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Missed the Mark: The Supreme Court of Missouri's Faulty Application of Strict Scrutiny to the Right to Bear Arms

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NOTE

Missed the Mark: The Supreme Court of Missouri's Faulty Application of Strict Scrutiny to the Right to Bear Arms

State v. Clay, 481 S.W.3d 531 (Mo. 2016) (en banc)

Abigail E. Williams[*]

I. INTRODUCTION

The discussion of the scope and potential limitations of the Second Amendment has been at the forefront of the United States's political debate in recent years. Prior to 2008, Second Amendment jurisprudence was unclear as to what could constitute a lawful restriction of an individual's right to bear arms.[1] In 2008, the U.S. Supreme Court, in *District of Columbia v. Heller*, affirmed the Second Amendment guarantee of the right to bear arms, holding that a Washington, D.C., law that prohibited possessing handguns in the home was unconstitutional.[2] The Court further indicated that nothing in the opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[3] Two years later, in *McDonald v. City of Chicago*, the U.S. Supreme Court held that the right to bear arms was fundamental and applied to the states.[4] While *Heller* and *McDonald* made clear that the Second Amendment was a limited fundamental right, neither decision defined the applicable constitutional standard for analyzing laws restricting the right to bear arms.[5]

In 2014, Missouri amended its constitution to include Amendment 5, a provision that requires the application of strict scrutiny to any law limiting the right to bear arms.[6] In a sequence of cases, the last of which was *State v. Clay*,

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1. District of Columbia v. Heller, 554 U.S. 570, 621 (2008).
2. *Id.* at 630.
3. *Id.* at 626–27.
4. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).
5. *Heller*, 554 U.S. at 628–29; *McDonald*, 561 U.S. at 786.
6. Following the adoption of Amendment 5, article I, section 23 states:

the Supreme Court of Missouri determined that section 571.070.1(1), a law that prohibited felons from possessing firearms, survived strict scrutiny.[7] In so holding, the Supreme Court of Missouri relied on the *Heller* dicta, even though the *Heller* Court did not apply the strict scrutiny standard.[8] This Note argues the Supreme Court of Missouri erred in its application of strict scrutiny. While it is difficult to measure the efficacy of gun control laws, it is evident that categorically and permanently banning felons from possessing firearms is not the least restrictive means of achieving the government's safety interest.

II. FACTS AND HOLDING

On January 26, 2015, Pierre Clay was stopped in St. Louis, Missouri, for a traffic violation and found possessing a revolver.[9] The police discovered he had a prior felony conviction and arrested him.[10] On February 25, 2015, Clay was charged by information with possession of marijuana under section 195.202 and unlawful possession of a firearm under section 571.070.1(1).[11] Section 571.070.1(1) prohibits previously convicted felons from possessing firearms.[12] Clay moved to dismiss the unlawful possession charge, claiming

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> That the right of every citizen to keep and bear arms, **ammunition, and accessories typical to the normal function of such arms,** in defense of his home, person, **family** 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~~. **The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.**

MO. CONST. art. I, § 23 (amended 2014) (new language in bold, deleted language struck through).

7. State v. Clay, 481 S.W.3d 531, 538 (Mo. 2016) (en banc); State v. Merritt, 467 S.W.3d 808, 816 (Mo. 2015) (en banc) (per curiam); State v. McCoy, 468 S.W.3d 892, 897 (Mo. 2015) (en banc) (per curiam); Dotson v. Kander, 464 S.W.3d 190, 197 (Mo. 2015) (en banc).

8. *Heller*, 554 U.S. at 628–29.

9. *Clay*, 481 S.W.3d at 533.

10. *Id.*

11. *Id.*; MO. REV. STAT. §§ 571.070.1(1), 195.202 (Cum. Supp. 2013).

12. *Id.* § 571.070.1(1). The statute states:

> A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and . . . [s]uch person has been convicted of a felony under the laws of this state, or of a crime under the

that section 571.070.1(1) was unconstitutional under article I, section 23 of the Missouri Constitution, after Amendment 5 was added on August 5, 2014.[13]

Clay claimed that article I, section 23, as amended, precluded the legislature from regulating the possession of firearms by nonviolent felons.[14] He argued that the Missouri Constitution's explicit authorization of the legislature to regulate the possession of firearms by *violent* felons should be read to preclude the legislature from regulating the possession of firearms by *nonviolent* felons.[15] Further, Clay asserted that Amendment 5 substantially changed article I, section 23.[16] Therefore, he argued the precedent that deemed section 571.070.1(1) constitutional under the pre-Amendment 5 version of article I, section 23 should not be applied to his case.[17]

The circuit court granted Clay's motion to dismiss the unlawful possession charge, determining that Amendment 5 barred the legislature from regulating the possession of firearms by nonviolent felons.[18] The State appealed.[19] The Supreme Court of Missouri held that Amendment 5 did not substantially alter article I, section 23 of the Missouri Constitution, and, therefore, the court's precedent which held that section 571.070.1(1) satisfied strict scrutiny remained applicable to this case.[20]

> laws of any state or of the United States which, if committed within this state, would be a felony . . . .

Id.

13. *Clay*, 481 S.W.3d at 533. Following the adoption of Amendment 5, article I, section 23 states:

> That the right of every citizen to keep and bear arms, **ammunition, and accessories typical to the normal function of such arms,** in defense of his home, person, **family** 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~~. **The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.**

MO. CONST. art. I, § 23 (amended 2014) (new language in bold, deleted language struck through).

14. *Clay*, 481 S.W.3d at 534.

15. *Id.*

16. *Id.* at 536.

17. *Id.*

18. *Id.* at 533.

19. *Id.* at 532.

20. *Id.* at 538.

III. LEGAL BACKGROUND

In *Clay*, the Supreme Court of Missouri determined that section 571.070.1(1) was constitutional under the amended version of article I, section 23 of the Missouri Constitution.[21] The pertinent part of section 571.070.1(1) states:

> A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and . . . [s]uch 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[.][22]

Following the adoption of Amendment 5,[23] article I, section 23 of the Missouri Constitution states:

> That the right of every citizen to keep and bear arms, **ammunition, and accessories typical to the normal function of such arms**, in defense of his home, person, **family** 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~~. **The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny**[24] **and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted *violent* felons or**

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21. *Id.*

22. *Id.* at 533 (alterations in original) (quoting MO. REV. STAT. § 571.070.1(1) (Cum. Supp. 2013)).

23. Amendment 5 of article I, section 26 was adopted on August 5, 2014. MO. CONST. art. I, § 23 (amended 2014).

24. Strict scrutiny is considered the "most rigorous and exacting standard of constitutional review." Dotson v. Kander, 464 S.W.3d 190, 197 (Mo. 2015) (en banc) (quoting Miller v. Johnson, 515 U.S. 900, 920 (1995)). If a classification is subject to strict scrutiny, the court must determine whether it is necessary to accomplish a compelling state interest. Etling v. Westport Heating & Cooling Servs., Inc., 92 S.W.3d 771, 774 (Mo. 2003) (en banc) (per curiam). *See also* State v. McCoy, 468 S.W.3d 892, 897 (Mo. 2015) (en banc) (per curiam); State v. Merritt, 467 S.W.3d 808, 814 (Mo. 2015) (en banc) (per curiam) ("[S]trict scrutiny is generally satisfied only if the law at issue is 'narrowly tailored to achieve a compelling interest.'" (alteration in original) (quoting *Dotson*, 464 S.W.3d at 197)). If other, less restrictive, means can serve the compelling interest equally, the more restrictive means will be unnecessary and, therefore, unconstitutional. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1465 (2009).

those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.[25]

In reaching its decision in *Clay*, the Supreme Court of Missouri relied on the U.S. Supreme Court's interpretation of the right to bear arms in both *District of Columbia v. Heller* and *McDonald v. City of Chicago*, as well as recent Supreme Court of Missouri decisions interpreting these U.S. Supreme Court cases. Accordingly, this Part examines the Supreme Court of Missouri's interpretation of article I, section 23 within the framework of *McDonald* and *Heller*. This Part concludes with a comparison of other states' evaluations of firearm regulations post-*Heller* and *McDonald* to Missouri's.

