

Arizona Journal of Environmental Law & Policy
Spring, 2013
Emi Kondo^{a1}Paula Cotter^{aa1}Stephanie Showalter Otts^{aaa1}

Copyright © 2013 Arizona Journal of Environmental Law & Policy; Emi Kondo, Paula Cotter, Stephanie Showalter Otts

***105 ARE STATE WATERCRAFT INSPECTIONS CONSTITUTIONALLY PERMISSIBLE SEARCHES?^{d1}**

In response to the discovery of quagga and zebra mussels in the region, many Western states have developed and implemented watercraft inspection programs to prevent the transport of quagga and zebra mussels to unaffected waters. Watercraft inspection programs generally involve the establishment of mandatory check stations at which state officials conduct screening interviews or surveys, inspect watercraft and equipment, and decontaminate upon detection of quagga or zebra mussels. State watercraft inspection programs raise challenging constitutional questions as they involve governmental searches and seizures of property. This Article addresses the states' legal authority to implement watercraft inspection programs to prevent the further spread of invasive mussels, focusing primarily on the permissibility of such programs under the Fourth Amendment to the U.S. Constitution. This Article also briefly examines two other potential objections to the watercraft interception programs, namely, that such programs could violate the Commerce Clause or the fundamental "right to travel."

TABLE OF CONTENTS

INTRODUCTION	106
I. CONSTITUTIONAL REQUIREMENTS FOR A REASONABLE SEARCH	108
A. Warrant Based on Probable Cause	108
B. Consent	110
C. Individualized Suspicion	111
D. Administrative Searches	114
II. OTHER CONSTITUTIONAL PROVISIONS	116
A. Commerce Clause	117
B. Right to Travel	121
CONCLUSION	122

***106INTRODUCTION**

Quagga and zebra mussels are native to the Black and Caspian Seas, but in recent years these aquatic species have spread throughout the domestic waters of the United States, often with disastrous effects. Collectively referred to as dreissenid mussels, these species are anticipated to cause billions of dollars in long-term damage.¹ Voracious filter feeders, dreissenid

mussels negatively affect native species by removing nutrients and altering water clarity, which increases the amount of light penetrating the water's surface, resulting in an increase in algae growth.² The increased algae production and waste from the mussels alter the ecosystem of the water body and change the existing equilibrium among species.

The dreissenid mussels also attach to water intake pipes, which can be particularly problematic for water delivery systems such as irrigation systems and dams,³ as the mussels clog pipes and prevent water from being transported. To fix this problem, the mussels must be mechanically removed or chemically controlled, increasing maintenance costs.⁴

***107** The threat is exacerbated because the dreissenid mussels can spread quickly. Ocean vessels transporting cargo from Europe initially introduced dreissenid mussels to the Great Lakes through their ballast water discharges.⁵ Since then, the mussels have quickly spread throughout the Great Lakes Basin and connected river systems, including the Mississippi River. The rapid spread of the dreissenid mussels may be attributed, in part, to human transport via trailered watercraft. The mussels attach to the exposed hard surfaces of a watercraft, such as a hull, anchor, or propeller, and “hitchhike” to a new environment when the watercraft is transported to another water body. This method of transport is thought to explain the recent detection of dreissenid mussels in Western waters. In 2007, quagga mussels were found along the Colorado River in the Lake Mead National Recreational Area, located along the Arizona-Nevada border,⁶ as well as in downstream Lakes Mohave and Havasu.⁷ Zebra mussels have also been detected in Western water bodies, most recently in Lake Texoma, Texas, located along the border of Texas and Oklahoma.⁸

In response to the discovery of dreissenid mussels in these areas, many Western states have developed and implemented watercraft inspection programs to prevent the transport of quagga and zebra mussels to unaffected waters. Watercraft inspection programs generally involve the establishment of mandatory check stations at which state officials conduct screening interviews or surveys, inspect watercraft and equipment, and decontaminate as necessary upon detection of quagga or zebra mussels. Screening interviews are a risk-assessment tool to collect data on where and when the watercraft had previously been launched.⁹ A visual inspection of the watercraft, boat trailer, and equipment is then performed to determine whether any mussels are attached to exterior surfaces or whether standing water is trapped in cooling systems, dry wells, bilge tanks, or other areas.¹⁰ If mussels are detected or the watercraft poses a high risk, inspectors will decontaminate the watercraft using pressure-washing equipment to spray or flush the affected area with scalding ***108** (140°F) water.¹¹ The location of mandatory watercraft inspection check stations varies by state. Check stations may be located along major highways, along state borders at ports of entry, or at popular launch sites on recreational waters.¹²

State watercraft inspection programs raise constitutional issues because they involve government searches and seizures of personal property. If a Fourth Amendment “seizure” occurs when a vehicle is stopped at a checkpoint, and if the inspection of watercraft, trailers, and equipment for the presence of dreissenid mussels is a “search,” then what is the legal basis for a state to conduct such warrantless inspections? This Article will address the states’ legal authority to implement watercraft inspection programs to prevent the invasion of dreissenid mussels. Part I analyzes the Fourth Amendment search and seizure issues raised by state watercraft interception programs by discussing several possible Fourth Amendment theories. Part II examines two other potential objections to the watercraft interception programs, namely, that such programs could violate the Commerce Clause or the fundamental “right to travel.”

I. CONSTITUTIONAL REQUIREMENTS FOR A REASONABLE SEARCH

The Fourth Amendment provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹³ The general purpose of the Fourth Amendment “is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”¹⁴ Except in limited circumstances, searches and seizures are “unreasonable” unless authorized by a valid search warrant issued upon a showing of probable cause. Part I begins with a discussion of the warrant requirement and then explores three exceptions that are potentially applicable to watercraft inspection programs: consent, individualized suspicion, and administrative searches.

