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"Alternative Method Required" and the Injection of Imaginary Language into the Missouri Constitution

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NOTE

"Alternative Method Required" and the Injection of Imaginary Language into the Missouri Constitution

Cope v. Parson, 570 S.W.3d 579 (Mo. 2019) (en banc).

Calla M. Mears[*]

I. INTRODUCTION

Mike Kehoe was appointed to Lieutenant Governor of Missouri in 2018 after Michael Parson became Governor of Missouri following the resignation of Eric Greitens.[1] A lawsuit raising interesting questions about the constitutional process for filling public office vacancies quickly followed the appointment of Lieutenant Governor Kehoe.[2] Article IV, Section 4 of the Missouri Constitution states: "The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified."[3] First, what exactly does the phrase "unless otherwise provided by law" mean in the context of filling vacancies? Second, what are the legal implications of allowing the governor to appoint a lieutenant governor when Missouri law expressly disallows it? Finally, what are some other methods of filling vacancies that would be constitutional and more democratic?

This Note first outlines the facts and holding of *Cope v. Parson* – the case at issue – in Part II. Next, Part III details the legal background, highlighting principles of constitutional and statutory interpretation. Part III reviews cases that interpreted the phrase that is the crux of the issue in this case – "unless otherwise provided by law." Part IV then summarizes the

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1. Office of Missouri Lieutenant Governor, *Biography*, https://ltgov.mo.gov/biography-mike-kehoe/ [https://perma.cc/MA6W-ZZF4] (last visited Nov. 16, 2020).

2. Cope v. Parson, 570 S.W.3d 579, 582 (Mo. 2019) (en banc).

3. MO. CONST. art. IV, § 4.

majority opinion of *Cope v. Parson* as well as the concurrence in part/dissent in part. Finally, Part V comments on the various legal implications of the decision in *Cope v. Parson* and proposes solutions to the issue.

This Note's ultimate conclusion is that the majority in *Cope v. Parson* erroneously interpreted the phrase "unless otherwise provided by law" to require an alternative method of filling the lieutenant governor's vacancy, and that Section 105.030 sufficiently "otherwise provided by law" a method for filling the vacancy – leaving it vacant. This Note finally recommends two democratic solutions: the legislature could pass legislation requiring a special election in the event that the Office of the Lieutenant Governor becomes vacant, or it could pass legislation requiring that an alternative method be provided to fill the vacancy rather than the current "unless otherwise provided by law."

II. FACTS AND HOLDING

Eric Greitens was sworn in as the fifty-sixth Governor of Missouri on January 9, 2017.[4] Following a string of scandals, Greitens resigned on June 1, 2018.[5] Governor Parson served as Missouri's lieutenant governor from 2017-2018 until Greitens resigned.[6] He then took the Office of the Governor on June 1, 2018, and left the Office of Lieutenant Governor vacant.[7] Governor Parson appointed then-Missouri Senator Mike Kehoe to lieutenant governor on June 18, 2018.[8] Lieutenant Governor Kehoe served in the Missouri Senate from 2010-2018.[9]

The Missouri Democratic Party ("MDP") is the Missouri affiliate of the United States Democratic Party.[10] Darrell Cope is a World War II veteran

4. Jason Hancock, *Missouri Gov. Eric Greitens resigns, ending political career once aimed at presidency*, KAN. CITY STAR (May 29, 2018), https://www.kansascity.com/news/politics-government/article212114314.html.

5. *Id.*

6. *Cope*, 570 S.W.3d at 582. Governor Parson previously served in the Missouri House of Representatives from 2005-2011 and in the Missouri Senate from 2011-2017. Missouri Governor, *About the Governor*, https://governor.mo.gov/about-governor [https://perma.cc/8T98-UKS4[(last visited Feb. 13, 2020).

7. *Cope*, 570 S.W.3d at 582.

8. Office of Missouri Lieutenant Governor, *Biography*, https://ltgov.mo.gov/biography-mike-kehoe/ [https://perma.cc/3XM2-SL53] (last visited Feb. 13, 2020).

9. *Id.*

10. *Party Bylaws*, MISSOURI DEMOCRATS, https://missouridemocrats.org/committees/bylaws/ [https://perma.cc/4FD6-VB7W] (last visited Feb. 13, 2020).

from southern Missouri.[11] Cope is a taxpayer[12] and citizen of Missouri who "want[ed] the opportunity to vote for the state's lieutenant governor, instead of having him picked 'in backroom deals.'"[13]

On the same day that Kehoe was appointed, Cope and the MDP initiated a lawsuit in Cole County, Missouri against Governor Parson and newly-appointed Lieutenant Governor Kehoe (collectively, "the State").[14] The petition sought a declaratory judgment and injunctive relief, alleging that the governor did not have legal authority to appoint a lieutenant governor and that the office should remain vacant until the 2020 election.[15] The State filed a motion to dismiss.[16] First, they argued that Cope – as a private litigant – did not have authority to remove the lieutenant governor from office.[17] Next, they argued that neither Cope nor the MDP had standing to bring the lawsuit.[18] Finally, they argued that the governor had authority under Article IV, Section 4 of the Missouri Constitution to appoint a lieutenant governor.[19]

