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### Shooting Fish

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# SHOOTING FISH

Michael L. Smith\*

## INTRODUCTION

Many academic legal articles begin with sweeping statements concerning the majesty of law, often noting that “the life of the law has not been logic: it has been experience,” and that “the law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”<sup>1</sup> This is not one of those articles, as it gets straight to the point, asking the question that’s on everyone’s mind: if you’re walking next to a stream, river, lake, or pond, and you happen to see a fish—are you allowed to shoot it with a gun?

One might wonder how common such a practice may be,<sup>2</sup> but this only reveals a failure to spend enough time with the right folks in northwest Iowa near shallow streams that tend to overflow with carp at certain times of the year.<sup>3</sup> With the proliferation of invasive fish species, such as carp,<sup>4</sup> scholarship addressing when

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<sup>1</sup> And, in doing so, signify that the author has managed to read at least (and often, only) the first page of Oliver Wendell Holmes Jr.’s, *The Common Law*. See OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic: it has been experience. . . . The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”).

<sup>2</sup> See, e.g., KEVIN UNDERHILL, *THE EMERGENCY SASQUATCH ORDINANCE: AND OTHER REAL LAWS THAT HUMAN BEINGS HAVE ACTUALLY DREAMED UP, ENACTED, AND SOMETIMES EVEN ENFORCED* 237 (2013) (analyzing Wyoming’s prohibition on shooting fish and noting that “[i]t’s hard to say how common it is for people to try to fish with firearms”).

<sup>3</sup> See *Floodwaters Carry Invasive Carp Into Northwest Iowa Lake*, KCRG (June 28, 2018, 11:13 AM), <https://www.kcrg.com/content/news/Floodwaters-carry-invasive-carp-into-northwest-iowa-lake-486837201.html> [<https://perma.cc/986Q-CULQ>].

<sup>4</sup> See, e.g., Steve Hoffman, *More Invasive Carp Confirmed in Mississippi and St. Croix Rivers*, DULUTH NEWS TRIBUNE (June 21, 2019, 11:00 AM), <https://www.duluthnewstribune.com/sports/outdoors/2723655-More-invasive-carp-confirmed-in-Mississippi-and-St.-Croix-Rivers> [<https://perma.cc/M9JJ-V7SN>]; see also *DNR says 4 invasive carp have been confirmed in Minnesota waters*, KSTP-TV (June 21, 2019, 10:53 AM), <https://kstp.com/news/dnr-says-4-invasive-carp-have-been-confirmed-in-minnesota-waters-5398103/> [<https://perma.cc/4JR5-TU96>] (“Invasive carp have been progressing upstream since escaping into the Mississippi River in the 1970s.”).

and where it is legal to use one's full arsenal to combat these creatures is a useful—if not vital—public service. Indeed, in the case of carp, some bold individuals have chosen to shoot first and ask questions later.<sup>5</sup> While legal scholars have hinted at the scope of laws restricting the shooting of fish,<sup>6</sup> there has yet to be a systematic review of the law of shooting fish with guns.

This Article fills this dramatic void in the literature by surveying state laws that prohibit or restrict shooting fish with firearms. As it turns out, every state and the District of Columbia has a law or regulation on the books that restricts or prohibits shooting fish with firearms. This Article gathers all of these statutes and regulations together for the first time, enabling the interested reader to analyze trends, note drafting mistakes and triumphs, and learn of the myriad methods<sup>7</sup> that people have devised to capture, kill, injure, or otherwise harass fish and other marine organisms.

This Article describes laws in all fifty states and the District of Columbia that explicitly restrict or prohibit the shooting of fish with firearms. It also surveys laws that restrict fishing methods in a manner that effectively prohibits the use of guns to shoot fish. This Article generally focuses on personal fishing and sport fishing, a popular activity with an economic impact in the billions of dollars.<sup>8</sup> Many commercial fishing rules and regulations are also addressed, as numerous restrictions on catching fish contain broad statements on permitted fishing methods—whether the fishing is for recreational or commercial purposes.

This Article does not address general laws regarding firearms that may incidentally restrict shooting fish. For instance,

<sup>5</sup> See, e.g., Sean A. Morr, *Video: Skeet Shooting With Asian Carp*, OUTDOORHUB (Sept. 28, 2014), <https://www.outdoorhub.com/news/2015/08/28/video-skeet-shooting-asian-carp/> [<https://perma.cc/ZM3N-B9NK>] (posting a video of a person shooting Asian carp out of the air with a shotgun and asking “[i]s this even legal? It looks a bit too fun to be legal.”).

<sup>6</sup> See UNDERHILL, *supra*, note 2, at 237.

<sup>7</sup> See Moritz, *The Excitement of Slingbow Hunting and Slingbow Fishing*, MY ARCHERY CORNER (Oct. 25, 2016), <https://myarcherycorner.com/the-excitement-of-slingbow-hunting> [<https://perma.cc/RN9N-QZ6D>] (discussing slingbow fishing or hunting, which consists of using a “slingshot that has been modified to be able to shoot arrows”).

<sup>8</sup> Robert M. Hughes, *Recreational Fisheries in the USA: Economics, Management Strategies, and Ecological Threats*, 81 FISHERIES SCIENCE 1, 1 (2015) (noting that in 2011, “an estimated 33 million anglers . . . participated in over 443,000 fishing trips and generated over \$40 billion in retail sales.”) [<https://perma.cc/JZQ6-6CHX>].

there will be no targeted survey or discussion of laws similar to California's general prohibition on assault rifles,<sup>9</sup> even though such a general prohibition is effectively a ban on shooting fish with assault rifles. Additionally, this Article does not actively seek out and address the shooting of fish with weapons other than firearms, such as arrows or nuclear weapons.<sup>10</sup> Many of these restrictions appear in the Article's discussions, as those prohibitions are often included in the laws banning the use of firearms to shoot fish, but an exhaustive survey of laws regarding fishing with alternate weapons is a topic for another article, book, or treatise.

As for terminology, the phrase "shooting fish" will refer to shooting fish with a gun unless expressly noted otherwise. For further clarity's sake, the phrase "shooting fish with a gun," refers to using a gun to shoot bullets, buckshot, or other projectiles toward fish, either to hit the fish directly or to use the resulting concussion to stun the fish. It does not mean using a gun that fires fish as projectiles. You may think that this clarification is unnecessary, but the realities of human-fish interactions prove otherwise.<sup>11</sup>

Now that you've been hooked by this introduction, it's time for a preview of what's downstream. Part I casts a wide net and surveys laws in every state and the District of Columbia that either directly or indirectly ban or restrict the shooting of fish. While the goal of the survey is to summarize laws on shooting fish, restrictions prohibiting other means of fishing—like explosives, poisons, and spears—are often caught up in the discussion. Part II is a deep dive into various issues implicated by the state laws and

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<sup>9</sup> See CAL. PENAL CODE § 30605 (Deering 2019) (prohibiting the possession of certain assault weapons).

<sup>10</sup> The latter practice is prohibited by general restrictions on the use of such armaments in nuclear-free zones such as Iowa City. See Iowa City, Iowa, Mun. Code § 6-5-3 (prohibiting "Nuclear Weapons Work" which includes "the development, production, deployment, launching, maintenance or storage of nuclear weapons or components of nuclear weapons."). Violation of this ordinance may result in a \$500.00 fine and thirty days imprisonment "for each violation," meaning that someone who launches a nuclear missile not once, but three times, could be punished by a fine of up to \$1,500.00 and imprisonment of up to *ninety* days. Iowa City, Iowa, Mun. Code § 3-4-9.

<sup>11</sup> See Martha Ann Overland, *The Salmon Cannon: Easier Than Shooting Fish Out Of A Barrel*, NAT'L PUB. RADIO (Aug. 31, 2014, 5:23 AM), <https://www.npr.org/sections/thesalt/2014/08/29/344360634/the-salmon-cannon-easier-than-shooting-fish-out-of-a-barrel> (describing a "salmon cannon" used to move hatchery fish using pressure to suck fish through a tube and then shoot them up to thirty feet in the air) [<https://perma.cc/DQ4M-XJZM>].

regulations restricting shooting fish, including why these laws and regulations exist, how states and regulators draft them, laws regarding the taking of invasive fish, the distinction between public and private waters, and potential Second Amendment and state constitutional implications of the laws.

## I. AN OVERVIEW OF LAWS RESTRICTING SHOOTING FISH

### A. State Laws Against Shooting Fish

This Article focuses on state laws, both because of their greater variety, and because legal scholarship tends to focus on federal law rather than state law.<sup>12</sup> Every state has at least one law or regulation that restricts or prohibits the shooting of fish. A table of each state's relevant law(s) or regulation(s), with a summary of the scope of each law or regulation, is below:

State	Law or Regulation	Summary
Alabama	ALA. CODE § 9-11-87	Prohibits taking, catching, or killing any fish in Alabama public waters by any means other than an ordinary hook and line, lure, troll, or spinner. <sup>13</sup>
Alaska	ALASKA ADMIN. CODE tit. 5, § 75.020; 75.027(a)	Permits sport fishing only with a closely attended single line unless otherwise provided by regulation. <sup>14</sup> While regulations permit for various additional methods of taking fish,

<sup>12</sup> See Ellen Ash Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1067–69 (1998) (noting that despite “innovative” developments in state constitutional law, scholars and litigants “direct a disproportionate amount of attention to the work of federal courts.”).

<sup>13</sup> ALA. CODE § 9-11-87 (LexisNexis 2019).

<sup>14</sup> ALASKA ADMIN. CODE tit. 5, § 75.020 (2019).

State	Law or Regulation	Summary
		guns are not permitted unless used while onboard vessels in saltwater to “kill a fish caught with legal gear.” <sup>15</sup> Alaska further bans the use of “any explosive or toxicant for taking any fish in the waters of Alaska,” but permits “shafts tipped with explosive charges” (known as “a bangstick or powerhead”). <sup>16</sup>
Arizona	ARIZ. REV. STAT. § 17-301(C)	“Fish may be taken only by angling unless otherwise provided by the Commission.” <sup>17</sup>
Arkansas	002-00 ARK. CODE R. § 001-26.01	Prohibits fishing “with the use of firearms or explosives,” as well as with the use of electrical devices, and “toxic, stupefying, or killing substances that can injure, stupefy, or kill fish,” in public waters unless done so under a scientific permit issued by the Game and Fish Commission. <sup>18</sup>
California	CAL. CODE REGS. tit. 14, § 27.50	California regulations prohibit the taking of fish by means other than

<sup>15</sup> ALASKA ADMIN. CODE tit. 5, § 75.027(a) (2019).

<sup>16</sup> *Id.*

<sup>17</sup> ARIZ. REV. STAT. § 17-301(C) (LexisNexis 2019).

<sup>18</sup> 002-00 ARK. CODE R. § 001-26.01 (LexisNexis 2019).

State	Law or Regulation	Summary
		angling, <sup>19</sup> except as otherwise authorized by law. <sup>20</sup> California statutes appear to prohibit the taking of fish with firearms in the commercial context, as there is a broad prohibition against non-angling <sup>21</sup> means of taking fish. <sup>22</sup> California law specifically prohibits the use of firearms in the taking of white sturgeon and further prohibits the taking of this fish by means of trolling, snagging, or gaffing. <sup>23</sup>
Colorado	2 COLO. CODE REGS. § 406-1:103	Sets forth a list of legal means of taking fish, and

<sup>19</sup> In the regulatory context, “angling” is defined as the taking “of fish by hook and line with the line held in the hand, or with the line attached to a pole or rod held in the hand or closely attended in such manner that the fish voluntarily takes the bait or artificial lure inside its mouth.” CAL. CODE REGS. tit. 14, § 1.05 (2019).

<sup>20</sup> CAL. CODE REGS. tit. 14, § 27.50 (2020); CAL. CODE REGS. tit. 14, § 2.00(a). Subsection (b) of the regulation prohibits snagging, which includes the spearing of fish with a hook, gaff or “other mechanical implement,” unless the gaff, bow and arrow, or spear is being used as authorized by regulations. CAL. CODE REGS. tit. 14, § 2.00(b).

<sup>21</sup> This statute applies the statutory, rather than regulatory definition of angling, under which “angling” means “the taking of, or attempting to take, fish by hook and line with the line held in the hand, or by hook and line with the line attached to a pole or rod which is closely attended or held in the hand in such a manner that the fish voluntarily takes the bait or lure in its mouth.” CAL. FISH & GAME CODE § 15 (Deering 1957).

<sup>22</sup> CAL. FISH & GAME CODE § 8603. Using a slurp gun, however, is permissible. CAL. FISH & GAME CODE § 9052. A “slurp gun” is “a self-contained, hand-held device used to capture fish by rapidly drawing water containing fish into a closed chamber.” CAL. FISH & GAME CODE § 82.

<sup>23</sup> A gaff is a long pole with a hook on the end that is used to hook a fish. See George Poveromo, *Easy Steps to Gaff Fish Better*, SALT WATER SPORTSMAN (Dec. 2, 2014), <https://www.saltwatersportsman.com/how-to-gaff-fish-tips/> [<https://perma.cc/8AFF-2TEK>] (depicting a picture of a gaff, as well as tips to “gaff fish like a pro”).

State	Law or Regulation	Summary
		prohibiting any non-listed item (unless otherwise provided by statute or regulation.) <sup>24</sup> While the use of a line, trotline, jugs, <sup>25</sup> underwater spearfishing, archery, slingbows, <sup>26</sup> gigs, snagging, by hand, dip nets, seines, <sup>27</sup> cast-nets, live traps, artificial light, and bait are all permitted in at least some circumstances, shooting fish with guns is not on the list. <sup>28</sup>
Connecticut	CONN. AGENCIES REGS. § 26-112-45	Lists several species of fish, and notes that the catching of alewives, blueback herring, and American shad may only be done by angling. <sup>29</sup> Anglers or ice fishers may take other fish, such as

<sup>24</sup> 2 COLO. CODE REGS. § 406-1-103 (LexisNexis 2019).

<sup>25</sup> “Jugs” are “floats to which are attached a line and common hook.” 2 COLO. CODE REGS. § 406-1-100(G) (LexisNexis 2019).

<sup>26</sup> See Moritz, *supra* note 7 (defining a slingbow as a device that is structured like a slingshot, but shoots arrows that are connected to a line and reel, which are used to reel in any fish that are speared by the arrow).

<sup>27</sup> A seine is “a large net with sinkers on one edge and floats on the other that hangs vertically in the water and is used to enclose and catch fish when its ends are pulled together or are drawn ashore.” *Definition of Seine*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/seine> [https://perma.cc/M3TK-T8MF]. However, “legal minnow seines or dip nets, within two hundred (200) yards of a dam that wholly or partly crosses a river, stream, or waterway in Indiana or the boundary water of the state” are permitted. 9 IND. ADMIN. CODE 14-22-9-3 (2019).

<sup>28</sup> 2 COLO. CODE REGS. § 406-1-103 (LexisNexis 2019).

<sup>29</sup> CONN. AGENCIES REGS. § 26-112-45 (2020). Connecticut regulations define angling as “fishing with hook and line which shall be personally attended, but shall not include ice fishing or snagging or snatching.” CONN. AGENCIES REGS. § 26-112-43(a) (2020).