A. Warrant Based on Probable Cause

A search conducted pursuant to a valid search warrant based on probable cause is generally presumed reasonable. The Warrant Clause of the Fourth Amendment sets forth three specific requirements that must be met before a warrant may issue:

“probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and *109 the persons or things to be seized.”¹⁵ Probable cause exists where “the facts and circumstances within [the officer’s] knowledge ... [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.”¹⁶ In other words, law enforcement officers have probable cause if they reasonably believe the person, place, or thing to be searched has evidence of a crime.¹⁷ To obtain a search warrant, law enforcement officers must file an affidavit with a magistrate setting forth the specific facts justifying the issuance of the warrant. Upon issuance of the warrant, the officer can execute the warrant (i.e., conduct the search or seize the property).

Although warrants are preferred, the U.S. Supreme Court has held that the warrant requirement is subject to several exceptions. For instance, in *Carroll v. United States*, the Court found that the mobility of automobiles made securing a warrant in some cases impractical.¹⁸ There is a difference, the Court stated,

between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.¹⁹

Despite the absence of a warrant, the Court concluded that a search was reasonable because the officer had probable cause. The Court later extended the automobile exception to the warrant requirement for motor homes in *California v. Carney*.²⁰ Individuals have a reduced expectation of privacy in their vehicles, as opposed to in their homes, due to the pervasiveness of governmental regulation of automobile licensing and use.²¹ Although a motor home possesses some of the attributes of a home, which might suggest a higher expectation of privacy, motor homes are readily mobile.²² The applicability of the automobile exception “has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation.”²³

Under this test, the automobile exception applies to watercraft. Watercraft are highly mobile, whether on the water or on a trailer. If an official observes a watercraft that he believes contains mussels, but he cannot immediately stop and inspect the watercraft, the *110 person transporting the watercraft could easily move it to another location while the state official seeks a warrant. In other words, the mobile nature of watercraft justifies the warrantless search under these circumstances. Individuals also have reduced expectations of privacy in watercraft, as they are open conveyances subject to government regulation.²⁴

Although the automobile exception would allow a state official to justify a warrantless search of a boat if he had probable cause to suspect a crime, it is unlikely that probable cause will exist to stop and search every boat. Because the mussels’ presence is not always obvious, exclusive reliance on the automobile exception would seem to inevitably lead to the spread of mussels to previously un-infested areas due to low inspection rates.

In addition to mobility concerns, the sheer number of boats traveling the nation’s roads would make securing individual warrants impractical. During the 2012 inspection season, the Idaho Department of Agriculture alone inspected 42,348 vessels.²⁵ Neither state court systems nor state agencies have the resources to handle that many warrants, especially because most would be needed on weekends and holidays when courts are closed.

The need to avoid impracticalities, however, does not give officers free rein to seize property and conduct searches as they see fit. A warrantless search may be valid where there is consent, individualized suspicion, or when it is an authorized administrative search. Warrantless searches and seizures, however, must still be “reasonable” to ensure that an individual’s Fourth Amendment rights are not violated, and the courts have attempted to flesh out what “reasonable” means under a variety of warrantless search scenarios.

B. Consent

A search conducted pursuant to consent is a well-settled exception to the warrant requirement.²⁶ If an individual voluntarily consents to a governmental search or seizure, a warrant is not required. When asked to determine the validity of a consent, courts consider the totality of the circumstances to ensure that no government coercion was involved, and that the individual understood the nature of the search to which he consented.

In 2009, the Oregon State Legislature authorized voluntary roadside boat-inspection stations.²⁷ The inspections conducted at these stations fall within the scope of searches conducted pursuant to consent. Watercraft owners may stop to take advantage of the state's inspection and decontamination services, but they are not required to participate. Although such voluntary programs avoid Fourth Amendment challenges associated with mandatory check stations, they are insufficient as a means of intercepting mussel-infested watercraft to *111 prevent the spread of dreissenid mussels. During Oregon's 2010 inspection season, the voluntary compliance rate for the inspection program was around 27 percent.²⁸ This meant that about three out of four boats failed to stop at a check station. Some of those uninspected watercraft may have been infested with quagga or zebra mussels, and a program relying on only consensual stops would not keep them from spreading.

C. Individualized Suspicion

A warrantless search or seizure may be reasonable without consent if individualized suspicion justifies the government intrusion. Requiring individualized suspicion limits the government's discretion and protects individuals from arbitrary and general searches.²⁹ There are two levels of individualized suspicion: reasonable suspicion and probable cause.³⁰

1. Reasonable Suspicion

Law enforcement officers may, based upon reasonable suspicion, briefly stop individuals to investigate those suspicions. "Reasonable suspicion is a less demanding standard than probable cause,"³¹ and may be based on "specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience."³² The U.S. Supreme Court first recognized this reduced standard of individualized suspicion for warrantless stops in *Terry v. Ohio*.³³ In determining whether the warrantless stop and frisk by the police officer was an unreasonable search and seizure, the Court considered the "nature and extent of the government interest involved" and "the nature and quality of intrusion on individual rights."³⁴ There is, according to the Court, "no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails."³⁵ In upholding the warrantless stop, the Court noted that there was a strong governmental interest in detecting crimes and ensuring public safety that outweighed the minimal intrusion of privacy as compared to an arrest.³⁶

The Court has stated that routine traffic stops are analogous to *Terry* stops.³⁷ In *United States v. Brignoni-Ponce*, the Court held that "when an officer's observations lead him reasonably to suspect" that a vehicle contains an illegal alien, he may stop the car without a *112 warrant to "investigate the circumstances that provoke suspicion."³⁸ An officer's reasonable suspicion may be based on a number of factors including "the characteristics of the area in which they encounter a vehicle," the driver's behavior, and "aspects of the vehicle itself."³⁹

