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The Hancock Amendment, User Fees, the Plain Meaning Rule, and an Invitation to Challenge *Buechner v. Bond*

*Keller v. Marion County Ambulance District*¹

I. INTRODUCTION

In 1980, Missouri voters adopted an amendment to the Missouri Constitution. The amendment, commonly called the Hancock Amendment,² limited the power of state and local governments to raise taxes by requiring voter approval for tax increases and by placing a spending limit on the state government.³

The types of increases prohibited without voter approval have been the subject of controversy. One of the controversial issues has been whether fees charged for governmental services may be raised without a vote.⁴ Initially, the Missouri Supreme Court, employing the plain meaning rule, held that such fees could not be raised without voter consent.⁵ *Keller v. Marion County Ambulance District*, the subject of this Note, marks a welcome change of that position, and a more rational approach to constitutional construction.

II. FACTS AND HOLDING

In 1974, the Marion County Ambulance District was organized under Missouri's Ambulance District Law.⁶ The voters of the ambulance district approved a doubling of the property tax rate in 1986;⁷ such voter approval was required by the Hancock Amendment.⁸ In early 1989, the ambulance district established a new schedule of charges for services rendered, with most of the charges representing increases over previous rates.⁹ The new schedule of charges was not submitted to district voters for approval.¹⁰ A group of taxpayers who resided in the district sued, claiming that the increases violated the Hancock Amendment because voter approval was not obtained.¹¹ The circuit court agreed with the taxpayers, holding that the charges were "fees"

1. 820 S.W.2d 301 (Mo. 1991).

2. *Id.*

3. MO. CONST., art. X, §§ 16, 18 (1980).

4. See *Keller*, 820 S.W.2d 301; *Roberts v. McNary*, 636 S.W.2d 332 (Mo. 1982).

5. *Roberts*, 636 S.W.2d at 332.

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

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

for purposes of Section 22(a) of the Hancock Amendment,¹² and were therefore subject to voter approval.¹³ The ambulance district's failure to get voter approval made the fee increases unconstitutional.¹⁴ On transfer, the Missouri Supreme Court reversed.¹⁵ The court held that the charges in question were user fees rather than "fees" that were in reality taxes.¹⁶ The court held that the amount to charge users of services should be determined by those elected to run such "quasi-governmental organizations,"¹⁷ and not the people of the district.¹⁸

III. LEGAL BACKGROUND

A. Constitutional Construction in Missouri

Over the last several decades, the Missouri Supreme Court has developed rules courts must use in the construction of constitutions. Many of these rules were spelled out in *Boone County Court v. State*.¹⁹ Generally, courts construe constitutional provisions using the same rules used in statutory construction, but constitutional provisions are to be given a broader construction because of their more permanent nature.²⁰

The court's fundamental role in interpreting a constitutional provision is to give effect to the intent of the voters who approved the provision.²¹ The voters are presumed to have intended that words carry their ordinary and usual

12. MO. CONST., art. X, § 22 (1980). Section 22(a) provides in part:

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

Id.

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

14. *Id.*

15. *Id.*

16. *Id.* at 305.

17. *Id.* at 304 n.6. ("These are organizations set up by governments to fulfill purposes inadequately served by private organizations."). The court listed the following as examples of quasi-governmental organizations: ambulance districts, community mental health services, conservancy districts, county airport authorities, county health centers, county library districts, hospital districts, junior college districts, metropolitan park and museum districts, nursing home districts, public water supply districts, school districts, and special business districts. *Id.* at 304.

18. *Id.* at 305.

19. 631 S.W.2d 321 (Mo. 1982).

20. *Id.* at 324.

21. *Id.*

meanings.²² The dictionary determines the "ordinary, usual and commonly understood meaning."²³

The grammatical word order used and the selection of associated words also indicate meaning.²⁴ With regard to both, the intent of the provision's drafters is influential, but ultimately of less importance than any intent derived from the voters who approved the provision.²⁵ A court may look to the title of the provision when interpreting it.²⁶ Context, too, is an important consideration: "Due regard is given to the primary objectives of the provision in issue as viewed in harmony with all related provisions, considered as a whole."²⁷ Finally, Missouri courts have long employed the common law "plain meaning" rule by holding that the meaning apparent on the face of the constitution is controlling, and no forced or unnatural construction is permissible.²⁸

B. Interpretations of the Hancock Amendment

Missouri courts have had relatively few opportunities to analyze the type of tax/fee distinction at issue in *Keller*.²⁹ Prior to *Keller*, the most important of these cases was *Roberts v. McNary*.³⁰ The *Roberts* case provided the Missouri Supreme Court with its first opportunity to determine whether "user fees" were covered by the "tax, license or fees" language of the Hancock Amendment³¹ and, thus, subject to a vote of the people before an could increase. *Roberts* centered around St. Louis County's proposed budget for 1982.³² The proposed budget included fee increases for some county services, including parks and building inspection.³³ The St. Louis County Council approved the budget without a popular vote.³⁴

A resident taxpayer sought a declaration that the St. Louis County Council's action violated the Hancock Amendment.³⁵ Relying on *Webster's Dictionary*,³⁶ the Missouri Supreme Court read the "tax, license or fees"

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 325.