The trial court held a hearing for the State's motion to dismiss.[20] At the hearing, Cope and the MDP withdrew their request for injunctive relief, but preserving their request for declaratory judgment challenging the validity of the governor's appointment of Kehoe.[21] The trial court sustained the State's motion to dismiss on the ground that Cope and the MDP had neither taxpayer nor associational standing to challenge the governor's appointment.[22] Cope and the MDP appealed the trial court's decision to the Supreme Court of Missouri.[23] At issue on direct appeal was the substantive question of whether the governor had authority to appoint Kehoe.[24] The Supreme Court of

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11. Marshall Griffin, *Missouri Lawyers Argue Over Validity of Lieutenant Governor Appointment*, ST. LOUIS PUB. RADIO (July 5, 2018), https://news.stlpublicradio.org/post/missouri-lawyers-argue-over-validity-lieutenant-governor-appointment#stream/0 [https://perma.cc/7ZCT-XKMW].

12. The fact that Cope is a taxpayer is relevant because he sued under the theory of taxpayer standing.

13. Griffin, *supra* note 11.

14. Cope v. Parson, 570 S.W.3d 579, 582 (Mo. 2019) (en banc).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 582–83.

21. *Id.* at 583.

22. *Id.*

23. *Id.*

24. *Id.* There were two other issues raised: whether Cope and the MDP had standing and whether their request for declaratory judgment called for a nonjusticiable advisory opinion. *Id.* at 583. The Court determined that Cope had taxpayer standing because the Governor's appointment would require the expenditure of tax revenue to fund the Lieutenant Governor's office. *Id.* at 584. The Court did not address the MDP's associational standing because it established

Missouri concluded that Governor Parson had the authority to appoint Kehoe to the Office of Lieutenant Governor.[25] The court's rationale was that the governor is permitted to fill all public office vacancies unless an alternative method is provided by law, and Section 105.030 of the Missouri Revised Statutes does not provide an alternative method.[26]

III. LEGAL BACKGROUND

Article IV, Section 4 of the Missouri Constitution provides: "The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified."[27] The clause "unless otherwise provided by law" was added to the provision in 1875.[28]

Section 105.030.1 of the Missouri Revised Statutes provides guidance for how vacancies in public offices may be filled.[29] The statute provides that when

> any vacancy, caused in any manner or by any means whatsoever, occurs or exists in any state or county office originally filled by election of the people, other than in the offices of lieutenant governor, state senator or representative, sheriff, or recorder of deeds in the City of St. Louis, the vacancy shall be filled by appointment by the governor."[30]

Section 105.030.2 further provides that vacancies in any county offices may be filled by the appointment of a county commission.[31]

A. Principles of Constitutional Interpretation

When interpreting the Missouri Constitution, the Supreme Court of Missouri must "ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted."[32]

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that Cope had taxpayer standing. *Id.* Further, the Court determined that the claim presented a justiciable controversy by Cope having taxpayer standing so the opinion would not be advisory in nature. *Id.* at 586.

25. *Id.* at 586.

26. *Id.* at 585.

27. MO. CONST. art. IV, § 4.

28. MO. CONST. of 1875 art. 5, § 11. The Missouri Constitution of 1875 contained substantially the same provisions as the current Missouri Constitution, while the Missouri Constitution of 1820 did not contain the words "unless otherwise provided by law." MO. CONST. of 1820 art. 4, § 9.

29. MO. REV. STAT. § 105.030 (2018).

30. *Id.*

31. *Id.*

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

The court is to assume that every word in a constitutional provision has meaning.[33] When words do not have a legal or technical meaning, the court must apply their plain or ordinary meaning, unless doing so would "defeat the manifest intent of the constitutional provision."[34]

B. Previous Statute Challenged under Article IV, Section 4

A statute's constitutionality under Article IV, Section 4 of the Missouri Constitution has only been determined once before *Cope v. Parson*.[35] In *Labor's Educational and Political Club Independent et al. v. Danforth*, the Court held that Section 130.070(1), part of the Missouri Campaign Finance and Disclosure Act ("the Act"), was unconstitutional.[36] Missouri voters passed the Act by a ballot initiative, and it contained various campaign finance and disclosure regulations.[37] Section 130.070(1) of the Act "void[ed] an election where violations of the Act occur, or if it is impossible to hold a special election prohibit[ed] the guilty candidate from becoming a candidate for any public office for ten years."[38] The court held that the ten-year prohibition was unconstitutional in that it created an eligibility requirement for public office in addition to those outlined in the Missouri Constitution.[39]

The plaintiffs in *Danforth* further challenged the Act as a violation of the Equal Protection Clause of the United States Constitution, because violators of the Act running for positions where a special election could be held were not subject to the same eligibility requirement.[40] To satisfy the equal protection clause, a strict scrutiny test required the government to provide a compelling interest for the classification.[41] The State argued, "because there is no authority to hold special elections for some public offices, these offices would be left vacant if voiding an election would be the government's only recourse for a violation of the Act, and this would be of little or no benefit to the public," but the State did not name any specific offices.[42] The court found that Section 130.070(1) violated the Fourteenth Amendment because the discrepancy that few if any offices – other than that of the lieutenant governor – would stay vacant in Missouri.[43]

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33. City of Arnold v. Tourkakis, 249 S.W.3d 202, 206 (Mo. 2008) (en banc).

