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Endangering Missouri's Captive Cervid Industry

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NOTE

Endangering Missouri's Captive Cervid Industry

Hill v. Mo. Dep't of Conservation, 550 S.W.3d 463 (Mo. 2018) (en banc)

*Lauren Hunter**

I. INTRODUCTION

Imagine a crisp autumn morning just after the break of dawn. A young hunter sits silently, waiting and watching, basking in the subtle sunlight serenading across the Missouri landscape. Out of the corner of her eye, she sees it – a beautiful ten-point buck slipping slowly into view. Steadily, she takes aim as the beast strolls perfectly between her sights. With a flash, the creature falls and adrenaline pulsates through the young hunter's veins. Each hunting season, these exhilarating experiences are facilitated by captive cervid¹ breeders like Donald Hill, co-owner of Oak Creek Whitetail Ranch.² However, with new, demanding regulations promulgated by the Missouri Conservation Commission ("Commission")³, Hill now finds his business caught between the crosshairs.

This Note seeks to explore the validity of regulations proposed by the Commission to prevent the spread of chronic wasting disease ("CWD") – a fatal neurodegenerative disease – in cervids, such as white-tailed deer. Part II discusses the facts and circumstances surrounding the Missouri Supreme

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1. Cervids are hoofed mammals in the family *cervidae*, whose males typically grow antlers that shed annually. *Hill v. Mo. Conservation Comm'n*, No. 15OS-CC00005-01, 2016 WL 8814770, at *1 (Mo. Cir. Ct. Gasconade Cty. Nov. 17, 2016), *rev'd sub nom.* *Hill v. Mo. Dep't of Conservation*, 550 S.W.3d 463 (Mo. 2018) (en banc). "White-tailed deer and elk are examples of cervids" that are native to Missouri. *Id.*

2. *See id.*

3. The Commission is a four-member board whose members are appointed by the governor to serve six-year terms. *Conservation Commission*, MO. DEP'T OF CONSERVATION, <https://mdc.mo.gov/about-us/conservation-commission> (last visited Jun. 1, 2019). The Commission is responsible for appointing the Director of the Missouri Department of Conservation, serving as policymakers, approving wildlife code regulations, developing the budget, and making major expenditure decisions. *Id.*

Court's decision in *Hill v. Missouri Department of Conservation*.⁴ Part III dissects the delicate balance between private property interests and government interests, the scope of the Commission's regulatory authority, as well as the driving forces behind the "right-to-farm" amendment to the Missouri Constitution. Part IV unpacks the court's reasoning in *Hill* before concluding with a discussion on the implications of the court's holdings on private property rights, the regulatory authority of the Commission, and the interpretation of the right-to-farm amendment.

II. FACTS AND HOLDING

Donald Hill and his co-plaintiffs, Travis Broadway, Kevin Grace, and Whitetail Sales and Service, LLC (hereinafter "Breeders"), each participate in the selective breeding of captive cervids, such as white-tail deer and elk.⁵ In October of 2014, the Commission began amending its regulations to impose stricter standards on the captive cervid industry.⁶ Shortly after the Commission's regulations were approved and took effect, the Breeders sued to enjoin the Commission from enforcing its regulations.⁷ The Breeders asserted that the new, more stringent regulations would prevent them from successfully operating their businesses and violate their right to farm as granted to them in the Missouri Constitution.⁸ Furthermore, the Breeders argued that these regulations fell outside the scope of the Commission's regulatory authority.⁹ In response to the Breeders' lawsuit, the Commission contended that regulating the captive cervid industry did fall within its regulatory authority,¹⁰ and, moreover, its stricter regulations on cervid breeding facilities were vital to preventing the spread of CWD.¹¹

CWD is a fatal neurodegenerative disease that infects cervids, such as white-tailed deer.¹² Symptoms of CWD have been likened to mad cow disease, and the two infections are part of the same family.¹³ Infecting its victims through contact with proteins – known as prions – the disease can be passed directly through animal-to-animal contact or indirectly through environmental

4. 550 S.W.3d 463 (Mo. 2018) (en banc).

5. *Hill*, 2016 WL 8814770, at *1.

6. *Id.* at *6.

7. *Id.* at *2.

8. *Id.* at *2–3.

9. *Id.*

10. *Id.* at *3.

11. *Id.* at *6.

12. Brief of Appellants Missouri Conservation Commission, Missouri Department of Conservation, James Blair, David Murphy, Marilynn Bradford, & Don Bedell at 12, *Hill v. Mo. Dep't of Conservation*, No. ED 105042, 2017 WL 4507991 (Mo. Ct. App. Oct. 10, 2017), *transferred to* 550 S.W.3d 463 (Mo. 2018) (en banc), 2017 WL 1534985 [hereinafter Brief of Appellants].

13. *Id.*

contact with plants, water, and other matter.¹⁴ The disease has an eighteen-month incubation period between initial infection and initial symptoms, and there are no methods of testing animals for the disease while they are still alive.¹⁵ Even if a live test for CWD became available, no cure or vaccination for the disease has yet been discovered or developed.¹⁶ All these factors make CWD incredibly contagious and particularly difficult to contain.¹⁷

The increased density of animals in captive cervid facilities increases the risk of CWD transmission.¹⁸ Recognizing this risk and attempting to minimize it, the Missouri Department of Agriculture (“MDA”) began regulating captive cervid facilities pursuant to its authority under the Missouri Livestock Disease Control and Eradication Law (“MLDCEL”).¹⁹ These regulations state that captive cervids cannot enter Missouri if they come from a herd that has tested positive for CWD within the previous five years or if they originate from an area where CWD has been reported in the previous five years.²⁰ The MDA also requires individual identification through ear tagging, strict veterinary records, and enrollment in the CWD program for all captive cervids over one year old.²¹ To move within the State of Missouri, captive cervids must meet a CWD status standard, and any herds suspected of contracting CWD must be quarantined.²² “In 2013, the [MDA]’s CWD-monitoring program was [named] an ‘Approved State Chronic Wasting Disease Herd Certification Program’ by the United States Department of Agriculture [(“USDA”)].”²³

On October 17, 2014, the Commission proposed a handful of amendments to regulations directed at the farmed-cervid industry in an attempt to manage the spread of CWD in the Missouri cervid population.²⁴ The Commission’s proposed amendments were approved and took effect on January 30,

14. *Id.*

15. *Id.* at 16.