A number of Western states' laws authorizing watercraft-inspection programs allow for routine stops based on some variation of the reasonable suspicion standard. "Peace officers within the state of Idaho, upon reasonable suspicion that a conveyance is infested with quagga mussels or zebra mussels, may require a driver of a vehicle to stop and submit to an inspection of the exterior of any conveyance(s) in plain view."⁴⁰ Wyoming peace officers may stop and inspect a vessel "upon a reasonable suspicion that an aquatic invasive species may be present."⁴¹ In California, the Department of Fish and Game is authorized "to temporarily stop conveyances that *may* carry or contain adult or larval dreissenid mussels on any roadway or waterway in order to conduct inspections."⁴² On its face, California's statute appears slightly more permissive because it does not expressly set forth any standard by which officer discretion is limited. California case law, however, requires that officers establish reasonable suspicion to justify individualized investigatory stops.⁴³

An officer might develop reasonable suspicion that a watercraft is transporting dreissenid mussels based on observations of the boater's actions while leaving a water body, the visible presence of aquatic plants, or tips from officials in other states. If reasonable suspicion exists, the Fourth Amendment limits the officer to asking investigatory questions regarding his suspicions and inspecting the exterior of the watercraft.⁴⁴ Warrantless searches of private property are not permissible based on reasonable suspicion. As part of the investigative process, however, officers may use trained canines to detect the presence of contraband because the U.S. Supreme Court does not consider dog sniffs to be Fourth Amendment searches.⁴⁵ "Mussel dogs"--canines trained to detect the presence of quagga and zebra mussels--have recently been incorporated into inspection programs in California.⁴⁶ A mussel dog's positive "alert" might indicate the presence of mussels, providing the officer with

probable cause to conduct a more thorough search of the watercraft.

***1132. Probable Cause**

While some states allow such routine stops whenever an officer has reasonable suspicion, other states require the heightened standard of probable cause: the officer must have reason to believe there has been a violation of the law. Probable cause means that there exists “a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure”⁴⁷ Peace officers in Colorado may stop and inspect a watercraft “upon a reasonable belief that an aquatic nuisance species may be present.”⁴⁸ Routine stops are allowed in Nevada “if the peace officer reasonably believes, based on articulable facts, that an aquatic invasive species or aquatic plant material is present.”⁴⁹ In Washington, fish and wildlife officers “based upon articulable facts that a person is transporting a prohibited aquatic animal species or any aquatic plant,” may temporarily stop and inspect watercraft.⁵⁰ The Utah Division of Wildlife Resources may “temporarily stop, detain, and inspect a conveyance or equipment that the division reasonably believes is in violation” of the state’s dreissenid mussel laws.⁵¹

The scope of a warrantless search based upon probable cause is limited to areas where evidence sought could potentially be located.⁵² In the watercraft inspection context, the warrantless search would be based upon a determination that there is probable cause based on a belief that the watercraft is carrying an invasive mussel species. The scope of the search, therefore, must be limited to places on or in the watercraft that are likely to contain mussels, such as livewells or bilge tanks. A state official would have no authority, for example, to look into dry storage compartments.

On the whole, it is clear that random stops based upon reasonable suspicion and searches based on probable cause are permissible under the Fourth Amendment, provided that state officials follow appropriate Fourth Amendment limits as to the scope of the intrusion. As a practical matter, however, exclusive reliance on individualized watercraft interceptions would likely fail to protect a state’s water from the potential introduction of dreissenid mussels. An inspection program based exclusively on random stops limits state officials to intercepting watercraft based on pure luck. Even where a state official observes a trailered watercraft, the presence of mussels on watercraft exteriors can be difficult to detect at a distance and impossible to detect with respect to the interior. Although a few watercraft might visibly be transporting aquatic plants, they represent only a small subset of watercraft posing a risk to the states. Because state officials cannot cast a wide-enough net with random stops to ensure adequate enforcement of dreissenid mussel programs, it is important to ***114** determine whether the Fourth Amendment would permit a broader, all-encompassing method.

D. Administrative Searches

The individualized suspicion exception to the warrant requirement is not a good fit for watercraft inspection programs because individualized stops are not the most efficient means of detecting and preventing the spread of quagga and zebra mussels. Furthermore, while the individualized suspicion rationale is intended to address the needs of police in investigating criminal activity, watercraft inspection programs are different. These inspections are part of broader state administrative programs focused on preventing the introduction of aquatic invasive species into Western states through the development of best management practices, extensive public education and outreach, and regulatory standards. The Supreme Court has adopted a balancing test to determine the reasonableness of warrantless searches that lack reasonable suspicion and are conducted by government officials in the context of administrative programs. Whether such “administrative searches”--like roadblocks and checkpoints--are permissible inspections of watercraft depends on the application of the Court’s three-part balancing test.

The Court first recognized the “administrative search” exception in 1967 in *Camara v. Municipal Court of the City and County of San Francisco*.⁵³ San Francisco’s Housing Code authorized city employees “to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.”⁵⁴ The city’s inspection program, according to the Court, was different from searches conducted as part of a criminal investigation because it was “aimed at securing city-wide compliance with minimum physical standards for private property.”⁵⁵ In determining whether the inspection at issue in the case was reasonable, the Court stated that “there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”⁵⁶ With respect to need, the Court cited an expert opinion asserting that “the only effective way to seek universal compliance with the minimum

standards required by municipal codes is through routine periodic inspections of all structures.”⁵⁷ When balanced against what the Court felt was a “relatively limited invasion of the urban citizen’s privacy,” the area-wide inspection was deemed reasonable even though the inspector lacked probable cause based upon specific knowledge of the inspected dwelling.⁵⁸ Probable cause is deemed to exist “if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.”⁵⁹

