many farmers thought this amendment would protect their industry, some believed it favored and protected corporate farms while hurting small and family farms because they saw this amendment as a way for corporate farms to insulate themselves from environmental and animal welfare regulations.[34] The vote, held in August 2014, was very close, with the amendment passing with 50.1 percent of voters in support. In June 2015, the Supreme Court of Missouri heard a challenge to the wording of the amendment on the ballot, and it upheld the amendment.[35]

After its passage, the Right to Farm amendment became part of the Missouri Constitution as article I, section 35.[36] The new amendment states:

> 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.[37]

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29. *Id.* § 537.296.3.

30. *Id.* § 537.296.5.

31. *Id.* § 537.296.6.

32. Julie Bosman, *Missourians Approve Amendment on Farming*, N.Y. TIMES (Aug. 6, 2014) http://www.nytimes.com/2014/08/07/us/right-to-farm-measure-passes-in-missouri.html?_r=0.

33. *Id.*

34. *Id.*

35. Shoemyer v. Mo. Sec'y of State, 464 S.W.3d 171, 173 (Mo. 2015) (en banc).

36. MO. CONST. art. I, § 35 (West, Westlaw through July 7, 2016).

37. *Id.*

While all fifty states have some type of a Right to Farm statute, Missouri became the second state to pass such a constitutional amendment.[38] This amendment was not referenced in the *Labrayere* decision because it went into effect during the appeal process of the instant case.[39]

B. Eminent Domain

Eminent domain was a major issue in the *Labrayere* decision. The landowners maintained that the limitation on nuisance damages under section 537.296 amounted to a taking of their land.[40] The landowners argued that the statute violates Missouri's eminent domain laws.[41] Eminent domain has long been a hot topic in Missouri, particularly in regards to agricultural land.[42]

The Supreme Court of Missouri has found a legitimate state interest in regulating and maintaining agriculture within the state.[43] The court held that the state legislature can pass laws regulating land used for agriculture to protect the "traditional farming community."[44] In practice, this rationale has been applied broadly – in 1988, it was used to uphold a statute that forced foreign corporations to sell farmland in order to keep Missouri farms owned by Missouri families.[45] The state's interest in Missouri's agricultural economy is important when it comes to the exercise of eminent domain because it opens the door to an eminent domain argument when agricultural use infringes on others' property rights.

The Supreme Court of Missouri has ruled that the state does not itself have to take property in an eminent domain action. Instead, it can delegate the eminent domain power to a municipality or another government subdivision.[46] As long as a "considerable number" of the public is benefitted, the purpose of public use is considered fulfilled.[47] Not every member of the public has to be benefitted, and not every member has to actually use the land.[48] This allows eminent domain to be used in a broad variety of circumstances, including inoculating farmers from nuisance claims.

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38. Bosman, *supra* note 32. The first state to pass such a constitutional amendment was North Dakota. *See id.*

39. *See* Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319, 319 (Mo. 2015) (en banc).

40. *Id.* at 326.

41. *Id.*

42. Stanley A. Leasure & Carol J. Miller, *Eminent Domain – Missouri's Response to Kelo*, 63 J. MO. B. 178, 187 (2007).

43. State *ex rel.* Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801, 806 (Mo. 1988) (en banc).

44. *Id.*

45. *Id.* at 808.

46. State *ex rel.* Jackson v. Dolan, 398 S.W.3d 472, 476 (Mo. 2013) (en banc).

47. *In re* Kan. City Ordinance No. 39946, 252 S.W. 404, 408 (Mo. 1923) (en banc).

48. *Dolan*, 398 S.W.3d at 476.

A nuisance interferes with the use and enjoyment of the affected property, causing it to be "taken" in the property owner's eyes. When eminent domain, even as a temporary taking, is invoked, the amount of compensation for the taking must be considered by the courts.[49] In Missouri, permanent taking or damage to property requires just compensation (fair market value); alternatively, temporary damage to property only requires compensation for the loss in value of the use of the property for the duration of the temporary taking.[50] In nuisance lawsuits, temporary taking is usually at issue, but a permanent taking claim may result if the nuisance is considered impracticable or impossible to abate. [51]

Eminent domain is a serious tool used by and against Missouri's farmers and is often involved in their legal battles. Sometimes it is invoked in the taking of a farmer's land for a public use.[52] More often, however, it is invoked in a farmer's alleged taking of his or her neighbors' land through permanent or temporary damages to it.[53] *Labrayere* examines and rules on the latter issue.

