Missouri Law Review

Volume 86 | Issue 2 Article 15

Spring 2021

Indirect Initiative and Unpopular Referendum in Missouri

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NOTE

Indirect Initiative and Unpopular Referendum in Missouri

Pippens v. Ashcroft, 606 S.W.3d 689 (Mo. Ct. App. 2020).

*Gunnar Johanson**

I. INTRODUCTION

Most governments in the United States operate as a representative democracy through elected officials. Over time, advocates have successfully reformed many of our institutions to give citizens themselves more power through direct democracy. The direct election of United States Senators, the presidential primary, recall, the direct initiative, and popular referendum are all developments in the governments of the United States that place power directly in the hands of voters. Direct initiatives and popular referendums, specifically, are lingering evidence of the Progressive Era of the 1900s.[1] Like most reforms of that time, proponents of direct initiative and popular referendum believed it would aid in breaking up concentrated political power in corporations and their enablers in the state legislatures.[2] Almost half the states instituted direct initiative and popular referendum before 1920.[3]

Direct initiative and popular referendum generally describe tools of direct democracy that vary from state to state; there is no national initiative or referendum process.[4] The direct initiative process enables citizens to propose a new or amended law, independently of the state legislature, often by popular

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1. UNIVERSITY OF SOUTHERN CALIFORNIA, INITIATIVE AND REFERENDUM INSTITUTE, http://www.iandrinstitute.org/ [https://perma.cc/UH6A-SCM3].

2. *Id.*

3. *Id.*

4. Dennis Polhill, *The Issue of a National Initiative Process*, INITIATIVES V. OLIGARCHY, https://cusdi.org/wp-content/uploads/2019/06/Polhill-The-Issue-of-a-National-Initiative-Process.pdf [https://perma.cc/CL5L-HEMA] (this article can be accessed directly from the Citizens for United Stated Direct Initiatives (CUSDI) website under the provided pdf references).

vote in a statewide election.[5] Popular referendum, by contrast, "allow[s] voters to approve or repeal an act of the legislature."[6] Initiatives can be statutory or constitutional.[7] Direct initiative proponents frequently prefer constitutional amendments as most states do not allow the legislature to unilaterally alter the constitution, whereas most legislatures can change statutes as they wish, thus providing additional protection to their proposal.[8] Many states also allow legislatively referred – or indirect – initiatives where the state legislature is permitted to place a proposal on the ballot for voter approval.[9]

Missouri voters encountered initiative and referendum in the voting booth on November 3, 2020, when deciding on Amendment 3.[10] Amendment 3 was the result of a legislature growing increasingly weary with Missouri's direct initiative process and weaponizing citizens' tools for democracy.[11] The proposed constitutional amendment was an indirect initiative, referred to voters by the legislature. However, this Note argues that the description of Amendment 3 as an "unpopular referendum" is more fitting. Where a popular referendum describes a citizen-led effort to repeal the will of the legislature, "unpopular referendum" should describe a legislature's effort to repeal the will of the people. Amendment 3 aimed to repeal a direct initiative, known as "Clean Missouri," approved by voters less than two years earlier.[12] The 2020 measure survived considerable legal challenge. The resulting case highlights the flaws in Missouri's initiative and referendum processes and the weak judicial protections afforded to the procedures.

In this Note, Part II introduces the case of *Pippens v. Ashcroft* which exemplifies the political tug-of-war occurring with the Missouri initiative process. Part III explores how the Missouri legislature's will often conflicts with voters' wants and how elected officials' mal-intent is becoming increasingly apparent. Part IV examines several measures from other states

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5. *See* Nicholas R. Theodore, *We the People: A Needed Reform of State Initiative and Referendum Procedures*, 78 Mo. L. Rev. 1401 (2013).

6. *Id.* at 1410.

7. *Id.* at 1408.

8. *Id.*

9. *Id.* at 1409.

10. *2020 Ballot Measures*, MO. SECRETARY OF STATE (last visited March 6, 2021), https://www.sos.mo.gov/elections/petitions/2020BallotMeasures [https://perma.cc/Q9VD-G4D4].

11. *The Missouri General Assembly is ignoring the will of the voters by placing Amendment 3 on the 2020 general election ballot*, COMMON CAUSE (last accessed March 6, 2021), https://www.commoncause.org/our-work/gerrymandering-and-representation/gerrymandering-redistricting/clean-missouri-initiative/ [https://perma.cc/X8DX-K84R].

12. *Id.*

that, if adopted, would protect the initiative process in Missouri from such mal-intent and abuse. Finally, Part V analyzes the government's role in the judicial review and drafting of ballot language which could ease the conflict in *Pippens* and strengthen Missouri's initiative process.

II. FACTS AND HOLDING

To sufficiently understand the facts of *Pippens*, an examination of "Clean Missouri" is required. On November 6, 2018, Missouri voters approved Constitutional Amendment No. 1.[13] Supporters of this proposal nicknamed it "Clean Missouri."[14] This amendment was proposed by the direct initiative petition process, where Missouri citizens independently propose legislation for the ballot through the collection of signatures.[15] "Clean Missouri" made multiple revisions to Article III of the Missouri Constitution which established the legislative branch, or the General Assembly, of the Missouri state government.[16] The amendment focused primarily on ethics reform and on the process of drawing legislative districts, known as apportionment.[17]

"Clean Missouri" provided for substantial modifications to the apportionment process for state House and Senate districts.[18] It established a new state position known as the "nonpartisan state demographer" who was charged with preparing proposed legislative redistricting plans and maps following the decennial census.[19] The nonpartisan state demographer was also given criteria to govern the designing of said districts.[20] The demographer had to give the districts a "total population as nearly equal as practicable to the ideal population for such districts."[21] Specifically, "Clean Missouri" required that districts be designed in a manner that achieves both partisan fairness and competitiveness.[22] The demographer also had to consider geographic contiguity, the boundaries of existing political subdivisions, and the compactness of the proposed districts.[23] However, these

13. Pippens v. Ashcroft, 606 S.W.3d 689, 694 (Mo. Ct. App. 2020).

14. Jo Mannies, *New limits to campaign finance confuse Missouri's political candidates*, ST. LOUIS PUBLIC RADIO (October 24, 2017), https://news.stlpublicradio.org/government-politics-issues/2017-10-24/new-limits-to-campaign-financing-confuse-missouris-political-candidates [https://perma.cc/QQ86-Z943].

