

# THE MISINTERPRETATION OF THE TONNAGE CLAUSE IN *POLAR TANKERS, INC. V. CITY OF VALDEZ*

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## ABSTRACT

*In its recent decision in Polar Tankers, Inc. v. City of Valdez, the United States Supreme Court held that a property tax implemented by the City of Valdez violated the Tonnage Clause of Article I, Section 10 of the United States Constitution. In this Note, the Author argues that the Supreme Court incorrectly interpreted the Court's prior Tonnage Clause jurisprudence. The Author begins by outlining the factual background of the dispute between Polar Tankers, Inc. and the City of Valdez. Next, the Author provides a historical overview of the Tonnage Clause, discussing both the Framers' intent in drafting the clause and the Supreme Court's evolving Tonnage Clause jurisprudence. He then summarizes the decisions of the lower courts in the Polar Tankers case, as well as the Supreme Court members' plurality, concurring, and dissenting opinions. Finally, the Author argues that the Court misinterpreted prior Tonnage Clause jurisprudence, and that a proper interpretation compels the conclusion that the property tax imposed by the City of Valdez did not violate the Tonnage Clause.*

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## INTRODUCTION

The Framers of the Constitution, when they convened to write the document that would define the scope of federal power and determine the "fate of an empire,"<sup>1</sup> were, for the most part, exceptionally wary of the rivalries that existed among the independent states. They believed that such rivalries, if left unchecked, would cripple the fledgling nation.<sup>2</sup> Since the end of the Revolution, the Founders had witnessed interstate rivalries foment firsthand as the separate states freely pursued their own interests, unrestrained by a federal government largely devoid of power under the Articles of Confederation.<sup>3</sup> Thus, the Framers sought to stem

1. THE FEDERALIST NO. 1 (Alexander Hamilton). Though the avowed purpose of the delegates who met in Philadelphia for the Constitutional Convention of 1787 was to revise the Articles of Confederation, the result was the creation of a new, more powerful national government. *See, e.g.,* THE FEDERALIST NO. 40 (James Madison); EDWIN MEESE, ET AL., THE HERITAGE GUIDE TO THE CONSTITUTION 178 (2006); JOSEPH J. ELLIS, AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC 99 (2007) (stating that the Founders recognized that "the Articles of Confederation did not need to be revised, they needed to be completely replaced with a fully empowered national government that possessed a clear mandate to coerce the states in . . . domestic policy.").

2. *See, e.g.,* JOHN R. VILE, A COMPANION TO THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS 44 (4th ed. 2006) (noting the "[F]ramers' concern over state rivalry"); Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 53 (1988) (arguing that "[i]nterstate rivalry was the Convention's greatest concern").

3. *See, e.g.,* JOHN FERLING, A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC 274 (2003) ("All nationalists concurred that the power of the

the potential conflict that would arise among those states with a geographic advantage and those without, recognizing that certain states with access to shipping lanes or natural resources would be able to leverage their superior situation to the detriment of their neighbors.<sup>4</sup> To that end, the Constitution that arose from the Philadelphia Convention contained provisions to facilitate trade among the states.<sup>5</sup> Among these provisions was the Tonnage Clause, which prohibits individual states from placing any duties on vessels when those duties “operate to impose a charge for the privilege of entering, trading in, or lying in a port.”<sup>6</sup> Through the nation’s first century and a half, the Supreme Court addressed the Tonnage Clause with relative frequency; the Clause, however, has taken on decreased importance in recent history.<sup>7</sup>

The United States Supreme Court in *Polar Tankers* held, in a 7-2 opinion (though the simplicity of that figure obscures the fact that the Court split along multiple lines), that a tax imposed by the City of Valdez, Alaska, on ships making use of its harbor was an unconstitutional levy imposed for the privilege of using Valdez’s ports, and was consequently a violation of the Tonnage Clause.<sup>8</sup> In deciding that the Valdez tax violated the Tonnage Clause, the Supreme Court overturned the decision of the Alaska Supreme Court, which had held that the tax was not a duty on tonnage in violation of the constitutional prohibition but was instead a “fairly apportioned *ad valorem* tax<sup>9</sup> on personal property.”<sup>10</sup> The courts at both levels examined previous Tonnage Clause cases, which have shown a marked evolution in the meaning and application of the Clause since its inception.<sup>11</sup> Additionally, at the Supreme Court level, all of the opinions—plurality, concurrence, and dissent—relied heavily on earlier interpretations of the

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states had to be reduced . . . [and insisted] that the states ‘pursued their own whimsical Schemes,’ indifferent to the national interest.”).

4. See *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2282 (2009) (citing 3 Records of the Federal Convention of 1787, at 519, 542 (1966)); see also THE FEDERALIST NO. 7 (Alexander Hamilton).

5. This includes the Commerce Clause and the Import/Export Clause, discussed *infra* Part II.B.

6. *Polar Tankers*, 129 S. Ct. at 2282 (citing *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm’n*, 296 U.S. 261, 265–66 (1935)). The history and application of the Tonnage Clause is discussed at length *infra* Part II.

7. The Supreme Court dealt with cases involving the Tonnage Clause only sparingly throughout the twentieth century.

8. *Polar Tankers*, 129 S. Ct. at 2282, 2287.

9. An “*ad valorem* tax” is “[a] tax imposed proportionally on the value of something . . . rather than on its quantity or some other measure.” BLACK’S LAW DICTIONARY 1496 (8th ed. 2004).

10. *City of Valdez v. Polar Tankers, Inc.*, 182 P.3d 614, 622 (Alaska 2008).

11. See *infra* Part II.C.

Tonnage Clause to divine the intent of the Framers in reaching their respective conclusions.<sup>12</sup>

Part I of this Note discusses the background of the dispute over the Valdez tax, in an attempt to put the litigation into perspective. Part II examines the Tonnage Clause generally, focusing on the Framers' intent as well as the evolution of the Tonnage Clause throughout Supreme Court jurisprudence. Part III closely examines the decision at the Alaska Superior Court and Alaska Supreme Court levels and proceeds to evaluate the three distinct approaches elucidated in the fractured United States Supreme Court opinion. Finally, Part IV takes the position that the United States Supreme Court misinterpreted previous Tonnage Clause cases when it decided against the City of Valdez. The Note then uses elements of both the Supreme Court's plurality and dissenting opinions, as well as the opinion of the Alaska Supreme Court, to argue that the Valdez tax was, in fact, a valid property tax that did not violate the Constitution.<sup>13</sup>

## I. THE DISPUTE

The 2009 Supreme Court decision in *Polar Tankers* concluded a decade-long dispute between the City of Valdez, which imposed the tax in question, and the various oil shipping companies that were subject to it. Though the Framers could not have foreseen the effects the Tonnage Clause would have on a city 3500 miles removed from Independence Hall, they would no doubt have been unsurprised by the fact that the recent litigation, well over two hundred years removed from the Clause's ratification, was focused on a valuable commodity abundant in one state and desired by the rest.

### A. The Pipeline

As petroleum production in the United States began to slow in the late 1960s, a new source of oil was discovered at Prudhoe Bay on the North Slope of Alaska.<sup>14</sup> After its discovery in 1968, a system was

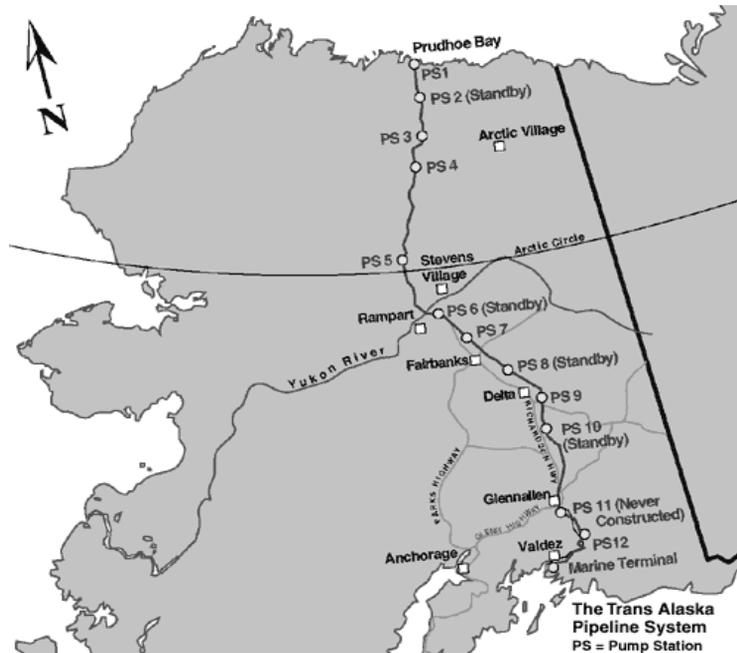
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12. See *infra* Part III.