C. Equal Protection

The Fourteenth Amendment to the U.S. Constitution created the doctrine of equal protection in the aftermath of the Civil War in an effort to ensure equal footing under the law between newly freed slaves and the white population.[54] The use and perceived purpose of equal protection has evolved since that time to fulfill a much broader purpose.[55] While the Equal Protection Clause was once used exclusively to protect minorities, it can now be used to challenge a minority's protected status as well.[56] The *Labrayere* case challenges the idea of rural landowners as a protected class.[57]

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49. Byrom v. Little Blue Valley Sewer Dist., 16 S.W.3d 573, 577 (Mo. 2000) (en banc).

50. *Id.*

51. Frank v. Envtl. Sanitation Mgmt., Inc., 687 S.W.2d 876, 883 (Mo. 1985) (en banc).

52. *See generally* Harris v. Bd. of Comm'rs of Wyandotte Cty., 101 P.2d 898 (Kan. 1940); Middletown Twp. v. Lands of Stone, 939 A.2d 331 (Pa. 2007); Wilson v. Fleming, 31 N.W.2d 393 (Iowa 1948).

53. *See generally* Bormann v. Bd. of Supervisors In & For Kossuth Cty., 584 N.W.2d 309 (Iowa 1998); Lindsey v. DeGroot, 898 N.E.2d 1251 (Ind. Ct. App. 2009); Moon v. N. Idaho Farmers Ass'n, 96 P.3d 637 (Idaho 2004); Johnson v. Paynesville Farmers Union Co-op. Oil Co., 817 N.W.2d 693 (Minn. 2012).

54. Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219, 221 (2009).

55. *Id.*

56. *Id.*

57. Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319, 331 (Mo. 2015) (en banc).

Missouri follows a tiered system of evaluation for equal protection claims. Equal protection claims can be evaluated in one of two ways in Missouri.[58] Strict scrutiny is used if the classification disadvantages a "suspect class" or infringes on a constitutionally protected fundamental right, a high bar to reach.[59] When strict scrutiny is used, the classification must be used to achieve a "compelling state interest" and must be narrowly tailored to achieve that interest.[60] Suspect classes include race, national origin, or illegitimacy that "command[s] extraordinary protection" for historical reasons.[61] Fundamental rights requiring strict scrutiny are interstate travel, voting, free speech, and other rights explicitly guaranteed by the Constitution.[62] In all other circumstances, the classification is evaluated using a rational basis test.[63] To pass a rational basis test, the classification must only be rationally related to the achievement of a "legitimate state interest," and deference is given to the legislature, a much easier standard for the law to meet than strict scrutiny.[64]

The connection between agriculture and equal protection is not one usually argued in Missouri courts. However, the Supreme Court of Missouri held in *State ex rel. Webster v. Lehndorff Geneva, Inc.* that agricultural laws can be evaluated with equal protection analysis.[65] In *Webster*, the plaintiffs objected to a law that denied foreign corporations ownership of Missouri farmland.[66] Foreign corporations that owned land prior to September 28, 1975, could keep their land, but all foreign corporations that acquired it after that date would have to sell their land.[67] Their claim was rejected based on the state's rational interest in limiting future ownership of Missouri's agricultural land using a rational basis analysis.[68]

Missouri has also tried to ensure equal protection by banning special laws when general laws can be used.[69] Special laws have been distinguished from general laws by looking at the created category; if the categories are open-ended, the law is not a special law.[70] A law is not considered to be a

58. Etling v. Westport Heating & Cooling Servs., Inc., 92 S.W.3d 771, 774 (Mo. 2003) (en banc).

59. *Id.*

60. *Id.*

61. *Id.* (quoting Riche v. Dir. of Revenue, 987 S.W.2d 331, 336 (Mo. 1996) (en banc)).

62. *In re* Marriage of Woodson, 92 S.W.3d 780, 784 (Mo. 2003) (en banc).

63. *Etling*, 92 S.W.3d at 774.