15. *Pippens*, 606 S.W.3d at 694.

16. *Id.*

17. *Id.*

18. Ritter v. Ashcroft, 561 S.W.3d 74, 80 (Mo. Ct. App. 2018).

19. *Id.* at 80–81; *see* MO. CONST. art. III, §§ 3(a)–(c), 7(a) (2020).

20. *Ritter*, 561 S.W.3d at 80–81; *see* MO. CONST. art. III, § 3(c).

21. *Ritter*, 561 S.W.3d at 81; *see* MO. CONST. art. III, § 3(c)(1)(a), (b).

22. *Ritter*, 561 S.W.3d at 81; *see* MO. CONST. art. III, § 3(c).

23. *Ritter*, 561 S.W.3d at 81; *see* MO. CONST. art. III, § 3(c).

considerations are subordinated to consideration of equal populations, compliance with federal law, and partisan fairness and competitiveness.[24]

"Clean Missouri" largely retained the procedure, enacted before its passage, where the Governor selected House and Senate reapportionment commissions.[25] As provided by the revisions, the commissions could then make modifications to the demographer's proposed plan and map by a vote of at least seven-tenths of the commissioners.[26] If no modifications were made, the plan and map would become final.[27] These citizen-proposed changes were widely accepted by Missouri voters and passed with sixty-two percent of the vote in November 2018.[28]

In 2020, the General Assembly set out to undo "Clean Missouri." In its regular session that year, the General Assembly passed Senate Joint Resolution No. 38 ("SJR 38") which submitted to voters a legislatively referred constitutional amendment which modified the features of 2018's "Clean Missouri" ballot initiative.[29] Its provisions were complex and comprehensive, affecting Missouri's ethics laws and its redistricting processes. The General Assembly passed SJR 38 on May 13, 2020, largely along party lines.[30] It appeared on the November 3, 2020, General Election Ballot as Amendment 3.[31]

The General Assembly has the prerogative to draft the official summary statement for legislatively referred constitutional amendments, like Amendment 3.[32] The summary statement is the language that appears on ballots. The legislature's summary statement proposed to ask voters:

> *Shall the Missouri Constitution be amended to:*
>
> - *Ban all lobbyist gifts to legislators and their employees;*
>
> - *Reduce legislative campaign contribution limits; and*

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24. *Ritter*, 561 S.W.3d at 81; *see* MO. CONST. art. III, § 3(c)(1)(c), (d), (e).

25. *Ritter*, 561 S.W.3d at 81; *see* MO. CONST. art. III, § 3(c)(2).

26. *Ritter*, 561 S.W.3d at 81; *see* MO. CONST. art. III, §§ 3(c)(3), 7(c).

27. *Ritter*, 561 S.W.3d at 81; *see* Mo. Const. art. III, §§ 3(c)(3), 7(c).

28. *Official Results, General Election, November 6, 2018*, MISSOURI SECRETARY OF STATE, https://enrarchives.sos.mo.gov/enrnet/?eid=750004333 [https://perma.cc/A8QD-NH5W].

29. Pippens v. Ashcroft, , 606 S.W.3d 689, 693 (Mo. Ct. App. W.D. 2020).

30. S. JOURNAL, 100TH GEN. ASSEMB., 2d Sess. at 241–42 (Mo. 2020); H.R. JOURNAL, 100TH GEN. ASSEMB., 2d Sess. at 1772–73 (Mo. 2020).

31. Pippens, 606 S.W.3d at 693.

32. *Id.* at 698.

> ■ *Create citizen-led independent bipartisan commissions to draw state legislative districts based on one person, one vote, minority voter protection, compactness, competitiveness, fairness, and other criteria?*[33]

The resolution was challenged in the courts by proponents of "Clean Missouri" almost immediately.[34] On May 18, 2020, eight Missouri citizens ("Challengers") filed suit against the Missouri Secretary of State and the leaders of the General Assembly as permitted by Missouri statute.[35] The challengers argued that each of the three bullet points in the official ballot language drafted by the General Assembly for Amendment 3 were insufficient and unfair as they did not clearly communicate to voters that Amendment 3 would largely repeal and replace "Clean Missouri."[36] The petition prayed for the circuit court to vacate the existing summary statement and either order the General Assembly to prepare a new one, or certify a replacement statement that they proposed.[37] On August 17, 2020, the circuit court entered its final judgment, agreeing with the challengers that all three bullet points in the General Assembly's proposed summary statement were insufficient and unfair.[38] The circuit court vacated the General Assembly's statement and certified an alternative summary statement which the court drafted itself:[39]

> *Shall the Missouri Constitution be amended to:*
>
> ■ *Repeal rules for drawing state legislative districts approved by voters in November 2018 and replace them with rules proposed by the legislature;*
>
> ■ *Lower the campaign contribution limit for senate candidates by $100; and*
>
> ■ *Lower legislative gift limit from $5 to $0, with exemptions for some lobbyists?*[40]

The defendant filed his Notice of Appeal on August 18, 2020, and oral argument was presented on August 28, 2020, in the Missouri Court of Appeals

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33. *Id.*

34. *Id.*

35. *Id.*; Missouri law allows any citizen of Missouri to challenge the official ballot language for a legislatively referred constitutional initiative for being insufficient or unfair. MO. ANN. STAT. § 116.190 (West).

36. *Pippens*, 606 S.W.3d at 698.

37. *Id.* at 699.