27. *Id.* at 324.

28. *Wenzlaff v. Lawton*, 653 S.W.2d 215, 216 (Mo. 1983); *Heimberger v. Board of Curators of Univ. of Mo.*, 188 S.W. 128, 130 (Mo. 1916).

29. *See Zahner v. City of Perryville*, 813 S.W.2d 855 (Mo. 1991); *Roberts v. McNary*, 636 S.W.2d 332 (Mo. 1982).

30. 636 S.W.2d 332 (Mo. 1982).

31. MO. CONST. art. X, § 22(a) (1980).

32. *Roberts*, 636 S.W.2d at 334.

33. *Id.*

34. *Id.*

35. *Id.*

36. The dictionary defined the word "fee" as "'a fixed charge for admission; a charge fixed by law or by an institution for certain privileges or services; a charge fixed by law for services

language broadly to mean that the Hancock Amendment imposed sweeping limitations on government's ability to raise fees of any sort without voter approval.³⁷

A more recent case on this issue is *Zahner v. City of Perryville*.³⁸ Perryville, Missouri had a street construction policy which required abutting property owners to pay the initial cost of paving an unpaved street.³⁹ As a result of the policy, Clarence L. Zahner was required to pay over \$1,600 under a "special tax assessment bill" for improvements to a street abutting his property.⁴⁰ There was no vote of the people of Perryville.⁴¹ Zahner filed suit, claiming that the assessment violated the Hancock Amendment.⁴² The Missouri Supreme Court found that the charge assessed to Mr. Zahner did not fit the dictionary definition of a "tax" or a "fee" because the charge was not "a fixed charge for admission; a charge fixed by law or by an institution for certain privileges or services; [or] a charge fixed by law for services of a public officer."⁴³ Instead, the court held that the charge was a "special assessment" and, therefore, did not require a vote of the people in order to satisfy the Hancock Amendment.⁴⁴

A case having nothing to do with the distinction between taxes and fees, but still extremely important in the history of interpreting the Hancock Amendment, is *Buechner v. Bond*.⁴⁵ *Buechner* dealt with an action for declaratory judgment sought by Missouri State Representatives John Buechner and Wayne Goode.⁴⁶ Buechner and Goode sought a declaratory judgment that Governor Bond's inclusion of unspent revenue from the 1979-80 fiscal year in "total state revenues"⁴⁷ was improper for purposes of calculating the revenue limit under Section 18 of the Hancock Amendment.⁴⁸ The way in

of a public officer." *Roberts*, 636 S.W.2d at 335 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1965)).

37. *Id.* at 335-36.

38. 813 S.W.2d 855 (Mo. 1991).

39. *Id.* at 857.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 858-59.

44. *Id.* at 859.

45. 650 S.W.2d 611 (Mo. 1983).

46. *Id.* at 612.

47. As used in §§ 16-24 of Article X:

(1) "Total state revenues" includes all general and special revenues, license and fees, excluding federal funds, as defined in the budget message of the governor for fiscal year 1980-1981. Total state revenues shall exclude the amount of any credits based on actual tax liabilities or the imputed tax components of rental payments, but shall include the amount of any credits not related to actual tax liabilities.

MO. CONST. art. X, § 17 (1981).

48. *Buechner*, 650 S.W.2d at 612. Section 18(a) provides in full:

There is hereby established a limit on the total amount of taxes which may be imposed by the general assembly in any fiscal year on the taxpayers of this state.

which that unspent revenue was characterized would partially determine what the state's revenue limit would be.⁴⁹ The unspent revenue amounted to approximately \$416 million.⁵⁰ If included in "total state revenues," it would raise Missouri's revenue limit.⁵¹ The higher the revenue for fiscal year 1980-81, the more money the state government could collect without voter approval.⁵²

The Missouri Supreme Court determined that the unspent revenue from the 1979-80 fiscal year should not be included in "total state revenues."⁵³ Instead of relying on the definition of "total state revenues" set out in Article X, Section 17,⁵⁴ the court looked to the dictionary for the definition of "revenue."⁵⁵ The court held that "[r]evenue is that amount generated in a given fiscal year,"⁵⁶ thereby excluding the unspent revenue from "total state revenues" and reducing the amount of money the state government could collect without voter approval.⁵⁷

IV. INSTANT DECISION

A. *The Majority Opinion*

Judge Benton wrote the majority opinion in which Chief Judge Robertson and Judges Blackmar and Thomas joined.⁵⁸ The majority noted that the most important objective of constitutional construction is to "give effect to the

Effective with fiscal year 1981-82, and for each fiscal year thereafter, the general assembly shall not impose taxes of any kind which, together with all other revenues of the state, federal funds excluded, exceed the revenue limit established in this section. The revenue limit shall be calculated for each fiscal year and shall be equal to the product of the ratio of total state revenues in fiscal year 1980-81 divided by the personal income of Missouri in calendar year 1979 multiplied by the personal income of Missouri in either the calendar year prior to the calendar year in which appropriations for the fiscal year for which the calculation is being made, or the average of personal income of Missouri in the previous three calendar years, whichever is greater.

