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MODERN TRANSPORTATION NEEDS AND THE PROHIBITIONS OF ARTICLE X, SECTION 10 OF THE VIRGINIA CONSTITUTION

*The Honorable Stephen R. McCullough **

INTRODUCTION

Although the United States Constitution plays the starring role in contemporary jurisprudence and in legal education, on occasion, Virginians are reminded of the importance of Virginia's own state constitution. As the foundational charter of Virginia's government, the Virginia Constitution contains some distinctive clauses shaped by Virginia's history. The Supreme Court of Virginia, for the first time in almost thirty years, addressed the scope of the "internal improvements clause"¹ and the "credit clause"² in *Montgomery County v. Virginia Department of Rail and Public Transportation*.³ Specifically, the court was asked whether these clauses prohibited the Commonwealth from entering into an agreement with Norfolk Southern to construct an "intermodal" rail⁴ facility in Montgomery County.⁵

This essay outlines the history of these two clauses and the litigation between the county and the Commonwealth, and exam-

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1. VA. CONST. art. X, § 10.

2. *Id.*

3. 282 Va. 422, 435–42, 719 S.E.2d 294, 300–04 (2011).

4. Intermodal rail is "a cooperative service where trucks pick up and deliver their shipments, but the truck trailer (or container) is carried between cities by rail, thus reducing the number of trucks that have to travel by highway." REEBIE ASSOCIATES, THE NORTHEAST—SOUTHEAST—MIDWEST CORRIDOR MARKETING STUDY EXAMINING THE POTENTIAL TO DIVERT HIGHWAY TRAFFIC FROM INTERSTATE 81 TO RAIL INTERMODAL MOVEMENT, EXECUTIVE SUMMARY 2 (Dec. 15, 2003) (hereinafter *MARKETING STUDY*), <http://www.drpt.virginia.gov/activities/files/I-81-Executive-Summary-revised.pdf>.

5. *Montgomery Cnty.*, 282 Va. at 434, 719 S.E.2d at 299.

ines the decision of the Supreme Court of Virginia. The essay concludes by examining whether these clauses retain any contemporary relevance.

I. HISTORICAL BACKDROP TO THE INTERNAL IMPROVEMENTS AND CREDIT CLAUSES

A. *Financial Catastrophe Leads to Constitutional Restrictions*

The term "internal improvements" has fallen into disuse. To the founding generation, however, internal improvements constituted an object of great interest. Essentially, internal improvements are transportation infrastructure.⁶ One of the overriding policy objectives for the newly independent United States was to open the West for settlement and to develop rich resources of the interior. Both objectives required internal improvements, at that time chiefly roads and canals.⁷

To meet this need, the General Assembly in 1816 established a Board of Public Works.⁸ This board was tasked with investing state funds in the stock of canal, turnpike and other "public work" companies.⁹ The General Assembly sought by these expenditures to "render[] navigable, and unit[e] by canals, the principal rivers, and . . . more intimately connect[], by public highways, the different parts of this Commonwealth."¹⁰

Consistent with this mandate, the Board of Public Works in 1816 proceeded to purchase stock in the Appomattox Canal Company, the Dismal Swamp Canal Company, the James River Canal Company, and the Little River Turnpike Company, among others.¹¹ The underpinning for this investment was the notion that

6. Senator Bradley T. Johnson described internal improvements as "railroads, canals, plank roads, turnpikes and road and river improvements." REPORT OF THE S. COMM. ON FINANCE RELATIVE TO THE PUBLIC DEBT, S. DOC. NO. 24, at 8 (1877) (hereinafter JOHNSON REPORT). Although the Supreme Court of Virginia has never defined the term, it has stated that internal improvements include "turnpikes, canals, railroads, telegraph lines . . . telephone lines, and other works of a like *quasi* public character." *Shenandoah Lime Co. v. Mann*, 115 Va. 865, 872, 80 S.E. 753, 755 (1914).

7. See Act of Feb. 5, 1816, ch. 17, 1816 Va. Acts 35.

8. *Id.*

9. *Id.* at 37-38.

10. *Id.* at 35.