38. *Id.*

39. *Id.*

40. *Id.* at 700.

for the Western District.[41] The Court affirmed in part and reversed in part the circuit court's judgment.[42]

III. LEGAL BACKGROUND

Missouri has a long and storied history with direct initiative and popular referendum. Both processes were added to the state's constitution at the height of the Progressive Era in 1907 and have provided for some of Missouri's most prominent policies.[43] For example, in 1936, Missouri citizens voted to create a Conservation Commission – which now oversees the Missouri Department of Conservation – to manage fish, game, and forest resources.[44] In 1940, a constitutional amendment was passed through an initiative petition that established a nonpartisan system for nominating, appointing, and retaining judges.[45] This is now known as the "Missouri Plan" for judicial selection and has served as the model for several states.[46] In recent decades, initiatives and referenda have resulted in meaningful policy initiatives that affect the daily lives of Missouri citizens. Over one hundred ballot initiatives have been proposed by Missouri citizens.[47] Increases to the minimum wage, union protections, healthcare expansion, and even medical marijuana have all been approved – or disapproved – by Missouri voters through a statewide popular vote.[48] In contrast, popular referendum has been used only about twenty-five times since its creation and in only two of those instances was it successful.[49]

In the last two decades, and in almost every general election since, Missouri citizens have passed many large-scale policy proposals via citizen-led, direct initiative. The policy proposals that have been approved via direct initiative include, but are not limited to:

- Stem cell research (2006)

41. *Id.*

42. *Id.* at 713.

43. Robin Carnahan, *Protecting Missouri's Initiative Petition Process for Citizens*, MO MUNICIPAL REV. 10 (2012) (on file with author).

44. *Id.*

45. *Id.*

46. *See* Charles B. Blackmar, *Missouri's Nonpartisan Court Plan from 1942 to 2005*, 72 MO. L. REV. 199 (2007).

47. David C. Valentine, *Constitutional Amendments, Statutory Revision and Referenda Submitted to the Voters by the General Assembly or by Initiative Petition, 1910–2008, Report 25–2008*, MO. LEGIS. ACAD. (2008).

48. *Id.*

49. *Id.*

- Increased the minimum wage (2006)
- Increased revenue for schools (2008)
- Created a "Renewable Energy Standard" for utility companies (2008)
- Prohibited taxing the transfer of real estate (2010)
- Regulated dog breeders (2010)
- Restructured STL police force (2012)
- Increased funding for education (2012)
- Reformed campaign finance (2016)
- Reformed redistricting ("Clean Missouri") (2018)
- Sanctioned medical marijuana (2018)
- Increased the minimum wage (2018)
- Expanded Medicaid (2020)[50]

The numerous successful initiatives and their varied topic areas demonstrate a citizenry dissatisfied with the legislative priorities of its elected officials. Instead of waiting for the General Assembly to pass meaningful legislation, citizens and advocates mobilized, fundraised, and organized to take advantage of Missouri's tools of democracy. "Clean Missouri's" large margin of approval is just one of the many examples of citizens taking the state's legislative power into their own hands, only to find they apparently went too far.

Two years after their passage, the major provisions of "Clean Missouri" were narrowly repealed and replaced by Amendment 3.[51] Mirroring the initiative process, the Missouri Constitution gives the General Assembly the right to legislatively propose constitutional amendments which shall be approved or rejected by a majority of the voters of the state.[52] Unlike the citizen's direct initiative process, the General Assembly is also authorized to draft the official ballot language and summary statement to be printed on

50. *Id.*((data from this report can be found at http://www.mofirst.org/issues/inr/MO-Petition-History.php [https://perma.cc/5XPX-B72M]).

51. *2020 Ballot Measures*, MO. SECRETARY OF STATE (last visited March 6, 2021), https://www.sos.mo.gov/elections/petitions/2020BallotMeasures [https://perma.cc/45SV-D87X].

52. MO. CONST. art. XII, § 2(b).

ballots which "shall be a true and impartial statement of the purposes of the proposed measure in language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure."[53]

Any citizen can challenge the official ballot title proposed by the General Assembly for being insufficient or unfair.[54] This judicial safeguard is designed to give voters the ability to judge the desirability of a proposed amendment.[55] Furthermore, the challenge process is necessary to provide voters a full realization of the proposals by the General Assembly.[56] Judicial review of ballot language, in particular, is especially important when challenging legislatively-referred proposals who draft their own statements.[57] In contrast, the language of citizen-proposed initiative petitions is drafted by the secretary of state and reviewed by the attorney general.[58]

The burden to show the insufficiency or unfairness of the ballot language falls upon the challenging party.[59] "Insufficiency" is defined as "inadequate; especially lacking adequate power, capacity, or competence."[60] "Unfairness" is defined as language that is "marked by injustice, partiality, or deception."[61] Additionally, the summary statement should accurately reflect both the legal and probable effects of the proposal.[62] It should also inform voters of the central features of the proposal.[63] The applicable question is not whether the language drafted is the *best* summary, but whether the language gives the voter a sufficient idea of what the proposed amendment would accomplish and whether it advises the voter what it is about.[64]

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53. MO. ANN. STAT. § 116.155 (West).

54. MO. ANN. STAT. § 116.190 (West).

55. Dotson v. Kander, 464 S.W.3d 190, 193 (Mo. 2015) (en banc).

56. *Id.* at 193 (citing Buchanan v. Kirkpatrick, 615 S.W.2d 6, 11–12 (Mo. 1981) (en banc).

57. *Id.* at 193–94.

58. *Id.* at 203 n.4.

59. Hill v. Ashcroft, 526 S.W.3d 299, 308 (Mo. Ct. App. 2017).

60. *Id.*

61. *Id.*

62. Shoemyer v. Sec'y of State, 464 S.W.3d 171, 174 (Mo. 2015) (citing Brown v. Carnahan, 370 S.W.3d 637, 654 (Mo. 2012)).

