Hey, What About the Free Rivers Doctrine?

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Many states, particularly Kentucky, impose tax upon commercial inland watercraft vessels, oftentimes administered as value-based taxes. While to some, taxation of inland watercraft vessels may not appear to ring any alarm bells, but when considering some bedrock principles of state taxation and our country's constitutional formation documents, the way many states are administering taxes on inland vessels runs afoul of these 235 plus-year-old principles.

This article highlights some issues that can arise due to friction between state taxation of watercraft and historic state and federal constitutional governance documents still well in effect today. This survey piece begins with a small overview of the Kentucky watercraft tax, and then shifts to discuss laws that have been in force since the early days of our Country's founding, notably, Article 4 of the Northwest Ordinance of 1787 ("Northwest Ordinance"), the Southwest Territory Legislation ("Southwest Ordinance"), the Kentucky—Virginia Compact of 1789 ("Virginia Compact"), and the Duty of Tonnage Clause of the U.S. Constitution ("Tonnage Clause"). And in particular, how these documents may bar the imposition of watercraft taxes as violating what is known as the Free Rivers Doctrine.

1. Kentucky's Watercraft Tax

As but one example, to understand the nature of this issue, it is worth starting with an overview of, here, Kentucky's watercraft tax. Kentucky's statutory guidance for its commercial watercraft tax ("watercraft tax") lies in KRS Chapter 136, Sections 1801–1806. In particular, KRS 136.1802 that sets forth guidance for the assessment, taxation, and valuation determination for commercial inland watercraft.[1] Kentucky's watercraft tax, as we know it today, was put forth in 2006 legislation and became effective on January 1, 2008. The 2006 legislation carved commercial watercraft into its own category and away from three separate and distinct predecessor forms of taxation, *inter alia*, the public service

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company tax, the nonresident watercraft tax, and the resident tangible property tax.[2]

Additionally, the 2006 legislation also changed the method of apportioning commercial watercraft. KRS 136.1802 establishes that route miles, not actual miles traveled or a form thereof such as trip ton miles, is the statutorily required method of apportioning commercial watercraft. Route miles are determined based on a "one-way directional waterway mileage over with a vessel(s) traversed in domestic commercial service upon one or more waterways."[3]

Equally interesting is that KRS 136.1802 establishes the way watercraft are assessed stating, "[T]he watercraft of any corporation operating within this state, or partly within this state and partly within other states, shall be assessed by the department as of January 1 each year."[4] The statute continues with subsection (2) stating, "The department shall have the sole power to assess *all of the corporation's watercraft*."[5] The importance of this section is that it purports to establish the power of the Commonwealth to levy a tax not just on the watercraft that actually physically operate in the state, or partly within the state, but against an entire fleet.[6] Thus, if a taxpayer has one commercial vessel that travels in Kentucky waters, the value of the taxpayer's *entire fleet* is subject to the watercraft tax albeit apportioned to Kentucky based on the amount of route mileage of Kentucky waterway routes traveled.

It is a fascinating circumstance that stirs more discussion around the history of our Country and some of its founding documents, because these types of watercraft taxes come into conflict when juxtaposed next to these early constitutional documents.

2. Navigable Waterways Free from Taxation

Before interstate highways, air travel and railroads, there were inland waterways, the interstate highways of the 18th century. There is cause for concern with this type of tax because it runs into direct conflict with the Northwest Ordinance, the Southwest Ordinance, the Virginia Compact, and also with the Tonnage Clause. Each of these documents will be reviewed in turn, highlighting the essential

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provisions that cause conflict with watercraft taxes like Kentucky's. Particularly, each of these documents includes a waterways provision, collectively referenced as the "Free Rivers Doctrine"[7] imposing protections from state taxation upon navigable waterways.[8]

A. The Northwest Ordinance of 1787

Students of American History will recognize that the Northwest Ordinance of 1787 was an early constitutional document that was legislated as an early form of government operation before the adoption and ratification of the original Constitution of the United States of America. The overall purpose of the Northwest Ordinance was to govern the territory northwest of the Ohio River, a large portion of land that previously belonged to the Commonwealth of Virginia.[9] Established by its Article IV, the Northwest Ordinance is the genesis for what has been termed the "Free Rivers Doctrine," which acts as a provision protecting U.S. waters, including the inland waterways, from taxation. Article IV of the Northwest Ordinance provides:

[I]t is hereby ordained and declared by the authority aforesaid that the following articles shall be considered as articles of compact between the original states and the people and states in the said territory forever remain unalterable unless by common consent to wit: …

Art. IV. … The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, **shall be** common highways and **forever free**, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, **without any tax, impost or duty therefor.[**10]

