

# SPECIAL REPORT

February 2008  
No. 159

## Virginia Supreme Court Considers Taxpayer Protections in NVTA Tax Case

By  
Joseph Henchman  
Tax Counsel  
Tax Foundation

### Introduction and Summary

On January 1, 2008, residents of Northern Virginia began paying seven new taxes that will raise \$326 million a year. The taxes are imposed by the Northern Virginia Transportation Authority (NVTA), a governmental entity created in 2002 but not given the power to tax and issue bonds until 2007.<sup>1</sup>

---

*Only an elected body can issue debt or impose taxes. Here, the Northern Virginia Transportation Authority, not the legislature, is imposing taxes and issuing debt. Because its members are not elected, its actions should be held to violate Article VII, Section 7.*

---

The taxes may not last long. The Virginia Supreme Court is considering a lawsuit challenging the NVTA as unconstitutional,

primarily because an unelected board cannot impose taxes without voter approval under the Virginia Constitution. Indeed, in this case, voters have on several occasions explicitly rejected NVTA-type taxes.

Oral arguments were heard by the state supreme court on January 8, 2008, after a lower court judge (Judge Benjamin Kendrick) had ruled the NVTA to be constitutional.<sup>2</sup>

Many states have taxpayer protections built into their state constitution, and Virginia is no exception. Some of these Virginia taxpayer protections include:

- Legislative power is vested with the legislature and cannot be delegated without constraints.<sup>3</sup> This limits the legislature if it seeks to avoid responsibility by turning over the decision-making power to other entities.
- The power to tax, once described by Chief Justice John Marshall as the “power to destroy,”<sup>4</sup> cannot be

---

1 The NVTA website’s FAQ helpfully notes that the Northern Virginia Transportation Authority is distinct from the Northern Virginia Transportation Alliance, the Northern Virginia Regional Commission (NVRC), and the Northern Virginia Transportation Commission (NVTC).

2 See *NVTA v. Marshall*, No. 07-923 (Arlington Co. Cir. Ct. August 31, 2007).

3 See VA. CONST. Article IV, Sec. 1. See also 1 A. Howard, *Commentaries on the Constitution of Virginia* (1974) at 468 (“The vesting of legislative power in the General Assembly reflects the notion that legislative power cannot be delegated.”).

4 *M’Cullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

delegated to an unelected body.<sup>5</sup> This gives taxpayers recourse against those who impose destructive taxes.

- Measures to raise taxes or borrow money must be approved publicly by elected officials, with votes recorded.<sup>6</sup> This helps ensure that taxes and borrowing are scrutinized publicly and enjoy a broad range of support beyond that of a narrow special interest.
- Debt to be repaid with tax revenues must be approved by a referendum.<sup>7</sup> Politicians are thus limited in their ability to spend future tax revenues today.
- Laws cannot embrace more than one object.<sup>8</sup> “Single-object” or “single-subject” rules are in virtually every state constitution, and they arose in “the 1830s to eliminate the evils of ‘logroll-

ing’ and ‘omnibus bills,’ and to ensure separate consideration by the legislature for distinct proposals.”<sup>9</sup>

*Many states have taxpayer protections built into their state constitution, and Virginia is no exception.*

### NVTA’s Governance

The NVTA Board consists of the following 16 members, none of whom are directly elected by voters to the NVTA Board:

- Nine mayors, chairs, or designees from each of the nine NVTA jurisdictions (City of Alexandria, Arlington County,

### NVTA Taxes

*The NVTA has approved the imposition of seven taxes within its region, estimated to generate over \$326 million per year in revenue.*

Tax	Description	Rate	Annual Funding
Grantors Tax	Applies to sale of property in NVTA region	40 cents per \$100 valuation (e.g., sale of \$400,000 property is \$1,600 tax)	\$171.0 million
Initial Vehicle Registration Fee*	One-time on purchase or initial registration of vehicles in NVTA region	1 percent of the vehicle’s value	\$64.6 million
Sales Tax on Auto Repairs	Extends sales tax to parts, materials, and labor associated with auto repairs in NVTA region	5 percent	\$33.2 million
Transient Occupancy Tax	Applies to hotel room rentals in NVTA region	2 percent	\$25.3 million
Regional Registration Fee*	For annual registration of vehicles in NVTA region	\$10 per year	\$17.0 million
Safety Inspection Fee*	For annual vehicle safety inspection in NVTA region	\$10 per year	\$16.2 million
Motor Vehicle Rental Tax	Applies to car rentals in NVTA region	2 percent	\$9.0 million

Source: Northern Virginia Transportation Authority.<sup>10</sup>

\*Although labeled a “fee,” these three assessments are more accurately described as taxes. The money raised by these three assessments goes into a common fund and is spent on projects not related to the services upon which they are imposed. Instead, the assessments raise money in excess of what is needed to pay for the services provided by government, with the money used for general spending on transportation construction projects in the NVTA region. For this reason, all seven charges are more accurately described as taxes.