63. Stickler v. Ashcroft, 539 S.W.3d 702, 709 (Mo. Ct. App. 2017) (internal citations omitted).

64. Sedey v. Ashcroft, 594 S.W.3d 256, 263 (Mo. Ct. App. 2020), *reh'g denied* (Feb. 4, 2020).

IV. INSTANT DECISION

The Missouri Court of Appeals for the Western District affirmed in part and reversed in part the circuit court's decision that the entire original ballot language was insufficient and unfair.[65] The Court of Appeals found that the first point of the original statement – "Ban all lobbyist gifts to legislators and their employees…" – was insufficient and unfair.[66] The Court of Appeals found that the second point of the original statement – "Reduce legislative campaign contribution limits…" – was not insufficient and unfair and that the circuit court erred in its revision.[67] The Court of Appeals found multiple problems in the third and final point of the original statement – "Create citizen-led independent bipartisan commissions to draw state legislative districts based on one person, one vote, minority voter protection, compactness, competitiveness, fairness, and other criteria…" – and rewrote it entirely.[68]

The third point attracted the most criticism from the court. As it was written, the original statement made no explicit reference to Amendment 3's elimination of the position of Nonpartisan State Demographer, a primary feature of the redistricting process adopted by voters in 2018.[69] Thus, the court held it as generally insufficient and unfair.[70] Next, the third point claimed that the commissions proposed are "citizen-led" and "independent."[71] The Court held such a description failed to accurately describe the membership and operation of the commissions, which are largely made up of partisan appointees.[72] Finally, the Court held that the third point falsely implied that SJR 38 established the listed criteria for drawing districts and fails to acknowledge "in *any* fashion" that the proposal would greatly modify and reorder the existing criteria.[73] The increased priority of "partisan fairness" and "competitiveness" was a primary feature of the redistricting process adopted by voters in 2018; this point failed to inform voters that it would move them to the very lowest priority.[74]

The court also held that the fact that SJR 38 largely modifies "Clean Missouri," which voters very recently approved, needed to be apparent.[75] In compliance with each of these issues, the Court of Appeals certified an alternative summary statement, replacing the circuit court's statement and

65. Pippens v. Ashcroft, 606 S.W.3d 689, 693 (Mo. Ct. App. 2020).

66. *Id.* at 698.

67. *Id.*

68. *Id.*

69. *Id.* at 699.

70. *Id.*

71. *Id.* at 700.

72. *Id.* at 709.

73. *Id.* at 710 (emphasis in original).

74. *Id.* at 711.

75. *Id.* at 712.

amending the first and third points of the General Assembly's original statement:

> *Shall the Missouri Constitution be amended to:*
>
> ■ *Ban gifts from paid lobbyists to legislators and their employees;*
>
> ■ *Reduce legislative campaign contribution limits; and*
>
> ■ *Change the redistricting process voters approved in 2018 by: (i) transferring responsibility for drawing state legislative districts from the Nonpartisan State Demographer to Governor-appointed bipartisan; (ii) modifying and reordering the redistricting criteria?*[76]

No appeal was made to the Supreme Court of Missouri by either party. As a result, the Court of Appeals' alternate language was certified for the ballot in the general election. On November 3, 2020, Missouri voters passed Amendment 3 with fifty-one percent voting "Yes" and forty-nine percent voting "No."[77]

V. COMMENT

On its face, *Pippens v. Ashcroft* is simply a case of what type of ballot language is "insufficient and unfair."[78] However, the analysis of the court, and the arguments of the parties, raise deeper questions worth examining. First, what happens when the will of the legislature conflicts with the policy goals of its constituents? Second, how can various constitutional changes safeguard against the efforts of legislatures to overturn the goals of their constituents? Finally, how can the state provide better – maybe nonpartisan – drafting assistance and judicial review to proponents of initiatives and referendums? This Part addresses each of those questions in turn.

A. Legislative Antagonism

An examination of recent legislative efforts reveal an antagonistic disposition towards the initiative and referendum process of Missouri. Some would claim Missouri has one of the few idyllic "citizen-legislatures" in the

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76. *Id.* at 713.0

77. Gregory J. Holman, *By a narrow margin, Amendment 3 reversed 'Clean Missouri.' How did we get here?*, SPRINGFIELD NEWS-LEADER, Nov. 5, 2020, https://www.news-leader.com/story/news/politics/2020/11/04/missouri-election-results-amendment-3-fails-ends-clean-missouri/6159978002/.

78. *Pippens*, 606 S.W.3d at 693 ; MO. REV. STAT. § 116.190.

nation, where career politicians "are replaced by average members of the community who enter and exit politics within a short period of time."[79] This characterization is facilitated by Missouri's term limits for its state legislators.[80] After serving eight years in each chamber, incumbents are forbidden to seek reelection.[81] Proponents of such term limits often argue that they "enhance participatory democracy."[82] This Subpart argues that Missouri's term limits have done just that, leading to a surge of successful initiative petitions being passed by *actual* citizens in the absence of legislative efforts to address issues facing Missourians since the state's term limits have taken effect.

The alleged "citizen-legislature" has now taken the drastic step to undermine the direct legislative efforts of the citizens. This is not a rare occurrence. One might say it is becoming a pattern. Since term limits were instituted, the legislature has attacked such efforts at least three other times.[83] In 2008, the legislature created exceptions for renewable energy standards expected to be passed by voters months later by initiative.[84] Next, in 2011, the same body repealed regulations for dog breeders passed by voters months earlier.[85] Finally, after voters defeated "Right to Work" in 2018, there was a concerted effort to proceed with the policy anyway.[86] A reflection upon these efforts aids in understanding the legislature's intentions today and will shed light on recent comments and proposals by the governing party to axe the citizen-led initiative petition process.

In 2008, the legislature sought to undermine the effectiveness of a direct initiative before its anticipated passage. Proposition C was certified for the

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79. Richard G. Niemi & Kristin K. Rulison, *The Effects of Term Limits on State Legislatures and Their Applicability to the Executive Branch*, 4 ALB. GOV'T L. REV. 641, 648–49 (2011).

80. *Id.* at 660.

81. MO. CONST. art. III, § 8.

82. Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 631 (1996).

83. *See, e.g.*, *infra* text accompanying notes 84–86.

84. Earth Island Institute v. Union Electric Company, 456 S.W.3d 27, 31 (Mo. 2015).

85. S.B. 113 & 95, 96TH GEN. ASS., 1st Regular Sess. (Mo. 2011).

86. Jack Suntrup, *Missouri voters said no to 'right to work,' Republican lawmaker wants it anyway*, ST. LOUIS POST-DISPATCH, (Dec. 6, 2018), https://www.stltoday.com/news/local/govt-and-politics/missouri-voters-said-no-to-right-to-work-republican-lawmaker-wants-it-anyway/article_365c4f4a-3303-5cde-a44e-b6324bf2ab59.html [https://perma.cc/H224-5QQC]. "Right to Work" laws guarantee that no person can be compelled, as a condition of employment, to join or not to join, nor to pay dues to a labor union. *Right to Work Frequently-Asked Questions*, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, https://www.nrtw.org/right-to-work-frequently-asked-questions/ [https://perma.cc/L4GG-N2KP] (last visited March 7, 2021).