34. Missouri Prosecuting Attorneys v. Barton Cty., 311 S.W.3d 737, 742 (Mo. 2010) (en banc).

35. *See* Cope v. Parson, 570 S.W.3d 579, 584 n.4 (Mo. 2019) (en banc).

36. Labor's Educ. And Political Club Indep. v. Danforth, 561 S.W.2d 339, 342 (Mo. 1977) (en banc).

37. *Id.* at 343.

38. *Id.* at 344.

39. *Id.* at 345.

40. *Id.* at 348.

41. *Id.*

42. *Id.*

43. *Id.*

C. Interpreting "Unless Otherwise Provided by Law"

Three cases have interpreted the phrase "unless otherwise provided by law" in different contexts, and the results were mixed. First, *State ex rel. St. Joseph Lead Co. v. Jones* confronted the venue question of whether a suit by summons could be instituted against an out-of-state business licensed to do business in Missouri in a county other than where the cause of action happened or where the company keeps an office or agent to conduct usual business.[44] The relevant statutes were Section 1751 and 1754.[45] Section 1751 stated that lawsuits "instituted by summons shall, except as otherwise provided by law, be brought . . . when all the defendants are nonresidents of the state, suit may be brought in any county in this state."[46] Section 1754 stated that lawsuits "against corporations shall be commenced either in the county where the cause of action accrued . . . or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business."[47] The court noted that Section 1751, by the express terms "except otherwise provided by law," indicated that there was no legislative intent for the Section to "prevail over any conflicting statute."[48] The court found that Section 1754 was controlling because it provided a rule about venue that superseded Section 1751.[49]

Another Missouri case, *Becker Glove Int'l v. Jack Dubinsky & Sons* determined whether a compulsory counterclaim rule applied to an action filed in an associate circuit division.[50] In *Becker*, a commercial landlord sued a tenant over nonpayment of rent.[51] The tenant withheld rent in response to the landlord failing to provide a heating system maintaining a temperature as required by the lease.[52] No counterclaims or responsive pleadings were made, the tenant paid the rent while the action was pending, and the landlord won the case.[53] The tenant went on to make improvements to the heating system then demanded payment from the landlord.[54] When the landlord refused to

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44. State *ex rel.* St. Joseph Lead Co. v. Jones, 192 S.W. 980, 980 (Mo. 1917) (en banc).

45. MO. REV. STAT. §§ 1751, 1754 (1909).

46. MO. REV. STAT. § 1751 (1909).

47. MO. REV. STAT. § 1754 (1909).

48. *Jones*, 192 S.W. at 981.

49. *Id.* This case was relied on by the dissent in *Cope v. Parson*, but the majority expressly declined to follow it. Cope v. Parson, 570 S.W.3d 579, 585 n.4 (Mo. 2019) (en banc).

50. Becker Glove Int'l v. Jack Dubinsky & Sons, 41 S.W.3d 885, 886 (Mo. 2001) (en banc).

51. *Id.* at 886–87.

52. *Id.* at 886.

53. *Id.* at 887.

54. *Id.*

pay, the tenant sued the landlord for breach of the lease.[55] One of the landlord's defenses was that the tenant was required to bring the action as a counterclaim to the landlord's suit.[56]

The relevant statute, Section 517.021, said that the rules of civil procedure "shall apply to cases or classes of cases to which this chapter is applicable, except where otherwise provided by law."[57] The Court held that "except where otherwise provided by law" included Section 517.031, a statute that had different procedural requirements from those in the rules of civil procedure.[58] Section 517.031 specifically did not require a responsive pleading or counterclaim for a claim to proceed.[59] The court found Section 517.031 to be controlling because its provisions were consistent with chapter 517's purpose "to simplify matters initially filed in an associate circuit division."[60]

Finally, *Marx v. General Revenue Corp.* is a federal case that interpreted "provides otherwise" in the context of awarding costs.[61] The rule at issue was Federal Rule of Civil Procedure 54(d)(1), which states that costs other than attorney's fees should be awarded to the prevailing party "[u]nless a federal statute, these rules or a court order provides otherwise."[62] The Fair Debt Collection Practices Act ("FDCPA") provides that courts may award costs to defendants when "an action under this section was brought in bad faith and for the purpose of harassment."[63] The United States Supreme Court determined that the FDCPA did not exclusively "provide otherwise," meaning a court can award costs to prevailing defendants in FDCPA cases in the absence of a finding that the plaintiff brought the claim in bad faith to harass the defendant.[64] The Court reasoned that a statute "provides otherwise" than Rule 54(d)(1) if it is "contrary" to the Rule.[65] Because the context of the FDCPA indicated a lack of congressional intent to prohibit courts from awarding costs under Rule 54(d)(1), the FDCPA was not contrary to the Rule.[66]

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55. *Id.*

56. *Id.*

57. MO. REV. STAT. § 517.021 (2000). Missouri Rule of Civil Procedure 41.01(d) similarly stated that "civil actions pending in the associate circuit division shall be governed by Rules 41 through 101 except where otherwise provided by law." Mo. R. Civ. P. 41.01(d).