16. *Id.*

17. *Id.* at 18.

18. *Id.* at 19.

19. *Hill v. Mo. Conservation Comm’n*, No. 15OS-CC00005-01, 2016 WL 8814770, at *2 (Mo. Cir. Ct. Gasconade Cty. Nov. 17, 2016), *rev’d sub nom. Hill v. Mo. Dep’t of Conservation*, 550 S.W.3d 463 (Mo. 2018) (en banc).

20. *Id.*; *see also* MO. CODE REGS. ANN. tit. 2, § 30-2.010(10)(E)(1) (2018) (stating captive cervids will not be allowed to enter Missouri if the cervid originated from an area with reported CWD and from a captive herd that has tested CWD-positive within last five years).

21. *Hill*, 2016 WL 8814770, at *3; *see also* MO. CODE REGS. ANN. tit. 2, § 30-2.020(6)(A) (requiring official ear tags).

22. *Hill*, 2016 WL 8814770, at *3; *see also* MO. CODE REGS. ANN. tit. 2, § 30-2.020(6)(D) (mandating enrollment in a CWD program).

23. *Hill*, 2016 WL 8814770, at *3.

24. *Id.* at *6.

2015.²⁵ The changes to the regulations included clarifying that the Commission's regulations extended to "wildlife raised or held in captivity";²⁶ defining "Class I Wildlife" to include white-tailed deer, white-tailed deer hybrids, mule deer, and mule deer hybrids and imposing fencing and confinement requirements on said wildlife class;²⁷ imposing new fencing requirements for captive cervid facilities;²⁸ imposing veterinary-testing, record-keeping, and reporting requirements on hunting preserves;²⁹ and prohibiting out-of-state cervids from being shipped to breeding facilities or held on hunting preserves.³⁰

As participants in the captive cervid industry,³¹ the Breeders are all too familiar with the threat that CWD poses to their herds.³² With cervid herds collectively worth millions of dollars, the Breeders' all have a significant interest in keeping their cervids healthy.³³ The Breeders' cervids are born and bred in captivity and are held on private property in enclosed hunting preserves or breeding facilities throughout their lives.³⁴ All new cervids that enter the Breeders' properties are purchased from other captive cervid owners.³⁵ Much like other domesticated animals, the Breeders' cervids are bred naturally or through artificial insemination and are bought, sold, or auctioned to other private breeding facilities and hunting preserves.³⁶ To successfully run their businesses, the Breeders rely on their ability to selectively breed white-tailed deer and elk, promoting desirable characteristics, such as large antler racks.³⁷ Selective breeding largely depends on the importation of live breeding stock

25. *Id.* at *2.

26. *Id.* § 10-4.110(1) (establishing the scope of regulation).

27. *Id.* § 10-9.220(2)(R) (table) (listing Class I wildlife by establishing their enclosure requirements).

28. *Id.* § 10-9.220(3) (defining fencing and enclosure requirements for cervids).

29. *Id.* § 10-9.565(1)(B) (mandating requirements for hunting preserves); *id.* § 10-9.566 (2015) (establishing record requirements for hunting preserves).

30. *Hill*, 2016 WL 8814770, at *6–7; MO. CODE REGS. ANN. tit. 3, § 10-9.353(2) (“[L]ive white-tailed deer, white-tailed deer-hybrids, mule deer, mule deer-hybrids, raccoons, foxes, and coyotes may not be imported . . .”); *id.* § 10-9.565(1)(B)(9) (prohibiting imported cervids to be held in a licensed big game hunting preserve).

31. “Donald Hill is the co-owner of Oak Creek Whitetail Ranch, LLC, . . . a 1,300-acre hunting preserve and [w]hite-tailed deer breeding facility” with a deer herd valued at approximately \$6.45 million. *Hill*, 2016 WL 8814770, at *1. “Travis Broadway is the owner of Winter Quarters Wildlife Ranch LLC, . . . [a] 3,000-acre hunting preserve” and lodge offering three-day guided hunts for deer and elk with revenues based on the size of the animal taken. *Id.* Kevin Grace is the owner of Whitetail Sales and Service, LLC, a business formed to broker transactions between breeding operations and hunting preserves, breed deer, and organize annual captive-cervid auctions. *Id.*

32. *See id.* at *5.

33. *See id.* at *2.

34. *Id.* at *8.

35. *Id.*

36. *Id.*

37. *Id.* at *1.

sourced from out-of-state breeding facilities;³⁸ however, the Commission's updated regulations prohibit the importation of live cervids from outside the state, thus endangering the Breeders' selective breeding stock.³⁹ Without the ability to import and hold captive cervids from outside the state, the Breeders will be unable to meet customer demand for "trophy" bucks.⁴⁰

Because of the threat the Commission's regulations posed to their businesses, the Breeders sued to enjoin the Commission from enforcing its regulations.⁴¹ The Breeders argued that the regulations were invalid because the animals at issue did not fall within the scope of the Commission's regulating authority as defined under article IV, section 40(a) of the Missouri Constitution.⁴² Furthermore, the Breeders asserted that the regulations inhibited their fundamental right to engage in farming and ranching practices as granted by article I, section 35 of the Missouri Constitution, also known as the right-to-farm amendment.⁴³ The Breeders maintained that if the Commission's regulations were enforced, they would face irreparable harm, including significant loss of business and potentially bankruptcy.⁴⁴

The Commission countered that even though the Breeders' operations were privately owned, involved privately bred cervids enclosed on private property, and were already subject to the regulation of the MDA, the cervids were still wild by nature and were thus "game" and "wildlife" subject to the regulation of the Commission.⁴⁵ As to the Breeders' assertion that the regulations violated their right to farm, the Commission argued that the right-to-farm amendment did not apply to the Breeders because they were not engaged in farming or ranching practices.⁴⁶

After the Breeders requested a preliminary injunction, the court held an initial hearing on July 23, 2015.⁴⁷ On August 13, 2015, the Circuit Court of

38. *Id.* at *9–10.