A. The U.S. Supreme Court's Interpretation of the Right to Bear Arms

In *District of Columbia v. Heller*, the U.S. Supreme Court determined a District of Columbia law that banned the possession of handguns in the home was unconstitutional under the Second Amendment.[26] In an opinion authored by Justice Scalia, the Court held, "The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute."[27] The Court did not apply a specific level of scrutiny, noting that "banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster" under any standard of scrutiny.[28] More important for the problems confronted in *Clay* was the *Heller* Court's dicta, which stated that nothing in the opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sen-

25. MO. CONST. art. I, § 23 (amended 2014) (emphasis added) (new language in bold, deleted language struck through).

26. District of Columbia v. Heller, 554 U.S. 570, 628 (2008). The Second Amendment to the U.S. Constitution states, "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." U.S. CONST. amend. II.

27. *Heller*, 554 U.S. at 628 (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).

28. *Id.* at 628–29 (citation omitted) (quoting *Parker*, 478 F.3d at 400). In response to Justice Breyer's dissent, the Court later rejected both rational basis scrutiny and interest balancing. *Id.* at 628 n.27, 634. Thus, possible applicable constitutional standards include intermediate and strict scrutiny. Intermediate scrutiny allows restrictions that are substantially related to important governmental interests. Volokh, *supra* note 24, at 1470. *See, e.g.*, Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 478 (1989). As addressed above, strict scrutiny allows restrictions that are narrowly tailored to achieve a compelling government interest. *McCoy*, 468 S.W.3d at 897; *Merritt*, 467 S.W.3d at 814.

sitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[29] According to the Court, each of these regulations was "presumptively lawful."[30]

In his dissent, Justice Breyer admonished the majority for its deliberate silence regarding the proper constitutional standard to evaluate laws under the Second Amendment.[31] The dissenting opinion explored some of the possible constitutional standards.[32] First, Justice Breyer opined that a rational basis standard was inconsistent with the majority's holding because the District of Columbia law undoubtedly bore "a 'rational relationship' to a 'legitimate governmental purpose.'"[33] Next, he determined that a strict scrutiny standard was also inconsistent with the majority's holding.[34] He asserted that the majority "implicitly, and appropriately," rejected strict scrutiny by broadly approving a set of laws, including "forfeiture by criminals of the Second Amendment right . . . whose constitutionality under a strict-scrutiny standard would be far from clear."[35] He not only determined that the majority's dicta was inconsistent with strict scrutiny, but also that the adoption of a true strict scrutiny standard for evaluating firearm regulations would be practically impossible.[36]

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29. *Heller*, 554 U.S. at 626–27. This dicta clearly departs from Scalia's notorious originalist interpretation of the Constitution and may have been inserted specifically to secure a fifth vote to gain the majority. *See* Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 420 (2009) (asserting that the language was "clearly tacked on to the opinion to secure a fifth vote (presumably Justice Anthony Kennedy's)").

30. *Heller*, 554 U.S. at 627–28, 628 n.27.

31. *Id.* at 687 (Breyer, J., dissenting).

32. *Id.* at 687–89.

33. *Id.* at 687–88 (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)). According to Justice Breyer, the government's interest was to save lives and prevent gun-related accidents. *Id.* He noted that the District of Columbia law at least bore a "'rational relationship' to that 'legitimate' life-saving objective." *Id.* at 688. Responding to Justice Breyer's dissent, Justice Scalia agreed that the District of Columbia law, like most laws, would survive rational basis scrutiny. *Id.* at 628–29, 629 n.27 (majority opinion). He wrote, "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id.* at 629 n.27.

34. *Id.* at 688–89 (Breyer, J., dissenting).

35. *Id.* at 688.

36. *Id.* at 689. He noted that every gun-control regulation will seek to advance a compelling government interest – a concern for the safety and the lives of its citizens. *Id.* Therefore, "any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other." *Id.* Ultimately, Justice Breyer concluded that the Court should adopt this interest-balancing inquiry explicitly. *Id.*

Two years later, in *McDonald v. City of Chicago*, petitioners filed suit against the city, alleging that its handgun ban violated the Second and Fourteenth Amendments.[37] Relying on the *Heller* decision, the *McDonald* Court held that the Fourteenth Amendment incorporates to the states the Second Amendment's right to bear arms for self-defense against the several states and any city therein.[38] The Court determined that the *Heller* decision indicated the right to bear arms was "fundamental" and "deeply rooted in this Nation's history and tradition" and was therefore incorporated in the concept of due process.[39] Like in *Heller*, the Court did not define a specific constitutional standard to evaluate laws limiting the right to bear arms.[40] Further, *McDonald* affirmed the *Heller* dicta regarding the presumed lawfulness of certain regulations, noting that "incorporation does not imperil every law regulating firearms."[41]

B. The Supreme Court of Missouri's Reliance on the Heller *and* McDonald *Precedent*

State v. Clay was preceded by four different Supreme Court of Missouri decisions that relied on *Heller* and *McDonald*.[42] First, *State v. Richard* was decided after *Heller* but before *McDonald*.[43] In *Richard*, the Supreme Court of Missouri determined that a law which forbade the possession or discharge of a firearm while intoxicated was constitutional under article I, section 23 of the Missouri Constitution.[44] The Supreme Court of Missouri did not define a specific constitutional standard but merely noted that the legislature was afforded "wide discretion to exercise its police power," and "[p]ossession of a loaded firearm by an intoxicated individual poses a demonstrated threat to public safety."[45]

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37. McDonald v. City of Chicago, 561 U.S. 742, 742 (2010).

38. *Id.* at 767.

39. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). The Court did not indicate that strict scrutiny must be applied for laws challenged under a provision that includes a fundamental right. *Id.* at 768. The Court discussed whether the right to keep and bear arms is fundamental solely for the purpose of determining whether the right is incorporated in the concept of due process. *Id.* at 767.

40. *Id.* at 767.

41. *Id.* at 786.

42. *See supra* note 7.

43. State v. Richard, 298 S.W.3d 529 (Mo. 2009) (en banc).

44. *Id.* at 531–33. This was decided under the pre-Amendment 5 version of article I, section 23 of the Missouri Constitution, which provided as follows: "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." MO. CONST. art. I, § 23 (amended 2014).

45. *Richard*, 298 S.W.3d at 532.

In his concurring opinion, Judge Fischer wrote that the Second Amendment was a fundamental right that applied to the states, "even though the United States Supreme Court ha[d] yet to make that declaration."[46] Despite his declaration that the right to bear arms was "fundamental," Judge Fischer did not declare strict scrutiny as the constitutional standard that should apply when evaluating restrictions on the Second Amendment.[47] Instead, he alluded to the *Heller* Court's dicta and wrote that "reasonable limitations on the possession of firearms by felons and the mentally ill and laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings," were constitutional.[48]

The Supreme Court of Missouri did not decide another right to bear arms case until 2015, after the U.S. Supreme Court's *McDonald* decision.[49] In *Dotson v. Kander*, the plaintiffs argued that the ballot title for Amendment 5 of article I, section 23 was legally insufficient because it omitted any description of the language concerning strict scrutiny and failed to inform the voter that the amendment substantially changed the laws regulating the right to bear arms.[50] In *Dotson*, the court determined that Amendment 5 "did not change the law affecting the right to bear arms but established a broader guideline indicating how laws affecting the right to bear arms should be scrutinized."[51] According to the *Dotson* court, after *McDonald*, the strict scrutiny standard was applicable to restrictions on the right to bear arms, even before the passage of Amendment 5.[52]

The *Dotson* court determined that the *McDonald* Court's holding that the right to bear arms was fundamental meant that strict scrutiny should be applied to any law challenged under article I, section 23.[53] In so holding, the *Dotson* court relied on *Etling v. Westport Heating & Cooling Services, Inc.*, in which the Supreme Court of Missouri held that fundamental rights, such as "the rights to free speech, to vote, [and] to freedom of interstate travel," are subject to strict scrutiny.[54] The *Etling* court defined the strict scrutiny standard as requiring a law to be "necessary to accomplish a compelling state interest."[55] While this definition of strict scrutiny differs from the traditional definition used by