13. Though the original complaint brought by *Polar Tankers* alleged violations of the Commerce and Due Process Clauses in addition to the Tonnage Clause claims which were argued at both the State Superior and State Supreme Court levels, the Supreme Court's opinion "begin[s], and end[s], with *Polar Tankers'* Tonnage Clause claim." *Polar Tankers*, 129 S. Ct. at 2281. Accordingly, this Note will focus exclusively on the Tonnage Clause claim.

14. See Energy API, History of Northern Alaska Petroleum Development, <http://www.api.org/aboutoilgas/sectors/explore/historyofnorthalaska.cfm>. (last visited Dec. 1, 2009).

needed to transport the crude oil from the reserves above the Arctic Circle to refineries in the lower forty-eight states.<sup>15</sup> Construction of the Trans Alaska Pipeline System, which carries oil south over 800 miles from Prudhoe Bay to the Marine Terminal at Valdez,<sup>16</sup> the northernmost ice-free port in North America and the southern terminus of the Trans Alaska Pipeline System,<sup>17</sup> was completed in 1977.<sup>18</sup>



On August 1, 1977, the freighter *ARCO Juneau* departed from the port at the City of Valdez, carrying the first oil transported from the

15. L.J. Clifton & B.J. Gallaway, *History of Trans Alaska Pipeline System*, available at [http://tapseis.anl.gov/documents/docs/Section\\_13\\_May2.pdf](http://tapseis.anl.gov/documents/docs/Section_13_May2.pdf).

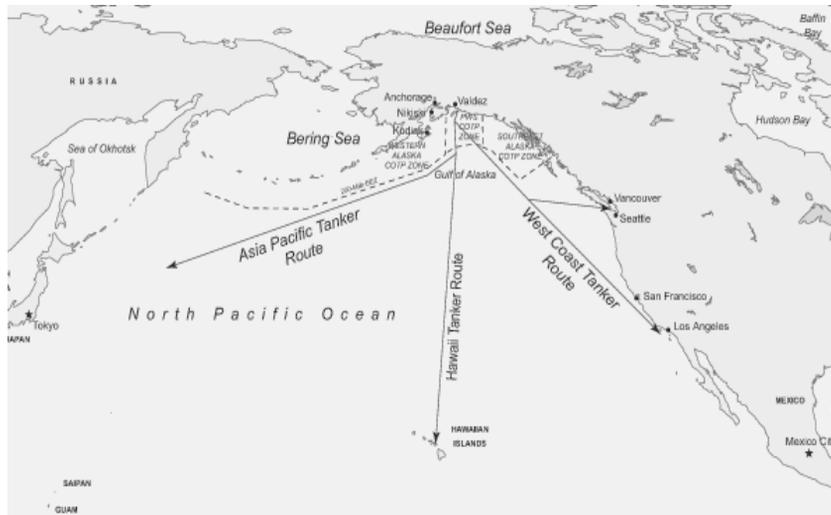
16. See PBS, *Timeline: Alaska Pipeline Chronology*, <http://www.pbs.org/wgbh/amex/pipeline/timeline/index.html> (last visited Dec. 1, 2009); Alyeska Pipeline Service Company, *Pipeline Quick Facts*, <http://www.alyeska-pipe.com/pipelinefacts.html> (last visited Dec. 1, 2009); see also map of the Trans Alaska Pipeline System, <http://www.d.umn.edu/~hoef0049/pipelinemap.html> (last visited Dec. 1, 2009).

17. See Brief for the Petitioner at \*2, *Polar Tankers*, 129 S. Ct. 2277, 2009 WL 191838 (Jan. 26, 2009).

18. See Brief in Opposition to Petition for Writ of Certiorari at \*1, *Polar Tankers*, 129 S. Ct. 2277, 2008 WL 4893773 (Nov. 10, 2008).

North Slope.<sup>19</sup> Since that first departure, over fifteen billion barrels of oil have been transported from Prudhoe to the ports at Valdez.<sup>20</sup>

Given its valuable oil stores, Valdez maintains a “substantial and continuous relationship with oil tankers and related vessels.”<sup>21</sup> A number of petroleum companies collectively own, through subsidiary shipping companies, the Trans Alaska Pipeline System, and these companies transport the oil from Alaska to refineries along the West Coast of the United States and in Hawaii.<sup>22</sup>



From the first shipment through April 2008, over 19,600 of these tankers had been loaded and shipped out from the port at Valdez to various refineries.<sup>23</sup>

Polar Tankers, Inc., a subsidiary of ConocoPhillips, owns tankers that transport oil from the Valdez Marine Terminal to refineries in the

19. See Clifton, *supra* note 15.

20. See PBS, *supra* note 16.

21. See Brief in Opposition to Petition for Writ of Certiorari, *supra* note 18, at \*1.

22. *Id.*; see also map, “Routes from Valdez for tankers carrying Alaska North Slope crude oil,” [http://tapseis.anl.gov/guide/photo/Tanker\\_Route\\_Map.html](http://tapseis.anl.gov/guide/photo/Tanker_Route_Map.html) (last visited Dec. 1, 2009).

23. See Pipeline Quick Facts, *supra* note 16.

lower forty-eight states and Hawaii.<sup>24</sup> Polar Tankers' ships spend an average of forty-five days per year in the City of Valdez port,<sup>25</sup> and it is estimated that the presence of ships like Polar Tankers' adds an average of 550 extra people to the City's population each year, representing greater than a ten percent increase in the City's total population.<sup>26</sup> This influx in population results in an increased use of municipal services, including various utilities, law enforcement and emergency response systems.<sup>27</sup>

## B. The Tax

Prior to 2000, all personal property in the City of Valdez was exempt from property tax.<sup>28</sup> In 1999, facing a "serious erosion of the city's tax base"<sup>29</sup> and a budget shortfall, the city repealed the personal tax exemption.<sup>30</sup> The city adopted a vessel tax under Ordinance No. 99-17, which it categorized as an "ad valorem property tax."<sup>31</sup> The Ordinance, later codified into the Valdez Municipal Code, imposed a property tax on "[b]oats and vessels of at least 95 feet in length."<sup>32</sup>

The Municipal Code includes exceptions to the blanket tax on ships, excluding vessels "used primarily in some aspect of commercial fishing"<sup>33</sup> and vessels that "dock[] exclusively at the Valdez Container Terminal."<sup>34</sup> As a practical matter, this limits the personal property tax to "oil tankers and vessels that escort or assist oil tankers" in the port of Valdez.<sup>35</sup> Importantly, however, the city also applies the same two percent tax rate to all other property that it taxes, "including mobile

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24. *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2281 (2009).

25. Brief for Respondent at \*1, *Polar Tankers*, 129 S. Ct. 2277, 2009 WL 507023 (Feb. 26, 2009).

26. See Brief in Opposition to Petition for Writ of Certiorari, *supra* note 18, at \*1.

27. *Id.*

28. Brief for the Petitioner, *supra* note 17, at \*3; Petition for Writ of Certiorari at \*3, *Polar Tankers*, 129 S. Ct. 2277, 2008 WL 4155609 (Sept. 8, 2008).

29. *City of Valdez v. Polar Tankers, Inc.*, 182 P.3d 614, 616 (Alaska 2008).

30. Brief for the Petitioner, *supra* note 17, at \*3; Petition for Writ of Certiorari, *supra* note 28, at \*3.

31. *Polar Tankers*, 182 P.3d at 616.

32. *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2281 (2009); see also VALDEZ MUN. CODE § 3.12.020 (2008) (codifying the Ordinance).