58. *Becker*, 41 S.W.3d at 887.

59. *Id.* at 888.

60. *Id.* at 888. Section 517.031.1 stated in relevant part, "The pleadings of the petition shall be informal unless the court in its discretion requires formal pleadings." MO. REV. STAT. § 517.031.1 (2000).

61. Marx v. Gen. Rev. Corp., 568 U.S. 371, 373, 373–74 (2013).

62. Fed. R. Civ. P. 54(d)(1).

63. 15 U.S.C. § 1692k(a)(3) (2012).

64. *Marx*, 568 U.S. at 374.

65. *Id.* at 377.

66. *Id.* at 373, 381.

D. Principles of Statutory Interpretation

While rules of constitutional interpretation often intersect with rules of statutory interpretation, there are a few key differences. Rules of statutory interpretation are more comprehensive, and there are several of them. Many of these rules are outlined in the Uniform Statute and Rule Construction Act ("USRCA").[67] The first, and probably most prominent, of these rules is the plain meaning rule.

1. Plain Meaning Rule

The plain meaning rule is typically used as a starting point for statutory interpretation. Once the dominant approach to legislative interpretation,[68] the rule asserts that "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."[69] The essential purpose of the rule is to deny any need to "interpret" unambiguous language.[70] The plain meaning rule is difficult to apply consistently because determining whether language is unambiguous is ultimately subjective.[71] This problem is further exacerbated by the courts – ironically – finding different meaning for the plain meaning rule and "indiscriminately citing these cases alongside 'pure' plain meaning cases as though all stood for the same thing."[72] The United States Supreme Court has sometimes referred to the plain meaning rule as having an even higher standard, holding in *United States v. Oregon* that there was no need to turn to legislative history when provisions were "clear and unequivocal on their face."[73] The plain meaning rule is rarely used alone, as the Supreme Court almost always looks at the legislative history as well.[74]

2. Dictionary Definitions and Common Usage

Statutory language with meaning that is not immediately obvious to satisfy the plain meaning rule may be determined by looking to dictionary definitions and common usage of the language. Section 2 of the USRCA

67. UNIF. STATUTE & RULE CONSTR. ACT (1995).

68. Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975).

69. United States v. Mo. Pac. R. Co., 278 U.S. 269, 278 (1929).

70. Murphy, *supra* note 68, at 1299.

71. *See* Caminetti v. United States, 242 U.S. 470, 496–497 (1917) (McKenna, J., dissenting).

72. Murphy, *supra* note 68, at 1302.

73. *Id.* at 1303.

74. *Id.*

states that "[u]nless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar, and common usage."[75] Section 2 further says "[a] word or phrase that has acquired a technical or particular meaning in a particular context has the meaning if it is used in that context."[76] Dictionaries are generally allowed in court "as aids to the memory and understanding of the court."[77] Context may also be used to determine statutory meaning.[78] "Context" as described in the Dictionary Act means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts, and this is simply an instance of the word's ordinary meaning.[79]

An example of dictionary usage in interpreting statutory language is found in *Muscarello v. United States*.[80] The challenged phrase in the statute was "carries a firearm" and the issue was whether that phrase was limited to carrying a firearm on someone's person or if it included carrying a firearm in a vehicle.[81] The parties did not dispute that Congress intended the phrase to convey an ordinary meaning rather than a legal term of art, so the United States Supreme Court turned to dictionary definitions.[82] Two of the three definitions of "carries" included "in a vehicle," and the third definition did not expressly exclude carrying by vehicle.[83] The Court also looked to the origin of the word "carries," tracing it to the Latin "carum," meaning "car" or "cart."[84] The Court ultimately concluded that "carries" included carrying a firearm in a vehicle.[85]

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75. UNIF. STATUTE & RULE CONSTR. ACT § 2, (1995).

76. *Id.*

77. Nix v. Hedden, 149 U.S. 304, 307 (1893).

78. Rowland v. California Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 199 (1993).

79. Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 199 (1993) (The dictionary definition of "context" means "[t]he part or parts of a discourse preceding or following a 'text' or passage or a word, or so intimately associated with it as to throw light upon its meaning." (citing Webster's New International Dictionary 576 (2d ed. 1942))).

80. *Id.* at 128.

81. *Id.* at 126–127.

82. *Id.* at 128.

83. *Id.*

84. *Id.*

85. *Id.* at 139.