39. *Id.* at *1.

40. *Id.*

41. *Id.* at *2.

42. *Id.* at *2, *18; *see also* MO. CONST. art. IV, § 40(a) ("The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission . . .").

43. *Hill*, 2016 WL 8814770, at *18; *see also* MO. CONST. art. I, § 35 ("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.").

44. *Hill*, 2016 WL 8814770, at *16–17.

45. *Id.* at *12.

46. *Id.* at *18–19.

47. *Id.* at *2.

Gasconade County, the Honorable Judge Robert D. Schollmeyer presiding, granted the Breeders' request for a preliminary injunction, finding that the Breeders had demonstrated a probability of success on the merits.⁴⁸ A second hearing on the full merits of both counts was held on June 8, 2016.⁴⁹ After the second hearing, the court found in favor of the Breeders, declaring the regulations imposed by the Commission invalid and granting the request for a permanent injunction.⁵⁰

The Commission appealed the circuit court's decision on both counts.⁵¹ The Missouri Court of Appeals for the Eastern District heard the appeal.⁵² For its first point on appeal, the Commission claimed the circuit court erred in finding that the regulations at issue were not authorized under the Missouri Constitution.⁵³ More specifically, the Commission argued that it was error to conclude that privately owned animals were neither game, wildlife, nor a resource of the state as defined under article IV, section 40(a).⁵⁴ On its second point, the Commission argued that the circuit court erred in holding that the regulations inhibited the Breeders' right to farm as granted by article I, section 35.⁵⁵ The Eastern District affirmed the circuit court's findings as to count one and two but requested transfer to the Missouri Supreme Court based on the significant state interests at stake in the matter.⁵⁶

The Missouri Supreme Court granted transfer and heard oral arguments on January 10, 2018.⁵⁷ On July 3, 2018, the Missouri Supreme Court handed down a unanimous decision that reversed the circuit court's judgment in favor of the Breeders and entered judgment in favor of the Commission on all counts.⁵⁸ Judge Paul C. Wilson delivered the opinion of the court, holding that captive cervids were "game" and "wildlife" subject to the regulatory authority of the Commission and that the Breeders were not engaged in "farming [or] ranching practice" for purposes of the right-to-farm amendment of the Missouri Constitution.⁵⁹ Thus, the court held the Commission's regulations did not infringe upon the Breeders' rights.⁶⁰

48. *Id.* at *2, *12.

49. *Id.* at *2.

50. *Id.* at *22.

51. *Hill v. Mo. Dep't of Conservation*, No. ED 105042, 2017 WL 4507991, at *1 (Mo. Ct. App. Oct. 10, 2017), *transferred to* 550 S.W.3d 463 (Mo. 2018) (en banc).

52. *Id.* at *3.

53. *Id.*; *see also* MO. CONST. art. IV, § 40(a).

54. *Hill*, 2017 WL 4507991, at *4–5.

55. *Id.* at *3.

56. *Id.* at *7, *9.

57. *See Case Summaries for January 10, 2018*, MO. COURTS, <https://www.courts.mo.gov/page.jsp?id=119841> (last visited June 4, 2019).

58. *Hill v. Mo. Dep't of Conservation*, 550 S.W.3d 463, 474 (Mo. 2018) (en banc).

59. *Id.* at 472–74.

60. *Id.*

III. LEGAL BACKGROUND

This Part explores the history of private property rights in animals, the protections on those rights, and the remedies when those rights are infringed upon. Section A discusses the power of the federal and state judiciary to review the actions of executive agencies through the use of regulatory taking analysis and defining the scope of regulatory power. Section B concludes this Part with a brief history and discussion of the right-to-farm movement that led Missouri to add the right-to-farm amendment to its Constitution.

A. Judicial Review of Agency Actions

Protecting property rights was a foundational concept in establishing the American system of governance.⁶¹ In most circumstances, animals fall within the category of personal property; therefore, the right of an individual to own and use animals also warrants protection.⁶² However, when the government has a public interest in regulation, oftentimes private property rights are inhibited.⁶³ To check this power, courts may exercise judicial review over agency actions.⁶⁴ This Section explores two situations in which the court may overturn a challenged regulation: when a regulation constitutes a regulatory taking under the Fifth Amendment and when a regulation exceeds the scope of an agency's regulatory authority.

1. Balancing Private Property Rights and Regulatory Interests

Property rights are said to be an integral part of any civilization.⁶⁵ Some scholars suggest that property rights should be held in equal regard with liberty rights.⁶⁶ Recognizing the importance of private property, the framers incorporated property protections into the U.S. Constitution in the form of the Takings Clause of the Fifth Amendment.⁶⁷ The Takings Clause, which states that "private property [shall not] be taken for public use, without just compensation,"⁶⁸ taken together with the Due Process Clause of the Fourteenth Amendment,

61. See James L. Huffman, *The Public Interest in Private Property Rights*, 50 OKLA. L. REV. 377, 381 (1997).

62. See David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1050 (2010).

63. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005) (outlining regulatory takings jurisprudence).

64. See Huffman, *supra* note 61, at 382–83.

65. Fred H. Blume, *Human Rights and Property Rights*, 64 U.S. L. REV. 581, 581 (1930).

66. Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L. J. 555, 555–56 (1997).

67. Huffman, *supra* note 61, at 381; Favre, *supra* note 62, at 1025; see also U.S. CONST. amend. V.

68. U.S. CONST. amend. V.

which prohibits the states from denying life, liberty, or property without due process of law, creates a limit on both federal and state governments.⁶⁹ While the plain meaning of these clauses appears to apply only to the physical seizure of private property, United States Supreme Court jurisprudence interprets the meaning of the Takings Clause to include a prohibition against regulatory takings as well.⁷⁰ In other words, statutes and regulations that restrict the use or decrease the value of property without just compensation may amount to a constitutional violation.