11. See 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1102 n.16 (1974); Phillip Morrison Rice, *The Virginia Board of Public Works Appendix G* (1947)

the government's role was "to provide incentive for private action."¹²

With the advent of railroads, the state overwhelmingly shifted its investments to rail.¹³ Initially, these investments consisted principally of purchases of stock funded from tax revenues.¹⁴ After 1831, however, the Commonwealth primarily turned to loans to finance stock purchases.¹⁵ The trend of borrowing gained momentum when additional borrowing became necessary to protect existing investments.¹⁶

The first sign of trouble came during the financial panic of 1837. Some states repudiated their debts outright.¹⁷ Virginia did not do so, but experienced great difficulty in meeting its obligations.¹⁸ These warnings, combined with the general sense that the General Assembly was guilty of "extravagance in the expenditure of funds for internal improvements," led to calls for a constitutional amendment.¹⁹ As the Supreme Court of Virginia later recounted,

[L]arge sums of money were loaned or advanced by Virginia to various corporations engaged in developing and operating privately owned works of internal improvements, such as canal, turnpike, and railroad companies, that held promise of public benefit. Financial obligations in vast sums were incurred by the State, and its credit was freely but often unwisely extended to foster these enterprises by purchase of their bonds and stock, or through guarantee of their obligations and indebtedness.²⁰

In response, the Constitution of 1850–51 imposed the first restrictions on the power of the General Assembly to expend funds and contract debt for internal improvements, prohibiting the

(unpublished M.A. dissertation) (on file with the Library of Virginia).

12. HOWARD, *supra* note 11, at 1102.

13. See JOHNSON REPORT, *supra* note 6, at 7.

14. Philip Morrison Rice, *Internal Improvements in Virginia 1775–1860*, at 162–63 (1948) (unpublished Ph.D. dissertation, University of North Carolina, Chapel Hill) (on file with the Library of Virginia).

15. See *id.* at 187.

16. *Id.*

17. *Id.* at 203. See generally WILLIAM A. SCOTT, *THE REPUDIATION OF STATE DEBTS* (1893) (studying debt repudiation and the financial history of several states).

18. Rice, *supra* note 14, at 194–204.

19. Francis Pendleton Gaines, Jr., *The Virginia Constitutional Convention of 1850–51: A Study in Sectionalism* 261 (June, 1950) (unpublished Ph.D. dissertation, University of Virginia) (on file with the Library of Virginia).

20. *Almond v. Day*, 197 Va. 782, 787–88, 91 S.E.2d 660, 665 (1956).

General Assembly from "pledg[ing] the faith of the State, or bind[ing] it any form, for the debts or obligations of any company or corporation."²¹ This prohibition was expanded in the Constitution of 1864 which specified that

[n]o debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability of the State, or to suppress insurrection, repel invasion, or defend the State in time of war. If the State becomes a stockholder in any association or corporation for purposes of internal improvements, such stock shall be paid for at the time of subscription, or a tax shall be levied for the ensuing year sufficient to pay the subscription in full.²²

The constitutional amendments, however, did not abolish existing commitments. By 1870, Virginia's total debt stood at \$45 million.²³ The annual interest charge on this debt stood at \$2 million—this at a time when the Commonwealth's entire revenue for 1869 did not reach \$3 million.²⁴ When this massive debt was combined with the great losses suffered during the Civil War, Virginia simply could not pay these obligations. Moreover, the optimistic assumptions concerning the profitability of the railroads turned out to be unfounded. "[W]ith only one single exception, every railroad company . . . proved unprofitable to its projectors and owners . . ."²⁵

The remaining debt obligations generated a protracted battle in the courts and in the legislature. Debt "readjusters" gained control of the General Assembly and sought through various stratagems to devalue or repudiate Virginia's debt.²⁶ The fact that the debt had to be apportioned between Virginia and West Virginia only added complexity to an already difficult issue.²⁷

The Supreme Court of Virginia is well aware of the historical backdrop that gave rise to these clauses. It has noted that

21. VA. CONST. of 1851, art. IV, § 28.

22. VA. CONST. of 1864, art. IV, § 29.

23. See SCOTT, *supra* note 17, at 215-16.

24. *Id.*

25. JOHNSON REPORT, *supra* note 6.

26. See SCOTT, *supra* note 17, at 167-96. See also *McCullough v. Virginia*, 172 U.S. 102, 106 (1898) (citations omitted) ("Perhaps no litigation has been more severely contested or has presented more intricate and troublesome questions than that which has arisen under the [readjuster] coupon legislation of Virginia. That legislation has been prolific of many cases, both in the state and Federal courts, not a few of which finally came to this court.").

