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THE CONSTITUTIONALITY OF FISH AND WILDLIFE RELATED SEARCHES AND SEIZURES CONDUCTED BY CONSERVATION AGENTS IN MISSOURI

INTRODUCTION

This Article argues that searches and seizures conducted in accordance with the provisions of the Wildlife Code of Missouri¹ are compliant with the Fourth Amendment. One commentator recently suggested: “[T]he Fourth Amendment should apply to game wardens to the same extent that it applies to police officers and other law enforcement officials. The arguments used by courts for departing from standard Fourth Amendment protections for game wardens and hunters do not pass muster.”² Like Missouri state troopers, Missouri conservation agents are government officials who are designated as “officers of the state.”³ The duty and power to enforce laws related to fish and wildlife in Missouri is primarily delegated to conservation agents;⁴ however, an affirmative duty is also placed on all other law enforcement officers to “aid diligently” in the enforcement of these laws and regulations.⁵ No special Fourth Amendment waiver is possessed by conservation agents, and searches and seizures related to fish and wildlife, regardless of the uniform the officer is wearing, trigger the limitations of the Fourth Amendment.⁶ This Article does not advocate a weaker Fourth Amendment standard for searches and seizures conducted to enforce fish and wildlife related laws, but argues these laws and their associated enforcement procedures are within the scope of police activities permitted by the Fourth Amendment.

1. MO. CODE REGS. tit. 3, § 10-4.105 (2017) (“The rules of the Conservation Commission and statutory laws not inconsistent therewith shall constitute the *Wildlife Code of Missouri* . . .”).

2. Ed R. Haden & Adam K. Israel, *The Fourth Amendment, Game Wardens, and Hunters*, 46 CUMB. L. REV. 79, 80 (2015).

3. *Compare* MO. REV. STAT. § 252.085.1 (2017) (“All authorized agents of the commission who have attained proper certification as peace officers in accordance with the provisions of chapter 590 . . . are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state.”), *with* MO. REV. STAT. § 43.190 (2017) (“The members of the patrol . . . are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state.”).

4. MO. REV. STAT. § 252.002 (2017).

5. MO. REV. STAT. § 252.070 (2017).

6. *Skinner v. Ry. Labor Execs.*, 489 U.S. 602, 613–14 (1989).

This Article begins with a discussion of the history of wildlife regulation in the United States and Missouri.⁷ The historical perspective is necessary to identify the “special needs” and “primary purpose” behind a government action and ultimately to evaluate the reasonableness of a government action in the context of the Fourth Amendment.⁸ The Article then discusses current regulatory structure and procedures in Missouri related to the enforcement of fish and wildlife related laws.⁹ Finally, it discusses and analyzes the constitutionality of the enforcement procedures, specifically search and seizure procedures associated with the enforcement of Missouri’s fish and wildlife related laws.¹⁰

I. A HISTORY OF FISH AND WILDLIFE REGULATION IN THE UNITED STATES

In the same way that England is the source of our legal system, the origins of wildlife regulation in the United States has its origins in English law.¹¹ In medieval England, the king was the ultimate owner of all land and also the head of government.¹² The king was owner of all wild game in the realm and had the authority to grant hunting rights as he saw fit, regardless of land ownership.¹³ As the power of the Parliament grew and the role of the king in the operation of government changed, so did the legal status of all wildlife.¹⁴ The English courts eventually determined that all valuable wild species were owned by the king in a sovereign capacity, instead of a proprietary one.¹⁵ The change in the nature of ownership required the king to “manage wildlife in the interests of the entire country, rather than for his own personal benefit.”¹⁶

This precedent carried over to the laws enacted by the newly formed states following the American Revolution.¹⁷ The state legislatures and courts in America determined that the state, in its sovereign capacity, owned wild animals “in trust for the people generally and with a duty to manage them for the benefit of the many rather than the few.”¹⁸ The U.S. Supreme Court endorsed the state ownership doctrine in *Geer v. Connecticut*¹⁹ in 1896.²⁰ The Court upheld a

7. See *infra* Parts I, II.

8. See *Indianapolis v. Edmond*, 531 U.S. 32, 37, 44 (2000).

9. See *infra* Part III.

10. See *infra* Parts IV, V.

11. ERIC T. FREYFOGLE & DALE D. GOBLE, *WILDLIFE LAW: A PRIMER* 22–23 (2009).

12. *Id.* at 23.

13. *Id.* at 22–23.

14. *Id.* at 23.

15. *Id.*

16. FREYFOGLE & GOBLE, *supra* note 11, at 23.

17. *Id.* at 25.

18. *Id.* at 25–27.

19. 161 U.S. 519, 528–29 (1896).

20. FREYFOGLE & GOBLE, *supra* note 11, at 27.

Connecticut law that allowed game birds lawfully killed within the state to be sold within the state but prohibited the transport and sale of these birds outside the borders of the state.²¹ This discriminated overtly against interstate commerce, but the Court reasoned the state owned the game birds while they were in the wild and had “full power to decide who could take them and when,” including the precise property rights the hunter obtained upon capture.²² In 1979, the Supreme Court expressly overruled *Geer* in *Hughes v. Oklahoma*, when it struck down an Oklahoma law that prohibited the export of minnows taken from the wild.²³ The Court found the law was contrary to the Commerce Clause of the U.S. Constitution, and held the federal power to regulate interstate shipments of wildlife precluded states from banning interstate shipments of wildlife.²⁴

Though the Court appeared to expressly overrule *Geer*, the ruling in *Hughes* has not had a broad effect on the state ownership doctrine.²⁵ The Court lacked the constitutional authority to overturn the state ownership doctrine, and the ruling has been interpreted to limit the specific federal issue of discrimination against interstate commerce related to wildlife.²⁶ Since *Hughes*, several states have reaffirmed the state ownership doctrine and no state has elected to change their applicable statutes as a result of the decision.²⁷

II. THE HISTORY OF THE FISH AND WILDLIFE REGULATION IN MISSOURI

In 1803, the land that would later become Missouri was purchased from France as a part of the Louisiana Purchase.²⁸ At this time, this area was abundant with a wide variety of fish and wildlife species.²⁹ Black bear, elk, buffalo, ruffed grouse, wild turkey, beaver, and prairie chicken all made their home in the land that would become Missouri.³⁰

As settlers moved westward through Missouri in the first half of the nineteenth century, most of the big game, except deer, were exterminated or driven from the state.³¹ The last concentration of elk was killed by market hunters in 1841, and by 1850, black bear were scarce, and the buffalo and

21. *Id.*

22. *Id.*

23. 441 U.S. 322, 335, 338 (1979).

24. *Id.* at 338.

25. FREYFOGLE & GOBLE, *supra* note 11, at 29.

26. *Id.*

27. *Id.*

28. Peter J. Kastor, *Making Missouri American: A Crowded Frontier in the Age of Lewis and Clark*, OFFICIAL MANUAL: STATE OF MISSOURI, 2003–2004, at 13, 18–19, <http://www.sos.mo.gov/cmsimages/bluebook/2003-2004/0011-0035.pdf#12> [<https://perma.cc/E6LN-W9VN>].

29. CHARLES CALLISON, *MAN AND WILDLIFE IN MISSOURI: THE HISTORY OF ONE STATE'S TREATMENT OF ITS NATURAL RESOURCES* 1–2 (1953).

30. *Id.* at 1.