Many states, such as Louisiana and Alabama, and some others outside of the original territorial jurisdiction of the Northwest Ordinance, have adopted this language from Article IV protecting their waterways from toll, duty, and taxation in their respective congressional state creation enabling acts or in their respective state constitutions.[11] Thus, terms from this document that many

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states adopted either in their congressional enabling acts for admittance into the union or in their state constitution declare that the navigable waters shall be free from tax.[12] Based on this storied history of the Free Rivers Doctrine, there is no question that this issue of taxation is one of national concern.[13] State taxation of inland watercraft directly threatens the federal interest of free use of America's inland waterways pronounced in the Northwest Ordinance.[14]

B. The Southwest Territory Ordinance

In the same vein as the Northwest Ordinance is the legislation that followed concerning the Southwest Territory, referred to as the Southwest Ordinance. Not long after the passage of the Northwest Ordinance, Congress, on May 26, 1790, enacted legislation directly addressing the provisions thereof and its applicability to the territory southwest of the Ohio River. The Congressional legislation states:

Act for Government of the Southwest Territory

Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, **That the territory** of the United States, **south of the river Ohio**, for the purposes of temporary government, shall be one district; **the inhabitants of which shall enjoy all the privileges, benefits and advantages, set forth in the Ordinance**[15] of the late Congress, for the government of the territory of the United States, north-west of the river Ohio; and the government of the said territory, South of the Ohio, shall be similar to that which is not exercised in the territory north-west of the Ohio; except so far as is otherwise provided in the conditions expressed in an Act of Congress of the present session, entitled, "An Act to accept a cession of the claims of the State of North Carolina, to a certain district of the western territory."[16]

To further cement that the Northwest Ordinance was adopted by the Southwest Ordinance, a leading historical guide provides that all of "the privileges, benefits and advantages" of the Northwest Ordinance were extended to the territory "south of the River Ohio"

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via the Southwest Ordinance of May 26, 1790, including the states and citizen rights of Kentucky, Tennessee, and Alabama, which became aligned with the rights of what later became Ohio, Michigan, Indiana, Illinois, Wisconsin, and Minnesota.[17]

A review of the Southwest Ordinance and the aforementioned historical guide clarify that the Northwest Ordinance, and its principles, were applied to the southern states in addition to the originally mentioned territory (later on, states) in the Northwest Ordinance itself. Thus, the Northwest Ordinance's "Free Rivers Doctrine" footprint was expanded *via* the Southwest Ordinance to the states in the south.

C. The Virginia Compact

The Virginia Compact is yet another example of how state watercraft taxes may be in conflict with federal documents.[18] Section 11 of the Virginia Compact provides "that the use and navigation of the river Ohio, so far as the territory of the proposed State [as in the Commonwealth of Kentucky], or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States."[19] Specifically, enacted by the General Assembly of Virginia on December 48, 1789, Section 11 of the Compact provides:

"[T]that the use and navigation of the River Ohio, so far as the territory or the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth of the proposed state on the river as foresaid shall be concurrent only with the states which may possess the opposite shores of the said river." [20]

That these antiquated laws are still valid is clear.[21] Both the U.S. Supreme Court and Kentucky's Highest Court have held that the Virginia Compact is still binding and controlling as to the Ohio River, [22] but for one example.

All three of these early constitutional documents are still controlling as their effect has been upheld by courts and not overruled.

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Therefore, it is likely that these documents and the provisions therein bar state taxation of inland watercraft.

3. The Tonnage Clause of the U.S. Constitution

Separate and apart from the aforementioned documents discussed, the Tonnage Clause of the United States Constitution is also intended to be a safeguard against certain taxation, here, of watercraft vessels. The Tonnage Clause was adopted and effective as of June 21, 1788.[23] Section 10, Clause 3, "Duty of Tonnage, State Compacts, War," of the U.S. Constitution provides:

No State shall, without 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.[24]

The purpose of the so-called Tonnage Clause (Art. I, §10, cl. 3) of the U.S. Constitution is to prohibit a state or local government, without the express consent of Congress, from imposing a charge or duty for the privilege of entering, trading in, or lying in a port, harbor, or waterway.