46. *Id.* at 533 (Fischer, J., concurring).
47. *Id.*
48. *Id.* at 534.
49. Dotson v. Kander, 464 S.W.3d 190 (Mo. 2015) (en banc).
50. *Id.* at 196.
51. *Id.* at 197.
52. *Id.* at 197 n.5.
53. *Id.*
54. Etling v. Westport Heating & Cooling Servs., Inc., 92 S.W.3d 771, 774 (Mo. 2003) (en banc) (per curiam).
55. *Id.*

the U.S. Supreme Court,[56] the Supreme Court of Missouri seems to use these two different articulations of the test interchangeably. The court later defined strict scrutiny as the determination of whether a law is "narrowly tailored to achieve a compelling governmental interest."[57]

The two *Dotson* concurring opinions shed further light on the possible impact of Amendment 5.[58] Judge Fischer noted that the purpose of the amendment was "not to change the law but to make sure the Missouri Constitution is *at least as* protective as the Supreme Court of the United States has declared the law of the right to bear arms is under the Second Amendment to the United States Constitution."[59] Judge Stith asserted that, within the meaning of Amendment 5, strict scrutiny does not require "utilization of a technical legal standard that even the United States Supreme Court does not apply to regulation of the Second Amendment."[60] She further avowed that adoption of the technical definition of "strict scrutiny" would "impinge on the judicial province and so raise serious separation of powers issues."[61]

Subsequently, the Supreme Court of Missouri decided *State v. McCoy* and *State v. Merritt*.[62] These were companion cases decided on the same day, as both challenged the constitutionality of section 571.070.1(1) under article I, section 23 of the Missouri Constitution.[63] The court in *McCoy* and *Merritt* determined that the amended version of article I, section 23 was not applicable because the amendment was not yet in effect at the time of the offenses.[64] The court held that, according to the *Dotson* decision, strict scrutiny applied under

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56. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 688 (2008) (defining the use of strict scrutiny as reviewing a law with care to determine whether it is "narrowly tailored to achieve a compelling governmental interest" (quoting Abrams v. Johnson, 521 U.S. 74, 82 (1997))).

57. *See* State v. McCoy, 468 S.W.3d 892, 897 (Mo. 2015) (en banc) (per curiam) (noting that strict scrutiny is only satisfied if the law is narrowly tailored to achieve a compelling government interest); State v. Merritt, 467 S.W.3d 808, 814 (Mo. 2015) (en banc) (per curiam) (same).

58. *Dotson*, 464 S.W.3d at 200–05 (Fischer, J., concurring); *id.* at 205–15 (Stith, J., concurring).

59. *Id.* at 200 (Fischer, J., concurring) (emphasis added).

60. *Id.* at 209 (Stith, J., concurring). It should also be noted that Judge Teitelman authored an opinion dissenting in part and concurring in part in the separate opinion filed in which he determined that Amendment 5 did substantially alter article I, section 23, and the summary statement on the ballot failed to reflect these changes. *Id.* at 215–21 (Teitelman, J., dissenting in part and concurring in part in separate opinion filed).

61. *Id.* at 209 (Stith, J., concurring).

62. State v. McCoy, 468 S.W.3d 892 (Mo. 2015) (en banc) (per curiam); State v. Merritt, 467 S.W.3d 808 (Mo. 2015) (en banc) (per curiam).

63. *McCoy*, 468 S.W.3d at 894; *Merritt*, 467 S.W.3d at 810.

64. *See McCoy*, 468 S.W.3d at 895; *see also Merritt*, 467 S.W.3d at 812. The court wrote, "The amended version of article I, section 23 does not have any text that suggests it was intended to be applied retroactively. Therefore, it applies prospectively only." *Merritt*, 467 S.W.3d at 812. *See also McCoy*, 468 S.W.3d at 895 (citing State *ex rel.* Hall v. Vaughn, 483 S.W.2d 396, 398–99 (Mo. 1972) (en banc)).

both the amended and previous versions of article I, section 23.[65] The court determined that section 571.070.1(1) satisfied strict scrutiny because it was "narrowly tailored to achieve a compelling governmental interest."[66]

The court in *Merritt* and *McCoy* relied on a Third Circuit case that determined "[i]t is well-established that felons are more likely to commit violent crimes than are other law abiding citizens."[67] Further, the court quoted a Seventh Circuit case in which the court determined that "someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use."[68] However, neither the Third Circuit nor the Seventh Circuit implied that a law prohibiting felons from possessing firearms was *narrowly tailored* to the government's interest in public safety.[69] Instead, both courts relied on *Heller* and upheld the federal law that prohibited firearm possession by felons without defining a level of scrutiny.[70] Despite this discrepancy between the instant case and the situation in the Third and Seventh Circuits, the court in *Merritt* and *McCoy* concluded, "The felon-in-possession law, which bans felons from possessing firearms, with no exceptions other than possessing an antique firearm, is sufficiently narrowly tailored to achieve the compelling interest of protecting the public from firearm-related crime. Therefore, it passes strict scrutiny."[71]

C. Other States' Reliance on the Heller *and* McDonald *Precedent*

The Supreme Court of Missouri's interpretation of the *Heller* and *McDonald* decisions addressed above differs from that of its counterparts in other states. In *Dotson* and its progeny, the Supreme Court of Missouri referred to *State v. Eberhardt*, a 2014 Louisiana Supreme Court case.[72] Like Missouri, Louisiana had recently amended the right to bear arms provision of its constitution to include a strict scrutiny requirement.[73] In *Eberhardt*, the Louisiana

65. *See McCoy*, 468 S.W.3d at 895; *Merritt*, 467 S.W.3d at 812.

66. *McCoy*, 468 S.W.3d at 897; *Merritt*, 467 S.W.3d at 814.

67. *McCoy*, 468 S.W.3d at 897 (alteration in original) (quoting United States v. Barton, 633 F.3d 168, 175 (3d Cir. 2011)); *Merritt*, 467 S.W.3d at 814 (quoting *Barton*, 633 F.3d at 175).

68. *McCoy*, 468 S.W.3d at 897–98 (quoting United States v. Yancey, 621 F.3d 681, 685 (7th Cir. 2010) (per curiam)); *Merritt*, 467 S.W.3d at 814 (quoting *Yancey*, 621 F.3d at 685).

69. *Barton*, 633 F.3d at 175; *Yancey*, 621 F.3d at 685.

70. *Barton*, 633 F.3d at 175; *Yancey*, 621 F.3d at 685.

71. *McCoy*, 468 S.W.3d at 899; *Merritt*, 467 S.W.3d at 816. In his concurring opinion, Judge Draper disagreed that strict scrutiny must be applied to any right to bear arms brought under article I, section 23 as it was written prior to Amendment 5. *McCoy*, 468 S.W.3d at 899 (Draper, J., concurring); *Merritt*, 468 S.W.3d at 816 (Draper, J., concurring).

72. *See* Dotson v. Kander, 464 S.W.3d 190, 197–98 (Mo. 2015) (en banc).

73. The amended version of article I, section 11 of the Louisiana Constitution states: "The right of each citizen to keep and bear arms **is fundamental and** shall not

Supreme Court upheld a statute that made it unlawful for "any person who has been convicted of a crime of violence . . . to possess a firearm or carry a concealed weapon."[74] This statute significantly differs from Missouri's section 571.070.1(1).[75] Not only does the Louisiana law limit criminalization to gun-possessing felons convicted of specific violent crimes, but it also does not criminalize gun possession by "any person who has not been convicted of any felony for a period of ten years from the date of completion of sentence, probation, parole, or suspension of sentence."[76] The Louisiana Supreme Court determined that the statute survived strict scrutiny because it is narrowly tailored to serve the compelling government interest of public safety.[77] In holding that the law is narrowly tailored, the court noted that it only applies to the violent felonies enumerated in the statute, and it does not apply to individuals who have not been convicted of a felony in the past ten years.[78]

Missouri and Louisiana are outliers in that their constitutions were amended to explicitly require the application of strict scrutiny.[79] Further, both the Supreme Court of Missouri and the Louisiana Supreme Court asserted that, absent their constitutional amendments, strict scrutiny would still have been

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be infringed~~, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person~~. **Any restriction on this right shall be subject to strict scrutiny.**" LA. CONST. art. I, § 11 (amended 2012) (new language in bold, deleted language struck through).