31. *Id.* at 3.

antelope had migrated west.³² At the same time, turkeys were “too abundant to be worthy of mention,” deer were “found everywhere,” prairie chickens were “here by the thousands” and recorded as “abundant” throughout the state.³³ As a result, market hunting was in full swing, and wagonloads of game were being dispatched from rural Missouri to be sold in urban areas on a regular basis.³⁴ Between 1870 and 1900, market hunting was in its prime, and Missouri saw the extinction of the passenger pigeon, the “decline of the deer, the turkey, the ruffed grouse, the prairie chicken, and . . . waterfowl” resulting from virtually unregulated commercialization of wildlife.³⁵

In 1851, urban sportsmen began to recognize the decline in wildlife populations, and the legislature passed Missouri’s first game law.³⁶ The law only applied to St. Louis County and placed “closed seasons on deer, pheasants and quail, woodcocks, prairie chickens, grouse[,] and turkey.”³⁷

A little over twenty years later, the decline of wildlife populations became dramatic enough that the first two state-wide fish and game laws were passed.³⁸ An “Act for the Preservation of Game, Animals and Birds” and the “Act to Prevent the Destruction of Fish” were enacted into law.³⁹ The Preservation of Game Act set open and closed seasons for animals such as deer, turkey, and prairie chickens; outlawed the most devastating harvest methods; and made it the duty of constables, market masters, and police to enforce these laws.⁴⁰ Thought of as laws of “fair trade practices” for market hunters, the laws were largely ignored and unenforced.⁴¹

In 1895 the office of Game and Fish Warden was created, and in 1901 a law was passed which made it illegal to export wild game from the state, but no funding was provided for enforcement.⁴² The office of Game and Fish Warden was abolished in 1903, the year before the World’s Fair was held in St. Louis.⁴³ Bureau of Labor statistics indicated that nearly four million pounds of game were sold in Missouri in 1904, a record number.⁴⁴

In 1905, in response to public outcry from the sale of game at the World’s Fair, and dwindling wildlife populations, the legislature passed the “Walmsley

32. *Id.*

33. *Id.* at 2.

34. CALLISON, *supra* note 29, at 2.

35. *Id.* at 3.

36. *Id.* at 3–4.

37. *Id.* at 4.

38. *Id.*

39. CALLISON, *supra* note 29, at 4.

40. *Id.* at 4 (explaining that the Act to Prevent the Destruction of Fish prohibited “the use of drugs, fish berries,” and explosives).

41. *Id.* at 4–7.

42. *Id.* at 6.

43. *Id.*

44. CALLISON, *supra* note 29, at 6.

Law.”⁴⁵ The law authorized the sale of hunting and fishing licenses and provided funding for a staff of wardens.⁴⁶ For the first time in Missouri, the law gave statutory recognition to the common law principle that wildlife belongs to the state.⁴⁷ It also established open and closed seasons for most game species, and it prohibited the sale and commercial transportation of game.⁴⁸ The law became the basis of Missouri’s fish and game laws until 1936.⁴⁹

Despite the Walmsley Law, wildlife populations continued to decline.⁵⁰ By 1934, market hunting had exploited wildlife populations to the degree it was estimated that less than 100 grouse, approximately 2,000 deer, 3,500 wild turkey, and 100 beaver remained in the state.⁵¹ The citizens of Missouri sought change to restore fish and wildlife populations in Missouri.⁵² In 1935, a constitutional amendment aimed at wildlife conservation was drafted by sportsmen and placed on the ballot through the Missouri constitution’s referendum and petition process.⁵³ The citizens of Missouri voted on the amendment in 1936, and adopted it by the largest majority ever received by an amendment to the constitution of Missouri.⁵⁴ This amendment created the Missouri Conservation Commission and provides the foundation for the current mechanism for regulating the fish, forest, and wildlife resources of Missouri.⁵⁵

III. THE CURRENT REGULATORY STRUCTURE AND LAW ENFORCEMENT PROCEDURES IN MISSOURI

Article IV, section 40(a) of the Missouri constitution establishes the exclusive regulatory authority of the Conservation Commission (“the Commission”) and states:

The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission consisting of four members appointed by the governor, by and with

45. *Id.* at 8.

46. *Id.*

47. *Id.*

48. *Id.*

49. CALLISON, *supra* note 29, at 9–11.

50. *Id.* at 13.

51. JAMES F. KEEFE, *THE FIRST 50 YEARS* 4 (1987).

52. *See* CALLISON, *supra* note 29, at 19–34 (discussing the formation of the Conservation Federation of Missouri and the origins of Proposition 4).

53. KEEFE, *supra* note 51, at 15–16.

54. *Id.* at 15. Proposition 4, the constitutional amendment creating the Missouri Conservation Commission, passed by a vote of 879,000 to 351,000. *Id.*

55. *See* MO. CONST. art. IV, §§ 40–46.

the advice and consent of the senate, not more than two of whom shall be of the same political party.⁵⁶

Other provisions in article IV establish the Commission's rule making authority, repeal any laws which are inconsistent with regulations of the Commission, and grant the legislature the authority to enact laws in support of the regulations of the Commission.⁵⁷

In *Marsh v. Bartlett*, the Missouri Supreme Court upheld the authority of the Commission to regulate fish and wildlife when an angler was convicted of violating a fishing statute which conflicted with the regulations of the Commission.⁵⁸ The court found the validity of the constitutional provisions granting authority to the Commission to be "absolute" in relation to the power to regulate and control game and fish within the state.⁵⁹ While the Commission has the exclusive authority to regulate fish and game, the court made it clear that only the legislature could fix punishments for violating regulations enacted by the Commission.⁶⁰

A. *The Regulatory Framework in Missouri*

In support of the rules established by the Conservation Commission, the Missouri legislature has enacted numerous statutes related to the regulation of fish and wildlife.⁶¹ The statutes establish the title and ownership of all wildlife in Missouri;⁶² declare conservation agents to be officers of the state and grant them arrest powers for violations of wildlife laws and regulations;⁶³ fix criminal penalties for violations of wildlife laws and regulations;⁶⁴ and establish the search and license inspection authority of conservation agents.⁶⁵

In turn, the Conservation Commission has enacted regulations granting authority to conservation agents, and all peace officers, to enforce the Wildlife Code; established conditions for acquiring permits and privileges; regulated the take, sale or commercial use, possession, transportation, and storage of wildlife; implemented inspection and documentation requirements; and enacted various regulations related to the use of lands owned, managed, or leased by the Commission.⁶⁶

56. MO. CONST. art. IV, § 40(a).

57. MO. CONST. art. IV, §§ 44–45.

58. 121 S.W.2d 737, 740 (Mo. 1938).

59. *Id.* at 744.

60. *Id.* at 744–45.

61. *See* MO. REV. STAT. § 252 (2017).

62. MO. REV. STAT. § 252.030 (2017).

63. MO. REV. STAT. § 252.080 (2017); MO. REV. STAT. § 252.085 (2017).

64. MO. REV. STAT. § 252.040 (2017).

65. MO. REV. STAT. § 252.060 (2017); MO. REV. STAT. § 252.100 (2017).

66. *See* MO. CODE REGS. tit. 3, § 10, ch. 4–20 (2017).

The statutes related to fish and wildlife, and the regulations enacted by the Conservation Commission pursuant to its constitutional authority, provide the framework for regulating hunting, fishing, and other uses of wildlife in Missouri.⁶⁷

B. Law Enforcement Procedures Used by Conservation Agents to Enforce Regulations

Conservation agents conduct routine stops and searches, without suspicion of any criminal wrongdoing, of persons engaged in fish and wildlife related activities: hunting, fishing, trapping, and the commercial uses of fish and wildlife. This has been the consistent method of enforcement throughout the history of Missouri.⁶⁸ During fiscal year 2015, conservation agents contacted 178,828 hunters and anglers to ensure compliance with the Wildlife Code.⁶⁹ During these contacts, conservation agents uncovered 25,245 violations, which resulted in 7,066 arrests.⁷⁰

IV. CONSTITUTIONAL IMPLICATIONS OF INSPECTION PROCEDURES RELATED TO ENFORCING REGULATIONS GOVERNING HUNTING, FISHING, AND OTHER USES OF FISH AND WILDLIFE

There has been very little guidance from the state and federal judiciaries on the constitutional implications of the fish and wildlife related inspections conducted by conservation agents in Missouri. Aside from a brief mention in the concurring opinion in *Delaware v. Prouse*, the Supreme Court has remained silent on the matter.⁷¹ The Eighth Circuit has not delivered an opinion, and other than the 1926 Missouri Supreme Court decision in *State v. Bennett*,⁷² Missouri courts have been silent. In *Bennett*, the court upheld the constitutionality of the statute requiring a hunter to permit the game commissioner or his deputies to inspect and count the fish, birds, animals, and game in his possession to determine their legality.⁷³ However, this decision was prior to the creation of the Missouri Conservation Commission and the current framework for regulating fish and wildlife resources in Missouri.⁷⁴ It was also prior to the Supreme

67. MO. CODE REGS. tit. 3, § 10-4.105 (“The rules of the Conservation Commission and statutory laws not inconsistent therewith shall constitute the *Wildlife Code of Missouri* . . .”).