33. VALDEZ MUN. CODE § 3.12.020 (2008).

34. *Id.*

35. Petition for Writ of Certiorari, *supra* note 28, at \*3; see also *Polar Tankers*, 129 S. Ct. at 2281.

homes, trailers, recreational vehicles, [and] oil and gas production and pipeline property.”<sup>36</sup>

The Municipal Code, in section 3.12.020, states that these vessels are “subject to taxation at their full and true *value*,”<sup>37</sup> and section 3.12.010 states that “[a]ll property not expressly . . . exempted from taxation by the city . . . shall be subject to annual taxation at its full and true *value* based upon the actual value of the property assessed.”<sup>38</sup> Thus, the measure of the vessel tax is similar to the property tax on any other item of personal or real property taxed in Valdez and is based on the assessed *value* of the ships<sup>39</sup> rather than on the vessels’ tonnage capacities or on the aggregate volume of their holds.<sup>40</sup>

The ships must also have acquired a “tax situs”<sup>41</sup> with the City in order to be taxed under the Municipal Code. A ship acquires a tax situs if it is “usually kept or used within the city, whether regularly or irregularly”;<sup>42</sup> “[t]ravels to or within the city along fixed and regular routes”;<sup>43</sup> has been kept or used within the City for ninety days or more in the previous twelve months;<sup>44</sup> or “takes on cargo within the city [that has] a cumulative value in excess of one million dollars during the tax year.”<sup>45</sup> Though this will easily capture the large ships of the major shipping companies that transport oil from Valdez’s Marine Terminal and “routinely carry millions of barrels of oil at a time worth well in excess of [the] \$1 million [threshold],”<sup>46</sup> the tax situs requirement prohibits the City from taxing ships “merely for the privilege of entering or leaving the port.”<sup>47</sup>

The revenue received from the tax is used to pay for various municipal services provided by the City to all its residents, which

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36. Brief in Opposition to Petition for Writ of Certiorari, *supra* note 18, at \*3–4 (citing VALDEZ MUN. CODE § 3.12.022(A) (2008) (“The property taxes levied against [property] classified as real property may be collected in accordance with the procedures established for collection of personal property taxes within the city.”)).

37. VALDEZ MUN. CODE § 3.12.020 (2008) (emphasis added).

38. VALDEZ MUN. CODE § 3.12.010 (2008) (emphasis added).

39. The City Assessor is instructed to “allocate to the City the portion of the total market value of [each vessel] that *fairly reflects its use in the City*.” Brief in Opposition to Petition for Writ of Certiorari, *supra* note 18, at \*4.

40. See *Polar Tankers*, 129 S. Ct. at 2291 n.2 (Stevens, J., dissenting).

41. A “tax situs” requires a jurisdiction to have “a substantial connection with assets that are subject to taxation.” BLACK’S LAW DICTIONARY 1503 (8th ed. 2004).

42. VALDEZ MUN. CODE § 3.12.020(C)(2)(a) (2008).

43. VALDEZ MUN. CODE § 3.12.020(C)(2)(b) (2008).

44. VALDEZ MUN. CODE § 3.12.020(C)(2)(c) (2008).

45. VALDEZ MUN. CODE § 3.12.020(C)(2)(e) (2008).

46. *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2284 (2009).

47. *Id.* at 2292 (Stevens, J., dissenting).

necessarily includes employees of the shipping companies who use those services.<sup>48</sup> The personal property tax “enables the City . . . to provide police protection, fire protection, a local hospital with ambulance services, a municipal airport, construction and maintenance of roads and transportation facilities, a post office . . . and maintenance of other city infrastructure.”<sup>49</sup>

## II. THE TONNAGE CLAUSE

The Supreme Court’s decision in *Polar Tankers* is rife with commentary attempting to determine the Framers’ intent in including the Tonnage Clause in the Constitution.<sup>50</sup> In spite of a general agreement on the purpose of the Clause and the Framers’ goals in including it, the Court members reached drastically different conclusions as to how the Framers’ intent should manifest itself in interpreting the Tonnage Clause.<sup>51</sup>

### A. “No State Shall . . . Lay Any Duty of Tonnage . . .”

Added to the Constitution in the “waning days of the Philadelphia Convention,”<sup>52</sup> the Tonnage Clause provides, in relevant part, that “[n]o State shall, without the Consent of the Congress, lay any duty of Tonnage.”<sup>53</sup> The term “duty of Tonnage,” as used in the Constitution, refers to a tax “imposed on ships, based on their cargo capacity, for the

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48. Brief in Opposition to Petition for Writ of Certiorari, *supra* note 18, at \*4; see also *City of Valdez v. Polar Tankers, Inc.*, 182 P.3d 614, 616 (Alaska 2008).

49. Brief in Opposition to Petition for Writ of Certiorari, *supra* note 18, at \*9 (citing *City of Valdez, Draft Budget (2009)*, available at <http://www.ci.valdez.ak.us/documents/2009DraftBudgetCouncilReview.pdf>).

50. See, e.g., *Polar Tankers*, 129 S. Ct. at 2282 (“In writing the Tonnage Clause, the Framers recognized that, if the states had been left free to tax the privilege of access by vessels to their harbors,” they could have gained an advantage over their neighbors); *id.* at 2288 (Roberts, C.J., concurring) (“The free flow of maritime commerce was . . . important to the Framers); *id.* at 2289 (Stevens, J., dissenting) (“[T]he purpose of the Clause is to prevent States with convenient ports from abusing the privileges the natural position affords.”).

51. See, e.g., *Polar Tankers*, 129 S. Ct. at 2282, 2288 (Roberts, C.J., concurring), 2289 (Stevens, J., dissenting).

52. BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 12.10 (1999).

53. U.S. CONST. art. I, § 10, cl. 3. The Tonnage Clause was inserted into Article I with other general prohibitions on the states. The full text of the third clause of Section 10 states: “No State shall, without the Consent of Congress, lay any duty of Tonnage, 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.” *Id.*

privilege of entering or leaving a port.”<sup>54</sup> This interpretation was also meant to distinguish a prohibited tax from the acceptable practice of assessing fees to ships based on their use of specific services, such as wharfage,<sup>55</sup> towage,<sup>56</sup> or pilotage<sup>57</sup> fees.<sup>58</sup> As will be seen *infra* Part II.C., this seemingly simple provision has evolved since its inception as the Supreme Court has expanded the Clause’s reach in certain areas and contracted it in others.

## B. Framers’ Intent and Historical Importance

Following the Revolution, some of the Founders, in favor of a powerful national government and confronted with a strong anti-central government sentiment,<sup>59</sup> set about to “assure national supremacy in . . . relations among the States.”<sup>60</sup> Allegiances at the time “remained primarily local; they then clustered into state-based loyalties, then periodically enlarged to regional affinities and interests,”<sup>61</sup> but interests and loyalties of the people rarely manifested themselves on a national level in post-Revolutionary America.<sup>62</sup>

On the political front, vocal proponents of the national government, such as James Madison and Alexander Hamilton, felt great apprehension towards the largely unbridled power of the states under the Articles of Confederation. The Founders were concerned that the union of necessity formed to fight the British would break apart, and America would “go the way of Europe,” with three or four large confederacies, unified by geography and local interests (mostly

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54. BITTKER, *supra* note 52, § 12.10. “Tonnage” generally is the “capacity of a vessel for carrying freight or other loads, calculated in tons.” BLACK’S LAW DICTIONARY 1526 (8th ed. 2004). The Framers, however, meant “tonnage” to refer not necessarily to the weight-carrying capacity of the vessels, but instead primarily to the “internal cubic capacity of a vessel.” *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm’n*, 296 U.S. 261, 265 (1935) (citing *Inman S.S. Co. v. Tinker*, 94 U.S. 238, 243 (1876)).