November ballot by the Secretary of State in February of 2008.[87] The proposition was initiated by a citizen-led petition and it sought to enact a requirement that utility companies use an increasing amount of renewable energy in their electricity sales.[88] In May of that same year, months before voters would vote on Proposition C in November, the General Assembly preemptively passed Senate Bill No. 1181.[89] This bill created an exemption from renewable energy requirements, now or in the future, for power companies if they met alternative standards, conflicting with the ones proposed by Proposition C.[90] The Supreme Court of Missouri later held that the efforts of the legislature "serve[d] as an end run around the constitutionally protected right of the people of Missouri to enact legislation by ballot initiative" and that the bill was repealed by Proposition C by implication when it passed with sixty-six percent of the vote.[91] The resulting case, *Earth Island Institute,* is valuable in understanding the legislature's antagonistic predisposition to the initiative petition process.

In 2011, then-state Senator Mike Parson did not agree with Proposition B, a proposal through the initiative petition process that imposed tough regulations on dog breeders.[92] He led a legislative effort to repeal the measure barely a month after fifty-two percent of voters approved it.[93] "Telling our breeders how many dogs they can own and how to raise them is just the tip of the iceberg," said then-Senator Parson when he introduced legislation eliminating many provisions included in Proposition B.[94] The bill was passed in March 2011 and signed by the Governor, Democrat Jay Nixon, in April 2011.[95] Proposition B had just passed less than six-months earlier in

87. It's important to note that citizens can propose both propositions or constitutional amendments via the initiative petition process. Propositions, if passed, become statutes that can change at the will of the elected legislature. Amendments are set in the Constitution which can only be changed by statewide approval. *Earth Island Inst.*, 456 S.W.3d at 30.

88. *Id.*

89. *Id.* at 31.

90. *Id.*

91. *Id.* at 34..

92. Virginia Young, *Voters' puppy mill law closer to repeal*, ST. LOUIS POST-DISPATCH, Mar. 11, 2011, https://www.stltoday.com/news/local/govt-and-politics/voters-puppy-mill-law-closer-to-repeal/article_8a404eaf-754c-5213-a8f2-55ac7260a466.html [https://perma.cc/MM96-JEE2].

93. *Id.*

94. Pamela M. Prah, *Missouri's puppy mill politics: Dog breeders outmaneuver animal-rights movement*, THE SEATTLE TIMES, (May 25, 2011)), https://www.seattletimes.com/life/lifestyle/missouris-puppy-mill-politics-dog-breeders-outmaneuver-animal-rights-movement/ [https://perma.cc/6R5A-BW2G].

95. S.B. 113 & 95, 96TH GEN. ASS., 1st Regular Sess. (Mo. 2011).

November of 2010.[96] The move caught the criticism of advocates. "Some lawmakers are not only thumbing their noses at a statewide vote of the people, but are also voting against their own districts," said Wayne Pacelle, then-president and CEO of The Humane Society of the United States.[97]

As of May 2019, Missouri had the largest number of puppy mills in the nation for the seventh year in a row, according to a report by the Humane Society of the United States.[98] "That's what our country was based on – us having a say so in our government . . . [i]f we vote for legislation and they are able to change it because they don't like the way we voted, then I think that is wrong," said Lauri Casey of Springfield, Missouri in response to repeal of most of Proposition C.[99]

It seems to be increasingly common that the legislature does not approve of the policies its own citizens enact. In December 2018, four months after citizens voted down an attempt – via referendum – by the General Assembly to make Missouri a "Right to Work" state, a Springfield-area state senator filed legislation to enshrine it in statute anyway.[100] "Democracy is not freedom. Democracy is two wolves and a lamb voting on what to eat for lunch," Senator Burlison said to the KC Star.[101] He further added that "in a Constitutional Republic there are certain rights which should never be taken away, not even by a 64% vote."[102]

More recently, legislators have exhibited explicit distaste at the passage of Medicaid Expansion by voters – via direct initiative – in August 2020.[103] In May, three months before the issue would be voted on, the budget chair of the Missouri House of Representatives, Representative Cody Smith, pushed a measure that would ensure all Medicaid expenditures be specifically approved

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96. *Missouri Ballot Issue History*, MISSOURI FIRST (last visited Mar. 8, 2021), http://www.mofirst.org/issues/inr/MO-Petition-History.php

97. Kenn Bell, *Missouri State Senate Overturns Puppy Mill Law Favored By Voters*, THE DOG FILES, Mar. 10, 2011, https://www.thedogfiles.com/2011/03/10/missouri-state-senate-overturns-puppy-mill-law-favored-by-voters/ [https://perma.cc/BV8L-PYPP].

98. *The Horrible Hundred 2019*, THE HUMANE SOCIETY OF THE UNITED STATES (May 2019), https://www.humanesociety.org/sites/default/files/docs/2019_Horrible-Hundred_0.pdf [https://perma.cc/KZG7-FM6C].

99. Bell, *supra* note 97.

100. Suntrup, *supra* note 86.

101. Hunter Woodall, *After Rejection By Missouri Voters, Republican Resurfaces Right-to-Work Legislation*, THE KANSAS CITY STAR (De. 4, 2018 6:29 PM), https://www.kansascity.com/news/local/news-columns-blogs/the-buzz/article222626700.html.

102. *Id.* If still in effect, "Right to Work" legislation would have prevented employers and their employees the freedom to associate in a comprehensive union relationship.