68. See generally Gene W. Arras, *The Theory of Enforcement of Wildlife Conservation*, 13 ST. LOUIS B.J., Summer 1967, at 37; George J. Pruneau, *Anatomy of a Missouri Conservation Agent*, 23 J. MO. B., Jan. 1967, at 301.

69. Missouri Department of Conservation, *Annual Report*, ANN. REV., July 2014–June 2015, at 4.

70. *Id.*

71. 440 U.S. 648, 664 (1979) (Blackmun, J., concurring).

72. 288 S.W. 50, 51 (Mo. 1926).

73. *Id.* at 53.

74. See *supra* Parts II, III.

Court's decision in *Mapp v. Ohio*, which extended the Fourth Amendment's privacy protections to state actions through the Due Process Clause of the Fourteenth Amendment.⁷⁵

Since *Mapp*, the Fourth Amendment has been at the heart of any analysis surrounding the constitutionality of a search or seizure of a citizen by a government agent, including inspections of hunters, anglers, trappers, and other users of fish and wildlife resources.⁷⁶ The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁷⁷

The purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials"⁷⁸ and to "protect[] people, not places" from unreasonable government intrusion.⁷⁹

As the Supreme Court indicated in *Oregon v. Hass*, a state may impose greater restrictions on police activity than is required by the U.S. Constitution.⁸⁰ For example, in a case involving a game warden's search of private property for an illegal bull elk, the Montana Supreme Court interpreted the language of its state constitution to afford its citizens broader protection than the Fourth Amendment in cases involving "searches of, or seizures from, private property."⁸¹ Missouri courts, however, have interpreted the provisions of the Missouri constitution against unreasonable search and seizure to offer no greater

75. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

76. See *Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014); *People v. Maikchio*, 253 P.3d 247, 257 (Cal. 2011); *State v. Thurman*, 996 P.2d 309, 314 (Idaho Ct. App. 1999); *State v. Keehner*, 425 N.W.2d 41, 44 (Iowa 1988).

77. U.S. CONST. amend. IV.

78. *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 528 (1967).

79. *Katz v. United States*, 389 U.S. 347, 351 (1967).

80. 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.")

81. *State v. Bullock*, 901 P.2d 61, 75–76 (Mont. 1995) ("We conclude that in Montana a person may have an expectation of privacy in an area of land that is beyond the curtilage which the society of this State is willing to recognize as reasonable, and that where that expectation is evidenced by fencing, 'No Trespassing,' or similar signs, or 'by some other means [which] indicate[s] unmistakably that entry is not permitted,' entry by law enforcement officers requires permission or a warrant." (citations omitted)).

protection than the U.S. Constitution.⁸² Consequently, a search or seizure that does not violate the Fourth Amendment, also will not violate article 1, section 15 of the Missouri constitution.⁸³

V. THE APPLICABILITY OF THE FOURTH AMENDMENT TO “SEARCHES” AND “SEIZURES” CONDUCTED DURING FISH AND WILDLIFE RELATED INSPECTIONS IN MISSOURI

Conservation agents are law enforcement officers who routinely contact individuals engaged in fish and wildlife related activities to determine if they are in compliance with applicable regulations.⁸⁴ As with any other interaction between a citizen and a law enforcement officer, the specific facts of each interaction will determine whether a search or seizure has occurred.⁸⁵ Missouri statutes and regulations place an affirmative duty on anglers, hunters, and others utilizing fish and wildlife resources to submit to an inspection to determine compliance with applicable laws.⁸⁶ Considering this, and the Supreme Court’s decisions in *Katz*, *Jones*, and *Mendenhall*,⁸⁷ it follows that a “search” and/or “seizure” subject to the requirements of the Fourth Amendment may occur at some point during the inspection process.

While Missouri courts have not weighed in on this issue, the courts in other states have been reluctant to find a search or seizure has occurred when a wildlife officer simply approaches a potential hunter or angler and asks them questions while they are afield.⁸⁸ However, the detention of a person by a wildlife officer for the purpose of conducting a fish and wildlife related inspection may amount to a Fourth Amendment seizure of his person.⁸⁹ The Minnesota Supreme Court

82. *State v. Hastings*, 450 S.W.3d 479, 485 (Mo. Ct. App. 2014).

83. *Id.* (“The analysis under both the U.S. Constitution and the Missouri Constitution is identical.”); see MO. CONST. art. I, § 15 (“That the people shall be secure in their persons, papers, homes, effects, and electronic communications and data, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, or access electronic data or communication, shall issue without describing the place to be searched, or the person or thing to be seized, or the data or communication to be accessed, as nearly as may be; nor without probable cause, supported by written oath or affirmation.”).

84. *See supra* Part III.

85. *See Florida v. Bostick*, 501 U.S. 429, 439 (1991); *United States v. Mendenhall*, 446 U.S. 544, 551 (1980).

86. MO. CODE REGS. tit. 3, § 10-4.125 (2017).

87. *United States v. Jones*, 565 U.S. 400, 404 (2012); *Mendenhall*, 446 U.S. at 551; *Katz v. United States*, 389 U.S. 347, 351 (1967).

88. *State v. Thurman*, 996 P.2d 309, 316 (Idaho Ct. App. 1999); *State v. Colosimo*, 669 N.W.2d 1, 4 (Minn. 2003).

89. *Brown v. Texas*, 443 U.S. 47, 50 (1979) (“When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment.”).

discussed this distinction in *People v. Colosimo*.⁹⁰ In *Colosimo*, the wildlife officer approached Colosimo and conversed with him while he was sitting in his already stopped boat that rested on the trailer of a parked truck.⁹¹ During the conversation, the officer asked Colosimo if he had caught any fish and if there were any fish in the boat.⁹² Colosimo admitted to the officer he had been fishing, and the boat contained fish.⁹³ The officer subsequently asked to see the fish, Colosimo refused, and an argument between them began over the officer's legal authority to board the boat and inspect the catch.⁹⁴ The officer ultimately did not board the boat and inspect the fish, but he did issue Colosimo a ticket for failing to present wildlife for inspection.⁹⁵ The court held the initial interaction between the officer and Colosimo, where the officer walked up and conversed with him while his boat rested on the trailer of a parked portage truck, did not amount to a seizure for the Fourth Amendment.⁹⁶ However, the court also stated: "There may be little doubt that after Colosimo admitted to having been fishing and the fact that he was transporting fish, he was seized by Officer Steen."⁹⁷

The question of when a seizure occurs is less ambiguous when a wildlife officer conducts a vehicle stop. The supreme courts of California and Iowa, and the Ninth Circuit, have held a vehicle stop by a wildlife officer to conduct a fish or wildlife related inspection is a seizure within the context of the Fourth Amendment.⁹⁸ Courts have also found a seizure occurs when motorists are stopped during roadblock checkpoints for the purpose of conducting inspections of anglers, hunters, and others who may be transporting wildlife.⁹⁹

Whether a search occurs during a fish or wildlife related contact will depend on the facts of the situation, the degree of intrusion on the privacy interests involved, and the conduct of the officer.¹⁰⁰ In *State v. Boyer*, the Montana Supreme Court held that both the officer's request to inspect an angler's license and concealed catch and the officer stepping on the bow of a boat to look in a live well of a boat did not constitute a "search" for the purposes of the Fourth Amendment.¹⁰¹ Conversely, in *State v. Larsen*, the Minnesota Supreme Court

90. *Colosimo*, 669 N.W.2d at 4.

