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QUIRKY CONSTITUTIONAL PROVISIONS MATTER: THE
TONNAGE CLAUSE, *POLAR TANKERS*, AND STATE
TAXATION OF COMMERCE

*Erik M. Jensen**

INTRODUCTION

Found in Article I, Section 10 of the U.S. Constitution—a section that contains explicit limitations on state power—the Tonnage Clause provides simply that “[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage.”¹ Even if taxation or constitutional law is your specialty, you have probably not pondered duties of tonnage. Maybe you heard the term in high school civics while going through the Constitution, but even if so, you quickly moved on to sexier topics.²

Whatever you might have thought (or not thought) then, however, this Article intends to show that the quirky Tonnage Clause is a worthwhile subject of study. If nothing else, the phrase “duty of tonnage” requires unpacking, and this Article will do that. Obviously we must focus on the meaning of “duty” and “tonnage,” and maybe we should consider the “of” as well.³ And, regardless of what those words mean one-by-one, a purposive interpretation might be necessary to resolve disputes about the Tonnage Clause’s scope.⁴

The general purpose underlying the Clause is no secret: to prevent a state, without congressional approval, from taxing vessels solely “for the privilege of entering, trading in, or lying in a port.”⁵ If such duties could be levied, friction among the states might increase, and national unity might be strained. So understood, the Tonnage Clause is a limitation on state power over foreign and interstate commerce. The Clause and the related Import-

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¹ U.S. CONST. art. I, § 10, cl. 3.

² Remember Letters of Marque and Reprisal? See U.S. CONST. art. I, § 10, cl. 1. Me neither.

³ Commentators sometimes get the language wrong, using “on” rather than “of,” see, e.g., FRANCIS HILLIARD, *THE LAW OF TAXATION* 64 (Boston, Little, Brown, & Co. 1875), as if the preposition makes no difference. But a duty of tonnage need not be imposed on tonnage. See *infra* notes 110-23 and accompanying text.

⁴ The Clause presents a nice test of the extent to which constitutional language divorced from underlying purpose should ever control in interpretation. See Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 796 (2010) (noting that “the [*Polar Tankers*] Court relied upon its precedents, as against text-based arguments, in construing the tonnage . . . clause[]”).

⁵ *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm’n*, 296 U.S. 261, 265-66 (1935).

Export Clause,⁶ also found in Article I, Section 10, serve as backstops to the “negative implications” of the Commerce Clause—the idea that the affirmative grant to Congress of the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”⁷ limits the *states’* power to regulate commerce.⁸ That kind of issue might not enthrall the typical tax lawyer, but it quickens the pulses of many constitutional scholars.

The Tonnage Clause has been understudied in recent years. One reason that law reviews are not filled with articles on the Clause is that it had largely disappeared from judicial dockets. It was once a staple of litigation, with a multitude of Supreme Court decisions in the mid- to late-nineteenth century.⁹ However, although a few state courts have considered the Clause in the not-too-distant past,¹⁰ until 2009 the U.S. Supreme Court had not heard a Tonnage Clause case since 1935.¹¹ With few judicial opinions to parse, there was no reason for case-centric legal academics to study the Clause.¹²

⁶ U.S. CONST. art. I, § 10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . .”); *see infra* Part III.B.1.

⁷ U.S. CONST. art. I, § 8, cl. 3.

⁸ *See* *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 306 (1851) (permitting state regulation of commerce so “local in character” as to require diverse treatment); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824) (taking the Madisonian position in favor of exclusive federal control over commerce—as distinguished from exercises of police power within the power of states).

⁹ *See, e.g.*, cases cited *infra* notes 18-19; *see also* *S.S. Co. v. Portwardens*, 73 U.S. (6 Wall.) 31, 32 (1867) (“[T]hat no State without the consent of Congress can lay any duties or imposts on imports or exports . . . or any duty of tonnage, are familiar provisions of the Constitution, which have been frequently and thoroughly examined in former judgments of this court.”).

¹⁰ *See, e.g.*, *City of Valdez v. Polar Tankers, Inc.*, 182 P.3d 614, 616 (Alaska 2008) (upholding a city tax on oil tankers), *rev’d*, 129 S. Ct. 2277 (2009), *reh’g denied*, 130 S. Ct. 31 (2009); *Japan Line, Ltd. v. Cnty. of L.A.*, 571 P.2d 254, 258 (Cal. 1977) (holding that properly apportioned ad valorem tax imposed on containers temporarily docked in California was not a prohibited duty of tonnage), *rev’d*, 441 U.S. 434 (1979); *Bigelow v. Dep’t of Taxes*, 652 A.2d 985, 986 (Vt. 1994) (holding that “use” tax imposed on vessels purchased out of state, but used in Vermont for at least thirty days, was not a prohibited duty of tonnage).

¹¹ Michael S. Greve, *Compact Clause*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 178, 178-79 (Edwin Meese III et al. eds., 2005). That case was *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm’n*, 296 U.S. 261, 266 (1935) (holding that a charge, though measured by tonnage, was in substance a user fee and therefore not a duty of tonnage).

¹² *See, e.g.*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988) (ignoring the Clause). Of course, if the Clause has kept states from enacting anything that might be a duty of tonnage, that result is powerful. *Cf.* Brief for the Petitioner at 12, *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009) (No. 08-310) (“The Tonnage Clause has fallen into relative obscurity in modern times, in part because it has been generally successful in effectuating the Framers’ goal of discouraging levies that have the effect of taxing vessels for the privilege of using a harbor.”). But lack of judicial activity makes a provision less interesting for legal-academic inquiry. *Cf.* Gregory S. Fisher, *Historical Bar: “Law in the Last Frontier: Commemorating the District of Alaska’s 50th Anniversary”*, *ALASKA BAR RAG*, Jan.-Mar. 2010, at 19, 22 (referring to the Tonnage Clause as “a relatively obscure provision in the Constitution”).

That has changed. In June 2009, the Supreme Court decided *Polar Tankers, Inc. v. City of Valdez*,¹³ reversing an Alaska Supreme Court decision that had upheld a levy imposed by Valdez—in the form of a property tax—that fell primarily on oil tankers using its ports. One of the challenges made by the taxpayer, a tanker company, was that Valdez’s levy violated the Tonnage Clause. The U.S. Supreme Court agreed.¹⁴

We modern sophisticates are inclined to view provisions like the Tonnage Clause as historical artifacts. But the Founders thought the Clause had bite, and, at a minimum, we should try to understand the provision’s place in the constitutional structure. Aided by the decision in *Polar Tankers*—with its defensible result¹⁵—this Article argues for the continuing importance, and intellectual interest, of the Tonnage Clause. It would be hyperbole to suggest that the Tonnage Clause has moved to the forefront of American constitutional law, but it still has effect.¹⁶

Polar Tankers motivated this Article, but the Article does more, discussing the Tonnage Clause as a whole, including several issues not involved in the recent litigation. Part I begins the process by discussing the ambiguity inherent in this not-at-all-straightforward provision. Part II outlines the basics of *Polar Tankers*, with its rich facts and sharply divided Court. Part III, the heart of the Article, discusses a number of issues relevant to interpreting the Tonnage Clause: the meaning of “tonnage,” the purposes underlying the Clause, and the meaning of “duty.” That last subject requires examining the bewildering variety of terms used in the Constitution to refer to governmental charges; the distinction between “user fees” and duties; the question of whether discrimination against vessels is required for a levy to be an invalid duty of tonnage; and much more.

¹³ 129 S. Ct. 2277, *reh’g denied*, 130 S. Ct. 31 (2009).

¹⁴ *Id.* at 2281.

¹⁵ See *infra* Part IV. The result was controversial. Compare James C. Cofer, *Supreme Court Strikes Down Personal Property Tax on Vessels Under Tonnage Clause in Polar Tankers, Inc. v. City of Valdez, Alaska*, 34 TUL. MAR. L.J. 153, 164 (2009) (arguing that the decision “brought the Tonnage Clause into the twenty-first century”), with Angelo J. Suzzo, Note, *The Misinterpretation of the Tonnage Clause in Polar Tankers, Inc. v. City of Valdez*, 26 ALASKA L. REV. 290, 292 (2009) (arguing that the “Supreme Court misinterpreted previous Tonnage Clause cases”). Controversy was not surprising given the split on the Supreme Court. See *infra* Part II.

¹⁶ If *Polar Tankers* by itself does not get your blood flowing, the Second Circuit decided another Tonnage Clause case only three weeks before the Supreme Court decision. See *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 81 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1075 (2010) (affirming the district court’s judgment that a fee imposed by a port authority on passengers taking the ferry between Bridgeport, Connecticut, and Port Jefferson, New York, was unconstitutional, violating both the Commerce and Tonnage Clauses). The fee was a duty of tonnage because it was intended to raise general revenues and was unrelated in amount to the value of services provided by the port. *Id.* at 88. The levy was imposed on passengers totally without regard to “tonnage,” as originally understood, but the result was consistent with longstanding authority. See, e.g., *Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (striking down levy on passengers, with four Justices viewing charge as duty of tonnage); see also discussion *infra* Part III.A.

Finally, Part IV considers some remaining questions about *Polar Tankers*: Could the constitutional problem with the Valdez ordinance have been cured with artful drafting, and did the application of the Tonnage Clause serve its purpose in that case?

I. THE AMBIGUITY INHERENT IN THE TONNAGE CLAUSE

States are forbidden to “lay any Duty of Tonnage” without congressional consent.¹⁷ In a discussion about how states cannot take steps that interfere with the federal commerce power, Justice Thomas Cooley wrote in 1876, in the first edition of his great treatise on taxation:

The precise meaning of [“duty of tonnage”] has been the subject of some controversy. Vessels are taxable as property, and possibly the tax may be measured by the capacity, when they are taxed only as property and not as vehicles of commerce; but any such distinction must be somewhat questionable. It has been often held that a tax on vessels at a certain sum “per ton” was forbidden. And it seems that a tax of a certain sum upon every vessel arriving in port is to be regarded as a duty of tonnage, though demanded irrespective of the vessel’s capacity.¹⁸

But only four years later, when focusing on constitutional law, Justice Cooley’s uncertainty seemed to have evaporated. He was then able to provide a one-paragraph “Tonnage Clause in a Nutshell”:

The States are . . . forbidden, without the consent of Congress, to lay any duty of tonnage. It is, therefore, not competent to levy dues upon vessels measured by their capacity, nor indeed any dues at all which are imposed upon the vessels as instruments of commerce, or are levied for the mere privilege of trading to a port. But owners of vessels may be taxed by the State for their interests in them as property, by the same standards employed in other cases. Wharfage dues are not taxes, and they may, therefore, be laid in proportion to tonnage.¹⁹

¹⁷ U.S. CONST. art. I, § 10, cl. 3. Congressional consent was secured once early in the life of the republic. South Carolina sought to impose a duty of tonnage to “erect[] and support[] an hospital [sic] in the vicinity of Charleston for the reception and relief of sick and disabled seamen,” Act of Dec. 21, 1804, 2 Acts of the Gen. Ass’y of S.C. 553, 554-55 (seeking consent), and Congress responded, permitting the duty for up to three years. *See* Act of Mar. 28, 1806, ch. 17, 2 Stat. 357.

¹⁸ THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION 61 (Chicago, Callaghan & Co. 1876) (footnotes omitted) (citing *Cannon v. New Orleans*, 87 U.S. (20 Wall.) 577 (1874); *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204 (1870); *S.S. Co. v. Portwardens*, 73 U.S. (6 Wall.) 31 (1867); *Lott v. Mobile Trade Co.*, 43 Ala. 578 (1869), *rev’d sub nom.* *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204 (1870)).

¹⁹ THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 76 (Boston, Little, Brown & Co. 1880) [hereinafter COOLEY, GENERAL PRINCIPLES] (footnotes omitted). This language remained unchanged through the final edition of the Cooley treatise, published in 1931, long after his death. THOMAS M. COOLEY, THE GENERAL

That is about as clear as an explanation can be.²⁰ Whatever “tonnage” is—and whatever a “duty of tonnage” is—the Clause does not limit the power of states to impose either a property tax that reaches vessels or a user fee for port services provided by a state, like wharfage or pilotage.²¹

Justice Cooley was closer to the mark the first time around, however, in expressing skepticism about the possibility of bright-line distinctions in this area. At an abstract level, it might be the case that “[v]essels are taxable as property . . . when they are taxed only as property and not as vehicles of commerce,”²² but, as Cooley had emphasized in 1876, “any such distinction must be somewhat questionable.”²³ American lawyers are schooled in the idea that substance controls over form—in many contexts at least—and formalistic distinctions would be suspect here. If the Tonnage Clause protects anything important, it should not be possible for a state to circumvent the Clause by calling a duty a property tax or a user fee, or by otherwise crafting a levy that has the effect of a duty of tonnage. Unless a state altogether avoids charging vessels that use its ports, difficult characterization issues are likely to arise under the Tonnage Clause.²⁴

Outside of the state context, levies on “tonnage” have been common in the United States.²⁵ Nothing in the Constitution precludes such levies by the *federal* government, the government responsible for regulating foreign and interstate commerce. Professor Henry Carter Adams began his widely noted book, *Taxation in the United States 1789-1816*, with a section entitled “Customs Duties and Tonnage Acts”—a discussion of *federal* protectionist taxation, including taxes on tonnage.²⁶ Adams described the United States’ first tonnage act in 1789, which imposed a levy of six cents per ton on

PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 113-14 (Andrew A. Bruce ed., 4th ed. 1931).

²⁰ In the second edition of his tax treatise, Cooley also seemed sure about the Clause’s meaning. See THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION 91-94 (Chicago, Callaghan & Co., 2d ed. 1886) (1876).

²¹ See *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 314 (1851) (noting that tonnage duties were “known to the commerce of a civilized world to be as distinct from fees and charges for pilotage . . . as they were from charges for wharfage or towage, or any other local port-charges for services rendered to vessels or cargoes”).

²² COOLEY, *supra* note 18, at 61-62. The word “might” is used here to suggest that the conventional wisdom on this point may be incorrect. And not all of the Justices in *Polar Tankers* thought that a nondiscriminatory property tax could have been imposed on tankers using Valdez’s ports. See *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2287-88 (Roberts, J., concurring in part and concurring in the judgment), *reh’g denied*, 130 S. Ct. 31 (2009); see also *infra* notes 63-66 and accompanying text.

²³ COOLEY, *supra* note 18, at 62.

²⁴ Many states have dispensed with levies on vessels that could even conceivably be characterized as tonnage duties. See *supra* note 12. But maybe we need to begin thinking about levies on *aircraft*. See *infra* notes 127-28 and accompanying text.

²⁵ See 2 HENRY CARTER ADAMS, *TAXATION IN THE UNITED STATES 1789-1816*, at 5-7 (Herbert B. Adams ed., Baltimore, John Murphy & Co. 1884).

²⁶ *Id.*

American-built and American-owned ships; thirty cents per ton on foreign-built or foreign-owned ships; and fifty cents per ton on both foreign-built and foreign-owned ships.²⁷

The federal government has imposed tonnage duties ever since;²⁸ the U.S. Code today contains tonnage taxes denominated as such.²⁹ To be valid, a federal duty of tonnage must satisfy only the constitutional rules that apply to the national taxing power, an easy set of requirements for this sort of levy.³⁰ As a result, the definitional problems that arise for states—that is, is a charge a duty of tonnage or not?—are not implicated with federal levies on ships' use of ports.

II. *POLAR TANKERS*: THE BASICS

The Trans-Alaska Pipeline is used to transport oil from the North Slope of Alaska to the port city of Valdez, Alaska, where tankers can send the oil to refineries.³¹ In 1999, Valdez adopted an ordinance, effective in 2000, that for the first time imposed a levy denominated as a personal property tax, but which, by its terms, applied to only one category of property: “[b]oats and vessels of at least 95 feet in length” that used private

²⁷ *Id.* at 40 (describing Act of July 20, 1789, ch. 3, 1 Stat. 27). The first tonnage duties were in addition to tariffs on imported goods. *See* DALL W. FORSYTHE, *TAXATION AND POLITICAL CHANGE IN THE YOUNG NATION 1781-1833*, at 65 (1977). Given the constitutional structure, there was no reason to question federal power to do this. The congressional debate on the first tonnage duty was not about the propriety of the enactment or the propriety of having different rates for U.S. and foreign vessels. Rather, it was about whether the duties should vary depending on the friendliness of the ship's home country toward the United States. *See id.* at 64-65.

²⁸ *Cf.* *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 216 (1870) (“Tonnage duties . . . have been imposed by Congress ever since the Federal government was organized under the Constitution to the present time.”).

²⁹ *See* 46 U.S.C. §§ 60301-12 (2008).

³⁰ Such a levy will be valid if authorized under the broad authority of the Taxing Clause, *see* U.S. CONST. art. I, § 8, cl. 1 (granting Congress the “Power To lay and collect Taxes, Duties, Imposts and Excises”), which should not be a problem, and if it meets the requirements of the Uniformity Clause. *See* U.S. CONST. art. I, § 8, cl. 1 (providing that “Duties, Imposts and Excises shall be uniform throughout the United States”). Uniformity should be satisfied so long as the levy is applied in the same way in all ports across the United States. *See* ERIK M. JENSEN, *THE TAXING POWER: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION*, 77-78 (2005) [hereinafter *JENSEN, TAXING POWER*]. A tonnage duty levied on foreign vessels was long ago held not to be a tax on articles exported and therefore not in violation of the Export Clause of the Constitution. *See* U.S. CONST. art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”); *Aguirre v. Maxwell*, 1 F. Cas. 212, 213 (C.C.S.D.N.Y. 1853). *See generally* *JENSEN, TAXING POWER, supra*, at 135-64; Erik M. Jensen, *The Export Clause*, 6 FLA. TAX REV. 1, 6-15 (2003) [hereinafter *Jensen, Export Clause*] (providing background on the Export Clause and its origins).