74. LA. STAT. ANN. § 14:95.1(A) (2017). The statute further defines which "crimes of violence" were included within the statute:

> a felony or simple burglary, burglary of a pharmacy, burglary of an inhabited dwelling, unauthorized entry of an inhabited dwelling, felony illegal use of weapons or dangerous instrumentalities, manufacture or possession of a delayed action incendiary device, manufacture or possession of a bomb, or possession of a firearm while in the possession of or during the sale or distribution of a controlled dangerous substance, or any violation of the Uniform Controlled Dangerous Substances Law which is a felony, or any crime which is defined as a sex offense in R.S. 15:541, or any crime defined as an attempt to commit one of the above-enumerated offenses under the laws of this state, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which, if committed in this state, would be one of the above-enumerated crimes . . . .

Id. (footnote omitted).

75. MO. REV. STAT. § 571.070.1(1) (Cum. Supp. 2013).

76. State v. Eberhardt, 145 So. 3d 377, 382 (La. 2014) (quoting LA. STAT. ANN. § 14:95.1(C)).

77. *Id.* at 385.

78. *Id.*

79. *State Strict Scrutiny Ballot Initiatives*, EVERYTOWN (July 9, 2015), https://everytownresearch.org/fact-sheet-strict-scrutiny/. Missouri, Louisiana, and Alabama are the only three states to have adopted a strict scrutiny requirement for the right to bear arms. *Id.* The Alabama amendment was approved in November 2014. *Id.*

the applicable constitutional test for laws that limited the right to bear arms.[80] Conversely, other state courts held that, in light of *Heller* and *McDonald*, strict scrutiny is not the applicable test.[81] Thus, the Supreme Court of Missouri is an outlier in both its interpretation of *Heller* and *McDonald* and its application of strict scrutiny to the right to bear arms. Missouri is the only state that has utilized strict scrutiny in a right to bear arms context and still upheld a law that permanently bans all felons from possessing firearms.

IV. INSTANT DECISION

In *State v. Clay*, the Supreme Court of Missouri held that Amendment 5 did not substantially alter article I, section 23 of the Missouri Constitution, and, therefore, the court's precedent that held section 571.070.1(1) satisfied strict scrutiny remained applicable to this case.[82] In so holding, the court first determined that the pre-Amendment 5 version of article I, section 23 permitted regulation of firearm possession by felons.[83] The court relied on its recent interpretation of the previous version of article I, section 23 in *Merritt* and *McCoy*.[84] According to the court, *Merritt* and *McCoy* held that, because *Heller* and *McDonald* recognized that the right to bear arms is a fundamental right, strict scrutiny should be used in analyzing the constitutionality of any regulation of that right.[85] The Supreme Court of Missouri did not define the exact strict scrutiny test in *Merritt*, *McCoy*, or *Clay*.[86] But, the Supreme Court of Missouri

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80. Dotson v. Kander, 464 S.W.3d 190, 197 n.5 (en banc) (per curiam); *Eberhardt*, 145 So. 3d at 383.

81. *See, e.g.*, State v. Craig, 826 N.W.2d 789, 795 (Minn. 2013) (recognizing that neither *Heller* nor *McDonald* applied a particular level of scrutiny, but determining that felons convicted of violent crimes should be categorically excluded from protection under the Second Amendment); City of San Diego v. Boggess, 157 Cal. Rptr. 3d 644, 648 (Cal. Ct. App. 2013) (holding that a California state law that "authorizes the seizure and possible forfeiture of weapons belonging to persons detained for examination . . . because of their mental condition" did not violate the Second Amendment); Rocky Mountain Gun Owners v. Hickenlooper, 371 P.3d 768, 770, ¶ 2 (Colo. App. 2016) (noting that neither *Heller* nor *McDonald* determined a level of scrutiny for the right to bear arms and finding a state law which "banned the sale, possession, and transfer of 'large-capacity ammunition magazines'" constitutional).

82. State v. Clay, 481 S.W.3d 531, 538 (Mo. 2016) (en banc).

83. *Id.* at 534.

84. *Id.*

85. *Id.*

86. *See, e.g.*, *id.* The court in *Clay* stated:

> While most commonly courts apply strict scrutiny by determining whether a law was narrowly tailored to achieve a compelling state interest, in other cases, depending on the extent the regulation burdens a particular right, the courts look to whether a regulation imposes "reasonable, non-discriminatory restrictions" that serve "the State's important regulatory interests" or whether the encroachment is "significant."

held that the section 571.070.1(1) restriction on the possession of weapons by felons survived "even the most stringent formulation of the strict scrutiny standard in that it is narrowly tailored to achieve a compelling state interest."[87] According to the court, the State has a "compelling governmental interest in 'ensuring public safety and reducing firearm-related crime[,] . . . [and] [p]rohibiting felons from possessing firearms is narrowly tailored to that interest because '[i]t is well-established that felons are more likely to commit violent crimes than are other law abiding citizens.'"[88] In concluding that section 571.070.1(1) was "narrowly tailored," the court relied on two federal appellate court cases, *United States v. Barton* and *United States v. Yancey*, both of which stated that felons are more likely than non-felons to commit violent crimes.[89]

Next, the court held that Amendment 5 did not substantially change article I, section 23, and, therefore, the *Merritt* and *McCoy* strict scrutiny analysis discussed above applied to the instant case.[90] The court relied on its holding in *Dotson*, which determined that Amendment 5 merely set out "a declaration of the law as it would have been declared by this Court after *McDonald* mandated that the fundamental right to bear arms applied to the states."[91] The court ultimately determined that Amendment 5 "sets out the standard of scrutiny for regulation of arms possessed by persons other than convicted violent felons and persons with certain mental disorders or infirmities – such regulations may be adopted but will be subject to strict scrutiny."[92] Thus, the court held that section 571.070.1(1) was constitutional under article I, section 23 of the Missouri Constitution.[93]

In his dissent, Judge Teitelman wrote that section 571.070.1(1) should not have been found constitutional under article I, section 23 of the Missouri Constitution.[94] While he agreed with the majority's analysis that strict scrutiny applied in determining the constitutionality of section 571.070.1(1) both before and after the adoption of Amendment 5, he determined that "[t]he categorical and permanent restrictions" of section 571.070.1(1) were "too broad to survive strict scrutiny."[95] He asserted that the State did not sufficiently demonstrate

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Id. at 535 (quoting Johnson v. California, 543 U.S. 499, 505 (2005)).

87. *Id.* (citing State v. Merritt, 467 S.W.3d 808, 814 (Mo. 2015) (en banc) (per curiam); State v. McCoy, 468 S.W.3d 892, 897 (Mo. 2015) (en banc) (per curiam)).

88. *Id.* at 535–36 (second, third, fourth, and fifth alterations in original) (quoting *Merritt*, 467 S.W.3d at 814).

89. *Merritt*, 467 S.W.3d at 814; *McCoy*, 468 S.W.3d at 897 (citing United States v. Barton, 633 F.3d 168, 175 (3d Cir. 2011); United States v. Yancey, 621 F.3d 681, 684 (7th Cir. 2010) (per curiam)).

90. *Clay*, 481 S.W.3d at 536.

91. *Id.* (quoting Dotson v. Kander, 464 S.W.3d 190, 197 n.5 (Mo. 2015) (en banc) (per curiam)).

92. *Id.* at 537.

93. *Id.* at 538.

94. *Id.* at 539 (Teitelman, J., dissenting).

95. *Id.*

that "categorically and permanently restricting the fundamental constitutional right of nonviolent felons is narrowly tailored to meet a compelling state interest in public safety."[96]

Ultimately, Judge Teitelman provided three deficiencies in the argument that permanently abrogating the constitutional rights of nonviolent felons to keep and bear arms in defense of themselves and their families is narrowly tailored to achieve the State's compelling interest of public safety.[97] First, he asserted that the studies and data offered by the State do not demonstrate that permanently banning convicted nonviolent felons from possessing a firearm will ameliorate any gun crime.[98] He noted that the studies provided by the State failed to differentiate between the rates and types of gun crimes committed by those with no prior convictions relative to individuals with prior nonviolent or violent convictions.[99] Second, he indicated that the majority opinion failed to properly consider that the number of nonviolent felons is growing.[100] Finally, he argued that the Louisiana statute at issue in *State v. Eberhardt* is "radically different" than section 571.070.1(1).[101] According to Judge Teitelman, unlike section 571.070.1(1), the Louisiana statute was narrowly tailored because it only banned possession of firearms by *dangerous* felons,[102] and the

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* He opined:

> The State does not show that any of the studies or articles separately analyzed obvious variables such as the number and nature of the prior offenses, the number and nature of subsequent offenses, the age of the offenders, or the lapse of time between offenses. The lack of analysis of different variables renders it impossible to determine the relative propensity of convicted nonviolent felons to commit gun crimes. Without this information, it is impossible to determine whether restricting the rights of nonviolent felons is actually narrowly tailored to achieve the goal of public safety.