91. *Id.* at 3.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Colosimo*, 669 N.W.2d at 3.

96. *Id.* at 4.

97. *Id.*

98. See *Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014); *People v. Maikhio*, 253 P.3d 247, 257 (Cal. 2011); *State v. Keehner*, 425 N.W.2d 41, 44 (Iowa 1988).

99. *State v. Tourillott*, 618 P.2d 423, 427–28 (Or. 1980); *State v. Halverson*, 277 N.W.2d 723, 724 (S.D. 1979).

100. See *United States v. Jones*, 132 S. Ct. 945, 952–54 (2012); *Katz v. United States*, 389 U.S. 347, 353, 356–57 (1967).

101. 42 P.3d 771, 775–77 (Mont. 2002).

found an unlawful search occurred when a conservation officer entered an ice fishing house without a warrant, permission, probable cause, or other justification for the purpose of inspecting the number of fishing lines being used by the angler inside.¹⁰²

VI. THE CONSTITUTIONALITY OF FISH AND WILDLIFE RELATED INSPECTIONS IN MISSOURI

In *Delaware v. Prouse*, the U.S. Supreme Court provides its only mention of the permissibility of inspections conducted by game wardens, wildlife officers, and conservation agents.¹⁰³ In *Prouse*, the officer stopped a motorist on a public roadway to check and see if he was properly licensed to operate a motor vehicle.¹⁰⁴ The Court concluded that motorists could not be randomly stopped for the officer to inspect a driver's license, and at a minimum, reasonable suspicion of criminal activity was required for the stop to be constitutional.¹⁰⁵ At first glance, this seems to cast doubt on the constitutionality of inspections conducted by conservation agents and other wildlife officers around the country.¹⁰⁶ However, in the concurring opinion, Justices Blackmun and Powell stated the following about their understanding of the effect of the majority's holding on random license inspections conducted by wildlife officers:

And I would not regard the present case as a precedent that throws any constitutional shadow upon the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties. In a situation of that type, it seems to me, the Court's balancing process, and the value factors under consideration, would be quite different.¹⁰⁷

Courts around the country often cite, and follow, the logic of this concurring opinion when confronted with evaluating the constitutionality of inspection procedures utilized by wildlife officers.¹⁰⁸ These decisions have primarily found inspections permissible as a matter of general reasonableness,¹⁰⁹ consent to an inspection as a condition of exercising a privilege,¹¹⁰ or as an administrative

102. 650 N.W.2d 144, 146, 153–54 (Minn. 2002).

103. 440 U.S. 648, 664 (1979).

104. *Id.* at 650–51.

105. *Id.* at 663.

106. *See supra* Part III.

107. *Prouse*, 440 U.S. at 664.

108. *People v. Maikhio*, 253 P.3d 247, 261–62 (Cal. 2011); *Elzey v. State*, 519 S.E.2d 751, 753–55 (Ga. Ct. App. 1999); *State v. Thurman*, 996 P.2d 309, 314 (Idaho Ct. App. 1999); *State v. Colosimo*, 669 N.W.2d 1, 8, 14–15 (Minn. 2003); *State v. Keehner*, 425 N.W.2d 41, 43–44 (Iowa 1988).

109. *Keehner*, 425 N.W.2d at 47.

110. *Elzey*, 519 S.E.2d at 755; *People v. Layton*, 522 N.E.2d 1280, 1287 (Ill. App. Ct. 1990); *State v. Bennett*, 288 S.W. 50, 51–52 (Mo. 1926); *State v. Halverson*, 277 N.W.2d 723, 724–25 (S.D. 1979).

inspection associated with a “pervasively regulated” enterprise.¹¹¹ The remainder of this part will analyze these constitutional theories, and issues presented by their application to inspections conducted by Missouri conservation agents of hunters, anglers, and others utilizing fish and wildlife resources.

A. *Inspections Related to Hunting, Fishing, and Other Uses of Wildlife in Missouri Are Not Prohibited by the Constitution Because They Are Reasonable*

Conservation agents routinely conduct seizures of hunters and anglers without any individualized suspicion of wrongdoing to inspect licenses, game, and equipment in their possession.¹¹² Under the test for reasonableness established by the Supreme Court in *Brown v. Texas*, when a seizure is not made pursuant to a warrant, probable cause, or a recognized exception, in order to determine if a search is reasonable, courts must balance the legitimate governmental interest and degree to which the seizure promotes the interest against the severity of the intrusion on the subject of the seizure.¹¹³ Inspections conducted by conservation agents are reasonable when analyzed under the three-factor balancing test of *Brown*.¹¹⁴

1. There Is a Legitimate Governmental Interest in the Enforcement of Wildlife Related Laws in Missouri

Courts around the country have recognized that states have a substantial interest in the enforcement of laws regulating the use of its wildlife.¹¹⁵ The Idaho Supreme Court found a compelling interest in the management of its wildlife and acknowledged, “fish and game violations are matters of grave public concern which justify minimal intrusion into the public’s right to privacy.”¹¹⁶

A similar substantial interest exists in Missouri. The Missouri Department of Conservation has conducted statistically accountable attitude, opinion,

111. See *Tarabochia v. Adkins*, 766 F.3d 1115, 1121–22 (9th Cir. 2014); *Maikho*, 253 P.3d at 265; *State v. Klager*, 797 N.W.2d 47, 52–53 (S.D. 2011).

112. See *supra* Part III.

113. 443 U.S. 47, 50–51 (1979).

114. *Id.*

115. *State v. Keehner*, 425 N.W.2d 41, 44 (Iowa 1988); *State v. Tourtillott*, 618 P.2d 423, 430 (Or. 1980) (“[T]he governmental interest in the enforcement of laws for the preservation of wildlife in this state is sufficiently substantial to justify the minimal intrusion upon the Fourth Amendment rights of those stopped for brief questioning and a visual inspection of their vehicles.”); *Halverson*, 277 N.W.2d at 725 (“[T]he uninterrupted use of the highways is slight and greatly outweighed by the public interest in the management and conservation of wildlife in this state.”).

116. *State v. Thurman*, 996 P.2d 309, 314 (Idaho Ct. App. 1999) (quoting *State v. Medley*, 898 P.2d 1093, 1096 (Idaho 1995)).

satisfaction, and participation surveys for more than thirty years.¹¹⁷ In the most recent survey, ninety-five percent of Missourians reported they are interested in Missouri's fish, forests, and wildlife; eighty-nine percent reported it was important for outdoor places to be protected even if they did not intend to visit them; and sixty-five percent of Missourians believed the Department of Conservation was doing a good job of enforcing fish and wildlife laws.¹¹⁸ It is also estimated that the total economic impact of fish and wildlife recreation and the forest products industry in Missouri is more than twelve billion dollars annually, annual expenditures related to fish and wildlife regulation support 56,910 jobs, expenditures related to these activities generate more than \$507 million annually in tax revenue, and 2.5 million people age sixteen years and older participate in fishing, hunting, and wildlife related recreation each year.¹¹⁹ These facts, coupled with the constitutional authority granted to the Conservation Commission by the citizens of Missouri,¹²⁰ establish a substantial governmental interest in closely regulating the fish and wildlife resources of the state.