64. State *ex rel.* Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801, 806 (Mo. 1988) (en banc).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. MO. CONST. art. III, § 40(30) (West, Westlaw through July 7, 2016).

70. Kan. City Premier Apartments, Inc. v. Mo. Real Estate Comm'n, 344 S.W.3d 160, 171 (Mo. 2011) (en banc) (quoting City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177, 184 (Mo. 2006) (en banc)).

special law if it applies in the same way to an entire class and the classification is reasonable.[71] The same principles used in a rational basis analysis are applicable in evaluating "special laws" and classifications.[72] In this way, a form of the rational basis test is applied to ensure fairness, even in laws that appear "special" on their face. Laws making occupations classifications have been upheld because they are open-ended classes.[73] Both equal protection and eminent domain shaped the decision in the instant case, *Labrayere*.

IV. INSTANT DECISION

In 2015, the Supreme Court of Missouri heard a challenge to section 537.296, a law protecting farms from nuisance suits, in the case *Labrayere v. Bohr Farms, LLC*.[74] Neighboring landowners objected to the CAFO that Bohr Farms operated due to the odors and hazardous substances that came onto their land from the CAFO.[75] The court denied the landowners' first argument that section 537.296 was unconstitutional because it allowed private takings.[76] The landowners argued it was a private taking because there was no redress for the temporary loss of the use and enjoyment of their land at the hands of a private company.[77] According to article I, section 28 of the Missouri Constitution, a private taking must involve: (1) property, (2) taken, (3) for private use, (4) without consent.[78] The court disagreed with the landowners' argument regarding private use.[79] It found that if land is taken for something that creates a public advantage or benefit, the use is public, not private, regardless of who is actually using the property in question.[80] The court stated that section 537.296.2 does not always authorize any private party or landowner to create a nuisance.[81] In fact, it declares the creation of a nuisance presumptively unlawful and allows damages in that situation.[82] However, the court found that the promotion of the state's agricultural economy was a sufficient public interest to deem any taking in pursuit of that interest public and not private.[83] Therefore, the court determined that one party

71. Alderson v. State, 273 S.W.3d 533, 538 (Mo. 2009) (en banc).

72. Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo., 950 S.W.2d 854, 859 (Mo. 1997) (en banc) (quoting Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 832 (Mo. 1991) (en banc)).

73. *Kan. City Premier Apartments*, 344 S.W.3d at 171.

74. Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319, 326 (Mo. 2015) (en banc).

75. *Id.*

76. *Id.* at 327.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 328.

81. *Id.*

82. *Id.*

83. *Id.*

"gaining" land and another party losing the loss and enjoyment of his or her land was not enough to negate the public purpose of the taking.[84]

The court next rejected the landowners' second point of appeal that section 537.296 authorized taking without just compensation.[85] The landowners argued that section 537.296.3 eliminated just compensation for the taking because it required that all claims subsequent to the first temporary nuisance claim be designated as permanent nuisance claims.[86] By requiring this designation, the landowners believed it created an easement for others to permanently interfere with the use and enjoyment of their property.[87] The landowners also argued that barring recovery for loss of use and enjoyment damages eliminated the just compensation requirement.[88] The court determined that the question of a permanent easement over the landowners' land was not ripe for consideration, as this was their initial claim of temporary nuisance, not a subsequent claim.[89] The court did not believe that the law allowed a regulatory taking that would require just compensation even when applying the temporary nuisance claim correctly.[90] However, it reasoned that even if it did require just compensation, the statute allows damages for the diminution of rental value, which is the test used to determine temporary-taking compensation.[91]

The court next found that section 537.296 did not violate equal protection.[92] The strict scrutiny test was not applicable because rural landowners and residents are not included in a suspect class.[93] The court found no case law to support the proposition that rural landowners have been marginalized.[94] It claimed that, in fact, the very statute at issue in the case provided benefits to a large number of rural landowners because it protects them from nuisance suits.[95] The court also found no fundamental rights requiring the application of strict scrutiny in the case.[96] It found that the right to freely use and enjoy one's property was generally considered fundamental, but if it were to be used as a justification for applying strict scrutiny, every property regulation or use of eminent domain would require proof of a compelling state interest.[97] The court was unwilling to stray from prior decisions exempting

