

Spring 2009

Falling through the Cracks: Missouri Amends Its Felon Firearm Possession Statute

Adam E. Hanna

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Adam E. Hanna, *Falling through the Cracks: Missouri Amends Its Felon Firearm Possession Statute*, 74 Mo. L. REV. (2009)

Available at: <https://scholarship.law.missouri.edu/mlr/vol74/iss2/6>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Falling Through the Cracks: Missouri Amends Its Felon Firearm Possession Statute

Missouri Revised Statute § 571.070

I. INTRODUCTION

In early September 2007, police in Cape Girardeau, Missouri, arrested a previously convicted felon whom they discovered driving with a loaded gun, a magazine of ammunition, and a stun gun in his vehicle.¹ The man, who was convicted in Illinois in 2000 for sexual abuse and failing to register as a sex offender, was later released after police determined that his possession of the gun, ammunition, and the stun gun did not violate Missouri law.² This incident inspired Cape Girardeau County Prosecuting Attorney H. Morley Swingle to lobby for changes to Missouri's statute prohibiting some felons from possessing firearms.³

Influential state legislators, including the president pro tem of the senate, immediately expressed support for Swingle's proposed revisions to the law.⁴ On June 26, 2008, Governor Matt Blunt signed Missouri House Bill 2034 into law which, among other things, made it easier for a person previously convicted of a felony to be arrested and prosecuted for possessing a firearm.⁵

The changes made by the 2008 Missouri Legislature to the state's felon-in-possession law were mostly improvements. While the changes were intended to enact "better protections . . . to prevent dangerous felons from falling through the cracks when it comes to firearm possession,"⁶ it is not clear that the drafters of the new statute considered all of the potential consequences arising from the changes. While some of the consequences are

1. Bridget DiCosmo, *State Law Lets Felon with Gun Go Free*, SE. MISSOURIAN, Sept. 6, 2007, at 1A.

2. *Id.* The lapse of time between his conviction and this incident allowed him to possess a firearm without violating Missouri law, as will be discussed, *infra*.

3. Letter from H. Morley Swingle, Prosecuting Attorney, Cape Girardeau County, to Michael Gibbons, President Pro Tem, Mo. Senate and Rod Jetton, Speaker, Mo. House of Representatives (Sept. 6, 2007) (on file with author). Mr. Swingle lobbied for similar legislation in 2001, but the legislation did not pass. Letter from H. Morley Swingle, Prosecuting Attorney, Cape Girardeau County, to Jeremiah W. Nixon, Attorney General, State of Mo. (July 26, 2001) (on file with author).

4. Letter from Michael R. Gibbons, President Pro Tem, Mo. Senate, to H. Morley Swingle, Prosecuting Attorney, Cape Girardeau County (Sept. 20, 2007) (on file with author); Letter from Jason G. Crowell, Senator, Mo. Senate, to H. Morley Swingle, Prosecuting Attorney, Cape Girardeau County (Nov. 29, 2007) (on file with author).

5. H.R. 2034, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008).

6. Letter from Michael R. Gibbons to H. Morley Swingle, *supra* note 4.

positive and will resolve the legitimate concerns expressed by prosecutors⁷ and the media,⁸ a number of unintended outcomes may arise from the new formulation of the statute as well. This Note argues that the state legislature should have enacted a statute following the contours of the federal statute in pursuit of a consistent, simple approach to regulating felons' possession of firearms. This Note also reviews the general background of laws prohibiting felons from possessing firearms, considers the constitutional implications of those laws, and critically examines the recent changes to the Missouri felon-in-possession statute.

II. LEGAL BACKGROUND

The federal government and many states have enacted legislation that prohibits, to some extent, a felon from lawfully possessing a firearm. State and federal laws vary widely, each with its own nuances and exceptions.

A. Federal Approach

Under 18 U.S.C. § 922(g), felons may not “possess . . . any firearm or ammunition; or . . . receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”⁹ The statute defines a “firearm” as “any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive” as well as the frame of such a weapon, a muffler or silencer, or a destructive device.¹⁰ However, it is important to note that “antique firearms” are expressly excluded from this definition.¹¹ The “antique firearm” exception allows persons otherwise prohibited from possessing firearms to own firearms manufactured during or before 1898, certain replicas, and muzzleloading guns that cannot fire fixed ammunition.¹² Even modern muzzleloaders that could be purchased in a retail store fall within the definition of an “antique firearm.”¹³

The restrictions present in 18 U.S.C. § 922(g) apply to “any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year,”¹⁴ although certain exceptions narrow this

7. Letter from H. Morley Swingle to Michael Gibbons and Rod Jetton, *supra* note 3, at 2; Letter from H. Morley Swingle to Jeremiah W. Nixon, *supra* note 3, at 2.

8. Editorial, *Guns and Felons*, SE. MISSOURIAN, Sept. 14, 2007, at 6A.

9. 18 U.S.C. § 922(g) (2006).

10. 18 U.S.C. § 921(a)(3) (2006).

11. *Id.*

12. *Id.* § 921(a)(16).