³¹ *See Pipeline Facts*, ALYESKA PIPELINE SERV. CO., <http://www.alyeska-pipe.com/pipelinefacts.html> (last updated May 28, 2010).

docks in Valdez³² and that established a tax situs there.³³ Although oil tankers were not mentioned in the ordinance, the definition made the tax applicable primarily to them.³⁴ In its first year in effect, the ordinance applied to twenty-eight vessels—twenty-four tankers, three tugboats, and one passenger cruise ship.³⁵ For vessels that also had tax situs elsewhere during the year, the tax was apportioned to take into account the time the vessels were in ports other than Valdez's.³⁶

According to the Alaska Supreme Court, Valdez established the levy to reinvigorate its revenue system.³⁷ As is typically true with taxes, the goal was to raise revenue for general governmental purposes. There was no direct link between the charge paid by a tanker owner and any governmental benefit received by that owner, and Valdez did not claim otherwise.³⁸ The city's tax base had been dependent on oil- and gas-related property, and, as North Slope operations declined, the value of that property had decreased as well.³⁹

³² The full text of the ordinance is as follows:

Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container Terminal where it is subject to municipal dockage charges.

City of Valdez v. Polar Tankers, Inc., 182 P.3d 614, 616 (Alaska 2008) (quoting Valdez Ordinance No. 99-17 (1999) (codified as amended at VALDEZ MUN. CODE § 3.12.020(A)(1) (2008))) (internal quotation marks omitted), *rev'd*, 129 S. Ct. 2277, *reh'g denied*, 130 S. Ct. 31 (2009). Because vessels docking at the Valdez Container Terminal or other city-owned docks would have been subject to municipal dockage charges, one purpose of the ordinance was to prevent shippers from avoiding such charges by using a private dock. *See id.* The past tense is used here to describe the ordinance because, as a result of *Polar Tankers*, it is no longer in place.

³³ In general, the situs requirement applied to vessels that regularly traveled to Valdez, were kept or used there, or annually took on at least \$1 million in cargo or engaged in other business of comparable value in Valdez. *See Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2281 (citing Valdez Ordinance No. 99-17 (1999) (codified as amended at VALDEZ MUN. CODE § 3.12.020(C) (2008))), *reh'g denied*, 130 S. Ct. 31 (2009).

³⁴ The tankers satisfied the length requirement and met at least one threshold to establish tax situs in Valdez. Any tanker was likely to take on cargo of at least \$1 million annually. *See supra* text accompanying note 33.

³⁵ *Polar Tankers*, 129 S. Ct. at 2283.

³⁶ *City of Valdez*, 182 P.3d at 616 (citing Valdez Ordinance No. 99-17 (1999) (codified as amended at VALDEZ MUN. CODE § 3.12.020(B) (2008))) (giving authority to city assessor to develop apportionment formula for vessels with tax situs outside Valdez); *see also id.* (discussing the apportionment requirement for the tax based on a formula that multiplied assessed value by "a ratio determined by the number of days spent in Valdez divided by the total number of days spent in all ports, including Valdez, where the vessel has acquired a situs for taxation" (quoting Valdez, Alaska, Resolution No. 00-15 (May 1, 2001)) (internal quotation marks omitted)).

³⁷ *Polar Tankers*, 129 S. Ct. at 2284.

³⁸ The charge, therefore, could not possibly have been characterized as a permissible user fee. *See* discussion *infra* Part III.C.2.

³⁹ *See City of Valdez*, 182 P.3d at 616.

Polar Tankers, a subsidiary of oil giant ConocoPhillips, challenged the application of the levy to its vessels, each of which typically spent forty to fifty days per year in Valdez.⁴⁰ It argued that “the tax effectively imposed a fee on certain vessels for the privilege of entering the port”⁴¹ and was therefore a duty of tonnage, and, in the alternative, that the apportionment scheme overstated the percentage of time that tankers were in Valdez, and hence the tax liability of those tankers, in violation of the Commerce and Due Process Clauses.⁴²

The Alaska Supreme Court upheld the ordinance against both challenges.⁴³ On the Tonnage Clause issue, the court concluded that jurisprudence under the Clause had always recognized the permissibility of a property tax, that the Valdez levy was such a tax in form and operation, and that “the legitimacy of the vessel tax does not depend on whether the city chooses to tax other personal property.”⁴⁴ Valdez’s singling out of vessels in a personal property tax should be irrelevant for Tonnage Clause analysis.

Polar Tankers then petitioned the U.S. Supreme Court. Given the way the Court dealt with the Tonnage Clause issue—holding the ordinance unconstitutional under that Clause⁴⁵—the apportionment issue did not have to be addressed. That was unfortunate. Polar Tankers had raised significant issues about Valdez’s apportionment scheme, and the Court could have provided useful guidance for the future.⁴⁶ But the Court’s focus on the

⁴⁰ *Polar Tankers*, 129 S. Ct. at 2281, 2292.

⁴¹ *Id.* at 2281.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *City of Valdez*, 182 P.3d at 623.

⁴⁵ *Polar Tankers*, 129 S. Ct. at 2281.

⁴⁶ The apportionment formula did not take into account the time a tanker was at sea or was being repaired. For example, if a tanker was in a Valdez port for sixty days during the year and was in other ports for 120 days, Valdez would have treated the tanker as in Valdez for one-third of the year, not one-sixth. *See supra* note 36. The resulting tax liability would have been double what Polar Tankers thought the Due Process Clause permitted. Ancient authority had limited property taxation to that of the home port of the vessel. *See, e.g.,* *Transp. Co. v. Wheeling*, 99 U.S. 273, 283 (1878) (“[T]axes levied by a State upon ships or vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition”); *St. Louis v. Ferry Co.*, 78 U.S. (11 Wall.) 423, 432 (1870) (concluding that St. Louis could not tax boats when their home port was elsewhere). However, the home port doctrine had been discarded long ago. Unless the Tonnage Clause applies, a state is now permitted to impose its property tax on vessels based in other states or nations if the vessels have established tax situs in the taxing state, but only insofar as the tax liability is determined using a reasonable apportionment formula.

Apportionment interested many amici, particularly business groups concerned about expanded state taxing power. *See, e.g.,* Brief of Amicus Curiae of National Federation of Independent Business Small Business Legal Center in Support of Petitioner at 3, *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009) (No. 08-310); Brief of Broadband Tax Institute as Amicus Curiae in Support of Petitioner at 3-4, *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009) (No. 08-310). Several states filed a brief supporting Valdez with little discussion of the Tonnage Clause. *See* Brief of the States

Tonnage Clause had the beneficial effect, for the purposes of this Article, of making the Clause relevant again.

For the Alaska Supreme Court, it had not mattered whether the Valdez tax singled out vessels, but discrimination was an issue for several U.S. Supreme Court Justices.⁴⁷ One question, not considered below, was whether it was appropriate to look at the Valdez levy on large ships in isolation, or whether the Valdez taxing structure as a whole (coupled with the larger Alaska taxation scheme) should have been considered.⁴⁸ Another Valdez property tax ordinance reached trailers, mobile homes, and recreational vehicles,⁴⁹ property that might have been treated as personal (although the four-Justice plurality saw these items effectively as real property).⁵⁰ And still another ordinance imposed a tax on property used “primarily in the exploration for, production of, or pipeline transportation of gas or unrefined oil.”⁵¹ If these other provisions had been considered, Valdez argued, the ordinance reaching oil tankers would have looked like part of a larger, personal property tax regime not directed at oil tankers.⁵² And if that had been so, the ordinance would have looked less like a duty of tonnage.

The record on the structure of Valdez’s and Alaska’s tax regimes was not well developed. The Supreme Court was obviously confused by the details,⁵³ and the Court would have benefitted from further consideration by

of Alaska, Alabama, Arkansas, Colorado, Delaware, Florida, Idaho, Maryland, Massachusetts, Montana, New Jersey, North Carolina, Ohio, Utah, Washington, West Virginia, and Wyoming as Amici Curiae in Support of Respondent at 4, *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009) (No. 08-310). The Clause attracted attention from shipping interests supporting Polar Tankers. *See, e.g.*, Brief of Amici Curiae World Shipping Council & Cruise Lines International Association in Support of Petitioner at 4-5, *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009) (No. 08-310); Brief of Tropical Shipping and Construction Company Limited as Amicus Curiae in Support of Petitioner at 6-7, *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009) (No. 08-310).

⁴⁷ *See Polar Tankers*, 129 S. Ct. at 2284-87 (discussing the discriminatory nature of the tax).

⁴⁸ *Id.* at 2286.

⁴⁹ *Id.* at 2285 (citing VALDEZ MUN. CODE § 3.12.022 (2008)).

⁵⁰ *Id.*

⁵¹ *Id.* at 2293 (Stevens, J., dissenting) (quoting ALASKA STAT. § 43.56.210(5)(A) (2008)) (internal quotation marks omitted). Another question was whether this last levy was a municipal ordinance at all and whether the answer to that question mattered. The language of the ordinance reached property taxable under Alaska Statutes Chapter 43.56—the ordinance referenced the state statute—but that provision specifically authorizes a “municipality [to] levy” such taxes. *Id.* at 2293 (quoting § 43.56.010(b)) (internal quotation marks omitted). Under this circular structure, was the tax a creature of the municipality or the state? The plurality in effect treated the city and state as distinct bodies for these purposes. *See id.* at 2286 (plurality opinion). Although this issue was not critical to their analysis, the two dissenters disagreed, on the reasonable ground that cities are state creations. *See id.* at 2293-94 (Stevens, J., dissenting).

⁵² *See* Brief for Respondent at 3-4, 23-25, *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009) (No. 08-310) (arguing that the personal property taxes reached more than oil tankers and that the 1999 Valdez ordinance in effect *extended* existing levies to tankers).

⁵³ *See Polar Tankers*, 129 S. Ct. at 2286 (acknowledging that the Court “lack[s] the State’s explanation of just how the tax on oil-related vehicles works”).

judges with expertise in Alaska law. But it was unwilling to send the case back to the Alaska courts.⁵⁴ Instead, the plurality blithely concluded that “[a]s far as we can tell, . . . Valdez applies a value-based personal property tax to ships and to no other property at all.”⁵⁵ With this informed guess in place, the Valdez ordinance was at risk under the Tonnage Clause.

Polar Tankers presented a stark set of issues, and the case divided the Supreme Court. Seven Justices agreed that the levy was a forbidden duty of tonnage, but they were split three ways on the rationale for that result.⁵⁶ Justice Stephen Breyer’s plurality opinion—joined by Justices Antonin Scalia, Anthony Kennedy, and Ruth Bader Ginsburg—concluded that the levy, when analyzed alone, was a duty of tonnage rather than a permissible property tax because it did not reach vessels “in the same manner” as it did other personal property.⁵⁷ Discrimination against vessels was key to characterizing the levy as a duty of tonnage: “We can find little, if any, other personal property that it taxes.”⁵⁸ Moreover, Justice Breyer wrote, “the City fail[ed] to point to a single oil tanker, or any vessel greater than 95 feet in length, that both entered the port and failed to establish a tax situs.”⁵⁹ In the form of a property tax, the Valdez levy thus “operate[d] as a ‘charge for the privilege of entering . . . a port,’” the quintessential duty of tonnage.⁶⁰

Justice Samuel Alito concurred, joining all of Justice Breyer’s opinion for the plurality except for the part discussing discrimination.⁶¹ Justice Alito concluded that once the levy had been characterized as on vessels, the plurality had no reason to imply that a nondiscriminatory tax might have been acceptable: “It is sufficient for present purposes that the Valdez tax is not [a nondiscriminatory] tax and therefore, even if the Tonnage Clause permits a true, evenhanded property tax to be applied to vessels, the Valdez tax is an unconstitutional duty of tonnage.”⁶²

Chief Justice John Roberts and Justice Clarence Thomas agreed that the levy was an impermissible duty of tonnage, but they thought the scope of the Tonnage Clause was broader than the understanding reflected in the opinions of the other Justices, in the Supreme Court decisions on the books,

⁵⁴ Apparently not enthralled by Tonnage Clause issues, hard as that is to believe, the Court chose to quickly dispose of this dispute. *See id.* at 2287.

⁵⁵ *Id.* (emphasis added).

⁵⁶ *See id.* at 2284-85; *id.* at 2287-89 (Roberts, J., concurring in part and concurring in the judgment); *id.* at 2289 (Alito, J., concurring).

⁵⁷ *Id.* at 2285 (plurality opinion) (emphasis omitted) (quoting *Transp. Co. v. Wheeling*, 99 U.S. 273, 284 (1878)) (internal quotation marks omitted).

⁵⁸ *Id.*

⁵⁹ *Polar Tankers*, 129 S. Ct. at 2284.

⁶⁰ *Id.* (quoting *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm’n*, 296 U.S. 261, 265-66 (1935)).

⁶¹ *Id.* at 2289 (Alito, J., concurring).

⁶² *Id.*

and in historic treatises.⁶³ As far as Chief Justice Roberts and Justice Thomas were concerned, a state may not apply its personal property tax to vessels from other states, period.⁶⁴ Even if the Valdez and Alaska statutes—when read together—had not discriminated against tankers, the ordinance was invalid as applied to vessels. Chief Justice Roberts wrote: “The majority[—including the plurality, plus Justice Alito—]correctly concludes that the Valdez tax is a tonnage duty, and that should be the end of the matter.”⁶⁵ If the Tonnage Clause requires exempting vessels from a nondiscriminatory tax, thus treating vessels *better* than other property, that result would “reflect[] the high value the Framers placed on the free flow of maritime commerce.”⁶⁶

Finally, two dissenters, Justices John Paul Stevens and David Souter,⁶⁷ concluded that under traditional jurisprudence, the levy was a permissible property tax that applied only to property with a tax situs in Valdez.⁶⁸ Quoting a nineteenth-century case, *Transportation Co. v. Wheeling*,⁶⁹ the dissenters said it was “too well settled to admit of question that taxes levied by a State, upon ships or vessels . . ., as property, based on a valuation of the same as property, to the extent of such ownership, are not within the prohibition of the Constitution.”⁷⁰ Looking at the larger tax structure, Justices Stevens and Souter questioned whether this levy did in fact discriminate against vessels.⁷¹ But they would have voted to uphold the levy anyway.⁷² A duty of tonnage is not measured by value, they said—if the tax *is* tied to value, it is being applied “in the same manner” as other, permissible property taxes⁷³—and that proposition should have decided the case, at least on the Tonnage Clause issue.⁷⁴

⁶³ *Id.* at 2287-89 (Roberts, J., concurring in part and concurring in the judgment).

⁶⁴ *Id.* at 2288 (“We have never held that the Tonnage Clause allows such property taxes to be imposed on visiting ships.”).

⁶⁵ *Polar Tankers*, 129 S. Ct. at 2288 (Roberts, J., concurring in part and concurring in the judgment) (citation omitted).

⁶⁶ *Id.*

⁶⁷ Should another Tonnage Clause case reach the Court in the near future—unlikely, but possible—it is worth noting that both Justice Stevens and Justice Souter have retired.

⁶⁸ *Polar Tankers*’s vessels had established a situs by meeting at least one of the alternative jurisdictional requirements of the Valdez ordinance. *See supra* text accompanying note 33.

⁶⁹ 99 U.S. 273 (1878).

⁷⁰ *Polar Tankers*, 129 S. Ct. at 2290 (Stevens, J., dissenting) (quoting *Transp. Co.*, 99 U.S. at 279) (internal quotation marks omitted). The full quotation refers to ships “owned by the citizens of the State,” reflecting the understanding that a state could tax only those vessels with a home port in the state. *Id.* (quoting *Transp. Co.*, 99 U.S. at 279) (internal quotation marks omitted). That doctrine is no longer relevant. *See supra* note 46.

⁷¹ *Id.* at 2292-94.

⁷² *Id.* at 2292.

⁷³ *See id.* at 2291 (quoting *Transp. Co.*, 99 U.S. at 284) (internal quotation marks omitted).

⁷⁴ If the dissenters had prevailed on the Tonnage Clause, it would then have been necessary for the Court to address the apportionment question.

A recapitulation: seven Justices thought the levy was an invalid duty of tonnage. Of those, four thought the levy invalid only because of discrimination against vessels; one found it unnecessary to consider whether a nondiscriminatory duty might have been valid because this levy was so clearly discriminatory; and the other two considered discrimination irrelevant in applying the Tonnage Clause. Only the two dissenters thought a property tax, measured by value, was valid as applied to vessels in these circumstances. These are smart people, and the division on the Court, having little or nothing to do with ideology, shows that none of this is easy.