27. SCOTT, *supra* note 17, at 167.

[t]he provision forbidding the State to “become a party to or become interested in any work of internal improvement,” as well as the “credit” and the “stock or obligations” clauses was inserted in the basic law to remedy the same evil, and the three clauses were adopted to meet the same long existing threat and danger, namely, the use of the State’s funds and credit to foster and encourage construction and operation of private enterprises.²⁸

Significantly, the internal improvements clause was amended in 1902.²⁹ The amendment exempted public roads from the scope of the prohibition on acquiring an interest in works of internal improvement.³⁰ Professor Howard observes that “[m]uch of the heart was cut out of this clause in 1902” with the ratification of the “public roads” exception.³¹

B. *The Clauses in the Courts*

Over the years, the Supreme Court of Virginia has addressed numerous legal challenges invoking the internal improvements clause and credit clause. With one lone exception, none of these challenges has been met with success.

The court has rejected credit clause attacks on the purchase of securities when the purchase was made for the Commonwealth’s benefit, namely, the Virginia Supplemental Retirement System;³² to approve the lease of public port facilities by a private company;³³ to sustain the issuance of bonds by a public school authority;³⁴ and to uphold loan and bond commitments designed to redevelop a blighted neighborhood.³⁵ In each case, the “moving consideration and motivating cause of a transaction” were the keys to the outcome.³⁶ In *City of Charlottesville v. DeHaan*, the court held that

[w]hen the underlying and activating purpose of the transaction and the financial obligation incurred are for the State’s benefit, there is

28. *Almond v. Day*, 197 Va. 782, 793, 91 S.E.2d 660, 668 (1956).

29. VA. CONST. of 1902, art. XIII, § 185.

30. *Id.*

31. HOWARD, *supra* note 11, at 1133.

32. *Almond*, 197 Va. at 791, 91 S.E.2d at 667.

33. *Harrison v. Day*, 202 Va. 967, 971–72, 121 S.E.2d 615, 618 (1961).

34. *Button v. Day*, 203 Va. 687, 693, 127 S.E.2d 122, 127 (1962).

35. *City of Charlottesville v. DeHaan*, 228 Va. 578, 592, 323 S.E.2d 131, 138 (1984).

36. *Id.* at 585–86, 323 S.E.2d at 134 (quoting *Almond*, 197 Va. at 790–91, 91 S.E.2d at 666–67).

no lending of its credit though it may have expended its funds or incurred an obligation that benefits another. *Merely because the State incurs an indebtedness or expends its funds for its benefit and others may incidentally profit thereby does not bring the transaction within the letter or the spirit of the "credit clause" prohibition.*³⁷

Despite extensive challenges invoking the clause, the Supreme Court of Virginia has invalidated only one legislative enactment as a violation of the credit clause. In *Button v. Day*, the court held that a fund designed to guarantee loans for industrial projects was invalid under the credit clause because it was designed "for the sole purpose of guaranteeing future payment of defaulted loans of private debtors."³⁸ The Virginia Constitution was then promptly amended to allow such extensions of credit.³⁹

Litigants seeking to bar governmental action based on the internal improvements clause have fared even worse than litigants pressing claims under the credit clause. For example, in *Harrison v. Day*, the court held that the internal improvements clause did not prohibit the Commonwealth from owning and operating port facilities.⁴⁰ The court reasoned that the internal improvements clause was not designed to hamper the Commonwealth in the exercise of its governmental functions, and the development and operation of port facilities is a governmental function.⁴¹ Building on this premise, the court later held that the leasing of government-owned port facilities to a private entity did not offend the internal improvements clause.⁴²

The court has broadly construed the public roads exception to the internal improvements clause. In *Almond v. Gilmer*, the court held that a public ferry was not forbidden by the internal improvements clause, reasoning that a ferry serves the same purpose as a public road and, like a bridge, serves to connect two roads.⁴³ Later, in *Almond v. Day*, the court held that the internal improvements clause did not prohibit the Commonwealth from

37. *Id.* at 586, 323 S.E.2d at 134 (quoting *Almond*, 197 Va. at 791, 91 S.E.2d at 667).

38. 208 Va. 494, 504, 158 S.E.2d 735, 741-42 (1968).

39. VA. CONST. art. X, § 10. The amendment provides that article X, section 10 "shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority." *Id.*

40. 200 Va. 764, 775, 107 S.E.2d 594, 601 (1959).

41. *Id.* at 772-75, 107 S.E.2d at 599-601.

42. *Harrison v. Day*, 202 Va. 967, 972, 121 S.E.2d 615, 618 (1961).

43. 188 Va. 822, 837-38, 51 S.E.2d 272, 277-78 (1949).

acquiring bus facilities designed to help transport pedestrians through the Hampton Roads Bridge Tunnel.⁴⁴ The court reasoned that

[b]y constructing the bridge-tunnel project and furnishing the proposed bus operation, the State is merely substituting one essential link in the highway for an existing link. Without the operation of the ferryboat for the transportation of passengers and vehicles across the water, the highway would end at the water's edge. Without the operation of an adequate facility for the transportation of pedestrians over the bridge-tunnel project, the highway would end for them at the terminals of the project.⁴⁵

In short, if history is any guide, litigants relying on these clauses to invalidate actions by the General Assembly or the executive branch face long odds.