State	Law or Regulation	Summary
		walleye, smelt, northern pike, trout, and kokanee. <sup>30</sup> Other fish, like common carp, may be taken by numerous means, including angling, bobbing, ice fishing, bow and arrow fishing, and spearing. <sup>31</sup> Nowhere in this regulation are firearms listed as a permitted means of taking any listed fish species. While the regulation does not specifically prohibit firearms as a means of taking fish, they prohibit as a means of taking snapping turtles. <sup>32</sup>
Delaware	DEL. CODE ANN. tit. 7, § 1103	Taking fish in the “nontidal waters of this State” may only be done with a hook and line, a dip net (if used to aid the landing of a fish caught with a hook and line), and—in the case of carp—with a bow and arrow or

<sup>30</sup> CONN. AGENCIES REGS. § 26-112-45 (2020).

<sup>31</sup> CONN. AGENCIES REGS. § 26-112-45(f) (2020).

<sup>32</sup> CONN. AGENCIES REGS. § 26-66-14(d)(5). This subsection also prohibits the use of poison, explosives, seines, gill nets, and fyke nets to capture snapping turtles. A fyke net is a cone-shaped bag with wings which is fied to the bottom of the waterway. These wings guide the fish into the net. *Fyke Nets*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, <http://www.fao.org/fishery/geartype/226/en> [<https://perma.cc/Y4XE-NVE5>].

State	Law or Regulation	Summary
		spear, unless otherwise restricted by regulation. <sup>33</sup>
District of Columbia	D.C. CODE MUN. REGS. tit. 19 § 1503.1(f)	Prohibits the taking, killing, or injuring of fish with firearms, explosives, chemicals, or electricity, unless done so pursuant to a scientific collection permit issued under section 1501.4 of the municipal regulations. <sup>34</sup>
Florida	FLA. ADMIN. CODE ANN. r. 68A-23.002	Prohibits taking freshwater fish with firearms, underwater swimming or diving, use of any “free-floating unattached devices,” explosives, electricity, spear guns, poison, or “any other deleterious substance or force unless specifically authorized by law.” <sup>35</sup> Florida’s regulations also prohibit the use of firearms in a variety of specific lakes and counties. <sup>36</sup>
Georgia	GA. CODE ANN. § 27-4-8	Bans the use of firearms, batteries, generators, dynamite, explosives,

<sup>33</sup> DEL. CODE ANN. tit. 7, § 1103 (2019).

<sup>34</sup> D.C. CODE MUN. REGS. tit. 19 § 1503.1(f) (2019). This law is redundant in light of a separate regulation permitting fishing by means of rod, hook, and line unless otherwise permitted. *See* D.C. MUN. REGS. tit. 19, § 1502.2 (2001).

<sup>35</sup> FLA. ADMIN. CODE ANN. r. 68A-23.002(5) (2020).

<sup>36</sup> FLA. ADMIN. CODE ANN. r. 68A-20.005 (2020).

State	Law or Regulation	Summary
		poisons, walnut hulls, <sup>37</sup> and lime for the purpose of catching, killing, taking, or harming fish. <sup>38</sup>
Hawaii	HAW. CODE R. 13-75-8(a)	Bans pursuit, taking, or killing of any "turtle, crustacean, mollusk, aquatic mammal, or fish, except tuna and billfish that have been caught and gaffed, and sharks, in the State with firearms." <sup>39</sup>
Indiana	IC 14-22-9-1	Prohibits the taking of fish from state-owned waters with firearms, a weir, an electric current, dynamite or other explosive, a net, a seine, <sup>40</sup> a trap, poison, or "the hands alone" unless the individual has a special permit or is otherwise permitted to do so by law. <sup>41</sup>
Idaho	IDAHO ADMIN. CODE r. 13.01.11.200(02)	Prohibits the "molesting" of fish by shooting at them with firearms or pellet guns, striking at fish with clubs, hands, rocks, or

<sup>37</sup> Juglone, an organic compound produced by walnut trees, is a fish toxicant that may be used to stun or poison fish. Maryon Strugstad and Saško Despotovski, *A Summary of Extraction, Synthesis, Properties, and Potential Uses of Juglone: A Literature Review*, 13 J. ECOSYSTEMS & MANAGEMENT, no. 3, 2012, at 1, 7.

<sup>38</sup> GA. CODE ANN. § 27-4-8 (2019).

<sup>39</sup> HAW. CODE R. § 13-75-8(a) (LexisNexis 2007).

<sup>40</sup> *Definition of Seine*, *supra* note 27.

<sup>41</sup> IND. CODE ANN. § 14-22-9-1 (LexisNexis 2012).

State	Law Regulation	or	Summary
			other objects, building obstructions for catching fish, or chasing fish up or downstream in any manner. <sup>42</sup>
Illinois	515 ILL. COMP. STAT. ANN. § 5/10-80		Prohibits taking “any aquatic life” with firearms, electricity, lime, acid, medicated drugs or chemical compounds, drugs or fishberries, <sup>43</sup> dynamite, “giant powder,” <sup>44</sup> nitroglycerine or other explosives, snares, treated grain, air guns, gas guns, wire baskets, wire seines, wire nets, wire trotlines, or limb lines. <sup>45</sup>
Iowa	IOWA CODE § 481A.76		Prohibits the taking of fish by means of firearms, as well as grabhooks, snaghooks, nets, seines, traps, dynamite,

<sup>42</sup> IDAHO ADMIN. CODE r. 13.01.11.200(02) (2019).

<sup>43</sup> This appears to refer to *anamirta cocculus*, or levant berries, which may be used to stun or kill fish (and humans). See *Levant Berry*, DRUGS.COM (Sept. 23, 2019), <https://www.drugs.com/npp/levant-berry.html> [<https://perma.cc/6XDJ-3KG8>].

<sup>44</sup> See THOMAS WILHELM, A MILITARY DICTIONARY AND GAZETTEER 141 (1881) (noting that dynamite is called “giant powder” in the United States). Dynamite was historically referred to as “Giant Powder” because it was manufactured by the Giant Powder Company—which, in the 19th Century, manufactured explosives and had an exclusive license from Alfred Nobel to produce dynamite. See CHL No. 1002 Giant Powder Company Site, San Francisco, Cal. Hist. Landmarks, <https://www.californiahistoricalandmarks.com/landmarks/chl-1002> [<https://perma.cc/8MDW-HV7H>] (noting that the site of the first dynamite factory designated by this landmark was completely destroyed in an explosion on November 26, 1869); *Ten Tons of Giant Powder Explode at Berkeley*, DAILY ALTA CAL., April 17, 1880, at 1, <https://cdnc.ucr.edu/?a=d&d=DAC18800417.2.4&srpos=11&e=-----en-20-DAC-1-txt-txIN-explosion+Giant+Powder-----1> [<https://perma.cc/SN3C-C65V>].

<sup>45</sup> 515 ILL. COMP. STAT. ANN. 5/10-80 (2019).

State	Law or Regulation	Summary
		explosives, poisonous or stupefying substances, lime, ashes, electricity, or hand fishing, although permits exist for hand fishing, snagging, spearing, fishing by bow and arrow, and with artificial light. <sup>46</sup>
Kansas	KAN. ADMIN. REGS. 115-7-1	Lists permitted means of taking sport fish and non-sport fish, none of which include firearms. <sup>47</sup>
Kentucky	KY. REV. STAT. § 150.460(4)	Prohibits the killing, shocking, and stunning of fish with “explosive agent[s], firearm[s], and other device[s].” <sup>48</sup>
Louisiana	LA. STAT. ANN. § 56:320	Prohibits taking or possessing fish taken by means of guns, “spears, poisons, stupefying substances... tree-topping devices,” <sup>49</sup> lead nets, and

<sup>46</sup> IOWA CODE § 481A.76 (2019). This statute is redundant, as Iowa law further provides that only hook, line, and bait may be used to take fish, except as otherwise provided by law. IOWA CODE § 481A.72 (2019).

<sup>47</sup> KAN. ADMIN. REGS. § 115-7-1 (2019).

<sup>48</sup> KY. REV. STAT. ANN. § 150.460(4) (LexisNexis 2019). This subsection’s prohibition of any “other device,” appears to be inadvertently broad drafting, as “[d]evice” means any article, instrument, or equipment of whatever nature or kind which may be used to take wild animals, wild birds, or fishes.” KY. REV. STAT. ANN. § 150.010(8) (LexisNexis 2019). The breadth of this definition may not apply, however “unless the context otherwise requires,” which may save the statute from inadvertently prohibiting fishing rods. *Id.*

<sup>49</sup> Tree-topping is “the drastic removal or cutting back of large branches in mature trees.” Rita McKenzie, *What’s Wrong With Topping Trees?* PURDUE U. FORESTRY AND NAT. RESOURCES (Oct. 2000), <https://www.extension.purdue.edu/extmedia/FNR/FNR-FAQ-14-W.pdf> [<https://perma.cc/CU5S-KRS4>]. It is unclear how devices used for tree-topping, such as saws, chainsaws, or clippers, may be used to catch fish.

State	Law or Regulation	Summary
		electricity. <sup>50</sup> The statute further states particular means by which freshwater and saltwater recreational fish <sup>51</sup> and commercial fish <sup>52</sup> may be taken. <sup>53</sup>
Maine	12 M.R.S.A. § 12654	Permits fishing only by means of a single baited hook and line, artificial flies, artificial lures, and spinners, except for smelt, which are governed by separate rules. <sup>54</sup> A separate statute explicitly prohibits the use of dynamite, explosives, poisons, or stupefying substances to take fish. <sup>55</sup>
Maryland	MD. CODE REGS. § 08.02.25.02	Lists various permitted means for landing fish in both recreational and commercial contexts. <sup>56</sup> Firearms are not permitted for recreational or commercial fishing. <sup>57</sup>
Massachusetts	MASS. ANN. LAWS ch. 131, § 50	Prohibits the taking of fish by means other than

<sup>50</sup> LA. STAT. ANN. § 56:320(C)(1) (2010).

<sup>51</sup> LA. STAT. ANN. § 56:320(A)(1) (2010).

<sup>52</sup> LA. STAT. ANN. § 56:320(B)(1) (2010).

<sup>53</sup> See LA. STAT. ANN. § 56:320 (2010).

<sup>54</sup> ME. STAT. tit. 12, § 12654 (2019). Smelt may be taken with dip nets from coastal waters. ME. CODE R. § 40.12(B)(1) (LexisNexis 2019).

<sup>55</sup> ME. REV. STAT. ANN. tit. 12 § 12653.

<sup>56</sup> MD. CODE REGS. 08.02.25.02 (2020).

<sup>57</sup> See *id.*

State	Law or Regulation	Summary
		angling, <sup>58</sup> “although cities and towns may permit the use of nets and seines for taking herring and alewives, and may permit the use of pots for eels.” <sup>59</sup> People may also take “eels, carp, or the species of fish commonly known as suckers” by use of bow and arrow, provided that they are over 150 feet from a state or hard-surfaced highway and not fishing in a pond or water held under lease by the Massachusetts Department of Agricultural Resources. <sup>60</sup>
Michigan	MICH. COMP. LAWS SERV. § 324.48703(1)	Bans taking, catching, or killing fish in state waters with firearms, grab hooks, snag hooks, <sup>61</sup> gaff hooks, sets, night lines, nets, explosive substances, combinations of substances “that have a tendency to kill or stupefy fish,” or by means other than “[a dull, technical description of fishing with

<sup>58</sup> MASS. ANN. LAWS ch. 130 § 1 (LexisNexis 2019) (defining angling as “fishing with hand line or rod, with naturally or artificially baited hook.”).

<sup>59</sup> MASS. ANN. LAWS ch. 131, § 50 (LexisNexis 2019).

<sup>60</sup> *Id.*

<sup>61</sup> Why Michigan uses two words to describe “grab hooks” and “snag hooks” compared with Iowa’s single word approach remains a mystery.

State	Law or Regulation	Summary
		a fishing line)] <sup>62</sup> in “the waters of this state.” <sup>63</sup>
Minnesota	MINN. STAT. ANN. § 97A.475(6)–(8)	Fishing licenses only permit fishing by angling or (in select cases) by spearing from a dark house. <sup>64</sup> Minnesota also specifically prohibits the taking of fish by means of explosives, chemicals, drugs, poisons, lime, medicated bait, fish berries, nets, traps, trotlines, snares, and “spring devices that

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<sup>62</sup> For those masochistic readers interested in the substance behind my alteration, Michigan prohibits fishing by any means:

other than a single line or a single rod and line while held in the hand or under immediate control, and with a hook or hooks attached, baited with a natural or artificial bait while being used for still fishing, ice fishing, casting, or trolling for fish, which is a means of the fish taking the bait or hook in the mouth. An individual shall not use more than 3 single lines or 3 single rods and lines, or a single line and a single rod and line, and shall not attach more than 6 hooks on all lines. The commission may decrease the number of rods per angler. However, the commission shall not reduce the number of rods per angler to less than 2. For the purposes of this part, a hook is a single, double, or treble pointed hook. A hook, single, double, or treble pointed, attached to a manufactured artificial bait is counted as 1 hook. The commission may designate waters where a treble hook and an artificial bait or lure having more than 1 single pointed hook must not be used during the periods the commission designates.

See MICH. COMP. LAWS Serv. § 324.48703(1) (LexisNexis 2019). Don’t say I didn’t warn you.

<sup>63</sup> *Id.*

<sup>64</sup> MINN. STAT. ANN. § 97A.475(6)–(8) (West 2019). Dark house spearing involves setting up a small fish house on the ice with no windows and spearing fish that swim under a hole in the ice that is illuminated only by light reflected by the ice and water. See *Dark House Spearing: A Whitefish Tradition*, WHITEFISH CHAIN OF LAKES, <https://whitefish.org/attractions-activities/dark-house-spearing-whitefish-tradition/> [<https://perma.cc/M94D-G8LL>].



State	Law or Regulation	Summary
		impale, hook or capture fish." <sup>65</sup>
Mississippi	40-003 MISS. CODE R. §§ 002.1.1; 1.3; 3.1.	Permits fishing only with "rod and reel or line and pole gear" in various specified public lakes and ponds. <sup>66</sup> Other regulations set forth permitted methods for sport fishing <sup>67</sup> and commercial fishing, <sup>68</sup> and neither regulatory scheme permits the use of firearms.
Missouri	MO. CODE REGS. ANN. tit. 3, § 10-7.410(1)(G)	Prohibits the use of firearms to take fish (as well as beaver, mink, muskrat, river otters, and turtles). <sup>69</sup>
Montana	MONT. CODE ANN. § 87-6-501	Subsection (1)(d) prohibits the taking of fish with any gun. <sup>70</sup> This prohibition is redundant with subsection (1)(a) which prohibits taking fish by any means other than hook and single line or single rod within immediate control, with numerous exceptions, such as snagging certain fish when an open season is declared, taking

<sup>65</sup> MINN. STAT. ANN. § 97C.325 (West 2007).

<sup>66</sup> 40-003 MISS. CODE R. § 002.1.1 (LexisNexis 2019).

<sup>67</sup> 40-001 MISS. CODE R. § 1.3 (LexisNexis 2019).

<sup>68</sup> 40-003 MISS. CODE R. § 3.1 (LexisNexis 2019).