III. DUTIES OF TONNAGE: INTERPRETATIVE ISSUES AND ANALYSIS

A duty of tonnage is a levy associated with a ship's "entering, trading in, or lying in a port"⁷⁵ and is apparently tied, at least tangentially, to the concept of "tonnage." That definition is quite abstract, however, and, as the discussion in Part I suggested, it is easier to say what a duty of tonnage is not than what it is. A tonnage duty must be distinguished from a user fee—that is, a charge for services provided to a ship by the government responsible for the port⁷⁶—and maybe from a property tax that applies to vessels in the same way it does to other property.⁷⁷

Some cases that reached the Supreme Court in the nineteenth century provide examples of what now seem to be noncontroversial duties of tonnage—so obvious that no state or state subdivision could enact a similar levy today.⁷⁸ For example, in *Cannon v. New Orleans*,⁷⁹ decided in 1874, a New Orleans ordinance provided in part that "the levee dues on all steam boats which shall moor or land in any part of the port of New Orleans shall be fixed as follows[:] ten cents per ton if in port not exceeding five days."⁸⁰ The Court concluded:

Whatever more general or more limited view may be entertained of the true meaning of th[e Tonnage C]lause, it is perfectly clear that a duty or tax or burden imposed under the authority of the State, which is, by the law imposing it, to be measured by the capacity of the vessel [i.e., the charge "per ton"], and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition.⁸¹

⁷⁵ *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265-66 (1935).

⁷⁶ See *infra* Part III.C.2.

⁷⁷ But see *supra* note 22; *infra* Part III.C.3.

⁷⁸ Valdez's ordinance, however, was also so problematic that it should not have been enacted as it was.

⁷⁹ 87 U.S. (20 Wall.) 577 (1874).

⁸⁰ *Id.* at 578 (emphasis omitted) (internal quotation marks omitted).

⁸¹ *Id.* at 581.

The charge was not a user fee because it applied, in theory at least, regardless of where a vessel moored (and regardless, therefore, of whether services were provided).⁸² And, not based on value, it was not a property tax.⁸³

Inman Steamship Co. v. Tinker,⁸⁴ decided in 1876, was another easy case for Tonnage Clause analysis. There, the Court held that charges imposed by the captain of the port of New York, explicitly tied to tonnage, were invalid.⁸⁵ The charge could not have been a user fee because it was imposed regardless of services provided: “If the vessel enter the port and immediately take her departure, or load or unload, or make fast to any wharf, either of these things disjunctively brings her within the act, and makes her liable to the burden prescribed.”⁸⁶ Nor was the charge a property tax because it was not measured by value.⁸⁷

All cases are not so easy, however, and this Part now considers several key interpretive issues under the Tonnage Clause. It begins with a discussion of the meaning of “tonnage” and questions whether that concept still has relevance to Tonnage Clause analysis. It then turns to the purposes underlying the Clause, as discerned from Founding-era debates and subsequent case law and commentary: to protect the Import-Export Clause and, more generally, federal power over commerce. The final Section examines the meaning of “duty” in the Tonnage Clause, dealing with three questions: whether the term distinguishes prohibited levies from other tax-like charges on vessels; whether “duty” includes legitimate user fees; and whether the Tonnage Clause, by its terms, constitutes an absolute prohibition against state duties of tonnage, absent congressional consent.⁸⁸

A. “Tonnage”

The term “tonnage”—or, more expansively, “tonnage and poundage”—has a long history. As exemplified by England’s Tonnage and Poundage Act of 1660,⁸⁹ tonnage and poundage were “duties on goods

⁸² *Id.* at 580-81; *see infra* Part III.C.2.a.

⁸³ *Cannon*, 87 U.S. (20 Wall.) at 581; *see infra* Part III.C.3. *But see infra* notes 99-102 and accompanying text (noting the possibility that “tonnage” was understood as a surrogate for value).

⁸⁴ 94 U.S. 238 (1876).

⁸⁵ *Id.* at 244 (“The State, in passing this law imposing a tonnage duty, has exercised a power expressly prohibited to it by the Constitution. In that particular the law is, therefore, void.”).

⁸⁶ *Id.* at 243.

⁸⁷ *Id.*

⁸⁸ On that point, Chief Justice Roberts and Justice Thomas got it right in *Polar Tankers*, although their position was contrary to 150 years of jurisprudence. Why let a little history interfere with original understanding?

⁸⁹ 12 Car. 2, c. 4 (Eng), *cited in* 2 EDWARD CHANNING, A HISTORY OF THE UNITED STATES: A CENTURY OF COLONIAL HISTORY 1660-1760, at 11 (1908). The Act, however, has antecedents dating to

imported into or exported out of England and the dominions thereunto belonging.”⁹⁰ The term “tonnage” apparently derives from levies imposed on *tuns* of wine.⁹¹ Such port duties on goods were commonly imposed by the American colonies as well.⁹²

But that is not what the term “tonnage” means in the Tonnage Clause. Duties on *ships* in the American colonies (as contrasted with duties on goods carried by ships) can be traced as far back as 1645.⁹³ In this context, the term “tonnage,” when used as the measure of a duty imposed on a ship, technically refers to cargo capacity, rather than weight.⁹⁴ The larger the ship’s capacity, the larger the duty. For these purposes, a “ton” was generally considered to be one hundred cubic feet.⁹⁵

Thus, the term “tonnage” as used in the Tonnage Clause has a meaning different from “tonnage and poundage.” If this were not the case, the Import-Export Clause, forbidding states to tax imports and exports without congressional approval, and the Tonnage Clause, directed at levies on ships carrying the goods, would be largely redundant. Nevertheless, the term’s historical ties to duties on imports and exports should help us understand the relationship of the clauses.⁹⁶

the fourteenth century. See ALVIN RABUSHKA, *TAXATION IN COLONIAL AMERICA* 28 (2008) (tracing “tonnage on wine and poundage on goods” to 1347).

⁹⁰ CHANNING, *supra* note 89. Channing noted that the 1660 Act was not enforced in the American colonies. *Id.* However, the fact that the duties were on the books was later used in support of the proposition that the Crown had authority to tax the colonies. See JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX* 163 (1987).

⁹¹ RABUSHKA, *supra* note 89.

⁹² See *id.* (describing tonnage and poundage as port duties).

⁹³ The early duties were known as “[p]owder duties” because cash was not a common medium of exchange, and gunpowder and iron shot were used for payment. *Id.* at 174. The colonial rules had all sorts of quirks, but each colony apparently exempted its own ships from tonnage duties. *Id.* at 174-75.

⁹⁴ *Id.* at 175.

⁹⁵ See W. H. BURROUGHS, *A TREATISE ON THE LAW OF TAXATION* § 63, at 89 (New York, Baker, Voorhis & Co. 1877) (“[T]onnage . . . means the contents of the vessel expressed in tons of one hundred cubical feet each.”); JAMES M. GRAY, *LIMITATIONS OF THE TAXING POWER* 479 (1906) (“[T]he word tonnage, as applied to American ships and vessels, means their entire cubical capacity, or the contents of the vessel expressed in tons of 100 cubic feet, as estimated and ascertained by the rules of admeasurement and computation prescribed by those Federal statutes.” (quoting *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 212 (1870))). That understanding followed English practice:

The tons used by the English to register merchant ships prior to 1773 correspond most closely to what Frederic C. Lane has called ‘measurement freight tonnage’, ‘freight tons’, or ‘tons burden’, all of which were terms that represented the cubic volume of space available in a ship for carrying cargo.

JAMES F. SHEPHERD & GARY M. WALTON, *SHIPPING, MARITIME TRADE, AND THE ECONOMIC DEVELOPMENT OF COLONIAL NORTH AMERICA* 237 (1972) (quoting Frederic C. Lane, *Tonnages, Medieval and Modern*, 17 *ECON. HIST. REV.* 213, 214-18 (1964)).

⁹⁶ This Article shall return to that relationship presently. See *infra* Part III.B.1.

That “tonnage” technically means capacity rather than weight is of little, if any, significance in interpreting the Tonnage Clause.⁹⁷ One would expect a correlation between those two attributes—the larger the carrying capacity, the greater its weight is likely to be—and therefore expect a state levy measured by a vessel’s weight to be presumptively a duty of tonnage.⁹⁸ The correlation between weight and capacity would not be perfect, of course, but it would be close enough.

For that matter, as recognized, at least implicitly, by the seven non-dissenting justices in *Polar Tankers*, a correlation would exist between capacity and value of a vessel as well, so that an *ad valorem* tax applied to vessels might be treated as a duty of tonnage in some circumstances.⁹⁹ Indeed, in his posthumously published *Lectures on the Constitution of the United States*, which appeared in 1893, Justice Samuel Freeman Miller, who had authored several opinions on the Tonnage Clause, went even further.¹⁰⁰ He said “tonnage” means value: “The word ‘tonnage’ was used by the framers . . . because at that day and time it was the customary mode of measuring the value of a ship.”¹⁰¹ Miller added:

A vessel was said to be of so many tons burden, which meant that it was worth so much money, carried so much freight, and, therefore, the method generally adopted of imposing a tax upon its tonnage was the readiest way to fix the amount which that species of property should pay.¹⁰²

Apparently Justice Miller did not give controlling weight to the Framers’ understanding, however, because in his treatise he conceded “that if a man living in Louisiana owns a steamboat, it is liable to be taxed like any other property that he may possess there, and if a tax is levied upon it, . . . that is not a tonnage tax,”¹⁰³ even if the amount of the tax is “measured by [the steamboat’s] capacity.”¹⁰⁴ That proposition is consistent with long-time understanding—that is, as long as vessels are “taxed like any other property,” a property tax does not violate the Tonnage Clause.¹⁰⁵ Moreover,

⁹⁷ *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 225 (“[T]he term, as applied to a ship, has become almost synonymous with that of size.”).

⁹⁸ “Presumptively” is used here because a user fee may be measured by capacity or weight. *See infra* Part III.C.2.b.

⁹⁹ *See Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2284 (“[A] tax on the value of such vessels is closely correlated with cargo capacity. Because the imposition of the tax depends on a factor related to tonnage and that tonnage-based tax is not for services provided to the vessel, it is unconstitutional.”), *reh’g denied*, 130 S. Ct. (2009).

¹⁰⁰ *See* SAMUEL FREEMAN MILLER, *LECTURES ON THE CONSTITUTION OF THE UNITED STATES* 253-54 (photo reprint 1980) (New York & Albany, Banks & Bros. 1891).

¹⁰¹ *Id.* at 253.

¹⁰² *Id.*

¹⁰³ *Id.* at 254.

¹⁰⁴ *Id.*

¹⁰⁵ *See supra* text accompanying note 19.

the Supreme Court has never said that an ad valorem property tax on vessels is *by its nature* a duty of tonnage.¹⁰⁶ Other late nineteenth-century treatise writers, working when the Tonnage Clause was often before the Supreme Court, consistently said that a nondiscriminatory property tax that reached vessels was permissible and cited authority for that position.¹⁰⁷

Chief Justice Roberts and Justice Thomas took the contrary position in *Polar Tankers*—that is, that even a nondiscriminatory property tax on out-of-state vessels was a duty of tonnage (and a fortiori the discriminatory Valdez levy was invalid). But at least six other Justices, the plurality and the dissenters, accepted the proposition that a property tax, which reaches vessels, is not automatically a duty of tonnage.¹⁰⁸

Whatever the technical meaning of “tonnage,” it fell by the wayside in nineteenth-century Supreme Court jurisprudence for good substance-over-form reasons.¹⁰⁹ The constitutional phrase is “duty of tonnage,” and a plain-meaning proponent might reasonably argue that a duty, which by its terms has nothing to do with tonnage, however understood (e.g., as capacity, weight, value, etc.), ought not to be treated as a “duty of tonnage.” But if the Tonnage Clause proscribed only levies that were explicitly measured by a vessel’s capacity or by some related concept, it would be too easy for states to circumvent the Clause.

A duty *of* tonnage thus need not be a duty *on* tonnage.¹¹⁰ As Justice Robert Cooper Grier explained in 1849 in the *Passenger Cases*¹¹¹—where constitutionally invalid levies were imposed on alien passengers arriving in the ports of Massachusetts and New York rather than on vessels carrying the passengers—if form controlled, it would be possible for a state to “do that indirectly which she is forbidden by the [Tonnage Clause] to do directly.”¹¹² A clause that forbids a state from “levy[ing] a duty or tax . . . graduated on the tonnage or admeasurement of the vessel” must therefore forbid a state from “effect[ing] the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she

¹⁰⁶ Indeed, the Alaska Supreme Court in *Polar Tankers* took the diametric position: “[A] charge based on the value of property is not a duty of tonnage.” *City of Valdez v. Polar Tankers, Inc.*, 182 P.3d 614, 623 (Alaska 2008), *rev’d*, 129 S. Ct. 2277, *reh’g denied*, 130 S. Ct. 31 (2009); *see also supra* text accompanying notes 18-19 (quoting two Thomas Cooley treatises); *infra* text accompanying note 277 (quoting treatise of W. H. Burroughs).

¹⁰⁷ *See, e.g.*, text accompanying notes 18-19 (quoting two Thomas Cooley treatises); *infra* text accompanying note 277 (quoting treatise of W. H. Burroughs).

¹⁰⁸ Concurring Justice Alito did not think it necessary to make any categorical pronouncement on that point, given that the Valdez levy was discriminatory. *See supra* note 65 and accompanying text.

¹⁰⁹ *See, e.g.*, *infra* text accompanying notes 111-13 and 119-22.

¹¹⁰ No court has focused on the prepositions in this way, but doing so makes sense. Prepositions do not get the respect they are due in constitutional interpretation. *See supra* note 3.

¹¹¹ 48 U.S. (7 How.) 283 (1849).

¹¹² *Id.* at 458 (Grier, J.).

carries.”¹¹³ A state cannot avoid the Tonnage Clause by labeling a tax on capacity as “a charge on the owner or supercargo” or on anything else.¹¹⁴ There was no opinion of the Court in the *Passenger Cases*—the five-Justice majority differed on many issues¹¹⁵—but Justice Grier was on the prevailing side. The *Polar Tankers* plurality cited Justice Grier’s views with approval¹¹⁶ in a part of the opinion joined by concurring Justice Alito.¹¹⁷ And although concurring Justices Roberts and Thomas did not explicitly join that part of the plurality opinion, there is no reason to think they would have disagreed with this point.¹¹⁸

In *Steamship Co. v. Portwardens*,¹¹⁹ decided in 1867, the Court concluded that even a fixed charge for a vessel’s use of a port (assuming the amount was not a fee for services¹²⁰) was invalid.¹²¹ The Founders did not intend the phrase “duty on tonnage” to be limited to a levy that sets “a certain rate on each ton.”¹²² The Court made clear that “any duty on the ship [imposed by a state or its subdivision], whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage

¹¹³ *Id.* at 458-59.

¹¹⁴ *Id.* at 459.

¹¹⁵ Professor David Currie made a valiant effort to determine what rationales each Justice had relied on, but (as he recognized) doing so was impossible. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 227-30 (1985). At least one of the five Justices who voted to overturn the levies, John McLean, did not rely on the Tonnage Clause, and none of the dissenters referred to that Clause. Justice McLean saw the levies as inconsistent with the federal government’s exclusive control over commerce, see *Passenger Cases*, 48 U.S. (7 How.) at 400 (McLean, J.), as did several others. But two of the five Justices in the majority did not mention the Commerce Clause explicitly in their opinions. See *id.* at 452-55 (McKinley, J.); *id.* at 437-52 (Catron, J.). In *Henderson v. Mayor of New York*, 92 U.S. 259 (1875), the Court struck down a later version of the New York ordinance, modified in response to the *Passenger Cases*, on Commerce Clause grounds. *Id.* at 272-73. Ships arriving with foreign passengers were required either to post an expensive bond or to pay \$1.50 per foreign passenger. *Id.* at 267. The Court characterized the arrangement as the equivalent of a tax:

[I]f it is apparent that the object of this statute . . . is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases*.

Id. at 268. Tax-like the charge may have been, but the Tonnage Clause was not mentioned.

¹¹⁶ *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2282-83, *reh’g denied*, 130 S. Ct. 31 (2009).

¹¹⁷ *Id.* at 2289 (Alito, J., concurring).

¹¹⁸ Their disagreement was with the plurality’s reliance on discrimination against vessels. *Id.* at 2287-88 (Roberts, J., concurring in part and concurring in the judgment).

¹¹⁹ 73 U.S. (6 Wall.) 31 (1867).

¹²⁰ See *infra* Part III.C.2 (discussing user fees).

¹²¹ *Portwardens*, 73 U.S. (6 Wall.) at 35.

¹²² See *id.* at 34.

with the rate of duty,” is an impermissible duty of tonnage.¹²³ A duty may thus be prohibited even if the connection between charge and “tonnage” is tenuous or nonexistent.

These results make sense. The Tonnage Clause would impose no serious restriction on the taxing power of states if it were interpreted to apply only to levies explicitly measured by ships’ capacities or by some reasonable surrogate for capacities. With the Clause interpreted to have real effect, however, the term “tonnage” seems to have little substantive content. Maybe we should take “tonnage” out of the Tonnage Clause.