2. Inspections Are a Reasonable Method to Advance the Governmental Interest Involved in Enforcing Wildlife Related Laws in Missouri

Advancement of the governmental interest in wildlife officers contacting hunters and anglers despite no suspicion of wrongdoing has primarily been examined in the context of fish and wildlife related checkpoints.¹²¹ In these cases, the courts have found the governmental interest was advanced because wildlife officers are responsible for enforcing wildlife laws in expansive rural areas with few officers,¹²² stops are necessary to attain a satisfactory level of enforcement of game laws,¹²³ enforcement of game laws is difficult,¹²⁴ "checkpoints are often the least restrictive means" of enforcement,¹²⁵ and there really isn't any other "effective means" of enforcing fish and wildlife related

117. Missouri Department of Conservation, *supra* note 69, at 16.

118. *Id.* at 17.

119. *Id.* at 18.

120. *See supra* Part II.

121. *Thurman*, 996 P.2d at 314–15; *State v. Sherburne*, 571 A.2d 1181, 1184 (Me. 1990); *State v. Albaugh*, 571 N.W.2d 345, 347–48 (N.D. 1997); *State v. Tourtillott*, 618 P.2d 423, 433–34 (Or. 1980); *State v. Halverson*, 277 N.W.2d 723, 724–25 (S.D. 1979).

122. *Sherburne*, 571 A.2d at 1185 (reasoning that because fish and game officers are responsible for enforcing "laws with limited numbers of personnel over a wide territory," much of which is uninhabited, fish and game checkpoints are a justified method of enforcement); *Thurman*, 996 P.2d at 315 (explaining that only two wildlife officers were available to police a rural and expansive area the size of New Jersey for fish and game violations).

123. *State v. McHugh*, 630 So. 2d 1259, 1267 (La. 1994).

124. *Tourtillott*, 618 P.2d at 430.

125. *Albaugh*, 571 N.W.2d at 348.

laws.¹²⁶ In *State v. Keehner*, the Supreme Court of Iowa extended this analysis to the context of a vehicle stop conducted by an officer to conduct an inspection of an occupant who the officer reasonably believed was hunting.¹²⁷ The court specifically noted that several courts have stricken stops as unconstitutional due to the perceived existence of less intrusive alternatives but stated:

However, in the context of the enforcement of our state's hunting regulations, and specifically the requirement of license demonstration involved here, we can conceive of no such options. The standard we apply today also contains its own limitation so as not to commit the seizure to the unfettered discretion of the officer: In order to be stopped, the individual must first be engaged in an activity which may be reasonably interpreted as "hunting."¹²⁸

A similar rationale is applicable in Missouri related to the advancement of the governmental interest involved in enforcing the Wildlife Code of Missouri. Missouri is the nineteenth largest state in the country at 69,697 square miles,¹²⁹ and, as of July 2016, has an estimated population of 6,093,000 people.¹³⁰ Out of this population, 576,000 people hunt, 1,000,000 people fish, and hunters reported harvesting 255,035 deer and 56,718 turkeys.¹³¹ Of the 14,554 law enforcement officers in the state of Missouri, only 204 are conservation agents charged with the primary duty of enforcing fish and wildlife related regulations.¹³² These facts demonstrate that Missouri is a large area with relatively few conservation available to enforce fish and wildlife related laws.

Enforcement of fish and wildlife laws is difficult and there really is not any other effective means of advancing Missouri's policy of protecting the fish and wildlife resources of the state without conducting inspections of those engaged in hunting, fishing, or other uses of wildlife. In *Prouse*, the Court concluded alternative law enforcement methods to advance the state's interest in ensuring highway safety were available, and random stops of motorists to inspect licenses were unreasonable.¹³³ The Court acknowledged that acting upon observed violations of traffic and vehicle safety laws provided ample opportunity to inspect licenses, insurance, safety requirements, etc.; violations of minimum-safety requirements for motor vehicles are readily observable; and vehicles must

126. *Halverson*, 277 N.W.2d at 724.

127. 425 N.W.2d 41, 43, 45 (Iowa 1988).

128. *Id.* at 45.

129. *Missouri: Location, Size, and Extent*, CITY-DATA.COM, <http://www.city-data.com/states/Missouri-Location-size-and-extent.html> [<https://perma.cc/6LQG-QMQZ>].

130. *QuickFacts: Missouri*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/29> [<https://perma.cc/44W6-MFS5>].

131. Missouri Department of Conservation, *supra* note 69, at 19, 89–90.

132. BRIAN REAVES, U.S. DEP'T JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES 15 (2011).

133. *Delaware v. Prouse*, 440 U.S. 648, 659 (1979).

carry and display current license plates.¹³⁴ Unlike in the motor vehicle context, violations of fish and wildlife regulations are not easily observable without first contacting the hunter or angler. Hunters and anglers conduct their activities in remote locations and wear clothing to conceal themselves. Fish and wildlife harvested is typically stored in a coat, bag, creel, or other container, making it impossible to observe and count animals in possession. The type of firearm, ammunition, game calls, fishing lures, and other methods used to take wildlife are usually concealed or not easily recognizable without close observation. Different permits are required based upon the species pursued, the open seasons for many species overlap, and the techniques employed to be a successful hunter or angler make it impractical to require those engaged in the activity to openly display their license in most circumstances. These factors make it impossible to determine if the rules have been followed until a hunter or angler has been stopped for an inspection.

The *Keehner* court established that the touchstone for Fourth Amendment compliance is not whether the stop is random or suspicionless, but whether the government action was reasonable.¹³⁵ Considering the size of the state and the number of hunters and anglers compared to the low number of conservation agents, the difficulty of enforcing these regulations, and the lack of practical alternatives for effective enforcement, random inspections of hunters, anglers, and others utilizing wildlife is a reasonable method of advancing Missouri's governmental interest of protecting the fish and wildlife resources of the state.

3. The Severity of the Intrusion Involved in Enforcing Wildlife Related Laws is Minimal in Missouri

The severity of the intrusion must be evaluated by both objective and subjective criteria to determine reasonableness.¹³⁶ The objective part of the balancing test is "measured by the duration of the seizure and the intensity of the investigation."¹³⁷ The subjective part of the balancing test gauges the potential for causing fear and surprise on lawful travelers.¹³⁸

When looked at objectively, the severity of the intrusion of inspections conducted by conservation agents is minimal. Inspections typically take place while in open fields outside of the home or other areas which enjoy a heightened expectation of privacy. This is where hunters and anglers pursue their endeavors. Furthermore, the regulations and statutes governing inspections mandate inspections to be of short duration and relatively innocuous. They specifically

134. *Id.* at 659–60.

135. *State v. Keehner*, 425 N.W.2d 41, 44 (Iowa 1988).

136. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 452 (1990).

137. *Id.*

138. *Id.*

limit the scope of the inspection to inquiries related to licenses, hunting or fishing equipment, and wildlife in the individual's possession.¹³⁹

As for the subjective component, conservation agents make contacts with citizens while wearing a distinctive uniform and patrol in vehicles marked with the insignia of the Missouri Department of Conservation. As the *Keehner* court acknowledged, Iowa law requires those who engage in the act of hunting to display a license upon request.¹⁴⁰ Because citizens are presumed to know the law, the court presumed those engaged in an activity such as hunting, know they may be stopped briefly and required to display a license.¹⁴¹ Missouri also has similar laws in place regarding the display of a license when engaging in an activity such as hunting or fishing.¹⁴² Considering these factors, the potential for fear or surprise is minimal because the contacts are made by uniformed conservation agents, and lawful travelers would expect those who are engaged in activities such as hunting or fishing to be briefly stopped for an inspection.