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 328–29.
89. *Id.* at 329.
90. *Id.* at 330.
91. *Id.*
92. *Id.* at 331.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 332.
97. *Id.*

from the strict scrutiny test property regulations and eminent domain.[98] With no suspect class or fundamental right at issue, the court determined that the correct test to determine whether there was an equal protection violation was the rational basis test.[99]

Under a rational basis analysis, the court gives deference to the legislature and presumes a statute satisfies rational basis scrutiny when it is rationally related to a legitimate state interest.[100] The challenger must overcome that presumption by showing that the statute is arbitrary and irrational.[101] The court also found a legitimate state interest in promoting agriculture and maintaining a strong agricultural economy within the state.[102] It determined that the statute at issue accomplished those goals by lowering the risk of litigation for Missouri farmers.[103] Further, it allowed recovery for property owners who have seen a diminution of their property value due to agricultural operations.[104] The landowners did not convince the court that the statute was completely irrational, so section 537.296 passed the rational basis analysis.[105]

The court next found that section 537.296 caused no due process violation.[106] The landowners argued that the statute's limit on damages destroyed the guaranteed right of enjoyment of one's property and industry.[107] This argument failed for the same reason the equal protection argument failed – the court found a legitimate state interest behind the statute and determined that the state interest and the statute were rationally related.[108] Finally, the court did not find section 537.296 to be a special law.[109] The landowners argued that it was a special law because it limited nuisance damages to cases where the farmer was the defendant.[110] Special laws, those that apply to specific localities, individuals, or classes, rather than the state and population in general, are unconstitutional under article III, section 40 of the Missouri Constitution.[111] However, an exception exists for reasonable classifications used in a law that affect the entire class the same way.[112] Laws with open-ended classifications are presumed by the court to be constitutional and do not qual-

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 333.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 334.
112. *Id.* (quoting Glossip v. Mo. Dep't of Transp. & Highway Patrol Emps.' Ret. Sys., 411 S.W.3d 796, 808 (Mo. 2013) (en banc)).

ify as special laws.[113] The court stated that if class members can change in status, the class is open-ended.[114] The court ruled that the class is open-ended because Missourians can easily change between the farmer and non-farmer class by deciding whether or not to farm their land.[115] The court held this class distinction was reasonable, and it was supported by a legitimate state purpose – promotion of the state's agricultural economy.[116] Therefore, the court concluded it was not an unconstitutional special law.[117]

The court also found proper the grant of summary judgment on the negligence and conspiracy claims because section 537.296 only allows noneconomic damage claims if they are independent of the nuisance claim.[118] In this case, the court found they were not independent of the nuisance claim because they were based upon the same facts and grievances.[119]

Judge Fischer wrote a concurrence, agreeing with the majority's analysis but stated that the analysis was unnecessary because there was no taking in the first place.[120] He said a taking under eminent domain only occurs when a person's protected property rights are infringed upon.[121] He noted that the common law nuisance claim does not recognize loss of use and enjoyment as an infringement upon those rights.[122] This rationale makes it clear that there is not an eminent domain or even an equal protection violation in section 537.296, which protects both large and small farm operations. The protection of farm operations of every size is a very important aspect of *Labrayere*. This case acts as a signal that all agricultural interests will be protected in Missouri, as does the new Right to Farm amendment.

V. COMMENT

The Supreme Court of Missouri made the right decision in this case for several reasons. This Part first considers the protection this statute grants to farmers, both large and small. While the statute does establish important protections for big agriculture and corporate farms, it also protects the small farmer from crippling nuisance suits. Second, this Part considers the influence of Missouri's new Right to Farm amendment – which provides broader protection of agricultural interests than those provided by section 537.296. Third, this Part examines the eminent domain decision by the court in *Labrayere*. Finally, it analyzes equal protection as applied to agricultural

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 335.
120. *Id.* (Fischer, J., concurring).
121. *Id.* at 336.
122. *Id.*

laws. The court's decision in *Labrayere* shows the Supreme Court of Missouri's willingness to protect the state's agricultural economy. This decision indicates that future lawsuits of this nature will also be decided in favor of agricultural interests.