II. NORFOLK SOUTHERN AND THE COMMONWEALTH REACH AN AGREEMENT TO BUILD AN INTERMODAL RAIL FACILITY

A. *The Virtues of Intermodal Rail*

Many of Virginia's roads, including Interstate 81, have become very congested. Interstate 81 was designed "to carry no more than 15 percent of its total traffic volume as truck traffic."⁴⁶ At present, trucks comprise as much as forty percent of the traffic volume.⁴⁷ One solution is to build more roads. That approach is extremely expensive. More than ten years ago, the General Assembly noted that widening Interstate 81 "is estimated to cost in excess of \$3 billion and take at least 10 years to complete."⁴⁸

In 1999, the General Assembly became interested in the potential for a "network of intermodal transfer facilities" to "reduc[e] heavy truck traffic on other long-haul highways in the Commonwealth, particularly Interstate Route 81," and it tasked the Secretary of Transportation to study "the desirability and feasibility of

44. 199 Va. 1, 10, 97 S.E.2d 824, 831 (1957).

45. *Id.* at 9, 97 S.E.2d at 830-31.

46. S.J. Res. 55, Va. Gen. Assembly (Reg. Sess. 2000).

47. *Id.*

48. *Id.*

establishing additional intermodal transfer facilities.”⁴⁹ In 2000, the Senate made a similar request.⁵⁰

In January 2001, the Secretary issued a report calling for additional study of the issue but noted that “the potential for significant public benefits exists” for “divert[ing] highway traffic to rail transportation.”⁵¹ Another study prepared for the Virginia Department of Rail and Public Transportation (“DRPT”) in December 2003 concluded that “public investment in rail intermodal infrastructure can produce material relief for highway traffic . . . in a practical time frame.”⁵² State officials counted on intermodal rail to provide relief of highway congestion, increased safety, improved fuel efficiency, reduced emissions, and enhanced industry competitiveness.⁵³

Still another study, known as VTrans 2025 and prepared by the Commonwealth Transportation Board, was released in November 2004 and noted the “great potential for both economic growth and improved transportation system efficiency through improved connectivity between transportation networks and modes.”⁵⁴ Around the same time, a commission convened by Governor Mark Warner issued its report on Rail Enhancement for the 21st Century.⁵⁵ It too highlighted the need to increase freight rail capacity, and in particular urged creation of “rail intermodal terminal facilities,” including one in the Roanoke area.⁵⁶

The General Assembly responded by authorizing the Commonwealth Transportation Board to spend funds for “rail projects

49. H.J. Res. 704, Va. Gen. Assembly (Reg. Sess. 1999).

50. S.J. Res. 55, Va. Gen. Assembly (Reg. Sess. 2000) (requesting further study “on the desirability and feasibility of establishing additional intermodal transfer facilities . . . to include the potential for shifting Virginia’s highway traffic to railroads”).

51. REPORT OF THE SEC’Y OF TRANSP. ON THE POTENTIAL FOR SHIFTING VIRGINIA’S HIGHWAY TRAFFIC TO R.R.S., S. Doc. No. 30, at 30 (2001).

52. MARKETING STUDY, *supra* note 4, at 7–8.

53. See Cambridge Systematics, Inc. & Jacobs Civil, Inc., THE VIRGINIA STATE RAIL PLAN: A MULTIMODAL STRATEGY TO MEET THE COMMONWEALTH’S PASSENGER AND FREIGHT TRANSPORTATION NEEDS THROUGH 2025, at SR-2 (2004), <http://www.drpt.virginia.gov/activities/files/FR5-DRPT-VSRP-Summary-Report.pdf>.

54. COMMONWEALTH TRANSP. BD., VIRGINIA’S STATEWIDE MULTIMODAL LONG-RANGE TRANSPORTATION PLAN 65 (2004), <http://www.virginiadot.org/projects/vtrans/resources/revisedphase3reportforctb.pdf>.

55. GOVERNOR’S COMM’N ON RAIL ENHANCEMENT FOR THE 21ST CENTURY IN THE COMMONWEALTH OF VIRGINIA (Dec. 1, 2004), <http://www.drpt.virginia.gov/activities/files/RailCommissionReport2004.pdf>.