55. The fee paid for landing, loading, or unloading goods on a wharf. BLACK’S LAW DICTIONARY 1626 (8th ed. 2004).

56. The act or service of towing ships and vessels. *Id.* at 1528.

57. Compensation that a pilot receives for navigating a vessel. *Id.* at 1186.

58. BITTKER, *supra* note 52, § 12.10.

59. After all, a war had just been waged and won in the name of casting off the “absolute Tyranny” of the British monarchy. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

60. MEESE, ET AL., *supra* note 1, at 178.

61. ELLIS, *supra* note 1, at 88.

62. *See id.*

commercial in nature), springing up on the American landscape and competing with one another for continental supremacy.<sup>63</sup>

In the economic arena, the biggest obstacle to the success of the newly unified Republic was the proliferation of local interests superseding the greater national economic interest. Under the system established by the Articles of Confederation, regulation of trade was left primarily to the states.<sup>64</sup> Self-interested states were in constant conflict with one another and had blocked efforts to facilitate interstate trade, instead opting to act in whatever way best suited the members of their particular state.<sup>65</sup>

The Framers recognized the problem inherent with a system of unregulated states with the freedom to impose trade restrictions on one another. The primary issue, Hamilton and Madison (among others) realized, was the geographic supremacy that some states possessed as a result of their superior natural resource base or the ease of access to the channels of interstate and international commerce.<sup>66</sup> At the time, this supremacy was primarily focused on access to major rivers and the Atlantic Ocean.<sup>67</sup> The Framers proffered multiple examples of how states had in the past, and could in the future, harm each other's trade, and they warned of the inevitable conflict that would arise in the course of economic competition among the states.<sup>68</sup> The Framers were

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63. FERLING, *supra* note 3, at 274. Though Madison was concerned about general "anarchy," which he interpreted as a war between individual states, it was clear that three or four separate confederacies, rather than outright anarchy, was the most likely alternative in the absence of a strong federal government; *see also* ELLIS, *supra* note 1, at 93-94.

64. Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409, 423 (2008) (discussing the Framers' fear of parochialism in the economic context).

65. *See* Gibbons v. Ogden, 22 U.S. 1, 11 (1824) (stating that under the Confederation, "[t]he States could still, each for itself, regulate commerce, and the consequence was, a perpetual jarring and hostility of commercial regulation."); *see also* THE FEDERALIST NO. 22 (Alexander Hamilton) (criticizing the states for their "interfering and unneighborly regulations," which were "contrary to the true spirit of the Union").

66. THE FEDERALIST NO. 11 (Alexander Hamilton) ("It happens, indeed, that different portions of confederated America possess each some peculiar advantage . . .").

67. *See id.*

68. *See, e.g.,* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 497 (4th ed. 2008) ("What could New York do with a single seaport, surrounded on each side by jealous maritime neighbors with numerous ports? . . . What could Pennsylvania oppose to the keen resentments, or the facile policy of her weaker neighbour, Delaware?"); James Madison, *Preface to Debates in the Convention of 1787* (stating that Rhode Island, under the Articles of Confederation, enjoyed an "advantage which her position gave her of taxing her neighbors thro' their consumption of imported goods," an advantage which would have disappeared under a strong federal Constitution; Madison claimed

convinced that each independent state “would pursue a commercial policy peculiar to itself”<sup>69</sup> and further noted that these policies would be drastically different, as interests varied widely from state to state.<sup>70</sup> The great concern was that if states were given the power to tax other states for the privilege of using their ports or otherwise restrict trade among the states generally, then each state would grow frustrated, retaliate with tariffs and restrictions of their own,<sup>71</sup> and “sink back into listless indifference or gloomy despondency.”<sup>72</sup>

Faced with a “veritable kaleidoscope of local interests with no collective cohesion whatsoever,”<sup>73</sup> the Framers at the Philadelphia Convention sought to create a strong national government capable of restraining each state from pursuing its own independent political and economic goals at the expense of the whole. Specifically, the focus and primary purpose of the Convention was the regulation of commerce;<sup>74</sup> the principal aim of the Founders was to “lay the groundwork for . . .

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this was the impetus for Rhode Island’s failure to send representatives at the outset of the Constitutional Convention); THE FEDERALIST NO. 7 (Alexander Hamilton) (“Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit?”).

69. THE FEDERALIST NO. 7 (Alexander Hamilton).

70. ELLIS, *supra* note 1, at 95. If there was any doubt that the states had widely divergent interests or that some level of distrust existed among the states in commercial matters, those doubts were put to rest when, prior to the Constitutional Convention, John Jay proposed the surrender of American rights to use the Mississippi River in exchange for a “generous commercial agreement” with Spain. *Id.* The northeastern states voted in favor of the proposal, believing that they would benefit from increased trade with Spain; the plan, however, “set off alarm bells throughout Virginia and settlements on the western frontier, where . . . Jay’s proposal conjured up the specter of a northeastern conspiracy to sell out western interests for eastern profits.” *Id.*

71. See Williams, *supra* note 64, at 427 (“[T]rade-inhibiting state regulations and taxes are likely to encourage retaliatory measures by those states whose citizens are adversely affected by the measures”) (citing Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1114 (1986)).

72. STORY, *supra* note 68, at § 497.

73. ELLIS, *supra* note 1, at 105.

74. See *Gibbons v. Ogden*, 22 U.S. 1, 11-13 (1824) (noting the “prevailing motive” in the adoption of the Constitution “was to regulate commerce,” and the “immediate origin” of the country’s foundation derived from the “necessities of commerce”); see also *In re State Tonnage Tax Cases*, 79 U.S. 204, 214 (1870) (noting that it was the regulations imposed by the states upon each other which “led to the abandonment of the Confederation and to the more perfect union under the present Constitution.”); Williams, *supra* note 64, at 425 (“The weaknesses of the Confederation-era system of commercial regulation . . . was one of the primary reasons that the Constitutional Convention was called.”) (citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949)).

enhanced Congressional authority over commerce."<sup>75</sup> In this way, the Founders hoped to rescue the nation from "the embarrassing and destructive consequences" resulting from division among the states and place the power to create uniform laws in the hands of a strong national government.<sup>76</sup>

There was little debate among those present at the Philadelphia Convention "regarding the need to divest states of their authority over interstate commerce."<sup>77</sup> The Framers successfully argued that free trade among the states was desirable, as unrestrained trade would "advance the trade of each by an exchange of their respective productions."<sup>78</sup> Desirable free trade among states would work to "foster economic wealth," and reduce the political and economic friction that had existed among the states leading up to the Constitutional Convention.<sup>79</sup>

In the Constitution, the "power to regulate commerce [is] given to Congress in comprehensive terms."<sup>80</sup> The goals of free trade and restraint on individual states' control over economic matters manifested themselves in the positive grants of power to the Congress in Section 8 of Article I<sup>81</sup> and in a number of the clauses prohibiting state action under Section 10 of the same Article.<sup>82</sup> The focus of the prohibitions in Section 10 was on enhancing the economic unity of the country.<sup>83</sup> To accomplish this, the Constitution prohibited the states from coining money, establishing a system of paper currency, or making any law impairing the obligations of contracts.<sup>84</sup> Further, in the "import/export clause," the Framers prohibited the states from laying any duties on

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75. FERLING, *supra* note 3, at 273; *see also* STORY, *supra* note 68, § 499 ("[T]here will be a uniformity of operations and arrangements upon all subjects of the common welfare under the guidance of a single head; instead of multifarious, and often conflicting systems by distinct states.").

76. *Gibbons*, 22 U.S. at 12.

77. Williams, *supra* note 64, at 424.

78. THE FEDERALIST NO. 11 (Alexander Hamilton). Hamilton advocated strongly for open trade among the states, noting that "[i]nterstate trade, at the moment negligible in a new nation of former colonies that had focused on imperial markets, would be enhanced" under the strong federal Constitution. FERLING, *supra* note 3, at 349.

79. Williams, *supra* note 64, at 426 (discussing the desirability of free trade among the states).

80. *S.S. Co. v. Portwardens*, 73 U.S. 31, 32 (1867).

81. In Section 8 of Article I, the U.S. Constitution states, in relevant part, that "Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . ; To borrow Money on the credit of the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . To coin Money [and] regulate the Value thereof . . ." U.S. CONST. art. I, § 8, cl. 1-3, 5.

82. U.S. CONST. art. I, § 8.

83. U.S. CONST. art. I, § 10.

84. U.S. CONST. art. I, § 10, cl. 1.

imports or exports beyond those which are “absolutely necessary for executing its inspection laws,”<sup>85</sup> with the intent of encouraging free trade among the states.<sup>86</sup> These Sections were supplemented by the Tonnage Clause, which prevented a state from circumventing the prohibition on import and export duties via taxation on the vessels carrying those goods in and out of the state.<sup>87</sup> The Clause, proposed by Delegate John Langdon, a member of the New Hampshire delegation,<sup>88</sup> “caused no significant debate at the Constitutional Convention,”<sup>89</sup> and became a part of the document that was the product of that Convention.