A. Protecting Large and Small Farmers

All fifty states have some form of a Right to Farm law.[123] Many people, including farmers, think laws like these are written to primarily protect corporate farmers – allowing their greed to continue unchecked at the expense of family farmers. Some family farmers believe that these laws hurt small farms, as they ban or limit their ability to receive damages from their large corporate neighbors. Farmers have long been a favored group in the United States. This protection goes beyond insulation from nuisance lawsuits. The federal government has passed laws excluding farmers from antitrust laws, allowing them to organize into cooperatives, and protecting them from lenders seeking to collect debts while farmland value was depressed.[124] The federal government also regularly passes farm bills to protect and subsidize the industry.[125] Most of this legislation is meant to protect family farms from large external forces – like the dust bowl, refrigerated shipping, and, more recently, the rise of corporate farming – that change the agricultural economy.[126]

These protections are important because the U.S. agricultural industry is rapidly losing members. The average age of the U.S. farmer has risen from 50.5 years to 58.3 years since 1985.[127] During this time, there has been more than a thirty percent increase in farmers over the age of seventy-five and a twenty percent decrease of farmers under the age of twenty-five.[128] There are almost six times more farmers at or near the end of their careers (sixty-five or over) than farmers just beginning their careers (thirty-four or younger).[129] This is why it is so important to protect the agricultural industry and give farmers some peace of mind.

These industry protections incentivize young people to begin careers in agriculture. Who wants to join an industry that is rapidly declining, expensive to get into, and constantly threatened by crippling and expensive lawsuits? Missouri must do what it can to alleviate these concerns and keep the industry healthy and vital. Small family farms are integral to American so-

123. Bosman, *supra* note 32.

124. Neil D. Hamilton, *Harvesting the Law: Personal Reflections on Thirty Years of Change in Agricultural Legislation*, 46 CREIGHTON L. REV. 563, 565–66 (2013).

125. *Id.* at 565–66.

126. *Id.* at 566.

127. Joe M. Allbaugh, *An America Without Farmers*, DAILY CALLER (Oct. 14, 2015, 12:03 PM), http://dailycaller.com/2015/10/14/an-america-without-farmers/.

128. *Id.*

129. *Id.*

ciety and have been from the beginning of the country's history. To lose this rich tradition would be to lose an important part of American heritage and American life.

As was seen in the debate over the Right to Farm amendment, some people believe the instant decision favors corporate farmers at the expense of small and family farmers.[130] There may be some truth to these accusations. It is true that section 537.296 and the Right to Farm amendment protect corporate farming interests. In doing so, they also support the state's agricultural economy by keeping large corporate farms in business in Missouri.[131] Corporate farms can now operate in Missouri without worrying about large damage awards for nuisance suits. However, it also protects the small farmer. It is true that small farmers will no longer be able to sue corporate farms for massive damages they might incur from stream pollution or runoff, but they in turn will not be liable in similar lawsuits against them.[132] Some small farmers may be threatened by large corporate farms moving into the area. However, a much more pressing concern for small farmers is the ever-encroaching urban areas which lead to more nonagricultural neighbors.[133] These neighbors are very likely to successfully sue for, and recover, large awards without section 537.296 and the Right to Farm amendment.[134]

Before Right to Farm laws were even being considered in most states, this very scenario closed down a Massachusetts hog farm.[135] In 1963, new neighbors successfully sued a local farmer for nuisance and obtained an injunction against the farmer, putting the farm out of business.[136] More recently, a farming family in Indiana was sued because of its new hog finishing facility.[137] The family followed all state rules and regulations in setting up the new finishing house.[138] After a lengthy approval process, the neighbors sued them for nuisance based on the odor the neighbors feared it would bring, and the family is now faced with an expensive lawsuit that threatens their

130. Editorial Board, *Editorial: Factory Farm Protection Act Degrades Missouri's Constitution*, ST. LOUIS POST-DISPATCH (Apr. 29, 2011, 12:00 AM), http://www.stltoday.com/news/opinion/columns/the-platform/editorial-factory-farm-protection-act-degrades-missouri-s-constitution/article_a247e52a-1ee0-57f4-becf-6163fa259bfb.html.

131. Maria Sudekum Fisher, *Mo. Jury Rules for Hog Farm Owner in Odor Lawsuit*, ASSOCIATED PRESS (June 23, 2011, 2:54 PM), http://www.businessweek.com/ap/financialnews/D9O1ONRG0.htm.