56. *Id.* at 32–33

that, in the Board's determination, will result in mitigation of highway congestion."⁵⁷ The General Assembly also empowered DRPT to "[p]romote the use of . . . freight rail services to improve the mobility of Virginia's citizens and the transportation of goods."⁵⁸ Similarly, the General Assembly has required the Statewide Transportation Plan to evaluate "all modes of transportation," including "movement of freight by rail" and "inter-modal connectivity."⁵⁹

The Heartland Corridor Project enhances the appeal of inter-modal rail. This project calls for a series of rail infrastructure projects that will enable containers to travel from the Port of Norfolk to Chicago on double-stacked rail cars.⁶⁰ Once completed, the travel time and travel distance for double-stacked rail cars will be reduced.⁶¹ Virginia has signed an agreement with three other states to enable this project to go forward.⁶²

To pursue the benefits of intermodal rail, the General Assembly established the Rail Enhancement Fund (the "Fund").⁶³ In part A of the statute, the General Assembly

declares it to be in the public interest that railway preservation and development of railway transportation facilities are an important element of a balanced transportation system of the Commonwealth for freight and passengers and further declares it to be in the public interest that the retention, maintenance, improvement and development of freight and passenger railways are essential to the Commonwealth's continued economic growth, vitality, and competitiveness in national and world markets, and there is hereby created in the state treasury a special nonreverting fund to be known as the Rail Enhancement Fund which shall be considered a special fund within the Transportation Trust Fund"⁶⁴

The Fund is to be administered by the director of the DRPT, subject to the approval of the Commonwealth Transportation

57. VA. CODE ANN. § 33.1-23.1(B) (Repl. Vol. 2011).

58. *Id.* § 33.1-391.5(10) (Repl. Vol. 2011).

59. *Id.* § 33.1-23.03 (Repl. Vol. 2011).

60. H.J. Res. 789, Va. Gen. Assembly (Reg. Sess. 2005).

61. *See id.*

62. *See id.*; Press Release, Norfolk S., Agreement Reached on Fed. Funding for Heartland Corridor (Sept. 5, 2006), available at http://www.nscorp.com/nscportal/nscorp/Media/News%20Releases/2006/heartland_fund.html.

63. VA. CODE ANN. § 33.1-221.1:1.1(A) (Repl. Vol. 2011).

64. *Id.*

Board.⁶⁵ The statute further provides that “[p]rojects undertaken pursuant to this section shall be limited to those the Commonwealth Transportation Board shall have determined will result in public benefits to the Commonwealth or to a region of the Commonwealth that are equal to or greater than the investment of funds under this section.”⁶⁶ The General Assembly also established a Rail Advisory Board to advise the director of DRPT.⁶⁷ The Commonwealth Transportation Board, in conjunction with Rail Advisory Board, developed policies to guide the expenditure of funds.⁶⁸

In October of 2005, Norfolk Southern submitted an application to DRPT under the Fund.⁶⁹ The application requested funding for several projects in connection with the Heartland Corridor, including enlarging tunnel clearances at several locations (none of them in Montgomery County), as well as a new intermodal terminal to be located somewhere in the Roanoke region.⁷⁰ Norfolk Southern explained that without public assistance the project would not happen.⁷¹ This facility was to “serve both the east-west traffic flows of the Heartland Corridor as well as future north-south flows . . . associated with the I-81 corridor.”⁷²

On December 15, 2005, the Commonwealth Transportation Board, based on a recommendation by DRPT, voted unanimously to provide funding under the Fund for a number of infrastructure projects, including an intermodal facility in the Roanoke region.⁷³ The board concluded that “these projects will result in public benefits to the Commonwealth as well as the various regions of the Commonwealth in which these projects are located, and serves [sic] the public purpose.”⁷⁴

65. *Id.* § 33.1-221.1:1.1(C) (Repl. Vol. 2011).

66. *Id.* § 33.1-221.1:1.1(D) (Repl. Vol. 2011).

67. *Id.* § 33.1-221.1:1.1(C) (Repl. Vol. 2009). This section was amended and no longer refers to the Rail Advisory Board. *Id.* (Repl. Vol. 2011).

68. See COMMONWEALTH TRANSP. BD., RAIL ENHANCEMENT FUND POLICY GOALS AND IMPLEMENTATION GUIDELINES FY2005-06 at 3–10 (Oct. 20, 2005).

69. *Montgomery Cty. v. Va. Dep’t of Rail & Pub. Transp.*, 282 Va. 422, 432, 719 S.E.2d 294, 298 (2011).

70. See *id.*

71. *Id.* at 432–33, 719 S.E.2d at 298.