13. *See id.*

14. 18 U.S.C. § 922(g). Although the phrase “convicted in any court” might suggest that a conviction in a foreign court could meet the requirement, the Supreme

definition. For example, persons charged with federal or state crimes “pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices” are not included.¹⁵ In addition, those convicted of state crimes punishable by a term of imprisonment of two years or less but considered misdemeanors are also excluded.¹⁶

The law also allows a person who is disqualified from possessing a firearm to appeal to the Attorney General for relief from the ban.¹⁷ If an application is approved by the Attorney General, the appellant is no longer prohibited from possessing a firearm.¹⁸ If the application is denied, however, the individual can appeal the denial to the district court.¹⁹ Furthermore, only a denial of relief is appealable, not the government’s failure to approve or deny the application.²⁰ The practical effect of this configuration is to make it impossible for an individual to appeal the Attorney General’s decision to take no action on an application for relief.

B. Missouri Approach

Prior to 2008, Missouri Revised Statute § 571.070 stated:

1. A person commits the crime of unlawful possession of a concealable firearm if he has any concealable firearm in his possession and:

(1) He has pled guilty to or has been convicted of a dangerous felony, as defined in section 556.061, RSMo, or of an attempt to commit a dangerous felony, or of a crime under the laws of any state or of the United States which, if committed within this state, would be a dangerous felony, or confined therefor in this state or elsewhere during the five-year period immediately preceding the date of such possession; or

Court has expressly rejected this interpretation. *Small v. United States*, 544 U.S. 385, 394 (2005).

15. 18 U.S.C. § 921(a)(20)(A).

16. *Id.* § 921(a)(20)(B).

17. 18 U.S.C. § 925(c) (2006).

18. *Id.*

19. *Id.* While this statute is in full effect, Congress has, without explanation, expressly forbade the use of appropriations for government agencies to act on these applications since 1992. *See United States v. Bean*, 537 U.S. 71, 73-75 (2002). *Bean* indicates that the Secretary of the Treasury is empowered to receive applications; however the Attorney General was substituted into this role under the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

20. *Bean*, 537 U.S. at 75-76.

(2) He is a fugitive from justice, is habitually in an intoxicated or drugged condition, or is currently adjudged mentally incompetent.

2. Unlawful possession of a concealable firearm is a class C felony.²¹

The law refers to Missouri Revised Statute § 556.061 for its definition of “dangerous felony,” which includes the crimes of:

[A]rson in the first degree, assault in the first degree, attempted forcible rape if physical injury results, attempted forcible sodomy if physical injury results, forcible rape, forcible sodomy, kidnapping, murder in the second degree, assault of a law enforcement officer in the first degree, domestic assault in the first degree, elder abuse in the first degree, robbery in the first degree, statutory rape in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, statutory sodomy in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, and, abuse of a child pursuant to subdivision (2) of subsection 3 of section 568.060, RSMo, [and] child kidnapping.²²

C. Other States' Approaches

States have not taken a uniform approach in regulating felons' possession of firearms. For example, Connecticut law takes a strict approach, similar to the revised Missouri statute. The plainly written Connecticut statute prohibits any person who has been convicted of a felony from possessing any firearm or stun-gun-type device.²³ The law contains no time limitations, limitations on the nature of the predicate offense, or exceptions for certain weapons.²⁴

Georgia's statute is somewhat more narrowly tailored than those in Missouri and Connecticut. While all felons are forbidden from possessing firearms under the Georgia law, the nature of their initial crime impacts the potential punishment for the possession offense.²⁵ Any felon convicted of unlawfully possessing a firearm is subject to a sentence between one and five

21. MO. REV. STAT. § 571.070 (2000), *amended by* MO. REV. STAT. § 571.070 (Supp. 2008).

22. MO. REV. STAT. § 556.061(8) (Supp. 2008).

23. CONN. GEN. STAT. ANN. § 53a-217 (West 2007).

24. *Id.*

25. GA. CODE ANN. § 16-11-131 (2007).

years.²⁶ If a felon whose predicate offense was one of an enumerated group of offenses termed a “forcible felony,” then the sentence is five years.²⁷

Indiana’s law resembles the pre-revision Missouri statute. Under this statute, those previously convicted of a “serious violent felony” are prohibited from possessing a firearm.²⁸ The law also provides for convictions under state laws which are “substantially similar” to the elements of a “serious violent felony.”²⁹ While the statute terms the offenses “violent,” it also includes some non-violent drug offenses.³⁰

D. The Constitutional Right to Bear Arms

The right to possess firearms is, to some degree, protected by both the United States Constitution³¹ and the Missouri Constitution.³² Nevertheless, cases decided under both the federal and state constitutions have held that some legislative limits on the classes of persons who are allowed to own or keep weapons are permissible. The nature and extent of these limitations remains the key unresolved issue.

26. *Id.*

27. *Id.* The law defines forcible felonies to include:

[A]ny felony which involves the use or threat of physical force or violence against any person and further includes, without limitation, murder; felony murder; burglary; robbery; armed robbery; kidnapping; hijacking of an aircraft or motor vehicle; aggravated stalking; rape; aggravated child molestation; aggravated sexual battery; arson in the first degree; the manufacturing, transporting, distribution, or possession of explosives with intent to kill, injure, or intimidate individuals or destroy a public building; terroristic threats; or acts of treason or insurrection.