3. Clear Statement Requirements and Preemption

There are three general categories of statutory interpretation canons.[86] The first and second are "referential" canons and "linguistic" canons.[87] Canons within those categories often have counter-canons, rendering them less meaningful than the third, more consistent category – "substantive" canons. Canons in this third category are not policy neutral and represent value choices by the Court.[88] Clear statement rules fall into the substantive canons.[89] These set of rules are of the newest rules of interpretation and some of the most stringent.[90] Essentially, they require a clearer, more explicit statement from Congress in the text of the statute – without reference to legislative history – than prior clear statement rules required.[91]

The clear statement rules were initially established in *Pennhurst State School and Hospital v. Halderman*.[92] The Court said its canon "applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate," and emphasized that the "crucial inquiry . . . is whether Congress spoke so clearly that we can fairly say that the State could make an informed choice" to assume the obligations mentioned.[93] Modern clear statement rules are powerful – "[a]t their strongest, [they] treat all statutes as maintaining the status quo unless Congress clearly states its contrary intention in the text of the statute."[94] They eliminate all need to use the purpose, history, or structure of statute to determine congressional intent, because they "foreclose inquiry into extrinsic guides of interpretation."[95] Further, the clear statement rules create strong statutory interpretation presumptions that can only be rebutted with unambiguous statutory language addressing the particular issue.[96]

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86. William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 (1992).

87. "Referential" canons involve rules referring to preexisting or outside sources to determine meaning, and "linguistic" canons look to grammar and syntax. *Id.*

88. *Id.* at 595–96.

89. *Id.* at 595.

90. *Id.* at 597.

91. *Id.*

92. *See* Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).

93. Eskridge, Jr. & Frickey, *supra* note 86, at 620 (quoting *Halderman,* 451 U.S. at 24-25).

94. John Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 772 (1995).

95. *Id.*

96. Eskridge, Jr. & Frickey, *supra* note 86, at 611–12.

The basic rule against preemption is that a governmental entity may not act contrary to rules set by a controlling governmental body.[97] In *Summer v. Teaneck*, the Supreme Court of New Jersey held that a municipality cannot contradict a state legislative policy.[98] Therefore "an ordinance will fall if it permits what a statute expressly forbids or forbids what a statute expressly authorizes."[99] Further, "[e]ven absent such evident conflict, a municipality may be unable to exercise a power it would otherwise have if the Legislature has preempted the field."[100] Ultimately, the question "is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act."[101]

IV. INSTANT DECISION

The Supreme Court of Missouri held that Governor Parson had authority to appoint a lieutenant governor.[102] The majority opinion, authored by Chief Justice Zel Fischer, determined that the "plain, ordinary meaning" of the phrase "unless otherwise provided by law" allows the governor to "fill all vacancies in public offices unless another way of filling the vacancy is furnished by law."[103] The majority looked to the Webster's New International Dictionary to determine that "otherwise" means "in a different manner, in another way, or in other ways" and that to "provide" means to "furnish [or] supply."[104] The majority further held that an intent for the listed offices in Section 105.030 to remain vacant cannot be inferred because "the law provides a way to fill every office expressly mentioned in the statute apart from Lieutenant Governor."[105]

The majority relied on *Overcast v. Billings Mutual Insurance Co.* to determine that preemption cannot be inferred when the legislature does not do so.[106] In *Overcast*, the plaintiff sued his insurance company after it refused to pay when his home was destroyed by a fire.[107] The insurance company

97. For example, local government cannot act contrary to state law. Summer v. Teaneck, 251 A.2d 761, 764 (N.J. 1969).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 764–65.

102. Cope v. Parson, 570 S.W.3d 579, 585 (Mo. 2019) (en banc).

103. *Id.* at 584–85.

104. *Id.* at 585 n.4.

105. *Id.* at 585. Different statutes provide for methods to fill the positions of state legislator, sheriff, county commissioners, and the St. Louis city recorder of deeds. *Id.*

106. *Id.* (citing *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 69 (Mo. 2000) (en banc)).

107. *Overcast*, 11 S.W.3d at 64.

maintained that the "loss resulted from an intentional act" committed by the plaintiff.[108] After a jury verdict in favor of the plaintiff, he was awarded contract damages for insurance coverage and actual and punitive damages for a tort claim of defamation.[109] On appeal, the insurance company claimed that the court should not have awarded damages to the plaintiff for defamation because Section 375.420 "provides enhanced recovery for an insurance company's vexatious refusal to pay [and] preempts all other claims."[110] The Supreme Court of Missouri rejected this argument, affirming the judgment of the trial court.[111] The Supreme Court of Missouri instead found that Section 375.420 "does not purport to preempt the common law breach of contract remedy but only to add to that remedy."[112]

The majority briefly touched on the policy argument that the "power to appoint cannot be abrogated by mere implication" because there is value in preserving the "uninterrupted functioning of the government."[113] Finally, the majority held that Article IV, Section 4 controls the governor's authority to make appointments because Cope and the MDP did not dispute the fact that no alternative methods of filling vacancies is provided by law.[114]

Joined by Judge Patricia Breckenridge, Judge George Draper concurred in part and dissented in part to the majority's opinion.[115] Draper concurred only to the majority's finding that Cope and the MDP had standing and that the petition for declaratory judgment did not call for a nonjusticiable advisory opinion.[116] He dissented to the majority's determination that the governor was permitted to fill the vacancy of the Office of Lieutenant Governor by appointment.[117] Draper argued that the legislature "otherwise provided" by

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 66. Section 375.420 reads as follows:

In any action against any insurance company to recover the amount of any loss under a policy of automobile, fire, cyclone, lightning, life, health, accident, employers' liability, burglary, theft, embezzlement, fidelity, indemnity, marine or other insurance except automobile liability insurance, if it appears from the evidence that such company has refused to pay such loss without reasonable cause or excuse, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed twenty percent of the first fifteen hundred dollars of the loss, and ten percent of the amount of the loss in excess of fifteen hundred dollars and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict.