MO. CONST. art. X, § 18(a) (1980).

49. *Buechner*, 650 S.W.2d at 612.

50. Edward D. Robertson, Jr. & Duncan E. Kincheloe, III, *Missouri's Tax Limitation Amendment: Ad Astra Per Aspera*, 52 UMKC L. REV. 1, 4 (1983).

51. *Id.*

52. See *supra* note 48 for the full text of § 18(a).

53. *Buechner*, 650 S.W.2d at 613.

54. MO. CONST., art. X, § 17 (1980).

55. *Buechner*, 650 S.W.2d at 613.

56. *Id.*

57. See Robertson & Kincheloe, *supra* note 50, at 4.

58. *Keller*, 820 S.W.2d at 301, 305.

intent of the voters who adopted the Amendment⁵⁹ and stressed the importance of looking at words in context.⁶⁰

The majority explained that Article X, Section 16 is the Hancock Amendment's principal clause, and that the Amendment's other provisions exist to "implement" Section 16.⁶¹ The majority held that the limit on "spending" referred to in section 16⁶² applied only to the state government,⁶³ and concluded that "there are two types of local revenue increases: those subject to the Hancock Amendment and those not subject to the Amendment."⁶⁴

The majority pointed out that the terms "license" and "fees" are mentioned in conjunction with revenue twice in the Hancock Amendment.⁶⁵ In Section 17(1)⁶⁶ the terms are used in the definition of total state revenue, and as alternatives to "general and special revenues."⁶⁷ In Section 22(a)⁶⁸ the terms are mentioned as alternatives to a "tax" in a list of increases that local governments are forbidden to make without voter approval.⁶⁹ The majority suggested that the differences in these sections suggest a narrow definition of "fees" as used in Section 22(a), and a general term like "revenue" should have been used if the people of Missouri actually intended that no increases in revenue of any kind be allowed without their approval.⁷⁰ According to the majority, the fact that "fees" are characterized as an alternative to taxes "suggests that what is prohibited are fee increases that are taxes in everything but name. What is allowed are fee increases which are 'general and special revenues' but not a 'tax.'"⁷¹

59. *Id.* at 302.

60. *Id.* Judge Benton wrote: "Context determines meaning. Consider this sentence: The batter flew out. Without knowing context, one cannot determine whether that sentence describes what happened when the cook tripped while carrying a bowl of cake mix, or the final act of a baseball game." *Id.*

61. *Id.* Article X, § 16 provides:

Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval as provided by this constitution. The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions. A provision for emergency conditions is established and the repayment of voter approved bonded indebtedness is guaranteed. *Implementation of this section is specified in sections 17 through 24, inclusive of this article.*

MO. CONST. art. X, § 16 (1980) (emphasis added).

62. The full text of art. X, § 16 is set out *supra* note 61.

63. *Keller*, 820 S.W.2d at 302-03.

64. *Id.* at 303.

65. *Id.*

66. See *supra* note 47 for the full text of § 17(1).

67. *Keller*, 820 S.W.2d at 303.

68. MO. CONST., art. X, § 22(a) (1980).

69. *Keller*, 820 S.W.2d at 303. See *supra* note 12 for the text of § 22(a).

70. *Keller*, 820 S.W.2d at 303.

71. *Id.* (footnote omitted).

The majority also found it persuasive that Section 22⁷² prohibited the "levying" of a "tax, license or fee" without voter approval.⁷³ According to the majority, in common usage, taxes are *levied*, but fees are *charged*.⁷⁴ They took this to suggest that the fees referred to in Section 22 were actually taxes, since fees are not ordinarily "levied."⁷⁵

Citing *Zahner v. City of Perryville*,⁷⁶ the majority noted that user fees generally are not considered taxes.⁷⁷ Accordingly, they held that the Hancock Amendment does not prohibit shifting the expenses of services provided by special districts and quasi-governmental organizations to those who actually use them.⁷⁸

The majority also provided a list of criteria to help determine whether a revenue increase is subject to the voter approval requirement of the Hancock Amendment.⁷⁹ The criteria include when the fee is paid, who pays the fee,

72. See *supra* note 12 for the text of § 22(a).

73. *Keller*, 820 S.W.2d at 303.

74. *Id.*

75. *Id.*

76. 813 S.W.2d 855, 859 (Mo. 1991).

77. *Keller*, 820 S.W.2d at 303-04.

78. *Id.* at 304.