Id. § 16-11-131(e).

28. IND. CODE ANN. § 35-47-4-5(c) (LexisNexis Supp. 2008). This statute includes many of the same crimes listed *supra* note 27, but also includes notable additions like incest and certain drug offenses. *Id.* § 35-47-4-5(b).

29. *Id.* § 35-47-4-5(a)(1)(B).

30. *Id.* § 35-47-4-5(b)(23)-(27).

31. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (holding that the Second Amendment protects an individual right to possess firearms).

32. MO. CONST. art. I, § 23 (“That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.”).

1. Federal Statute and Caselaw

The United States Supreme Court first interpreted the Second Amendment to allow significant regulation of firearms in the 1939 case of *United States v. Miller*.³³ In *Miller*, the defendant was indicted for possessing an unregistered double-barrel shotgun with a barrel less than eighteen inches in length in violation of federal law.³⁴ The defendant challenged the indictment on the basis that the statute violated his Second Amendment right to bear arms.³⁵ The Court disagreed, stating that the Second Amendment only applies to firearms considered part of “ordinary military equipment” to “contribute to the common defense.”³⁶ Until 2008, *Miller* was the United States Supreme Court’s only guidance to lower courts regarding the application of the Second Amendment.

The United States Supreme Court first upheld 18 U.S.C. § 922(g), the federal felon-in-possession statute, as constitutional in *Lewis v. United States*.³⁷ In *Lewis*, George Calvin Lewis, Jr. was indicted and later convicted for unlawfully receiving and possessing a firearm as a felon.³⁸ Lewis’ predicate offense was a 1961 state court conviction for breaking and entering.³⁹ The primary point on appeal was whether the predicate felony conviction could be collaterally attacked in defense of the felon-in-possession charge.⁴⁰ The Court ruled against Lewis, finding that the felon-in-possession law was valid regardless of the fact that the original offense could be collaterally attacked on constitutional grounds.⁴¹ While *Lewis*’ primary holding is not directly pertinent under a Second Amendment analysis, the Court addressed the issue of constitutionality in dicta, stating that “legislative restrictions on the use of firearms . . . do [not] trench upon any constitutionally protected liberties.”⁴² The Court went on to cite *Miller* for the premise that the Second Amendment does not protect a right to keep and bear arms unless reasonably related to a well-regulated militia.⁴³

The Eighth Circuit Court of Appeals reached the same result some eight years earlier in *Cody v. United States*.⁴⁴ In *Cody*, James Cody was convicted of making false statements to a firearms dealer in violation of federal law.⁴⁵

33. 307 U.S. 174 (1939).

34. *Id.* at 175.

35. *Id.* at 176.

36. *Id.* at 178.

37. 445 U.S. 55 (1980).

38. *Id.* at 57.

39. *Id.* at 56-57.

40. *Id.* at 58.

41. *Id.* at 65.

42. *Id.* at 65 n.8.

43. *Id.*

44. 460 F.2d 34 (8th Cir. 1972).

45. *Id.* at 35.

The government alleged that Cody falsely certified that he had not been convicted of a felony.⁴⁶ The court, applying the *Miller* holding, held that regulations on civilian possession of firearms are permissible because the constitutional right to bear arms only protects the possession or use of firearms in the context of a well-regulated militia.⁴⁷ Although *Cody* considered the constitutionality of the federal statute that forbade making false statements to a federal firearms dealer,⁴⁸ the analysis also applies to the federal statute prohibiting felons from possessing weapons because both statutes arguably restrict the exercise of Second Amendment rights.

Prior to 2008, lower federal courts routinely read *Miller* to stand for the proposition that the Second Amendment only applied to bearing arms in connection with service in the militia.⁴⁹ This interpretation prevailed until the Supreme Court's decision in *District of Columbia v. Heller*.⁵⁰ In *Heller*, Dick Anthony Heller challenged the District of Columbia's denial of a registration certificate that would allow him to keep a handgun in his home.⁵¹ The Court carefully noted that it did not view the Second Amendment as an unlimited right,⁵² but held that the Second Amendment prohibits the federal government from enacting an outright ban on the possession of firearms.⁵³

The Court's decision in *Heller* presents an interesting conflict. Courts issuing decisions like those in *Lewis* and *Cody* relied on the belief that *Miller* rejected an interpretation of the Second Amendment protecting an individual right to bear arms.⁵⁴ But, the *Heller* court takes a different view of *Miller*, stating that the latter only addresses the fact that "the type of weapon at issue was not eligible for Second Amendment protection."⁵⁵ This statement undermines the basic reasoning employed in *Lewis* and *Cody* because both cases look to *Miller* for Congress' authority to regulate *who* can possess a firearm – far beyond the power to simply determine which types of firearms are eligible for constitutional protection.

The majority in *Heller* makes an effort, albeit in dicta, to avoid undermining the legal authority for banning felons from possessing firearms. "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by

46. *Id.* at 35-36.

47. *Id.* at 36-37 (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

48. *Id.* at 35.

49. *See supra* notes 44-48 and accompanying text.

50. 128 S. Ct. 2783 (2008).

51. *Id.* at 2788.