***115** The Court later extended the administrative search exception to warrantless searches of “closely regulated industries,” such as liquor and firearms dealers, because pervasive federal regulation of such businesses leads to a reduced expectation of privacy.⁶⁰ In *New York v. Burger*,⁶¹ a case involving a search of an automobile junkyard, the Court stated that warrantless inspections of closely regulated industries would be deemed reasonable if three criteria are met. First, “[t]here must be a ‘substantial’ government interest that informs the regulatory scheme pursuant to which inspection is made.”⁶² Second, “[t]he warrantless inspection must be necessary to further the regulatory scheme.”⁶³ Finally, “[t]he statute’s inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.”⁶⁴ With respect to the third criterion, the Court further explained that the statute “must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.”⁶⁵ Specifically, in order to limit officer discretion, the statute must limit the “time, place, and scope” of the inspection.⁶⁶

In applying this three-part balancing test, the Court found the junkyard search reasonable. First, the state’s interest in regulating automobile junkyards was substantial due to the industry’s association with motor vehicle theft.⁶⁷ Second, the warrantless administrative search regime was necessary because stolen vehicles and parts can pass quickly through a junkyard and “surprise is crucial if the regulatory scheme ... is to function at all.”⁶⁸ Finally, the state statute was an adequate substitute for a warrant because it provided notice and limited the discretion of the officers.⁶⁹

A balancing test is also used to determine the reasonableness of roadblocks and checkpoints--an analogy that is more apt for watercraft inspection programs than that of closely regulated industries. Roadblocks occur “where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community.”⁷⁰ In *United States v. Martinez-Fuerte*, the Supreme Court balanced the need for government intrusion (detection of illegal aliens) with the level of intrusion on an individual’s privacy (brief stops for questioning) in upholding a routine border checkpoint.⁷¹ Sobriety ***116** checkpoints have been upheld on similar grounds, given the states’ significant interest in removing drunk drivers from the road and the minimal level of intrusion suffered by drivers who are subjected to the stops.⁷² The Court, however, will likely strike down checkpoint programs if their primary purpose is indistinguishable from general interest in crime control.⁷³ In *City of Indianapolis v. Edmond*, the Court refused to approve Indianapolis’ drug checkpoint program because its primary purpose was interdiction of illegal narcotics.⁷⁴

Application of the balancing test to state watercraft inspection programs reveals that properly designed state watercraft inspection programs should be able to withstand constitutional scrutiny. First, with respect to government interest, the Western states have a significant interest in preventing the further spread of zebra and quagga mussels, for both economic and environmental reasons. The primary purpose of the checkpoints is to detect and remove mussels, not to detect criminal wrongdoing. Although a criminal penalty may flow from a checkpoint stop in some states, the primary purpose is civil in nature. In addition, mandatory checkpoints are an essential component of the states’ regulatory schemes, and state statutes and regulations limit the discretion of officials regarding the placement of checkpoints, the hours of operation, and the scope of the inspections. This strong governmental interest is likely to outweigh individual privacy interests because the search involves a minimal level of intrusion and because watercraft operated in public waterways or transported on public roadways are associated with reduced expectations of privacy.

The balancing test utilized by the U.S. Supreme Court in determining the validity of administrative searches and seizures is limited by the constraints of the U.S. Constitution. State constitutions, however, may impose more stringent requirements. For example, the Oregon Supreme Court held that its constitution requires that an administrative search have “a purpose other than enforcement of laws by means of criminal sanctions;” therefore, sobriety checkpoints are unconstitutional because they aim to enforce drunken-driving violations that result in criminal sanctions.⁷⁵ To ensure the constitutionality of its watercraft inspection program, Oregon does not impose criminal sanctions for possessing or transporting a dreissenid mussel if the watercraft operator cooperates at the stationary checkpoint.⁷⁶

II. OTHER CONSTITUTIONAL PROVISIONS

State watercraft inspection programs impose temporary delays on individuals seeking to transport boats in the region. Although in most cases, owners transport their own boats, owners frequently hire boat-hauling companies when boats are sold. There are between 3000 and 5000 companies in North America that provide transportation services *117 for commercial watercraft and equipment, with an estimated 500 active in the West.⁷⁷ Under various state statutes, anyone transporting a boat—including a commercial hauler—must stop at a watercraft inspection station. Stations located along major highways or at points of entry may be perceived as an infringement on the free movement of goods and people across state lines. Such infringement implicates two constitutional issues: the Commerce Clause and the right to travel.

A. Commerce Clause

The “Commerce Clause” of the U.S. Constitution grants Congress the authority to regulate commerce “among the several States.”⁷⁸ The negative implication of the Commerce Clause is that states do *not* have the power to regulate interstate commerce because Congress’s power in that arena is exclusive.⁷⁹ A state may be barred from regulating even if Congress has not yet exercised its legislative authority to address a particular issue. This negative aspect of the Commerce Clause is commonly referred to as the “dormant Commerce Clause,” and it is the primary restriction on the power of states to enact laws and regulations that would normally be within their legislative powers but that impermissibly burden interstate commerce. Generally speaking, the Commerce Clause prohibits states from enacting laws or regulations that restrict the free flow of commerce across state lines, or protect in-state economic interests from out-of-state competition. States, however, may enact laws affecting interstate commerce as long as they do not discriminate against interstate commerce and are not unduly burdensome.