Id. at 539–40.

100. *Id.* at 539–40. He wrote:

> While it is beyond dispute that murderers, rapists and others who commit violent or dangerous felonies have amply demonstrated the inability to abide by the responsibilities entailed by the right . . . to bear arms, that conclusion becomes considerably less certain and, in some cases, counterintuitive when one considers the broad and ever-expanding array of nonviolent felonies.

Id. at 540–41.

101. *Id.* at 541.

102. Dangerous felons include only those who have been convicted of enumerated felonies "determined by the legislature to be offenses having the actual or potential danger of harm to other members of the general public." State v. Eberhardt, 145 So. 3d 377, 385 (La. 2014).

ban was not permanent but lasted ten years following completion of the sentence.[103]

V. COMMENT

As demonstrated above, neither *Heller* nor *McDonald* declared a specific level of scrutiny for determining the constitutionality of laws that limit the right to bear arms.[104] By requiring strict scrutiny, Missouri actually expanded the protection of the right to bear arms beyond the realm of the U.S. Supreme Court's holdings in *Heller* and *McDonald*. Judge Fischer alluded to this expansion in his concurring opinion in *Dotson v. Kander*.[105] He noted that the purpose of Amendment 5 to article I, section 26 was "to make sure the Missouri Constitution is *at least as* protective as the Supreme Court of the United States has declared the law of the right to bear arms is under the Second Amendment to the United States Constitution."[106]

Prior to *Merritt* and *McCoy*, neither Missouri nor the federal government had ever applied strict scrutiny to restrictions on the right to bear arms.[107] Thus, the Supreme Court of Missouri, in *Dotson* and its progeny, ultimately defined Missouri's standard.[108] First, this Part will address the weaknesses in the Supreme Court of Missouri's definition and application of strict scrutiny. Specifically, it will assert that section 571.070.1(1), while consistent with the *Heller* dicta, cannot survive under a strict scrutiny standard. Next, this Part will recognize the inherent difficulties in applying strict scrutiny to the right to bear arms, as well as the rationales behind and implications of the court's use of strict scrutiny in *Clay*. Ultimately, this Part will conclude that the Supreme Court of Missouri failed to exercise the level of scrutiny required by the Missouri people and their constitution.

A. Section 571.070.1(1) Cannot Survive Strict Scrutiny

While the Supreme Court of Missouri's language is consistent with the strict scrutiny standard, its limited analysis fails to convincingly demonstrate that section 571.070.1(1) actually meets this high constitutional bar. Neither

103. *Id.*

104. *See* District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008) (determining that the District of Columbia law is unconstitutional "[u]nder any of the standards of scrutiny" that the Court has applied to enumerated rights). *See also* McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (holding that the right to bear arms is fundamental and applies to states).

105. Dotson v. Kander, 464 S.W.3d 190, 202 (Mo. 2015) (en banc) (per curiam) (Fischer, J., concurring).

106. *Id.* (emphasis added).

107. *See id.* ("Strict scrutiny has no settled meaning as applied to the right to bear arms, which the Supreme Court of the United States has declared a '[ ]limited' fundamental right." (alteration in original) (quoting *Heller*, 554 U.S. at 595, 626)).

108. *See id.* at 197.

the *Heller* nor *McDonald* Courts applied a specific level of scrutiny to the right to bear arms.[109] Nevertheless, in its strict scrutiny analysis, the Supreme Court of Missouri relied on the *Heller* dicta, which determined that laws prohibiting possession of firearms by felons are presumptively lawful.[110] Despite the Supreme Court of Missouri's assumption, the *Heller* Court's declaration that prohibitions of firearm possession by felons are presumed lawful does not mean that they are presumed lawful under the strict scrutiny standard.

The *Clay* court erred in using the more lenient constitutional standard employed by the U.S. Supreme Court to justify its upholding of section 571.070.1(1). In *Clay*, the Supreme Court of Missouri expressed the position that, in order to satisfy strict scrutiny, a law does not necessarily have to be "narrowly tailored to achieve a compelling state interest."[111] To justify its position, the Supreme Court of Missouri referred to the language used by the U.S. Supreme Court in both *Heller* and *Burdick v. Takushi*.[112] But neither the *Heller* nor *Burdick* Courts applied a strict scrutiny test.[113] As noted above, the *Heller* Court deliberately did *not* define a specific standard of scrutiny.[114] The *Burdick* Court expressly rejected strict scrutiny, determining that "a more flexible standard" applied.[115] This more lenient standard, quoted in the *Clay* opinion, asked whether a regulation imposed "reasonable, nondiscriminatory restrictions" that served "the State's important regulatory interests" or whether the encroachment was "significant."[116] Because neither the *Heller* Court nor the *Burdick* Court actually applied strict scrutiny, the *Clay* court erred in using these Courts' analyses to justify its conclusion that, to satisfy strict scrutiny, a law does not necessarily have to be narrowly tailored to achieve a compelling state interest.

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109. *See Heller*, 554 U.S. at 628–29 (determining that the District of Columbia law is unconstitutional "[u]nder any of the standards of scrutiny" that the Court has applied to enumerated rights). *See also McDonald*, 561 U.S. at 767 (holding that the right to bear arms is fundamental and applies to states).

110. State v. Clay, 481 S.W.3d 531, 535 (Mo. 2015) (en banc) (citing *Heller*, 554 U.S. at 626–27).

111. *Id.* The court opined:

> While most commonly courts apply strict scrutiny by determining whether a law was narrowly tailored to achieve a compelling state interest, in other cases, . . . the courts look to whether a regulation imposes "reasonable, non-discriminatory restrictions" that serve "the State's important regulatory interests" or whether the encroachment is "significant."

Id. (quoting Johnson v. California, 543 U.S. 499, 505 (2005)).

112. *Id.* (citing *Heller*, 554 U.S. at 628–29; Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

113. *Heller*, 554 U.S. at 628–29; *Burdick*, 504 U.S. at 428.

114. *Heller*, 554 U.S. at 628–29.

115. *Burdick*, 504 U.S. at 428.

116. *Id.*; *Clay*, 481 S.W.3d at 535.

A categorical restriction on the possession of firearms by felons cannot survive strict scrutiny.[117] Strict scrutiny is the "most rigorous and exacting standard of constitutional review."[118] To survive strict scrutiny, a law must be the "least restrictive means of achieving a compelling state interest."[119] The standard can also be stated as requiring the law to be "narrowly tailored" or "necessary" to promote the state's "compelling interest."[120] The Supreme Court of Missouri used the language of this standard but failed to accurately apply the test.[121]

Despite the *Clay* court's expression that a law need not be narrowly tailored to achieve a compelling government interest to survive strict scrutiny, the court nevertheless relied on the *Merritt* and *McCoy* opinions to conclude that section 571.070.1(1) survived strict scrutiny because it is narrowly tailored to achieve a compelling government interest.[122] In *Merritt* and *McCoy*, the Supreme Court of Missouri held that section 571.070.1(1) survived strict scrutiny because the state had "a compelling interest in ensuring public safety and reducing firearm-related crime."[123] In reaching the conclusion that prohibiting felons from possessing firearms was narrowly tailored, the court relied on two federal appellate cases, *United States v. Barton*[124] and *United States v. Yancey*.[125] These cases opined that it was "well-established that felons are more likely to commit violent crimes than are other law abiding citizens," and

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117. *See, e.g.*, Mark Tushnet, *Permissible Gun Regulations After* Heller*: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1429 (2009) [hereinafter Tushnet, *After* Heller] (determining that a ban on possession of firearms by felons would not survive strict scrutiny because it is "almost certainly overbroad").