103.

by the legislature.[104] While it ultimately failed in the chamber, in a committee debate, Smith said that the measure could "theoretically allow legislators to choose not to fund Medicaid."[105] Still, even after its popular approval, some state senators signaled that the vote could essentially be ignored.[106] Senator Bob Onder doubted the legislature would even fund the expansion in 2021, citing budget concerns and an appellate court's decision supposedly granting the power to do so.[107] Senator Eric Burlison also questioned the actual implementation of Medicaid Expansion.[108] "There are going to be a lot of attorneys looking at this to see what flexibility we have … [a]nd from my understanding, you can't take away the legislature's authority to appropriate, so if the budget chairs in the House and Senate decide not to fund that line item, then at the end of the day it doesn't happen."[109] This comment was made on Thursday, August 6th, 2020.[110] Two days earlier, 1,263,776 Missouri voters exercised their constitutional right by passing Medicaid Expansion by a vote of 53.25% to 46.75%.[111] The legislature did not implement Medicaid Expansion until it was ordered to do so by Missouri courts almost a year later in the Summer of 2021.[112]

Moving further than criticism or distaste, a number of Missouri officials are now questioning the entire initiative petition process. In interviews regarding the repeal of "Clean Missouri," Governor Mike Parson has signaled

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104. Austin Huguelet, *Missouri voters could expand Medicaid, then let lawmakers block it on the same ballot*, SPRINGFIELD NEWS LEADER (May 11, 2020 6:54 PM), https://www.news-leader.com/story/news/2020/05/11/could-gop-resolution-block-medicaid-expansion-missouri/3108394001/ [https://perma.cc/JXH2-9WLH]; House Joint Resolution No. 106, 2nd Regular Session, 100th General Assembly, https://house.mo.gov/billtracking/bills201/hlrbillspdf/5152H.02C.pdf [https://perma.cc/YHB4-USUL].

105. Huguelet, *supra* note 104.

106. Jack Suntrup, *Missouri voters approved Medicaid expansion, but roll-out talks just getting started*, ST. LOUIS POST-Dispatch (Aug. 5, 2020), https://www.stltoday.com/news/local/govt-and-politics/missouri-voters-approved-medicaid-expansion-but-roll-out-talks-just-getting-started/article_606ef32b-6c77-52e1-8724-0a7b3b06d1fb.html [https://perma.cc/V6GH-HXL7].

107. *Id.*

108. Huguelet, *supra* note 104.

109. *Id.*

110. *Id.*

111. Alex Smith, *Missouri Voters Approve Medicaid Expansion Despite Resistance From Republican Leaders*, NATIONAL PUBLIC RADIO (Aug. 5, 2020 11:01 AM), https://www.npr.org/sections/health-shots/2020/08/05/898899246/missouri-voters-approve-medicaid-expansion-despite-resistance-from-republican-le [https://perma.cc/PL5V-L4ZA].

112 Doyle v. Tidball, SC99185 (Mo. Jul. 22, 2021).

that he believes "it may also be time to raise the bar for initiative petitions to appear on the ballot."[113] A few months later, four state senators proposed a number of different measures that would raise the standards for efforts to legislate through the initiative petition process.[114] At a hearing for the proposals, one witness stated that the standard would be so high that they would effectively eliminate the initiative petition process altogether.[115] All measures failed in 2019.[116] One was refiled in 2020 and it failed as well.[117]

All of these statements and actions show a general antagonistic disposition by the legislature toward the initiative process that threatens Missourian's right to initiative and referendum, the primary way in which citizens can respond to legislative neglect.

B. Constitutional Safeguards

There are possible solutions to protect the initiative process from a legislative supermajority. Some states ban similar initiatives and referenda from the ballot for a specific period of time.[118] These policies aim to reduce the number of measures on the ballot and ensure advocates and opponents do not abuse the initiative process. In Massachusetts, for example, a proposed initiative cannot be substantially similar as one that has appeared on the ballot in either of the two preceding elections, which is essentially a six-year ban.[119] Such a restriction would be welcome in Missouri to protect the citizen-led initiative process.

In addition, various states place limits on the legislature's power to amend and repeal citizen-initiated statutes.[120] This restriction exists with the

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113. David A. Lieb, *Missouri governor wants repeal of new redistricting law*, ASSOCIATED PRESS (Dec. 23, 2018), https://apnews.com/7702bd1c62244505a0653a99167480e3 [https://perma.cc/YQA3-KPAT].

114. S.B. 5 & 256, SJRs 1, 7, & 11, 100th Gen. Ass., 1st Reg. Sess., 2019.

115. Alisha Shurr, *Senators propose upping initiative petition requirements*, THE MISSOURI TIMES, (Feb. 13, 2019), https://themissouritimes.com/senators-propose-upping-initiative-petition-requirements/ [https://perma.cc/8AWZ-RND2].

116. SBs 5 & 256, SJRs 1, 7, & 11, 100th Gen. Ass., 1st Reg. Sess., 2019.

117. SJR 31, 100th Gen. Ass., 2nd Reg. Sess., 2020.

118. At least five states have prohibited the same or a substantially similar measure from reappearing on the ballot for a specified period of time after it is rejected by voters: Massachusetts, Mississippi, Nebraska, Oklahoma, Wyoming. *See Initiative and Referendum in the 21st Century*, Nat'l Conference of State Legislatures, (July 2002), https://www.ncsl.org/research/elections-and-campaigns/task-force-report.aspx [https://perma.cc/72YE-BHSL].

119. MASS. CONST., art. LXXIV, Sec. 1.

120. A legislature's power to amend and/or repeal a statute passed by the initiative has beenrestricted in at least 10 states: Alaska, Arizona, Arkansas, California, Michigan, Nevada, North Dakota, Oregon, Washington, and Wyoming. *See Initiative and Referendum in the 21st Century*, *supra* note 117.

hope that it would incentivize statutory initiatives over constitutional ones, which tend to be more pliable. Often, and especially in Missouri, petitioners choose to amend the constitution so the legislature cannot change it on a whim.[121] For example, in Arizona, the legislature cannot repeal a statutory initiative.[122] To amend it, the body must pass a proposed change with a three-fourths vote and the amendment must "further the purpose" of the measure.[123]

There are other restrictions worth examining that would limit the legislature's power to submit to constitutional amendments to voters. In Missouri, a simple majority is required in the legislature to submit to voters a constitutional amendment.[124] Twenty-six states require legislatively referred constitutional amendments to be approved by a supermajority before they go to the ballot.[125] Nine require a sixty percent supermajority vote in one session of the state's legislature.[126] Seventeen others required a two-thirds – 66.67 percent – supermajority vote in one session of the state's legislature.[127] For example, in South Carolina, a legislatively referred constitutional amendment can be submitted to voters if it is approved by two-thirds vote of each chamber of the state legislature.[128] South Carolina further limits the legislature's power by requiring a second affirmative vote if voters approve the amendment.[129]

Finally, eleven states require the legislature to pass constitutional amendment proposals twice in consecutive sessions in order to refer them to

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121. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY 10 (2002), https://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/IandR_report.pdf [https://perma.cc/5NKN-E29S]; *see also Initiative and Referendum in the 21st Century*, *supra* note 117..