79. *Id.* at 304 n.10. The majority wrote:

In order to determine whether a revenue increase by a local government is an increase in a "tax, license or fees" that requires voter approval under the Hancock Amendment, the following are critical:

- 1) When is the fee paid?—Fees subject to the Hancock Amendment are likely due to be paid on a periodic basis while fees not subject to the Hancock Amendment are likely due to be paid only on or after provision of a good or service to the individual paying the fee.
- 2) Who pays the fee?—A fee subject to the Hancock Amendment is likely to be blanket-billed to all or almost all of the residents of the political subdivision while a fee not subject to the Hancock Amendment is likely to be charged only to those who actually use the good or service for which the fee is charged.
- 3) Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?—Fees subject to the Hancock Amendment are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to the Hancock Amendment are likely to be dependent on the level of goods or services provided to the fee payer.
- 4) Is the government providing a service or good?—If the government is providing a good or service, or permission to use government property, the fee is less likely to be subject to the Hancock Amendment. If there is no good or service being provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government is probably subject to the Hancock Amendment.
- 5) Has the activity historically and exclusively been provided by the government?—If the government has historically and exclusively

whether the government is providing goods or services, and whether the government has historically and exclusively provided the good or service.⁸⁰

Finally, the majority stated that *Roberts* has been overruled sub silentio by other cases to the extent that it holds that all revenue increases, including those labeled as "fee" increases, require voter approval under the Hancock Amendment.⁸¹ The majority stated that the precedential value of *Roberts* was minimal because it attempts to define "fees" out of context.⁸²

B. The Dissent

Judge Holstein authored the dissenting opinion in *Keller* and was joined by Judges Covington and Rendlen.⁸³ The dissent declared that "the majority nullifies the express intent of the voters who adopted [Article X, Section 22(a)]."⁸⁴

The dissent's first point of contention was the manner in which the majority construed the terms of Section 22(a).⁸⁵ The dissent said that the precedent relied on by the majority for rules of constitutional construction⁸⁶ did not suggest that context should deprive words of meanings as defined in the dictionary.⁸⁷ The dissent alleged that the majority made no attempt to read "fees" so as to give it its "dictionary meaning."⁸⁸

The dissent stated that rules of construction employed by the majority were unnecessary because the majority failed to demonstrate that the word

provided the good, service, permission or activity, the fee is likely subject to the Hancock Amendment. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to the Hancock Amendment.

Based on these criteria, property taxes, sales taxes, franchise taxes, and income taxes, among others, are subject to the Hancock Amendment. The above criteria are helpful in examining charges denominated as something other than a tax. No specific criterion is independently controlling; but, rather, the criteria together determine whether the charge is closer to being a "true" user fee or a tax denominated as a fee.

Id. (citations omitted).

80. *Id.*

81. *Id.* at 305. The court cited the following cases as overruling *Roberts* sub silentio: *Zahner v. City of Perryville*, 813 S.W.2d 855 (Mo. 1991); *Tax Increment Fin. Comm'n v. J.E. Dunn Constr. Co.*, 781 S.W.2d 70 (Mo. 1989); *Pace v. City of Hannibal*, 680 S.W.2d 944 (Mo. 1984).

82. *Keller*, 820 S.W.2d at 305.

83. *Id.*

84. *Id.* (Holstein, J., dissenting).

85. *Id.*

86. *Boone County Ct. v. State*, 631 S.W.2d 321 (Mo. 1982); *McDermott v. Nations*, 580 S.W.2d 249 (Mo.), *cert. denied*, 444 U.S. 901, and *cert. dismissed*, 444 U.S. 958 (1979).

87. *Keller*, 820 S.W.2d at 306 (Holstein, J., dissenting).

88. *Id.*

"fees" as used in the Hancock Amendment is ambiguous.⁸⁹ Where there is no ambiguity in a constitutional provision, there should be no reliance on the rules of construction.⁹⁰ Additionally, the dissent said that if the terms "taxes," "licenses," and "fees" were really intended to convey the same meaning, only one of them would be necessary, and there would be no reason to include the others.⁹¹

The dissenters also took exception to the majority's notion that "fees" are not "levied," calling it "an exercise in wishful thinking."⁹² They cited a legion of cases that contained examples of "fees" being "levied."⁹³

The dissent stated that the majority ignored the precedent of *Roberts*.⁹⁴ The *Roberts* court had adopted a dictionary definition of "fees," as "[a] fixed charge for admission; a charge fixed by law or by an institution for certain privileges or services; [or] a charge fixed by law for services of a public officer."⁹⁵ The dissent noted that the *Roberts* court determined the plain and ordinary meaning of "fees," finding no need to apply the rules of construction.⁹⁶

The dissent rejected the majority's claim that *Roberts* had been overruled *sub silentio*, noting that the cases cited by the majority had actually cited *Roberts* with approval and relied upon it.⁹⁷ The dissent stated that if the majority wished to reject the holding of *Roberts* "it is far preferable to do so by the front door of reason rather than the amorphous back door of *sub silentio*."⁹⁸

The dissent went on to say that if there were ambiguity in the Hancock Amendment, it exists in Section 16⁹⁹ rather than in Section 22(a)¹⁰⁰. According to the dissent, the phrase "[p]roperty taxes and other local taxes and state taxation and spending may not be increased"¹⁰¹ is ambiguous because it is unclear whether "spending" applies only to the state, or to both state and

89. *Id.*

90. *Id.* (citing *E.B. Jones Motor Co. v. Industrial Comm'n*, 298 S.W.2d 407, 410 (Mo. 1957)).

91. *Id.*

92. *Id.* at 307.