118. Dotson v. Kander, 464 S.W.3d 190, 197 (Mo. 2015) (en banc) (per curiam) (quoting Miller v. Johnson, 515 U.S. 900, 920 (1995)). *See also* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring) ("This most exacting standard 'has proven automatically fatal' in almost every case." (quoting Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J., concurring))).

119. McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014) (citing United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000)).

120. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (stating that strict scrutiny requires a law to be "narrowly tailored to further compelling governmental interests"). *See also* Etling v. Westport Heating & Cooling Servs., Inc., 92 S.W.3d 771, 774 (Mo. 2003) (en banc) (per curiam) (stating that strict scrutiny requires a law to be "necessary to accomplish a compelling state interest").

121. Post-*Heller*, Tushnet predicted that lower courts would uphold regulations "reasonably analogous to the longstanding ones that the Court in *Heller* purported to leave untouched" under what the courts would call "strict scrutiny," though the test actually applied will be a more lenient standard. Tushnet, *After* Heller, *supra* note 117, at 1428 n.13.

122. State v. Clay, 481 S.W.3d 531, 535 (Mo. 2016) (en banc).

123. State v. McCoy, 468 S.W.3d 892, 897 (Mo. 2015) (en banc) (per curiam); State v. Merritt, 467 S.W.3d 808, 814 (Mo. 2015) (en banc) (per curiam).

124. United States v. Barton, 633 F.3d 168, 175 (3d Cir. 2011), *overruled by* Binderup v. Attorney Gen. U.S., 836 F.3d 336 (3d Cir. 2016).

125. United States v. Yancey, 621 F.3d 681, 685 (7th Cir. 2010) (per curiam).

"someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use."[126]

These appellate court cases are easily distinguished from *Merritt*, *McCoy*, and *Clay* and do not support a holding that section 571.070.1(1) survives the narrowly tailored prong of the strict scrutiny standard. Most notably, the appellate courts followed *Heller* and did not apply a specific level of scrutiny.[127] The *Barton* court relied on the *Heller* Court's statement that laws prohibiting felons from possessing firearms are "presumptively lawful" and concluded that this restriction was "entirely consistent with the purpose of the Second Amendment to maintain 'the security of a free State.'"[128] In *Yancey*, the court asked whether the government had made a "strong showing" that the challenged law was "substantially related to an important governmental objective."[129] Nothing in either opinion supported a conclusion that a right to bear arms restriction would survive under the strict scrutiny test.[130] Indeed, the *Yancey* court implied the possibility that, under a more stringent standard, a law prohibiting felons from possessing firearms would not survive.[131] The court stated, "[W]hile felon-in-possession laws could be criticized as 'wildly overinclusive' for encompassing nonviolent offenders, every state court in the modern era to consider the propriety of disarming felons under *analogous state constitutional provisions* has concluded that step to be permissible."[132] Although such limitations have been found to be permissible under standards such as those performed by the *Yancey* and *Barton* courts, it seems highly unlikely that a "wildly overinclusive" law would survive strict scrutiny.

While it might be true that felons are more likely to commit violent crimes than non-felons, this fails to demonstrate how a law prohibiting felons from possessing firearms is narrowly tailored or the least restrictive means to promote the government's interest. For instance, it is also true that both men and individuals aged fifteen to twenty-four are, in general, more likely than the general population to commit violent crimes.[133] But, this does not justify restricting these classes' right to bear arms, especially when the restriction is evaluated under strict scrutiny. A restriction of firearm possession by felons can be easily narrowed to achieve the interests of safety and reduction of violent crime. Most obviously, the class of all felons could be narrowed to a class

126. *McCoy*, 468 S.W.3d at 897; *Merritt*, 467 S.W.3d at 814 (first quoting *Barton*, 633 F.3d at 175; and then quoting *Yancey*, 621 F.3d at 685).

127. *Barton*, 633 F.3d at 175; *Yancey*, 621 F.3d at 683.

128. *Barton*, 633 F.3d at 175 (quoting U.S. CONST. amend. II).

129. *Yancey*, 621 F.3d at 683.

130. *Id.*; *Barton*, 633 F.3d at 175.

131. *Yancey*, 621 F.3d at 683.

132. *Id.* (emphasis added) (quoting Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 721 (2007) [hereinafter Winkler, *Scrutinizing*]).

133. *Crime and Criminal Justice*, A PRIMER ON SOCIAL PROBLEMS 372, 381 (2012) (ebook), http://jsmith.cis.byuh.edu/pdfs/a-primer-on-social-problems/s11-crime-and-criminal-justice.pdf.

of individuals who are even more likely to commit violent crimes with firearms – violent felons.

A general ban on the possession of firearms by all felons simply is not the least restrictive means to promote the government's interest of public safety. A ban on the possession of firearms by felons is almost certainly overbroad.[134] There is not much evidence that indicates a convicted felon is more likely to engage in unlawful acts with a gun than a non-felon.[135] Indeed, to support the proposition that it is "well-established that felons are more likely to commit violent crimes than are other law abiding citizens," the Supreme Court of Missouri merely cited to the *Barton* and *Yancey* decisions, neither of which provided strong evidence to support this assertion.[136] In *Barton*, the Third Circuit cited to the Bureau of Justice Statistics, which found that within a population of 234,358 federal inmates released in 1994, the rates of arrest for homicides were fifty-three times the national average.[137] This study is clearly outdated and imprecise.[138] In *Yancey*, the court specified that the "evidence of historical precedent for prohibiting criminals from carrying arms" is frequently debated by scholars.[139] The court cited to *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, in which Carlton F.W. Larson asserts that prohibiting the possession of firearms by nonviolent felons does not seem to serve the government's interest in public safety.[140] He writes, "Why would we think that a tax evader, an embezzler, or someone who bribed a public official would be more likely to commit acts of gun violence?"[141] Larson also notes that laws permanently banning the possession of firearms by all felons are also overbroad with respect to *violent* felons.[142] He asserts, "Is it at all realistic to think, say, that a ninety-two year old man, confined to a wheelchair, who committed an armed burglary in his early twenties and was released from prison over sixty years ago, poses a realistic threat of unlawful gun violence?"[143] Nevertheless, the court in *Yancey* concluded that the right to bear

134. Tushnet, *After* Heller, *supra* note 117, at 1429.

135. Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 HASTINGS L.J. 1371, 1380 (2009) ("[T]he fit between being a convicted felon and being someone who is likely to engage in unlawful acts with a gun, although far from irrational, is not especially tight.").

136. State v. Clay, 481 S.W.3d 531, 535–36 (Mo. 2016) (en banc) (quoting State v. Merritt, 467 S.W.3d 808, 814 (Mo. 2015) (en banc) (per curiam)).

137. United States v. Barton, 633 F.3d 168, 175 (3d Cir. 2011), *overruled by* Binderup v. Attorney Gen. U.S., 836 F.3d 336 (3d Cir. 2016) (citation omitted).

138. *Id.*

139. United States v. Yancey, 621 F.3d 681, 684 (7th Cir. 2010) (per curiam).

140. Larson, *supra* note 135, at 1381.

141. *Id.* (footnotes omitted).

142. *Id.*

143. *Id.*

arms is "tied to the concept of a virtuous citizenry," and therefore, the government can disarm "unvirtuous citizens."[144] While the *Barton* and *Yancey* courts held that these findings were sufficient to allow the laws to pass muster under a lower level of scrutiny, these findings do not indicate that a permanent ban of the possession of firearms by all felons is narrowly tailored.

Judge Teitelman expressed similar views in his dissent.[145] He opined that the State failed to present adequate evidence distinguishing between the rate and types of gun crimes committed by those with no prior convictions relative to individuals with prior or violent convictions.[146] Further, he suggested that section 571.070.1(1) could be more narrowly tailored by limiting the length of time for which the prohibition applies to a specific felon.[147] Judge Teitelman concluded that the "categorical and permanent restrictions that section 571.070.1 places on the exercise of this fundamental right are too broad to survive strict scrutiny."[148]

While the Supreme Court of Missouri relied on *State v. Eberhardt*, a Louisiana case, to justify its upholding of section 571.070.1(1), this case is inapposite to *Clay*.[149] In fact, the Louisiana law at issue in *Eberhardt* exemplifies how section 571.070.1(1) could have easily been more narrowly tailored and less restrictive.[150] The Louisiana law was not a categorical or permanent ban on the possession of firearms for felons, which enabled the Louisiana Supreme Court to determine that the State met its burden in satisfying strict scrutiny.[151] The *Eberhardt* court determined

> the law is narrowly tailored in its application to the possession of firearms or the carrying of concealed weapons for a period of only ten years from the date of completion of sentence, probation, parole, or suspension of sentence, and to only those convicted of the enumerated felonies determined by the legislature to be offenses having the actual or potential danger of harm to other members of the general public.[152]

Conversely, section 571.070.1(1) permanently bans all felons from possessing firearms and does not differentiate between violent and nonviolent felons.[153]

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144. United States v. Yancey, 621 F.3d 681, 684–85 (7th Cir. 2010) (per curiam) (quoting United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010)).