52. *Id.* at 2816. The Court also stated that the historical tradition of banning "dangerous and unusual weapons" remains in force. *Id.* at 2817.

53. *Id.* at 2821-22.

54. *See supra* notes 42-48 and accompanying text.

55. 128 S. Ct. at 2814 (emphasis omitted).

felons”⁵⁶ This brief passage offers no reasoning or authority for the statement, a fact which is pointed out by Justice Stephen Breyer’s dissenting opinion.⁵⁷

Because *Heller* was decided on the law of the District of Columbia, a federal enclave,⁵⁸ instead of the law of a state, the facts of the case did not present the Court with an opportunity to decide whether the Second Amendment should operate against the states. Although the Second Amendment, as interpreted by *Heller*, only restrains the federal government, the Missouri Constitution may serve to limit the state felon-in-possession statute.

2. Missouri’s Statute and Caselaw

Missouri courts have never addressed the question of whether the pre-2008 version of Missouri Revised Statute § 571.070 ran afoul of article I, section 23 of the Missouri Constitution. This constitutional section provides “the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.”⁵⁹ Missouri appellate courts have, however, had the occasion to review the constitutionality of other gun control regulation.

For example, in *City of Cape Girardeau v. Joyce*, the Missouri Court of Appeals, Eastern District considered the constitutionality of a city ordinance that prohibited individuals from openly carrying a deadly weapon.⁶⁰ William Joyce was charged with violating the ordinance when he was found riding a motorcycle with a loaded pistol plainly visible in a holster.⁶¹ He challenged his conviction on the grounds that it violated article I, section 23 of the Missouri Constitution.⁶² In rejecting Joyce’s argument that the Missouri Constitution granted him a right to bear arms unfettered by state legislation and affirming his conviction,⁶³ the court based its decision on *State v. Wilforth*.⁶⁴ *Wilforth* held that the Missouri Constitution permitted the legislature to regulate the bearing of arms.⁶⁵ There, the defendant was convicted and fined \$10 for carrying a firearm into a church where a school art show was being held.⁶⁶ He appealed his conviction on constitutional

56. *Id.* at 2816-17.

57. *Id.* at 2869-70 (Breyer, J., dissenting).

58. See U.S. CONST. art. I, § 8, cl. 17.

59. MO. CONST. art. I, § 23.

60. 884 S.W.2d 33, 34 (Mo. App. E.D. 1994).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* (citing *State v. Wilforth*, 74 Mo. 528 (1881)).

65. 74 Mo. at 528.

66. *Id.*

grounds, but the court rebuffed his challenge, stating that “the constitution . . . has neither expressly nor by implication denied to the legislature the right to enact laws in regard to the manner in which arms shall be borne.”⁶⁷ In its last paragraph, the *Joyce* opinion offered a vague limit as to how the legislature could regulate firearms, stating that, “[n]othing in the Missouri constitution limits the power of the legislature to enact laws pertaining to the time, place and manner of carrying weapons.”⁶⁸

III. RECENT DEVELOPMENTS

Following the incident described in the introduction, where a convicted felon was found by Cape Girardeau police to be in possession of a firearm, yet not in violation of Missouri law, commentators expressed three primary criticisms of Missouri Revised Statute § 571.070.⁶⁹ First, requiring that the predicate offense be a dangerous felony arguably excludes too many offenses that should be included, like sexual assault and robbery.⁷⁰ Second, “the law only applies to conceal[able] weapons.”⁷¹ Finally, the law only applies to those felons who were convicted or released from prison in the last five years.⁷²

During the 2007 legislative session, in response to criticisms of the existing statute, State Representative Brian Munzlinger introduced House Bill 2034, which modified Missouri Revised Statute § 571.070 to conform to the requests of Mr. Swingle and the Southeast Missourian.⁷³ The bill, in the form ultimately adopted by the General Assembly and signed into law by the governor, provides that:

67. *Id.* (quoting *State v. Reid*, 1 Ala. 612 (1840)).

68. *Joyce*, 884 S.W.2d at 35.

69. Editorial, *supra* note 8, at 6A. The editorial asks the legislature to “tighten the law in an effort to keep guns out of the hands of convicted felons.” *Id.*

70. *Id.*

71. *Id.* A “concealable firearm” is defined as “any firearm with a barrel less than sixteen inches in length, measured from the face of the bolt or standing breech.” MO. REV. STAT. § 571.010 (Supp. 2008). A firearm is defined as “any weapon that is designed or adapted to expel a projectile by the action of an explosive.” *Id.*

72. Editorial, *supra* note 8, at 6A. It has been argued that this interpretation of the law’s time limitation is incorrect, and that, instead, any person who has been convicted of or pled guilty to a dangerous felony under Missouri law, federal law, or the laws of another state is permanently barred from possessing a firearm, but those who are convicted of other crimes are prohibited from possessing firearms for five years following their release from incarceration. *State v. Jackson*, 948 S.W.2d 138, 139-40 (Mo. App. E.D. 1997). This interpretation has been generally rejected by commentators. See Robert H. Dierker, *Possession of Weapons by Certain Persons*, in 32 MISSOURI PRACTICE § 41.8 (2d ed. 2004); Letter from H. Morley Swingle to Michael Gibbons and Rod Jetton, *supra* note 3, at 2.