While drafted very broadly, not unlike other provisions of the U.S. Constitution, the Tonnage Clause is clear in its prohibition of duties of tonnage, though not fees or charges made by a state as compensation for some type of services rendered to and/or enjoyed by a vessel. Thus, reasonable charges for pilotage and wharfage services, loading and unloading charges, or similar services are not in violation of the Tonnage Clause under U.S. Supreme Court doctrine.[25]

The prohibition set forth by the Tonnage Clause is clear in that it applies to vessels engaged in intrastate commerce as well as vessels engaged in interstate commerce.[26] Consequently, when a state attempts to tax a vessel through a charge that is not related to any service provided by the state, but rather is levied upon the vessel based upon its weight or a proxy for its weight (such as value or size), such a charge without the consent of Congress violates the duty of Tonnage Clause.[27]

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The Supreme Court in *Clyde Mallory Lines v. Alabama* answered whether a tax being scrutinized under the Tonnage Clause had to directly relate to the measure of tonnage, holding:

Hence the **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 a vessel, with operate to impose a charge for the privilege of entering, trading in, or lying in a port.[28]

Thus, a tax being scrutinized under the Tonnage Clause that is not directly a measure of tonnage has no bearing in determining whether the involved tax violates the Tonnage Clause, because it "embrace[s] all taxes and duties regardless of their name or form, and *even though not measured by the tonnage of a vessel*."[29]

In recent years, the Tonnage Clause was revisited by the U.S. Supreme Court in *Polar Tankers, Inc. v. City of Valdez*.[30] In *Polar Tankers*, the Court took a closer and more granular look at this issue and ultimately found that a city's property tax violated the Tonnage Clause.[31] In this case, oil transporters challenged a city's *ad valorem* property tax on large vessels docking at the city's ports. The taxpayer therein argued that because the tax only applied to vessels of at least 95 ft. in length or those that regularly take on at least one million dollars in cargo or conducted that much business in the port, it had the effect of imposing a duty of tonnage. While the tax in form applied only to ships involving certain monetary amounts, in practice, the tax was targeted primarily at large oil tankers. The Court affirmed that states cannot evade the Tonnage Clause by calling a tax a charge on the owner or the supercargo, while in reality placing a tax on a ship's capacity. The Court reiterated that the purpose of the Tonnage Clause was to "diminish a state's ability to obtain tax advantages based on favorable geographic position."[32]

However, more consistent with the Free Rivers Doctrine is the opinion text in concurrence and dissent, where Chief Justice Roberts and Justice Thomas were clear. Opining that the tax should be struck down because the Duty of Tonnage Clause bans all taxes on vessels using a port:

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The majority's list of interpretive tools tellingly leaves out one—the words the Framers used. The Clause by its terms provides that "No state shall, without the consent of Congress, lay any Duty of Tonnage." The majority correctly concludes that the Valdez tax is a tonnage tax, and that should be the end of the matter.[33]

The *Polar Tankers* decision thus shows the Tonnage Clause is alive and well in the area of state watercraft-related taxation and can apply even if not related to cargo, providing yet another hurdle for state watercraft taxes to jump over. The Tonnage Clause along with the aforementioned founding documents deserve a preemption discussion around how states tax watercraft.

Conclusion

On their face, some state watercraft taxes may run into direct conflict with the Northwest Ordinance, the Southwest Ordinance, the Virginia Compact, and the Tonnage Clause, depending on the nature of the tax and how the state is administering it. The validity of the aforementioned documents has yet to be overturned as binding law, and in fact, each document is radiant in its precedent. [34] As such, as this article presents, such precedent must be considered when scrutinizing state watercraft taxes and the legitimacy thereof.

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[1] KRS 136.1802.

[2] *See* KRS 136.120 and KRS 136.160; KRS 136.181; 103 KAR 8:010; and KRS 132, respectively.

[3] KRS. 136.1802.

[4] *Id.* at (1).

[5] *Id.* at (2). (emphasis added).

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[6] *Id.*

[7] *See* Transcript of the Northwest Ordinance, Sec. 14 Art. 4 (1787), Act of May 26, 1790, ch. 14, 1 Stat. 123 (organizing what would become the Southwest Territory), available at US Statutes at Large, vol. 1, 1789–1799, and 13 Henning's statutes at L., C. 14 §11.

[8] *See* Kendall L. Houghton, Brief for Hartley Marine Corp. et al. as Amici Curiae Supporting Petitioners in *Hartley Marine v. Paige*, (No. 96-563) 1996 WL 33439489, *cert. denied*, SCt, 519 US 1108, 117 SCt 942 (1997) (stating [The Northwest Ordinance of 1787, the Virginia Compact of 1789, and the Duty of Tonnage Clause] "On their faces, these federal mandates and prohibitions do not contemplate or tolerate a tax [such as the one] imposed on Ohio River traffic in this case. In fact, the diverse manifestations of preemptive intent constitute unambiguous evidence of the overriding concern our founding fathers had that *travel and trade conducted upon inland waterways be and remain free and unimpeded*.") (all emphasis and [] added).

[9] The Virginia General Assembly formally authorized the transfer of such land on December 20, 1783.

[10] Transcript of the Northwest Ordinance, Sec. 14 Art. 4 (1787) (emphasis added).