72. *Id.* at 432, 719 S.E.2d at 298.

73. *Id.* at 433, 719 S.E.2d at 298.

74. *Id.*, 719 S.E.2d at 298–99.

DRPT and Norfolk Southern executed an agreement in which Virginia contributed \$22,350,000 to the project.⁷⁵ A subsequent amendment provided an additional \$4,410,000 in state funding.⁷⁶ In exchange, Norfolk Southern agreed to build and operate the facility.⁷⁷

The agreement provided that DRPT “has an interest in ensuring that [the] improvements created by the [p]roject continue to be operated for their intended purpose for the duration of the [p]erformance [p]eriod,” which is fifteen years from the date of project completion.⁷⁸ The agreement required Norfolk Southern to transport at least 150,000 additional containers per year through the Heartland Corridor within five years of the project’s completion.⁷⁹ If Norfolk Southern did not reach this target, the agreement called for DRPT to be reimbursed based on a formula specified in the contract.⁸⁰ Finally, if Norfolk Southern abandoned or ceased to operate the intermodal facility, DRPT “shall be reimbursed the value of its interest in the portion of the [p]roject abandoned or discontinued.”⁸¹ Ultimately, a site in Montgomery County was chosen to build the intermodal rail facility.⁸²

Initially, local governments, including Montgomery County, embraced the project.⁸³ Upon learning that the intermodal facility would be located in the county, however, the county changed its mind, concluding that it did not want the project because of the incompatibility of the project with the county’s plans for the Elliston area where the facility was to be built.⁸⁴

75. *Id.*, 719 S.E.2d at 299.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* (internal quotations omitted).

82. *Id.* at 433 n.3, 719 S.E.2d at 299 n.3.

83. Montgomery County Selected for \$18 Million Regional Intermodal Rail Facility (June 28, 2006), http://nrvalliance.org/news/documents/norfolk_southern_announcement.pdf (last visited Oct. 15, 2012) (quoting Steve Spradlin, chairman of the Montgomery County Board of Supervisors, as saying that “the County is extremely pleased to have been contacted by Norfolk Southern in its search for the preferred Site and is anxious to work with Norfolk Southern as they finalize their Site selection in Montgomery County for this project”).

84. Montgomery Cnty. Bd. of Supervisors, Res. in Opposition of the Proposed Norfolk S. Intermodal Rail Facility in the Elliston Cmty. of Montgomery Cnty., Va., R-FY-007-50 (Sept. 25, 2006), <http://www.montva.com/filestorage/1144/100/326/328/336/938/2006-09-25>

III. MONTGOMERY COUNTY'S CHALLENGE UNDER THE INTERNAL IMPROVEMENTS AND CREDIT CLAUSES

The county filed suit in the Richmond City Circuit Court.⁸⁵ Norfolk Southern intervened in support of the project.⁸⁶ With respect to the credit clause, the county argued that "credit" represents a broader concept under the Virginia Constitution than simply extending a loan to a particular entity.⁸⁷ The county contended that the agreement at issue was analogous to the guarantee fund invalidated in *Button v. Day*.⁸⁸ In response, the Commonwealth and Norfolk Southern argued that a grant, conditioned upon Norfolk Southern meeting certain benchmarks, did not resemble a loan and, therefore, did not fall within the credit clause prohibition.⁸⁹

The county further argued that a large rail facility such as this one plainly constituted an "internal improvement"—a point the Commonwealth and Norfolk Southern did not contest.⁹⁰ Further, the county contended that, under the contract, the Commonwealth expressly has an "interest" in this facility, thereby violating the prohibition on the state acquiring an interest in a work of internal improvement.⁹¹ Finally, the county asserted that the public roads exception did not permit Virginia to acquire such an interest in a railroad facility because a privately owned railroad plainly is not a "public road" such as a highway.⁹² The Commonwealth and Norfolk Southern countered that, under the court's precedent, the public roads exception had been broadly construed to afford the Commonwealth flexibility in addressing its transportation needs.⁹³ Moreover, the "interest" acquired by the state in

_m.pdf; Montgomery Cnty. Bd. of Supervisors, Res. Requesting the Governor and the Va. Gen. Assembly to Oppose the Commonwealth of Va. Providing State Funding to Norfolk S. for the Development of an Intermodal Facility in the Elliston Cmty. of Montgomery Cnty., Va., R-FY-07-62 (Oct. 23, 2006), http://www.montva.com/filestorage/1144/100/326/328/336/938/2006-10-23_m.pdf.