<sup>69</sup> MO. CODE REGS. ANN. tit. 3, § 10-7.410(1)(G) (2019).

<sup>70</sup> MONT. CODE ANN. § 87-6-501(1)(d) (2019).

State	Law or Regulation	Summary
		paddlefish, channel catfish, and nongame fish with longbow and arrow pursuant to applicable regulations, using a net or gaff to land a hooked game fish, and other exceptions. <sup>71</sup>
Nebraska	NEB. REV. STAT. ANN. § 37-543	Prohibits taking fish by means other than a fishing hook and line unless otherwise provided by law or regulation. <sup>72</sup>
Nevada	NEV. REV. STAT. ANN. § 503.290(1)-(2)	Permits taking fish only by means of “a hook and line attached to a rod or reel closely attended in the manner known as angling,” although the Board of Wildlife Commissioners may authorize other methods for taking fish. <sup>73</sup>
New Hampshire	N.H. REV. STAT. ANN. § 207:9	Permitting the taking of fish only by angling, <sup>74</sup> and further stating that if a fish is “unintentionally taken contrary to the prohibitions or

<sup>71</sup> MONT. CODE ANN. § 87-6-501(1)(a) (2019).

<sup>72</sup> NEB. REV. STAT. ANN. § 37-543 (LexisNexis 2019).

<sup>73</sup> NEV. REV. STAT. ANN. § 503.290(1)-(2) (LexisNexis 2019). They have—as Nevada regulations permit a variety of additional means of taking fish, allowing use of a “bow and arrow, hook and line, dipnet, cast net, minnow seine, or minnow trap”—as well as by spear “except in any water where this method is specifically prohibited.” NEV. ADMIN. CODE § 503.580(1) (1984).

<sup>74</sup> Defined as “the taking of fish by line in hand, or rod in hand to which is attached a cast of artificial flies, or an artificial bait, or hooks or other devices for the attachment of bait.” N.H. REV. STAT. ANN. § 207:1(I-a) (2019).

State	Law or Regulation	Summary
		restrictions” of this law, the fish “shall be immediately liberated and returned to the water without unnecessary injury.” <sup>75</sup>
New Jersey	N.J. REV. STAT. § 23:5-11	Prohibits fishing by means other than “the manner commonly known as angling with hand line or with rod and line,” although there are exceptions permitting ice fishing and the taking of eels with baskets. <sup>76</sup>
New Mexico	N.M. CODE R. § 19.31.10.14(A), (O)	Permits fishing by angling, <sup>77</sup> and prohibits the use of “any device or substance capable of catching, stupefying or killing fish except as permitted by state game commission rule.” <sup>78</sup>
New York	N.Y. ENVTL. CONSERV. § 11-0701(4), (6)	Holders of fishing licenses may only take fish by “angling, spearing, hooking, longbow, and

<sup>75</sup> N.H. REV. STAT. ANN. § 207:9 (LexisNexis 2019). The fish liberation portion of this statute is unlikely to be of much use in cases that involve firearms. It is possible that they apply in cases where other prohibited devices are used, such as a “trotline, tips-ups, set and trap lines, crossbows, spears, grappling hooks, naked hooks, snatch hooks, eel wires, eel pots, and nets ...” N.H. REV. STAT. ANN. § 207:10 (LexisNexis 2019).

<sup>76</sup> N.J. STAT. ANN. § 23:5-11 (West 2019). The ice fishing exceptions are permitted by reference to N.J. STAT. ANN. § 23:5-3 (West 2019).

<sup>77</sup> N.M. CODE R. § 19.31.10.14(A) (LexisNexis 2019).

<sup>78</sup> N.M. CODE R. § 19.31.10.14(O) (LexisNexis 2019).

State	Law or Regulation	Summary
		tipups . . . .” <sup>79</sup> Taking fish without a license is illegal. <sup>80</sup>
North Carolina	N.C. Gen. Stat. § 113-272.3(a)	People may only fish using a hook-and-line or a “special device,” both of which the Wildlife Resources Commission defines. <sup>81</sup> The special device regulation permits numerous alternate means of fishing during specified periods in specified waters but nowhere permits shooting fish with firearms (although spear guns are occasionally permitted). <sup>82</sup> North Carolina law specifically prohibits the use of “poisons, drugs, explosives, or electricity” to kill fish. <sup>83</sup>
North Dakota	N.D. CENT. CODE §§ 20.1-06-02, 20.1-06-06	Section 02 prohibits the taking of fish except as provided in “this title.” <sup>84</sup> The title under which this

<sup>79</sup> N.Y. ENVTL. CONSERV. § 11-0701(4) (Consol. 2019). Typically spelled “tip up” or “tip-up,” these devices are placed above a hole in the ice with a baited line attached. *Ice Fishing Tip Ups: An Easy Way to Catch Fish Through the Ice*, KARL’S BAIT & TACKLE, <https://shopkarls.com/blog/ice-fishing-tip-ups/> [<https://perma.cc/SB23-2JXF>]. Tip ups include a spring-loaded flag that is triggered when a fish takes the attached bait. *Id.*

<sup>80</sup> N.Y. ENVTL. CONSERV. § 11-0703(6)(a)(3) (McKinney 2019).

<sup>81</sup> N.C. GEN. STAT. § 113-272.3(a) (2019).

<sup>82</sup> 15A N.C. ADMIN. CODE 10C.0407 (2019). In Alexander County, for example, fishing with spear guns in Lake Hickory and Lookout Shoals Reservoir is permitted year-round (or, as stated in the regulation, from “July 1 to June 30”). 15A N.C. ADMIN. CODE 10C.0407(2) (2019).

<sup>83</sup> N.C. GEN. STAT. § 113-262 (2019).

<sup>84</sup> N.D. CENT. CODE § 20.1-06-02 (2019).

State	Law or Regulation	Summary
		<p>section appears, however, includes only a limited set of laws permitting particular means of taking fish, including any means chosen by the Director of the Game and Fish Department in the case of “undesirable fish,”<sup>85</sup> and by spearing through the ice from dark houses upon proclamation by the governor.<sup>86</sup> Section 06 lists several illegal methods for taking fish (including fishberries,<sup>87</sup> dynamite, traps, and trotlines), although it permits the use of dip nets to aid in landing fish that have been legally taken by a hook and line, which may imply that taking fish with a hook and line is lawful.<sup>88</sup></p>

<sup>85</sup> N.D. CENT. CODE § 20.1-06-05 (2019).

<sup>86</sup> N.D. CENT. CODE § 20.1-06-08 (2019).

<sup>87</sup> In case you have forgotten, fishberries are levant berries that can stun or kill fish. See *Levant Berry supra*, note 48.

<sup>88</sup> N.D. CENT. CODE § 20.1-06-06 (2019). This is, admittedly, a generous reading of the statute, and North Dakota’s regulations are of no assistance in determining what permissible means of fishing are permitted by state law. This borderline-incomprehensible statutory scheme—a fair reading of which could lead to a ban on all fishing—is surprising, given that North Dakota’s Constitution recognizes that fishing is “a valued part of our heritage and will be forever preserved for the people and managed by law and regulation for the public good.” N.D. Const. art. II, § 27.

State	Law or Regulation	Summary
Ohio	OHIO ADMIN. CODE 1501:31-13-01(A)(2)	Prohibits taking fish with firearms, explosives, poisons, “electricity, chemicals, seines, nets, or traps”—although “gizzard shad, minnows, and smelt may be taken with minnow seines, minnow dip nets, or hand landing net[s].” <sup>89</sup>
Oklahoma	29 Okl. St. § 6-302	Game fish may only be taken by means of hook and line, throwline, trotline, or spearguns used by SCUBA divers, although catfish may be taken by noodling. <sup>90</sup>
Oregon	Various	It is unlawful to take ocean food fish and pacific halibut by means other than those outlined in the applicable regulation, which does not include firearms. <sup>91</sup> Other regulations prohibit the possession of certain types of fish such as steelhead trout or walleye and salmon if they are not taken by angling (in the case of steelhead and

<sup>89</sup> OHIO ADMIN. CODE 1501:31-13-01(A)(2) (2019). For those readers who are noodling enthusiasts, bad news: taking fish by hand is prohibited statewide for quite a few fish, including “bullheads, catfish, coho, and chinook or pink salmon, brown, rainbow and steelhead trout”—and for “walleye and sauger in the Maumee and Sandusky rivers.” OHIO ADMIN. CODE 1501:31-13-01(A)(4) (2019).

<sup>90</sup> OKLA. STAT. tit. 29, § 6-302 (2019).

<sup>91</sup> OR. ADMIN. R. 635-004-0325 (2019).

State	Law or Regulation	Summary
		walleye) <sup>92</sup> or by trolling (in the case of salmon). <sup>93</sup> Using explosives and throwing substances that are “deleterious to fish” in the water is also prohibited, but the statute prohibiting these practices does not appear to apply to the use of firearms. <sup>94</sup>
Pennsylvania	58 PA. CODE § 63.5	Prohibits any fishing method that is not authorized by law or subpart B of the Fish and Boat Commission regulations. <sup>95</sup> The regulations do not explicitly authorize the use of firearms to catch fish and limit permissible fishing methods, with some exceptions, to the use of rods, lines, and hooks. <sup>96</sup> Fishing hooks may not, however, catch badgers, fishers, minks, muskrats, opossums, otters, pine marten, skunks, beavers, raccoons,

<sup>92</sup> OR. ADMIN. R. 635-006-0230 (2019).

<sup>93</sup> OR. ADMIN. R. 635-006-0231 (2019).

<sup>94</sup> See OR. REV. STAT. ANN. § 509.130 (West 2019).

<sup>95</sup> 58 PA. CODE § 63.5 (2019).

<sup>96</sup> 58 Pa. Code § 63.6.

State	Law or Regulation	Summary
		weasels, foxes, and bobcats. <sup>97</sup>
Rhode Island	20 R.I. GEN. LAWS § 11-3	“[O]nly a rod and reel or other device held in and operated by hand” may be used to catch fish unless otherwise specified by regulation, although suckers, fallfish, and carp may be taken by “snares, spears, or bow and arrow . . .” <sup>98</sup>
South Carolina	S.C. CODE ANN. § 50-13-200	Permits the taking of fish in freshwater <sup>99</sup> only with “game fishing devices.” <sup>100</sup>
South Dakota	S.D. CODIFIED LAWS § 41-12-5	Fishing is permitted by hook or line only, unless otherwise provided by law. <sup>101</sup> Other statutes prohibit the use of nets

<sup>97</sup> 58 PA. CODE § 141.68(1) (2019) (prohibiting the use of fishing hooks to catch furbearers); 34 PA. STAT. AND CONS. STAT. ANN. § 102 (West 2019) (defining “furbearers”). This prohibition on using fishing hooks to catch these animals was adopted after the Pennsylvania Game Commission “identified anecdotal evidence of the usage of fishing or snagging hooks in certain trapping activities.” 40 Pa. Bull. 6685 (Nov. 20, 2010).

<sup>98</sup> 20 R.I. GEN. LAWS § 11-3 (2019). Like Pennsylvania, Rhode Island also prohibits the use of fishing hooks to “catch, capture, or injure furbearers,” which include red foxes, raccoons, river otters, longtailed weasels, fishers, striped skunks, bobcats, beavers, gray squirrel, muskrat, opossum, cottontail, and snowshoe hare. 250-60 R.I. CODE R. 9.14(O) (LexisNexis 2019) (prohibiting the use of fishing hooks to catch furbearers); 20 R.I. GEN. LAWS § 20-16-1(b) (2019) (defining “furbearers”). Rhode Island also prohibits the use of fishing hooks to take, kill, or destroy wild birds. 20 R.I. GEN. LAWS § 20-14-7 (2019).

<sup>99</sup> South Carolina’s Marine Resources Act, at South Carolina Statutes sections 50-5-10, et seq., sets forth a broad list of laws governing the taking of fish from saltwater. The Act does not specifically permit or prohibit guns, although it does prohibit the use of poisons, explosives, and bang sticks to take saltwater fish. S.C. CODE ANN. § 50-5-110 (2019).

<sup>100</sup> S.C. CODE ANN. § 50-13-200 (2013). A “game fishing device” is “a hook and line, pole or artificial pole, or rod and reel.” S.C. CODE ANN. § 50-13-10(A)(9) (2019).

<sup>101</sup> S.D. CODIFIED LAWS § 41-12-5 (2019).



State	Law or Regulation	Summary
		and dams <sup>102</sup> as well as explosives and drugs. <sup>103</sup>
Tennessee	Tenn. Code Ann. § 70-4-104	Prohibits the use or possession of any instrument other than a rod and reel, hook and line, or by regularly-attended trotlines unless provided for by statute or regulation. <sup>104</sup>
Texas	31 TEX. ADMIN. CODE § 57.973(d)	Prohibits the taking of fish “in public waters of this state” by means not permitted in Subchapter N of the Texas Parks and Wildlife Department’s Fisheries chapter. <sup>105</sup> While this regulation notes that a variety of means to take particular fish are allowed in particular circumstances, <sup>106</sup> it does

<sup>102</sup> S.D. CODIFIED LAWS § 41-12-9 (2019).

<sup>103</sup> S.D. CODIFIED LAWS § 41-12-13 (2019).

<sup>104</sup> TENN. CODE ANN. § 70-4-104 (2019).

<sup>105</sup> 31 TEX. ADMIN. CODE § 57.973(d) (2019).

<sup>106</sup> Fishing with spear guns, for instance, is permitted as long as the fish are non-game fish. 31 TEX. ADMIN. CODE § 57.973(g)(20) (2019). 31 TEX. ADMIN. CODE § 57.971(15)(B) helpfully defines “non-game fish” as fish that are not on the game fish list of subsection (15)(A), which are:

Alabama bass, blue catfish, blue marlin, broadbill swordfish, brown trout, channel catfish, cobia, crappie (black and white), flathead catfish, Guadalupe bass, king mackerel, largemouth bass, longbill spearfish, pickerel, red drum, rainbow trout, sailfish, sauger, sharks, smallmouth bass, snook, Spanish mackerel, spotted bass, spotted seatrout, striped bass, tarpon, tripletail, wahoo, walleye, white bass, white marlin, yellow bass, and hybrids or subspecies of the species listed in this subparagraph.

State	Law or Regulation	Summary
		not permit the use of firearms to shoot fish.
Utah	UTAH ADMIN. CODE R657-13-11	Prohibits the taking of fish (or crayfish) with a firearm, chemical, explosive, electricity, poison, crossbow, pellet gun, or archery equipment. <sup>107</sup>
Vermont	12-010-014 VT. CODE R. § 1	In general, fishing is only permitted by using not more than two lines with attached baited hooks. <sup>108</sup> In Noyes Pond, the only permitted means of fishing is fly fishing, <sup>109</sup> but in Lake Champlain, between March 25 and May 25, people can shoot a variety of fish with any sort of gun they choose. <sup>110</sup>

31 TEX. ADMIN. CODE § 57.971(15)(A)–(B).

<sup>107</sup> UTAH ADMIN. CODE r. 657-13-11 (2019). Utah's regulations permit the taking of nongame fish by "angling, traps, bow and arrow, liftnets, dipnets, cast nets, seine, or spear," except in certain waters—although even in those certain waters, the restrictions are relaxed for the taking of carp. UTAH ADMIN. CODE r. 657-13-14(2)(a)–(b) (2019). But no such exception exists for shooting fish—not even if the fish is shot with Utah's official state gun, the John M. Browning designed M1911 automatic pistol. *See* UTAH CODE ANN. § 63G-1-601(9) (2019); *see also* James Nelson, *Utah Becomes First in U.S. to Designate Official State Gun*, THOMSON REUTERS (March 17, 2011, 6:03 p.m.), <https://www.reuters.com/article/us-automatic-pistol-utah-idUSTRE72H08Z20110318> [<https://perma.cc/XQ5J-PZA9>] (recognizing Utah as the first state to name an official state gun).