73. H.R. 2034, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008).

A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and:

- (1) Such person has been convicted of a felony under the laws of this state, or of a crime under the laws of any state or of the United States which, if committed within this state, would be a felony; or
- (2) Such person is a fugitive from justice, is habitually in an intoxicated or drugged condition, or is currently adjudged mentally incompetent.⁷⁴

IV. DISCUSSION

A. Reasons for a Felon Firearm Possession Ban

After release from prison, felons are typically subjected to a number of collateral sanctions in addition to being prohibited from possessing firearms. In many states, felons are prohibited from serving on juries, voting, or being elected to public office.⁷⁵ The justification for prohibiting felons from jury service is frequently explained as the “probity of the jury.”⁷⁶ This rests on the idea that felons possess “poor character [and] innate untrustworthiness,”⁷⁷ which, as a result, leads some commentators to argue that their presumptively bad character could harm proper decision making or inject an inherent bias against the criminal justice system into the jury room.⁷⁸ Laws prohibiting felons from voting are often justified because felons may be more likely to engage in voter fraud or use their vote to enact undesirable changes in society.⁷⁹ Some fear that felons “would ‘band together’ to loosen criminal laws, [or] elect weak-on-crime sheriffs.”⁸⁰ Similar concerns are expressed as reasons to disqualify felons for running for public office.⁸¹

74. MO. REV. STAT. § 571.070 (Supp. 2008).

75. James M. Binnall, *EG1900 . . . The Number They Gave Me When They Revoked My Citizenship: Perverse Consequences of Ex-Felon Civic Exile*, 44 WILLAMETTE L. REV. 667, 669-70 (2008).

76. Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 102 (2003).

77. *Id.*

78. Binnall, *supra* note 75, at 675-76 (noting other authors’ arguments in support of banning felons from jury service).

79. Andrea Steinacker, Note, *The Prisoner’s Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801, 821; KATHERINE IRENE PETTUS, *FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES* 140 (2005).

80. JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 13 (2006).

81. Steinacker, *supra* note 79, at 823.

Remarkably, there is virtually no literature offering justifications for prohibiting violent and non-violent felons alike from possessing firearms.⁸² Common sense indicates that it is good public policy to prohibit those convicted of *violent* felonies from possessing firearms in order to prevent them from using a gun to perpetrate additional violence. This rationale, however, does little to explain why a *non-violent* felon is barred from possessing a firearm. As a result, it is necessary to extrapolate a justification for the bans from literature explaining the justifications for other collateral consequences. Each of these justifications for excluding felons from participating in civic activities is related to a perception of the felon as untrustworthy with an important privilege.⁸³ The disqualifications appear to be aimed at protecting the public from some harm caused by a person who has been convicted of a felony. It therefore follows that the reasoning for prohibiting all felons from possessing firearms could be theoretically similar: just as felons are prohibited from voting because of the harm they might do through voter fraud or through enacting improper initiatives, felons are prohibited from possessing firearms because of the perceived risks of putting a deadly apparatus in the hands of one who has shown serious disrespect for the law by their commission of a felony.

B. Policy Grounds

The most laudable aspect of the 2008 revision to Missouri Revised Statute § 571.070 is the widening of the definition of prohibited firearm from only concealable firearms to any firearm.⁸⁴ This change seems to be grounded in the belief that any gun is dangerous. Further, if the statute's primary purpose is public safety, the law should not distinguish between concealable firearms and those with longer barrels. However, the pre-2008 statutory limitation to concealable weapons was not baseless; in fact, it even put Missouri in accord with federal statistics on the issue. Studies from the Department of Justice show that "[o]f all firearm-related crime . . . , 86% involved handguns."⁸⁵ The previous limitation was certainly narrowly tailored to focus on guns likely to be used in crime, but was also

82. The Supreme Court of Georgia concluded that a law prohibiting felons from possessing firearms was enacted "to keep guns out of the hands of those individuals who by their prior conduct had demonstrated that they may not possess a firearm without being a threat to society." *Landers v. State*, 299 S.E.2d 707, 709-10 (Ga. 1983).

83. See *supra* notes 75-81 and accompanying text.

84. H.R. 2034, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008).

85. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS, GUNS USED IN CRIME 2 (1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf>.

under-inclusive to a degree, as the remaining 14% of firearms used in crime involving guns were not prohibited to felons under the law.⁸⁶

On the other hand, the change regarding the concealability requirement leaves the Missouri statute in discord with federal law. By banning felons from owning or having any firearms, Missouri may have been overzealous in its regulation, particularly in light of the federal law. While the federal law is rather broad, it does boast some exceptions that permit felons to have certain firearms. For example, under the antique firearms exception,⁸⁷ federal law permits felons to possess certain firearms, including modern-day muzzle loading rifles. A better approach for the Missouri statute would have been to incorporate by reference the exceptions permitted under federal law. This design would eliminate much of the existing confusion about the inconsistency between the state and federal laws relating to felons possessing firearms and potentially reduce inadvertent violations of the law.⁸⁸