145. State v. Clay, 481 S.W.3d 531, 539 (Mo. 2016) (en banc) (Teitelman, J., dissenting).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 541.

150. *Id.*

151. State v. Eberhardt, 145 So. 3d 377, 379 (La. 2014).

152. *Id.* at 385.

153. MO. REV. STAT. § 571.070.1 (Cum. Supp. 2013). The statute states:

Eberhardt does not justify upholding section 571.070.1(1). To the contrary, the Louisiana statute demonstrates how section 571.070.1(1) could be more narrowly tailored.[154]

B. Difficulties in Application of Strict Scrutiny to the Right to Bear Arms

As suggested in Judge Teitelman's dissent, and as demonstrated by the statute at issue in *State v. Eberhardt*, there are many ways that section 517.070.1(1) could have been more narrowly tailored.[155] However, it is inherently challenging to assess the efficacy of gun control laws, and as a result, it is difficult for the government to meet its burden under a true strict scrutiny standard.[156] In its response to Judge Teitelman's dissent, the *Clay* majority alluded to the difficulty in applying strict scrutiny to the right to bear arms.[157] The court rejected any suggestion that, "for the law to survive strict scrutiny," the court must "in each case de novo reconsider and itself evaluate the strength of studies about the use of weapons by felons before it can determine whether restrictions on the right of felons to bear arms are sufficiently narrowly tailored."[158] The court indicated that if the State were required to present convincing studies demonstrating that restricting felons from possessing firearms actually improved public safety, it would struggle to meet its burden.[159]

It is, of course, inherently difficult to ascertain whether gun control laws actually improve public safety.[160] Demonstrating that a gun control law is narrowly tailored requires one to predict "(1) the possible decrease in injury and

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> A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and . . . [s]uch 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.

Id.

154. LA. STAT. ANN. § 14:95.1 (2017).

155. *Clay*, 481 S.W.3d at 539 (Teitelman, J., dissenting); *Eberhardt*, 145 So. 3d at 382.

156. *See, e.g.*, Tushnet, *After* Heller, *supra* note 117, at 1427 ("[I]n general, it is quite difficult to show with any moderately persuasive social-science evidence that discrete and moderate gun regulations – what political candidates and public opinion surveys refer to as reasonable gun regulations – do much if anything to advance public policies favoring reduction in violence, reduction in gun violence, reduction in accidents associated with guns, or pretty much anything else the public thinks the regulations might accomplish."); Volokh, *supra* note 24, at 1465 ("The difficulty is that we often won't know if the proposed law is really necessary to reduce various dangers. And this is especially true as to the right to keep and bear arms.").

157. *Clay*, 481 S.W.3d at 536 n.5.

158. *Id.* at 536.

159. *Id.*

160. Volokh, *supra* note 24, at 1465.

crime stemming from the controls and (2) the possible increase in injury and crime stemming from the interference with lawful self-defense."[161] These are both difficult, if not impossible, to project and calculate.[162] But, the nature of the strict scrutiny test requires some level of evidence and analysis demonstrating that the law is narrowly tailored or the least restrictive means to promote the government's interest.[163] In fact, both the Supreme Court of Missouri and the U.S. Supreme Court have required this showing when they have applied strict scrutiny to other various rights.[164]

In *State v. Clay*, the court erred in failing to recognize that the State did not satisfy this burden. In determining whether section 571.070.1(1) was narrowly tailored, the court merely cited to *Barton*, noting that "[i]t is well-established that felons are more likely to commit violent crimes than are other law

161. *Id.*

162. *See, e.g.*, *id.* ("Gun control proponents argue that only banning guns, or removing guns from certain places, or limiting guns in other ways will prevent certain kinds of crimes. And they suggest that lawful self-defense isn't really that effective, or that it won't be much interfered with by the proposals . . . . Gun control opponents argue that the gun restrictions largely won't disarm those who misuse guns, since the misusers are criminals who won't comply with gun laws any more than they comply with laws banning robbery, rape, or murder. And they argue that any possible slight decline in injuries caused by people who do comply with gun laws, or in accidental injuries or in suicides . . . will be more than offset by the increase in crime and injury stemming from lost opportunities for effective self-defense." (footnote omitted)). For a more comprehensive version of this debate, see Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437 (2011).

163. Rosenthal & Malcolm, *supra* note 162, at 438–39.

164. *See, e.g.*, *In re* Norton, 123 S.W.3d 170, 174 (Mo. 2003) (en banc) (determining that a law which required secure confinement of sexually violent predators was narrowly tailored because the state "erect[ed] an elaborate, step-by-step procedure, conferring on the suspected predator a number of rights enjoyed by defendants in criminal prosecutions" and mandated annual court examinations to "determine if the person's mental abnormality has improved with treatment and if the individual remains likely to engage in violent sexual acts if released"), *modified* (Jan. 27, 2004); Weinschenk v. State, 203 S.W.3d 201, 217 (Mo. 2006) (en banc) (holding that provision requiring photo identification to vote was not narrowly tailored to serve the compelling state interest in preventing voter fraud because "[n]o evidence was presented that voter impersonation fraud exists to any substantial degree in Missouri. In fact, the evidence that was presented indicates that voter impersonation fraud is not a problem in Missouri"). *See also* Frontiero v. Richardson, 411 U.S. 677, 689 (1973) (holding that a law requiring a female member of the uniformed services to prove dependency in fact to receive benefits for her spouse, where no such burden was imposed upon male members, required the government to demonstrate concrete evidence that "it is actually cheaper to grant increased benefits with respect to *all* male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement" in order to survive strict scrutiny (emphasis added)).

abiding citizens."[165] Further, the court opined that 571.070.1(1) was narrowly tailored in that it "does not apply to misdemeanors, felony convictions that have been pardoned, or possession of antique firearms."[166] Because the State failed to show evidence indicating that a categorical and permanent restriction of firearm possession by felons actually increases public safety, the court should have held section 571.070.1(1) unconstitutional.

C. The Rationale Behind and Implications of the Clay *Decision*

Most laws do not survive under a strict scrutiny standard.[167] But, a court striking down a restriction of the right to bear arms can result in substantial consequences that do not typically occur when other laws restricting fundamental rights are declared unconstitutional. For example, had the Supreme Court of Missouri declared section 571.070.1(1) unconstitutional, then *all* felons would have the legal ability to possess firearms until the Missouri legislature passed a law that was narrowly tailored to achieve a compelling government interest.[168] But, the potentially unsettling aftermath of declaring section 571.070.1(1) unconstitutional does not exempt the State from having to meet its burden, nor does it exempt the court from fulfilling its responsibility to strike down unconstitutional laws.

Because declaring 571.070.1(1) unconstitutional would have allowed *all* felons, including violent felons, to possess firearms for at least a short period of time, the approach taken by the court was likely motivated by its desire to avoid this policy result. But, this approach failed to embody the rigorous strict scrutiny standard. As Justice Breyer predicted in his *Heller* dissent, this analysis was, in practice, akin to an interest-balancing inquiry, where the Court asked whether "the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[169] The finding that felons were more likely to commit

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165. State v. Clay, 481 S.W.3d 531, 535 (Mo. 2016) (en banc) (alteration in original) (quoting State v. Merritt, 467 S.W.3d 808, 814 (Mo. 2015) (en banc) (per curiam)).

166. *Id.* at 536.

167. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) ("Overall, 30 percent of all applications of strict scrutiny – nearly one in three – result in the challenged law being upheld.").