85. *Montgomery Cnty. v. Va. Dep't of Rail & Pub. Transp.*, 79 Va. Cir. 521 (2009) (Richmond City), *aff'd*, 282 Va. 422, 442, 719 S.E.2d 294, 304 (2011).

86. *See id.* at 522.

87. Plaintiffs' Motion for Summary Judgment at 29–32, *Montgomery Cnty.*, 79 Va. Cir. 521 (No. CL08-4290-1).

88. *Id.* (citing *Button v. Day*, 208 Va. 494, 501–02, 158 S.E.2d 735, 739–40 (1968)).

89. Norfolk S. Ry. Co.'s Brief in Support of Its Motion for Summary Judgment at 35–36, *Montgomery Cnty.*, 79 Va. Cir. 521 (No. CL08-4209-1).

90. Plaintiffs' Motion for Summary Judgment, *supra* note 87, at 13.

91. *Id.* at 14, 17–20.

92. *Id.* at 27.

93. Norfolk S. Ry. Co.'s Brief in Support of Its Motion for Summary Judgment, *supra*

the contract was not the sort of capitalization of private enterprise that lay at the root of the constitutional prohibition.⁹⁴ Instead, the Commonwealth's interest in the intermodal facility was a contractual arrangement: Norfolk Southern agrees to transport a fixed number of "containers" within a specified time frame, in exchange for which the Commonwealth provides a grant.⁹⁵ Such contractual agreements, the Commonwealth argued, do not violate the internal improvements clause.⁹⁶

The Richmond City Circuit Court, on cross-motions for summary judgment, granted the Commonwealth's motion for summary judgment.⁹⁷ The county appealed to the Supreme Court of Virginia and its petition for appeal was granted.⁹⁸

A. *The Supreme Court of Virginia Upholds the Project*

The Supreme Court of Virginia, in a unanimous opinion authored by Justice Elizabeth McClanahan, affirmed the decision of the circuit court.⁹⁹

Turning first to the internal improvements clause, the court observed that the public roads exception to article X, section 10 was amended to allow the General Assembly to construct, operate, and maintain a highway system.¹⁰⁰ The county's challenge "must be rejected if the development can be reasonably deemed an exercise of the Commonwealth's governmental function of constructing, maintaining and operating its highway system."¹⁰¹ Consulting the General Assembly's resolutions with regard to intermodal rail, the court concluded that the intermodal facility here would be developed and integrated with Virginia's highway system as a "roadway connector" which would permit "the seamless

note 89, at 24–25.

94. *See id.* at 31.

95. *Id.* at 33–34.

96. *Id.* at 24–25.

97. *Montgomery Cnty. v. Va. Dep't of Rail & Pub. Transp.*, 79 Va. Cir. 521, 523 (2009) (Richmond City), *aff'd*, 282 Va. 422, 442, 719 S.E.2d 294, 304 (2011).

98. *Montgomery Cnty. v. Va. Dep't of Rail & Pub. Transp.*, 282 Va. 422, 428, 719 S.E.2d 294, 295–96 (2011).

99. *Id.* at 427–28, 719 S.E.2d at 295–96. It is noteworthy that the attorney general personally argued the case on behalf of the state defendants. *Id.* at 426, 719 S.E.2d at 295.

100. *Id.* at 437, 719 S.E.2d at 301 (quoting *Almond v. Gilmer*, 188 Va. 822, 837, 51 S.E.2d 272, 277 (1949)).

101. *Id.*

transfer of rail-to-truck and the reverse.”¹⁰² Intermodal rail, in the judgment of the General Assembly, would provide a means “of relieving Virginia’s highways of congestion from excessive truck traffic, and particularly Interstate 81.”¹⁰³ The court, therefore, concluded that “the funding for the facility under the Agreement” did not infringe upon the internal improvements clause because it was “directly related to the construction, maintenance and operation of Virginia’s highways.”¹⁰⁴ Finally, the court rejected the county’s argument that private ownership of the facility altered the applicability of the public roads exception.¹⁰⁵

The court made short work of the county’s credit clause argument. The court observed that “in the absence of an extension of actual credit by the Commonwealth, the credit clause does not apply.”¹⁰⁶ Credit under the credit clause, the court explained, is the “customary relation of borrower and lender” where “money is borrowed for a fixed time, and the borrower promises to repay the amount borrowed at a stated time in the future, with interest at a fixed rate.”¹⁰⁷ The Commonwealth’s “grant to Norfolk Southern for the development of the intermodal facility was only that, a grant, and not an extension of the Commonwealth’s credit to Norfolk Southern. Indeed, it was effectively a purchase by the Commonwealth of additional traffic capacity for Interstate 81.”¹⁰⁸ The state did not extend any credit to Norfolk Southern.