93. *Id.* Among the cases cited by the dissent are: *Carpenter v. King*, 679 S.W.2d 866, 867 (Mo. 1984); *Concerned Parents v. Caruthersville Sch. Dist.*, 548 S.W.2d 554, 561 (Mo. 1977); *Automobile Club of Mo. v. City of St. Louis*, 334 S.W.2d 355, 362 (Mo. 1960); *Fetter v. City of Richmond*, 142 S.W.2d 6, 8 (Mo. 1940).

94. *Keller*, 820 S.W.2d at 307 (Holstein, J., dissenting).

95. *Id.* at 307-08 (citing *Roberts v. McNary*, 636 S.W.2d 332, 335 (Mo. 1982)).

96. *Id.* at 308.

97. *Id.* See *Zahner*, 813 S.W.2d at 858; *Tax Increment Fin. Comm'n v. J.E. Dunn Constr. Co.*, 781 S.W.2d 70, 76-77 (Mo. 1989); *Pace v. City of Hannibal*, 680 S.W.2d 944, 948 (Mo. 1984).

98. *Keller*, 820 S.W.2d at 308 (Holstein, J. dissenting).

99. MO. CONST., art. X, § 16 (1980). The full text of § 16 is set out *supra* note 61.

100. *Keller*, 820 S.W.2d at 309 (Holstein, J., dissenting) (citing MO. CONST., art. X, § 22(a) (1980)). The relevant portion of § 22(a) is quoted *supra* note 12.

101. MO. CONST., art X, § 16 (1980).

local governments.¹⁰² The dissent contended that the "specific" language in Section 22(a) should prevail over the "general" language of Section 16.¹⁰³

The dissent also tried to find the intent of the voters by looking at the ballot title of the Hancock Amendment.¹⁰⁴ The ballot title informed voters that the amendment "prohibits local tax or fee increases without a popular vote."¹⁰⁵ The dissent interpreted this as suggesting that the voters intended to do more than limit the government's power to raise taxes.¹⁰⁶

V. COMMENT

A. Righting the Wrong of Roberts

1. The Value of Voter Intent

Under ideal circumstances, the dissenters in *Keller* would be correct in asserting that the most important determination to be made is what the voters who ratified the Hancock Amendment intended.¹⁰⁷ Although some argue there is no such thing as the intent of a voting body,¹⁰⁸ if it could be determined that voters intended to achieve a specific result by voting for a constitutional amendment, such intent should be given effect.¹⁰⁹ However, in a case such as this, making an accurate determination of the voters' intent is a difficult, if not impossible, task. It would be unrealistic to say that all those who favored the Hancock Amendment intended the same thing. Different voters were certain to perceive the Amendment differently. Some were probably influenced by advertisements, others by newspaper and television stories, and still others by the opinions of friends and family. Many may have read the Amendment in its entirety, while most probably had not. Also making the intent of the voters difficult to ascertain is that this issue dealt not with Section 16, the principal provision of the Amendment, but with the latter, more minor provisions. The Hancock Amendment was popularly known as the "tax limit amendment" or the "tax lid amendment."¹¹⁰ It

102. *Keller*, 820 S.W.2d at 309 (Holstein, J., dissenting).

103. *Id.* at 309-10.

104. *Id.* at 310.

105. *Id.* (quoting *Roberts v. McNary*, 636 S.W.2d 332, 336 (Mo. 1982)).

106. *Id.*

107. *Id.*

108. "[T]here is no such thing as the intention of the Framers waiting to be discovered, even in principle. There is only some such thing waiting to be invented." Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477 (1981). Logically, this position would extend to the intention of the voters who ratify a constitutional amendment.

109. "If a court is reasonably sure what the legislators were driving at . . . a refusal to give effect to their purposes because they did not dot every *i* and cross every *t* is defensible only if one has some principled objection to legislation in general." RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 291 (1990). This should be equally true if a court is reasonably sure of the voters' purpose in ratifying the amendment.

110. Rhonda C. Thomas, *The Hancock Amendment: The Limits Imposed on Local*

seems unlikely that the voters contemplated the types of issues raised in *Keller* and *Roberts*, which deal with charges not commonly thought of as "taxes," and even less likely they fully comprehended the wording of the Amendment. Nevertheless, the voters did enact the Amendment complete with its wording, and this wording should be given some effect.

2. Context vs. Plain Meaning

To determine the meaning of "tax, license or fees" in Section 22 of the Hancock Amendment,¹¹¹ it is crucial to look at the terms in context. The majority's statement that "[c]ontext determines meaning" is accurate.¹¹² The words in the Hancock Amendment, like any other document, do not exist in a vacuum. They act together synergistically to create meanings which they alone cannot convey.¹¹³ They modify and explain each other. Section 16¹¹⁴ states that "[p]roperty taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval as provided by this constitution."¹¹⁵ It goes on to say that "[i]mplementation of this section is specified in sections 17 through 24, inclusive of this article."¹¹⁶ Nowhere in Section 16 is a reference made to "licenses" or "fees." It only speaks of "taxes." Since this section specifically refers to the subsequent sections as "implementation," it strains reason to contend that the intent could be found in a provision other than Section 16. The sections following Section 16 tend to be technical, including matters such as the definition of terms,¹¹⁷ an explanation of how the revenue limit is set,¹¹⁸ and a description of who may have standing to bring an action to enforce the provisions of the Hancock Amendment.¹¹⁹ Section 16 is what the Hancock Amendment is about. Sections 17 through 24 make it work.

