



# PREPOSITIONS IN THE CONSTITUTION

*Erik M. Jensen*

**I**N MY RECENT WORK I've had occasion to contemplate the importance of prepositions in the Constitution. It's not a preposterous proposition to postulate that prepositions should have effect, as should all other words in a legal document. But the lowly preposition, always linked in my mind to rabbits and hollow logs,<sup>1</sup> has not been given the respect it deserves in interpretive matters.

In the Tonnage Clause, the Constitution precludes states from imposing “duties *of* tonnage” without congressional approval.<sup>2</sup> “Tonnage” was understood historically to refer to the capacity of maritime vessels, and states weren't supposed to be levying duties that would interfere with federal regulation of interstate and foreign commerce.<sup>3</sup>

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<sup>1</sup> As I was taught in elementary school, a rabbit can go *on* the hollow log, *around* it, *through* it, *over* it, and so on. Hare-splitting purists might sputter that the bunny idea doesn't work with some prepositions, like “of,” but to me that complaint rings hollow.

<sup>2</sup> U.S. Const. art. I, § 10, cl. 3 (providing that “[n]o State shall, without the consent of Congress, lay any Duty of Tonnage”).

<sup>3</sup> See Erik M. Jensen, Quirky Constitutional Provisions Matter: The Tonnage Clause, *Polar Tankers*, and State Taxation of Commerce, 18 *Geo. Mason L. Rev.* no. 3 (2011) (forthcoming) (arguing that Tonnage Clause raises a boatload of

Long ago the Supreme Court concluded that at least some state levies not expressed in terms of vessels' capacities – not explicitly tied, that is, to “tonnage” – were still forbidden by the Tonnage Clause. If that weren't the case, it would be too easy for states to circumvent the Clause: A state could measure the amount of tax liability on a vessel using its ports by the number of masts, say, rather than capacity. Indeed, the Court concluded that a fixed levy on vessels using a state's ports – a charge not even remotely tied to vessels' capacities – could have results that the Tonnage Clause was intended to prevent.<sup>4</sup>

If the Tonnage Clause is to have effect, the Court's position makes sense. But constitutional and statutory language does not have to lead to sensible results. Does the Court's interpretation comport with the language of the Clause? I think it does, when we focus on the preposition. The Clause forbids duties *of* tonnage.<sup>5</sup> A duty *on* tonnage (i.e., one measured by capacity or a reasonable surrogate therefor) may be a duty *of* tonnage, but the latter category can be far broader. Understood in that way, the constitutional phrase describes the nature of the generally proscribed levy, with its emphasis on maritime vessels,<sup>6</sup> not the measure of the levy. The language of the Clause supports the purpose of the Clause, which is as things should be in a ship-shape world.

You go, prepo!

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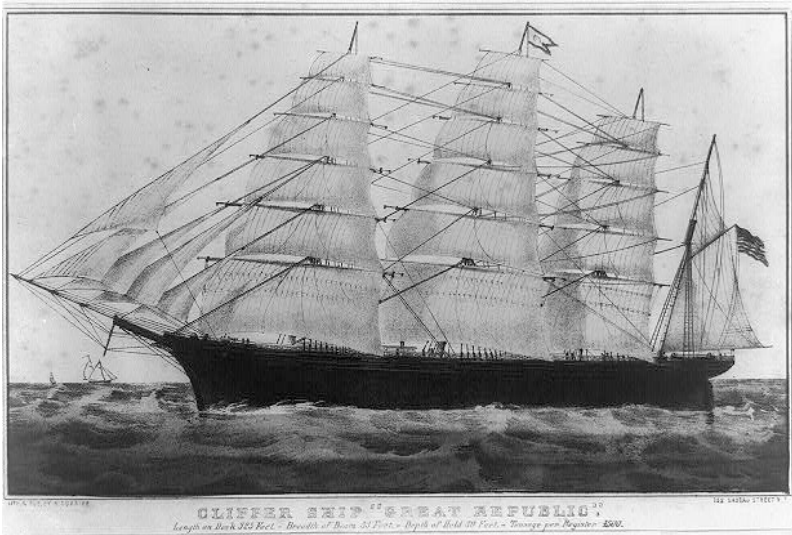
issues). The Tonnage Clause received its most recent Supreme Court consideration in *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009).

<sup>4</sup> See Jensen, *supra* note 3, at Part IV.A (discussing the many relevant cases, which I would cite here except that doing so would make it hard to fit this article on these tiny, low-tonnage pages).