The elimination of the five-year disqualification period also has mixed consequences. The newly enacted lifetime prohibition against felons possessing firearms brings Missouri's statute in line with federal law. One might argue, however, that a one-time felon who has avoided being convicted of a crime for a certain period of time should have his or her right to possess firearms restored. These commentators bolster their position by arguing that felons should have their right to vote restored after a certain period of time following their conviction because the offenders "have paid their debt to society."⁸⁹ While the content of the rights at issue are quite different, as the right of voting does not carry with it the potential hazards associated with the right to possess a gun, the general premise of restoring a citizen's constitutionally granted rights upon completion of a "probationary" period is the same. On the other hand, there is clearly some public discomfort with the idea of a convicted felon possessing firearms at any time, even five years after release from prison.⁹⁰ Given that statistics collected by the Department of Justice show that 70.2% of prisoners released after a conviction for possessing, using, or selling illegal weapons were rearrested within three years,⁹¹ a lifetime prohibition is sensible in the interest of public safety.

A more difficult topic is the removal of the "dangerous" felony limitation by the 2008 revision to Missouri Revised Statute § 571.070. Under

86. *Id.*

87. 18 U.S.C. § 921(a)(16) (2006).

88. See Andy Boyle, *Felons Hunting with Guns Slip Past State Law*, ARK. DEMOCRAT-GAZETTE, Aug. 10, 2008 (reporting that in Arkansas many felons believed that they were permitted to hunt with muzzleloaders while state law actually prohibited them from owning any firearm).

89. PETTUS, *supra* note 79, at 143; see also MANZA & UGGEN, *supra* note 80.

90. See, e.g., DiCosmo, *supra* note 1.

91. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

the new statute, a person convicted of *any* felony is prohibited from possessing any firearm.⁹² Such a broad prohibition has been criticized as “wildly overinclusive, encompassing . . . non-violent felonies that offer no hint of the potentially violent tendencies of convicted individuals.”⁹³ Yet, prosecutors prefer a blanket approach in order to avoid inadvertently omitting dangerous crimes in an exhaustive list.⁹⁴

There is, however, a middle ground in the debate between prohibiting all felons from possessing firearms and only prohibiting felons convicted of an enumerated felony from possessing a firearm. Under the federal statute, for example, those convicted of felonies related to violation of anti-trust statutes or other laws related to business practices are not prohibited from possessing a gun.⁹⁵ Following this lead, at the state level there are a number of felonies that do not involve violence or indicate that a person convicted under the law would be dangerous with a gun. For example, possessing gambling records,⁹⁶ tampering with computer data,⁹⁷ forgery,⁹⁸ and theft of cable television service⁹⁹ are all felonies under Missouri law. It is sensible to exclude citizens convicted under these laws from a prohibition on felons having firearms.

In order to protect against an overly broad restriction on firearm possession, a compromise solution would be preferable to an outright ban on all felons from possessing firearms. While it is justifiable to ban those convicted of violent crimes from possessing firearms, those convicted of nonviolent crimes involving merely deceptive behavior should not be included in the ban, as their crimes do not reflect a propensity towards violence.

Perhaps a more difficult decision, however, is whether those convicted of drug-related felonies should be disqualified from owning weapons. Under the pre-2008 version of the Missouri felon-in-possession statute, drug crimes were not included in the term “dangerous felonies.”¹⁰⁰ One could question whether a drug-related felony should disqualify a person from possessing a firearm. However, federal law has recognized that there is a dangerous nexus between drug crimes and firearms, and has enacted sentence enhancement for using a firearm in relation to drug trafficking.¹⁰¹ Federal legislators have

92. MO. REV. STAT. § 571.070 (Supp. 2008).

93. Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597, 604 (2006).

94. Letter from H. Morley Swingle to Michael Gibbons and Rod Jetton, *supra* note 3.

95. 18 U.S.C. § 921(a)(20)(A) (2006).

96. MO. REV. STAT. § 572.050 (2000).

97. MO. REV. STAT. § 569.095 (Supp. 2008).

98. MO. REV. STAT. § 570.090 (Supp. 2008).

99. MO. REV. STAT. § 570.300 (Supp. 2008).

100. MO. REV. STAT. § 571.070 (2000), *amended by* MO. REV. STAT. § 571.070 (Supp. 2008).

101. 18 U.S.C. § 924(c)(1) (2006).

justified this enhancement on the basis that “firearms are the tools of the trade of most drug traffickers. Weapons clearly facilitate the criminal transactions and embolden violent thugs to commit their crimes.”¹⁰² These findings lend credible support to the idea that those convicted of drug felonies (at least those related to trafficking) are prone to violence and should therefore be barred from possessing firearms under Missouri law.