132. *Id.*

133. Steven D. Shrout, *Missouri's Right to Farm Statute's Durational Use Requirement and the Right to Farm Amendment,* 83 UMKC L. REV. 499, 499–500 (2014).

134. *Id.* at 504–05.

135. *See* Pendoley v. Ferreira, 187 N.E.2d 142, 146 (Mass. 1963).

136. *Id.* at 146.

137. Mike Wilson, *A Legal Battle to Farm*, PORK NETWORK (Aug. 11, 2015, 6:15 AM), http://www.porknetwork.com/community/legal-battle-farm.

138. *Id.*

entire farming operation.[139] The family has turned to a crowd-funding website to pay its ever-mounting legal bills and to keep its farm running.[140] This is exactly the kind of suit from which the ruling in the instant case, section 537.296, and the Right to Farm amendment will protect farmers.

B. The Influence of the Right to Farm Amendment

Labrayere failed to mention the Right to Farm amendment because it did not apply retroactively, but it almost certainly influenced the court's decision. With the passage of the Right to Farm amendment, Missouri citizens reaffirmed their commitment to the state's agricultural economy.[141] The vote signaled that Missouri citizens support farming rights.[142] This signal was almost certainly considered by the court in *Labrayere*, influencing the outcome of the case. Not only was this decision in keeping with the political climate of the state,[143] but it also sends a signal to future litigants who might challenge the new Right to Farm amendment. While the decision in no way explains or addresses the amendment, it does show the court's willingness, or lack thereof, to invalidate laws created to protect the state's agricultural economy.

C. Eminent Domain

In the instant case, the court found that the question of eminent domain was not ripe for consideration because it was only a temporary nuisance suit.[144] However, this topic is likely to come up again as the limits of the statute and the Right to Farm amendment are tested. In the future, it seems quite possible that the courts could find an eminent domain-like taking when applying this statute to a nuisance lawsuit, based on the limitation the nuisance creates on the use of neighboring land. This sort of conflict between urban and agricultural landowners is particularly common on the edge of an urban area, where new urban residents are moving to get just outside the city.[145] Many state legislatures feared that *Kelo v. City of New London* would allow farmland to be taken for economic development and therefore created statutes to protect farmland.[146]

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139. *Id.*

140. *Id.*

141. Bosman, *supra* note 32.

142. Brandon Kiley, *Missouri Voters Pass Right to Farm Amendment by Slim Margin*, KBJA MID-MO. PUB. RADIO (Aug. 6, 2014), http://kbia.org/post/missouri-voters-pass-right-farm-amendment-slim-margin.

143. *Id.*

144. Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319, 328 (Mo. 2015) (en banc).

145. Peter J. Wall, *Land Use and Agricultural Exceptionalism*, 16 SAN JOAQUIN AGRIC. L. REV. 219, 220 (2006-07).

146. *Id.* at 232.

One argument advanced by the neighbors in *Labrayere* was that allowing farmers to interfere with their property with no possibility for damages created an easement, which was a taking without just compensation.[147] This could be compared to the inconvenience a railroad creates when it runs near someone's property.[148] Some industries are so important that they receive favorable legal treatment, including protection from nuisance suits.[149] Some states use regulations to mandate reasonable farming practices and only protect farms following those practices from nuisance suits.[150] Besides, farmers are not allowed to hop over the fence and start planting corn and grazing cows on their neighbors' land. Instead, farmers are allowed to use their own land to the best of their abilities, even if it creates a nuisance for some of their neighbors.

Farm neighbors in Iowa have also claimed an unlawful taking of their land.[151] Iowa's Right to Farm statute originally included a blanket ban on all nuisance suits for all property involved in agricultural activities.[152] The Iowa Supreme Court declared this statute unconstitutional because it enabled unlawful takings without just compensation since there was no possibility of a remedy.[153] Section 537.296 differs from the Iowa statute because there is no blanket ban on nuisance suits.[154]

Further, there is a distinct public use to an agricultural operation.[155] The Supreme Court of Missouri has held that producing food for the population is a public purpose.[156] However, a farmer versus farmer suit may complicate this law and this belief. It is very common for large corporate farms to pollute streams and fields used by smaller farms, which can lead to lawsuits. In these cases, it will be difficult to conclude one farmer's use is public without finding that the other's use is as well, leaving one or both sides with no remedy for the damages they face.