### C. Building in Exceptions: The Evolution of the Tonnage Clause in Supreme Court Jurisprudence

The Framers, as they did so often throughout the text of the Constitution, left the Tonnage Clause short, simple, and open to interpretation, indicating only that a state shall not “lay any Duty of Tonnage.”<sup>90</sup> Though it is clear that the Framers intended the Clause to limit the states’ power to tax commerce,<sup>91</sup> the text does not indicate the scope of the Clause nor does it define “Duty of Tonnage.” As a result of this ambiguity, the Court has been required to interpret the Clause. In doing so, the Court has extended the Clause’s application past its literal meaning in some aspects, while at the same time softening what at first glance appears to be an absolute prohibition. Over time, the Clause has been interpreted generally to limit a state’s ability to impose taxes that

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85. U.S. CONST. art. I, § 10, cl. 2.

86. See *S.S. Co. v. Portwardens*, 73 U.S. 31, 33 (1867) (the Constitution had the “obvious intent” of placing the commerce among the states “beyond interruption or embarrassment arising from the conflicting or hostile State regulations.”).

87. See *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm’n*, 296 U.S. 261, 264–65 (1935) (“the prohibition against the imposition of any duty of tonnage was due to the desire of the framers to supplement article 1, § 10, cl. 2”) (citing *Portwardens*, 73 U.S. 31, 35 (1867), and *Packet Co. v. Keokuk*, 95 U.S. 80, 87–88 (1877)); see also BITTKER, *supra* note 52, § 12.10 (stating that the Tonnage Clause functions as a “textual backstop” to the import/export clause).

88. See Delegates to the Constitutional Convention: New Hampshire, <http://www.law.umkc.edu/faculty/projects/FTrials/conlaw/marrynewhamp.html>. (last visited Dec. 1, 2009).

89. MEESE, ET AL., *supra* note 1, at 178–79. In fact, James Madison, never reticent to speak at length on any topic relating to the Constitution, claimed that the reasons behind the Tonnage Clause were “so obvious . . . that they may be passed over without remark.” THE FEDERALIST NO. 44 (James Madison).

90. U.S. CONST. art. I, § 10, cl. 3.

91. BITTKER, *supra* note 52, § 12.10.

operate to impose a charge for the privilege of entering or leaving a port.<sup>92</sup>

1. *Expansion of the Clause: "All Duties, Regardless of Their Name or Form"*

From the outset, the notion of what constituted a "Duty of Tonnage" was not interpreted literally. To the Framers, "tonnage" did not refer to a literal calculation of the capacity of a ship for carrying freight, measured in tons;<sup>93</sup> instead, the Framers intended the Clause to refer to any taxes based on the internal cubic carrying capacity of a vessel.<sup>94</sup> More generally, "duties of tonnage" were known among men of commerce of the time to refer to "levies upon the privilege of access by vessels or goods to the ports."<sup>95</sup> This divination of the Framers' apparent intent in the Clause's construction led the Court to expand the Tonnage Clause to encompass all duties and taxes that impose a charge on ships for the privilege of entering a port, whether that charge was based on the storage capacity of the vessel or on some other measure.<sup>96</sup>

In *Steamship Co. v. Portwardens*,<sup>97</sup> the Court addressed a Louisiana statute that entitled the wardens of the port of New Orleans to impose a flat fee of five dollars on every vessel that entered the port.<sup>98</sup> The Court recognized that the flat fee was imposed regardless of the size or capacity of the vessel and thus did not technically constitute a "duty on tonnage."<sup>99</sup> In spite of the fact that the Louisiana statute was not "proportioned to the tonnage of the vessel," the Court nonetheless held that it was an unconstitutional "duty on tonnage."<sup>100</sup> Looking to the Framers' intent, the Court determined that the Tonnage Clause was meant not only to prohibit a *pro rata* tax based on the vessel's carrying capacity, but "any duty on the ship, whether a fixed sum upon its whole

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92. *Id.*; see also *Clyde Mallory Lines*, 269 U.S. at 266–67.

93. See *supra* note 54.

94. *Clyde Mallory Lines*, 296 U.S. at 265 ("At the time of the adoption of the Constitution 'tonnage' was a well-understood commercial term signifying in America the internal cubic capacity of a vessel.") (citing *Inman S.S. Co. v. Tinker*, 94 U.S. 238, 243 (1876)); see also *In re State Tonnage Tax Cases*, 79 U.S. 204, 212 (1870) ("[T]he word tonnage, as applied to American ships and vessels, must be held to mean their entire internal cubical capacity . . . ."); BITTKER, *supra* note 52, § 12.10 n.137 (discussing the etymology of "tonnage" as a "measure of volume rather than weight" in maritime terminology).

95. *Clyde Mallory Lines*, 296 U.S. at 265.

96. *Id.* at 265–66.

97. 73 U.S. 31 (1867).

98. See *id.* at 32.

99. *Id.* at 34.

100. *Id.*

tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."<sup>101</sup>

The expansion of the Clause past the initial notion of prohibiting duties based on a vessel's carrying capacity occurred in other nineteenth- and early twentieth-century Tonnage Clause cases before the Supreme Court. A number of cases explicitly referenced the *Portwardens* decision, agreeing that the prohibition on duties of tonnage was meant to include any duty imposed on a ship for the privilege of entering a port.<sup>102</sup> This included *Cannon v. New Orleans*,<sup>103</sup> holding that a tax of ten cents per ton levied on ships was unconstitutional because it was a tax for the privilege of landing or mooring in the city's port;<sup>104</sup> *In re State Tonnage Tax Cases*,<sup>105</sup> holding that an Alabama tax levied on ships at the rate of \$1 per ton violated the Tonnage Clause, since it reflected a duty on the ship for the privilege of using Alabama's ports;<sup>106</sup> and *Inman Steamship Co. v. Tinker*,<sup>107</sup> which looked to the substance of the tax rather than its name in determining that a fee imposed on ships based on their tonnage was unconstitutional.<sup>108</sup>

Early Supreme Court cases also made it clear that the prohibition would extend to duties on ships if those duties would "effect the same purpose" as imposing a charge on the duty of tonnage.<sup>109</sup> The Court noted that any tax that was imposed on, for example, the "number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she carries," would have substantially the same effect as a tax based on the carrying capacity of the vessel.<sup>110</sup> Thus, the Clause was read to extend to these similar types of taxes, to prevent states from easily sidestepping the "tonnage" language.

## 2. *Exceptions: Fees for Services*

While the Court was expanding the Tonnage Clause to encompass all taxes that operated as a charge for the privilege of entering a port,

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101. *Id.* at 35.

102. *See* BITTKER, *supra* note 52, § 12.10.

103. 87 U.S. 577 (1874).

104. *Id.* at 581.

105. 79 U.S. 204 (1870).

106. *Id.* at 217.

107. 94 U.S. 238 (1876).

108. *Id.* at 243-44; *see also* *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265-66 (1935) ("[T]he prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering in, trading in, or lying in a port.").

109. *The Passenger Cases*, 48 U.S. 283, 458-59 (1849).

110. *Id.*

whether or not they were based on tonnage per se, the Court was simultaneously establishing an important exception to the Tonnage Clause, by refusing to extend the Clause to encompass taxes imposed by states, “even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage . . . or wharfage.”<sup>111</sup> Cases where the Court invoked the Tonnage Clause to strike down fees charged for “mere entry into a port” were contrasted with cases where a vessel was required to pay for “use of the state’s maritime facilities or for services rendered.”<sup>112</sup>

The Court in *Cooley v. Board of Wardens*<sup>113</sup> upheld a pilotage fee imposed upon vessels by the Port of Philadelphia.<sup>114</sup> The Court noted that imposts on tonnage were, in the time of the Framers, “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.”<sup>115</sup>

Similarly, the Court in *Packet Co. v. Keokuk*,<sup>116</sup> citing to *Cooley*, found that a fee based on tonnage imposed for docking at the town’s wharf could not be considered a duty of tonnage, as the Constitutional Framers could not, when they drafted the Tonnage Clause, have “had in mind charges for services rendered or for conveniences furnished to vessels in port, which are facilities to commerce rather than hindrances to its freedom.”<sup>117</sup> The Court also upheld similar wharfage fees based on tonnage in *Packet Co. v. St. Louis*,<sup>118</sup> noting that the fees were “paid as compensation for the use of an improved wharf and not for the mere privilege of stopping at the port” and were “reasonable in amount.”<sup>119</sup>

In *Clyde Mallory Lines v. Alabama ex rel. State Docks Commission*,<sup>120</sup> regulations establishing a “schedule of harbor fees for mooring and shifting vessels in the harbor,” including a separate fee for vessels “500 tons and over” were at issue.<sup>121</sup> The Supreme Court found that the fee, though based on tonnage, was a “reasonable charge for a service”

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

112. BITTKER, *supra* note 52, § 12.10.

113. 53 U.S. 299 (1851).