Three categories of property exist: real property, personal property, and intellectual property.⁷¹ From this perspective, animals are categorized as personal property, defined as physical, moveable, or with a limited physical existence.⁷² Under English common law, however, not all animals earned such status.⁷³ While “useful” animals, such as cattle and sheep, were given the most protections under property law, animals *ferae naturae* – of a wild nature – were given little to no protection at all.⁷⁴ This distinction was largely based on perceived economic value.⁷⁵ Work animals and livestock, such as horses and cattle, were thought to provide an inherent value to their owners that wild animals did not.⁷⁶ American jurisprudence puts less emphasis on an animal’s usefulness as a justification for property protections.⁷⁷ Instead, animals are considered personal property if they are tame, domesticated, or reduced to possession by either kill or capture.⁷⁸ The domesticated animal distinction has been held to include more than traditional farm animals such as cattle, swine, chickens, and horse.⁷⁹ For example, white-tailed deer bred and raised in captivity have

69. Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 888–89 (2001).

70. *Id.* at 885–86.

71. Favre, *supra* note 62, at 1025.

72. *Id.* at 1026.

73. *Id.*

74. *Id.*

75. *Id.* at 1027.

76. *Id.* at 1026.

77. *See id.* at 1027–28.

78. *On Property in Animals*, 3 JURIST 403, 404 (1832).

79. *Oak Creek Whitetail Ranch, L.L.C. v. Lange*, 326 S.W.3d 549, 550 (Mo. Ct. App. 2010).

frequently been recognized as domesticated animals for the purposes of defining the deer as personal property.⁸⁰ Therefore, most animals kept on a person's property warrant private property protections.⁸¹

The balance between the constitutional protection of private property and the government's interest in protecting the public good has always been a delicate one.⁸² In recent years, claimants challenging the constitutionality of statutes and regulations that infringe upon their property rights often fail.⁸³ While such claimants assert that their economic interests are being jeopardized, the government's pursuit of some social or economic purpose is perceived as warranting judicial deference.⁸⁴ In deciding whether a regulation constitutes a violation of the Takings Clause, the Supreme Court weighs various factors, including whether the "government regulation amount[s] to a physical confiscation," whether the regulation "leave[s] the property owner with [an] economically viable use of the property," whether "the benefits of the regulation outweigh the detriment to the property owner," and whether "the regulation [is] necessary to effect a substantial public purpose."⁸⁵

This delicate balance becomes particularly clear when environmental regulations come head to head with private property rights.⁸⁶ In his exploration of this issue, Professor James Huffman explains that environmental regulation presumes that private property owners are the cause of environmental harm: "[P]rivate property and other forms of private economic rights are exercised by self-interested, even if well intentioned, individuals in ways which do not take account of most environmental consequences."⁸⁷ Therefore, executive agencies that promulgate environmental regulations often inhibit private property rights.⁸⁸ Ensuring that the decisions of executive agencies do not infringe too far into private property rights is one reason why the decisions of all executive agencies are subject to judicial review.

80. *See, e.g.*, *State v. Hudnall*, 480 So. 2d 933, 936 (La. Ct. App. 1985) ("A person of ordinary intelligence would understand that a "domesticated deer" includes a tamed deer raised as a pet in a pen behind someone's home, such as in the present case."); *State v. Lee*, 41 So. 2d 662, 663 (Fla. 1949) ("These wild animals are not subject to private ownership so long as they remain wild and unconfined, but such animals become property when removed from their natural liberty and made the subject of man's dominion. It will be observed that animals *ferae naturae* become property, and entitled to protection as such, when the owner has them in his actual possession, custody or control and usually this is accomplished by taming, domesticating or confining them."); *Dieterich v. Fargo*, 194 N.Y. 359, 364–65 (N.Y. Ct. App. 1909) ("Deer, though strictly speaking *ferae naturae*, kept in inclose [sic] ground, are the subject of property, pass to the executors, and are liable to be taken in distress.")

81. Huffman, *supra* note 61, at 381–82.

82. Huffman, *supra* note 61, at 381–82.

83. *See id.* at 383.

84. *Id.*

85. Tunick, *supra* note 69, at 885–86.

86. Huffman, *supra* note 61, at 382.

87. *Id.*

88. *See id.* at 382.

2. Maintaining the Scope of Regulatory Authority

Courts can also exercise a check on executive agencies by issuing opinions on the validity of challenged regulations. Under section 536.050 of the Missouri Revised Statutes, Missouri courts are granted the authority to render declaratory judgments against state agencies regarding the validity of rules and regulations promulgated by said agencies.⁸⁹ When deciding the validity of a state agency's regulation, the court first looks to the agency's enabling statute⁹⁰ to determine whether the regulation in question falls within the delegated authority of the state agency.⁹¹ "Rules are void if they are beyond the scope of the legislative authority conferred upon the state agency or if they attempt to expand or modify the statutes."⁹² Regulations will be sustained unless they are found to be unreasonably or clearly inconsistent with the agency's enabling statute.⁹³ The court will construe the enabling statute "in light of the purposes the legislature intended to accomplish and the evils it intended to cure."⁹⁴ To give effect to the statute as written, statutory language is generally taken at its plain and ordinary meaning.⁹⁵ The court presumes that the legislature intended the logical results of a statute's particular wording and phrasing.⁹⁶

In *Missouri Hospital Association v. Missouri Department of Consumer Affairs*, the court held that certain rules imposed by the Missouri State Board of Pharmacy ("Board") were void and that the Board had no authority to create rules and regulations relating to in-hospital dispensing of drugs.⁹⁷ In reaching its decision, the court first looked to the Missouri statute establishing the Board.⁹⁸ The court found that chapter 338 of the Missouri Revised Statutes

89. MO. REV. STAT. § 536.050 (2018) ("The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments respecting the validity of rules, or of threatened applications thereof, and such suits may be maintained against agencies whether or not the plaintiff has first requested the agency to pass upon the question presented.").