Diminished in importance though it might be, the term nevertheless remains relevant in at least two respects. First, if a state charge *is* measured by tonnage—a charge “per ton,” for example—the likelihood of scrutiny under the Tonnage Clause is heightened.¹²⁴ The lesson for state and local officials is clear: if you intend to impose a levy on vessels using your ports, be careful with your word choice.¹²⁵ Valdez’s ordinance, explicitly directed at large boats and vessels, was asking for trouble.¹²⁶

Second, the term “tonnage” emphasizes that the levies that concerned the Founders were on ships or vessels engaged in maritime commerce, and this might be an important interpretive datum. Here too, however, time may have passed the traditional understanding by. Is there reason to think the Tonnage Clause should apply only to means of transport known in 1789? Just as it is now assumed that congressional power “[t]o raise and support Armies” and “[t]o provide and maintain a Navy” encompasses having an air

¹²³ *Id.* at 35. Chief Justice Chase’s opinion for the Court also concluded that the state levy was invalid under the Commerce Clause, an analysis that should have been unnecessary if the levy was an impermissible duty of tonnage. *See* CURRIE, *supra* note 115, at 332-34. Indeed, the Commerce Clause discussion was inconsistent with the general proposition that states do retain taxing power unless specifically divested of such by the Constitution. *See infra* Part III.B.2 (discussing *Gibbons v. Ogden* and the relationship of the Commerce and Tonnage Clauses).

¹²⁴ Even then, the result is not foreordained. *See infra* Part III.C.2.b. *Compare* Peete v. Morgan, 86 U.S. (19 Wall.) 581, 581-83 (1873) (holding that quarantine fees collected by the health inspector in Galveston, imposed at a rate of \$5 for the first hundred tons and one and a half cents for each additional ton, were proscribed duties of tonnage), *with* Morgan’s S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 462-63 (1886) (concluding that fees, varying by type of vessel and imposed by the Board of Health to inspect and perhaps quarantine vessels carrying contagious diseases, were permitted user fees).

¹²⁵ *Cf.* Johnson v. Drummond, 61 Va. (20 Gratt.) 419, 420, 425-27 (1871) (concluding that Virginia’s oyster law, which imposed a license tax on officers of vessels that “carry[] oysters taken in the waters of Virginia,” was a duty of tonnage in part because the charge was “three dollars per ton, for every ton said vessel may measure” (quoting Act of March 3, 1866, § 7, 1865-66 Va. Acts 75) (internal quotation marks omitted)).

¹²⁶ *See supra* notes 32-34. It is possible that drafters of the ordinance, not having the benefit of the Supreme Court decision and this Article, were unaware of the Tonnage Clause. In Part IV, this Article considers whether the ordinance could have been cured by a wordsmith aware of the Clause and concludes that a substantive problem would still remain.

force,¹²⁷ one day, perhaps, a state or local charge on aircraft using an airport will be challenged as a duty of tonnage.¹²⁸

In *Polar Tankers* itself, the Valdez ordinance, applying the levy to “boats and vessels” longer than ninety-five feet, a factor clearly tied to capacity, had a connection to tonnage as traditionally understood.¹²⁹ In addition, a majority of the Court agreed that “a tax on the value of such vessels is closely correlated with cargo capacity. . . . [T]he imposition of the tax depends on a factor related to tonnage.”¹³⁰ Although the dissenters complained that the statement was “contrary to our longstanding recognition that a ship’s capacity is not a proxy for its value,”¹³¹ it is hard to see why that should matter anymore. If even a fixed charge can be a “duty of tonnage,” then surely a levy measured by value, “closely correlated with cargo capacity,” can bring the Tonnage Clause into play.¹³²

B. *The Purposes of the Tonnage Clause*

It might seem peculiar to have deferred an extended discussion of the Tonnage Clause’s rationale to this point in the Article, but this Article considered the meaning of “tonnage” first because it is impossible to

¹²⁷ U.S. CONST. art. I, § 8, cls. 12-13. The Fourth Amendment is relevant to electronic surveillance, even though such surveillance was unknown in the eighteenth century. A similar point can be made in countering the argument made by many commentators that the direct-tax apportionment rule of the Constitution, *see* U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 4, can limit only forms of taxation known in 1789. *See, e.g.,* Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2417 (1997).

¹²⁸ *See State Tax Trends: A Roundtable Discussion*, TAXES—THE TAX MAGAZINE, Jan. 2010, at 23, 42-43 (suggesting that the Tonnage Clause might preempt Dormant Commerce Clause analysis used in some cases involving airports); *cf. Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302-08 (1944) (Jackson, J., concurring) (failing to mention the Tonnage Clause, but suggesting that rules limiting state taxation on other forms of commerce should apply with respect to state property tax levied on airplanes, and ultimately concluding that the Minnesota tax was justified under the home port doctrine then in effect).

¹²⁹ The city did not use the term “tonnage” or apply the tax at a rate of so much “per ton,” but it might as well have.

¹³⁰ *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2284, *reh’g denied*, 130 S. Ct. 31 (2009).

¹³¹ *Id.* at 2291 n.2 (Stevens, J., dissenting).

¹³² *Id.* at 2284 (plurality opinion). The dissenters cited to a passage in the *State Tonnage Tax Cases* to the effect that “[t]he experience of every one shows that a small steamer, new and well built, may be of much greater value than a large one, badly built or in need of extensive repairs.” *Id.* at 2291 n.2 (Stevens, J., dissenting) (quoting *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 224 (1870)) (internal quotation marks omitted). That point is true, but should we not be looking at probabilities? Size and value would correlate positively so that, in some cases, it would make sense to view an ad valorem levy as a duty of tonnage. In any event, one of the *State Tonnage Tax Cases* involved a levy “on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents as ascertained by the rules of admeasurement,” 79 U.S. (12 Wall.) at 217, suggesting that value might stand for tonnage in other cases.

understand the underpinnings of the Clause without getting a grasp on a basic term that is not part of everyday discourse. With the definition of “tonnage” explicated (or perhaps eradicated), this Article now examines what the Tonnage Clause was intended to do.

1. Reinforcing the Import-Export Clause and Federal Control of Commerce

This Subsection argues that the Import-Export Clause of the Constitution, prohibiting states from taxing imports or exports without congressional approval,¹³³ was intended to protect federal primacy over foreign commerce and that the Tonnage Clause should generally be understood as providing support to the Import-Export Clause. It will also argue, however, that the Tonnage Clause can apply to prevent state taxation in some commercial situations that are outside the scope of the Import-Export Clause.

Article I, Section 10, Clause 3 of the Constitution, which begins with the reference to “Duty of Tonnage,” goes on to include a hodgepodge of additional limitations on state power, all of which seem to have little to do with levies on ships: “No State shall . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”¹³⁴ That is heady stuff, far more important, one might think, than a duty on vessels.¹³⁵ And those other provisions seem to be of no help in interpreting the Tonnage Clause, except to indicate—on the theory that a clause is known by the company it keeps—that the Founders considered the possibility that a state might impose a duty of tonnage important in 1787.¹³⁶

From a theoretical standpoint, the Tonnage Clause fits more coherently within the preceding clause in Section 10, the so-called Import-Export Clause:

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for

¹³³ U.S. CONST. art. I, § 10, cl. 2.

¹³⁴ U.S. CONST. art. I, § 10, cl. 3.

¹³⁵ See, e.g., Greve, *supra* note 11 (devoting almost all attention to the “Compact Clause” portion of the passage, with only a passing reference to the Tonnage Clause—noting only the lack of Supreme Court cases since 1935).

¹³⁶ Chief Justice Roberts made that point in *Polar Tankers*: “The free flow of maritime commerce was so important to the Framers that they grouped the prohibition on tonnage duties with bans on keeping troops or ships of war, entering into compacts with other States or foreign powers, and engaging in war.” *Polar Tankers*, 129 S. Ct. at 2288 (Roberts, J., concurring in part and concurring in the judgment).

the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controll of the Congress.¹³⁷

Regulating “Commerce with foreign Nations, and among the several States, and with the Indian tribes” is a federal responsibility—specifically given to Congress¹³⁸—and control over imports and exports is an important component of that responsibility, at least with respect to “Commerce with foreign Nations.”¹³⁹ Unless Congress gives its approval, states are not to interfere with federal regulation of foreign commerce through the exercise of their taxing power.¹⁴⁰ Indeed, if Congress gives its approval, it would reflect a congressional determination that a state regulation was not, as Justice Joseph Story put it, “injurious to the general interests.”¹⁴¹

In his *Commentaries on the Constitution of the United States*, Justice Story wrote about the Import-Export Clause:

If there is wisdom and sound policy in restraining the United States from exercising the power of taxation unequally in the states, there is, at least, equal wisdom and policy in restraining the states themselves from the exercise of the same power injuriously to the interests of each other. A petty warfare of regulation is thus prevented, which would rouse resentments, and create dissensions, to the ruin of the harmony and amity of the states.¹⁴²

Justice Story conceded that even without the constitutional limitation, it would not be in a state’s interest to impose duties on imports or exports in a way that would damage the state’s own commerce.¹⁴³ But, as powerful as market forces can be, the Founders were unwilling to rely only on the laws of economics to protect against abusive state taxation, particularly when

¹³⁷ U.S. CONST. art. I, § 10, cl. 2.

¹³⁸ U.S. CONST. art. I, § 8, cl. 3.

¹³⁹ *Id.* In *The Federalist No. 44*, James Madison discusses the Import-Export Clause and describes the other prohibitions of clauses two and three as “fall[ing] within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.” *THE FEDERALIST NO. 44*, at 280 (James Madison) (Clinton Rossiter & Charles R. Kesler eds., Signet Classic 2003) (1961). A prohibition against a state declaring war might be obvious, but a restriction on duties of tonnage?

¹⁴⁰ For that matter, even the federal government is forbidden to impose a tax on exports, see U.S. CONST. art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”), a limitation that has attracted attention in recent years. Twice in the 1990s, the Supreme Court struck down federal levies, as applied in particular circumstances, on the ground that they violated the Export Clause. See *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 370 (1998); *United States v. IBM Corp.*, 517 U.S. 843, 863 (1996); see also JENSEN, *TAXING POWER*, *supra* note 30, at 135.

¹⁴¹ 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1013 (photo reprint 1991) (Boston, Hilliard, Gray & Co. 1833); see *supra* note 17 (noting an instance in which Congress approved a state duty of tonnage).

¹⁴² STORY, *supra* note 141.

¹⁴³ *Id.* § 1019.

one state's taxing scheme can impose costs on persons in other parts of the country.¹⁴⁴

What “dissensions” did Justice Story fear? The general problem, not limited to taxation, is that described by Alexander Hamilton in *The Federalist No. 7*: the “[c]ompetitions of commerce” and the resulting “contention” and “discontent” that would arise if each state were able to “pursue a system of commercial policy peculiar to itself.”¹⁴⁵ With respect to taxation, Justice Story pointed to the situation under the Articles of Confederation, where, “in the exercise by the states of their general authority to lay imposts and duties, . . . the most mischievous restraints, preferences, and inequalities existed; so, that very serious irritations and feuds were constantly generated, which threatened the peace of the Union.”¹⁴⁶

One particular danger of state taxation of imports was that to the extent state levies could be passed on to the consumers of the taxed goods—and the general assumption during the Founding period was that the economic burden of taxes imposed on articles of consumption was borne by ultimate purchasers¹⁴⁷—port states could penalize consumers in landlocked states.¹⁴⁸ James Madison explained the Import-Export Clause as seeking to prevent states with “convenient ports” from creating taxes that would hurt residents of states with

¹⁴⁴ *Id.*

¹⁴⁵ THE FEDERALIST NO. 7, at 57 (Alexander Hamilton) (Clinton Rossiter & Charles R. Kesler eds., Signet Classic 2003) (1961); *see also* THE FEDERALIST NO. 22, at 140 (Alexander Hamilton) (Clinton Rossiter & Charles R. Kesler eds., Signet Classic 2003) (1961) (deploring the “interfering and unneighborly regulations of some States” under the Articles of Confederation and noting, by quoting from an encyclopedia, “the multiplicity of the duties which the several princes and states [in Germany] exact upon the merchandises passing through their territories,” making Germany’s “fine streams and navigable rivers . . . almost useless” (internal quotation marks omitted)).

¹⁴⁶ STORY, *supra* note 141, § 1014.

¹⁴⁷ That was not always assumed—Hamilton understood that the market could constrain a merchant’s ability to pass the burden of taxes on to consumers—but it was the general view. *See* THE FEDERALIST NO. 35, at 208 (Alexander Hamilton) (Clinton Rossiter & Charles R. Kesler eds., Signet Classic 2003) (1961) (“It is not always possible to raise the price of a commodity in exact proportion to every additional imposition laid upon it. . . . The maxim that the consumer is the payer is so much oftener true than the reverse of the proposition”); Jensen, *supra* note 127, at 2395-96.

¹⁴⁸ The term “landlocked” reflects Founding-era thinking, but it does not give a full sense of the Tonnage Clause’s scope today. The deliberations in the Founding era focused on ports of the original colonies—that is, seaports. *See* *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283-86 (1976). The Import-Export Clause was intended to preserve “harmony among the States” by forbidding “seaboard States, with their crucial ports of entry, . . . from levying taxes on citizens of other States by taxing goods merely flowing through their ports to other States not situated as favorably geographically.” *Id.* at 285-86; *see also* *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 556-57 (1959) (Frankfurter, J., dissenting in part) (making same point). But the Tonnage Clause can limit duties imposed on inland ports as well. Many nineteenth-century cases involved levies on vessels using ports on navigable rivers. *See, e.g.,* *Packet Co. v. Catlettsburg*, 105 U.S. 559, 559-60 (1881) (applying the Clause to a port in Tennessee); *Transp. Co. v. Wheeling*, 99 U.S. 273, 273 (1878) (applying the Clause to a port in West Virginia); *Packet Co. v. Keokuk*, 95 U.S. 80, 80-81 (1877) (applying the Clause to a port in Iowa).

no convenient ports for foreign commerce, [and who, as a result,] were subject to be taxed by their neighbors, thro whose ports, their commerce was carried [sic] on. New Jersey, placed between Phila. & N. York, was likened to a Cask tapped at both ends: and N. Carolina between Virga. & S. Carolina to a patient bleeding at both Arms.¹⁴⁹

As Madison wrote in a letter in 1832, the Import-Export Clause effectively prevents port states from “taxing the consumption of their neighbours.”¹⁵⁰ Ultimately, the Import-Export Clause protects federal control over commerce,¹⁵¹ particularly commerce with foreign nations.¹⁵² Madison wrote in *The Federalist No. 44*: “The restraint on the power of the States over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade to the federal councils.”¹⁵³

And the Tonnage Clause, by supporting the Import-Export Clause, helps to confirm federal primacy over commerce, particularly with foreign nations. Treatise writer W. H. Burroughs made that point in 1877:

This prohibition [in the Tonnage Clause], like the [Import-Export Clause], and like the provision giving to Congress the power to regulate commerce, was designed to enable the government to give uniformity to the commerce of the States with foreign countries, and with each other. But it would have been useless to prohibit the taxing of imported goods, if the States retained the power of taxing the vessels, as such, which carried the goods.¹⁵⁴

The Supreme Court said the same thing in 1935, in *Clyde Mallory Lines v. Alabama ex rel. State Docks Commission*.¹⁵⁵ “If the states had been left free to tax the privilege of access by vessels[,] the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise.”¹⁵⁶

The discussion at the Constitutional Convention about duties of tonnage was short, but consistent with the proposition that the Tonnage

¹⁴⁹ James Madison, *Preface to Debates in the Convention of 1787*, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 539, 542 (Max Farrand ed., rev. ed. 1966) (1911) [hereinafter FARRAND].

¹⁵⁰ Letter from James Madison to Professor Davis (Feb. 6, 1832), in FARRAND, *supra* note 149, at 518, 519.

¹⁵¹ See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 439 (1827) (noting that the Founders decided that “the interest of all would be best promoted by placing that whole subject under the control of Congress,” and then positing reasons why that decision might have been made, including “an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony . . . which it was desirable to preserve”).

¹⁵² See *id.* at 446 (noting that the grant to Congress to regulate commerce should comprehend all commerce between foreign nations).

¹⁵³ THE FEDERALIST NO. 44, *supra* note 139, at 280 (James Madison).

¹⁵⁴ BURROUGHS, *supra* note 95.

¹⁵⁵ 296 U.S. 261 (1935).

¹⁵⁶ *Id.* at 265.

Clause protects federal power over commerce.¹⁵⁷ As reported in Madison's notes, on September 15, late in the deliberations, James McHenry and Daniel Carroll of Maryland "moved that 'no State shall be restrained from laying duties of tonnage for the purpose of clearing harbours and erecting light-houses.'" ¹⁵⁸ After George Mason of Virginia supported the motion by noting that "the situation of the Chesapeak . . . peculiarly required expences of this sort," Gouverneur Morris made the obvious rejoinder to those, like Mason, who thought they were *advancing* state power: nothing in the language considered by the Convention to that point would have expressly forbidden a state from levying a duty of tonnage, and "[t]he exception proposed will imply the Contrary, and will put the States in a worse condition than [Mason] wishes."¹⁵⁹

But, whatever the language used, such a limitation on state power might have been implicit in the idea of federal power over commerce. James Madison, a strong proponent of national power in that regard, stated that such an inference was possible—and appropriate:

Whether the States are now restrained from laying tonnage duties depends on the extent of the power "to regulate commerce". [sic] These terms are vague but seem to exclude this power of the States . . . [Madison] was more & more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority.¹⁶⁰

Roger Sherman of Connecticut responded to Madison, arguing that there was no danger in providing for concurrent federal-state jurisdiction, as the supreme national power "can controul interferences of the State regulations (when) such interferences happen."¹⁶¹ But John Langdon of New Hampshire "insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it."¹⁶² If Sherman was right, however, that concurrent taxing power over commerce-related matters might otherwise have been inferred from constitutional language (a proposition that even the great nationalist

¹⁵⁷ See James Madison, Notes on the Constitutional Convention (Sept. 15, 1787), in 2 FARRAND, *supra* note 149, at 622, 624-26.