A court’s inquiry into whether a state has violated the dormant Commerce Clause begins with an examination of the statute in question: does the state statute discriminate against interstate commerce “either on its face or in practical effect”?⁸⁰ A state statute that discriminates against interstate commerce is invalid unless the statute serves a legitimate state purpose that cannot be served by nondiscriminatory means.⁸¹ For example, in *Maine v. Taylor*, the U.S. Supreme Court upheld a facially discriminatory state statute that completely banned the importation of live baitfish into Maine. The Court concluded that Maine’s ban on the importation of live baitfish served the legitimate purpose of protection against two ecological threats:

*118 First, Maine’s population of wild fish ... would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine’s aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways.⁸²

In contrast, Western state statutes implementing watercraft-inspection programs require *all* boats to stop at inspection stations. Both in-state and out-of-state boaters are subject to the same treatment. The statutes, therefore, regulate evenhandedly on their face. All boats are required to stop, and it is the presence of invasive mussels, not the state of registration, that triggers decontamination protocols. Statutes that are not facially discriminatory are subject to a less rigorous standard of review announced by the U.S. Supreme Court in *Pike v. Bruce Church, Inc.*: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁸³

Application of this test reveals that watercraft inspection programs should withstand constitutional scrutiny. First, these initiatives serve a legitimate local public interest. One of the primary responsibilities of a state government is “to advance the safety, happiness and prosperity of its people and to provide for its general welfare”⁸⁴ To carry out these duties, states can pass laws and regulations pursuant to their police powers to protect public safety, the environment, and the general welfare of the community.⁸⁵ State watercraft inspection programs fall well within the states’ police powers because they are enacted to prevent the introduction of invasive species that pose a significant threat to Western states’ environments and economies. Although the states have the authority to enact watercraft inspection programs to advance legitimate state interests, the balancing test established in *Pike* requires that states can only go so far in their attempts to keep invasive species out; state efforts to protect themselves from invasive species may not impose a burden on interstate commerce that clearly exceeds the benefits to the states.

The popularity of recreational boating in the United States, however, suggests that the impact on interstate commerce from state regulations may not be trivial. In 2009, the U.S. Forest Service estimated that 82 million adults in the United States participated in recreational boating activities.⁸⁶ Boaters spend a considerable amount of money on boats, food, supplies, and lodging. An estimated \$30.8 billion is spent on boating sales and services *119 every year, with an additional \$21 billion in recreational boating trip expenditures.⁸⁷ Given the commercial value of the recreational boating sector, any restrictions on the free movement of boats across state lines could have a significant impact on interstate commerce.

Watercraft inspection programs, however, have only incidental effects on the interstate-commerce aspects of recreational boating. Western states are not seeking to regulate commercial activity associated with recreational boating. State statutes, for instance, do not ban out-of-state boats from entering the state or utilizing state waters. Rather, the statutes subject all boats entering the state or launching in state waters to submit to an inspection and decontamination if invasive mussels are discovered. Watercraft inspection and decontamination performed at highway checkpoints and boat launch sites will likely have only a slight impact, if any, on interstate commerce. Although a boater will be briefly delayed in his travels, once the boat has been inspected and decontaminated, he is free to continue to his destination.⁸⁸

Finally, given the significant economic and environmental benefits to be gained from keeping a water body free of dreissenid mussels, the burden imposed on interstate commerce by watercraft inspection programs does not appear to be “clearly excessive” in comparison. Although stopping at an inspection station may be an inconvenience, it is only a slight one for boaters who are already in compliance with state dreissenid mussel laws. Boaters who have cleaned, drained, and dried their boats to remove invasive mussels will have to stop at the checkpoints, and if checkpoints are administered properly, they should quickly be able to continue their journeys when inspectors fail to detect any mussels. Boaters who have not taken such precautions will encounter longer delays while their boats are more thoroughly inspected and decontaminated. Such decontamination advances the states’ legitimate interests in ensuring that boaters do not inadvertently introduce dreissenid mussels into previously un-infested water. On balance, the scales tip in favor of the states because the potential burden on interstate commerce is slight, while the local environmental and economic benefits of preventing an invasion are significant.

Federal courts have upheld more burdensome state regulations. In addition to Maine’s baitfish ban mentioned above, courts have rejected dormant Commerce Clause challenges to state laws regulating the discharge of ballast water from large oceangoing *120 vessels to minimize the risk of invasive species introduction. It is widely believed that zebra mussels were introduced into the Great Lakes through the discharge of ballast water, and it remains a key vector of concern throughout the United States. Despite long-term regulatory costs imposed on shipping companies (including installing and maintaining expensive treatment systems to remove or kill all aquatic organisms), the Sixth Circuit, in reviewing Michigan’s ballast-water permit requirement, focused only on the direct costs of the permit requirement. The court in *Fednav, Ltd. v. Chester* concluded that the permit fees--less than \$200 annually--were a *de minimis* burden, while “to the extent the permit requirement even marginally reduces the problem of [Aquatic Nuisance Species] introduction, its local benefits would be very large.”⁸⁹

Although the Sixth Circuit’s decision in *Fednav* suggested that Michigan’s ballast-water law would withstand a dormant Commerce Clause challenge, it went on to hold that there was no need to apply the *Pike* balancing test at all, because “the Commerce Clause has not been dormant here.”⁹⁰ According to the court,

The Commerce Clause power belongs to Congress, not the courts. The purpose of the dormant Commerce Clause doctrine is to safeguard Congress’ *latent* power from encroachment by the several States. Accordingly, we only engage in dormant Commerce Clause review when Congress has not acted or purported to act. Once Congress acts, courts are not free to review state taxes or other regulation under the dormant Commerce Clause.

[The National Invasive Species Act of 1996 (NISA)] was an exercise of Congress’s power under the Commerce Clause. And in enacting NISA ... Congress expressly contemplated, and indeed encouraged, state participation in ANS prevention measures. We would lose our constitutional bearings if we were to hold that the Commerce Clause, in its dormancy, strikes down state regulation that Congress, in *actively exercising* its power under the Clause, expressly contemplated. We therefore affirm the dismissal of this claim.⁹¹

A similar argument could be made for the inapplicability of the dormant Commerce Clause to state laws implementing watercraft inspection programs. Congress, through NISA, called on the Western Regional Panel on Aquatic Nuisance Species to develop an “education, monitoring (including inspection), prevention, and control program to prevent the spread of the zebra mussel west of the 100th Meridian.”⁹² Local, state, and federal agencies in the West, working collaboratively through the 100th Meridian Initiative, have engaged in extensive public education and outreach, developed rapid-response plans, and *121 standardized watercraft inspection and decontamination protocols.⁹³ Because Congress has encouraged Western states to take action to prevent the spread of zebra mussels, state dreissenid mussel laws should survive a constitutional challenge based upon the dormant Commerce Clause.