<sup>108</sup> 12-010-014 VT. CODE R. § 1 (2019).

<sup>109</sup> 12-010-044 VT. CODE R. § 16-4-110(1) (2019).

<sup>110</sup> *See* VT. STAT. ANN. tit. 10 § 4606(e) (2019) (permitting "shooting" of pickerel, northern pike, carp, garfish, bowfin, mullet, shad, suckers, bullhead, and other cull fish"); *see also* Pam Belluck, *How to Catch Fish in Vermont: No Bait, No Tackle, Just Bullets*, N.Y. TIMES (May 11, 2004), <https://www.nytimes.com/2004/05/11/us/how-to-catch-fish-in-vermont-no-bait-no-tackle-just-bullets.html> [<https://perma.cc/3SKX-CRJQ>] (noting that those who shoot fish in Lake Champlain use "high-caliber pistols, shotguns, even AK-47's" to shoot fish).

State	Law or Regulation	Summary
Virginia	4 VA. ADMIN. CODE § 20-570-20	Prohibits taking, catching, or killing fish with the use of a firearm, unless the fish is a shark that has been “brought to boatside by legal fishing methods.” <sup>111</sup> Shooting fish is permitted for those with a fishing license for shooting “suckers, redhorse and carp with a rifle during the hours of sunrise to sunset, between April 15 and May 31.” <sup>112</sup> This statute applies to the Clinch River in Scott County unless it is a Sunday, when shooting fish is always prohibited. <sup>113</sup>
Washington	WASH. ADMIN. CODE § 220-353-040	Prohibits shooting fish and shellfish with a firearm, crossbow, bow and arrow, or compressed air gun, as well as clubs, gaffs, snags, snares, dip nets, harassment, spears, and stones unless the fish is a “food fish,” in which case the use of some of those devices are

<sup>111</sup> 4 VA. ADMIN. CODE § 20-570-20(C) (2019). The use of “underwater fishing devices, known as ‘bang sticks,’ which are attached to spears or are hand held and discharge a blank charge or projectile” are permitted. 4 VA. ADMIN. CODE § 20-570-20(D) (2019).

<sup>112</sup> 4 VA. ADMIN. CODE § 15-320-150 (2019).

<sup>113</sup> *Id.*

State	Law or Regulation	Summary
		allowed. <sup>114</sup> “It is unlawful to use a fish pew, <sup>115</sup> pitchfork, or other penetrating instrument on any fish or shellfish” that will not be retained or are illegal to possess. <sup>116</sup>
West Virginia	W. VA. CODE R. § 20-2-5(a)(14)	Bans taking, catching, killing, or attempts to do so by means other than by “rod, line, and hooks with natural or artificial lures,” is banned, unless otherwise authorized by the Director of the Division of Natural Resources. <sup>117</sup> However, snaring species of sucker, carp, fallfish, and creek chub and catching catfish by hand is lawful if done by a holder of a valid license. <sup>118</sup>
Wisconsin	WIS. ADMIN. CODE NR § 20.05	Permits fishing only by means of hook and line

<sup>114</sup> WASH. ADMIN. CODE § 220-353-040(1) (2019).

<sup>115</sup> A fish pew is a long wooden bench that is lowered into a body of water. Nearby fish are converted to Christianity. On Sunday, when they swim over the bench to attend church services, the bench is quickly raised out of the water, trapping the fish. Just kidding—a fish pew is a single-tined pitchfork used for catching fish. See James Mackovjak, *Navigating Troubled Waters: A History of Commercial Fishing in Glacier Bay, Alaska*, U.S. DEPT OF THE INTERIOR, 253 (2010), <https://www.nps.gov/glba/learn/historyculture/upload/NAVIGATING-TROUBLED-WATERS.pdf> [<https://perma.cc/2LNH-EY7G>]. The device may also be spelled “peugh,” or “pugh.” See Ross Coen, *Putting an End to the Peugh*, ALASKA HISTORICAL SOCIETY BLOG (Nov. 2, 2015), <https://alaskahistoricalsociety.org/putting-an-end-to-the-peugh/> [<https://perma.cc/A95V-F537>].

<sup>116</sup> WASH. ADMIN. CODE § 220-353-040(1) (2019).

<sup>117</sup> W. VA. CODE R. § 20-2-5(a)(14) (2019).

<sup>118</sup> W. VA. CODE R. § 20-2-5(a)(14) (2019).

State	Law or Regulation	Summary
		and bans the possession or control of any firearm or gun while “on the waters, banks or shores that might be used for the purpose of fishing.” <sup>119</sup>
Wyoming	WYO. STAT. ANN. § 23-3-201	Prohibits the taking, wounding, or destruction of “any fish of Wyoming with a firearm of any kind or nature.” <sup>120</sup>

### *B. Federal Restrictions Against Shooting Fish*

The systematic exploration of federal laws and regulations that restrict shooting fish is beyond the scope of this article, which focuses on state laws. But one should not assume that he or she may go around shooting fish on federal land.

Federal law limits the means of taking fish to hook and line only in many national parks and then, only at times that are directed by the Secretary of the Interior.<sup>121</sup> National parks with such restrictions include Crater Lake National Park,<sup>122</sup> Lassen Volcanic National Park,<sup>123</sup> Glacier National Park,<sup>124</sup> Mesa Verde National Park,<sup>125</sup> Mount Rainier National Park,<sup>126</sup> Shenandoah National Park, and Great Smoky Mountains National Park,<sup>127</sup> Hawaii National Park,<sup>128</sup> Rocky Mountain National Park,<sup>129</sup> and

<sup>119</sup> WIS. ADMIN. CODE NR § 20-05 (2019).

<sup>120</sup> WYO. STAT. ANN. § 23-3-201 (2019).

<sup>121</sup> *See, e.g.*, 16 U.S.C.S. § 127 (LexisNexis 2019); 16 U.S.C.S. § 204 (LexisNexis 2019); 16 U.S.C. § 170 (LexisNexis 2019); 16 U.S.C. § 403c-3 (LexisNexis 2019).

<sup>122</sup> 16 U.S.C.S. § 127 (LexisNexis 2019).

<sup>123</sup> 16 U.S.C.S. § 204 (LexisNexis 2019).

<sup>124</sup> 16 U.S.C.S. § 170 (LexisNexis 2019).

<sup>125</sup> 16 U.S.C.S. § 117c (LexisNexis 2019).

<sup>126</sup> 16 U.S.C.S. § 98 (LexisNexis 2019).

<sup>127</sup> 16 U.S.C.S. § 403c-3 (LexisNexis 2019).

<sup>128</sup> 16 U.S.C.S. § 395c (LexisNexis 2019).

<sup>129</sup> 16 U.S.C.S. § 198c (LexisNexis 2019).

Sequoia and Yosemite National Parks.<sup>130</sup> Yellowstone National Park's restriction is more explicit in what it restricts, noting that seines, nets, traps, drugs, and explosive substances are prohibited, before stating that the only permissible way to catch fish is by hook and line.<sup>131</sup>

Clever anglers may attempt to circumvent these fishing restrictions by rising above the federal land using a plane to carry out their fish shooting schemes. These people would be explicitly prohibited from doing so, as shooting fish (and other animals) from an airplane is illegal under federal law.<sup>132</sup>

## II. ANALYSIS OF STATE LAWS AGAINST SHOOTING FISH

### A. *Why ban shooting fish?*

Before evaluating the drafting nuances of state laws against shooting and the potential state and federal constitutional implications of these laws, it's worth considering why states ban shooting fish in the first place. For many states, this question is not applicable, as the state law sets forth certain, specified means by which fish may be caught and does not specify shooting as a permissible means of taking fish.<sup>133</sup> As a result, many state legislatures or regulators have never needed to explicitly ban shooting fish, as the practice is effectively banned by existing law.

For those states with regulations explicitly prohibiting shooting fish—or those states that may wish to add a specific, yet redundant, prohibition against shooting fish—it is worth considering reasons for such a ban. Many states have constitutional amendments protecting the right to hunt and fish along with rights to keep and bear arms,<sup>134</sup> so legislatures should at least be prepared to justify any fish-shooting bans should a litigious hunter or angler decide to fight the law.

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<sup>130</sup> 16 U.S.C.S. § 60 (LexisNexis 2019).

<sup>131</sup> 16 U.S.C.S. § 26 (LexisNexis 2019).

<sup>132</sup> 16 U.S.C. § 742j-1 (LexisNexis 2019).

<sup>133</sup> See, e.g., 40-003 MISS. CODE R. §§ 002.1.1, 1.3, 3.1 (LexisNexis 2020); KAN. ADMIN. REGS. § 115-7-1 (2019).

<sup>134</sup> These constitutional provisions, and the ample regulations that these provisions nevertheless allow, are discussed later. See discussion *infra* Section III.E.2.

A readily apparent reason to ban shooting fish is the danger of shooting other people who are fishing and who may not expect others to be using firearms. Shooting fish from a moving boat is an extreme example of an unsafe way of taking fish, as it endangers others on the water or those on the shore.<sup>135</sup> Aside from the obvious potential for bad aim, bullets may ricochet off of the water, endangering people on the banks or on the water.<sup>136</sup> Proponents of the activity insist that this danger is minimal, and officials in states that permit limited fish shooting have not reported any injuries (to people) resulting from shooting fish.<sup>137</sup>

Several states's restrictions recognize the need for shooting fish only under controlled circumstances. Both Alaska<sup>138</sup> and Hawaii<sup>139</sup> allow people to shoot certain fish already caught through lawful means. The fish is more likely to be restricted to a particular location, and the potential danger to bystanders on other boats or on the bank is reduced.

In addition to the immediate dangers of flying bullets, shooting fish may also pollute the water and the surrounding environment—mainly through the use of lead projectiles. While the United States Department of the Interior had previously banned the use of lead ammunition on Fish and Wildlife Service lands, former Secretary Ryan Zinke overturned this ban on his first day as Secretary of the Interior, stating that he worried “about hunting and fishing becoming activities for the land-owning elite.”<sup>140</sup> While a ban on the use of lead shot while hunting

<sup>135</sup> See Mark Goss, *Blasting the Jumping Carp!!!* YOUTUBE (Aug. 18, 2013), <https://www.youtube.com/watch?v=pMw4KW3MzcE> [<https://perma.cc/7P3Q-N2Y5>]; see also Jimmy O'Neal, *Shotgun Fishing!* YOUTUBE (Dec. 20, 2014), <https://www.youtube.com/watch?v=er4tM-GjKhW> [<https://perma.cc/QYY6-WACG>].

<sup>136</sup> See, e.g., Will Dabbs, *The Art Of The Ricochet*, DAILY CALLER (July 5, 2015, 5:15 PM), <https://dailycaller.com/2015/07/05/the-art-of-the-ricochet/> [<http://perma.cc/V4PW-DDLY>] (describing how bullets glance off water, particularly when striking water at a shallow angle).

<sup>137</sup> Belluck, *supra* note 110 (noting that while Vermont state officials “know of no gunshot injuries from the sport,” an owner of a marsh where fish shooting takes place recalled that he thought someone had been shot in the “stomach area’ . . . about 40 years ago”).

<sup>138</sup> ALASKA ADMIN. CODE tit. 5, § 75.027(a) (2019).

<sup>139</sup> HAW. CODE R. § 13-75-8(a) (LexisNexis 2019).

<sup>140</sup> Juliet Eilperin, Josh Dawsey, & Darryl Fears, *Interior Secretary Zinke Resigns Amid Investigations*, WASH. POST (Dec. 15, 2018, 12:33 PM), <https://www.washingtonpost.com/national/health-science/interior-secretary-zinke-resigns->

waterfowl remains in place, the use of lead ammunition on other animals (or fish) is permitted as a result of this revocation.<sup>141</sup> Use of lead ammunition, particularly around bodies of water, creates a high risk of contamination and exposure to wildlife.<sup>142</sup> Prohibiting the shooting of fish altogether will prevent fish from being shot with lead bullets and may reduce the introduction of lead into lakes and rivers, even if other regulations permit the use of lead bullets.

Shooting fish may also destroy the fish, rendering them useless for food, and complicating the enforcement of limits on taking specified numbers of fish.<sup>143</sup> Those who shoot fish may avoid this outcome by shooting within a close range of the fish to kill or stun them with concussions, but the risk of destroying the fish is still present.<sup>144</sup> While shooting may be more practical (and even humane) in the case of slaughtering large fish, this method is better suited for situations where the fish is already under one's control in order to minimize the distance from the fish—a practice that is allowed by several states.<sup>145</sup>

amid-investigations/2018/12/15/481f9104-0077-11e9-ad40-cdfd0e0dd65a\_story.html?utm\_term=.4dcfc985d2e1 [http://perma.cc/G28B-4KRG]; *see also* Press Release, Dep't of the Interior, Day One: Secretary Zinke Signs Orders to Expand Access to Public Lands (Mar. 2, 2017) <https://www.doi.gov/pressreleases/day-one-secretary-zinke-signs-orders-expand-access-public-lands> [http://perma.cc/S3BR-KEV7] (noting Secretary Zinke later resigned following multiple investigations into “his connection to a real estate deal involving a company that Interior regulates; whether he bent government rules to allow his wife to ride in government vehicles; and allowing a security detail to travel with him on a vacation to Turkey at considerable taxpayer cost”).

<sup>141</sup> *See* What Hunting Methods are Illegal, 50 C.F.R. § 20.21(j) (2019); *see also* Greg Care, *Duck Hunters Beware, It is Still Illegal to Hunt Waterfowl with Lead Shot*, BROWN GOLDSTEIN LEVY, LLP (Mar. 15, 2017), <https://www.browngold.com/duck-hunters-beware-illegal-hunt-waterfowl-lead-shot> [http://perma.cc/KL2H-N9CB] (noting the scope of the still-existing ban on shooting waterfowl with lead shot and the implications of Secretary Zinke's decision).

<sup>142</sup> *See Best Management Practices for Lead at Outdoor Shooting Ranges*, U.S. EPA (June 2005), [https://www.epa.gov/sites/production/files/documents/epa\\_bmp.pdf](https://www.epa.gov/sites/production/files/documents/epa_bmp.pdf) [http://perma.cc/Z365-4FC7] (discussing the “VERY high potential for contamination” and wildlife exposure when lead shot is used at a firing range near bodies of water); *see also* Xinde Cao, et al., *Weathering of Lead Bullets and Their Environmental Effects at Outdoor Shooting Ranges*, 32 J. ENVTL. QUALITY 526, 532 (2003) (noting increased lead concentration in surface waters at shooting ranges).