From a policy standpoint of preferring congruity and simplicity, the Missouri legislature should have revised the felon-in-possession statute to mirror the federal statute. Even though the federal approach is slightly over-inclusive in its blanket prohibition of all felons except those convicted of anti-trust and business felonies,¹⁰³ it would provide a consistent rule with which felons could be familiar. As such, felons would be less likely to inadvertently violate either state or federal law because of confusion about the differences between the statutes. Instead of bringing Missouri law into harmony with federal standards, the 2008 revision to Missouri Revised Statute § 571.070 only made minor changes to the state statute and ultimately resulted in a standard distinct from federal law.¹⁰⁴

Consistency would avoid some of the nonsensical outcomes that have arisen out of the overlapping state and federal statutes. For example, because Missouri law proscribes possession of a firearm by *any* felon, whether convicted in state or federal court,¹⁰⁵ but the federal law proscribes possession by any felon *except* those convicted of anti-trust and business practices felonies,¹⁰⁶ a person convicted of a federal anti-trust felony is permitted to possess a firearm under federal law but not under Missouri law. Similarly, a person convicted of murder under Missouri law can possess a muzzleloader within minutes of his or her release from prison under the federal felon-in-possession statute, but is prohibited from ever owning a firearm under state law. These examples demonstrate that the current configuration can lead to results easily comprehended by lawyers as a side effect of a government system of dual sovereignty, but likely misunderstood¹⁰⁷ by laypersons lacking an understanding of the division of state and federal criminal statutes. This

102. 143 CONG. REC. 764 (1997) (statement of Sen. Helms). The statement quoted in the text is in relation to a bill to tighten the existing statute after a decision of the Supreme Court limited the application of the earlier version of the law. *Id.*

103. The approach is over-inclusive, in that crimes other than anti-trust and business felonies are also nonviolent in nature and indicate no propensity towards violence. Logically, those other nonviolent felonies should also be excluded from the ban. See 18 U.S.C. § 921(a)(20) (2006).

104. Some commentators argue that the federalization of crime is undesirable and that most crimes should be designated and prosecuted at the state level. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 645-46 (1997).

105. MO. REV. STAT. § 571.070 (Supp. 2008).

106. 18 U.S.C. § 921(a)(20).

107. See, e.g., Boyle, *supra* note 88, at 1 (explaining felons' confusion over a similar felon-in-possession statute in Arkansas).

confusion would be avoided if Missouri had adopted a felon-in-possession statute mirroring the provisions of the federal statute.¹⁰⁸

C. Constitutionality of the Revised State Felon-in-Possession Statute Under the Missouri Constitution

As noted above, the Missouri Supreme Court has not had occasion to decide the constitutionality of the pre-2008 felon-in-possession statute. The court has only given broad guidance as to how the legislature can regulate gun possession. Some of the changes enacted in the 2008 revision of the Missouri felon-in-possession law could lead to potential constitutional challenges of the statute based on the plain text of article I, section 23 and related case law.

The Missouri Constitution guarantees a right to “every citizen to keep and bear arms,”¹⁰⁹ but appellate court decisions have held that the legislature has the authority to regulate the “time, place and manner” of possessing weapons.¹¹⁰ Interestingly, Missouri courts have never broached the question of whether the state constitution precludes the legislature from regulating *who* can possess firearms. This question is especially relevant in the wake of the 2008 revision to the state felon-in-possession statute. The previous statute prohibited certain felons from possessing certain firearms for a specified period of time after their conviction.¹¹¹ By setting limits on the time period during which a felon is prohibited from possessing a firearm, it was arguably in line with *Joyce*. The old Missouri statute also restricted the manner in which an individual could possess a firearm by preventing felons from having concealable firearms but not those with barrels at least sixteen inches long.¹¹²

Under the 2008 revision to Missouri Revised Statute § 571.070, the restrictions on possession of a firearm by a felon extend beyond time, place, and manner to a new blanket prohibition preventing an entire class of persons, those convicted of felonies, from ever possessing any firearm. The language of the Missouri Constitution protecting a right to bear arms is far

108. One might question why a state statute is necessary if the federal law would already prohibit felons from possessing firearms. The best response is that it provides state prosecutors the ability to “package” a felon-in-possession offense with other charges. For example, if a felon were caught with a firearm while perpetrating a state crime like burglary, the charges could be brought together in state court. Without a state criminal statute, separate charges would have to be brought by a federal prosecutor in federal court under the federal statute.

109. MO. CONST. art. I, § 23.

110. *See, e.g., City of Cape Girardeau v. Joyce*, 884 S.W.2d 33, 34 (Mo. App. E.D. 1994).

111. MO. REV. STAT. § 571.070 (2000), *amended by* MO. REV. STAT. § 571.070 (Supp. 2008).

112. *Id.*; MO. REV. STAT. § 571.010(4) (2000), *amended by* MO. REV. STAT. § 571.010(4) (Supp. 2008).

more explicit than the analogous provision in the Second Amendment to the United States Constitution. While the United States Constitution addresses the general “right of the people” to bear arms prefaced by vague language about a well-regulated militia,¹¹³ the Missouri Constitution uses specific language: “the right of *every citizen* to keep and bear arms . . . shall not be questioned.”¹¹⁴

This specific language in the Missouri Constitution could be interpreted to impose a stricter standard for firearm possession legislation than is found in the United States Constitution. While the text of article I, section 23 does not guarantee a right to possess any type of gun at any time, it specifically precludes “questioning” the right of every citizen to possess a firearm. As a result, by enacting a broad prohibition against anyone convicted of a felony from possessing a firearm, which arguably treads on the right protected by article I, section 23 of the Missouri Constitution, there is a high probability of a constitutional challenge to the 2008 revision of the Missouri felon-in-possession statute.