B. Inspections Related to Hunting, Fishing, and Other Uses of Wildlife in Missouri Are Constitutional Because Hunters and Anglers Consent to Inspection as a Condition of Exercising the Privilege

Consent to an inspection can be inferred in the context of exercising the privilege of hunting, fishing, and other uses of wildlife. It is well established that a search is reasonable when a person consents to the search.¹⁴³ It is also settled that sometimes consent to a search does not have to be express but can be inferred from the context.¹⁴⁴

Agreeing to certain conditions to exercise a privilege regulated by the state is not unique to the hunting and fishing context in Missouri.¹⁴⁵ This was illustrated by the Missouri Court of Appeals in the context of operating a motor vehicle on public roads in *Bertram v. Director of Revenue*:

The theory of the "implied consent law" is that "the use of public streets and highways is a privilege and not a right," and that by obtaining a license and

139. See MO. CODE REGS. tit. 3, § 10-4.125 (2017); MO. REV. STAT. § 252.100.1 (2017); MO. REV. STAT. § 252.060 (2017).

140. *Keehner*, 425 N.W.2d at 44.

141. *Id.*

142. MO. REV. STAT. § 252.060 (2017).

143. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

144. *Florida v. Jardines*, 133 S. Ct. 1409, 1415–16 (2013).

145. See *Bertram v. Dir. of Revenue*, 930 S.W.2d 7, 9 (Mo. Ct. App. 1996). *But see* *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2165, 2186 (2016). In the context of "implied consent" there must be a limit to the consequences a motorist consents to by virtue of operating a motor vehicle on public highways. The court held that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.*

exercising the privilege of using the public roads, the motorist has impliedly consented to submission to the chemical test.¹⁴⁶

Like the use of public streets and highways, the use of the fish and wildlife resources located in Missouri is also a privilege. The U.S. Constitution contains no express provisions establishing the right of citizens to use fish and wildlife resources.¹⁴⁷ While the constitutions of some states do contain provisions guaranteeing the right to hunt and fish, the Missouri Constitution contains no such provision.¹⁴⁸ To the contrary, the Missouri Constitution contains a sovereign ownership provision granting the exclusive authority to administer all laws pertaining to “[t]he control, management, restoration, conservation and regulation of the bird, fish, game forestry and all wildlife resources of the state” in the Conservation Commission.¹⁴⁹ This supports the conclusion that hunting, fishing, and other uses of wildlife in Missouri is a privilege instead of a right.

Consent to inspection as a condition of exercising the privilege of hunting, fishing, and other uses of wildlife in Missouri was theorized prior to the formation of the modern Conservation Commission, and was first recognized in *State v. Bennett*:

[T]he defendant cannot play fast and loose, that by accepting a hunter’s license and exercising the privilege under the restrictions and limitations of the statute, one of which was his duty to submit to the inspection and count of the quail in his possession by the game warden, he waived the constitutional rights invoked so far as applicable to the facts in this case.¹⁵⁰

The laws providing the basis for *Bennett* have been replaced;¹⁵¹ however, the modern regulatory framework still provides support for this concept.

The idea of state ownership provides the basis for this enforcement theory.¹⁵² Those who pursue, take, possess, or otherwise utilize the fish and wildlife resources “consent that title of said wildlife shall be and remain in the state of Missouri,”¹⁵³ for the purposes of conserving, managing, and regulating wildlife.¹⁵⁴ The regulations provide that acceptance of a permit is conditioned on compliance with the provisions of the Wildlife Code, which include inspections.¹⁵⁵ Additionally, each permit issued must be signed by the person it

146. 930 S.W.2d. at 9.

147. See generally U.S. CONST.

148. Ryan Notarangelo, *Hunting Down the Meaning of the Second Amendment: An American Right to Pursue Game*, 61 S.D. L. REV. 201, 203–04 & n.14 (2016).

149. MO. CONST. art. IV, § 40(a).

150. *State v. Bennett*, 288 S.W. 50, 53 (Mo. 1926).

151. See *supra* Part III.

152. Arras, *supra* note 68, at 48.

153. MO. REV. STAT. § 252.030 (2017).

154. Arras, *supra* note 68, at 48.

155. MO. CODE REGS. tit. 3, § 10-5.215(3) (2017) (“The acceptance of a permit or privilege or method exemption shall constitute an acknowledgement of the duty to comply with the provisions

to whom it is issued,¹⁵⁶ and has the following acknowledgement statement printed on its face: “I agree to comply with the Wildlife Code, to present this permit upon request to any officer authorized to enforce wildlife rules, and allow such officer to inspect wildlife in possession to determine compliance with rules.”¹⁵⁷

Much like how consent to submit to a chemical test under Missouri’s implied consent law is limited to circumstances specified in the statute,¹⁵⁸ consent to an inspection by an officer charged with the enforcement of the Wildlife Code is also limited by statute.¹⁵⁹ One statute provides that officers “may search without warrant any creel, container, game bag, hunting coat or boat in which he has reason to believe wildlife is unlawfully possessed or concealed” but requires a warrant to enter and search “an occupied dwelling or out-building immediately adjacent thereto, cold storage locker plant, motor vehicle or sealed freight car.”¹⁶⁰ Another makes it “the duty of every person holding a license or permit . . . to submit the same for inspection by any agent of the commission.”¹⁶¹ The qualifications and limitations identified in these statutes establish the scope of the inspection which is implicitly consented to by purchasing a permit or taking game.¹⁶²

The acknowledgement statement printed on every permit allows an officer to inspect wildlife in the “possession” of a permit-holder.¹⁶³ If applied broadly, the term “possession” is problematic because it extends the consent implied from the purchase of a license or taking of game beyond the scope authorized by statute or intended by the Commission.¹⁶⁴ The Commission likely intended a narrower interpretation of the scope of the consent feature because within title 3, section 10-4.125 of the Missouri Code of Regulations, the rule specifies inspection is “subject to the provision of section 252.100, RSMo.”¹⁶⁵ Consequently, the term “possession” in the acknowledgment statement printed

of this Code and to pursue wildlife in a safe manner, and all permits and privileges are conditioned upon such compliance.”); MO. CODE REGS. tit. 3, § 10-4.125 (2017) (Inspection).

156. MO. CODE REGS. tit. 3, § 10-5.210 (2017).

157. For an example of a Missouri Hunting Permit, and the acknowledgment statement on the permit, see *CWD Testing Results*, MO. DEP’T CONSERVATION, <http://mdc7.mdc.mo.gov/applications/cwdSurveillance/cwdSurveillance.aspx> [https://perma.cc/6LQG-QMQZ].

158. See MO. REV. STAT. § 577.020.1 (2017). Some circumstances where consent to a chemical test is triggered are if the person is arrested for operating a motor vehicle or vessel while intoxicated, involvement in a collision or accident causing a fatality or serious physical injury, or an arrest for specified traffic or boating violations. *Id.*

159. See MO. REV. STAT. § 252.100.1 (2017); MO. REV. STAT. § 252.060 (2017).

160. MO. REV. STAT. § 252.100.1 (2017).

161. MO. REV. STAT. § 252.060 (2017).

162. Arras, *supra* note 68, at 48, 51.

163. *Id.* at 51.

164. *Id.*

165. MO. CODE REGS. tit. 3, § 10-4.125 (2017).

on the license should be read to limit the consent feature to the circumstances prescribed in the statute, and not to all wildlife in the person's "possession."¹⁶⁶ The concept of consent is fundamental to the authority granted to officers to inspect but extends no further than the qualifications and limitations of the statute.¹⁶⁷

The concept of consent to an inspection as a condition of exercising the privilege of fishing, hunting, or other uses of wildlife is not exclusive to Missouri and has also found support from the courts in other states.¹⁶⁸ The U.S. Supreme Court has also had the opportunity to review this issue in the context of fish and wildlife related inspections but declined to do so.¹⁶⁹

In *People v. Layton*, a conservation officer observed several individuals returning to their vehicle after their hunt and approached them to check their hunting licenses and inspect their vehicles for illegal game.¹⁷⁰ During the search of Layton's vehicle, the conservation officer discovered several bags of cannabis.¹⁷¹ The Illinois Court of Appeals upheld the search and stated in its decision:

Hunting is a privilege, not a right, to which licensing requirements apply. Because of the nature of hunting, we conclude that licensing (or hunting without a license) may be deemed consent to some intrusions. . . .