114. *Id.* at 313–14.

115. *Id.* at 314.

116. 95 U.S. 80 (1877).

117. *Id.* at 87–88; *see also* BITTKER, *supra* note 52, § 12.10.

118. 100 U.S. 423 (1879).

119. *Id.* at 427, 429. The Court also upheld fees for wharfing (*see, e.g.,* *Packet Co. v. Aiken*, 121 U.S. 444 (1887); *Transp. Co. v. Parkersburg*, 107 U.S. 691 (1883); *Packet Co. v. Catlettsburg* 105 U.S. 559 (1881)), as well as fees for the uses of locks (*see Huse v. Glover*, 119 U.S. 543 (1886)).

120. 296 U.S. 261 (1935).

121. *Id.* at 263 (internal quotation marks omitted).

provided by Alabama—namely, the policing of the harbor.<sup>122</sup> Though the benefit to the ships was not as direct as in the wharfage cases, the vessels nonetheless received a clear benefit from the policing, as the local government’s police activities ensured the safety of the vessels while they were present in the harbor.<sup>123</sup>

3. *Vessels Taxed As Property*

In *In re State Tonnage Tax Cases*,<sup>124</sup> the Supreme Court held that a levy that taxed ships at a rate of \$1 per ton for the privilege of using the state’s ports was an unconstitutional violation of the Tonnage Clause.<sup>125</sup> Despite its holding, the Court explicitly noted that taxes levied “as on property,” based on a valuation of that property, were not prohibited by the Constitution.<sup>126</sup> The Court noted that ships owned by individuals were, when viewed as property, “plainly within the taxing power of the States.”<sup>127</sup>

The Supreme Court reaffirmed and expanded this notion in *Transportation Co. v. Wheeling*.<sup>128</sup> The *Wheeling* decision—relevant historically because it established an important exception to the normal Tonnage Clause jurisprudence, and relevant to the instant litigation because it was the decision misinterpreted by the Court in *Polar Tankers*—contained a vital clause relied on by both the plurality and the dissent in *Polar Tankers*.<sup>129</sup> In *Wheeling*, the state of West Virginia authorized the city of Wheeling to collect an annual tax on “personal property in the city,” which included certain ships that used the city’s ports.<sup>130</sup> The Court repeated the doctrine established in *In re State Tonnage Tax Cases*, noting that taxes levied by a state upon vessels are “not within the prohibition of the Constitution” if they are taxed as property, rather than as “vehicles of commerce.”<sup>131</sup> The Court went further and declared that “vessels of all kinds are liable to taxation as

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122. *Id.* at 267.

123. *Id.* at 266–67; *see also* Cannon v. New Orleans, 87 U.S. 577, 581 (1874) (although the Supreme Court determined that the tax in question was a violation of the Tonnage Clause, the Court nonetheless made it clear that a city should be “allowed to exact and receive . . . reasonable compensation” when it assists vessels landing within its limits and making use of the structures that it has built with its own money).

124. 79 U.S. 204 (1870).

125. *Id.* at 217.

126. *Id.* at 205.

127. *Id.* at 213.

128. 99 U.S. 273 (1878).

129. *See generally* Polar Tankers v. City of Valdez, 129 S. Ct. 2277 (2009); *id.* at 2290 (Stevens, J., dissenting).

130. *Wheeling*, 99 U.S. at 277.

131. *Id.* at 279, 283.

property *in the same manner* as other personal property owned by citizens of the State,” and that the Tonnage Clause prohibitions only come into play where ships “are not taxed in the same manner as the other property of the citizens, or where the tax is imposed upon a vessel as an instrument of commerce, without reference to the value as property.”<sup>132</sup> The Court held that the taxes did not violate the Tonnage Clause, as they were levied on the ships as property and were based on the ships’ value.<sup>133</sup> The Supreme Court in *Polar Tankers* relied heavily on the “in the same manner” language from *Wheeling*, and though both the plurality and the dissent cited to the same language, their conflicting interpretations led them to divide sharply on the implications of the *Wheeling* decision.

### III. THE OPINIONS

Following the implementation of the Valdez tax in 1999, various shipping companies challenged the tax in Alaska Superior Court for the Third Judicial District, alleging that the tax violated the Due Process, Commerce, and Tonnage Clauses of the United States Constitution.<sup>134</sup> In 2004, the superior court held that the tax was an unconstitutional levy in violation of the Tonnage Clause.<sup>135</sup> After the City moved for reconsideration in 2005, the superior court held that the tax violated the Due Process and Commerce Clauses but reversed its position on the Tonnage Clause issue, concluding that the tax did not violate the Tonnage Clause.<sup>136</sup> Both *Polar Tankers* and the City appealed to the Alaska Supreme Court, with the City challenging the Due Process and Commerce Clause rulings and *Polar Tankers* challenging the superior court’s final Tonnage Clause ruling.<sup>137</sup>

#### A. The Alaska Supreme Court Decision

Justice Eastaugh, writing for a unanimous Alaska Supreme Court, reversed the ruling of the superior court and held for the City, determining that the tax did not violate the Commerce, Due Process, or

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132. *Id.* at 284 (emphasis added).

133. *Id.*

134. *City of Valdez v. Polar Tankers*, 182 P.3d 614, 616 (Alaska 2008). Following the initial suit, the City entered into settlements with nearly all of the litigants. *Id.* at 617.

135. *Id.*; see also Agenda Statement, Draft of Release and Settlement Agreement between ConocoPhillips and the City of Valdez (Oct. 15, 2008), available at <http://www.ci.valdez.ak.us/clerk/documents/NB2102008.pdf>.

136. *Polar Tankers*, 182 P.3d at 617.

137. *Id.*

Tonnage Clauses of the federal Constitution.<sup>138</sup> On the Tonnage Clause issue, the court determined that Valdez's tax was a "fairly apportioned ad valorem tax on personal property," and thus did not run afoul of the Constitution.<sup>139</sup> The court noted that the property tax was used to support services "available to all taxpayers in the city," including the employees of Polar Tankers, and thus functioned as a normal property tax.<sup>140</sup>

The court noted that Polar Tankers' brief argued that the tax was invalid based on an interpretation of the language in *Wheeling* that a tax must be applied "in the same manner" as it is applied to other property.<sup>141</sup> The court determined instead that, since the City taxed the ships *based on their value and at the same rate* as it did other property, it complied with the Supreme Court's holding in *Wheeling*.<sup>142</sup> Since the tax thus reflected a normal tax on property rather than an imposition on vessels for the privilege of entering the City's port, it was not an improper duty on tonnage.<sup>143</sup>

Following the Alaska Supreme Court's decision, Polar Tankers filed for certiorari with the Supreme Court of the United States, arguing (among other claims) that the Valdez tax violated the Tonnage Clause.<sup>144</sup> The Supreme Court granted certiorari and decided the case on June 15, 2009.

## B. Plurality: Improper Duties of Tonnage

A plurality of the Supreme Court reversed the Alaska Supreme Court's decision, holding that the tax violated the prohibition against tonnage duties.<sup>145</sup> Noting that the Valdez tax ordinance applied primarily to oil tankers and did not apply to any other form of personal property, the plurality held that the Valdez ordinance was effectively a levy specifically "designed to impose a charge for the privilege of entering" the port, in violation of the Tonnage Clause.<sup>146</sup>

The plurality also attempted to divine the intent of the Framers, noting that the Clause should be read in light of its purpose, which was

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138. *Id.* at 617–22, 624.

139. *Id.* at 622.

140. *Id.* at 623 (citing *Bigelow v. Dep't of Taxes*, 652 A.2d 985, 988 (Vt. 1994)).

141. *Polar Tankers*, 182 P.3d at 623; *see also* Brief of Appellee/Cross-Appellant *Polar Tankers, Inc.*, at \*11–12, *Polar Tankers*, 182 P.3d 614, 2006 WL 4545044 (Nov. 15, 2006).