The dissent rejected the majority's contextual reading of "tax, license or fees" and stated that "[t]he meaning apparent on the face of the constitution

Governments, 52 UMKC L. REV. 22, 31 n.28 (1983).

111. MO. CONST., art. X, § 22 (1980).

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

113. Judge Patricia M. Wald of the D.C. Circuit Court of Appeals has written, Words do mean different things in different contexts. . . . To stop at the purely literal meaning of a word, phrase, or sentence—if indeed the purely literal meaning can be found—ignores reality. In the context of the statute, other related statutes, or the problems giving rise to the statute, words may be capable of many different meanings, and the literal meaning may be inapplicable or nonsensical.

Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 199 (1982).

114. MO. CONST., art. X, § 16 (1980).

115. *Id.*

116. *Id.*

117. *Id.* § 17.

118. *Id.* § 18.

119. *Id.* § 23.

is controlling and no forced or unnatural construction is permissible."¹²⁰ Although they did not use the term, the dissent's position is a restatement of the "plain meaning" rule, a doctrine that has fallen out of the favor of the American judiciary.¹²¹ The plain meaning rule ignores the dynamic quality of language and assumes that the meanings of words remain the same despite changes in context. An acontextual reading is more likely to strip a statute or constitutional provision of its meaning than the type of reading employed by the majority which considers the total text. The dissent's method incorrectly removes terms from the context that help to define them.

By relying so heavily on context in construing the terms of the Hancock Amendment, the majority seems to reject the plain meaning rule, though it does not do so expressly.¹²² Greater reliance on context and less reliance on elusive "plain meanings" in interpreting statutes and constitutional provisions would be a positive step for Missouri courts.

3. "License or Fees" as Surplus Language

The dissent's strongest point is that including the terms "license" and "fees" in Section 22(a) would be superfluous if the drafters intended only limits on the increases of "taxes."¹²³ Clearly, if only the word "taxes" were included in that section there would be little question that the type of user fees at issue in *Keller* would be beyond the scope of the Hancock Amendment. However, since the "license" and "fees" language was included, it must either be explained or conceded to evidence an intent that these types of charges may not be raised without the approval of the voters. Judge Posner has called "dubious" the type of nonsurplusage construction employed by the dissent,¹²⁴ since it overlooks the fact that seemingly superfluous language may be used for a variety of reasons, such as emphasis or inadvertence,¹²⁵ or an attempt

120. *Keller*, 820 S.W.2d at 307 (Holstein, J., dissenting) (citing *Wentzlaff v. Lawton*, 653 S.W.2d 215, 216 (Mo. 1983); *State ex rel. Heimberger v. Board of Curators of Univ. of Mo.*, 188 S.W. 128 (Mo. 1916)).

121. Judge Posner has said that

the plain-meaning canon . . . seems to imply that the way to read a text is first acontextually, and only if this reading produces puzzlement to consider its context. This is not the way people do or should read, and here it should be noted that the parallel approach in contract interpretation, which forbids inquiry into context if the words of the contract are plain, is largely discredited.

Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 442 (1989). Judge Wald has written that the "[plain meaning] rule has effectively been laid to rest. . . . When the plain meaning rhetoric is invoked, it becomes a device not for ignoring legislative history but for shifting onto legislative history the burden of proving that the words do not mean what they appear to say." Wald, *supra* note 113, at 199.

122. See *Keller*, 820 S.W.2d at 302-03.

123. *Id.* at 306 (Holstein, J., dissenting).

124. Posner, *supra* note 121, at 442.

125. *Id.*

to be as thorough as possible.¹²⁶ Such a nonsurplusage construction seems especially dubious if there is evidence that can explain the seemingly superfluous language. The majority relied on the drafters' notes from the Hancock Amendment to help explain the language.¹²⁷ The notes explain that it was not the intent of the drafting committee "to include user charges that are specific charges for services rendered" among the sources of revenue described in section 22.¹²⁸ Also included in the notes was the statement that "[t]he drafters feel that final court interpretation will validate the intent of the section and will not require voter approval for increases or decreases in charges . . . [which could be construed as a user fee] by local political subdivisions."¹²⁹ These statements support the *Keller* majority's position that "what is prohibited are fee increases that are taxes in everything but name."¹³⁰ While the dissenters ideally are correct in asserting that "[t]he material inquiry is . . . not what the drafters meant to say, but . . . what the voters intended,"¹³¹ in a case such as this where the intent of the voters is nearly impossible to discern, the reasoning of the drafters can be helpful in clearing up ambiguities¹³² and identifying plausible readings of the text other than the so-called "plain meaning."