<sup>143</sup> *See* Belluck, *supra* note 137 (quoting a fish-shooting aficionado who stated that shooting fish directly causes the fish to “just kind of shatter”).

<sup>144</sup> *See id.*

<sup>145</sup> *See* Kelly Levenda, *Legislation to Protect the Welfare of Fish*, 20 ANIMAL L. 119, 138 (2013); *see e.g.*, ALASKA ADMIN. CODE tit. 8, § 75.027(a) (2019); HAW. CODE R. § 13-75-8(a) (LexisNexis 2019) (permitting the shooting of fish once they have been brought under control by legal fishing methods).



In addition to physical impracticalities of shooting fish, there is a strong argument that it is just not good sportsmanship. Unlike fishing with a hook and line, which requires patience, or even fishing with a spear or bow and arrow, which requires technique, physical effort, and prowess to aim and shoot, shooting with a gun is relatively less challenging and gives the shooter an unfair advantage.<sup>146</sup>

The risks of environmental damage, destruction of fish, and injury to participants are all reasons for states to prohibit or restrict shooting fish. With such a survey of these laws and regulations now available, this article turns to evaluating states's laws and regulations on shooting fish.

### *B. Evaluating States's Laws and Regulations Against Shooting Fish*

The table above illustrates several approaches that states employ to prohibit or restrict shooting fish. States like Indiana, Iowa, and Michigan include firearm prohibitions in lists of restricted practices.<sup>147</sup> Other states, like Wyoming, have opted to pass particular laws or subsections specifically targeting the shooting of fish while leaving restrictions on other means of taking fish for other statutes or subsections.<sup>148</sup> Still others like Alabama, Arizona, Minnesota, and West Virginia specifically define what means of fishing is permitted, implying that alternate means of catching or taking fish are prohibited (unless otherwise permitted or licensed).<sup>149</sup> Other states, like North Dakota, have laws or regulations that are drafting travesties.<sup>150</sup>

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<sup>146</sup> See Irus Braverman, *Conservation and Hunting: Till Death Do They Part? A Legal Ethnography of Deer Management*, 30 J. LAND USE & ENVTL. L. 1, 6–8 (2015) (describing the importance of sportsmanship and ensuring that hunters do not obtain an unfair advantage over their quarry).

<sup>147</sup> See IND. CODE ANN. § 14-22-9-1 (LexisNexis 2012); IOWA CODE § 481A.76 (2019); MICH. COMP. LAWS SERV. § 324.48703(1) (LexisNexis 2019).

<sup>148</sup> A separate subsection of Wyoming's law prohibits snagging fish. See WYO. STAT. ANN. § 23-3-201(e) (defining "snag" as "attempting to take a fish in such a manner that the fish does not take the hook voluntarily in its mouth").

<sup>149</sup> See ALA. CODE § 9-11-87 (LexisNexis 2019); ARIZ. REV. STAT. § 17-301(C) (2019); MINN. STAT. ANN. § 97A.475(6)–(8) (West 2019); W. VA. CODE R. § 20-2-5(a)(14) (2019).

<sup>150</sup> N.D. CENT. CODE §§ 20.1-06-02, 20.1-06-06 (2019).

### *1. Clear and Concise: The Specific-Definition Approach*

Many states (and the federal government) employ laws or regulations that specifically state what means of fishing are permitted and note that, unless permitted by law, only these means of fishing may be employed. This approach—referred to as the “Specific-Definition Approach”—is a clear and simple means of restricting fishing practices. Rather than set forth a laundry-list of prohibited activities, the laws take a more restrictive approach by permitting only particular types of fishing methods.

The advantage of the Specific-Definition Approach is that it is both predictable, by setting forth a clear statement of what fishing methods are permitted, and it prevents creative individuals or entities from circumventing fishing restrictions by inventing new means of catching fish that are not clearly covered by the statute. If anything can be taken away from the table above, it is that there are a nigh-unlimited number of fish-taking techniques, and any attempt to list them exhaustively is doomed to fail.

Critics of the Specific-Definition Approach may argue that it is too restrictive and that it may stifle innovation in fishing methods. This argument misses the point that most fishing for sport and pleasure does not focus on finding new and effective methods for killing or capturing fish as quickly and efficiently as possible but instead focuses on either the challenge of catching a particular size or type of fish using traditional means or enjoying the process of fishing regardless of the results.<sup>151</sup> As for commercial fishing, failing to provide a specific definition of permitted fishing methods may allow large-scale fishing operations to employ a potentially unlimited range of fishing methods and would likely result in environmental damage.<sup>152</sup>

In both the commercial and private context, laws that specifically define fishing can include caveats that either laws *or regulations* may be employed to broaden the scope of permitted methods of taking fish. Regulations, in particular, can serve as a means of permitting more focused or flexible exceptions to broader prohibitions—particularly in the context of recreational hunting

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<sup>151</sup> See Braverman, *supra* note 146, at 6–8.

<sup>152</sup> See, e.g., Peter B. McIntyre, Catherine A. Reidy Liermann, & Carmen Revenga, *Linking Freshwater Fishery Management to Global Food Security and Biodiversity Conservation*, 113 PROC. NAT'L ACAD. OF SCI. U.S. 12880, 12883 (2016) (noting that intensive harvests of freshwater fish particularly impact “the most species-rich rivers”).

and fishing—without requiring the often belabored process of traditional legislation regarding fishing methods.<sup>153</sup> While the desirability of flexible regulations in the context of environmental law is a matter of debate, when it comes to addressing specific methods of taking fish—particularly in the recreational context—regulatory flexibility supports the Specific-Definition Approach by creating the potential for useful, additional fishing methods.<sup>154</sup>

## 2. *The Redundant Approach*

Several states employ redundant laws and regulations that provide a specific definition of what means of fishing are permitted, while also listing methods of fishing that are not permitted. The specific prohibitions on means of fishing are redundant, as the law or regulation has already narrowly defined what types of fishing methods are allowed and prohibits all others.<sup>155</sup>

Michigan's law is an example of this redundant approach, stating, in pertinent part, that:

An individual shall not take, catch, or kill or attempt to take, catch, or kill a fish in the waters of this state with a grab hook, snag hook, or gaff hook, by the use of a set or night line or a net or firearm or an explosive substance or combination of substances that have a tendency to kill or stupefy fish, or by any other means or device other than a single line or a single rod and line while held in the hand or under immediate control, and with a hook or hooks attached, baited with a natural or artificial bait while being used for still fishing, ice fishing,

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<sup>153</sup> See Eric Biber & Josh Eagle, *When Does Legal Flexibility Work in Environmental Law?*, 42 ECO. L. Q. 787, 821 (2015) (noting that flexibility in state regulations restricting hunting is “generally seen as having been extremely successful at accomplishing its goal: recovering and restoring fish and game populations across the United States”).

<sup>154</sup> See *id.* at 821–22, 828 (noting the success of flexibility in regulations for recreational hunting and that flexibility is less likely to lead to positive outcomes if powerful interest groups can shape regulations).

<sup>155</sup> See, e.g., MONT. CODE ANN. § 87-6-501(1) (2019); MICH. COMP. LAWS ANN. § 324.48703(1) (West 1995).

casting, or trolling for fish, which is a means of the fish taking the bait or hook in the mouth.<sup>156</sup>

The law begins with a series of specific prohibitions, but these specific bans are rendered redundant by the catch-all provision that states that any means of taking or killing fish other than using a single line or rod and line held in hand, under immediate control, with attached hooks and bait are prohibited.<sup>157</sup>

Other states employ a similar approach, including the District of Columbia,<sup>158</sup> Florida,<sup>159</sup> Iowa,<sup>160</sup> and Montana.<sup>161</sup> These states either apply specific definitions of what means of fishing are permitted, or, in the case of Florida, use a broadly-phrased prohibition of “any other deleterious substance or force” that is not explicitly authorized by law.<sup>162</sup> While these laws are redundant, the supplemental use of specific prohibitions on types of fishing methods helps reduce ambiguity as to whether these particular methods are allowed. This approach to statutory drafting has a mixed impact on the environment—it prohibits harmful means of fishing such as the use of poison and explosives benefit the broader marine ecosystem, but it sacrifices a larger number of trees to print the statutes that provide these protections.

### 3. The “Laundry List” Approach

A less-effective way that states attempt to regulate fishing methods is to provide a list of prohibited fishing methods. The survey of state laws above reveals the obvious flaw in this approach: there are dozens, if not hundreds, of creative methods that people have devised to harass, injure, kill, or catch fish.

<sup>156</sup> MICH. COMP. LAWS ANN. § 324.48703(1) (West 1995).

<sup>157</sup> *Id.*

<sup>158</sup> Section 1502.2 permits fishing by means of rod, hook, and line unless otherwise permitted, and section 1503.1(f) prohibits shooting fish. *See* D.C. MUN. REGS. tit. 19, § 1502.2, 1503.1(f) (2000).

<sup>159</sup> FLA. ADMIN. CODE ANN. r. 68A-23.002 (prohibiting various specific means of taking fish along with a general ban on “any other deleterious substance or force unless specifically authorized by law”).

<sup>160</sup> IOWA CODE §§ 481A.72, 481A.76 (2013).

<sup>161</sup> MONT. CODE ANN. §§ 87-6-501(a), (d) (2019).

<sup>162</sup> FLA. ADMIN. CODE ANN. r. 68A-23.002(5).

States that employ this “laundry list” approach towards prohibiting various fishing methods include Arkansas,<sup>163</sup> Illinois,<sup>164</sup> Indiana,<sup>165</sup> and Washington.<sup>166</sup> Laws and regulations of this kind are often lengthy and evidence a great deal of thought regarding the various means available for how one could take fish. But as creative as legislators may be, and as much as they may endeavor to control and restrict people’s fish-taking tactics, people will inevitably find ways around these laws. Even if states have extensive lists of prohibited methods of taking fish—like Washington<sup>167</sup>—it is simply clearer and easier for states to authorize specific, enumerated legal means of fishing rather than to attempt to create a comprehensive list of the various ways that people may kill fish. States that attempt the laundry list approach will likely either end up with statutes that are unwieldy or include a broad prohibition that effectively makes the state into a specific-definition state.<sup>168</sup>

Legislation regulating synthetic or “designer” drugs helps illustrate the problem with states simply attempting to list prohibited substances or behaviors in legislation. By “slightly modify[ing] the molecular structures of illegal or controlled substances,” people can produce synthetic drugs that mimic the effect of illegal or controlled substances that “circumvent existing drug laws.”<sup>169</sup> To address this, Congress enacted the Controlled Substances Analogue Enforcement Act, which prohibits substances with substantially similar chemical structures and which have a similar stimulant, depressant, or hallucinogenic effect on those using the substances.<sup>170</sup> Some enforcement issues

<sup>163</sup> 002-00-1 ARK. ADMIN. CODE R. § 002.00.1-26.01 (LexisNexis 2019).

<sup>164</sup> 515 ILL. COMP. STAT. 5/10-80 (1999).

<sup>165</sup> IND. CODE § 14-22-9-1(a) (2019).

<sup>166</sup> WASH. ADMIN. CODE § 220-353-040(1) (2017).

<sup>167</sup> *See id.*

<sup>168</sup> *See, e.g.,* FLA. ADMIN. CODE ANN. r. 68A-23.002 (prohibiting various specific means of taking fish along with a general ban on “any other deleterious substance or force unless specifically authorized by law”).

<sup>169</sup> Lisa N. Sacco & Kristin Finklea, SYNTHETIC DRUGS: OVERVIEW AND ISSUES FOR CONGRESS 1, (Cong. Res. Serv., 2016) <https://fas.org/sgp/crs/misc/R42066.pdf> [<https://perma.cc/K3EE-9RCM>].

<sup>170</sup> *Id.* at 2–3; *see also* United States v. Washam, 312 F.3d 926, 933 (8th Cir. 2002) (“One of Congress’ purposes for passing the Analogue Statute was to prohibit innovative drugs that are not yet listed as controlled substances.”).

persist over how similar the drugs must be and whether labeling the drugs as “not intended for human consumption” avoids implicating the Analogue Enforcement Act.<sup>171</sup> By prohibiting substances based on similarity of chemical structure and effects, the Analogue Enforcement Act prohibits synthetic drugs that may otherwise slip past prohibitions on a list of specific drugs.<sup>172</sup> In a similar fashion, laws that specifically define *permitted* fishing methods avoid the problem of people who may invent new and unexpected fish-taking methods in a way that a simple “laundry list” of prohibited methods cannot accomplish.

#### 4. *North Dakota’s Terrible Fishing Statutes*

North Dakota’s statutes regarding the taking of fish are poorly drafted.<sup>173</sup> North Dakota prohibits the catching, killing, or destruction of any fish except “as provided in this title.”<sup>174</sup> The title in question, however, provides very few examples of how one may legally take fish. One section states that people can erect fishhouses and dark houses on the ice for ice fishing or spearfishing—which appears to imply that ice fishing and spearfishing are permitted.<sup>175</sup> Another statute sets forth a list of prohibited means of taking fish, but lists exceptions—including allowing the taking of minnows with minnow traps and dip nets, and using dip nets to land fish “which have been legally taken by hook and line.”<sup>176</sup> This last section implies that fish may be legally taken by hook and line, although there is no other section under this title that explicitly permits this means of fishing.<sup>177</sup> The implication that fishing with hooks and lines is allowed appears to be the strongest basis in North Dakota law permitting hook and line fishing. Apparently it is enough, as there is no indication that all non-ice-fishing is illegal in North Dakota, as evidenced by the number of popular fishing spots in the state.<sup>178</sup>

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<sup>171</sup> Sacco & Finklea, *supra* note 169, at 3.

<sup>172</sup> *Id.*

<sup>173</sup> See N.D. CENT. CODE § 20.1-06-02 (2019).

<sup>174</sup> N.D. CENT. CODE §§ 20.1-06-02, 20.1-06-07, 20.1-06-06.

<sup>175</sup> N.D. CENT. CODE § 20.1-06-07.

<sup>176</sup> N.D. CENT. CODE § 20.1-06-06.

<sup>177</sup> *See id.*

<sup>178</sup> See, e.g., *8 Great Fishing Spots in North Dakota*, NORTH DAKOTA TOURISM DIVISION, <https://www.ndtourism.com/best-places/8-great-fishing-spots-north-dakota>

While North Dakota law appears to allow fishing by means of implication, it would be far better if the law listed authorized means of fishing. At the very least, there should be a section or subsection that explicitly states that fishing with a hook and line is permitted. The description of hook and line fishing can be awkward and confusing, like Michigan's,<sup>179</sup> or straightforward and clear, like Delaware's.<sup>180</sup> Any description would be better than the currently vague state of the law, which should cause heartburn to any attentive lawyers who enjoy fishing in North Dakota.

### *5. Location-Specific Drafting Regulations*

While not as much of a travesty as North Dakota's poorly structured fishing laws, some states's restrictions on fishing methods are in cumbersome statutes that are organized by location.<sup>181</sup> Federal fishing laws are one such example.<sup>182</sup> Rather than providing general requirements or restrictions in statutes or regulations, federal laws regarding fishing in national parks are listed with respect to each park, leading to repetitive statutes that often make use of the exact language for their fishing restrictions.<sup>183</sup>

Restrictions based on location are necessary and commonplace—differences in types of fish in different places, for example, necessitate different approaches to permitting and restricting fishing methods on a locational basis. While differences

[<https://perma.cc/XK92-X3KF>] (listing a variety of fishing spots in North Dakota and showing numerous photos of mostly bearded men holding large fish).