B. Right to Travel

U.S. citizens have always “possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom”⁹⁴ The Supreme Court “long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”⁹⁵ Watercraft inspection programs have the potential to restrain the freedom of both interstate and intrastate travel. A boater, for instance, may not be able to launch in his water body of choice without first submitting to state inspection. A boater’s journey home might be delayed because of a mandatory stop at a highway inspection station. In short, boaters may no longer move as freely through the Western states.

The right to *interstate* travel is often described as a fundamental constitutional right,⁹⁶ entitled to similar protections against infringement as the freedom of speech and the right to bear arms. Government restrictions on fundamental rights are subject to strict scrutiny, meaning the restriction is unconstitutional unless narrowly tailored to promote a “‘compelling government interest.”⁹⁷ The majority of right-to-travel cases deal with the ability of out-of-staters, or individuals who have recently moved into a state, to avail themselves of in-state privileges relating to, for instance, voting or medical care. The case law regarding the right to *intrastate* travel is less clear because the U.S. Supreme Court has not directly addressed the issue of whether the right to intrastate travel is a fundamental right. If the right to intrastate travel is not considered a fundamental right, restrictions need only be rationally related to a legitimate governmental interest.⁹⁸

While there is no consensus on the issue, several federal appellate courts have observed that intrastate freedom of movement should be considered a fundamental right. The Second Circuit Court in *King v. New Rochelle Municipal Housing Authority* stated that “[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a *122 state.”⁹⁹ In striking down a local government’s anti-cruising ordinance, the Third Circuit similarly concluded that “the right to move freely about one’s neighborhood or town, even by automobile, is ‘implicit in the concept of ordered liberty’ and ‘deeply rooted in the Nation’s history.”¹⁰⁰

Assuming that the right to travel--both between states and within an individual state--is a fundamental right, watercraft inspection programs, to the extent that they infringe upon the right to travel, would only be permissible if narrowly tailored to promote a compelling government interest. Even if a court chooses to apply this most stringent test, Western states should be able to make a credible argument that their interest in preventing the introduction of invasive species is sufficiently compelling to withstand heightened judicial scrutiny.

This analysis assumes that the deciding court rules that checkpoints actually infringe on a boater’s right to travel. However, “minor burdens impacting interstate travel, such as toll roads, do not constitute a violation of [the right to travel.]”¹⁰¹ Furthermore, according to the Supreme Court, “a state law implicates the right to travel only when it actually deters such travel, when impeding travel is its primary objective, or when it uses ‘any classification which serves to penalize the exercise of that right.”¹⁰² Watercraft inspection programs do not fall within any of these categories. Western states are not trying to prevent boaters from traveling between water bodies, and state law does not punish them for doing so. Although stopping at a watercraft inspection station may be an inconvenience, it is unlikely that watercraft inspection programs will actually deter boaters from traveling. Travelers encounter similar delays and hassles at airport security checkpoints, yet most people continue to fly on a regular basis. While citizens may have “a right to travel throughout the United States ‘uninhibited by statutes, rules, and regulations which unreasonably burden or restrict movement,’ ... [they] do not have a right to travel

without any impediments whatsoever.”¹⁰³

CONCLUSION

Dreissenid mussels have devastated native aquatic ecosystems in the Great Lakes and connected river systems. Unfortunately, the invasive mussels have now crossed the 100th Meridian and are becoming established throughout the southwestern United States. Without aggressive action, the mussels will quickly spread throughout the Western region, drifting to downstream waters and hitchhiking overland on trailered boats. Since 2007, Western states have taken significant actions to educate boaters regarding best management practices and have strengthened aquatic invasive species laws to prevent the further introduction of dreissenid mussels. Watercraft inspection programs are a crucial element of *123 the states’ prevention programs that provide opportunities for face-to-face outreach and ensure boater compliance with dreissenid mussel laws.

Watercraft inspection programs advance a compelling state interest. States are seeking to protect their water bodies from an invasive species that is harmful to native ecosystems and imposes significant costs on water users. Supreme Court jurisprudence interpreting the Fourth Amendment, the Commerce Clause, and the right to travel establish that constitutional rights are not absolute. The government may infringe, to some degree, if there is a compelling government interest. While it can be a challenge to strike the proper balance, watercraft inspection programs should generally prevail. Watercraft inspectors conduct rather limited searches, examining only the exterior of the boat and other places where mussels are likely to be present. Inspectors are not authorized to look in vehicles or closed dry compartments where personal effects may be stored. In addition, most inspections do not result in lengthy delays that significantly restrict a boater’s ability to travel. On balance, watercraft inspection programs should withstand constitutional scrutiny, as they involve minimum intrusions and infringements on boaters’ privacy and freedom of movement while advancing states’ legitimate interests in preventing significant economic and environmental harm.

Footnotes

^{d1} The authors would like to thank Terra Bowling, Senior Research Counsel, National Sea Grant Law Center, for her editing assistance, and David Rabe, Visiting Counsel, National Association of Attorneys General, for his help in outlining the issues surrounding the right to travel.

^{a1} Candidate for J.D., 2014. Emi Kondo is a second-year student at Lewis & Clark Law School.

^{aa1} J.D., Paula Cotter is Environment and Energy Counsel with the National Association of Attorneys General.