126. An explanation of the "tax, license or fees" language was offered by Rhonda C. Thomas in 1981, before the Missouri courts had addressed the issue, when she suggested that [t]he drafters may have feared that the term "tax" was too narrow and could be interpreted by the courts to apply to only the property tax, the sales tax and other municipal charges labeled as taxes. Addition of the terms "license or fees" was intended to assure that all charges, regardless of their form or label, imposed by a city pursuant to its power to tax would be limited. Certainly, a lay person drafting or endorsing this initiative amendment might have thought the addition of the "license or fees" phrase necessary to assure coverage of a business license fee or a motor vehicle sticker fee imposed as a tax.

Rhonda C. Thomas, *Recent Developments in Missouri: Local Government Taxation*, 49 UMKC L. REV. 491, 503 (1981).

127. *Keller*, 820 S.W.2d at 304.

128. *Id.* at 304 n.8. The Drafters' Notes are more fully set out in Robertson & Kincheloe, *supra* note 50.

It was not the intent of the drafting committee when using the words "taxes, license or fees" to include user charges that are specific charges for services rendered. This would include the charge for the collection of garbage, admissions to public swimming pools, library fines, the price of school lunches, and any and all charges to the public which could be construed as a user fee. The drafters feel that final court interpretation will validate the intent of the section and will not require voter approval for increases or decreases in charges of this type by local political subdivisions.

Id. at 19.

129. *Id.*

130. *Keller*, 820 S.W.2d at 303.

131. *Id.* at 310 (Holstein, J., dissenting).

132. *Boone County Ct. v. State*, 631 S.W.2d 321, 324 (Mo. 1982).

4. Taxpayer Standing

A close reading of the Hancock Amendment yields another clue which suggests that only taxes are covered by the Amendment. Under Section 23¹³³ "any taxpayer of the state, county or other political subdivision shall have standing to bring suit . . . to enforce the provisions of sections 16 through 22[.]"¹³⁴ The Amendment fails to give payers of fees and licenses such standing. Such an omission suggests that the Hancock Amendment implicates the interests of taxpayers but not payers of other governmentally imposed charges.¹³⁵ If the Amendment was intended to cover licenses and fees, then, logically, those upon whom these charges are imposed would be granted standing to enforce the amendment's provisions.¹³⁶ That these people are not granted standing implies that the Hancock Amendment does not restrict government's ability to impose or raise licenses and fees.

5. Which Title Do You Trust?

While the dissent pointed out that the Hancock Amendment's ballot title stated that the Amendment "prohibits local tax or fee increases without a popular vote,"¹³⁷ it declined to refer to the title of the petition circulated to place the Hancock Amendment on the ballot. The title of the petition used the term "taxation" twice without using the term "fees."¹³⁸ In fact, on the front of the petition, the terms "tax," "taxes," and "taxation" appeared thirteen times, without a single appearance of "license" or "fees."¹³⁹ The only provision of the Hancock Amendment set out on the front of the petition was Section 16, with the full body of the Amendment set out in small print on the back.¹⁴⁰ Also, there was a direct reference to Section 22: "Local government must get voter approval before it can levy any new taxes. (See Sec. 22)."¹⁴¹ It says nothing about needing voter approval for increases in fees. There was even

133. MO. CONST., art. X, § 23 (1980).

134. *Id.*

135. See Thomas, *supra* note 110, at 31 n.28. The article states:

Implicit in the limitation of standing to taxpayers is a reading that the amendment's provisions are a limit on taxes. If the amendment's framers had intended its "lid" to cover all municipal charges, then logically any individual required to pay a new or increased city charge (e.g., a city sewer charge) would be granted standing to challenge imposition of the charge as violative of Hancock.

Id.

136. *Id.*

137. *Keller*, 820 S.W.2d at 310 (Holstein, J., dissenting).

138. *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. 1981). The title used on the petition appeared as follows: "An amendment to the Constitution of the State of Missouri amending Article X of the Constitution relating to taxation including but not limited to, limitations on taxation and governmental expenditures and the effectuation of such purpose." *Id.*

139. *Id.* at 25.

140. *Id.* at 24, 25.

141. *Id.* at 25.

a direction to return the petitions to "Taxpayer's Survival Association"¹⁴² and a characterization of the Amendment as a "constitutional tax and spending limitation amendment."¹⁴³ Any suggestion that the Hancock Amendment's ballot title (which voters probably read for the first time at the polling place after having already made up their minds) is stronger evidence of voter intent than the language of the petition that put the Amendment on the ballot (about which the people had several months to think) is less than convincing. The intent to be derived from these sources is at least ambiguous. At most, it is evidence that the people of Missouri wanted to limit government's power to raise taxes and probably did not consider the types of fee increases at issue in *Roberts* and *Keller*.

It is somewhat hard to believe the notion that the people of Missouri intended that an election should be required every time a municipality wanted to charge more for a dog license or to raise the price of admission to the city swimming pool from \$1.50 to \$2.00. That, however, is what the sweeping definition of "license" and "fees" adopted by *Roberts* and urged by the dissenters in *Keller* would require. The approach adopted by the majority in *Keller* seems to be more sensible and realistic.¹⁴⁴ The people of Missouri wanted to restrict the government's ability to tax them, and to keep the government from disguising tax increases by using terms like "licenses" and "fees." It seems unlikely that they wanted to clutter their ballots with the question of whether public library fines may be increased.