[11] *See, e.g.*, Louisiana Congressional Enabling Act of 1811; Ala. Const. Ann. Art. I, § 24.

[12] *Id.*

[13] *See* Michael J. McIntyre & Richard D. Pomp, Brief for Hartley Marine Corp. et al. as Amici Curiae Supporting Petitioners in *Hartley Marine Corp. v. Paige*, (No. 96-563), 1996 WL 33439488, *cert. denied,* SCt, 519 US 1108, 117 SCt 942 (1997) (stating that "Not only is the free-river doctrine a long-standing federal policy, but also it operates in an area that is preeminently a matter of *national concern* … the federal government is responsible for regulation, servicing, and maintenance of the inland waterways system.) (emphasis added).

[14] *Id.*

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[15] Referencing the Northwest Ordinance, *supra*.

[16] Act of May 26, 1790, ch. 14, 1 Stat. 123 (organizing what would become the Southwest Territory), available at US Statutes at Large, vol. 1, 1789–1799.

[17] *See* William J. Hall & Robert W. Hull, *The Origin and Development of the Waterways Policy of the United States* (1967).

[18] *See* Paul H. Frankel, Craig B. Fields & Elliot S. Frank, *Free the Free Rivers Doctrine*, 50 Tax Executive 31, 33 (January–February 1998) (stating that after [the Northwest Ordinance] "[T]he Virginia Compact was enacted by the General Assembly of Virginia and by the sanction of Congress, became the law of the Union.").

[19] 13 Henning's Statutes at L., C. 14 §11.

[20] *Id.*

[21] See Frankel et al., *Free the Free Rivers Doctrine*, at 33 ("In *Economy Light & Power Co.*, SCt, 256 US 113, 41 SCt 409 (1921), the Supreme Court found that while the Northwest Ordinance was superseded by statehood with respect to a state's internal affairs, that "so far as it established public rights of highway in navigable waters capable of bearing commerce from state to state, it did not regulate internal affairs alone, and was *no more capable of repeal by one of the states than any other regulation of interstate commerce* enacted by the Congress." 256 US at 120-21 (emphasis added) (citations omitted). Thus, under *Economy Light*, although the act of Congress in admitting a state was sufficient to supersede provisions of the Northwest Ordinance pertaining to the state's internal affairs, where interstate commerce is involved, the Northwest Ordinance remains in full force to preempt improper state actions, such as the taxation of navigation on interstate waterways.").

[22] *See Wedding v. Meyler*, SCt, 192 US 573, 24 SCt 322 (1904) (Holding that because of the Virginia Compact, an Indiana court judgement should be respected because Indiana had jurisdiction to serve a summons below the low-watermark of the Ohio River. The Virginia Compact provides both states with concurrent jurisdiction, and therefore, Indiana's judgment was entitled to full faith and

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credit because of proper service.). *See Beard v. Smith*, 22 Ky. 430 (1828) (Holding that the delegates chosen from Kentucky assented at the convention of delegates with the Virginia legislature to create the Commonwealth of Kentucky, and this became a "solemn compact" and was "engrafted into the Constitution of Kentucky.).

[23] This was at a point in time after the adoption of the Northwest Ordinance on July 13, 1787, but prior to the Act of August 7, 1789. And prior to the adoption of the 1789 Virginia Compact.

[24] U.S.C.A. Const. Art. I, Sect. 10, cl. 3.

[25] *See e.g.*, *Clyde Mallory Lines v. Alabama*, SCt, 296 US 261, 24 SCt 322 (1935).

[26] *See* State Tonnage Tax Cases, SCt, 79 US 204 (1870).

[27] *See generally*, *Inman S.S. Company v. Tinker*, SCt, 94 US 238 (1876); *Cannon v. New Orleans*, SCt, 87 US 577 (1874).

[28] *Clyde Mallory Lines v. Alabama*, SCt, 296 US 261, 265-66, 56 SCt 194 (1935).

[29] *Id.* (emphasis added).

[30] SCt, 557 US 1, 129 SCt 2277 (2009).

[31] *Id.*

[32] *Id.* at 7.

[33] *Polar Tankers, Inc. v. City of Valdez, supra* at 18 (Roberts, C.J., and Thomas, J., concurring in part, dissenting in part, and concurring in the judgment).

[34] Fun fact—for a fun, popular film reference regarding the nature of this type of precedent, *see* National Treasure: Book of Secrets (Walt Disney Studios 2007) (Wherein Patrick Henry Gates (Jon Voight) while fishing in the Potomac River near Mt. Vernon while the President is there is approached by police who ask him if he knows he's in a restricted area, responds, "Are you aware that according to article one, section 25 of the Maryland Constitution, I'm allowed to fish in public water?). These old, obscure provisions are still controlling!

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