<sup>5</sup> Commentators sometimes mix up prepositions. See, e.g., Francis Hilliard, *The Law of Taxation* 64 (1875) (referring to “duties on tonnage,” as if the preposition mattered not a whit).

<sup>6</sup> One question today is whether the Clause might also prohibit similar levies imposed on other means of transportation – aircraft, say – entering a state. See Jensen, *supra* note 3, at Part IV.A (arguing that the answer should be Yes, if we look to the purpose of the Clause or, in the alternative, if we apply the plane-meaning rule).

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*The clipper ship Great Republic: “Length on deck 325 feet. – Breadth of beam 53 feet. – Depth of hold 39 feet. – Tonnage per register 4500.” By Currier & Ives (ca. 1835-1856).*

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Another example of prepositions’ possible preeminence can be found in discussions as to whether the individual-mandate penalty in the recently enacted health-care legislation – beginning in 2014, most Americans must acquire health care coverage or pay a penalty – might be a direct tax and, if it will be, whether it would be exempted from the direct-tax apportionment rule<sup>7</sup> by the Sixteenth Amendment, which refers to “taxes *on* incomes.”<sup>8</sup>

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<sup>7</sup> See U.S. Const. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .”); U.S. Const. art. I, § 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”).

<sup>8</sup> U.S. Const. amend. XVI (exempting “taxes on incomes, from whatever source derived,” from the apportionment requirement). For what it’s worth, I don’t think the penalty will be a tax to begin with, and the constitutionality of the individual mandate should be analyzed only under the Commerce Clause, not the Taxing Clause. But, as an alternative argument, the Obama administration is defending the individual mandate as an exercise of the taxing power, see U.S. Const.

Under the Patient Protection and Affordable Care Act of 2010,<sup>9</sup> the penalty for anyone who doesn't acquire "minimum essential coverage," and who is not exempted from these rules (as, for example, low-income people will be), will be one of three figures: A fixed dollar figure will set the floor (to be \$695 in 2016). A percentage-of-income figure will come into play if it is higher than the floor (the rate to be 2.5% in 2016),<sup>10</sup> but subject to a cap based on the average national cost of so-called "bronze level coverage" — meaning decent, but not lavish, health insurance.<sup>11</sup>

If the penalty will be a direct tax, it will be subject to the onerous direct-tax apportionment rule of the Constitution, generally requiring that the direct-tax liability be apportioned among the states on the basis of the respective states' populations, without regard to how the tax base (in this case, the population without adequate insurance) is distributed across the country.<sup>12</sup> If the penalty has to be apportioned, it could not work in the intended way.<sup>13</sup> In

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art. I, § 8, cl. 1 (giving Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises"), and the administration's position brings these taxing issues into play. For extended discussion of all of this stuff, see Erik M. Jensen, *The Individual Mandate and the Taxing Power*, 37 N. Ky. L. Rev. No. 3 (2011) (symposium issue) (forthcoming).

<sup>9</sup> Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242-49 (2010) (as if you're really going to check out Statutes at Large after seeing this reference in the *Bag*).

<sup>10</sup> I'm ignoring some details here, such as the content of the category I have called "income." For present purposes, it's good enough to understand the concept in a commonsense way and to assume that what goes into the penalty calculation would be treated as "income" under the Sixteenth Amendment.

<sup>11</sup> I.R.C. § 5000A(c)(1)-(c)(3). "Bronze level coverage" has nothing to do with the simultaneously enacted excise on persons for whom "indoor tanning services" are performed, *see* I.R.C. § 5000B, a tax generally understood to have been directed at John Boehner.

<sup>12</sup> *See supra* note 7 (quoting the Direct-Tax Clauses).

<sup>13</sup> Suppose two states with identical populations have vastly different numbers of un- or under-insured people. Regardless of that difference, the total penalty to be collected from the two states will have to be the same if the penalty will be a direct tax and will not be a "tax on incomes." That would be a crazy result. This illustrates how the apportionment rule, clearly intended to deter direct taxation, makes it unlikely that an openly direct tax will ever again be enacted.

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any event, the penalty as enacted will not be apportioned and, if it will be a direct tax, it will therefore be unconstitutional in its present form, unless . . . .