168. *See* Grutter v. Bollinger, 539 U.S. 309, 326 (2003) (stating that strict scrutiny requires a law to be narrowly tailored to the government's compelling interest). *See also* Etling v. Westport Heating & Cooling Servs., Inc., 92 S.W.3d 771, 774 (Mo. 2003) (en banc) (per curiam) (stating that strict scrutiny requires a law to be "necessary to accomplish a compelling state interest").

169. District of Columbia v. Heller, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting). In his *Heller* dissent, Justice Breyer noted that the adoption of a true strict scrutiny standard for evaluating gun-control regulation would be impossible. *Id.* He opined:

violent crimes than "other law abiding citizens" proved a compelling interest to restrict firearm possession by felons – an interest that is likely not overcome by its "burden" on the right to bear arms.[170] Thus, while the State could not sufficiently prove that section 571.070.1(1) is narrowly tailored, it did convince the majority in *Clay* that the state's compelling interest in public safety outweighs the right of felons to bear arms.[171]

Despite the *Heller* majority's explicit rejection of the interest-balancing test,[172] analysis of the majority's decision in *State v. Clay* indicates that the attempt to apply a high standard of scrutiny to a law restricting the right to bear arms may actually morph into an interest-balancing inquiry.[173] On the other hand, had the Supreme Court of Missouri properly applied strict scrutiny, then, for the reasons outlined above, it would have found that the State failed to meet its burden because there was insufficient evidence showing that a permanent firearm ban for all felons was narrowly tailored to achieve the government's public safety interest.

By failing to properly apply strict scrutiny, the court defied the clear language of the constitution, as well as its duty to declare the statute unconstitutional.[174] The court attempted to justify its upholding of section 571.070.1(1) under strict scrutiny by citing to its determination that Amendment 5 did not "substantially change" article I section 23.[175] In their *Dotson* concurrences, both Judge Fischer and Judge Stith stated that the authors of Amendment 5, which included the Missourians Protecting the Second Amendment, merely

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> [A]ny attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

Id.

170. *Clay*, 481 S.W.3d at 536.

171. *Id.*

172. *Heller*, 554 U.S. at 635.

173. *See, e.g.*, Rosenthal & Malcolm, *supra* note 162, at 446–47 ("[T]he historical acceptance of concealed-carry prohibitions cannot be explained by anything other than this very type of interest-balancing – an approach that does not require the kind of compelling empirical evidence of necessity that the strict scrutiny test demands.").

174. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.").

175. *Clay*, 481 S.W.3d at 536 (citing Dotson v. Kander, 464 S.W.3d 190, 190 (Mo. 2015) (en banc) (per curiam)).

wanted to "ensure that the Missouri right to keep and bear arms remains coextensive with the federal right explicated in *Heller* and *McDonald*."[176] But, the authors of Amendment 5 undoubtedly desired the greatest protection of the right to bear arms possible and recognized that the "strict scrutiny" language would increase the protection of the right.[177] The Missourians Protecting the Second Amendment website notes that, prior to the addition of Amendment 5, Missouri's right to bear arms provision was "deemed to only deserve a 'rational basis' or the lowest standard of review – virtually any rights-infringing law can pass this level of review."[178] Thus, with their approval of Amendment 5, Missourians called for the application of the most exacting standard of review for laws restricting the right to bear arms.[179]

It seems, though, that the court had reason to fail to exercise the power given to them by the people. First, as addressed above the court must have recognized that declaring section 571.070.1(1) unconstitutional would, at least for a period of time, allow all felons to possess firearms, including those who committed the most violent crimes. Further, in *Scrutinizing the Second Amendment*, Adam Winkler notes that when courts apply a true strict scrutiny standard for laws restricting the right to bear arms, "legislatures may be hesitant to undertake their duty to enhance public safety by regulating weapons out of fear that strict scrutiny will in fact be fatal."[180] He states, "Even if legislatures know that some laws survive Second Amendment strict scrutiny, the expected bene-

176. *Dotson*, 464 S.W.3d at 202 (Fischer, J., concurring); *see also id.* at 206–07 (Stith, J., concurring) (noting that Amendment 5 "was not intended to change the current state of the law regarding the right to carry or to regulate concealed weapons but was intended only to codify that law"). The court seems to read Amendment 5 in a way that makes it pure surplusage. *Id.* at 210. This violates an important canon of statutory interpretation – the principle that each word in a statute is meaningful, and thus, "an interpretation that would render a word or phrase redundant or meaningless should be rejected." Katharine Clark & Matthew Connolly, *A Guide to Reading, Interpreting and Applying Statutes*, WRITING CTR. AT GEO. U. L. CTR. 6 (Apr. 2006), https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf. *See also* Matthew Davis, Note, *Statutory Interpretation in Missouri*, 81 MO. L. REV. 1127, 1136 (2016) ("Ideally, 'every word, clause, sentence, and provision of a statute' should be given effect." (quoting 801 Skinker Boulevard Corp. v. Dir. of Revenue, 395 S.W.3d 1, 5 (Mo. 2013) (en banc))).

177. MISSOURIANS PROTECTING 2ND AMEND., http://www.morkba.com/ (last visited Nov. 17, 2016) (encouraging constituents to support Amendment 5 because it "[a]dds 'strict scrutiny' which is the highest level of legal protection for a constitutional right").

178. *Id.*

179. *Id.*

180. Winkler, *Scrutinizing*, *supra* note 132, at 731.

fits of gun control would be discounted by the probability of judicial invalidation."[181] The court avoids these potentially problematic implications by circumventing a true strict scrutiny application and declining to declare section 571.070.1(1) unconstitutional.[182]

The court's faulty application of strict scrutiny is concerning. *Dotson* and its progeny will undoubtedly serve as precedent for future challenges to laws restricting the right to bear arms in Missouri. Thus, despite the language of the Missouri Constitution requiring laws restricting the right to bear arms to be narrowly tailored to achieve a compelling government interest, the court will continue to uphold laws that in reality fail to meet this standard. Possibly more concerning, it is probable that the court's erroneous application of strict scrutiny to the right to bear arms may lead to the loose application of strict scrutiny to laws that undermine other fundamental rights. Should this occur, laws limiting fundamental rights will be upheld under the strict scrutiny standard merely because there is a compelling government interest,[183] despite the state's failure to demonstrate that the law is narrowly tailored.

VI. CONCLUSION

In *State v. Clay*, the Supreme Court of Missouri declared constitutional a law that prohibited felons from possessing firearms – a Second Amendment restriction that has historically been affirmed by the U.S. Supreme Court, lower federal courts, and state courts. The Supreme Court of Missouri's decision in *Clay* differed from that of other courts, however, in that the Supreme Court of Missouri found this law constitutional, even under a strict scrutiny standard. While the Supreme Court of Missouri's holding is seemingly consistent with the intentions of the U.S. Supreme Court and the Missouri legislature, it is arguably inconsistent with the Missouri Constitution's true meaning and the will of the people of Missouri. In failing to properly apply strict scrutiny, the court evaded its duty to serve as a check on the legislative branch and strike down legislation that impinges upon the people's constitutional rights.[184]

To carry out the role demanded by the Framers[185] and preserve the meaning of the most exacting standard of constitutional review, the court should have properly applied strict scrutiny and declared section 571.070.1(1) unconstitutional. The court could have declared the law unconstitutional while also avoiding the potential problematic policy implications addressed above. For example, in declaring section 571.070.1(1) unconstitutional, the court could

181. *Id.*

182. State v. Clay, 481 S.W.3d 531, 534–35 (Mo. 2016) (en banc).

183. *See supra* notes 166–68 and accompanying text.

184. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.").

185. *Id.*

have provided suggestions of laws that are narrowly tailored. For instance, the Louisiana law at issue in *State v. Eberhardt* is as an example of a properly tailored felon-in-possession statute.[186] Additionally, declaring the statute unconstitutional "as applied" to Clay, a nonviolent felon, was another option for the court. This would have avoided a facial declaration of unconstitutionality and preserved the restrictions on all felons until the Missouri legislature passed a new law. These alternatives would have allowed the court to fulfill its duty under the constitution, while avoiding potential negative policy implications. Instead, the court chose an option that left unclear the proper application of the strict scrutiny standard to laws restricting the right to bear arms and ultimately flouted the language of the constitution.

186. State v. Eberhardt, 145 So. 3d 377, 381 (La. 2014).