90. An enabling statute is a statute that delegates powers or creates new powers. *Enabling Statute Law and Legal Definition*, U.S. LEGAL, <https://definitions.uslegal.com/e/enabling-statute/> (last visited June 4, 2019). For example, a congressional statute is an enabling statute when it confers powers on executive agencies to carry out various delegated tasks. *Id.*

91. *Brown v. Melahn*, 824 S.W.2d 930, 933 (Mo. Ct. App. 1992) (en banc) (citing *Osage Outdoor Advert. v. State Highway Comm'n*, 624 S.W.2d 535, 537 (Mo. Ct. App. 1981)).

92. *Mo. Hosp. Ass'n v. Mo. Dep't of Consumer Affairs*, 731 S.W.2d 262, 264 (Mo. Ct. App. 1987) (citing *Brown-Forman Distillers Corp. v. Stewart*, 520 S.W.2d 1 (Mo. 1975) (en banc)).

93. *Brown*, 824 S.W.2d at 933 (citing *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 197 (Mo. 1972) (en banc)).

94. *Id.* (citing *In re A.M.B.*, 738 S.W.2d 128, 130 (Mo. Ct. App. 1987)).

95. *Id.* (citing *Moyer v. Walker*, 771 S.W.2d 363, 368 (Mo. Ct. App. 1989)).

96. *Id.* at 933–34.

97. 731 S.W.2d at 265.

98. *Id.* at 263.

was designed to regulate pharmacies dispensing drugs to the general public, not hospital pharmaceutical services.⁹⁹ As further evidence that the Board did not have regulatory authority over hospital pharmaceuticals, the court pointed to the Missouri Department of Social Services, Division of Health, another state agency that was granted the authority over hospitals under the Hospital Licensing Law.¹⁰⁰ The court noted that the Hospital Licensing Law, passed subsequent to the pharmacy regulatory statutes, provided for the regulation of hospitals, including pharmaceutical services, by the Division of Health.¹⁰¹

Like in *Missouri Hospital Association*, in *Hill*, the Missouri Supreme Court explored the scope of two agencies: the Commission and the MDA.¹⁰² The Commission was established in 1936.¹⁰³ The responsibilities of the Commission are addressed in article IV, section 40 of the Missouri Constitution and include “[t]he control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state.”¹⁰⁴

As to the Commission’s regulatory authority relating to captive cervids, in *State v. Weber*, the court held that deer raised in captivity are “game” for the purposes of the Commission’s enabling statute.¹⁰⁵ The *Weber* court reasoned that the term “game” encompassed all deer both tame and wild, free and reduced to captivity, as “game” means wild by nature.¹⁰⁶ The Commission has promulgated regulations surrounding big game hunting preserves since 1973.¹⁰⁷ In 1985, the Commission began permitting such preserves to include captive white-tailed deer.¹⁰⁸

By contrast, the MDA regulates captive cervids pursuant to its authority under the MLDCEL.¹⁰⁹ The MLDCEL, enacted in 1959, gave the MDA the power to regulate the entry of animals into Missouri and the movement of animals throughout Missouri.¹¹⁰ For purposes of the MLDCEL, “animal” is defined as “an animal of the equine, bovine, porcine, ovine, caprine, or species domesticated or semidomesticated.”¹¹¹ “Semidomesticated” is defined as “a captive state (as on a fur or game farm or in a zoo) of a wild animal in which its living conditions and often its breeding are controlled and its products or

99. *Id.* at 264.

100. *Id.*

101. *Id.*

102. *See Hill v. Mo. Dep’t of Conservation*, 550 S.W.3d 463 (Mo. 2018) (en banc).

103. *See* Brief of Appellants, *supra* note 12, at 40.

104. MO. CONST. art. IV, § 40(a) (emphasis added).

105. 102 S.W. 955, 956 (Mo. 1907).

106. *Id.*

107. Brief of Appellants, *supra* note 12, at 9.

108. *Id.*

109. *Hill v. Mo. Conservation Comm’n*, No. 15OS-CC00005-01, 2016 WL 8814770, at *2 (Mo. Cir. Nov. 17, 2016), *rev’d sub nom. Hill v. Mo. Dep’t of Conservation*, 550 S.W.3d 463 (Mo. 2018) (en banc).

110. MO. REV. STAT. § 267.560 (2016).

111. *Id.* § 267.565(2).

services used by man.”¹¹² Because captive cervids fall within that definition, the MDA has several regulations governing the inter and intra state movement of cervids and requiring disease-testing.¹¹³

To explain the differences between the two agencies, Missouri Department of Conservation Deputy Director Tom Draper said “The [Missouri] Department of Agriculture has the regulatory responsibility of overseeing disease issues and inter and intra state movement associated with captive cervids. The [Missouri] Department of Conservation is responsible for the permitting of hunting preserves.”¹¹⁴

B. Article I, Section 35 of the Missouri Constitution: The Right to Farm

In 2014, Missouri placed a constitutional amendment on the ballot guaranteeing Missourians the right to engage in farming and ranching practices.¹¹⁵ The provision, known colloquially as the right-to-farm amendment, was adopted by a narrow margin.¹¹⁶ The amendment, article I, section 35 of the Missouri Constitution, reads in whole:

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.¹¹⁷

The proposal of the amendment was a response to “Proposition B,” an initiative backed by the U.S. Humane Society and passed in 2010.¹¹⁸ Proposition B imposed stricter regulations on dog breeders in an attempt to stop proprietors of “puppy mills.”¹¹⁹ While right-to-farm movements in many states were proposed as initiatives to protect citizens engaged in farming and ranching practices from nuisance suits, Missouri already protected farmers from nuisance actions prior to the proposal of the right-to-farm amendment.¹²⁰ Instead, supporters of the right-to-farm amendment suggested that it would provide much-needed protection for farmers from regulations pushed by well-funded

112. *Hill*, 2016 WL 8814770, at *8.

113. *Id.* at *2–3.

114. *Id.* at *3 (alterations in original).