MO. REV. STAT. § 375.420 (2000).

113. Cope v. Parson, 570 S.W.3d 579, 585 (Mo. 2019) (en banc).

114. *Id.*

115. *Id.* at 586–87.

116. *Id.*

117. *Id.* at 587.

enacting Section 105.030, which plainly stated that the governor is not authorized to fill

> any vacancy, caused in any manner or by any means whatsoever, occurs or exists in any state or county office originally filled by election of the people, other than in the offices of lieutenant governor, state senator or representative, sheriff, or recorder of deeds in the City of St. Louis, the vacancy shall be filled by appointment by the governor.[118]

He conceded that Section 105.030 does not provide an alternative method but argued that the majority failed to analyze the language in the constitution and instead injected language into it that does not exist.[119] He went on to say that "[t]here is no language stating the governor shall fill public vacancies unless otherwise provided by law *and* [emphasis original] an alternative method is provided.[120] Draper further argued that an alternative method did exist – the position could remain vacant until the 2020 election.[121] He stated that the Supreme Court of Missouri has found for over 100 years that "otherwise provided by law" means "unless otherwise provided by statute."[122] Draper reiterated that "[n]either the constitution nor statutes indicate, mandate, state, or require there *must* [emphasis original] be an alternative means to fill a public office vacancy."[123]

V. COMMENT

The crux of the issue in this case is the meaning of the phrase "unless otherwise provided by law" in the Missouri Constitution. The Missouri General Assembly has the express authority to dictate how vacancies are filled when the Missouri Constitution does not otherwise prescribe a method.[124]

A. The Missouri Legislature Could Have Added "Unless an Alternative Method Is Provided" Language

The Missouri Constitution expressly states that the governor may fill vacancies for certain positions – including that of lieutenant governor – unless otherwise provided by law.[125] The Missouri Constitution does not include any language saying that the governor may fill vacancies unless some alternative

118. *Id.*; MO. REV. STAT. § 105.030.1 (2018).
119. *Cope*, 570 S.W.3d at 587.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. MO. CONST. art. VII, § 7.
125. MO. CONST. art. IV, § 4.

method is provided.[126] Unlike Missouri, several state constitutions do expressly state that an alternative method is required for a statute to supersede the state's governor's ability to fill vacancies.[127]

Arizona's constitution says that the governor may make an appointment "when any office shall, from any cause, become vacant, and no mode shall be provided."[128] "[W]hen any office, from any cause, may become vacant, and no mode is provided by the Constitution and laws for filling such vacancy," Arkansas allows appointments by the governor.[129] Iowa defers to governor appointments "when any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy."[130] "[I]n all cases, not otherwise provided for in this constitution, the Legislature may determine the mode of filling all vacancies" in Mississippi.[131] The governor may appoint someone to a position "when any Office shall, from any cause become vacant and no mode is provided by the Constitution and laws for filling such vacancy" in Nevada.[132] "[W]hen any State or district office shall become vacant, and no mode is provided by the Constitution and laws for filling such vacancy," the governor of Utah may fill the vacancy.[133] Finally, in Wyoming, the governor may appoint to fill vacancies "when any office from any cause becomes vacant, and no mode is provided by the constitution or law for filling such vacancy."[134] When comparing the language of Missouri's constitution to that of the states mentioned above, it is obvious that the drafters of the Missouri Constitution would have included language requiring an alternative method to prevent the governor from filling vacancies if it desired that to be the law.

Only the seven states mentioned have some kind of alternative method requirement. Other states either explicitly provide for a method of filling vacancies in the constitution itself or have statutory provisions "otherwise providing by law" how to fill vacancies. For example, Alabama's constitution requires Alabama's senate president *pro tem* to succeed to the position of lieutenant governor until an election can be held.[135] California's constitution mandates that the legislature must provide an order of succession in the event that the lieutenant governor succeeds to the governorship.[136] Other states

126. *Id.*

127. *See* ARIZ. CONST. art. V, § 8; ARK. CONST. art. VI, § 23; IOWA CONST. art. IV, § 10; MISS. CONST. art. IV, § 103; NEV. CONST. art. V, § 8; UTAH CONST. art. VII, § 9; WYO. CONST. art. IV, § 7; CAL. CONST. art. V, § 5; COLO. CONST. art. 4, § 6.