122. ARIZ. CONST., art. IV, pt. 1, § 1, paras. 6, 15.

123. *Id.*

124. MO. CONST., art. XII, § 2(b).

125. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 120; *Initiative and Referendum in the 21st Century*, *supra* note 117.

126. ALA. CONST. art XVIII, § 284; FLA. CONST. art. XI, § 1; ILL. CONST. art. XIV, § 3; Kent. Const. § 256; MD. CONST. art. XIV, § 1; NEB. CONST. art. XIV, § 1; N.H. CONST. art. 100, pt. II; N.C. CONST. art. XIII, § 4; OHIO CONST. art. XVI § 1.

127. ALASKA CONST., art. XIII, § 1; CAL. CONST. art. XVIII, § 1; COLO. CONST. art. XIX § 2; GA. CONST. art. X, § 1, para. II; IDAHO CONST. art. XX, § 1; KAN. CONST. art. 14, § 1; LA. CONST. art. XIII, § 1; ME. CONST. art. X, § 4; MICH. CONST. art. XII, § 1; MISS. CONST. art. XV, § 273; MONT. CONST. art. XIV, § 8; S.C. CONST. art. XVI, § 1; TEX. CONST. art. 17, § 1; UTAH CONST. art. XXIII, § 1; WASH. CONST. art. XXIII, § 1; W. VA. CONST. art. XIV, § 2; WYO. CONST. art. 20, § 1.

128. S.C. CONST. art. XVI, § 1.

129. S*Id.*

the ballot.[130] Some require two votes in some circumstances and one vote in others, depending on, among other factors, how decisive the first vote was.[131] For example, the Tennessee General Assembly must approve a proposed amendment in two successive sessions before it is submitted to voters.[132] The first approval only needs a majority approval.[133] The second session, the proposal must earn a two-thirds supermajority before being placed on the ballot.[134] Four states use a system that is a hybrid model between supermajority approval and the consecutive session requirement.[135] For example, in Connecticut, the state legislature must approve a proposed amendment by a supermajority vote of seventy-five percent.[136] But, if the legislature approves the measure by a simple majority in consecutive sessions, such approval is sufficient for submission to voters.[137]

Any of the restrictions discussed above would have prevented the underlying conflict in *Pippens*.[138] By either protecting citizen-led initiatives or restricting legislatively referred ones, the will of voters could be guarded from antagonization by elected officials. However, absent these constitutional reforms, states like Missouri depend on judicial protections to avoid abuse of the initiative and referendum processes. As *Pippens* demonstrated, Missouri's existing judicial protections are not enough.

C. Judicial Safeguards

Modern judicial review of state constitutional amendments is largely deferential, imposing limits only on the procedure of their implementation and not their substance.[139] Relevant procedural review includes the courts' ability to review ballot language of a proposed amendment via initiative or referendum.[140] In Missouri, such review is allowed by statute and is designed

130. IND. CONST. art. 16 § 1; IOWA CONST. art. X, § 1; MASS. CONST. art. XLVIII, pt. IV; NEV. CONST. art. 16, §1; N.Y. CONST. art. XIX, § 1; PA. CONST. art. XI, § 1; S.C. CONST. art. XVI, § 1; TENN. CONST. art. XI, § 3; VT. CONST. § 72; VA. CONST. art. XII, § 1; WIS. CONST. art. XII, § 1.

131. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 120; *Initiative and Referendum in the 21st Century*, *supra* note 117.

132. TENN. CONST. art. XI, § 3.

133. *Id.*

134. *Id.*

135. CONN. CONST. art. XII, § 1; HAW. CONST. art. XVII, § 3; N.J. CONST. art IX; PA. CONST. art. XI, § 1.

136. CONN. CONST. art XII, § 1.

137. *Id.*

138. Pippens v. Ashcroft, 606 S.W.3d 689, 698–700 (Mo. Ct. App. 2020).

139. Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 68 (2019).

140. *See id.* at 68–70 n. 10; *see also* NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 120; *Initiative and Referendum in the 21st Century*, *supra* note 117.

to protect against insufficient and unfair language.[141] In an ideal world, the resulting language is fair and sufficient after a challenge in court. However, in practice, and as demonstrated by *Pippens*, judicial review of ballot language does little to ensure voters receive a fair and sufficient description of a measure if the measure is fundamentally designed to deceive.[142]

Section 116.190 of the Missouri Revised Statutes provides Missouri courts – specifically the Circuit Court of Cole County, Missouri – the power to edit insufficient and unfair ballot language.[143] This power to correct deficient language is reflected in a great majority of states.[144] Such flexibility is desired for citizen-initiated measures. Citizens and advocates often have little to no legal background or legislative expertise and a minor deficiency should not be fatal to their efforts. However, should the court allow such flexibility and grace to a powerful body like a state legislature ruled by a supermajority?

In Florida, the judicial review of ballot language is unique.[145] Florida courts do not serve as editors of proposed ballot language but rather executioners.[146] If language is found to be legally insufficient, the courts do not correct them as they see fit; defective language results in the entire measure being stricken from the ballot.[147] Such an error is fatal. Critics rightfully deride such judicial power to remove a decision for Florida voters.[148] Advocates and organizers have often invested immense amounts of time and money into a citizen-led initiative or referendum only to have the entire effort set aside by a panel of judges.[149] However, a legislatively referred constitutional amendment goes to the ballot by a simple majority vote of a governing body.[150]

Missouri should take note of Florida's extraordinary power of judicial review. If a legislatively referred constitutional amendment is found to have

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141. MO. REV. STAT. § 116.190 (2017).

142. *See Pippens*, 606 S.W.3d at 698–700.

143. MO. REV. STAT. § 116.190

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

145. *Id.* at 170.