B. *An Invitation to Challenge Buechner v. Bond*

Although the majority neatly disposed of the issue of whether user fees are subject to the Hancock Amendment, they left us with the curious case of footnote eleven. Near the end of the majority opinion it is stated that "*Roberts* lifts the word 'fees' from its constitutional context, and attempts to define 'fees' as though it stood alone. The result of this error is that *Roberts* speaks far too broadly to be of much use as precedent."¹⁴⁵ At that point, the majority includes footnote eleven which states: "*Buechner v. Bond*, 650 S.W.2d 611 (Mo. banc 1983), partakes of the same error of reasoning, lifting the word 'revenues' for [sic] the constitutional phrase 'total state revenues' to interpret the Hancock Amendment in the most government-constricting manner possible."¹⁴⁶

Footnote eleven is unnecessary to the disposition of *Keller*. It contains no reasoning that strengthens the position of the majority. *Buechner v. Bond* is not even discussed in *Keller*. Footnote eleven appears to be an invitation to challenge *Buechner*.

The *Buechner* court's task was to determine whether unspent revenue from the 1979-80 fiscal year should be included in "total state revenues," an

142. *Id.*

143. *Id.* at 24.

144. See *Keller*, 820 S.W.2d at 302-05.

145. *Id.* at 305.

146. *Id.* at 305 n.11.

element used in calculating the revenue limit under Section 18 of the Hancock Amendment.¹⁴⁷ The majority took an unusual path in making its determination. Instead of taking the definition of "total state revenues" set out in Article X, Section 17¹⁴⁸ at face value, the majority looked at the term "revenue" separately and looked to the dictionary to determine its meaning.¹⁴⁹ The definition of "revenue" used was "the annual or periodical yield of taxes, excises, customs, duties, and other sources or income that a nation, state, or municipality collects and receives into the treasury for public use."¹⁵⁰ The majority declared that "[r]evenue is that amount generated in a given fiscal year."¹⁵¹ Thus, the previous year's unspent funds did not fit the "plain and ordinary" meaning of "revenue" and was not includable in "total state revenues."¹⁵² This caused the state's revenue limit to be set at a lower figure than it otherwise would have been.

Chief Justice Edward D. Robertson, then Deputy Attorney General of the State of Missouri, called the *Buechner* majority's method a "sleight of hand" in a law review article.¹⁵³ That seems to be an accurate description. As then Chief Justice Albert Rendlen said in dissent,

The majority . . . plucks the term "revenue" from its place in the phrase "total state revenues" and defines it as though not a part of that phrase then compounds the problem by lifting the phrase from its position in §17(1) and redefines the phrase as though not a part of the section. In so doing it . . . warps the meaning of the entire section.¹⁵⁴

The method of reading terms employed by the *Buechner* majority was rejected by the Missouri Supreme Court in *Keller*.¹⁵⁵ As Judge Benton wrote, "[c]ontext determines meaning."¹⁵⁶ In *Buechner*, the court found meaning in spite of context.¹⁵⁷ The *Buechner* approach is inconsistent with the approach taken in *Keller*. The Missouri Supreme Court seems ready to topple *Buechner*.¹⁵⁸ Footnote eleven appears to be the court's way of asking someone to allow it to do so.

147. *Buechner*, 650 S.W.2d at 612. See *supra* note 48 for the full text of § 18(a).

148. MO. CONST. of 1945, art. X, § 17 (1980).

149. *Buechner*, 650 S.W.2d at 613.

150. *Id.* The definition came from WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1942 (1964).

151. *Buechner*, 650 S.W.2d at 613.

152. *Id.*

153. Robertson & Kincheloe, *supra* note 50, at 7.

154. *Buechner*, 650 S.W.2d at 616 (Rendlen, C.J., dissenting).

155. See *Keller*, 820 S.W.2d at 302.

156. *Id.*

157. See *supra* text accompanying notes 148-53.

158. The consequences of the reversal of *Buechner* would seem to be a higher revenue limit, which would mean that the state government could collect a greater amount of money without voter approval.

VI. CONCLUSION

Keller v. Marion County Ambulance District is a giant step forward in Missouri's approach to constitutional and statutory construction. The fiction of "plain meaning" is gone, replaced by the more realistic approach adopted by the majority that recognizes that "[c]ontext determines meaning."¹⁵⁹

In practical terms, *Keller* will likely be welcomed by financially-strapped local governments and met with disdain by some citizens who believed that the Hancock Amendment would prevent the increase of any fees without voter approval. Presumably, it also will encourage a challenge to *Buechner v. Bond*. Whether the *Keller* majority simply views *Buechner* as a bad example of constitutional construction needing correction, or they have some other unstated motivation, *Buechner's* days appear to be numbered. *Keller* has begun the eradication of the plain meaning rule in Missouri while increasing the amount of money Missouri governments can collect without a vote of the people. The fall of *Buechner* would continue each of these processes.

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