128. ARIZ. CONST. art. V, § 8.

129. ARK. CONST. art. VI, § 23.

130. IOWA CONST. art. IV, § 10.

131. MISS. CONST. art. IV, § 103.

132. NEV. CONST. art. V, § 8.

133. UTAH CONST. art. VII, § 9.

134. WYO. CONST. art. IV, § 7.

135. ALA. CONST. art. V, § 127.

136. CAL. CONST. art. V, § 10.

allow the governor to make appointments to fill vacancies in the office of lieutenant governor without any possibility that the legislature may provide otherwise.[137] In Colorado, the governor may appoint someone to fill the office of lieutenant governor, and the appointment is subject to approval by the legislature.[138]

B. The Legislature Intended to Preempt the Governor's Authority to Appoint

The majority opinion used *Overcast v. Billings Mutual Insurance Co.* to determine that courts do not need to infer a preemption when the legislature does not say so clearly.[139] The majority claimed that Cope and the MDP asked the Court to infer such a preemption.[140] *Overcast* is not directly on point in this case. It held that when "the legislature intends to preempt a common law claim, it must do so clearly."[141] *Overcast* did not speak to whether the legislature must be as clear when preempting a provision in the Missouri Constitution that it was expressly permitted to preempt.[142] Still, there is no need to make the inference because the language in Section 105.030 plainly states that the governor lacks authority to appoint a lieutenant governor when it says,

> Whenever any vacancy, caused in any manner or by any means whatsoever, occurs or exists in any state or county office originally filled by election of the people, other than in the offices of lieutenant governor, state senator or representative, sheriff, or recorder of deeds in the City of St. Louis, the vacancy shall be filled by appointment by the governor.[143]

137. *See* COLO. CONST. art. IV, § 13.

138. *Id.*

139. Cope v. Parson, 570 S.W.3d 579, 585 (Mo. 2019) (en banc).

140. *Id.*

141. Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 69 (Mo. 2000) (en banc). "Preemption" is the principle that one law can "supersede or supplant any inconsistent . . . law or regulation." *Preemption*, BLACK'S LAW DICTIONARY (11th ed. 2019). In this context, preemption happens when the legislature passes a law that will supersede or supplant state common law. *See* Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62 (Mo. 2000) (en banc).

142. *See Overcast*, 11 S.W.3d at 62.

143. MO. REV. STAT. § 105.030.1 (2018).

C. Allowing the Office of Lieutenant Governor to Remain Vacant Would Not Cause Harm

The majority and the State expressed concern for leaving the Office of Lieutenant Governor vacant.[144] In the State's brief, it gave several policy arguments for allowing the governor to make an appointment and emphasized the importance of the role of lieutenant governor.[145] The lieutenant governor does serve two important functions: acting as a tiebreaker for the Missouri Senate and being available as the next successor to the Office of the Governor.[146] The State listed various boards the lieutenant governor serves on, including the Board of Fund Commissioners and the Board of Public Funds.[147] While the lieutenant governor's service on the various boards is not trivial, it is also not crucial to the functioning of the state government. Further, each board has other members that would continue to operate the board in the absence of the lieutenant governor.

The State makes a slightly stronger argument that the lieutenant governor breaks ties in the Senate.[148] Still, all that would happen in the absence of a tiebreaker in the Senate is that a bill may not pass, which is already one of the two potential results even with a lieutenant governor.[149] The "strong presumption" in favor of filling vacancies is not justified by the State's reasoning because the functions of the Office of the Lieutenant Governor are not vital.[150] Further, the duties of the lieutenant governor have remained largely unchanged, as those duties are enumerated in the Missouri Constitution.[151]

Historically, Missouri has survived several years of vacancies in the Office of the Lieutenant Governor. The first vacancy was from July 1825, when Lieutenant Governor Reeves resigned, until January 1828, when Lieutenant Governor Dunklin was inaugurated.[152] The second vacancy took place between August 1855, when Governor Brown died, and August 1856,

144. *Cope*, 570 S.W.3d at 585; Respondent's Brief at 39–42, Cope v. Parson, 570 S.W.3d 579 (Mo. 2019) (en banc) 2018 WL 4467224, at *39-42

145. Respondent's Brief at *12.

146. *Id.*

147. *Id.* at *12–13. The Lieutenant Governor also serves on the Missouri Community Service Commission, the Missouri Development Finance Board, the Missouri Housing Development Commission, the Missouri State Capitol Commission, the Tourism Commission, and the Special Health, Psychological, and Social Needs of Minority Older Individuals Commission. *Id.*

148. *Id.*

149. Appellant's Reply Brief at 9, Cope v. Parson, 570 S.W.3d 579 (Mo. 2019) (en banc) 2018 WL 4928953, at *8–9.

150. *Id.* at *9.

151. MO. CONST. art. IV, § 10.

152. *Lieutenant Governors*, Missouri History, https://www.sos.mo.gov/archives/history/historicallistings/ltgov.asp [https://perma.cc/KUP3-F8X5].

when Lieutenant Governor Jackson was elected.[153] The office was again vacant for a brief period in 1861 as the lieutenant governor at that time, Thomas Caute Reynolds, was a secessionist driven into exile.[154] There was another vacancy between April 1872, when Lieutenant Governor Gravely died, until the November 1872 general election.[155] Another vacancy took place between 1887, when Lieutenant Governor Morehouse became governor following the death of Governor Marmaduke, and the inauguration of Lieutenant Governor Claycomb in 1889.[156] There was a brief vacancy from December 1944, when Lieutenant Governor Harris died, to January 1945, when the newly-elected Lieutenant Governor Davis was inaugurated.[157] Finally, Lieutenant Governor-Elect Maxwell was appointed to the vacant office to serve until his inauguration in January 2001.[158]