¹⁵⁸ *Id.* at 625. McHenry's own notes probably provide a more trustworthy transcript of the motion: "No State shall be prohibited from laying such duties of tonnage as may be sufficient for improving their harbors and keeping up lights, but all acts laying such duties shall be subject to the approbation or repeal of Congress." James McHenry, Notes on the Constitutional Convention (Sept. 15, 1787), in 2 FARRAND, *supra* note 149, at 633, 633.

¹⁵⁹ Madison, *supra* note 157, at 625.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* Ultimate congressional control was provided for in the Maryland resolution. See *supra* note 158.

¹⁶² Madison, *supra* note 157, at 625.

Alexander Hamilton reluctantly accepted in *The Federalist No. 32*¹⁶³), an explicit prohibition of state duties was necessary.

The Langdon position prevailed, with a motion to the effect that no state could lay a duty of tonnage without congressional consent—the Tonnage Clause, as it came to be.¹⁶⁴ That motion passed six to four (with one state delegation divided).¹⁶⁵ The Constitutional Convention did not revisit the issue, and the rest is history.

This Article has characterized the Tonnage Clause as a backstop for the Import-Export Clause, but the two clauses do not mesh perfectly, at least not as the Import-Export Clause has been interpreted.¹⁶⁶ Unlike the Tonnage Clause, the Import-Export Clause has been deemed to apply only to foreign commerce, as the terms “imports” and “exports” indicate.¹⁶⁷ Although the status of the original thirteen states was, in the minds of more than a few Founders, more like that of independent nations—with the understanding that Georgia might “export” goods to South Carolina¹⁶⁸—the terms “imports” and “exports” have come to refer to property coming from, or going to, foreign nations.¹⁶⁹ Relying in part on the work of Professor

¹⁶³ See THE FEDERALIST NO. 32, at 193-94 (Alexander Hamilton) (Clinton Rossiter & Charles R. Kesler eds., Signet Classic 2003) (1961). Practicalities might limit the use of particular levies by a government: “It is, indeed, possible that a tax might be laid on a particular article by a State which might make it *inexpedient* that a further tax should be laid on the same article by the Union . . .” *Id.* at 168. But the Constitution generally did not forbid concurrent taxation: “[The Import-Export Clause] implies an admission that if it were not inserted the States would possess the power it excludes; and it implies a further admission that as to all other taxes, the authority of the States remains undiminished.” *Id.* at 167.

¹⁶⁴ Madison, *supra* note 157, at 625-26.

¹⁶⁵ *Id.*

¹⁶⁶ The Supreme Court has interpreted the Import-Export Clause to deal solely with foreign trade, see *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 131 (1868), while the Tonnage Clause applies equally to foreign and interstate commerce. *State Tax Trends*, *supra* note 128, at 42.

¹⁶⁷ Hence the use of terms like “seaboard” or “inland” to describe the tensions that the Import-Export Clause was intended to lessen. See *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285-86 (1976) (standing for the proposition that the Import-Export Clause was intended to preserve “harmony among the States” by forbidding “seaboard States, with their crucial ports of entry . . . from levying taxes on citizens of other States by taxing goods merely flowing through their ports to other States not situated as favorably geographically.”); see also *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 556 (1959) (Frankfurter, J., dissenting in part); *supra* note 148.

¹⁶⁸ Early legislation sometimes reflected that understanding. See, e.g., Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527, 528 (imposing a tax on, among other things, “any note or bill of lading for any goods or merchandise to be *exported*, if from one district to another district of the United States, not being in the same state, ten cents; if to be exported to any foreign port or place, twenty-five cents” (emphasis added)). Congress was seeking to avoid the limitations of the Export Clause by imposing a levy on bills of lading, rather than the underlying goods, a scheme that should not have worked. See Jensen, *Export Clause*, *supra* note 30, at 21-25.

¹⁶⁹ See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 437 (1827) (stating that the term “duty on imports” in the Import-Export Clause “is a custom or a tax levied on articles brought into a country”). The reference in the Export Clause is “only to exportation to foreign countries,” *United States v. Hvoslef*, 237 U.S. 1, 13 (1915), not to transfers across state lines. Similarly, the term “imports” in the

William Winslow Crosskey, Justice Thomas has recently explained how the Import-Export Clause has been misinterpreted in this regard.¹⁷⁰ Although Justice Thomas makes a convincing argument to reclaim original understanding, this is an issue that is unlikely to be revisited.¹⁷¹ If Georgia may not impose a levy on goods going to or coming from South Carolina, it is because of the negative implications of the Commerce Clause, not because of the Import-Export Clause.¹⁷²

Whatever the original understanding of the Import-Export Clause, the Tonnage Clause can unquestionably apply even if no commerce with foreign nations is involved.¹⁷³ For example, in the *State Tonnage Tax Cases*,¹⁷⁴ decided in 1871, the Supreme Court held that an Alabama levy was an impermissible duty of tonnage even when imposed on a citizen of Alabama whose vessel was engaged in commerce only within the ports and rivers of that state.¹⁷⁵ The Tonnage Clause can thus have effect in circumstances that go beyond those to which the Import-Export Clause has been held to apply, certainly to preclude duties of tonnage on vessels engaged in interstate commerce and perhaps even on vessels that are not engaged in either interstate or foreign commerce.¹⁷⁶ Given the expanded

Import-Export Clause means goods coming from foreign nations, not goods coming from another state. See *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 131-32 (1868).

¹⁷⁰ See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 621-22 (1997) (Thomas, J., dissenting) (citing to *The True Meaning of the Imports and Exports Clause: Herein of "Interstate Trade Barriers" in 1787*, in 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 295, 295-323 (1953)).

¹⁷¹ See Brannon P. Denning, *Justice Thomas, the Import-Export Clause, and Camps Newfound/Owatonna v. Harrison*, 70 U. COLO. L. REV. 155, 157-58 (1999) (suggesting that before Justice Thomas's decision in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, no one suggested a change back to a reading of "import" and "export" that included interstate commerce as well as international commerce); see also BORIS I. BITTKER & BRANNON P. DENNING, *BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE* § 12.02 n.17 (1999) (noting that Justice Thomas's proposal to replace Dormant Commerce Clause analysis with the Import-Export Clause could be possible by using his interpretation of the Import-Export Clause as controlling commerce between the states, but concluding that the proposal would not fix every problem currently addressed by the Import-Export Clause).

¹⁷² See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 5.3.4, at 431 (3d ed. 2006) (explaining that the Dormant Commerce Clause is applied when a state or local law interferes with commerce and that it serves to stop protectionist state legislation that interferes with the economy).

¹⁷³ *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 219 (1870) ("[T]he prohibition [of the Tonnage Clause] extends to *all ships and vessels* entitled to the privileges of ships and vessels employed in the coasting trade, whether employed in commercial intercourse between ports in different States or between different ports in the same State."); see also *State Tax Trends*, *supra* note 128, at 42.

¹⁷⁴ 79 U.S. (12 Wall.) 204 (1870).

¹⁷⁵ *Id.* at 216; cf. *Peete v. Morgan*, 86 U.S. (19 Wall.) 581, 584 (1873) ("Much more does this inhibition [of the Tonnage Clause] apply when the vessels are owned by citizens of another State, and are engaged in commerce between the States, over which Congress has control.").

¹⁷⁶ See *Peete*, 86 U.S. (19 Wall.) at 584 (noting the result in the *State Tonnage Tax Cases* even though the boats "were employed exclusively in the internal commerce of [Alabama], over which

scope of the Commerce Clause these days, however, that latter point is probably not of great practical importance. Justice Samuel Freeman Miller surveyed the state of Tonnage Clause jurisprudence in the late-nineteenth century and concluded:

[V]essels coming from abroad, or engaged in navigation among the States, or *even if plying entirely within the boundaries of and owned by citizens of a single State*, shall not be taxed, as vessels, for the privilege of navigating the inland waters of the country, or coming into any of its ports.¹⁷⁷

Justice Miller's comments about the Clause's scope are as valid now as when they were written.

2. The Tonnage Clause and the Dormant Commerce Clause

This Article argues that the Tonnage Clause is part of the body of doctrine giving primacy to the national government in regulating commerce. But if regulation of commerce is fundamentally federal to begin with, as the Commerce Clause makes reasonably clear, what is the point of having a specific restriction on states' power to levy duties of tonnage—or on imports or exports, for that matter? After all, James Madison seemed to think state duties of tonnage would violate the Commerce Clause, and, if so, a specific restriction on such duties would be redundant.¹⁷⁸ Indeed, to a proponent of national power over commerce, the effect of the Import-Export and Tonnage Clauses is worse than redundancy. The restrictions might imply that if the Clauses were not part of the Constitution, the states would have the power to levy import-export taxes or duties of tonnage, and that, more generally, the states might retain other powers relating to commerce not specifically prohibited in the Constitution.

In 1824, Chief Justice John Marshall provided an answer to this conundrum, one that confirms federal power over commerce while recognizing the existence of state taxing powers. In the great case of *Gibbons v. Ogden*,¹⁷⁹ the first extended explication of the Dormant

Congress has no control" (emphasis added)). This Article has generally ignored the Indian Commerce Clause. A hypothetical on point would involve the possible application of the Tonnage Clause to a case involving "Commerce . . . with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3, and doing so would not add to the arguments in this Article. It is unlikely that the Founders were thinking about Indian tribes when contemplating the Tonnage Clause, although in principle the Clause could apply to commerce with the tribes.

¹⁷⁷ MILLER, *supra* note 100, at 253 (emphases added).

¹⁷⁸ See Madison, *supra* note 157, at 625 ("Whether the States are not restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce'. [sic] These terms are vague but seem to exclude this power of the States . . .").

¹⁷⁹ 22 U.S. (9 Wheat.) 1 (1824).

Commerce Clause,¹⁸⁰ the Marshall Court inferred limitations on state power from the affirmative grant of the commerce power to Congress.¹⁸¹ Both Justice Marshall's opinion for the Court and Justice William Johnson's concurrence contain significant discussions of the Tonnage Clause,¹⁸² which once again confirms the importance of the Clause to the Founding generation.

Among other things, the Justices explained why it should not be inferred from the Tonnage Clause and other constitutional limitations on state *taxing* power that the states retain other regulatory power over commerce.¹⁸³ According to the Court, taxation has a special status in the constitutional structure, and it was understood that state taxing power, unlike other forms of regulation affecting commerce, was concurrent with federal taxing power.¹⁸⁴

Starting with the proposition that “the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government,”¹⁸⁵ Justice Marshall rejected the argument that the power of Congress to regulate foreign and interstate commerce may “be co-extensive with the subject itself, and have no other limits than are prescribed in the [C]onstitution, yet the States may severally exercise the same power, within their respective jurisdictions.”¹⁸⁶ Concurrent state regulation of commerce would interfere with the national power over commerce.

The Tonnage Clause deals with regulation of commerce, of course, but it also deals with taxation.¹⁸⁷ In contrast to the commerce power generally, it was always understood that—absent constitutional dictates to the contrary—the federal government and the states would have concurrent taxing power.¹⁸⁸ Justice Marshall wrote: “The grant of the power to lay and collect taxes . . . has never been understood to interfere with the exercise of

¹⁸⁰ See CHEMERINSKY, *supra* note 172, § 5.3.3.1.

¹⁸¹ See *id.*

¹⁸² See *Gibbons*, 22 U.S. (9 Wheat.) at 202; *id.* at 236-37 (Johnson, J., concurring).

¹⁸³ See, e.g., *id.* at 200-01 (majority opinion) (noting that the Import-Export Clause “shows the opinion of the Convention, that a State might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows as a consequence, from this concession, that a State may regulate commerce with foreign nations and among the States, cannot be admitted”).

¹⁸⁴ *Id.* at 199 (“The power of taxation is indispensable to their existence, and is a power which . . . is capable of residing in, and being exercised by, different authorities at the same time. . . . When, then, each government exercises the power of taxation, neither is exercising the power of the other.”).

¹⁸⁵ *Id.* at 197.

¹⁸⁶ *Id.* at 197-98.

¹⁸⁷ See STORY, *supra* note 141, § 1014 (“The power to lay duties and imposts on imports and exports, and to lay a tonnage duty, are doubtless properly considered a part of the taxing power; but they may also be applied, as a regulation of commerce.”).

¹⁸⁸ See *id.* § 1029 (noting that “the power of taxation exists in the states concurrently with the United States, subject only to the restrictions imposed by the constitution”); THE FEDERALIST NO. 32, *supra* note 163, at 195 (Alexander Hamilton).

the same power by the States”¹⁸⁹ States need revenue: “The power of taxation is indispensable to [the states’] existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time.”¹⁹⁰ Yes, state taxation can affect federal taxation and vice versa—revenue sources are not infinite, and taxation by one sovereign can destroy the tax base of the other¹⁹¹—but in theory, the existence of a federal taxing power does not eliminate the states’ power to tax. We know federal and state governments can and do tax the same items, and “[w]hen . . . each government exercises the power of taxation, neither is exercising the power of the other.”¹⁹²

Pure regulation of commerce is different, as the Court explained: “[W]hen a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.”¹⁹³ If that is so, then why the limitations, so clearly related to commerce, found in the Import-Export and Tonnage Clauses? Justice Marshall had to concede that the existence of the Import-Export Clause “shows the opinion of the Convention, that a State might impose duties on exports and imports, if not expressly forbidden.”¹⁹⁴ But he rejected the extrapolation of that argument—that “any other commercial regulation, not expressly forbidden, to which the original power of the State was competent, may still be made.”¹⁹⁵

The confusion arises because the Taxing Clause and the Commerce Clause are independent grants of power to Congress. “[T]he act of laying ‘duties or imposts on imports or exports[]’ is considered in the [C]onstitution as a branch of the taxing power,”¹⁹⁶ even though there would be unquestioned effects on commerce. But because the Taxing Clause could not be interpreted as limiting state power to tax, the Import-Export Clause “is an exception from the acknowledged power of the States to levy taxes, not from the questionable power to regulate commerce.”¹⁹⁷ Taxation has regulatory effects, but it also has its own special constitutional status.

¹⁸⁹ *Gibbons*, 22 U.S. (9 Wheat.) at 198. *But see* 2 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION § 389, at 844 (Henry St. George Tucker ed., Chicago, Callaghan & Co. 1899) (“The power to lay duties on tonnage is clearly included in the eighth section of the first article If the states could lay a duty on tonnage, it would interfere with the power given to Congress . . .”).

¹⁹⁰ *Gibbons*, 22 U.S. (9 Wheat.) at 199.

¹⁹¹ One reason the Founders took the direct-tax apportionment rule seriously was that, without limits on the taxing power, the federal government could dry up states’ revenue. *See Jensen, supra* note 127, at 2397-2402.

¹⁹² *Gibbons*, 22 U.S. (9 Wheat.) at 199.

¹⁹³ *Id.* at 199-200.

¹⁹⁴ *Id.* at 200.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 201.

¹⁹⁷ *Id.* at 201-02.

The same analysis explains the limitation on state power to lay duties of tonnage. Yes, commerce is involved, but taxation is as well:

[A] duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on Congress, without affording any implication respecting a power to regulate commerce. It is true, that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution, to prohibit the States from exercising this power.¹⁹⁸

Like the Import-Export Clause, the Tonnage Clause is “a *prudent* precaution.”¹⁹⁹ Maybe these clauses were technically unnecessary, given the Commerce Clause, but their inclusion removed any doubt. The restrictions of those clauses “are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.”²⁰⁰

C. “Duty” of Tonnage

By its terms, the Tonnage Clause forbids only a state’s imposition of “duties” of tonnage. This Section discusses the terms used in the Constitution to refer to governmental charges, argues that user fees are not taxes or duties (a relatively noncontroversial position), and urges that, as an absolute prohibition against the imposition of state duties of tonnage (unless Congress provides otherwise), the Tonnage Clause should apply whether or not a levy discriminates against vessels (a much more controversial position).

1. Taxes, Duties, and Other Charges

The Taxing Clause provides that “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . .; but all Duties, Imposts and Excises shall be uniform throughout the United States.”²⁰¹ That passage contains a variety of terms for governmental charges. And the language could be interpreted to suggest that a “tax” and a “duty” are not the same thing.

The Founders used varied terminology for governmental exactions in other constitutional provisions as well: “Tax or Duty” in the Export Clause²⁰² and in the clause limiting a levy on the “Migration or Importation”

¹⁹⁸ *Gibbons*, 22 U.S. (9 Wheat.) at 202.

¹⁹⁹ *Id.* (emphasis added).

²⁰⁰ *Id.* at 202-03.

²⁰¹ U.S. CONST. art. I, § 8, cl. 1.

²⁰² U.S. CONST. art. I, § 9, cl. 5.

of slaves to “ten dollars for each Person;”²⁰³ “Imposts or Duties” in the Import-Export Clause;²⁰⁴ “Tax” or “Taxes” in the Direct-Tax Clauses,²⁰⁵ and, of course, “Duty” in the Tonnage Clause.