142. *Polar Tankers*, 182 P.3d at 623.

143. *Id.*

144. *See* Petition for Writ of Certiorari, *supra* note 28, at \*7–8.

145. *See* *Polar Tankers v. City of Valdez*, 129 S. Ct. 2277, 2287 (2009).

146. *Id.* (internal quotation marks omitted).

to “restrai[n] the states from the exercise of the taxing power injuriously to the interests of each other.”<sup>147</sup> Further, the Court noted that the Framers had recognized the dangers inherent in allowing states to tax the vessels that used their ports and that states should not be allowed to “evade the Clause” at their discretion.<sup>148</sup>

Importantly, the plurality also addressed the City’s contention that the tax was a personal property tax based on the value of the property.<sup>149</sup> Citing *Wheeling*, the Court determined that the requirement to tax in the “same manner” is vital if the tax is to be viewed as a personal property tax.<sup>150</sup> Since the relevant Municipal Code Section applied only to ships using the Valdez harbor, and to no other forms of personal property, the Court held that the vessels were not taxed in the “same manner” as other property, and thus the Valdez tax did not qualify as an ad valorem personal property tax under *Wheeling*.<sup>151</sup>

### C. Concurring in the Judgment: A Plain Language View

The concurrence took a more extreme stance in deciding that the tax was unconstitutional. Looking to the language of the Tonnage Clause, the concurring Justices concluded that the Tonnage Clause prohibits *any* duty of tonnage, “regardless of how that duty compares to other commercial taxes.”<sup>152</sup> The concurrence noted that a tax in this manner on maritime commerce is per se unconstitutional, and a violation of what they viewed as a straightforward clause could not be overcome by simply bundling the tax on tonnage with taxes on “other activities or property.”<sup>153</sup>

The concurring judges used a simple deductive argument: (1) since the Valdez tax was a duty imposed for the privilege of entering a port, it was a duty of tonnage; (2) the Tonnage Clause prohibits a state from laying “*any* Duty of Tonnage”; (3) therefore, the matter should be concluded, and questions of taxation of other property in the “same manner” should not be reached.<sup>154</sup> The Justices recognized that this may cause vessels to receive preferential treatment because they are essentially exempt from property taxes, but they disregarded the

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147. *Id.* at 2279 (internal quotation marks omitted).

148. *See id.* at 2279–80.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 2288.

153. *Id.*

154. *Id.* at 2288–89.

argument, noting that “[s]uch protection reflects the high value the Framers placed on the free flow of maritime commerce.”<sup>155</sup>

#### D. Dissent: A Property Tax

The dissenting opinion in the Supreme Court in *Polar Tankers* agreed with the decision of the Alaska Supreme Court and determined that the Valdez tax was a property tax and therefore not in violation of the Tonnage Clause.<sup>156</sup> The dissenting opinion noted that the ships had sufficient contacts with the City through the use of its port to establish tax situs,<sup>157</sup> and that the City was therefore permitted to levy a property tax “in proportion to the ship’s contacts with the jurisdiction.”<sup>158</sup> The dissent noted that the tax had the “critical characteristics of a property tax”: namely, that the ships were taxed based on their value and were only taxed after they had established a tax situs in the City.<sup>159</sup>

The dissent relied upon *Wheeling* and determined that the Tonnage Clause would only come into play if the ships were not taxed “in the same manner” as other property, or if the tax was imposed without reference to the value of the ships.<sup>160</sup> The dissent reasoned that *Wheeling* and *In re State Tonnage Tax Cases* held that any tax based on the value of a ship, rather than its tonnage, would not be in violation of the Tonnage Clause. The dissent thus concluded that the plurality misinterpreted the cases by requiring a state to impose similar taxes on other forms of property.<sup>161</sup> The dissent, however, noted that even if the plurality’s interpretation of *Wheeling* was correct and the Tonnage Clause permitted a jurisdiction to apply a tax to ships only when that jurisdiction also taxes other property in the “same manner,” multiple sections under the Valdez Municipal Code tax property using the same “value-based” criteria as it did for ships.<sup>162</sup> Since the City taxes other property “at the same rate,” the dissent stated that the plurality opinion

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155. *Id.*

156. *Id.* at 2289 (Stevens, J., dissenting).

157. The dissenting opinion details the substantial impact that the “prolonged physical presence” of the company’s ships had on the municipal resources provided by the City. *Id.* at 2292.

158. *Id.* at 2291 n.1 (citing *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 442–43 (1979)).

159. *Polar Tankers*, 129 S. Ct. 2293 (2009).

160. *Id.* (quoting *Transp. Co. v. Wheeling*, 99 U.S. 273, 284 (1879) and *In re State Tonnage Tax Cases*, 79 U.S. 204, 213–14 (1870) (“[T]axes levied on ships as property, based on a valuation of the same as property, are not within the prohibition of the Constitution.”)).

161. *Id.* at 2291.

162. *Id.* at 2293.

was incorrect in its assertion that ships entering the port had been “singled out for taxation.”<sup>163</sup>

#### IV. A MISINTERPRETATION OF PRECEDENT

The plurality and concurring opinions in the Supreme Court’s decision misinterpreted the Court’s prior Tonnage Clause jurisprudence and overturned a property tax that was, in reality, an appropriate charge on the shipping vessels that routinely utilized the port at Valdez. Specifically, the concurring opinion failed to take into account the modifications to the Clause’s interpretation in prior Supreme Court opinions, and the plurality opinion misinterpreted the holding in *Wheeling* by finding that the property tax applied to “no other form of personal property.”<sup>164</sup> Further, both opinions failed to take into account relevant policy considerations that support permitting states and local jurisdictions such as Valdez to implement these types of taxes.

##### A. The Concurrence’s Plain Language View Ignores Supreme Court Jurisprudence

Though appealing in its simplicity, the opinion of the concurring Justices fails to take into account prior Supreme Court decisions on the Tonnage Clause and the overall evolution of that Clause. The concurrence, when it claims that *any* Duty of Tonnage is unconstitutional, fails to account for the exception developed in *In re State Tonnage Tax Cases* and *Wheeling*, permitting states to impose a tax on ships “as property.”<sup>165</sup> The precedential value of those opinions was ignored by the concurring Justices, who instead reverted back to a strict reading of the Clause’s language, claiming that because the ordinance imposes a tax based on tonnage, it is in violation of the plain language of the Tonnage Clause, ending the inquiry.<sup>166</sup>

The concurrence does raise important arguments about the Framers’ desire for freedom in interstate maritime commerce,<sup>167</sup> but these general invocations of the Framers’ intent should not supersede the deficiencies present in the concurring opinion’s failure to adhere to Supreme Court precedent regarding the Tonnage Clause.<sup>168</sup>

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163. *Id.*

164. *Id.* at 2283.

165. See *Wheeling*, 99 U.S. at 279; *In re State Tonnage Tax Cases*, 79 U.S. at 213.

166. *Polar Tankers*, 129 S. Ct. at 2288–89.

167. *Id.*

168. The concurring opinion attempts to downplay the importance of *Wheeling* and *In re State Tonnage Tax Cases* by claiming that those cases are only

## B. The Plurality Misapplied the *Wheeling* Decision

The plurality opinion declared that, since the Valdez ordinance applies to ships that use the port at Valdez while applying to “no other form of personal property,” the ships are not taxed “in the same manner” as other property under the *Wheeling* standard.<sup>169</sup> The plurality claims that, for a tax on a ship’s tonnage to be valid under *Wheeling*, similar taxes must be imposed upon other businesses, which will operate as a “check upon a State’s ability to impose a tax on ships at rates that reflect an effort to take economic advantage of the port’s geographically based position.”<sup>170</sup>

This interpretation presents a compelling and valid concern, which, though never stated explicitly, can be pieced together through examination of the plurality’s opinion. In practical terms, the plurality is troubled over the potential ability of a state or local municipality to impose a tax on ships entering its ports at whatever rate it desires, and the Court is most concerned about the potential for rates to “get out of hand.”<sup>171</sup> Past Supreme Court cases (specifically, *Wheeling* and *In re State Tonnage Tax Cases*) have shown that a balance must be maintained between the right of a state to tax the property that makes use of its services and the constitutional prohibition on states taxing ships merely for the privilege of entering their ports.