The court’s conclusion with respect to the internal improvements clause is consistent with prior cases, in which the court broadly construed the public roads exception.¹⁰⁹ The intermodal project helps to integrate various modes of transportation, including public roads, and further serves to provide breathing space to Virginia’s road network by removing trucks from the roads.¹¹⁰ The decision also shows the deference the court will give to the Gen-

102. *Id.* (quoting H.J. Res. 789, Va. Gen. Assembly (Reg. Sess. 2005)).

103. *Id.* at 438, 719 S.E.2d at 301.

104. *Id.* at 439, 719 S.E.2d at 302.

105. *Id.* at 440 n.8, 719 S.E.2d at 302-03 n.8.

106. *Id.* at 441, 719 S.E.2d at 304 (citation omitted).

107. *Id.*, 719 S.E.2d at 303-04 (quoting *Almond v. Day*, 197 Va. 782, 790-91, 91 S.E.2d 660, 667 (1956)).

108. *Id.*, 719, S.E.2d at 303.

109. *See supra* notes 43-45 and accompanying text.

110. *See supra* Part II.A.

eral Assembly in determining how best to manage Virginia's public roads.

The court's rejection of the credit clause challenge is unsurprising. A grant conditioned upon meeting certain performance benchmarks does not constitute an extension of credit as that term is commonly understood.¹¹¹

Finally, although the court grounded its decision chiefly on its own precedent, the outcome is defensible on originalism grounds. The internal improvements clause and the credit clause were added to the Virginia Constitution to prohibit the Commonwealth from fostering private enterprises by capitalizing them through loans, purchases of stocks and bonds, and any other means of acquiring a financial "interest" in such projects.¹¹² Although, on a superficial level, the intermodal rail project involves taxpayer money awarded to a private railroad, a grant of funds to a private railroad, which is subject to specific performance benchmarks and which is designed to accomplish a variety of public policy objectives such as reducing pollution and congestion, does not in substance resemble the practices that gave rise to the internal improvement clause and credit clause.

IV. ONGOING RELEVANCE OF THE CONSTITUTIONAL PROHIBITION

Under current practices for funding transportation infrastructure, it is true, as Professor Howard notes, that article X, section 10 does not impose "a significant barrier to legislative response to modern problems."¹¹³ The state no longer capitalizes infrastructure companies by extending loans, purchasing their stock, or otherwise acquiring an "interest" in such companies as it did in the nineteenth century.¹¹⁴ The sophistication of modern capital markets obviates the need for the state to extend its funds for such purposes.

It would be premature, however, to relegate these clauses to utter irrelevance. Virginia faces a significant challenge in modernizing and expanding its infrastructure.¹¹⁵ At the same time,

111. *Montgomery Cnty.*, 282 Va. at 441, 719 S.E.2d at 303.

112. *See supra* notes 21–22.

113. HOWARD, *supra* note 11, at 1130.

114. *See supra* notes 8–22 and accompanying text.

115. *See supra* notes 50–63 and accompanying text.

the Commonwealth finds itself in the budgetary vise of funding increasingly expensive entitlement programs—as well as its pension obligations for state employees—all while maintaining basic services.¹¹⁶ In order to provide its infrastructure needs, Virginia could well be tempted in the near future to once more capitalize private enterprises, particularly if, for whatever reason, private capital is unwilling or unable to supply the requisite funds. Purchases of stock, extensions of credit, and other arrangements would again be defended, as they were in the nineteenth century, on the ground that they are low-risk or even a source of revenue for the Commonwealth. Any such arrangement would be constrained to a significant degree by article X, section 10. The credit clause and internal improvements clause also likely would limit commonwealth funding for new transportation technologies, such as space travel. Until the Commonwealth returns to the practices that gave rise to the internal improvements clause and credit clause, however, challenges to government action based on article X, section 10 are unlikely to succeed.

Perhaps the overarching lesson of these clauses for our time is that amassing large debts under favorable economic conditions, with overly optimistic projections for future repayment, will lead to financial hardship and political turmoil. Although that may seem an obvious point, it repeatedly has been ignored throughout history. That lesson is no less relevant today than it was in the mid-nineteenth century.

116. See Michael Martz, *Assembly Passes Pension Overhaul*, RICH. TIMES-DISPATCH, March 11, 2012, at A1; Jim Nolan, *Budget Changes Weighed*, RICH. TIMES-DISPATCH, May 14, 2012, at A1.