D. Allowing the Governor to Appoint A Lieutenant Governor Is Undemocratic

The lieutenant governor has very few duties enumerated in the Missouri Constitution.[159] The lieutenant governor acts as *ex officio*[160] president of the Missouri Senate, participates in legislative committees, and breaks ties for the Senate.[161] Fundamental to the position is democratic election, because the person who breaks ties in the Senate must be someone elected statewide. The holding in the instant case allows for a partisan result by giving the governor the power to decide who breaks the tie. Further, when the governor can appoint someone to lieutenant governor, it becomes possible for the highest public office to become inhabited by someone who was not chosen by the people of Missouri.

There is no sign that the drafters of the Missouri Constitution intended the governor to fill a vacancy in the office of lieutenant governor by appointment.[162] On the contrary, the drafters modified a provision from the previous Missouri Constitution that provided that "[w]hen any office shall become vacant, the governor shall appoint a person to fill such vacancy, who shall continue in office until a successor be duly appointed and qualified

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *See* MO. CONST. art. IV, § 10.

160. A member *ex officio* is someone who serves on a board or committee by virtue of holding an office, and whose membership will therefore pass with the office to his or her successor. *Member ex officio*, BLACK'S LAW DICTIONARY (11th ed. 2019).

161. *Id.*

162. *See Journal of the Constitutional Convention of Missouri—1943* (1943).

according to law" to include "unless otherwise provided by law."[163] This addition of the phrase "unless otherwise provided by law" suggests that the drafters chose not to allow the governor to make appoints to fill the position. It further suggests that the drafters were purposeful about requiring the extra check on the executive branch by requiring an election for the lieutenant governor position. Further, the lieutenant governor was not even required to come from the same party as the governor.[164]

Judge Draper argued in the dissent that there is an alternative method of filling the vacancy, waiting until the next election.[165] One similar solution could be enacting a statute, or proposing a constitutional amendment, creating an order of succession to the Office of the Lieutenant Governor. For example, the Missouri Constitution has a provision for the order of succession to the governorship.[166] In the event that the governor dies, becomes convicted, becomes impeached, or resigns, the lieutenant governor becomes the governor.[167] If there is no lieutenant governor, the order of succession is as follows: the president pro tempore of the senate, the speaker of the house, the secretary of state, the state auditor, the state treasurer, then the attorney general.[168] There is no reason, in theory, that a similar provision – whether constitutional or statutory – could not be enacted to provide a similar plan for the vacancy of the Office of the Lieutenant Governor.

Another alternative method could exist – holding a special election to fill the position. One state that follows this procedure is New York.[169] New York Public Officers Law Section 42(3) allows the governor to use his or her discretion to call a special election to fill vacancies in any elective office that cannot adequately be filled by appointment.[170] This solution would allow for two things to happen. First, the Office of the Lieutenant Governor would be elected democratically, rather than being appointed by the governor. Second, if Missouri were to follow New York's example, those in favor of governor appointments to fill positions would still be satisfied with an option giving the governor discretion. Further, it would satisfy the majority's rule in *Cope v. Parson* that a statute would need to provide an alternative method to fill vacancies. While New York's statute would make a good example to use, Missouri's legislators could consider enacting a rule with more specificity that gives the governor more or less discretion depending on factors such as how much time will pass until the next general election.

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163. MO. CONST. of 1820, art. IV, § 9.

164. *See Journal of the Constitutional Convention of Missouri—1943* (1943).

165. Cope v. Parson, 570 S.W.3d 579, 587 (Mo. 2019) (en banc).

166. MO. CONST. art. IV, § 11(a).

167. *Id.*

168. Interestingly, the constitutional provision provides the order of succession if "there be no lieutenant governor," but there is no similar language for the other positions listed, including governor, possibly indicating that the lack of a lieutenant governor was something the drafters expected. *Id.*

169. N.Y. PUB. OFF. LAW § 42(3).

170. *Id.*

VI. CONCLUSION

The decision in *Cope v. Parson* highlights some interesting constitutional issues. Essentially reading nonexistent language into the Missouri Constitution, the majority disregarded the explicit plain language of Section 105.030. Article IV, Section 4 of the Missouri Constitution grants power to the Governor of Missouri to fill all vacancies unless otherwise provided by law. Section 105.030 otherwise provided by law by stating in clear terms that the governor may not fill the Office of the Lieutenant Governor by appointment. The majority decided such clear language was not sufficient and instead determined that "unless otherwise provided by law" means "unless an alternative method is provided." The Missouri Constitution makes no such requirements. If the drafters of the Missouri Constitution wanted to require an alternative method, they would have included such language as many other states have done. Even within the current framework set out by the majority, better options than a governor appointment exist. Missouri could adopt legislation or a constitutional amendment to either provide a clear order of succession in the case of a vacancy or allow for the governor to call a special election. Either option would be more democratic than the one legitimized by the Supreme Court of Missouri in *Cope v. Parson*.