. . . .

. . . defendant fit what might be termed a "hunter's profile," [therefore] we deem implied consent sufficient to sustain the search—which we emphasize was, according to the officer's testimony, limited to containers of a size and type as experience dictated might be used for holding separate any illegally taken game¹⁷²

Haden and Israel contend that consent to inspection as a condition of exercising the privilege of hunting or fishing does not pass the "unconstitutional-conditions doctrine" of *Frost v. Railroad Commission*.¹⁷³ In *Frost*, the Supreme Court held that a state "may not impose conditions which require the relinquishment of constitutional rights."¹⁷⁴ To illustrate impermissible state conduct, Haden and Israel analogize the implicit consent of hunters to seizures

166. Arras, *supra* note 68, at 51.

167. *Id.* at 48.

168. Elzey v. State, 519 S.E.2d 751, 753 (Ga. Ct. App. 1999); *See* *People v. Layton*, 552 N.E.2d 1280, 1285–86 (Ill. App. Ct. 1990); *State v. Halverson*, 277 N.W.2d 723, 724–25 (S.D. 1979) ("Since it is a privilege to hunt wild game, a hunter tacitly consents to the inspection of any game animal in his possession when he makes application for and receives a hunting license.").

169. *Layton v. Illinois*, 552 N.E.2d 1280, *cert. denied*, 501 U.S. 1219 (1991).

170. *Layton*, 552 N.E.2d at 1281.

171. *Id.*

172. *Id.* at 1286.

173. Haden & Israel, *supra* note 2, at 90.

174. *Frost v. R.R. Comm'n*, 271 U.S. 583, 594 (1926).

for license checks as a condition of the privilege of hunting, to a state conditioning drivers' licenses on consent to stops and searches of automobiles.¹⁷⁵ This comparison is inaccurate because it fails to recognize the qualifications and limitations of the consent in the context of fish and wildlife inspections.¹⁷⁶ The consent agreed to in Missouri is not to a general search like in the example offered by Haden and Israel, but the scope is limited by the applicable statutes and regulations to only what is necessary to advance the state's interest in enforcing laws to protect its fish and wildlife.¹⁷⁷ This is more akin to implied consent laws related to enforcement of DWI laws. The Supreme Court in *Missouri v. McNeely* noted that, "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense."¹⁷⁸

Regardless, the unconstitutional-conditions argument advanced by Haden and Israel fails because it is questionable whether the implied consent statute related to fish and wildlife¹⁷⁹ is substantially coercive or authorizes a search that violates the Fourth Amendment. Furthermore, in either case, constitutional rights are not relinquished. In the context of driving, those who are subject to the implied consent law are still free to refuse to submit to the test.¹⁸⁰ And in the fish and wildlife context, hunters or anglers are also free to withdraw consent and refuse to submit their game for inspection. However, in both cases, there are consequences for doing so.¹⁸¹

C. *Inspections Related to Hunting, Fishing, and Other Uses of Wildlife in Missouri Are Constitutional Because They are Highly Regulated Activities Which Are Subject to an Administrative Inspection*

Over time, the U.S. Supreme Court has recognized an exception for warrantless administrative searches of certain types of industries which have a

175. Haden & Israel, *supra* note 2, at 90.

176. See MO. CODE REGS. tit. 3, § 10-4.125 (2017); MO. REV. STAT. § 252.100.1 (2017); MO. REV. STAT. § 252.060 (2017).

177. See MO. CODE REGS. tit. 3, § 10-4.125 (2017); MO. REV. STAT. § 252.100.1 (2017); MO. REV. STAT. § 252.060 (2017).

178. 133 S. Ct. 1552, 1566 (2013).

179. See MO. REV. STAT. § 252.060 (2017).

180. MO. REV. STAT. § 577.041 (2017).

181. MO. REV. STAT. § 252.100.3 (2017) ("Any person who shall resist such search . . . shall be deemed guilty of a misdemeanor."); MO. REV. STAT. § 252.060 (2017) ("It is hereby declared to be the duty of every person holding a license or permit issued pursuant to any such rules and regulations to submit the same for inspection by any agent of the commission, or by any sheriff, marshal or constable or any deputy thereof. Any person holding such license or permit and refusing to submit the same when a proper demand is made therefor shall be deemed guilty of a misdemeanor."); MO. REV. STAT. § 577.041 (2017).

pervasive history of regulation.¹⁸² The Court recognized the need to conduct surprise inspections of these “closely regulated industries” to advance the regulatory scheme.¹⁸³ In *Donovan v. Dewey*, the Court extended the warrantless administrative search exception to the coal mining industry, an industry which did not have a long history of pervasive regulation.¹⁸⁴ The Court reasoned that so long as the business was subject to comprehensive regulations, administrative agencies could perform warrantless inspections without any suspicion of a violation.¹⁸⁵ In *New York v. Burger*, the Supreme Court established the current constitutional standards for determining the validity of warrantless administrative searches.¹⁸⁶ Under *Burger*, warrantless administrative searches are valid if: (1) there is a substantial government interest in regulating the industry or activity; (2) the warrantless inspections are necessary to further the regulatory scheme; (3) there is a constitutionally adequate substitute for a warrant; and (4) the time, place, and scope of the inspection must appropriately limit the discretion of inspecting officers.¹⁸⁷

Courts around the country have found hunting, fishing, and other uses of wildlife are highly regulated activities, and have upheld warrantless administrative inspections conducted by wildlife officers using the *Burger* rationale.¹⁸⁸ In *People v. Maikhio*, the California Supreme Court reasoned:

[T]he state interest underlying a stop and demand pursuant to section 2012 is quite distinct from the state’s ordinary interest in the enforcement of its criminal law, and the limited category of persons affected by the procedure—anglers and hunters—are individuals who have chosen to engage in a heavily regulated activity that reduces their reasonable expectation of privacy with regard to the type of intrusion at issue.¹⁸⁹

182. *New York v. Burger*, 482 U.S. 691, 712–13 (1987) (automobile junk yards); *Donovan v. Dewey*, 452 U.S. 594, 596 (1981) (mining); *United States v. Biswell*, 406 U.S. 311, 315–16 (1972) (firearms dealing); *Colonnade Catering Corp. v. United States*, 392 U.S. 72, 76–77 (1970) (liquor sales).

183. *See, e.g., Colonnade*, 397 U.S. at 74–75, 77 (permitting surprise inspections of retail alcohol businesses).

184. *Dewey*, 452 U.S. at 596.

185. *Id.* at 600, 605–06.

186. *Burger*, 482 U.S. at 702–03.

187. *Id.*

188. *See, e.g., People v. Maikhio*, 253 P.3d 247, 256, 262–63 (Cal. 2011) (upholding warrantless administrative stop and search of defendant’s vehicle after warden observed defendant fishing lobster); *State v. Klager*, 797 N.W.2d 47, 49–50 (S.D. 2011) (upholding the warrantless inspection of the records of the defendant’s taxidermy business); *State v. Colosimo*, 669 N.W.2d 1, 2, 9 (Minn. 2003) (holding that game warden was entitled to search defendant’s boat despite no suspicion of fishing violation); *State v. Boyer*, 42 P.3d 771, 773, 779 (Mont. 2002) (upholding warrantless search of defendant’s live well fish container).

189. *Maikhio*, 253 P.3d at 259 (citations omitted).