115. *Missouri Right-to-Farm, Amendment 1* (August 2014), BALLOTPEDIA, [https://ballotpedia.org/Missouri_Right-to-Farm,_Amendment_1_\(August_2014\)](https://ballotpedia.org/Missouri_Right-to-Farm,_Amendment_1_(August_2014)) (last visited June 4, 2019) [hereinafter Right-to-Farm].

116. *Id.*

117. MO. CONST. art. I, § 35.

118. Right-to-Farm, *supra* note 115.

119. *Id.*

120. *Id.*

environmental and animal rights groups.¹²¹ With the broad language of the amendment, scholars like Professor Erin Hawley predicted that the true meaning and effect of the right-to-farm amendment would have to be determined by the courts.¹²² *Hill* provided the first meaningful opportunity for the court to interpret the right-to-farm amendment.

IV. INSTANT DECISION

The Missouri Supreme Court, with Judge Paul C. Wilson writing for the unanimous court, agreed with the Commission that the Breeders' cervids were "game" and "wildlife" under article IV, section 40(a) of the Missouri Constitution, making the captive cervids subject to the Commission's authority.¹²³ The court rejected the Breeders' assertion that "wildlife" means both wild by nature and never tamed or domesticated.¹²⁴ The court first utilized a plain meaning analysis, which pointed in favor of the inclusion of all animals that are wild by nature in the definition of game and wildlife.¹²⁵ Next, the court turned to historical context and found that prior to the adoption of article IV, section 40(a), "game" included "species both wild by nature and generally pursued for food, sport, or other lawful ends."¹²⁶ Finally, the court looked to precedent and found that, in *State v. Weber*, deer "fawned and raised in captivity" were defined as "game."¹²⁷ The court concluded that, as used in article IV, section 40(a), "wildlife" means species that are wild by nature and "game" means wildlife species that are often pursued for sport, food, or other lawful ends.¹²⁸ Therefore, the court held that the Commission acted appropriately under its authority when it proposed the regulations in question.¹²⁹

The court then agreed with the Commission's assertion that the Breeders' cervids were game and wildlife resources of the state.¹³⁰ The Breeders suggested that game and wildlife were resources of the state only when they were in the wild, but the court maintained that this was not what Missouri voters believed when approving article IV, section 40(a).¹³¹ The court compared "wildlife resources of Missouri" to "the mountains of Wyoming" or "the lakes

121. See Right-to-Farm, *supra* note 115.

122. Kristofor Husted, *Missouri Constitutional Amendment Pits Farmer Against Farmer*, NPR (Aug. 6, 2014), <https://www.npr.org/sections/the-salt/2014/08/06/338127707/missouri-s-right-to-farm-amendment-pits-farmer-against-farmer>.

123. *Hill v. Mo. Dep't of Conservation*, 550 S.W.3d 463, 473 (Mo. 2018) (en banc).

124. *Id.* at 467–69.

125. *Id.* at 468–69.

126. *Id.* at 469.

127. *Id.*

128. *Id.* at 470–71.

129. *Id.*

130. *Id.* at 472.

131. *Id.*

of Minnesota.”¹³² When people say these things, they do not mean that the state owns these resources, but rather that these are resources inside the geographical boundaries of the state.¹³³

Finally, agreeing with the Commission once again, the court held that the Breeders were not engaged in farming or ranching practice for the purposes of the right-to-farm amendment, and therefore, the Commission’s regulations were not infringing on the Breeders’ rights.¹³⁴ The Breeders had the burden to prove the regulations clearly and undoubtedly violated article I, section 35.¹³⁵ The court found that the Breeders failed to meet that threshold.¹³⁶ The court reasoned that “nothing in the language of article I, section 35, suggests it was intended to limit the Commission’s constitutional authority under article IV, section 40(a), to regulate [the Breeders’] captive cervids as ‘wildlife’ and ‘game’ resources of this state.”¹³⁷ Furthermore, the court pointed out that captive cervid operations have been regulated by statutes and regulations for almost a century.¹³⁸ Based on this history, the court concluded that it was unlikely that Missouri voters intended to “overthrow this longstanding regulatory pattern by adopting article I, section 35.”¹³⁹

V. COMMENT

The decision in *Hill v. Missouri Department of Conservation* has several significant implications for the protection of private property rights in Missouri, the continuing legacy of the Commission, and the right-to-farm amendment. The court’s holding that the Commission’s regulations are valid allows for a regulatory taking to occur, effectively destroying the usefulness of the Breeders’ captive cervids and severely endangering the Breeders’ livelihoods. Furthermore, this holding allows the Commission to improperly usurp power from the MDA. Finally, the court’s holding that the Breeders are not engaged in “farming and ranching practices”¹⁴⁰ insinuates that Missouri’s right-to-farm amendment is an arbitrary provision that affords little, if any, protection to Missouri’s agricultural community.

132. *Id.*

133. *Id.*

134. *See id.* at 472–73.

135. *Id.* at 473.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 473–74.

140. *Id.* at 474.

A. Imbalance Between Private Interests and State Interests

The Commission's regulations at issue in *Hill* constitute a regulatory taking under the Takings Clause because they gravely inhibit the use of the Breeders' property without just compensation. Although Missouri has a legitimate interest in containing the risk of CWD, the Commission's regulations go too far, trampling on the private property rights of the Breeders. The court's decision to uphold the regulations will cause irreparable harm to the Breeders' business operations, including the potential for bankruptcy. An interest in containing the spread of CWD should not require the court's deference, especially where that specific interest is already covered by the regulations of another state agency – in this case the MDA. The Breeders' sufficiently demonstrated that the MDA's regulations are adequate to contain the risk of CWD, therefore, the public policy argument in favor of the Commission's regulations falls flat.