Protecting farmers from nuisance suits does not automatically lead to an eminent domain conflict, but it may be viewed that way in some cases. In those cases, the public purpose of food production can protect farmers against crippling nuisance suits. This special treatment of agricultural interests has inevitably led to questions of fairness and equal protection.

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147. Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319, 329 (Mo. 2015) (en banc).

148. Wall, *supra* note 145, at 228.

149. *Id.*

150. *Id.* at 230.

151. *Id.* at 226.

152. *Id.* at 231.

153. *Id.* at 232; Bormann v. Bd. of Supervisors In & For Kossuth Cty., 584 N.W.2d 309, 321 (Iowa 1998).

154. MO. REV. STAT. § 537.296 (Cum. Supp. 2013).

155. State *ex rel.* Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801, 806 (Mo. 1988) (en banc).

156. *Id.*

D. Equal Protection

In *Labrayere*, the landowners argued a violation of equal protection had occurred based on agriculture's special treatment under the law.[157] The court found no violation of equal protection.[158] This decision is very important for future agricultural laws and litigation.

All over the United States, agricultural land use is recognized as a separate category for nuisance laws.[159] Much like the Missouri law, these laws seek to protect the agricultural economy by ensuring only the most grievous nuisances by agricultural landowners are punished.[160] However, when an industry is singled out in this way, there is an unwritten conclusion that its activities and effects will never be unreasonable.[161] If the state's agricultural economy is so important that it warrants a heightened level of protection, it is difficult to imagine a scenario where a neighbor's complaint would outweigh the state interest. Undoubtedly, this could be pushed too far, as when Iowa's lawmakers banned all nuisance suits against farmers.[162] This example illustrates the importance of striking an appropriate balance between protecting farmers' rights without infringing on other citizens' rights.

Agriculture was once a majority industry in the United States.[163] In 1840, farmers made up sixty-nine percent of the American labor force.[164] However, farmers today are an unmistakable minority in America, with just eight percent of the population involved in agriculture in 2012.[165] As such, their rights must be protected to ensure the survival of such an important industry.

Section 537.296 protects both large and small agricultural operations in Missouri. This protection is essential for both the preservation and growth of Missouri agriculture. The Right to Farm amendment is also important in this respect, but the *Labrayere* case ensures that these protections will survive against legal challenges. Eminent domain and equal protection challenges are unlikely to defeat these protections. The Supreme Court of Missouri did the right thing in *Labrayere* because the statute protects the state's agricultural economy in a fair and just manner for the good of the general population. It does not run afoul of eminent domain or equal protection laws. The court correctly applied section 537.296 to prevent farmers' neighbors from bringing a nuisance suit against the farmer. The decision is also an important indi-

157. Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319, 326 (Mo. 2015) (en banc).

158. *Id.* at 333.

159. Wall, *supra* note 145, at 226.

160. *Id.*

161. *Id.*

162. *Id.* at 231.

163. *See* Debra Spielmaker, Historical Timeline – 1840, AGCLASSROOM (2014), http://www.agclassroom.org/gan/timeline/1840.htm.

164. *Id.*

165. NASS, U.S.D.A., 2012 Census of Agriculture (2014).

cation as to how future lawsuits concerning the protection of Missouri agriculture will be decided.

VI. CONCLUSION

Agricultural nuisance will always be a problem in our society, as the ever-present and necessary agricultural industry pushes against the borders of its neighbors and gets too close for comfort. Section 537.296 helps to protect this vital industry by limiting crippling damages in nuisance suits for agricultural operations. The *Labrayere* decision enshrines this protection in case law and creates important precedent for Missouri agriculture. With this decision, farmers are encouraged to continue their important work without worrying about being pushed out by their new, disgruntled neighbors. This case also signals how future cases regarding the Right to Farm amendment might turn out. The eminent domain analysis in agricultural nuisance suits clarifies the practice and process for awarding just compensation. The court's position on equal protection is important because it addresses not just this statute, but other protectionist agricultural laws as well. The *Labrayere* case is significant not only because of its decision upholding section 537.296, but also because of its signal to future farmer litigants.