<sup>179</sup> MICH. COMP. LAWS ANN. § 324.48703(1) (West 2019) (stating “an individual shall not take, catch, or kill... a fish... by any other means or device other than a single line or a single rod and line while held in the hand or under immediate control, and with a hook or hooks attached, baited with a natural or artificial bait while being used for still fishing, ice fishing, casting, or trolling for fish, which is a means of the fish taking the bait or hook in the mouth”).

<sup>180</sup> DEL. CODE ANN. tit. 7, § 1103(1) (2017) (stating “[a] hook and line may be used, and each hook and line shall have no more than 3 hooks or 3 separate lures with hooks”).

<sup>181</sup> See, e.g., FLA. ADMIN. CODE ANN. r. 68A-20.005 (2019); 15A N.C. ADMIN. CODE 10C.0407 (2019); VT. STAT. ANN. 10, § 4606(e) (2019).

<sup>182</sup> See, e.g., 16 U.S.C.S. § 127 (LexisNexis 2019); 16 U.S.C.S. § 204 (LexisNexis 2019); 16 U.S.C.S. § 170 (LexisNexis 2019); 16 U.S.C.S. § 403c-3 (LexisNexis 2019).

<sup>183</sup> See, e.g., 16 U.S.C.S. § 127 (LexisNexis 2019); 16 U.S.C.S. § 204 (LexisNexis 2019); 16 U.S.C.S. § 170 (LexisNexis 2019); 16 U.S.C.S. § 403c-3 (LexisNexis 2019); See *supra* notes accompanying Section II.B.

in geography, types of fish, and climate may necessitate variations in the rules, general restrictions—such as permitting only fishing by rod and reel unless otherwise specified by law—are often broadly applicable and should be drafted as such, rather than repeated in myriad location-specific sections or subsections spread across a state's code or administrative register.<sup>184</sup>

A better approach to location-specific legislation is to include generally applicable regulations at the beginning of a law or regulation that then specifies permitted means of catching fish in each particular location. Mississippi's regulations of Community Fishing Assistance Program Lakes is an example of this approach.<sup>185</sup> While the regulation includes specific regulations regarding types and numbers of fish that may be taken from particular bodies of water, the regulation begins with a general restriction that limits people to fishing only with rod and reel or line and pole gear.<sup>186</sup> This approach makes for a much more approachable statute than Mississippi's series of regulations regarding sport fishing, which include numerous location-specific regulations intermixed with general restrictions, with general restrictions interspersed throughout the statute.<sup>187</sup> Additionally, states that include general restrictions on fishing that then repeat in statutes or regulations pertaining to location-specific regulations locations should consider removing those specific, redundant restrictions, as they have no effect other than crowding the already complicated legal schemes governing fishing.

### *C. Shooting Invasive Fish*

While all states have restrictions on how people can take fish, these restrictions are often relaxed when it comes to killing invasive or undesirable species of fish.<sup>188</sup> West Virginia, for example, specifically permits snaring sucker, carp, fallfish, and

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<sup>184</sup> See, e.g., 16 U.S.C.S. § 127 (LexisNexis 2019); 16 U.S.C.S. § 204 (LexisNexis 2019); 16 U.S.C.S. § 170 (LexisNexis 2019); 16 U.S.C.S. § 403c-3 (LexisNexis 2019).

<sup>185</sup> See 40-3 MISS. CODE R. § 2.2 (LexisNexis 2019).

<sup>186</sup> *Id.*

<sup>187</sup> See 40-3 MISS. CODE R. § 1.3 (LexisNexis 2019).

<sup>188</sup> See, e.g., W. VA. CODE R. § 20-2-5(a)(14) (2017); IND. CODE ANN. § 14-22-9-11(b) (LexisNexis 2019).



crek chub for those who hold valid licenses.<sup>189</sup> States may also permit expanded methods to catch fish that do not typically take bait in the mouth, such as paddlefish.<sup>190</sup>

Some states, like Indiana, go so far as to establish statutory schemes that would allow agencies to bypass laws and regulations that prohibit shooting fish.<sup>191</sup> An Indiana statute allows the Director of the Division of Fish and Wildlife to “establish and implement a demonstration program for the purpose of containing and reducing invasive animal species specifically in the Wabash River.”<sup>192</sup> In implementing this program, the Director has the authority to permit the taking of “specific invasive animal species” by means described in section 14-22-9-1(a)(2) of the chapter—the section that prohibits shooting fish with firearms—although they have not yet done so.<sup>193</sup> The reason for such a specific exception is apparent in light of the impact of invasive Asian carp in the Wabash River, including silver carp that can grow up to 100 pounds and “fly out of the water when they are startled.”<sup>194</sup> Illinois’s Department of Natural Resources has even gone so far as to offer bounties for people who catch certain species of carp.<sup>195</sup>

<sup>189</sup> W. VA. CODE R. § 20-2-5(a)(14) (2017).

<sup>190</sup> *See, e.g.*, MO. CODE REGS. ANN. tit. 3 § 10-6.525 (2011) (permitting methods of fishing including “snagging, grabbing, trotline, throwline, limb line, bank line, or jug line” for paddlefish); Bill Cooper, *How To Catch Giant Paddlefish with Giant Hooks*, OUTDOOR LIFE (Apr. 12, 2017), <https://www.outdoorlife.com/catch-giant-paddlefish/> [<https://perma.cc/5UQR-B9Y5>] (noting that paddlefish eat plankton and describing the technique of snagging the fish in deep water with weights and large hooks).

<sup>191</sup> IND. CODE ANN. § 14-22-9-11(b) (LexisNexis 2019).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*; IND. CODE ANN. § 14-22-9-1(a)(2) (LexisNexis 2019).

<sup>194</sup> *Potential Impact of Asian Carp Invasion’s No Fishy Story*, MADISON COURIER (June 16, 2012, 11:00 AM), <https://madisoncourier.com/Content/News/Trimble-County/Article/Potential-impact-of-Asian-carp-invasion-s-no-fishy-story/178/270/70320> [<https://perma.cc/Z9EZ-CPNH>]; *see also* Ron Wilkins, *Asian Carp Invasion a Growing Problem*, J. & COURIER (June 14, 2014, 8:20 PM), <https://www.jconline.com/story/news/2014/06/14/asian-carp-invasion-growing-problem/10537439/> [<https://perma.cc/6BHW-9JAL>] (noting the intrusion of Asian Carp into the Wabash River). For a near-apocalyptic example of this phenomenon, *see* David Evans, *Wabash River Asian Carp Attack*, YOUTUBE (May 9, 2013), <https://www.youtube.com/watch?v=v6iBL-I4xdk> [<https://perma.cc/GJ27-3GMM>].

<sup>195</sup> *Invasive Black Carp Nearing Indiana Waters*, IND. DEPT NAT. RESOURCES (July 2, 2019), [http://www.in.gov/activecalendar\\_dnr/EventList.aspx?view=EventDetails&eventidn=24766&information\\_id=58393&type=&syndicate=syndicate](http://www.in.gov/activecalendar_dnr/EventList.aspx?view=EventDetails&eventidn=24766&information_id=58393&type=&syndicate=syndicate) [<https://perma.cc/36CZ-4EFR>] (noting that the Illinois Department of Natural Resources offers a \$100 bounty for each black carp carcass).

Indiana regulations permit a wider range of taking methods for “sucker[s], carp, Asian carp, gar, bowfin, buffalo, [and] shad” by allowing people to use “spear[s], gig[s], spear gun[s], underwater spear[s], crossbow[s], and bowfishing equipment” depending on the river or lake in question.<sup>196</sup> One regulation permits the use of a broader range of fishing methods against particular fish species, including Asian carp, in the Wabash River as well.<sup>197</sup> While these more permissive regulations allow for a wider means of taking carp and other undesirable fish, shooting carp with a gun has yet to be made legal in Indiana.<sup>198</sup> Should the Director of the Division of Fish and Wildlife choose to do so, however, the option is there—at least for the Wabash River.<sup>199</sup>

The proliferation of Asian carp infestations have inspired attempts to legalize shooting fish with guns in other states, but these efforts have not yet succeeded.<sup>200</sup> In 2012, for instance, Illinois State Representative Dave Winters introduced a bill that would permit registered gun owners to shoot Asian carp “with a shotgun off a motorboat in the Illinois River beginning with the 2013 licensing year.”<sup>201</sup> Despite Representative Winters’s efforts, his suggestion that gun owners zip around on motorboats firing shotguns into the air to shoot fish that fly out of the water on all sides of their boats never became law.<sup>202</sup>

<sup>196</sup> 312 IND. ADMIN. CODE 9-7-2(n) (2019).

<sup>197</sup> 312 IND. ADMIN. CODE 9-7-2(m)(4) (2019).

<sup>198</sup> IND. CODE ANN. § 14-22-9-1(a)(2) (LexisNexis 2019); IND. CODE ANN. § 14-22-9-11(b) (LexisNexis 2019).

<sup>199</sup> IND. CODE ANN. § 14-22-9-11(b) (LexisNexis 2019).

<sup>200</sup> *Id.*; IND. CODE ANN. § 14-22-9-11(b) (LexisNexis 2019) (showing that while still illegal to shoot fish with guns, efforts have been made to legalize it); *see also* Asian Carp Shooting? Illinois Lawmakers Suggest Gun Owners Fire at Invasive Species From Their Boats, HUFFPOST (Feb. 13, 2012, 10:39 AM), [https://www.huffpost.com/entry/asian-carp-shooting-illin\\_n\\_1272984?guccounter=1](https://www.huffpost.com/entry/asian-carp-shooting-illin_n_1272984?guccounter=1) [<https://perma.cc/B2VH-HK7L>] (quoting H.B. 5317, 97th Gen. Assemb., (Ill. 2012)).

<sup>201</sup> *Asian Carp Shooting? Illinois Lawmakers Suggest Gun Owners Fire at Invasive Species From Their Boats*, HUFFPOST (Feb. 13, 2012, 10:39 AM), [https://www.huffpost.com/entry/asian-carp-shooting-illin\\_n\\_1272984?guccounter=1](https://www.huffpost.com/entry/asian-carp-shooting-illin_n_1272984?guccounter=1) [<https://perma.cc/B2VH-HK7L>] (quoting H.B. 5317, 97th Gen. Assemb., (Ill. 2012)); *see also* H.B. 5317, 97th Gen. Assemb., (Ill. 2012).

<sup>202</sup> *See Bill Status of HB 5317*, ILL. GEN. ASSEMB., <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=5317&GAID=11&DocTypeID=HB&LegId=65507&SessionID=84&GA=97> [<https://perma.cc/LN2A-KFF5>].

While the 2012 carp-shooting proposal never became law, Illinois did begin to permit slingbows in 2013.<sup>203</sup> The head of the state's Department of Natural Resources supported the bill because it would expand bowfishing opportunities—particularly opportunities to shoot invasive carp.<sup>204</sup> He further noted that because the “ability to effectively and ethically take an animal” with a slingbow was questionable the bill only permitted for bowfishing.<sup>205</sup>

Several states have site-specific exceptions to their bans on shooting fish, some of which permit shooting carp.<sup>206</sup> Vermont, for example, permits shooting “pickerel, northern pike, carp, garfish, bowfin, mullet, shad, suckers, bullhead, and other cull fish” between March 25–May 25 in Lake Champlain.<sup>207</sup> Virginia allows those with fishing licenses to shoot “suckers, redhorse, and carp with a rifle during the hours of sunrise to sunset, between April 15 and May 31” in the Clinch River in Scott County, unless it is a Sunday.<sup>208</sup> These exceptions to the general trend against shooting fish are not without their critics, but they have resisted attempts at reform for years, largely due to “noisy objections from a small but dedicated bunch.”<sup>209</sup>

#### *D. The Distinction Between Public and Private Waters*

The statutes and regulations against shooting fish often apply to fishing in state or public waters.<sup>210</sup> The distinction between public waters and private waters can be significant.<sup>211</sup>

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<sup>203</sup> 515 ILL. COMP. STAT. ANN. 5/10-110 (LexisNexis 2019). The statute uses the phrase “sling shot bow,” but appears to refer to the device that is more commonly referred to as a slingbow.

<sup>204</sup> Chris Young, *New Legislation: Sling Shot Bows Authorized*, ST. J.-REG. (Aug. 9, 2013, 8:03 AM), <https://www.sj-r.com/article/20130809/NEWS/308099918> [<https://perma.cc/5DN6-2JSR>].

<sup>205</sup> *Id.*

<sup>206</sup> VT. STAT. ANN. tit. 10, § 4606(e) (2019); 4 VA. ADMIN. CODE § 15-320-150 (2019).

<sup>207</sup> VT. STAT. ANN. tit. 10, § 4606(e) (2019).

<sup>208</sup> 4 VA. ADMIN. CODE § 15-320-150 (2019).

<sup>209</sup> Belluck, *supra* note 110; see also Richard D. Lyons, *OUTDOORS: Shooting Fish Has Become an Endangered Sport*, N.Y. TIMES (May 5, 1991), <https://www.nytimes.com/1991/05/05/sports/outdoors-shooting-fish-has-become-an-endangered-sport.html> [<https://perma.cc/M4QE-E3BZ>] (highlighting the story of John Roy, who had helped block a previous attempt at banning fish shooting).

Laws may apply to public water only, but when the text of the statute is not specific, courts may apply the law in a manner that exempts water that is purely on private land (or, say, in a barrel)<sup>212</sup> from restrictions that limit how people can take fish.

For example, the restrictions on shooting fish in Alabama,<sup>213</sup> Indiana,<sup>214</sup> Michigan,<sup>215</sup> and Texas<sup>216</sup> include a qualifier that the fish must be in state or public waters. Other states's statutory or regulatory schemes recognize that private waters are subject to fewer restrictions; Connecticut regulations, for example, state that owners of private waters that are registered as required may remove "any species of fish" from these waters "by any method, except by the use of chemicals or explosives."<sup>217</sup>

In determining the scope of restrictions on the means of killing fish, courts have addressed the distinction between public and private waters.<sup>218</sup> The Michigan Supreme Court confronted this issue in *People v. Conrad*.<sup>219</sup> There, several defendants were convicted of illegal spearfishing in a 15-acre lake, which was owned by at least one of several defendants.<sup>220</sup> The defendants had permission from the owners of the lake to spear fish in the water.<sup>221</sup>

<sup>210</sup> ALA. CODE § 9-11-87 (LexisNexis 2019); IND. CODE ANN. § 14-22-9-1(a)(2) (LexisNexis 2019); MICH. COMP. LAWS SERV. § 324.48703(1) (LexisNexis 2019); 31 TEX. ADMIN. CODE § 57.973(d) (2019).

<sup>211</sup> See, e.g., ALA. CODE § 9-11-87 (LexisNexis 2019); IND. CODE ANN. § 14-22-9-1(a)(2) (LexisNexis 2019); MICH. COMP. LAWS SERV. § 324.48703(1) (LexisNexis 2019); TEX. ADMIN. CODE § 57.973(d) (2019); *People v. Conrad*, 125 Mich. 1, 83 N.W. 1012 (1900).