Overlap exists among the terms. Sometimes, it seems, the Founders used multiple terms out of an excess of caution. For example, would an “impost,” a levy on imports, not simply be a specialized form of “duty,” in which case the phrases “Duties, Imposts and Excises” and “Imposts or Duties” were—in the worst lawyerly style—unnecessarily wordy? Maybe, but there was no consensus that one term subsumed the other.²⁰⁶ When in doubt, add words to make sure nothing falls through the cracks.²⁰⁷

An important instance of overlap is found in the Taxing Clause and the attached Uniformity Clause.²⁰⁸ As argued in a previous article,²⁰⁹ the phrase “Duties, Imposts and Excises” referred to the sort of levies generally called “indirect *taxes*”—not a constitutional term, but one used in Founding-era debates.²¹⁰ The national levies subject to the uniformity rule are generally required to operate the same way in state A as in state B.²¹¹ Other national taxes (i.e., *direct* taxes) are subject to the more stringent apportionment rule, which requires that the levies be apportioned among the states on the basis of population.²¹² Among the taxes historically considered to be direct were capitation taxes (specifically denominated as such in the

²⁰³ U.S. CONST. art. I, § 9, cl. 1.

²⁰⁴ U.S. CONST. art. I, § 10, cl. 2. This again suggests that “tax” and “duty” are not synonymous.

²⁰⁵ U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 4.

²⁰⁶ James Madison, Notes on the Constitutional Convention (Aug. 16, 1787), in 2 FARRAND, *supra* note 149, at 304, 305.

²⁰⁷ See, e.g., U.S. CONST. art. I, § 8, cl. 1. When the language of the general taxing power (i.e., “Taxes, Duties, Imposts and Excises,” U.S. CONST. art. I, § 8, cl. 1) was discussed at the Convention, Luther Martin “asked what was meant by the Committee of detail in the expression ‘*duties*’ and ‘*imposts*’. [sic] If the meaning were the same, the former was unnecessary; if different, the matter ought to be made clear.” Madison, *supra* note 206 (footnote omitted). James Wilson responded, “[*D*]uties are applicable to many objects to which the word *imposts* does not relate. The latter are appropriated to commerce; the former extend to a variety of objects, as stamp duties &c.” *Id.*

²⁰⁸ See *supra* text accompanying note 201.

²⁰⁹ See generally Jensen, *supra* note 127, at 2382-83, 2386, 2394.

²¹⁰ See, e.g., James Madison, Notes on the Constitutional Convention (July 12, 1787), in 1 FARRAND, *supra* note 149, at 591, 592 (emphasis added) (noting Gouverneur Morris’s reassurance, as reported in Madison’s notes, that “[w]ith regard to indirect taxes on *exports* & imports & on consumption, the [direct-tax apportionment] rule would be inapplicable”); THE FEDERALIST NO. 21, at 138 (Alexander Hamilton) (Clinton Rossiter & Charles R. Kesler eds., Signet Classic 2003) (1961) (“Impositions of this kind [imposts, excises, and all duties upon articles of consumption] usually fall under the denomination of indirect taxes . . .”).

²¹¹ See JENSEN, TAXING POWER, *supra* note 30, at 76-88.

²¹² U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 4. The aggregate direct-tax liability for a state with one-tenth of the national population must be one-tenth of the national total, regardless of how the tax base is distributed. This rule makes direct taxes politically impossible, except in times of national emergency. See Jensen, *supra* note 127, at 2380-89; Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355, 372-74 (2004).

Constitution)²¹³ and those on real property and, by extension, on personal property as well.²¹⁴

With that understanding, a “duty” is a “tax” of the indirect variety, but a direct “tax,” including a property tax, is not a “duty.” In another context, in interpreting the Export Clause’s limitation on *federal* taxing power, the Supreme Court has noted that “impost and duty are narrower terms than tax”²¹⁵—making the point that the universe of levies prohibited by the Export Clause is broader than that under the Import-Export Clause.²¹⁶ If that is correct, and if this learning transfers to Tonnage Clause analysis, a property *tax* levied on a vessel might not be a “duty of tonnage” because it would not be a duty at all.

When it comes to parsing constitutional provisions that deal with taxation, however, the results in cases outside the Export Clause context have generally not turned on fine linguistic distinctions. In particular, whether or not the distinction between “tax” and “duty” was originally intended to have effect under the Tonnage Clause,²¹⁷ the case law does not recognize this distinction. For example, Chief Justice Marshall wrote in *Gibbons v. Ogden* in 1824: “‘A duty of tonnage’ is as much a tax, as a duty on imports or exports; and the reason which induced the prohibition of those taxes, extends to this also.”²¹⁸ For better or for worse, “tax” and “duty” had long ago come to be used interchangeably in interpreting the Clause.

Other examples are legion. In the *Passenger Cases*, decided in 1849, Justice Grier characterized the Tonnage Clause as forbidding a state from “levy[ing] a duty or tax . . . graduated on the tonnage or admeasurement of [a] vessel.”²¹⁹ In 1873, in *Cannon v. New Orleans*, Justice Miller referred to

²¹³ U.S. CONST. art. I, § 9, cl. 4 (referring to “Capitation, or other direct, Tax”).

²¹⁴ In *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, *modified on reh’g*, 158 U.S. 601 (1895), *overruled* by U.S. CONST. amend. XVI, the Supreme Court held that the 1894 income tax was a direct tax, at least insofar as it reached income from property, that had not been properly apportioned. *Id.* at 586. A tax on real estate was unquestionably understood by the Founders to be direct, and in the first decision, the *Pollock* Court concluded that there was no substantive difference between a tax on real estate and one on income from real estate. In the second decision, the Court concluded that income from personal property should be treated no differently than income from real property for these purposes. *See Jensen, supra* note 127, at 2369-70.

²¹⁵ *United States v. IBM Corp.*, 517 U.S. 843, 857 (1996).

²¹⁶ In *United States v. IBM Corp.*, the Court gave as one reason for its decision that the Import-Export Clause, in limiting state taxing power, cannot be used to interpret the Export Clause and to limit federal taxing power: the “meaningful textual differences” between the two clauses, including the difference between “Tax or Duty” and “Imposts or Duties.” *Id.* (internal quotation marks omitted).

²¹⁷ There appears to be no Founding-era discussion of how a property tax might be treated under the Tonnage Clause. The silence might have been because no one would have thought such a levy was a “duty” to begin with or because the Founders’ attentions were elsewhere when the Clause was being considered.

²¹⁸ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824).

²¹⁹ *Passenger Cases*, 48 U.S. (7 How.) 283, 458 (1849) (emphasis added).

“a duty or tax or burden imposed under the authority of the State”²²⁰—one term would apparently do as well as another—as being potentially prohibited by the Clause. In an 1886 case, *Morgan’s Steamship Co. v. Louisiana Board of Health*,²²¹ Justice Miller wrote:

In the present case we are of opinion that the fee complained of is not a tonnage tax, that, in fact, it is not a tax within the true meaning of that word as used in the Constitution, but is a compensation for a service rendered . . . to the vessel which receives the certificate that declares it free from further quarantine requirements.”²²²

For Miller, the Tonnage Clause guru of the late-nineteenth century, a “tonnage tax” was the same as a “duty of tonnage.” Nor did any distinction between tax and duty matter to the Justices in *Polar Tankers*.²²³ The plurality used language like “where a tax otherwise qualifies as a duty of tonnage.”²²⁴ Even the dissenters did not pick up on the distinction, which—if there were anything to it—would have bolstered their conclusion that the levy, in the form of a property tax, was not a “duty of tonnage.”

2. User Fees Versus Taxes (or Duties)

A distinction that did matter in many of the old cases was between taxes or duties, which might be subject to the Tonnage Clause, and fees for services, which would not be taxes or duties to begin with and therefore would be unaffected by the Clause.²²⁵ To that common issue, which was not implicated in *Polar Tankers*²²⁶—this Subsection now turns.

It has been accepted for at least a century and a half that a fee imposed for services provided by a governmentally operated port, such as for wharfage or pilotage, is not a prohibited duty of tonnage.²²⁷ In *Cooley v. Board of Wardens*,²²⁸ one of the cases that developed the modern understanding of the Dormant Commerce Clause, the Supreme Court noted

²²⁰ Cannon v. New Orleans, 87 U.S. (20 Wall.) 577, 581 (1874) (emphasis added).

²²¹ 118 U.S. 455 (1886).

²²² *Id.* at 463.

²²³ *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2284, *reh’g denied*, 130 S. Ct. 31 (2009); *see id.* at 2287-89 (Roberts, J., concurring in part and concurring in the judgment).

²²⁴ *Id.* at 2284 (plurality opinion).

²²⁵ *See supra* note 11.

²²⁶ Valdez did not argue that its levy was a valid user fee, and given the way the levy was set up—applicable only to some vessels and then only to those using private docks (where specific governmental services were therefore not being provided), measured by value, and so on—such an argument would have been implausible anyway.

²²⁷ The classic treatises from the late-nineteenth century that were quoted earlier took this point for granted. *See, e.g., supra* notes 18-19 and accompanying text.

²²⁸ 53 U.S. (12 How.) 299 (1851); *see id.* at 321 (holding that a requirement that local pilots be hired to navigate a port was permitted despite the Commerce Clause).

in 1851 that tonnage duties were “known to the commerce of a civilized world to be as distinct from fees and charges for pilotage . . . as they were from charges for wharfage or towage, or any other local port-charges for services rendered to vessels or cargoes.”²²⁹ Not every governmental charge is a tax or duty.

We continue to live in a civilized world, at least when it comes to distinguishing between duties and user fees. Operating a port is expensive, and nothing in the Tonnage Clause prevents a state or state subdivision from charging for the services it renders—if that is what the charge actually represents. For example, in *Packet Co. v. St. Louis*,²³⁰ a 1879 case, the Supreme Court looked at whether a municipal corporation could “charg[e] and collect[] from those using its wharves and facilities, such reasonable fees as will fairly remunerate it for the use of its property.”²³¹ No constitutional problem exists, the Court held, so long as a governmental entity is merely receiving “just compensation.”²³²

To be sure, the distinction between taxes or duties, on the one hand, and user fees, on the other, does not jump out from the Founding debates or the language of the Constitution. But none of the constitutional terms for governmental charges outlined above works in context if understood to include charges for services provided by the government.²³³ How, for example, can Congress apportion a fee for services among the states on the basis of population, as it would have to if the fee were a direct “tax”? Should the Export Clause and the Import-Export Clause really be interpreted to preclude governmental bodies from charging those who use ports?²³⁴ And if a federal charge is imposed for use of a particular port, what would it mean to require that the charge be “uniform” throughout the

²²⁹ *Id.* at 314.

²³⁰ 100 U.S. 423 (1879).

²³¹ *Id.* at 427.

²³² *Id.* at 428-29 (discussing *Cannon v. New Orleans*, 87 U.S. (20 Wall.) 577 (1874), and *Packet Co. v. Keokuk*, 95 U.S. 80 (1877)).

²³³ See *supra* Part III.C.1. The distinction is recognized statutorily. For example, many state “taxes” are deductible in computing federal taxable income, but fees for benefits are not taxes. See I.R.C. § 164 (2006). Many foreign taxes are creditable or deductible in computing taxable income, but a payment to a foreign country for a specific economic benefit is not a tax. See *id.* §§ 901-03; 26 C.F.R. § 1.901-2(a)(2)(i) (2004) (“[A] foreign levy is not pursuant to a foreign country’s authority to levy taxes, and thus is not a tax, to the extent a person subject to the levy receives (or will receive), directly or indirectly, a specific economic benefit . . . from the foreign county in exchange for payment pursuant to the levy.”); Rev. Rul. 61-152, 1961-2 C.B. 42, 43-44 (“A tax is . . . not . . . payment for some special privilege granted or service rendered.”).

²³⁴ The Import-Export Clause includes a passage that creates some interpretational difficulty: it permits a state to lay imposts or duties without congressional consent if doing so is “absolutely necessary for executing its inspection Laws.” U.S. CONST. art. I, § 10, cl. 2. It has been said that “[t]he inspection fees which may properly be imposed under this clause are in no sense a duty on imports or exports, but are a compensation for services.” COOLEY, *supra* note 18, at 142-43. But if the fees are user fees, why mention them at all, as they would not have been precluded anyway?

United States? Surely the Constitution cannot require that the same fee be charged for services provided in every U.S. port, regardless of the value or cost of the services. One reason the user fee-tax distinction does not appear in the Founding debates is that the Founders, when discussing taxation, were not talking about charges for specific benefits.²³⁵

The critical question is not whether user fees should be treated differently than taxes or duties—that point is almost universally conceded in the case law and commentary²³⁶—but what principles should be used to distinguish fees from taxes.

a. *How to Tell Whether a Charge Is for Services*

There are no bright-line rules here or perfect consistency in the case law. Although hard judgment calls are inevitable, the ultimate question is whether a quid pro quo exists. If a governmental charge is intended to raise revenue in a general way, with nothing specifically provided in return (only the abstract benefits of living in a civilized society), the charge is a tax or duty.²³⁷ In contrast, if the payor receives something specific in return, and the amount of the charge is reasonably related to the value of that something, the charge is a user fee and cannot be a duty of tonnage.²³⁸ That transaction is no different from any other value-for-value exchange occurring in a commercial context.²³⁹ Of course, a charge should not be

²³⁵ See generally THE FEDERALIST NOS. 30, 31, 32 (Alexander Hamilton).

²³⁶ But see Claire R. Kelly & Daniela Amzel, *Does the Commerce Clause Eclipse the Export Clause? Making Sense of United States v. United States Shoe Corp.*, 84 MINN. L. REV. 129, 145-48 (1999) (arguing that user fees charged by the federal government that are associated with exportation should be invalid under the Export Clause). For a challenge to the Kelly-Amzel position, see Jensen, *Export Clause*, *supra* note 30, at 44-49.

²³⁷ See, e.g., *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 220 (1870) (“Beyond question the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed or to the shipowners”); cf. *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2284 (“[W]here a tax otherwise qualifies as a duty of tonnage, a general, revenue-raising purpose argues in favor of, not against, application of the Clause.”), *reh’g denied*, 130 S. Ct. 31 (2009).

²³⁸ See, e.g., *Packet Co. v. City of St. Louis*, 100 U.S. 423, 427-30 (1879) (“The sums paid . . . were exacted and paid as compensation for the use of an improved wharf and not for the mere privilege of entering or stopping at the port”).

²³⁹ An alternative approach, in making the tax-user/fee distinction, might be to focus more on inputs (i.e., whether the state’s entitlement to money comes from its ownership of a market asset rather than its exercise of the sovereign taxing power) than on outputs (i.e., whether the funds raised go to general governmental purposes rather than maintenance of the port). So understood, wharfage is a fee, not a duty of tonnage, because it can be charged only to boats that choose to use a wharf. Although this distinction is helpful—a user fee is consensual in an important sense—“choice” can take us only so far. One of the key distinctions in the minds of the Founders between direct and indirect taxes was that with an indirect tax on articles of consumption, a person could effectively decide whether to pay the tax by deciding whether to buy the taxed good. In contrast, with a direct tax like a capitation tax, avoiding the

characterized as a “user fee” for these purposes just because the state labels the charge as such. If a state were to impose a charge for use of its ports, but the charge had little or nothing to do with services provided by the state, it should not be characterized as a user fee.

In some historic cases, the characterization of a charge as a duty was relatively easy because it was clear that the government operating the port provided nothing in the way of services.²⁴⁰ In *Polar Tankers* itself, for that matter, Valdez did not even try to argue that the levy was a user fee.²⁴¹ Much earlier, in *Steamship Co. v. Portwardens*, decided in 1867, the Supreme Court concluded that a fixed charge imposed on any ship entering the port of New Orleans was a duty of tonnage, not a user fee, because the statute specifically provided that the charge was required “whether [the master and wardens] be called on to perform any service or not.”²⁴²

Reasonable people can sometimes differ as to whether a government might be required to provide services. In the 1874 *Cannon v. New Orleans* decision, for example, the Supreme Court rejected the city’s argument that the charge at issue was a wharfage fee because the charge by its terms would have applied whether or not a vessel tied up to any wharf within the port:

A tax which is, by its terms, due from all vessels arriving and stopping in a port, without regard to the place where they may stop, whether it be in the channel of the stream, or out in a bay, or landed at a natural river-bank, cannot be treated as a compensation for the use of a wharf.²⁴³

As an abstract matter, that may be true, but the *Cannon* Court read the statute in an otherworldly way. By its terms, the statute might technically have applied to a ship stopped “in the channel of the stream” or “landed at a natural river-bank,”²⁴⁴ where the port of New Orleans would obviously have provided no specific services, but it seems unlikely that the port intended to make any effort to collect charges in those circumstances. If one takes that

levy was difficult, if not impossible. See Jensen, *supra* note 127, at 2393-97. Like user fees, “duties” are avoidable in this sense, but they are nevertheless “taxes,” at least for some purposes.

²⁴⁰ See, e.g., *City of Oakland v. E. K. Wood Lumber Co.*, 292 P. 1076, 1080 (Cal. 1930) (per curiam) (holding that an “ordinance requiring every vessel to land at the city’s wharves, or, upon paying the same charge, be entitled to a permit to land at some other wharf in the city, is not a charge, as to vessels so landing elsewhere, for facilities or services furnished by the city” and thus was an unconstitutional duty of tonnage).

²⁴¹ The ordinance, by its terms, characterized the levy as a personal property tax, with no tie to services, and it is difficult for a government to seriously argue that its charge is other than as labeled. See *Polar Tankers*, 129 S. Ct. at 2283-85. But see *infra* notes 248-53 and accompanying text (describing the federal government’s posture in an Export Clause case and arguing that the Harbor Maintenance Tax was a user fee).