Similar rationale is applicable to warrantless administrative inspections conducted by conservation agents. Missouri has enacted a comprehensive regulatory scheme aimed at preserving the fish and wildlife resources of the state.¹⁹⁰ Regulations are prescribed for a wide variety of activities related to the taking, possession, sale, and transportation of fish and wildlife.¹⁹¹ Brian Mull explains the purpose of these regulations: “Fishing and game laws are nearly ubiquitous, and most states consider those regulations vital in order to preserve wildlife populations for current populations and future generations.”¹⁹² Considering the citizens of Missouri granted the Conservation Commission with the exclusive constitutional authority to regulate the fish, forest, and wildlife resources of the state, the same holds true in Missouri.¹⁹³

Advancing the regulatory scheme related to fish and wildlife in Missouri would be nearly impossible without the ability for conservation agents to conduct warrantless administrative inspections. As the *Maikho* court correctly recognized:

[M]any of the regulations concern [the characteristics and number of fish]. A rule permitting a game warden to stop and to demand display of only those . . . who the warden reasonably suspects have violated a statute or regulation would seriously compromise . . . the state’s ability to accomplish its objective. Violations of these types are not apparent from an angler’s or hunter’s outward appearance or conduct.¹⁹⁴

Missouri regulations related to hunting and fishing also require close inspection for realistic enforcement.¹⁹⁵ Furthermore, Missouri’s size, population, number of hunters and anglers, and the relatively small number of conservation agents create a situation necessitating warrantless regulatory inspections.¹⁹⁶

Section 252.100 of the Revised Statutes of Missouri and title 3, section 10-4.125 of the Missouri Code of Regulations read together provide an adequate substitute for a warrant, and place appropriate restraint on the discretion of conservation agents by limiting the time, place, and scope of inspections.¹⁹⁷ The statute notifies hunters and anglers of who is authorized to conduct an inspection

190. See MO. CODE REGS. tit. 3, § 10, Chapters 1–20 (2017).

191. See MO. CODE REGS. tit. 3, § 10, Chapters 4–20 (2017).

192. Bryan M. Mull, *The Hidden Cost of Rod and Rifle: Why State Fish and Game Laws Must be Amended in Order to Protect Against Unreasonable Search and Seizure in the Great Outdoors*, 42 U. BALT. L. REV. 801, 809 (2013).

193. See *supra* Part III.

194. *Maikho*, 253 P.3d at 261.

195. See, e.g., MO. CODE REGS. tit. 3, § 10-6.505 (2017) (establishing seasons, methods, and limits for taking black bass); MO. CODE REGS. tit. 3, § 10-7.410 (2017) (prohibiting use of a shotgun with a capacity of more than three shells).

196. See *supra* Section VI.A.2.

197. MO. REV. STAT. § 252.100.1 (2017); MO. CODE REGS. tit. 3, § 10-4.125 (2017).

(authorized agents of the Conservation Commission, sheriffs, and marshalls), gives notice of the specific places or items which may be inspected without a warrant, and the locations or items where a warrant is specifically required.¹⁹⁸ The regulation limits the inspections to times when a person is possessing, taking, transporting, or using wildlife; and the scope of the inspection is limited to permits, wildlife, and devices or facilities used to take, possess, or transport wildlife; but only as permitted by section 252.100 of the Revised Missouri Statutes.¹⁹⁹

These facts demonstrate that warrantless administrative inspections by conservation agents of hunters, anglers, and others using fish and wildlife in Missouri pass constitutional muster under the administrative search exception.

Haden and Israel contend the administrative search exception is not applicable to inspections conducted by game wardens or conservation agents because “a field check of a hunter or a stop of his vehicle is not searching a ‘commercial premises’ at a fixed geographic location during regular business hours.”²⁰⁰ This is a narrow interpretation which goes beyond the *Burger* requirements by interpreting the “fixed time, place, and scope” requirement to be limited to these places. As Justice Scalia noted in *City of Los Angeles California v. Patel*, the Court may have only identified four industries as closely regulated, but lower courts have identified several more industries as closely regulated under the test announced by the Court.²⁰¹ In one of these cases, the Ninth Circuit upheld the warrantless stop and boarding of a salmon fishing boat in Puget Sound by an officer of the National Marine Fishery Service under the administrative search exception to the warrant requirement.²⁰² In this instance, the administrative inspection was clearly not conducted on “commercial premises” at a “fixed geographic location during regular business hours.”

Furthermore, as the Supreme Court stated in *Patel*, “[h]istory is relevant when determining whether an industry is closely regulated,”²⁰³ as is the “duration of the regulatory tradition.”²⁰⁴ The origins of fish and wildlife regulation in Missouri is arguably rooted in regulating a commercial industry, “market hunting.”²⁰⁵ Missouri’s first game laws in the 1800s for the protection of wildlife were thought of as “fair trade practices” for market hunters, and ultimately were ineffective in managing the fish and wildlife resources of the

198. MO. REV. STAT. § 252.100.1 (2017).

199. MO. REV. STAT. § 252.100.1 (2017); MO. CODE REGS. tit. 3, § 10-4.125 (2017).

200. Haden & Israel, *supra* note 2, at 92–93.

201. 135 S. Ct. 2443, 2460 (2015) (Scalia, J., dissenting); *see also* Calzone v. Hawley, 866 F.3d 866, 871 (8th Cir. 2017) (holding warrantless inspections of commercial trucks are permissible and Missouri statutes permitting these inspections are “constitutional on their face”).

202. *United States v. Raub*, 637 F.2d 1205, 1206 (9th Cir. 1980).

203. *Patel*, 135 S. Ct. at 2455.

204. *Id.* at 2459 (Scalia, J., dissenting).

205. *See supra* Part II.

state.²⁰⁶ As wildlife populations declined, commercial harvest methods and sale of wildlife were abolished or strictly regulated.²⁰⁷ Today, wildlife regulations allow extremely limited commercialization by holders of sport permits, and business entities utilizing fish or wildlife as part of their enterprise are closely regulated.²⁰⁸ Based upon the historical uses and regulation of wildlife in Missouri, hunting, fishing, and other uses of wildlife are highly regulated activities which fall within the administrative inspection exception to the warrant requirement.

CONCLUSION

As Bryan Mull correctly notes: “it appears fruitless to contend that the wardens’ suspicionless searches are unconstitutional. . . . [s]tate and lower federal courts have upheld the majority of administrative game warden searches.”²⁰⁹ Missouri has a rich history of protecting and conserving its fish and wildlife resources, and the citizens of the state have developed a regulatory framework that strongly favors protecting them.²¹⁰

Although history demonstrates a strong commitment to protecting Missouri’s fish and wildlife resources by the citizens of the state,²¹¹ this must be done without infringing on the Fourth Amendment rights of those who hunt, fish, and utilize the wildlife resources of the state. While an argument to the contrary can be made that there is a lower standard for interactions between conservation agents and hunters and anglers,²¹² the analysis indicates that the applicable laws and enforcement procedures exercised by conservation agents are within the traditional scope of police activities permitted by the Fourth Amendment.²¹³

The search authority of officers charged with enforcing fish and wildlife related regulations has not been challenged for over ninety years in Missouri,²¹⁴ and if a challenge occurs in the future, the courts will likely find searches and

206. *See supra* Part II.

207. *See supra* Part II.

208. *See* MO. CODE REGS. tit. 3, § 10, Chapters 4–10 (2017).

209. Mull, *supra* note 192, at 811.

210. *See supra* Part III.

211. *See supra* Parts II, III.

212. Haden & Israel, *supra* note 2, at 80.

213. *See supra* Part VI.

214. *See* State v. Bennett, 288 S.W. 50 (Mo. 1926).

seizures conducted by conservation agents do not offend the Fourth Amendment.²¹⁵

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215. *See supra* Part VI.

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