<sup>212</sup> Or perhaps a fish tank. See, e.g., Thomas Tracy, *Man Wanted for Shooting Up Fish Tank After Argument with Sister in Bronx Apartment*, N.Y. DAILY NEWS (Nov. 1, 2016, 3:18 PM), <https://www.nydailynews.com/new-york/bronx/man-wanted-shooting-fish-tank-bronx-apartment-article-1.2854143> [<https://perma.cc/RF27-HG5W>]; 44NEWS, *Woman Accused of Shooting Fish Tank Appears in Court*, WEVV (June 7, 2016), <https://44news.wevv.com/woman-accused-shooting-fish-tank-appears-court/> [<https://perma.cc/Z6RQ-92VU>].

<sup>213</sup> ALA. CODE § 9-11-87 (LexisNexis 2019).

<sup>214</sup> IND. CODE ANN. § 14-22-9-1(a)(2) (LexisNexis 2019).

<sup>215</sup> MICH. COMP. LAWS SERV. § 324.48703(1) (LexisNexis 2019).

<sup>216</sup> TEX. ADMIN. CODE § 57.973(d) (2019).

<sup>217</sup> *Id.*; CONN. AGENCIES REGS. § 26-131-1 (2019).

<sup>218</sup> *People v. Conrad*, 125 Mich. 1, 83 N.W. 1012 (1900).

<sup>219</sup> See *id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

At the time, the relevant statute prohibited the taking, catching, or killing of fish, or attempted taking, killing, or catching of fish with spears (as well as firearms) in “any of the inland lakes in this state . . .”<sup>222</sup>

The court overturned the convictions, reasoning that the lake was private property, not connected with any other lakes or streams, and therefore the public had no interest in it.<sup>223</sup> The court held that the act could not “be construed to include private ponds or lakes, in which the public have no interest.”<sup>224</sup> Notably, the act’s application to “any of the inland lakes in this state” did not qualify a ‘state waters’ or ‘public waters’ distinction, nor with other limits that could give rise to the non-public-interest exception that the court employed.<sup>225</sup> Such a determination would be more understandable under the current wording of the statute, which the legislature amended to include only state waters.<sup>226</sup> The modern wording of the statute may be less restrictive than the court’s approach under the public interest test, as the narrower ‘state waters’ terminology removes the need for the public or private interest analysis. In doing so, the court removes from the scope of the statute private waters that may connect to public waters.

Other states with broadly-worded prohibitions against shooting fish may find that these restrictions hindered by the interpretive approach that Michigan applied in the *Conrad* case. For example, in *State v. Roberts*, the New Hampshire Supreme Court evaluated the appeal of an indictment against a defendant who caught and killed four trout in a pond that the defendant claimed that he owned.<sup>227</sup> The state asserted that an outlet from the pond connected it to a nearby river and that a public brook emptied into the pond, bringing the privacy of the pond into question.<sup>228</sup> The court determined that the state had no power to restrict the taking of fish from private ponds that had no

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 2.

<sup>224</sup> *People v. Conrad*, 125 Mich. at 2.

<sup>225</sup> *Id.* at 1 (quoting Section 1).

<sup>226</sup> MICH. COMP. LAWS. SERV. § 324.48703(1) (LexisNexis 2018).

<sup>227</sup> *State v. Roberts*, 59 N.H. 256, 256 (N.H. 1879).

<sup>228</sup> *See id.* at 256, 258.

connections to other waters because it would not interfere with another's enjoyment of their land.<sup>229</sup> Whether or not the indictment could be maintained depended on whether there was indeed a connection between the pond and other waters, such that fish could pass to or from the pond, and that the indictment could not be maintained if no such connection existed.<sup>230</sup> The court's broad holding limits the application of New Hampshire's restriction on shooting fish, which is not otherwise restricted by any 'public' or 'state water' qualifier.<sup>231</sup>

Those who believe they may get away with shooting fish in private waters should be wary that if the water even occasionally allows fish to escape into other waterways, the private water may be a water of the state.<sup>232</sup> For instance, in the Pennsylvania case of *Commonwealth v. Storch*, the defendant was charged with unlawfully shooting a fish in a pond with a shotgun.<sup>233</sup> The magistrate discharged the defendant, finding that the "fish laws do not extend to exclusively private waters," and that the state lacked the authority to "extend its control over fishing in purely private waters."<sup>234</sup> However, the court found the defendant was guilty, noting that fish from the pond could escape "through a discharge pipe into the creek below, and from thence into the North Branch of the Susquehanna river," which defeated the defense that the defendant caught the fish in a private pond.<sup>235</sup>

It is worth noting that an example of a privately owned water without an outlet would be water in a barrel. However, fish do not typically manifest in barrels without human aid or intervention. While shooting the fish in the barrel may not violate any state rules restricting the taking of fish, a person engaging in this activity should take care not to violate any laws or regulations when obtaining the fish to place in the barrel in the first place.

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<sup>229</sup> *Id.* at 257–58.

<sup>230</sup> *Id.*

<sup>231</sup> See N.H. Rev. Stat. ANN. § 207:9 (LexisNexis 1935).

<sup>232</sup> See, e.g., *Commonwealth v. Storch*, 17 Pa. D. 61, 61–62 (1907) (finding that the "fish laws do not extend to exclusively private waters," but leaving open the possibility that if even a few fish can get into open water the outcome may be different).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 62 (internal quotation omitted).

<sup>235</sup> *Id.* at 66.

*E. Constitutional Implications of Fish Shooting Restrictions*

Laws and regulations against shooting fish may have federal and state constitutional implications. Those who want to fish with firearms may argue that restrictions against shooting fish affect the constitutional right to keep and bear arms. They may further argue that these restrictions can be impacted by state constitutional provisions that protect the right to hunt and fish.

*1. A Second Amendment Right to Shoot Fish?*<sup>236</sup>

The Supreme Court held that the Second Amendment of the Constitution protects an individual's right to keep and bear arms, and has incorporated this right to the states through the Fourteenth Amendment.<sup>237</sup> Forty-two state constitutions now have provisions that guarantee an individual's right to keep and bear arms.<sup>238</sup> While the scope of Second Amendment protections and permissible restrictions on the possession and carrying of firearms is the subject of significant academic debate and numerous lawsuits,<sup>239</sup> Second Amendment (or state constitution equivalent) challenges to statutes or regulations that restrict the shooting of fish do not appear to be the subject of any available case law.

In *District of Columbia v. Heller*, the Supreme Court stated that the Second Amendment protects a right to use arms for self-defense.<sup>240</sup> The Court described lawful self-defense as the "core" purpose of the Second Amendment.<sup>241</sup> While the *Heller* Court mentioned that Americans at the time of the founding believed

<sup>236</sup> My entire legal career led to the point where I finally was able to draft this sub-heading.

<sup>237</sup> See *D.C. v. Heller*, 554 U.S. 570, 595 (2008) (holding "that the Second Amendment confer[s] an individual right to keep and bear arms"); *McDonald v. Chicago*, 561 U.S. 742, 791 (holding "that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right" against the states).

<sup>238</sup> Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 (2007).

<sup>239</sup> See, e.g., *Peruta v. San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (holding that the Second Amendment does not include a right of a "member of the general public to carry concealed firearms in public"); *N.Y. State Rifle & Pistol Ass'n v. N.Y.*, 883 F.3d 45, 53, 64 (2d. Cir. 2018) (holding that New York City's rule against transporting firearms anywhere other than shooting ranges in the City did not infringe on Second Amendment rights of those permitted to possess firearms in the home under "premises licenses").

<sup>240</sup> *Heller*, 554 U.S. at 616.

<sup>241</sup> *Id.* at 630.

that the Second Amendment was important “for self-defense and hunting,” the passing reference to hunting does not materialize into any suggestion that the activity itself warrants constitutional protection.<sup>242</sup> Discussions of the Second Amendment’s history and ratification rarely analyze the use of guns for hunting. Some commentators, such as Joseph Blocher, argue that hunting does not fall under the Second Amendment’s direct protection.<sup>243</sup> The Second Amendment has been interpreted as protecting a core right of self-defense, meaning the use of firearms for recreational purposes—particularly hunting—is peripheral to the central right that the Second Amendment protects.<sup>244</sup>

While Second Amendment jurisprudence neglects the specific right to hunt, incidental restrictions on the right to keep and bear arms that hunting and fishing laws create may still implicate the Second Amendment. To the extent that a law against shooting fish creates a bar against possessing or carrying firearms in certain circumstances, these restrictions may restrict a citizen’s ability to keep and bear arms.

Georgia, Louisiana, and Wisconsin each feature laws that illustrate how incidental restrictions on keeping and bearing arms may arise, and showcase two very different approaches to this potential constitutional issue.<sup>245</sup> Georgia’s law, by its drafting, avoids limiting the right to carry firearms<sup>246</sup>, but Louisiana’s<sup>247</sup> and, particularly, Wisconsin’s law<sup>248</sup> both directly implicate the right to carry firearms, which could potentially be subject to a Second Amendment challenge.<sup>249</sup>

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<sup>242</sup> See *id.* at 599. The *Heller* Court also mentioned references to hunting in versions of Second Amendment proposals, but only to support its conclusion that the Second Amendment protects an individual right. See *id.* at 604.

<sup>243</sup> Joseph Blocher, *Hunting and the Second Amendment*, 91 NOTRE DAME L. REV. 133, 167–68 (2015).

<sup>244</sup> *Id.* at 156, 165, 167–68.

<sup>245</sup> See GA. CODE ANN. § 27-4-8 (1977); LA. STAT. ANN. § 56:320(C)(1) (2010); WIS. ADMIN. CODE NR § 20.05(1).

<sup>246</sup> See GA. CODE ANN. § 27-4-8 (1977).

<sup>247</sup> See LA. STAT. ANN. § 56:320(C)(1) (2010).

<sup>248</sup> See WIS. ADMIN. CODE NR § 20.05(1).

<sup>249</sup> Although these incidental restrictions may not be advisable in the immediate future if the Supreme Court remains on track to review the scope of the Second Amendment’s right to carry firearms. See generally Adam Liptak, *Supreme Court Will Review New York City Gun Law*, N.Y. TIMES, Jan. 22, 2019, <https://www.nytimes.com/2019/01/22/us/politics/supreme-court-guns-nyc-license.html>



Georgia's law, however, illustrates tactics that legislators may take to avoid potential Second Amendment challenges. The law there prohibits the taking of fish through a variety of means, including with firearms, batteries, generators, dynamite, poisons, walnut hulls, and lime.<sup>250</sup> The law goes on to note that possession of any of the listed devices or substances, *except firearms*, in a boat on state freshwater "shall be deemed prima-facie evidence of guilt under this Code section," (although the provision does not apply to batteries used to operate motors or lights).<sup>251</sup> Without the firearm exception, a law like Georgia's would create a presumption that anyone with a gun on a boat is breaking the law against shooting fish.

Louisiana prohibits the use of guns and various other devices to take or possess fish.<sup>252</sup> Louisiana legislation further prohibits the possession of prohibited "instruments, weapons, substances, or devices... with the intent to take fish in violation of the provisions of this Section."<sup>253</sup> Although the prohibition is qualified by a specific intent requirement, Louisiana's law, unlike Georgia's model, leaves the possibility that the mere possession of a firearm may subject a law-abiding citizen to a violation under the statute.

Challengers may argue that the prohibition on possessing firearms with the intent to take fish infringes on the Second Amendment right to bear arms.<sup>254</sup> Both the Second Amendment and Louisiana's own state constitution protect the right to keep and bear arms, which further requires that any restriction on the right be subject to strict scrutiny.<sup>255</sup> Despite this heightened standard of review, a constitutional challenge to the possession restriction will likely fail. The requirement that firearms are possessed with the specific intent to use them to illegally take fish<sup>256</sup> acts as a qualifier that limits the possession restriction to a

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[<https://perma.cc/DU79-BEWW>] (discussing the Supreme Court reviewing a Second Amendment case, which is a rare occurrence).

<sup>250</sup> GA. CODE ANN. § 27-4-8 (1977).

<sup>251</sup> *Id.*

<sup>252</sup> LA. STAT. ANN. § 56:320(C)(1) (2010).

<sup>253</sup> *Id.*

<sup>254</sup> *See* U.S. CONST. amend. II.

<sup>255</sup> *See* LA. CONST. art. I, § 11 (amended 2012).

<sup>256</sup> *See id.*; LA. STAT. ANN. § 56:320(C)(1) (2010).

narrow set of circumstances in which intent to violate the law is clear. By narrowing the scope of the restriction to circumstances in which a person specifically intends to violate the law against shooting fish, Louisiana legislators have likely neutralized any constitutional challenge.<sup>257</sup>

Opponents of Louisiana's law against possessing guns with the intent to shoot fish<sup>258</sup> will find little support in Louisiana's state constitutional right to bear arms.<sup>259</sup> The law against possessing guns with such intent predates the 2012 amendment that required any state laws restricting the right to keep and bear arms to pass strict scrutiny.<sup>260</sup> Even when the legislature removed language explicitly permitting restrictions of concealed firearms and replaced that language with the strict scrutiny requirement, the Louisiana Supreme Court held that the current constitutional right to bear arms did not serve to invalidate existing laws that restricted the carrying of concealed weapons.<sup>261</sup> Just as opponents of the Second Amendment were unable to invalidate previous law, challenges to this pre-existing law against possessing firearms with the intent to shoot fish will likely fail in a similar manner.

Wisconsin's regulation against fishing with when possessing firearms serves as among the most stringent restrictions in the United States.<sup>262</sup> Wisconsin, like many states, prohibits fishing by means other than hook and line unless specifically authorized by regulation.<sup>263</sup> Wisconsin's regulation goes farther, however, by prohibiting the possession or control of "any firearm, gun, or similar device at any time while on the waters, banks or shores that might be used for the purpose of

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<sup>257</sup> See *Louisiana ex rel. J.M.*, 144 So. 3d 853, 863 (La. 2014) (rejecting constitutional challenge to law prohibiting those under sixteen years of age from accessing handguns and finding that its focus on that particular problem meant that the law passed strict scrutiny).

<sup>258</sup> See LA. STAT. ANN. § 56:320(C)(1) (2010).

<sup>259</sup> See LA. CONST. art. I, § 11 (amended 2012).

<sup>260</sup> See LA. STAT. ANN. § 56:320(C)(1) (2010) (stating "it shall be unlawful to possess any of the prohibited instruments, weapons, substances, or devices set out hereinabove with the intent to take fish in violation of the provisions of this Section"; See LA. CONST. art. I, § 11 (amended 2012)).

<sup>261</sup> *J.M.*, 144 So. 3d at 864.

<sup>262</sup> See *supra* notes accompanying Section II.A; see also WIS. ADMIN. CODE NR § 20.05(1).

<sup>263</sup> See WIS. ADMIN. CODE NR § 20.05(1).

fishing.”<sup>264</sup> While the Wisconsin regulation does not contain the “prima facie evidence” language of the Georgia statute,<sup>265</sup> the specific language does not seem necessary in light of the broad language clarifying that the firearm or gun simply “might” be used for fishing.<sup>266</sup> Because any gun *might* be used for fishing, this regulation essentially prohibits the possession of firearms on waters, banks, or shores of bodies of water.