²⁴² *S.S. Co. v. Portwardens*, 73 U.S. (6 Wall.) 31, 34 (1867) (internal quotation marks omitted).

²⁴³ *Cannon v. New Orleans*, 87 U.S. (20 Wall.) 577, 580 (1874).

²⁴⁴ *Id.*

possibility seriously, however, as the *Cannon* Court did, the duty-of-tonnage result was easy.

Even if it is clear that a state government might be called on to provide some services, a question might remain about how close the relationship must be between the “fee” charged and the value of the services if the charge is to be treated as a user fee. On this point, we can transfer learning from Export Clause jurisprudence to the Tonnage Clause context. Although the Supreme Court has recently emphasized that the Export Clause is unique and that, in general, the principles of other clauses should not be used to interpret it (and vice versa),²⁴⁵ there is no obvious reason why that should be so—at least not on this issue. A fee for services is a fee for services, regardless of the constitutional provision involved. And it has been understood, at least since 1876, that if the federal government imposes a user fee affecting taxpayers engaged in exportation, the fee is not a “Tax or Duty . . . on Articles exported from any State”²⁴⁶ and is therefore not prohibited by the Export Clause.²⁴⁷ If a user fee is not a “tax or duty” under the Export Clause, a similar fee imposed by a state on vessels ought not to be a “duty of tonnage.”

The user-fee issue came up most recently in 1998 in *United States v. United States Shoe Corp.*,²⁴⁸ where the Court considered whether the federal Harbor Maintenance Tax (“HMT”), as it applied to exports, was an invalid tax or duty on exported articles.²⁴⁹ The HMT was an excise imposed “on any port use . . . [in] an amount equal to 0.125 percent of the *value* of the commercial cargo involved.”²⁵⁰ The statute defined “commercial cargo” as “any cargo transported on a commercial vessel,” including exported goods²⁵¹—hence the Export Clause question.

In *U.S. Shoe*, the government found itself in the awkward position of having to argue that the Harbor Maintenance Tax was not a “tax or duty.”²⁵² The government appeared to argue that it was a fee for use of ports: a

²⁴⁵ See *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 368 (1998) (“[T]he Export Clause’s simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority.”).

²⁴⁶ U.S. CONST. art. I, § 9, cl. 5.

²⁴⁷ See *Pace v. Burgess*, 92 U.S. 372, 375 (1875) (holding that a stamp on exported tobacco was a user fee not prohibited by the Export Clause because the charge “bore no proportion whatever to the quantity or value of the package on which [the stamp] was affixed”); see also *U.S. Shoe*, 523 U.S. at 369 (citing *Pace* with approval).

²⁴⁸ 523 U.S. 360 (1998).

²⁴⁹ *Id.* at 363.

²⁵⁰ I.R.C. § 4461(a)-(b) (1990), *invalidated by U.S. Shoe*, 523 U.S. 360. “[P]ort use” meant “(A) the loading of commercial cargo on, or (B) the unloading of commercial cargo from, a commercial vessel at a port.” *Id.* § 4462(a)(1).

²⁵¹ *Id.* § 4462(a)(3)(A) (internal quotation marks omitted).

²⁵² *U.S. Shoe*, 523 U.S. at 367-68.

“charge designed as compensation for Government-supplied services, facilities, or benefits.”²⁵³

To be a fee, said the Court, the HMT had to “fairly match the exporters’ use of port services and facilities.”²⁵⁴ Determining a “fair match” requires judgment, of course, and the process lends itself to a good amount of wiggle room. The benefits provided by governments are often of a sort not readily available in the marketplace, making a determination of a “fair match” problematic. Ultimately, and inevitably, characterization requires a facts-and-circumstances analysis, and resolution of the issue should depend on whether there is *correlation* between charge and value of services, not on whether absolute equivalence (whatever that might mean) exists.²⁵⁵

Deference will be given to legislative characterizations of charges; in 1876, the Court said it had to show “due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object.”²⁵⁶ But, as noted earlier, in *U.S. Shoe*, Congress’s characterization of the HMT was not helpful to the government’s case.²⁵⁷ The HMT failed constitutionally because the measure of the charge was “not a fair approximation of services, facilities, or benefits furnished to the exporters.”²⁵⁸ If a harbor usage *fee* is going to be measured by value, it should be measured by the benefit provided and not the goods being shipped.

The same sort of analysis ought to be appropriate under the Tonnage Clause: Is the charge “a fair approximation of services, facilities, or benefits furnished?” If so, it is ipso facto a user fee and not a duty of tonnage.

b. *Fees Measured by Tonnage*

If a charge imposed on a vessel *is* measured by tonnage, as the term was traditionally understood, that fact is not helpful to a state government arguing for the legitimacy of the charge. But neither is tying a charge to

²⁵³ *Id.* at 363. The proceeds were deposited in a fund from which Congress would appropriate amounts for harbor maintenance and development projects. *See* I.R.C. § 9505(a).

²⁵⁴ *U.S. Shoe*, 523 U.S. at 370.

²⁵⁵ *See id.* at 369 (“*Pace* establishes that . . . the connection between a service the Government renders and the compensation it receives for that service must be closer than is present here. Unlike the stamp charge in *Pace*, the HMT is determined entirely on an ad valorem basis. The value of export cargo, however, does not correlate reliably with the federal harbor services used or usable by the exporter.”).

²⁵⁶ *Pace v. Burgess*, 92 U.S. 372, 375-76 (1875) (stating that “[t]he rule by which [the amounts] are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted” and then noting the inevitable “latitude of discretion which the legislature is entitled”).

²⁵⁷ *See supra* text accompanying note 252.

²⁵⁸ *U.S. Shoe*, 523 U.S. at 363.

tonnage necessarily fatal. Long ago, Justice Cooley made that point in one of his treatises: “Wharfage dues are not taxes, and they may, therefore, be laid in proportion to tonnage.”²⁵⁹ In *Packet Co. v. Keokuk*,²⁶⁰ for example, decided in 1877, the Court stated that nothing in the previous case law “justifies the assertion that either wharfage or port charges are duties of tonnage, merely because they are proportioned to the actual tonnage or cubical capacity of vessels.”²⁶¹

As counterintuitive as this might initially seem, it is consistent with the distinction between fees and taxes. If the charge is sufficiently related to the value of services provided, it is a user fee and not a duty. And the value of services provided in a particular situation might very well correlate with the size of vessels involved: larger vessels require more services.

c. *Nature of the Services*

Another question that can arise is how specific to a particular vessel services provided by a port must be for a charge to be treated as a legitimate user fee. In its most recent, pre-*Polar Tankers* decision under the Tonnage Clause, *Clyde Mallory Lines v. Alabama ex rel. State Docks Commission*, the Supreme Court concluded that a charge on all vessels using the Port of Mobile was not a prohibited duty of tonnage. The amount of the charge depended on tonnage,²⁶² but, as already noted, that did not rule out user-fee status. And the state successfully argued that the charge was a fee for policing the harbor to ensure vessel safety.²⁶³

Although taxpayer Clyde Mallory Lines had made no specific request for services, the Court agreed with the state that tonnage was a reasonable measure of the value of safety services received by any user of the port.²⁶⁴ The value of protective services for a large vessel is higher, in general, than the value of services in protecting a small one.

That result is not bizarre, but it is peculiar to treat *policing* as the sort of governmental service that a user fee might cover. Providing for public safety, on land or at sea, was traditionally thought to be a function of

²⁵⁹ COOLEY, GENERAL PRINCIPLES, *supra* note 19; *see supra* text accompanying note 19.

²⁶⁰ 95 U.S. 80 (1877).

²⁶¹ *Id.* at 87; *see also* *Packet Co. v. Catlettsburg*, 105 U.S. 559, 562 (1881) (“[I]t is no objection to the ordinance fixing the amount of [a purported wharfage fee] that it was measured by the size of the vessel, and that this size was ascertained by the tonnage of each vessel.”).

²⁶² *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm’n*, 296 U.S. 261, 263 (1935). *Clyde Mallory Lines* had vessels of “500 tons and over,” subject to a fee of \$7.50. *Id.* (internal quotation marks omitted).

²⁶³ *See id.* at 266-67.

²⁶⁴ *Id.* at 267.

government,²⁶⁵ with no direct linkage between amounts paid and value of benefit received. We generally pay for the benefits of civilized society, that is, with taxes, not fees. The Court in *Clyde Mallory Lines* held otherwise on this point, however: “It is not any the less a service beneficial to appellant because its vessels have not been given any special assistance.”²⁶⁶

d. *Deference to State Characterization*

In addition to what it says about measuring fees by tonnage and treating safety services as no different from wharfage or pilotage, *Clyde Mallory Lines* illustrates a judicial reluctance to question governmental characterizations of particular charges.²⁶⁷ Deference is not complete, of course, but for legislators to cross the line, they must take giant steps.

The most striking example of judicial deference in the Tonnage Clause context was *Transportation Co. v. Parkersburg*,²⁶⁸ decided in 1882, where the Supreme Court refused to look beyond the language of a municipal ordinance.²⁶⁹ The ordinance characterized a charge imposed on vessels using city docks as a wharfage fee, with the measure of the charge determined by the tonnage of the vessel, and the Court, over one dissent, looked no further.²⁷⁰

Indeed, the Court determined that it had no jurisdiction to undertake a more detailed inquiry of a local matter.²⁷¹ The Court had concluded in *Cooley v. Board of Wardens* that a local requirement that pilots be hired to navigate a port was consistent with the Dormant Commerce Clause.²⁷² The rule affected interstate and foreign commerce, to be sure, but only at the margins. Wharves, said the *Transportation Co.* Court, are similarly local in nature, and federal courts have no jurisdiction to hear such disputes.²⁷³

²⁶⁵ See, e.g., COOLEY, GENERAL PRINCIPLES, *supra* note 19, at 227 (describing the police power as “a most comprehensive branch of sovereignty”).

²⁶⁶ *Clyde Mallory Lines*, 296 U.S. at 266.

²⁶⁷ See *id.* at 267 (“State regulations of harbor traffic, although they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden.”). Just as courts are hesitant to second guess Congress on Export Clause matters, see *supra* text accompanying note 256, they are inclined to defer to state legislatures trying to avoid the strictures of the Import-Export and Tonnage Clauses.

²⁶⁸ 107 U.S. 691 (1883).

²⁶⁹ *Id.* at 707 (“It cannot be supposed that the law authorizes exorbitant [wharfage rates] to be made; but whether the charges exacted are exorbitant or not can only be determined by that law.”).

²⁷⁰ *Id.* at 706-07.

²⁷¹ *Id.* at 707 (“[T]he question of reasonableness of wharfage . . . is only determinable by the laws of the State within whose jurisdiction the wharf is situated.”).

²⁷² *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 321 (1851).

²⁷³ *Transp. Co.*, 107 U.S. at 707.

Conceptions of the scope of the Commerce Clause have changed so dramatically since 1882 that the jurisdictional issue in *Transportation Co.* would not be resolved in the same way today. But the reluctance of judges to question legislative characterizations remains as powerful now as it was then.

3. Discrimination and Duties of Tonnage

Perhaps the most debated issue under the Tonnage Clause—it certainly was contentious in *Polar Tankers*—is the question of discrimination. Is a duty of tonnage a levy that targets vessels, or is it possible that even a widely applicable personal property tax might run afoul of the Tonnage Clause insofar as it applies to vessels? This Article’s answer is that a levy can violate the Tonnage Clause, as written and originally understood, without being discriminatory, but discrimination now seems to be widely accepted as a necessary element of a Tonnage Clause claim.

One practical, preliminary point worth making is that, whatever the ultimate answer to the legal question, a state levy that singles out vessels for taxation is more likely to face a Tonnage Clause challenge. Had Valdez openly and notoriously imposed a more generally applicable personal property tax, the likelihood of a tanker company’s challenge would have been lessened. Instead, the Valdez ordinance by its terms applied only to boats and vessels, and then only to those of a particular length.²⁷⁴ The Valdez officials might just as well have labeled the ordinance “A Levy to Elicit Challenges Under the Tonnage Clause.”

In *Polar Tankers*, the tanker company had argued that “[t]his anti-discrimination principle, which also applies under the Import-Export Clause, is an essential element of Tonnage Clause doctrine.”²⁷⁵ That statement accurately describes the understanding of the Tonnage Clause reflected in a multitude of Supreme Court cases and in treatises from the days when the Clause was a hot-button issue.²⁷⁶ For example, W. H. Burroughs wrote in 1877 that “[t]he prohibition only comes into play where [vessels] are not taxed in the same manner as other property of citizens of the State, but where the tax is imposed upon the vessel, the instrument of commerce, without reference to the value of the vessel.”²⁷⁷ Burroughs’s statement, with one word (inadvertently?) changed—the “but” became an

²⁷⁴ See *supra* note 32.

²⁷⁵ Brief for the Petitioner, *supra* note 12, at 10 (advocating the view that the Founders deliberately included the Tonnage Clause to prevent states with access to seaways from using onerous fees to take advantage of their landlocked neighbors).

²⁷⁶ It may not accurately reflect Import-Export Clause doctrine, however. See *infra* notes 295-97 and accompanying text (noting that the Supreme Court has not explicitly held that discrimination is necessary for an Import-Export Clause claim).

²⁷⁷ BURROUGHS, *supra* note 95, at 91.

“or,” making the Tonnage Clause more likely to apply—was blessed by the Supreme Court the next year in *Transportation Co. v. Wheeling*.

With that authority on the books—that is, requiring an investigation as to whether a levy reaches vessels “in the same manner” as other property—it made sense tactically for Polar Tankers to take the position it did. It would have been foolhardy for the company to argue that any property tax reaching vessels with a tax situs in a port is invalid under the Tonnage Clause. That theory was unlikely to attract a majority of the Justices,²⁷⁸ and, besides, the argument that the Valdez ordinance discriminated against vessels was a strong one.²⁷⁹ Polar Tankers wanted to win its case, not to push a broader theory that was unnecessary for the Court to rule in the company’s favor.

The plurality in *Polar Tankers* took as its starting point the position that the Tonnage Clause cannot be interpreted to prohibit all state property taxes on ships—just discriminatory ones—because otherwise, vessels would be treated better than other forms of property.²⁸⁰ But because the Valdez levy did single out large vessels, it was not imposed on vessels “in the same manner” as on other property. Indeed, with the ordinance interpreted in isolation, without regard to other ordinances or state statutes,²⁸¹ there was no “other property” being taxed at all. Justice Breyer wrote for the plurality that “[w]e can find little, if any, other personal property that [Valdez] taxes.”²⁸²

A levy that was so apparently discriminatory (and that could not have been seen as a user fee) was problematic, and Justice Alito was correct that

²⁷⁸ With the benefit of hindsight, we know that two Justices (i.e., Roberts and Thomas) would have been receptive to such an argument. *See* *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2288 (Roberts, J., concurring in part and concurring in the judgment) (“The Tonnage Clause applies to ‘any Duty of Tonnage,’ regardless of how that duty compares to other commercial taxes.” (quoting U.S. CONST. art. I, § 10, cl. 3)), *reh’g denied*, 130 S. Ct. 31 (2009). Justice Alito could likely have been convinced as well. *See id.* at 2289 (Alito, J., concurring) (“[E]ven if the Tonnage Clause permits a true, evenhanded property tax to be applied to vessels, the Valdez tax is an unconstitutional duty of tonnage.”).

²⁷⁹ Justice Alito’s concurrence pointed out that if the Valdez levy was discriminatory, the Court had no need to consider the status of a nondiscriminatory levy. *Id.* at 2289 (Alito, J., concurring); *see also supra* text accompanying note 62.

²⁸⁰ *Polar Tankers*, 129 S. Ct. at 2285.

²⁸¹ *See supra* text accompanying notes 48-55.

²⁸² *Polar Tankers*, 129 S. Ct. at 2285. Had the “in the same manner” test, so understood, been satisfied, the plurality would presumably have approved the levy. *See id.* (pointing out numerous exceptions in Valdez’s property taxation scheme, which placed the burden almost entirely on ships). Concurring Justice Alito said that it was unnecessary to provide any inference about the nondiscriminatory situation because the Valdez levy so clearly did single out vessels. *Id.* at 2289 (Alito, J., concurring). But the Burroughs passage blessed in *Transportation Co.*—argued the *Polar Tankers* dissenters—requires only that a property tax be measured by value, whether or not other types of personal property are reached. With that understanding, the Valdez levy would have survived scrutiny. *See id.* at 2291-92 (Stevens, J., dissenting).

it was unnecessary for the Court to infer any broader principles.²⁸³ Nevertheless, the question remains whether discrimination is in fact an “essential element” for a levy that is in the form of a personal property tax to be rejected under the Tonnage Clause. The Clause “says nothing about discrimination,”²⁸⁴ as Chief Justice Roberts and Justice Thomas emphasized, “and it should hardly come as a surprise that a constitutional ban on tonnage duties would give preferential treatment to vessels.”²⁸⁵ In their view, the states were not supposed to be taxing these instruments of commerce at all, without congressional permission: “Such protection reflects the high value the Framers placed on the free flow of maritime commerce.”²⁸⁶

The understanding of the role of discrimination in Export Clause jurisprudence might help us understand how the Tonnage Clause should be interpreted. A previous article on the Export Clause argued that the Import-Export Clause, which applies to the states and has been interpreted permissively—as prohibiting only levies on imports or exports that discriminate against those goods²⁸⁷—and the Export Clause, which the Supreme Court in the 1990s described as an absolute prohibition on such taxes, ought to be interpreted consistently.²⁸⁸ This had been the case historically. Indeed, Chief Justice John Marshall took this position, writing in 1827 that the two clauses should have a common core: “There is some diversity in language, but none is perceivable in the act which is prohibited.”²⁸⁹

Nevertheless, in the two Export Clause cases decided in the 1990s, the Supreme Court concluded that the jurisprudence of the Import-Export Clause was not helpful in interpreting the Export Clause (and, presumably, vice versa).²⁹⁰ The Import-Export Clause contains nothing like the clear “textual command”²⁹¹ of the Export Clause, said the Court, and it therefore discarded the long-time understanding that the two clauses should be read as a package, with mutually reinforcing goals.²⁹² “*IBM*[, the first of the two

²⁸³ See *supra* text accompanying notes 61-62.