In siding with the Commission, the court fails to acknowledge that the Commission's regulations leave the Breeders with businesses that are no longer economically viable. Nearly all the deer imported by the Breeders are used as hunting stock and killed on the Breeders' preserves during the hunting season.¹⁴¹ The Breeders testified that although they breed deer to stock their hunting preserves, this is "not enough to sustain [their] operations" for the upcoming season.¹⁴² The inability to keep up with demand will cause the Breeders to cancel scheduled hunts and return reservation fees paid in advance by customers.¹⁴³ One of the Breeders attested that without being able to conduct business as usual during the hunting season, he will not have sufficient funds to repay his loans, effectively forcing his business into bankruptcy.¹⁴⁴

Both the Breeders and the Commission acknowledged that CWD is a devastating illness that spreads rapidly and poses a significant risk to Missouri's cervid population,¹⁴⁵ however, the Commission failed to establish that their regulations specifically are necessary to effect a substantial public purpose. Given the degree of the Commission's concern over this issue, it is unsettling that the Commission was "not aware" that the MDA was already taking significant regulatory measures to combat the spread of CWD.¹⁴⁶ The Breeders pre-

141. See Brief of Respondents at 19–20, *Hill v. Mo. Dep't of Conservation*, 550 S.W.3d 463 (Mo. 2018) (No. ED105042), 2017 WL 2345231, at *19–20.

142. *Id.* at 20.

143. *Id.*

144. *Id.*

145. See *id.* at 10.

146. See *Hill v. Mo. Conservation Comm'n*, No. 15OS-CC00005-01, 2016 WL 8814770, at *6 (Mo. Cir. Nov. 17, 2016), *rev'd sub nom.* *Hill v. Mo. Dep't of Conservation*, 550 S.W.3d 463 (Mo. 2018) (en banc). One commissioner testified "that he was not aware of the [MDA]'s regulations regarding interstate movement of cervids into Missouri when he voted to approve the amended regulations being challenged in this case." *Id.*

sented ample evidence that the MDA's CWD regulations and programs, certified by the USDA, were effective.¹⁴⁷ Even the Commission's experts testified that the MDA representatives managing the CWD herd-certification program were "very good scientists" and that "the USDA herd-certification program was based on good science and minimize[d] risk of transmission of CWD."¹⁴⁸ No evidence exists to suggest that the Commission's importation ban is necessary to purport a substantial public purpose that the MDA's herd-certification program is not already accomplishing.¹⁴⁹ In fact, the Commission admits that it "did not anticipate there would be a mass mortality of white-tailed deer in Missouri . . . as a result of CWD."¹⁵⁰ Moreover, prior to the adoption of the Commission's regulations, no additional cases of CWD were reported at privately owned deer farms or hunting preserves.¹⁵¹

In its brief, the Commission argued that the regulations it attempts to impose are the best way to prevent the spread of CWD and are an appropriate response to the issue and cited other states, such as Arkansas, that have imposed similar bans on importation.¹⁵² If an importation ban was the only effective method of stopping CWD, the Breeders would have a strong interest in supporting the ban based on the risk CWD poses to their valuable herds. It is clear from the Breeders' stark opposition to Commission's ban that it is not the only effective method of preventing CWD. Instead, the harsh economic consequences of the ban outweigh any marginal benefit over other methods of containing the disease. Even if an importation ban was necessary to stop the spread of the disease, the Commission does not have the authority to issue such a regulation. Rather, the decision to implement a ban on the intra state movement of captive cervids rests in the hands of the MDA pursuant to the MLDCEL.

B. Improper Regulatory Power

In support of its authority to regulate the Breeders' captive cervids, the Commission argues that "all cervids in Missouri are owned commonly by citizens of the state and managed by the Missouri Department of Conservation, whether those cervids are free-ranging or are kept in privately owned breeding or hunting facilities."¹⁵³ Looking back to the enabling statute of the Commission, the relevant language are the words "game" and "wildlife resources of the state." These terms do not appear ambiguous; therefore, they can be taken at

147. See Brief of Respondents, *supra* note 141, at 57–58.

148. *Hill*, 2016 WL 8814770, at *3.

149. *Id.* at *9.

150. *Id.* at *6.

151. *Id.* at *7.

152. Brief of Respondents, *supra* note 141, at 15.

153. *Hill v. Mo. Conservation Comm'n*, No. 15OS-CC00005-01, 2016 WL 8814770, at *8 (Mo. Cir. Nov. 17, 2016), *rev'd sub nom.* *Hill v. Mo. Dep't of Conservation*, 550 S.W.3d 463 (Mo. 2018) (en banc).

their plain and ordinary meaning. Merriam-Webster defines “game” as “animals under pursuit or taken in hunting especially: wild animals hunted for sport or food”¹⁵⁴ and “wildlife” as “living things and especially mammals, birds, and fishes that are neither human nor domesticated.”¹⁵⁵ In *Oak Creek Whitetail Ranch, LLC v. Lange*,¹⁵⁶ the court concluded that because the Breeders’ deer have never been in the wild, are penned and hand-fed, and cannot move freely beyond their confined area, the Breeders’ deer are domestic. If Breeders’ cervids are domestic rather than wild, they do not fall under the plain definition of game or wildlife. Therefore, the Commission’s enabling statute does not extend authority over captive cervids as the Commission claims.

Moreover, other regulations and practices clearly contradict the Commission’s assertion that it has authority over captive cervids. One regulation regarding hunting preserves requires that fences should be maintained to “exclude all hooved wildlife of the state from becoming a part of the enterprise.”¹⁵⁷ This language suggests that the Commission distinguishes between “hooved wildlife of the state” and the captive cervids held on hunting preserves. State officials also recognize the Commission’s distinction between wild and captive deer. An officer from the Howell County Sheriff’s Department remarked that “The Missouri Department of Conservation states that any Whitetail Deer bought by and maintained by a private big game hunting preserve is considered by them to be the same as a domestic animal so the deer in question is the sole property of [the hunting preserve owner].”¹⁵⁸

Despite these inconsistencies, in its analysis of whether the Commission has the regulatory authority necessary to promulgate the regulations in question, the court stated that “the Commission’s regulations under article IV, section 40(a)[] have always regulated captive deer and elk owned by private parties.”¹⁵⁹ This statement, however, is misleading. Prior to the adoption of the regulations at issue in *Hill*, the Commission’s regulations as they related to “captive deer and elk owned by private parties” merely provided licensing requirements for hunting preserve owners like the Breeders.¹⁶⁰ While the MDA was granted the power to control the inter and intra state movement of captive cervids under the MLDCEL, the Commission has never been granted that power.¹⁶¹ Therefore, by issuing regulations inhibiting the importation of live cervids into the state, the Commission is usurping power reserved for the MDA. Thus, it is inappropriate for the court to assume that because the Commission regulates some aspects of captive cervid operations it is proper for the Commission to regulate the inter and intra state movement of captive cervids.