^{aaa1} J.D., M.S.E.L., Stephanie Showalter Otts is the Director of the National Sea Grant Law Center at the University of Mississippi School of Law.

¹ W. REG’L PANEL ON AQUATIC NUISANCE SPECIES, QUAGGA-ZEBRA MUSSEL ACTION PLAN FOR WESTERN U.S. WATERS E-1 (2010), *available at* http://anastaskforce.gov/QZAP/QZAP_FINAL_Feb2010.pdf [hereinafter QUAGGA-ZEBRA MUSSEL ACTION PLAN].

² *Nonnative Aquatic Species -- Glen Canyon National Recreational Area*, NAT’L PARK SERV., <http://www.nps.gov/glca/naturescience/nonnativeanimals.htm> (last updated Dec. 30, 2012).

³ QUAGGA-ZEBRA MUSSEL ACTION PLAN, *supra* note 1, at 1.

⁴ *Id.* at 4.

5 U.S. Dep't of Agric., *Invasive Species: Aquatic Species -- Zebra Mussel (Dreissena polymorpha)*, NAT'L INVASIVE SPECIES INFO. CTR., [http:// www.invasivespeciesinfo.gov/aquatics/zebramussel.shtml#.UKQLp4X31ZE](http://www.invasivespeciesinfo.gov/aquatics/zebramussel.shtml#.UKQLp4X31ZE) (last updated Aug. 20, 2012).

6 Erik Stokstad, *Feared Quagga Mussel Turns Up in Western United States*, 315 SCI. 453 (2007).

7 *Id.*; LAKE MEAD NAT'L RECREATION AREA, NAT'L PARK SERV., QUAGGA MUSSELS FREQUENTLY ASKED QUESTIONS 2 (2008), available at [http:// www.nps.gov/lame/naturescience/upload/Frequently%20Asked%CC20Questions%CC20Public%CC20Version%CC20May%CC2021%CC20C.doc](http://www.nps.gov/lame/naturescience/upload/Frequently%20Asked%CC20Questions%CC20Public%CC20Version%CC20May%CC2021%CC20C.doc).

8 Press Release, Tex. Parks & Wildlife, Lone Zebra Mussel Found in Lake Texoma (Apr. 21, 2009), [http://www.tpwd.state.tx.us/newsmedia/releases/? req=20090421a&nrtype=all&nrspace=&nrsearch=zebra+mussels](http://www.tpwd.state.tx.us/newsmedia/releases/?req=20090421a&nrtype=all&nrspace=&nrsearch=zebra+mussels).

9 *See, e.g.*, E. BAY MUN. UTIL. DIST., EBMUD RECREATION AREA PRIVATE BOAT LAUNCH INSPECTION FORM (2010), available at [http:// www.ebmud.com/sites/default/files/pdfs/BoatInspectionFormRev0410.pdf](http://www.ebmud.com/sites/default/files/pdfs/BoatInspectionFormRev0410.pdf).

10 BILL ZOOK & STEPHEN PHILLIPS, UNIFORM MINIMUM PROTOCOLS AND STANDARDS FOR WATERCRAFT INTERCEPTION PROGRAMS FOR DREISSENID MUSSELS IN THE WESTERN UNITED STATES (UMPS II) 36-37 (2012).

11 *Id.* at 38-39.

12 *See, e.g.*, Press Release, Or. Dep't of Fish & Wildlife, Mandatory Boat Inspection Stations Open in Oregon to Target Invasive Species (June 4, 2012), <http://www.dfw.state.or.us/news/2012/June/060412b.asp>; COLO. PARKS & WILDLIFE, 2012 STATEWIDE WATERCRAFT INSPECTION AND DECONTAMINATION SITES (2012), available at [http:// wildlife.state.co.us/SiteCollectionDocuments/DOW/Fishing/2012WatercraftInspectStationList.pdf](http://wildlife.state.co.us/SiteCollectionDocuments/DOW/Fishing/2012WatercraftInspectStationList.pdf).

13 U.S. CONST. amend. IV.

14 *Camara v. Mun. Ct.*, 387 U.S. 523, 528 (1967).

15 U.S. CONST. amend. IV.

16 *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949), *citing* *Carroll v. United States*, 267 U.S. 132, 162 (1925) (internal punctuation omitted).

17 THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 476 (2008).

18 *Carroll*, 267 U.S. at 153.

19 *Id.*

20 *California v. Carney*, 471 U.S. 386 (1985).

21 *Id.* at 393.

22 *Id.*

23 *Id.* at 394.

24 *See, e.g.,* Cal. Dep't of Motor Vehicles, *Vessel Boat Registration and Information*, STATE OF CAL., <http://www.dmv.ca.gov/boatsinfo/boatreg.htm> (last visited Nov. 2, 2012).

25 Idaho Invasive Species Council, *2012 Road-side Inspection Stations*, IDAHO STATE DEP'T OF AGRIC., http://www.agri.idaho.gov/Categories/Environment/InvasiveSpeciesCouncil/Inspection_Stations_2012/Inspection_Stations_2012.php (last visited Jan. 19, 2013).

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

27 H.B. 2220, 75th Leg. Assemb., Reg. Sess. (Or. 2009).

28 JAS. JEFFREY ADAMS, *AQUATIC INVASIVE SPECIES IN OREGON: THE SEARCH FOR A VIABLE MODEL FOR MANDATORY ROADSIDE INSPECTION* 2 (2011), *available at* http://seagrant.oregonstate.edu/sites/default/files/invasive-species/mussel-workshop-2012/ag_ais_workshop_the_search_for_a_viable_model_for_mandatory_roadside_inspections.pdf.

29 CLANCY, *supra* note 17, at 473.

30 *Id.* at 475.

31 *Alabama v. White*, 496 U.S. 325, 330 (1990).

32 *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

33 *Id.*

34 *Id.* at 23-24.