The Missouri Supreme Court has never determined the scope of the “every citizen” language in the article I, section 23 of the state constitution. However, decisions by a number of other state supreme courts illuminate the issue,¹¹⁵ and lead to the conclusion that the court would, in fact, uphold the felon-in-possession statute as a reasonable limitation on the constitutional right to bear arms. This standard of reasonableness has been applied as a pragmatic alternative to the federal constitutional analysis that would require “strict scrutiny” review.¹¹⁶ One commentator noted that state supreme courts are eager to declare felon-in-possession statutes reasonable under a variety of state constitutional schemes and have never invalidated a felon possession ban on constitutional grounds.¹¹⁷

In general, courts defer to legislatures on the issue of firearm regulations,¹¹⁸ and the Missouri Supreme Court has only briefly referred to this deferential standard of reasonableness. In 1886, the Missouri Supreme Court heard the case of *State v. Shelby*.¹¹⁹ Here, the defendant was charged with possessing a firearm while under the influence of alcohol.¹²⁰ The defendant argued that the statute under which he was charged conflicted with his state constitutional right to bear arms.¹²¹ The court rejected this argument on the basis that it was a reasonable regulation on the right to bear arms, and

113. U.S. CONST. amend. II.

114. MO. CONST. art. I, § 23 (emphasis added).

115. See Winkler, *supra* note 93, at 600.

116. *Id.* at 604.

117. *Id.* at 603 & n.36. Missouri is absent from Winkler’s list of state supreme courts to have decided on the issue. *Id.*

118. *Id.* at 600.

119. 2 S.W. 468 (Mo. 1886).

120. *Id.* at 468.

121. *Id.* at 468-69.

stated that a “citizen must yield” to such legislation.¹²² This standard of reasonableness has been employed by other states’ courts to enable “the legislature[] to enact policies to preserve and enhance public safety.”¹²³ Such policies have been justified as a valid exercise of the state’s “police power.”¹²⁴

For these reasons, it is likely that if confronted with a challenge to Missouri’s 2008 revision of its felon-in-possession statute, the Missouri Supreme Court would hold that the statute is constitutional as a reasonable regulation on the right to bear arms. Even though there are cogent arguments that the new statute is in conflict with article I, section 23 of the Missouri Constitution, they are outweighed by the countervailing considerations noted above. Given the virtual unanimity of other state courts on the issue, and the Missouri Supreme Court’s previous deference to the legislature on regulations as to the right to bear arms, it appears that the Missouri Supreme Court would take a similar course and allow reasonable regulations on firearms to stand.

D. Constitutionality of the Revised Statute Under the U.S. Constitution

As previously discussed,¹²⁵ *District of Columbia v. Heller* did not decide whether the Second Amendment is incorporated into the Fourteenth Amendment to the United States Constitution as a fundamental due process protection, thereby imposing limits on state legislation. In anticipation of the possibility that the Supreme Court will later answer this question affirmatively, it is important to consider whether Missouri’s felon-in-possession statute would survive a federal constitutional challenge under *Heller*.

Heller overturned the District of Columbia’s refusal to grant Dick Heller a permit to keep a handgun in his home because the Court found that the decision conflicted with the Second Amendment.¹²⁶ The majority opinion attempted to preempt any argument that the opinion should be construed to weaken laws prohibiting felons from possessing firearms.¹²⁷ Much of this Note’s previous discussion regarding the constitutional implications of the federal felon-in-possession statute is applicable to the state statute as well. The federal statute is actually narrower than the state statute, as the federal law allows certain felons to possess firearms and all felons to possess certain

122. *Id.* at 469.

123. Winkler, *supra* note 93, at 602.

124. Mitchell D. Ridberg, Comment, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U. CHI. L. REV. 185, 187 (1970) (“In the absence of specific constitutional authorization to regulate arms, the authority for such regulation stems solely from the general police power.”).

125. *See supra* Part II.D.1.

126. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821-22 (2008).

127. *See supra* Part II.D.1.

firearms.¹²⁸ Conversely, the state statute applies to all persons convicted of any felony.¹²⁹ Accordingly, if the Supreme Court were to invalidate the federal felon-in-possession statute under the Second Amendment and incorporate the Second Amendment against the states, it is likely that the broader state statute would also be susceptible to invalidation.

V. CONCLUSION

The passage of House Bill 2034 in 2008 marked a subtle yet significant shift in Missouri's felons possessing firearms policy. The state moved from a narrowly-tailored approach, which left "loopholes" allowing some seemingly dangerous criminals to possess firearms, to a blanket prohibition preventing any felon from possessing a firearm at any time. While the modified statute includes some improvements, a better tactic would have been to match the federal felon-in-possession statute. This broadened law also makes the statute more susceptible to challenges under the Missouri Constitution's provision on the right to bear arms. Although it is uncertain how the Missouri Supreme Court would view this statute, it is probable that the statute would be upheld. While challenges to the statute have been rare, the fact that more prosecutions will likely result from the broadened law could lead to an increased number of cases moving through the system. As a result, the Missouri legal community should expect to see increased interest in the state's felon-in-possession statute in coming years.

ADAM E. HANNA

128. See *supra* notes 9-20 and accompanying text.

129. MO. REV. STAT. § 571.070 (Supp. 2008).