154. *Game*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2014).

155. *Wildlife*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2014).

156. 326 S.W.3d 549, 550 (Mo. Ct. App. 2010).

157. MO. CODE REGS. ANN. tit. 3, § 10-9.565(1)(B) (2018).

158. *Hill*, 2016 WL 8814770, at *9.

159. *Hill v. Mo. Dep’t of Conservation*, 550 S.W.3d at 463, 471 (Mo. 2018) (en banc).

160. *Id.*

161. *Hill*, 2016 WL 8814770, at *3.

C. Implication of Arbitrariness

When article I, section 35 was adopted into the Missouri Constitution, experts predicted that it would take judicial interpretation to fully understand the implications of the right-to-farm amendment.¹⁶² Previous litigation surrounding the application of article I, section 35 to the cultivation of marijuana has provided little insight in the way of unpacking the protections of the provision.¹⁶³ However, *Hill v. Missouri Department of Conservation* provided the perfect opportunity for the court to offer a groundbreaking analysis of the right-to-farm amendment. Instead, in holding that the Breeders were not involved in the elusive “farming and ranching practices” purported to be protected by the amendment, the court left proponents of the right to farm disheartened and confused.

Since its adoption, marijuana cultivators have been the only group to attempt to use the right-to-farm amendment as a shield.¹⁶⁴ In *State v. Shanklin*,¹⁶⁵ the Missouri Supreme Court held that the right-to-farm amendment did not preclude convictions for illegal marijuana cultivation. In coming to this conclusion, the court found it instructive that the text of the amendment did nothing to suggest an intent to displace longstanding statutes making marijuana cultivation illegal.¹⁶⁶ Despite holding that marijuana cultivation is not a farming or ranching practice, the *Shanklin* court did nothing more to define what does constitute a farming or ranching practice.

Much like *Shanklin*, the court in *Hill* held that the Breeders are not engaged in farming and ranching practices; but if breeding cervids does not count as farming or ranching, what does? Merriam-Webster defines farming as “the practice of agriculture or aquaculture”¹⁶⁷ and ranching as “to live or work on a ranch,” with ranch defined as “a large farm for raising horses, beef cattle, or sheep.”¹⁶⁸ Although the dictionary excludes deer and elk from its definition of ranch, the day-to-day activities undertaken by ranchers who raise other domestic animals are incredibly similar to the practices engaged in by the Breeders in *Hill*. As discussed above, the court in *Lange* labeled the Breeders’ cervids as domestic animals meaning “[l]iving in or near the habitation of man; domesticated; tame; as, domesticated animals.”¹⁶⁹ Much like horses, cattle, and sheep, the Breeders’ cervids are born and bred in captivity where they remain for the

162. Husted, *supra* note 122.

163. *Hill*, 550 S.W.3d at 473.

164. *See id.*

165. 534 S.W.3d 240, 243 (Mo. 2017) (en banc).

166. *Id.* at 242–43.

167. *Farming*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2014).

168. *Ranch*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2014).

169. *Oak Creek Whitetail Ranch, L.L.C. v. Lange*, 326 S.W.3d 549, 550 (Mo. Ct. App. 2010).

entirety of their lives. The captive cervids are provided with feed and are considered docile and approachable.¹⁷⁰ One of the Commission's expert witnesses admitted that because of how the Breeders' cervids are raised they are "reliant on humans for food and protection."¹⁷¹ Given the close similarities between the Breeders' practices and those of other domestic ranchers, it seems unlikely that even a cattle rancher is engaged in farming or ranching practices under the court's interpretation.

The *Hill* court, following *Shanklin*, concludes that "the voters [did not] intend[] to overthrow this longstanding regulatory pattern by adopting article I, section 35, when there is no language in this provision to suggest they did so."¹⁷² However, unlike *Shanklin*, here it is unclear that the Commission's regulations are actually part of a "longstanding regulatory pattern." In fact, the ban imposed is the first example of the Commission regulating the intra state movement of captive cervids. This holding sets what seems to be an impossibly high bar for protection under the right-to-farm amendment.

Because the court still refuses to put a precise definition on farming and ranching practices, it is impossible to determine what, if anything, is protected by the right-to-farm amendment. Perhaps a challenge brought by a cattle rancher inhibited from his business by a new statute separate from any longstanding statutory scheme will invoke the protection. Only time and future challenges will tell.

VI. CONCLUSION

The court in *Hill v. Missouri Department of Conservation* allowed public policy in favor of containing the spread of CWD to outweigh the risk of regulatory taking and an invalid extension of regulatory authority. This decision will effectively lead to the destruction of captive cervid operations like those engaged in by the Breeders – although, this is a fact that did not seem to phase the court. Despite MDA regulations already in place to fight CWD, the court acquiesced in the Commission's usurpation of power from the MDA, approving the Commission's regulations although they fell outside the scope of its regulatory authority. Furthermore, the court's holding regarding the right-to-farm amendment insinuates that the provision has much less force than initially anticipated by voters. It is unclear what kind of challenge it will take for the court to define the true meaning of the amendment. Until the court interprets the reach of farming and ranching practices, Missourians will be left to wonder if there is any force behind the right-to-farm amendment.

170. *Hill v. Mo. Conservation Comm'n*, No. 15OS-CC00005-01, 2016 WL 8814770, at *8 (Mo. Cir. Nov. 17, 2016), *rev'd sub nom.* *Hill v. Mo. Dep't of Conservation*, 550 S.W.3d 463 (Mo. 2018) (en banc).

171. *Id.*

172. *Hill*, 550 S.W.3d at 473–74.