146. *Id.* at 171

147. *Id.*

148. *Id.*

149. Jack Suntrup, *Missouri abortion rights supporters sue secretary of state after failed initiative petition*, ST. LOUIS POST-DISPATCH (Aug. 23, 2019), https://www.stltoday.com/news/local/govt-and-politics/missouri-abortion-rights-supporters-sue-secretary-of-state-after-failed-initiative-petition/article_3393b638-f0ab-5226-83f9-10792520e368.html [https://perma.cc/D9RX-LWM4].

150. MO. CONST., art. XII § 2(a).

insufficient and unfair ballot language, such a defect should be fatal and not simply grounds for correction. The entire measure should be forbidden from appearing on the ballot until the legislature itself can create language that meets legal standards in its next session. Otherwise, in their review, courts essentially provide step-by-step instructions for the drafters to rewrite their proposal to abide by state law while still accomplishing their self-serving objectives.

This leads to the question, why should the drafting of language remain within the domain of the legislature or a partisan official? The substantive dispute in *Pippens* is primarily about who should be in charge of redistricting and apportionment of legislative districts.[151] The 2018 measure put the process in nonpartisan hands.[152] Ballot summaries and language of initiative and referendums, whether proposed by citizens or the legislature, should be placed in similarly non-partisan hands. Ballot language, often a few hundred words, can determine if a measure succeeds or fails.[153] Legislatures and partisan Secretary of States often face a conflict of interests when drafting a statement required to be "sufficient and fair" for the proposal they hope to pass.[154] Which raises an important question of why let citizens or elected officials draft a ballot summary or initiative at all?

Many states with initiative and petition offer assistance to proponents on the drafting of the relevant summary statement and ballot language. This could be accomplished with two types of assistance: technical review and substantive review.[155] Technical review is exercised to ensure the proposal meets legal requirements for formal and style and adheres to drafting conventions.[156] However, in states like Colorado, that review goes a step further to ensure the quality, consistency, and fairness of initiative proposals and their summary statements.[157]

In Colorado, the Legislative Council staff and Legislative Legal Services hold public hearings on proposed initiatives to present their review and comments.[158] These hearings help proponents clarify their proposal, but they are not required to accept any suggestions offered by legislative staff.[159] The meeting, held in the Capitol, is open to the public and although people who

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151. Pippens v. Ashcroft, 606 S.W.3d 689, 695–96 (Mo. Ct. App. 2020).

152. *Id.* at 696.

153. *See* Grayson Keith Sieg, *A Citizen's Guide to Redistricting Reform Through Referendum*, 63 CLEV. ST. L. REV. 901, 938 (2015); William A. Lund, *What's in A Name? The Battle over Ballot Titles in Oregon*, 34 WILLAMETTE L. REV. 143, 153–54 (1998).

154. Lack of legislative expertise can apply to members of the state legislature and citizens and advocates can also have conflicting interests.

155. Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 79 (1995).

156. *Id.*

157. *Id.* at 81–82.

158. *Id.* at 81.

159. *Id.* at 81–82.

may oppose a measure are welcome to attend, no testimony or comments are accepted from anyone other than the proponents.[160] The meeting is taped and becomes public record.[161] Proponents are required to go through this process before they can move on to the next step of setting a title.[162]

Colorado also has a special Ballot Title Board that drafts the language and summary statements that eventually go to voters.[163] The Board is not quite nonpartisan; it consists of the elected Secretary of State, the Attorney General, and the director of the office of legislative services.[164] Within two weeks of a submitted initiative, the board must draft a title for the initiative, a submission clause, and a clear, concise summary, all approved by a majority vote of the board.[165] The Colorado Constitution further requires the state to mail a "ballot information booklet" to every registered voter before the election and also requires the state to publish the proposed provisions in newspaper notices.[166] These requirements would help to ensure the electorate rightfully understands the measures it has been asked to adopt.

Whether Missouri works to make defects in ballot language fatal, like Florida, or hopes to institute an independent body to draft initiatives, like Colorado, the General Assembly should explore ways to improve the flaws in the state's review of ballot language. The current process is not working. Proponents of a measure are allowed to draft its appearance to voters.[167] Courts only have the power to modestly edit language that is fundamentally designed to deceive. Such a combination results in a power imbalance that threatens popular majority rule.

VI. CONCLUSION

Pippens v. Ashcroft is the result of an escalating conflict between a legislature's will and the citizen's want.[168] Without needed protections and reform, the initiative and referenda processes of Missouri are at risk of abuse by a legislature who has failed to show restraint. Citizens continue to use their

160. *Id.* at 79, 93–94.

161. *Id.*

162. *Id.* at 79.

163. *Id.* at 93–94.

164. *Id.* at 94.

165. *Id.*

166. *Id.* at 99.

167. *See* MO. CONST. art. III, *see also* Gladys Bautista, *Understanding the ballot: What to know about Missouri Amendment 3*, KRCG (Oct. 14, 2020), https://krcgtv.com/news/local/understanding-your-ballot-what-to-know-about-missouri-amendment-3 [https://perma.cc/EF2A-CFWB].

168. 606 S.W.3d 689 (Mo. Ct. App. 2020).

rightful power to direct initiative and popular referendum. As demonstrated in 2020, the supermajority in Jefferson City is happy to exercise indirect initiative and unpopular referendum in response.[169] The legislature, with a slap on the wrist from the Court of Appeals, successfully repealed – with a bare majority – a measure enacted by nearly two-thirds of Missouri voters. It is the latest example in a growing trend of contempt held by elected officials against the initiative process and their own constituency. Missourians were hoodwinked and confused by language written for that purpose. This time, popular reforms were replaced by a less-popular return to status-quo. The result is an unfortunate result for any proponents of direct democracy. Still larger threats of regression loom and the flaws in Missouri's democratic system must be addressed.

169. *See* Gabriella Limón & Yurij Rudensky, *Missouri Amendment 3 Passed, What Does that Mean for Redistricting?*, BRENNAN CTR. FOR JUST. (Nov. 5, 2020), https://www.brennancenter.org/our-work/research-reports/missouri-amendment-3-passed-what-does-mean-redistricting [https://perma.cc/PW5C-TNYD].