This is not to say that states will enforce these laws—indeed, it appears that Wisconsin approved a lengthy waterfowl hunting season, an activity that appears to be at odds with the language of the fishing restriction.<sup>267</sup> Law enforcement is likely either unaware of the law’s scope or is practically inferring a specific intent requirement (like Louisiana’s) in enforcing the law beyond the actual text. Even if Wisconsin does not choose to enforce this law currently, law enforcement may still have the authority to enforce it in the future—or use the law’s broad language as an excuse to stop or arrest those who do possess guns near water for any reason.

An alternative reading of the regulation may apply only to public waters, as the regulations clarify that “fishing” or “fish,” when used as a verb, means “to take, capture, kill or attempt to take, capture or kill any variety of fish in the waters *of the state*.”<sup>268</sup> One may reasonably interpret the “waters of the state” language in the definition to restrict the scope of “fishing” to public rather than private waters.<sup>269</sup> The drafter’s failure to further define “waters of the state” leaves the proper interpretation unresolved.<sup>270</sup>

Even if the regulation is interpreted to limit the restriction on the possession of firearms to those on or next to public waters,

<sup>264</sup> WIS. ADMIN. § 20.05(2).

<sup>265</sup> GA. CODE ANN. § 27-4-8.

<sup>266</sup> WIS. ADMIN. § 20.05(2).”

<sup>267</sup> See Paul A. Smith, *Despite Another Drop in Duck Population, State Waterfowl Hunters Will be Offered a 60-Day Season*, MILWAUKEE JOURNAL-SENTINEL (Mar. 16, 2019, 8:12 AM) <https://www.jsonline.com/story/sports/outdoors/2019/03/16/wisconsin-duck-hunters-again-offered-60-day-season/3134796002/> [<https://perma.cc/4TN7-6HP7>] (noting that Wisconsin is permitting a 60-day duck season in 2019, a length of time that the United States Fish and Wildlife Department classifies as “liberal”).

<sup>268</sup> WIS. ADMIN. CODE NR § 20.03(12) (emphasis added).

<sup>269</sup> *Id.*

<sup>270</sup> *See id.*

the regulation still suggests a geographic area encompassing all public waterways.<sup>271</sup> This interpretation may not be fatal to the validity of the statute, as regulations prohibiting possession of loaded handguns in vehicles while in a public park have been upheld against Second Amendment challenges.<sup>272</sup> However, because Wisconsin's regulations effectively prohibit the possession of firearms near (at least) any public waterway, a challenger may argue that Wisconsin's regulation is an unconstitutional restriction on the Second Amendment right to bear arms.

Such a challenge depends largely on a court's determinations regarding the right to carry firearms. Whether the Second Amendment right to bear arms protects the right to carry firearms—and the extent of this protection—is the subject of extensive debate and litigation.<sup>273</sup> The scope of the right to carry firearms may be clarified soon, as the Supreme Court recently granted certiorari for a case concerning New York City's prohibition against the transportation of guns outside of the home, the latest attempt to clarify the uncertain right to carry firearms.<sup>274</sup> Whether this case will indeed proceed, or lead to a meaningful opinion on the Second Amendment is doubtful at this point after New York City recently scrapped the law at issue in an apparent effort to moot the case.<sup>275</sup> The fact that the Supreme Court took up this case suggests that, even if it does become moot, the Court is at least willing to consider the scope of the right to carry firearms—and when the Court ultimately rules on the merits, the resulting opinion will likely have implications on Wisconsin's restriction on the possession of firearms near water.

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<sup>271</sup> *See id.*

<sup>272</sup> *See* United States v. Masciandaro, 638 F.3d 458, 473–74 (4th Cir. 2011) (holding that the prohibition of carrying or possessing a loaded handgun in a motor vehicle within a national park area did not violate the Second Amendment right to bear arms).

<sup>273</sup> *See, e.g.,* Peruta v. County of San Diego, 824 F.3d 919, 939 (9th Cir. 2016) (holding that the Second Amendment does not include a right of a “member of the general public to carry concealed firearms in public”); N.Y. State Rifle & Pistol Ass'n v. City of N.Y., 883 F.3d 45, 53, 64 (2d. Cir 2018) (holding that New York City's rule against transporting firearms anywhere other than shooting ranges in the City did not infringe on Second Amendment rights of those permitted to possess firearms in the home under “premises licenses”).

<sup>274</sup> *See* N.Y. State Rifle & Pistol Ass'n v. City of N.Y., 139 S. Ct. 939 (2019) (granting the petition for writ of certiorari from the United States Court of Appeals for the Second Circuit); *see also* Liptak, *supra* note 249.

<sup>275</sup> *See* Liptak, *supra* note 243.

*2. State Constitutional and Statutory Protection of the Right to Hunt and Fish*

States must also be wary of state constitutional and legislative provisions that directly preserve the right to hunt and fish. States with constitutional provisions that protect the right to hunt *and* fish are Alabama,<sup>276</sup> Arkansas,<sup>277</sup> Georgia,<sup>278</sup> Idaho,<sup>279</sup> Indiana,<sup>280</sup> Kansas,<sup>281</sup> Kentucky,<sup>282</sup> Louisiana,<sup>283</sup> Mississippi,<sup>284</sup>

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<sup>276</sup> ALA. CONST. art. I, § 36.02 (recognizing a right to “hunt, fish, and harvest wildlife . . . subject to reasonable regulations”).

<sup>277</sup> ARK. CONST. amend. 88, § 1 (establishing a right for Arkansas citizens to hunt, fish, trap, and harvest wildlife).

<sup>278</sup> GA. CONST. art. 1, § 1, para. XXVIII (“The tradition of fishing and hunting and the taking of fish and wildlife shall be preserved for the people and shall be managed by law and regulation for the public good.”).

<sup>279</sup> Idaho CONST. art. 1, § 23 (recognizing the “rights to hunt, fish, and trap” as a part of Idaho’s heritage and stating that the rights shall be preserved and “managed through the laws, rules and proclamations that preserve the future of hunting, fishing and trapping” but that the amendment shall not prevent the suspension or revocation of a hunting or fishing license pursuant to a statute enacted by the legislature).

<sup>280</sup> IND. CONST. art. 1, § 39 (recognizing the right to hunt and fish subject only to laws “prescribed by the General assembly and rules prescribed by virtue of the authority of the General assembly” to promote wildlife conservation and management and preserve the future of hunting and fishing).

<sup>281</sup> KAN. CONST. B. of R. § 21 (recognizing a right to hunt and fish “subject to reasonable laws and regulations that promote conservation and management and that preserve the future of hunting and fishing”).

<sup>282</sup> KY. CONST. § 225A (recognizing a right to hunt and fish “using traditional methods subject only to statutes enacted by the Legislature and regulations adopted to promote wildlife conservation, and management and to preserve the the future of hunting and fishing”).

<sup>283</sup> LA. CONST. art. 1, § 27 (recognizing a right to hunt and fish, and stating that hunting and fishing “shall be managed by law and regulation... [to] conserve and replenish state natural resources”).

<sup>284</sup> MISS. CONST. art. 3, § 12A (recognizing a right to hunt and fish “subject only to laws and regulations that promote wildlife conservation and management and that preserve the future of hunting and fishing”).

Minnesota,<sup>285</sup> Montana,<sup>286</sup> Nebraska,<sup>287</sup> North Dakota,<sup>288</sup> Oklahoma,<sup>289</sup> South Carolina,<sup>290</sup> Tennessee,<sup>291</sup> Texas,<sup>292</sup> Vermont,<sup>293</sup> Virginia,<sup>294</sup> Wisconsin,<sup>295</sup> and Wyoming.<sup>296</sup> California's<sup>297</sup> and Rhode Island's<sup>298</sup> constitutions protect the right to fish. Florida law recognizes the right to hunt and fish.<sup>299</sup> Both Delaware's<sup>300</sup> and West Virginia's<sup>301</sup> constitutions protect the right to keep and bear arms for self-defense as well as for hunting and recreational use.

While a substantial minority of states have passed constitutional provisions protecting the right to hunt and fish,

<sup>285</sup> Minn. CONST. art. XIII, § 12 (recognizing that hunting and fishing “are a valued part of our heritage that shall be forever preserved for the people and shall be managed by law and regulation for the public good”).

<sup>286</sup> MONT. CONST. art. IX, § 7 (recognizing a right to “harvest wild fish and wild game animals”).

<sup>287</sup> NEB. CONST. art. XV, § 25 (recognizing a right to hunt and fish subject to “laws, rules, and regulations regarding participation and that promote wildlife conservation and management and that preserve the future of hunting [and] fishing”).

<sup>288</sup> N.D. CONST. art. XI, § 27 (stating that hunting and fishing “are a valued part of our heritage and will be forever preserved for the people and managed by law and regulation for the public good”).

<sup>289</sup> OKLA. CONST. art. II, § 36 (recognizing that Oklahoma citizens have a right to hunt and fish subject to reasonable regulation by the legislature and by the Wildlife Conservation Commission).

<sup>290</sup> S.C. CONST. art. I § 25 (recognizing that South Carolina citizens have a right to hunt and fish “subject to laws and regulations promoting sound wildlife conservation and management as prescribed by the General Assembly”).

<sup>291</sup> TENN. CONST. art. XI, § 13 (establishing a personal right to hunt and fish “subject to reasonable regulations and restrictions prescribed by law”).

<sup>292</sup> TEX. CONST. art. I, § 34(a) (recognizing a right to hunt and fish “subject to laws or regulations to conserve and manage wildlife and preserve the future of hunting and fishing”).

<sup>293</sup> VT. CONST. Ch. II, § 67 (recognizing a right to hunt fowl, as well as to fish on “all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly”).

<sup>294</sup> VA. CONST. art. XI, § 4 (recognizing a right to hunt and fish subject to regulations and restrictions prescribed by general law).

<sup>295</sup> WIS. CONST. art. I, § 26 (recognizing a right to hunt and fish “subject only to reasonable restrictions as prescribed by law”).

<sup>296</sup> WYO. CONST. art. I, § 39 (recognizing Wyoming citizens’ right to hunt and fish “subject to regulation as prescribed by law”).

<sup>297</sup> CAL. CONST. art. I, § 25 (recognizing a right to fish “upon and from the public lands of the State”).

<sup>298</sup> R.I. CONST. art. I, § 17 (recognizing the “rights of fishery, and the privileges of the shore,” which include fishing from the shore).

<sup>299</sup> FLA. STAT. § 379.104 (2008) (recognizing Florida citizens’s right to hunt and fish “subject to regulations and restrictions prescribed by general law”).

<sup>300</sup> DEL. CONST. art. I § 20.

<sup>301</sup> W. VA. CONST. art. III, § 22.

“[n]one of the state hunting or fishing rights constitutional provisions have been interpreted as preventing a state from regulating hunting or fishing.”<sup>302</sup> Additionally, many state constitutional rights to hunt and fish include the caveat that the rights are subject to regulation by laws and regulations. West Virginia’s constitution, for example, protects the right to keep and bear arms “for lawful hunting and recreational use.”<sup>303</sup> In *State ex rel. West Virginia Dep’t of Nat. Res. v. Cline*, however, the court granted a writ of prohibition against two counties’s prosecuting attorneys for refusing to enforce violations of West Virginia Code section 20-2-5(10), which prohibited the transportation of loaded firearms.<sup>304</sup> The Court held that the state constitution only protected the “lawful” use of firearms, and “[a]s an unlawful manner of hunting, the transportation of a loaded firearm is not subject to constitutional protection.”<sup>305</sup>

*Cline* shows that to the extent that state constitutional provisions only protect the “lawful” use of weapons for hunting or fishing, courts can rely on the “lawful” qualifier to defeat challenges to firearm restrictions. And even when no such qualifier exists, courts often refuse to strike down laws or regulations as violating the right to fish. In *Cherenzia v. Lynch*, for example, the Rhode Island Supreme Court held that a law prohibiting using SCUBA gear to harvest shellfish in several ponds did not violate the right to fish.<sup>306</sup> Indeed, the court noted that while laws and regulations often provide for the enjoyment of the right to fish by the population as a whole, “reasonable legislation regulation is necessary to properly effectuate” the right to fish.<sup>307</sup>

As demonstrated by *Lynch*, even if states explicitly protect the right to fish, the restriction of certain means of fishing is unlikely to give rise to a successful state constitutional challenge so long as some means of fishing remains available. Generally, laws against shooting fish with firearms, address such a specific means of hunting fish that these restrictions are unlikely to give

<sup>302</sup> Jeffrey Omar Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 85 (2009).

<sup>303</sup> W. VA. CONST. art. III, § 22.

<sup>304</sup> *State ex rel. W. Va. Dep’t of Nat. Res. v. Cline*, 488 S.E.2d 376, 378 (W. Va. 1997).

<sup>305</sup> *Id.* at 382.

<sup>306</sup> *Cherenzia v. Lynch*, 847 A.2d 818, 819–20, 823–24 (R.I. 2004).

<sup>307</sup> *Id.* at 823–24.

rise to a violation of a constitutional right to fish so long as other means of fishing remain available.

### CONCLUSION

Returning to our original inquiry: can you shoot that fish over there with a gun?

In most cases, the answer is likely “No.” Indeed, before even proceeding to the question of whether an applicable law or regulation bans the shooting of fish in your jurisdiction, there may be other incidental laws or circumstances that prohibit the shooting of fish even if there is no law against doing so. Your gun (or nuclear weapon) may be prohibited by law. You may not have a license to take fish. There may be a person or endangered animal between you and the fish that may get caught in the crossfire.

If you manage to make it past these various other restrictions, nearly every state and the District of Columbia has restrictions that either explicitly prohibit shooting fish with guns, or that require that people fish using means that are outlined in laws and regulations, nearly all of which do not allow guns.<sup>308</sup> Even if you happen to be at Lake Champlain in Vermont or the Clinch River in Scott County, Virginia, you are out of luck if it is not the right time of year. And if you want to assert your state or federal constitutional rights and claim that restricting your use of firearms against violates your Second Amendment rights or right to hunt or fish under state constitutional law, the likelihood that such a claim will succeed is low.<sup>309</sup>

While prohibiting or restricting the shooting of fish seems to be a simple enough task, a complete picture of the state laws on the topic reveals a wide variety of methods that states have employed to address the issue. Some are fairly straightforward; others are redundant; still others are overly-complicated and technical.<sup>310</sup> This simple question—is it legal to shoot fish—reveals the variety of laws that federalism encourages and the interconnectedness of legal issues, with the matter of shooting fish

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<sup>308</sup> See *supra* notes accompanying Section II.A.

<sup>309</sup> See, e.g., LA. CONST. art. I, § 11; LA. STAT. ANN § 56:320(C)(1); J.M., 144 So. 3d at 863.

<sup>310</sup> And enough mean things have been said about North Dakota’s law.



having implications for constitutional law, environmental law, and the scope of state power.

While scholars will inevitably continue to debate theories of law and ideal interpretations of federal constitutional provisions, this article serves to show how simple laws and regulations that often go unnoticed in legal academia illuminate issues of constitutional, environmental, and legislative significance. If nothing else, this article is a vital reference (and, in most circumstances, a stern warning) for the everyday person who wants to do nothing more than head on down to the river and shoot a fish.