The possible *unless* is the Sixteenth Amendment, which made the modern, unapportioned income tax possible. If the penalty will be a “tax *on* incomes” – yes, the preposition is important – the penalty need not be apportioned, even if it would otherwise be a direct tax.<sup>14</sup>

Some commentators have argued that the percentage-of-income calculation described earlier will make the penalty an income tax. And, because some low-income persons will be exempted from the penalty, income will help determine who will be subject to the penalty, also supporting the idea (it is argued) that the penalty, if it will be a tax at all, will be an income tax.<sup>15</sup>

I concede (as I have to) that income computations will be necessary to determine the amount of any penalty for un- or under-insured persons, and to determine whether someone will be subject to the penalty to begin with. Call that an “income tax,” if you wish.<sup>16</sup> But think about how liability will be computed: someone with annual income of \$1 billion who does not acquire suitable insurance will pay exactly the same penalty, the cap – the cost of bronze level coverage – as someone with *one-one thousandth* of that income.<sup>17</sup> Can one say that a tax which hits lower-income folks as hard as higher-income ones is a tax *on* incomes? (Remember – if you

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<sup>14</sup> See *supra* note 8 (quoting relevant part of Sixteenth Amendment).

<sup>15</sup> See, e.g., Edward D. Kleinbard, *Constitutional Kreplach*, 128 *Tax Notes* 755, 760 (2010); Brian Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 *Yale L.J. Online* 27, 31 (2010).

<sup>16</sup> Some have wished. See, e.g., Kleinbard, *supra* note 15, at 760 (seeing the operation of the individual-mandate penalty as equivalent to “[i]mposing mandatory government collections calculated as a percentage of household income, [which] is exactly how an income tax operates”).

<sup>17</sup> I could make the fraction even smaller to support the point, but I wanted to make sure I was using numbers that result in a percentage-of-income figure far above any reasonable estimate of what the cost of bronze level coverage might be. (I certainly hope that 2.5% of \$1 million (i.e., \$25,000) meets that criterion.)

could possibly forget after reading this far – that the language in the Amendment is “taxes *on* incomes,” not “income tax.”) One might think – indeed, I do think – that a tax *on* incomes must impose higher absolute liability as income rises<sup>18</sup> (just as a duty *on* tonnage would be higher for a high-capacity vessel than a low-capacity one).<sup>19</sup> To the extent that doesn’t happen, you don’t have a tax *on* incomes, even if income plays a role in the calculations.<sup>20</sup> A cap doesn’t fit with the idea of a tax *on* incomes, at least for those subject to the cap.<sup>21</sup>

As was the case with the Tonnage Clause, the preposition in the Sixteenth Amendment – taxes *on* incomes<sup>22</sup> – has real meaning, and the language supports the purpose of the provision. The move for an income tax in the late nineteenth century, temporarily stalled by the Supreme Court’s 1895 decisions in *Pollock v. Farmers’ Loan & Trust Co.*,<sup>23</sup> but rejuvenated by ratification of the Amendment in 1913, was intended to make the wealthy bear their fair share of the national tax liability. That had not been true when the nation relied on consumption taxes like tariffs for revenue. It would turn the

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<sup>18</sup> I’m not talking progressivity here. A proportional tax – with the same rate on all income – still results in a higher absolute income-tax liability for higher-income persons. For that matter, a regressive income tax, with rates declining at higher levels, will result in higher taxes for higher-income folks as long as the marginal rate does not reach zero.

<sup>19</sup> As noted earlier, however, the Tonnage Clause generally forbids state duties of tonnage, thus picking up more than duties *on* tonnage.

<sup>20</sup> I have also argued that exempting really low-income people from a tax isn’t enough to make the tax into one *on* incomes. That conception would make almost all levies into taxes *on* incomes, and the proponents and ratifiers of the Sixteenth Amendment didn’t think they were abolishing the direct-tax apportionment rule. See Jensen, *supra* note 8, at Part III.C.

<sup>21</sup> At the other extreme, those whose penalty will be the floor, the fixed dollar figure, also don’t seem to be subject to a tax *on* incomes, however that phrase might be interpreted.

<sup>22</sup> Have I italicized “on” enough times yet? Maybe I’ll do it once more.

<sup>23</sup> 157 U.S. 429 (1895), 158 U.S. 601 (1895) (striking down 1894 income tax on the ground that it was an unapportioned direct tax, at least insofar as it reached income from property).

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Amendment on its head to conclude that a tax which does not impose higher liability on higher-income people would still be *on* incomes.

It's nice when language and goals coincide. And, at least occasionally, prepositions help us get to that happy result.

*GB*