35 *Id.* at 21.

36 *Id.* at 22-26.

37 *See, e.g., Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

38 *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975).

39 *Id.* at 884-85.

40 IDAHO CODE ANN. § 22-1910A(2) (2012).

41 WYO. STAT. ANN. § 23-4-203(d) (2012).

42 CAL. FISH & GAME CODE § 2301(a)(2)(A) (West 2012) (emphasis added).

43 20 CAL. JUR. 3 DCriminal Law: Pretrial Proceedings § 219 (2012).

44 *See generally Brignoni-Ponce*, 422 U.S. at 881-82.

45 *United States v. Place*, 462 U.S. 696, 707 (1983).

46 MUSSEL DOGS, <http://www.musseldogs.info/> (last visited Jan. 19, 2013).

47 *Carroll v. United States*, 267 U.S. 132, 149 (1925).

48 COLO. REV. STAT. § 33-10.5-104(1)(b)(IV) (2012).

49 NEV. REV. STAT. § 488.530(3) (2012).

50 WASH. REV. CODE § 77.15.080(2) (2012).

51 UTAH CODE ANN. § 23-27-301(1)(a) (West 2011).

52 *See United States v. Ross*, 456 U.S. 798, 824 (1982) (scope of warrantless search may not exceed scope of search that would have been authorized by warrant based on probable cause, if warrant had in fact been obtained).

53 *Camara v. Mun. Ct.*, 387 U.S. 523 (1967).

54 *Id.* at 526.

55 *Id.* at 535.

56 *Id.* at 536-37.

57 *Id.* at 535-36.

58 *Id.* at 537-38.

59 *Id.* at 538.

60 *See Colonnade Catering Corp v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972).

61 *New York v. Burger*, 482 U.S. 691, 702 (1987).

62 *Id.*

63 *Id.*

64 *Id.* at 703 (internal punctuation omitted).

65 *Id.*

66 *Id.*

67 *Id.* at 708.

68 *Id.* at 710.

69 *Id.* at 711.

70 Delaware v. Prouse, 440 U.S. 648, 657 (1979).

71 United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976).

72 *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

73 City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

74 *Id.*

75 State v. Anderson, 304 Or. 139, 141 (1987).

76 OR. REV. STAT. § 830.589(5) (2012).

77 WILLIAM ZOOK & STEPHEN PHILLIPS, PREVENTING THE TRANSFER OF DREISSENID MUSSELS AND OTHER
AQUATIC INVASIVE SPECIES BY COMMERCIAL WATERCRAFT AND EQUIPMENT TRANSPORT PROVIDERS 5
(2010), *available* *at* <http://www.100thmeridian.org/Columbia/A%20Survey%CC20of%CC20Commercial%CC20Haulers%CC20in%CC20the%CC20%CC20United%CC20States%CC20Final%20November%CC202010%20II.pdf>.

78 U.S. CONST. art. 1, § 8.

79 *See generally* Gibbons v. Ogden, 22 U.S. 1 (1824) (invalidating a state law seeking to regulate interstate commerce).

80 *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

81 *Id.*

- 82 Maine v. Taylor, 477 U.S. 131, 141 (1986).
- 83 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
- 84 Mayor of New York v. Miln, 36 U.S. 102, 103 (1837).
- 85 Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926).
- 86 H. KEN CORDELL ET AL., LONG-TERM NATIONAL TRENDS IN OUTDOOR RECREATION ACTIVITY PARTICIPATION -- 1980 TO NOW 2 (2009), available at <http://warnell.forestry.uga.edu/nrrt/nsre/IRISRec/IRISRec12rpt.pdf>.
- 87 GLENN E. HAAS, A SNAPSHOT OF RECREATIONAL BOATING IN AMERICA 3 (2010), available at <http://www.nmma.org/assets/cabinets/Cabinet214/USCG%20Recreational%CC20Boating%CC20in%C%America.doc> (citing NAT'L MARINE MFRS. ASS'N, 2009 RECREATIONAL BOATING STATISTICAL ABSTRACT (2009)).
- 88 Although beyond the scope of this Article, a few states, including Idaho, authorize peace officers to impound boats if dreissenid mussels are present or a boat owner refuses to submit to an inspection. See IDAHO CODE ANN. § 22-1910 (2012); see also COLO. REV. STAT. § 33-10.5-104 (2012), UTAH CODE ANN. § 23-27-302 (West 2011). The impoundment and quarantine of vessels for up to thirty days potentially imposes a greater burden on interstate commerce than a one-to-two-hour delay at a highway checkpoint.
- 89 Fednav, Ltd. v. Chester, 547 F.3d 607, 624 (6th Cir. 2008).
- 90 *Id.*
- 91 *Id.* (internal citations omitted).
- 92 National Invasive Species Act of 1996, Pub. L. No. 104-332, 110 Stat. 4073 (Oct. 26, 1996) (codified in scattered sections of 16, 18, and 33 U.S.C.).
- 93 See 100TH MERIDIAN INITIATIVE, <http://www.100thmeridian.org> (last visited Nov. 10, 2012).
- 94 United States v. Wheeler, 254 U.S. 281, 293 (1920).
- 95 Shapiro v. Thompson, 394 U.S. 618, 629 (1969).
- 96 *Id.* at 630.
- 97 *Id.* at 634.
- 98 See generally Armour v. City of Indianapolis, 132 S. Ct. 2073, 2079-80 (2012).
- 99 King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971).

¹⁰⁰ Lutz v. City of York, 899 F.2d 255, 268 (3d Cir. 1990).

¹⁰¹ Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999).

¹⁰² Att’y Gen. of New York v. Soto-Lopez, 476 U.S. 898, 903 (1986).

¹⁰³ Green v. Transp. Sec. Admin., 351 F.Supp.2d 1119, 1130 (W.D. Wash. 2005).