²⁸⁴ *Polar Tankers*, 129 S. Ct. at 2288 (Roberts, J., concurring in part and concurring in the judgment).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ The Supreme Court has not explicitly said this, see *infra* notes 295-97 and accompanying text, but it is often assumed to be the case. See, e.g., *Polar Tankers*, 129 S. Ct. at 2283 (plurality opinion).

²⁸⁸ See Jensen, *Export Clause*, *supra* note 30, at 71.

²⁸⁹ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827).

²⁹⁰ See, e.g., *United States v. IBM Corp.*, 517 U.S. 843, 857, 859 (1996) (acknowledging that there are key textual differences between the two clauses that render them incompatible with each other, as well as noting that the two clauses serve opposite goals).

²⁹¹ See *id.* at 851 (“Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid.”).

²⁹² *Id.* at 852-53.

Export Clause cases,] plainly stated,” wrote Justice Ruth Bader Ginsburg in *U.S. Shoe*, the second case, “that the Export Clause’s simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority.”²⁹³ The 1990s Court thought it knew better than Chief Justice Marshall about the relationship between the Export Clause, where discrimination is irrelevant, and the Import-Export Clause.²⁹⁴

Not all of the Justices were convinced that the Import-Export Clause was directed only at discriminatory taxation. In *IBM*, Justice Thomas wrote for a majority of seven and suggested that Import-Export Clause jurisprudence might indeed preclude a state-imposed, “nondiscriminatory tax directly on goods in import or export transit”²⁹⁵—or at least that the government had not convinced them otherwise—just as the Export Clause altogether precludes a tax on articles exported.²⁹⁶ And Justice Thomas emphasized that regardless of the conventional wisdom, “this Court’s Import-Export Clause cases have not upheld the validity of generally applicable, nondiscriminatory taxes that fall on imports or exports in transit.”²⁹⁷ The assumption nevertheless remains that discrimination is required for a state levy to be struck down under the Import-Export Clause, while the Court has explicitly held that no such requirement should be imported (so to speak) into Export Clause analysis.

Neither the language, the purposes, nor the original understanding of the Import-Export Clause, however, suggests that it should have been interpreted in a way fundamentally different from the Export Clause. This Article’s argument is not that the “absolute prohibition” that the Court saw in the Export Clause was wrong; it is that Import-Export Clause jurisprudence had gone off-track because the Court had not seen a similarly absolute prohibition in that Clause. And the Tonnage Clause is no less absolute in its commands than the Import-Export Clause.

The Import-Export Clause is permissive, in a way, in that Congress can authorize a state to levy a tax on imports or exports.²⁹⁸ If that does not happen, however, and assuming the contemplated levies go beyond what is

²⁹³ *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 368 (1998).

²⁹⁴ *See IBM Corp.*, 517 U.S. at 857 (“We have good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence. . . . [M]eaningful textual differences exist [between the two clauses] and should not be overlooked.”).

²⁹⁵ *Id.* at 861-62.

²⁹⁶ *Id.* at 863 (“We conclude that the Export Clause does not permit assessment of nondiscriminatory federal taxes on goods in export transit.”).

²⁹⁷ *Id.* at 862.

²⁹⁸ By contrast, the Export Clause is a limitation on Congress, and Congress cannot waive such a limitation. *E.g., id.* at 861 (“[T]he Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all.”).

“absolutely necessary for executing [the state’s] inspection Laws,”²⁹⁹ the language of the Import-Export Clause is no less absolute than that of the Export Clause. The term “tax or duty” must be broader than “duty”—it certainly is not narrower—so that the prohibition under the Export Clause is broader than that under the Import-Export Clause, as the Court noted in *IBM* and *U.S. Shoe*.³⁰⁰ But both clauses ultimately command: Do not impose the prohibited levies! “The Export Clause forbids a national ‘tax or duty’ on ‘articles exported’; the Import-Export Clause generally forbids state ‘duties’ on ‘exports’ without congressional consent.”³⁰¹ Neither Clause hints that discrimination is relevant.

The divergence in Import-Export Clause and Export Clause jurisprudence—how by the 1990s discrimination was seen as relevant, and maybe critical, to Import-Export Clause analysis but not under the Export Clause—was due to historical accident, not reasoned analysis.³⁰² And, if the Import-Export Clause and the Tonnage Clause are directed at the same goal—ensuring the primacy of the national government in regulating commerce—then the Tonnage Clause, also an absolute prohibition on state duties of tonnage without congressional permission, ought to be interpreted in a similarly robust way. Doing so would have the additional salutary effect of eliminating the inevitable issue about how pervasive a personal property tax that reaches vessels must be so as not to be considered discriminatory.³⁰³

Discrimination’s irrelevance is fairly clear, but, notwithstanding the seemingly absolute language of the Tonnage Clause, and of the Import-Export Clause as well, it remains the case that discrimination is likely to remain an “essential element” of any claim under those clauses. The Supreme Court has not stated this explicitly about the Import-Export Clause, and in *Polar Tankers*, only a plurality said discrimination is an

²⁹⁹ U.S. CONST. art. I, § 10, cl. 2. This language in the Import-Export Clause seems to simply recognize the legitimacy of user fees of a particular sort. *See supra* note 234.

³⁰⁰ *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 368-69 (1998); *IBM Corp.*, 517 U.S. at 857-59.

³⁰¹ Jensen, *Export Clause*, *supra* note 30, at 68 (quoting U.S. CONST. art. I, § 10, cl. 2).

³⁰² *See id.* at 70-71. According to this theory, the twentieth-century Court decided taxation cases exclusively under the Import-Export clause, ignoring the Export Clause for decades after 1923. *Id.* at 17 & n.73. During that time, the Court interpreted the Clause ever more permissively. *See, e.g., IBM Corp.*, 517 U.S. at 859. The scope of the Import-Export Clause evolved as the Court analyzed it, while Export Clause jurisprudence stagnated as the Court ignored it. *See Jensen, Export Clause, supra* note 30, at 70. Only when the Court revisited the Export Clause in 1996 in *IBM* did it discover this divergence, and to avoid rendering the Export Clause obsolete, the Court was forced to sever the connection between the two Clauses. *See IBM Corp.*, 517 U.S. at 853.

³⁰³ *See Taylor Simpson-Wood, Polar Tankers, Inc. v. City of Valdez, Alaska: A New Spin on the Tonnage Clause Leaves Lower Courts and Government Taxing Authorities High and Dry*, 33 *HAMLIN L. REV.* 19, 37 (2010) (“After *Polar Tankers*, both lower courts and taxing authorities are left to wonder just how much additional property must be taxed so that vessels may also be taxed with impunity.”).

essential element of a Tonnage Clause claim. But the plurality had inertia on its side, and inertia has legal effect.³⁰⁴

IV. FINAL THOUGHTS: *POLAR TANKERS*, STATUTORY DRAFTING, AND THE TONNAGE CLAUSE

Polar Tankers was rightly decided. The City of Valdez levied the tax because of the use of a port; the measure of the tax was close to the original conception of tonnage (although that was probably not necessary for the Tonnage Clause to apply); the levy was not even arguably a user fee (and, indeed, Valdez did not try to argue that it was); and the levy applied (or so it was assumed) only to vessels using Valdez's ports. Chief Justice Roberts and Justice Thomas were correct that the holding could have gone further: the levy could have been struck down even if it had not been deemed discriminatory. Nevertheless, if a tax that is in the form of a property tax *does* discriminate against vessels, it is a fortiori an invalid duty of tonnage.

A few loose ends relating to *Polar Tankers* remain. This final Part discusses whether Valdez's problem was simply attributable to bad drafting and whether the city could have gotten the desired results with an economically equivalent levy that would not have implicated the Tonnage Clause. It then examines whether any great purpose is still served by enforcing the Tonnage Clause in general, or in a particular situation like that in *Polar Tankers*.

A. *Drafting and the Tonnage Clause*

On the drafting question, the answer is clear: if Valdez's goal was to impose a levy on oil tankers, and basically only on oil tankers, doing so was impossible given the Tonnage Clause. Yes, the Valdez government could have crafted a levy that reached oil tankers "in the same manner" as it reached a significant body of other personal property—interpreting "in the same manner" the way the *Polar Tankers* plurality did—and thus could have satisfied at least six of the nine Justices. But enacting such a levy would have fundamentally changed the tax base at which the levy was aimed.

The city's goal was to tax oil tankers, not to tax personal property more generally. Valdez's unquestionably discriminatory goal, reflected in the language of the ordinance, was one reason a clear constitutional problem existed. Drafting a more broadly applicable personal property levy

³⁰⁴ Cf. *supra* text accompanying notes 168-72 (suggesting that the Supreme Court as a whole is unlikely to revisit the view—which is perhaps inconsistent with the original understanding—that the Import-Export Clause applies only to foreign commerce).

would have required a significant, substantive change in the law—with the attendant political pushback that would have resulted from others facing an increased tax bill—not merely a change in the language of the ordinance.

B. *The Purposes of the Tonnage Clause and Polar Tankers*

This Article began by noting the common view—common, that is, among the three people who think about the Tonnage Clause—that constitutional provisions like the Clause are historical artifacts. Even if the Clause was considered important in 1789, the argument might go, we have moved so far beyond the circumstances of that time that we could ignore the Clause, and the Republic would survive.

The Republic would survive—indeed, it would survive the repeal or the decline into desuetude of many constitutional provisions—but that is not the standard we ordinarily apply in constitutional interpretation. The Tonnage Clause issues were hard to avoid in *Polar Tankers*,³⁰⁵ and the case was close to a sure thing, at least in the minds of most Supreme Court Justices. We could countenance such a levy only if we were to ignore an explicit constitutional limitation on state power, and we might have to ignore the purposes of the Clause as well. As the plurality wrote, Valdez’s levy, “no less than a similar duty, may . . . ‘ta[x] the consumption’ of those in other states. It is consequently the kind of tax that the Tonnage Clause forbids.”³⁰⁶

But—a critic of *Polar Tankers* might say—it really was not clear that the purposes of the Tonnage Clause were served by invalidating the Valdez levy. For one thing, it was not at all evident that the levy “taxed the consumption” of consumers elsewhere. How could the costs of the levy have been passed on, dollar for dollar, given the worldwide petroleum market? It is not as though ConocoPhillips, the parent of Polar Tankers, could have charged consumers in other states more for Alaskan oil than it could have charged for similar oil that did not pass through Valdez. If the price at the pump were higher for gasoline refined from Alaskan oil, who would buy it?

More generally, the extent to which taxes imposed on businesses can be passed on to consumers depends on market forces. If provisions like the Tonnage Clause were based on mistaken assumptions about the economic

³⁰⁵ Once the Court agreed to hear the case, the Tonnage Clause could have been avoided only if the Court had struck down the levy on the Due Process-Commerce Clause claim made by Polar Tankers. See *supra* text accompanying notes 42-46.

³⁰⁶ *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2287 (citation omitted) (quoting Letter from James Madison to Professor Davis, *supra* note 150), *reh’g denied*, 130 S. Ct. 31 (2009).

incidence of taxation,³⁰⁷ perhaps we should curtail our enthusiasm for enforcing those provisions. Maybe we should not apply the Tonnage Clause in cases with real doubt as to whether the “consumption of those in other states” is being taxed.

Still another reason modern theorists might question the application of the Tonnage Clause to a levy like Valdez’s is that the Founders’ concern that state taxation would create frictions and harm national unity seems far-fetched these days.³⁰⁸ It is hard to imagine anyone, except those directly affected, getting worked up about duties imposed on ships. Other than oil executives, who outside Valdez knew, or cared, about the ordinance? Anyway, the market protects against abusive taxation, as Justice Story noted long ago.³⁰⁹ States fighting for business are unlikely to impose duties of tonnage because doing so could drive business to competing ports in other states. So why worry about the Tonnage Clause?

Finally, the dissenters in *Polar Tankers* raised another point: even if the burden of the Valdez levy could be passed on to consumers in other jurisdictions—unlikely in full, but there could be effects at the margins—how does a duty of tonnage differ economically from any other levy that Alaska (or Valdez) might have imposed on oil operations?

Taxes imposed on ships exporting . . . oil have the same effect on commerce in oil as do taxes on oil-production property or the oil itself, and Alaska’s authority to impose taxes on oil and oil-production property is undisputed. From an economic or political point of view, there is no difference between Alaska’s geographical control over the area in which the oil is produced and the port from which it is exported.³¹⁰

Is there any longer a reason to treat state taxes on vessels, and state taxes on imports and exports, any differently, *as a matter of constitutional law*, than other state levies on business operations?

There are several responses to these criticisms. To begin with, it is true that our increased economic sophistication should cause us to view Tonnage Clause claims skeptically. But skepticism is not justification for ignoring a specific provision of the Constitution, one that is part of the structure intended to ensure federal control over commerce. That goal is important, and the Valdez levy seemed so clearly to violate the Tonnage Clause that a different result would have written the Clause out of the Constitution. Whether one likes the Tonnage Clause or not, it remains. And it is worth remembering that if Valdez’s goals were defensible ones, the city had a way to get what it wanted: ask Congress for permission to impose

³⁰⁷ See *supra* note 147 and accompanying text (discussing the Founders’ assumptions about the incidence of indirect taxes).

³⁰⁸ See *supra* notes 142-46 and accompanying text.

³⁰⁹ See STORY, *supra* note 141, § 1019.

³¹⁰ *Polar Tankers*, 129 S. Ct. at 2294 (Stevens, J., dissenting).

the levy. It has been a long time since such a request has been entertained,³¹¹ but it has happened and it could happen again.

If there were no Tonnage Clause, it is true that market forces would still prevent many seaboard states from imposing tonnage duties. For those states, the Tonnage Clause might be irrelevant, but it would also do them no harm.³¹² The situation in Valdez was different, however. Given that Valdez is the terminus of the Trans-Alaska Pipeline, tanker companies could not, all of a sudden, have shopped around to find a friendlier port in the way that ships carrying cotton could. The Valdez levy might not have been a clear tax on the “consumption” of those in other states, but it was certainly intended to pull largely captive, out-of-state enterprises into the Valdez tax system. That factor should be taken into account in Tonnage Clause jurisprudence.³¹³

Finally, the point made by the dissenters in *Polar Tankers* is a peculiar one. It may be that—economically and politically—a tax on oil tankers is no different from a tax on oil-production property, and everyone can agree that the Tonnage Clause would not forbid a tax of that latter sort. But the Tonnage Clause does what it does. It treats taxes on means of transport differently from taxes on other items. And the Import-Export Clause also serves its particular purpose. Maybe if the Founders had been better able to see the economic future, they would have concluded that other forms of state taxation affecting commerce should have been forbidden as well. That they did not do so hardly supports ignoring the limitations included in the Constitution.

Sometimes problems of this sort—an apparent incongruity between goals and actual provisions—can be taken care of by imaginative interpretation. Nineteenth-century jurists had no difficulty in extending the meaning of “duty of tonnage” to apply to levies generally on vessels, even if not directly on tonnage. Indeed, if they had not done that, the Tonnage Clause would have been gutted.³¹⁴ And we can reasonably interpret the Clause today, if necessary, to apply to duties on means of transport, like aircraft, unknown in 1789.³¹⁵

But trying to eliminate the incongruity noted by the dissenters by extending the Tonnage Clause’s prohibition to taxes on commerce generally would stretch the language beyond recognition. Of course, that is not what the dissenters were arguing for, but it is no more persuasive to

³¹¹ See *supra* note 17.

³¹² A state is not damaged by a clause that forbids it from doing something it would not do anyway.

³¹³ This point is not one that would have been apparent to the Founders because it was assumed then, and for decades thereafter, that a state could not tax a vessel the home port of which was elsewhere. See *supra* note 46.

³¹⁴ See *supra* notes 110-23 and accompanying text.

³¹⁵ See *supra* notes 127-28 and accompanying text.

conclude that the Clause should be inapplicable to duties that it was intended to reach. We should not ignore a constitutional restriction because it is narrower than it might otherwise have been.

If it is incongruous to treat duties on vessels differently than taxes on other commercial activities, so be it. Life is incoherent; not all constitutional anomalies can be eliminated through interpretation. And focusing on incongruities should not cause us to overlook the core of good sense in the Tonnage Clause and other provisions dealing with federal control over commerce.

CONCLUSION

The Tonnage Clause is not the most important provision in the Constitution, but it is full of wonderful interpretive issues, enriched by history. And it deals with a nontrivial matter: federal regulation of commerce. For purely intellectual reasons, the Clause does not deserve to be ignored. And, as *Polar Tankers* shows, quirky though the Clause may be, it deals with matters in which real dollars can be at stake. It is a small clause, but there are those who love it.