The fear of the plurality in *Polar Tankers* and the Court in *Wheeling* can be addressed through a simple example: suppose that a tax is levied on ships, but all other local property is exempt from similar tax rates. In this case, a 2% tax (like the one implemented by Valdez) on the value of the ships may seem to be a relatively minor tariff. However, if the City faces a budget shortfall and decides to tax the ships at 40% of their value, the non-resident shipping companies, unable to vote in Valdez, will not be in a position to contest the tax. Similarly, the owners of other local property (who do have a say in the political process) would be indifferent to the tax increase on the non-resident shipping companies; 40% multiplied by the residents’ tax base results in the same amount of tax to these individuals as 2% multiplied by the zero base. In fact, given that the tax would be used to support municipal improvements but

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applicable where property is owned by citizens of the state imposing the tax. *Id.* at 2288. Both the plurality and the dissent discount the use of this “home port doctrine,” noting that the doctrine “has been abandoned,” and states have long been permitted to “tax vessels belonging to citizens of other States.” *Id.* at 2287, 2291 n.2.

169. *Id.* at 2284–85.

170. *Id.* at 2285.

171. *Id.*

would not come out of local taxpayers' pockets, those citizens would likely be in favor of such a tax increase. Therefore, if other local property is not taxed at the same rate (or, in the words of *Wheeling*, "in the same manner"<sup>172</sup>) as ships, then the state is free to tax at whatever rate it pleases, likely resulting in an "embarrassing and destructive" restriction on free commerce among the states.<sup>173</sup>

If, however, the vessels are taxed "in the same manner" as other local property, and local businesses are subject to the same tax rates, then there will be a sufficient "electorate-related check . . . upon the City's vessel-taxing power."<sup>174</sup> Any attempts by the City to increase the tax on the ships that is accompanied by a concurrent increase in the tax on property owned by local individuals and businesses that have direct influence on the political process will implicate "political concern[s]" and become a "potential ballot-box issue," and the impact of the tax increase on local property owners will provide a safeguard against excessive taxation on those ships using the City's ports.<sup>175</sup>

The dissent's primary contention, that *Wheeling* only requires that property taxes be based on the value of the ship rather than its tonnage,<sup>176</sup> is insufficient to solve this problem, as, in the absence of a parallel tax on other local property, the tax rate could still be raised at will by the City. Nonetheless, the dissent's argument in the alternative still holds weight, and reflects the optimal result in this case based on both past Supreme Court cases and practical considerations.

Both sides agreed that the Valdez Municipal Code section authorizing the tax "applies only to ships."<sup>177</sup> For the plurality, this ends the inquiry, as the ships are not taxed in the "same manner" as other property.<sup>178</sup> This opinion, however, ignores the presence of "other property in the city [that] is also subject to taxation" *at the same rate*.<sup>179</sup> Under a different section of the Valdez Municipal Code, a value-based property tax is imposed on "trailers, mobile homes, and recreational vehicles that are affixed to a site and connected to utilities."<sup>180</sup> The dissent notes that the taxability of these types of property under section 3.12.022 of the Valdez Municipal Code is "determined much in the same way as the taxability of ships," as the property under both sections may

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172. *Transp. Co. v. Wheeling*, 99 U.S. 273, 284 (1878).

173. *See Gibbons v. Ogden*, 22 U.S. 1, 11 (1824).

174. *Polar Tankers*, 129 S. Ct. at 2287.

175. *Id.* at 2285, 2287.

176. *Id.* at 2291.

177. *Id.* at 2282, 2292; *see also* VALDEZ MUN. CODE § 3.12.020 (2008).

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

179. *Id.* at 2292; *see also* *City of Valdez v. Polar Tankers, Inc.*, 182 P.3d 614, 623 (Alaska 2008).

180. *Polar Tankers*, 129 S. Ct. at 2292 (citing VALDEZ MUN. CODE § 3.12.022).

be taxed if it meets a “ninety day” requirement.<sup>181</sup> In both cases, the property has been assessed a tax only after establishing sufficient contacts with the city, and the tax rate levied on the property in both cases is the same.<sup>182</sup>

Since this other property is treated in the same manner and taxed at the same rate, the fears of the Court here and the Court in *Wheeling* should be put to rest. As a result of the interests of the owners of the real and personal property who are taxed at the same rate and in the same manner as the ships, the City is subject to the safeguards of the political process and does not have unfettered discretion to set whatever price it desires.

If the rate applied to ships was different than the rate applied to other types of property, or if the tax truly applied only to ships and no other form of property, then the plurality would have been correct in its interpretation of *Wheeling* and its opinion in this case. Since, however, other personal and real property was taxed in the same manner and at the same rate, the Valdez ordinance was an ad valorem property tax, imposed with the safeguards of the democratic process. For this reason, pure ad valorem property taxes, like the one adopted under Valdez’s municipal code, if applied in the same manner as other local property taxes, should not be considered unconstitutional duties on tonnage in violation of the federal Constitution.

### C. Congressional Approval

The Tonnage Clause does note that the states can gain the “Consent of Congress” if they wish to impose a duty of Tonnage.<sup>183</sup> In theory, this requirement was meant to ensure that Congress would have the “final exercise of this important power” to prevent the states from hindering trade.<sup>184</sup> The Framers recognized that a congressional approval requirement would be beneficial to the purposes behind the Tonnage Clause, as it would ensure that “each state will be informed of, and heard on, potentially threatening sister-state activities.”<sup>185</sup> Further, the proponents of a tonnage tax would be required to “mobilize the requisite majorities at the federal level, thus affording an added measure

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181. A trailer or mobile home may be taxed if it has “remained at a fixed site for more than ninety days.” VALDEZ MUN. CODE § 3.12.022(C). Similarly, a ship establishes a tax situs in Valdez if it is “used within the city for any ninety days or more.” VALDEZ MUN. CODE § 3.12.020(C)(2)(c).

182. *Polar Tankers*, 129 S. Ct. at 2292.

183. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, *without the Consent of the Congress*, lay any duty of Tonnage”) (emphasis added).

184. *Cannon v. New Orleans*, 87 U.S. 577, 583 (1874).

185. MEESE, ET AL., *supra* note 1, at 179.

of security.”<sup>186</sup> Critics of property taxes based on tonnage of ships could claim that if a state truly wants a justifiable tax, then it could simply ask Congress.<sup>187</sup>

A balance, however, must be reached between the clear desires of the Framers for freedom of commerce among the states and the needs of states and cities to independently impose taxes on those corporations who frequently make use of their ports. States should not be required to ask permission at the federal level to implement a tax on certain property that routinely makes use of local utilities and services. Such a position, essentially enabling federal oversight over matters of taxation that are distinctly local, would be as offensive to a republican system of government as an overabundance of power in the hands of the states.

A similar policy argument made against the Valdez tax is that it would have the effect of passing the tax burden on to the lower forty-eight states. If the shipping companies were required to pay a tax to ship oil, the costs of production and transportation would rise, and this cost would be passed on to the ultimate consumers. These consumers, however, are the same people who derive an indirect benefit from the City’s maintenance of the port, which enables a substantial amount of domestic oil to enter into the market, increasing the supply and pushing down the price. A property tax on the ships that bring this oil to market, properly tied to the vessels’ use of the port and restricted by similarities to other local property taxes, would be just compensation for the services provided by the City of Valdez and the State of Alaska in helping to bring the valuable resource to consumers in the lower forty-eight states.

The statute implemented by the City of Valdez, if phrased differently, may have passed Supreme Court review. The statute could have explicitly tied the percentage rate charged to the vessels to the statutory sections that taxed other property within city limits, with an indication that the tax rate charged to ships could not rise unless the tax rate for other personal property increased at the same rate. Though this construction would likely not have swayed the concurring Justices, it may have influenced the remaining Justices by bringing into sharper focus the rule elucidated in *Wheeling* and *In re State Tonnage Tax Cases*: that when ships are taxed *as property, in the same manner* as other personal property in the jurisdiction, there is no violation of the Tonnage Clause.

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186. *Id.*

187. *See Cannon*, 87 U.S. at 583 (“[If] the just necessities of a local commerce require a tax that is otherwise forbidden, it is presumed that Congress would not withhold its assent if properly informed and its consent requested.”).