5 See *County of Fairfax v. Fleet Indus. Park Ltd. Partnership*, 410 S.E.2d 669, 672 (Va. 1991) (“This Court has uniformly held that the power to exercise legislative authority may not be removed from the control of the local legislative representatives of the people.”).

6 See VA. CONST. Article VII, Sec. 5.

7 See VA. CONST. Article VII, Sec. 10; Article X, Sec. 9.

8 See VA. CONST. Article IV, Sec. 12.

9 ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW* (4th ed. 2006) at 754.

10 [http://www.thenovaauthority.org/PDFs/Fact Sheets/Taxes and fees Fact Sheet Final.pdf](http://www.thenovaauthority.org/PDFs/Fact%20Sheets/Taxes%20and%20fees%20Fact%20Sheet%20Final.pdf).

City of Fairfax, Fairfax County, City of Falls Church, Loudoun County, City of Manassas, City of Manassas Park, and Prince William County). These officials, while elected to some office, are not directly elected to the NVTa.

- Two appointed by the Speaker of the Virginia House.
- One appointed by the Virginia Senate Committee on Privileges and Elections.
- Two appointed by the Governor of Virginia.
- The Director of the Department of Rail and Public Transportation (non-voting).
- The Commonwealth Transportation Commissioner (non-voting).

### Voters Rejected Prior Efforts to Impose Transportation Taxes

Prior to the state legislature's creation of NVTa and grant of taxing power to it, Virginia voters consistently rejected ballot measures that would have allowed regional bodies to impose taxes and issue debt for transportation purposes:<sup>11</sup>

- In 1990, Virginia voters rejected (76% to 24%) Question 3, which would have amended the state constitution to permit local governments to issue bonds for transportation projects, secured by pledged tax revenues.<sup>12</sup>
- Also in 1990, Virginia voters rejected (78% to 22%) Question 4, which would have similarly given the state government the power to issue bonds for transportation projects secured by pledged tax revenues, without voter referendum.<sup>13</sup>

- In 1998, Virginia voters rejected (56% to 44%) Question 3, which would have amended the state constitution to allow for regional governing bodies with the power to collect taxes and issue bonds.<sup>14</sup>
- Also in 1998, Virginia voters rejected (62% to 38%) Question 4, which would have permitted local governments to form a compact to issue bonds, without voter referendum.<sup>15</sup>
- In 2002, Northern Virginia voters rejected (55% to 45%) a measure which would have authorized the NVTa to issue \$2.8 billion in bonds for transportation projects, secured by a half-cent regional sales tax increase.<sup>16</sup>

---

*The assessments raise money in excess of what is needed to pay for the services provided by government, with the money used for general spending on transportation construction projects in the NVTa region. For this reason, all seven charges are more accurately described as taxes.*

---

These results suggest that Virginia voters did not support the creation of a new regional entity with the power to impose taxes or issue debt without further voter approval. The frequent attempts to amend the state constitution to do so suggest that absent constitutional amendment, the legislature has no power to create regional bodies with the power to raise taxes and issue debt.

---

11 See Brief of Robert G. Marshall, et al., *Marshall v. NVTa* (hereafter "Marshall Brief"), at 19-20 (Va. 07-1959) (filed Nov. 27, 2007).

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 2002 General Election Results, Virginia State Board of Elections, [http://www2.sbe.state.va.us/web\\_docs/election/results/2002/nov](http://www2.sbe.state.va.us/web_docs/election/results/2002/nov).

### Passage of H.B. 3202, Enactment of Taxes, and Lawsuit

Nevertheless, the Virginia legislature in 2007 passed House Bill 3202, which authorized the NVRTA to impose regional taxes and issue debt. The bill also unified “numerous, separate pieces of legislation, some having been rejected in substantially similar form at the 2006 special session of the General Assembly,” including new driver surcharges, acquisition of school sites, park and open space management, and an increase in salaries for Virginia Tech professors.<sup>17</sup> Governor Tim Kaine (as he is empowered to do in Virginia) returned the bill to the General Assembly, recommending a substitute by adding the phrase “relating to transportation” to the otherwise non-descript title. The substitute was enacted and signed into law in April 2007.

In July 2007, the NVRTA Board imposed the taxes, and approved the issuance of \$130 million in bonds to pay for 22 “ready-to-go” transit, roadway, and pedestrian projects. None of the tax increases, nor the bond issuance, will be submitted to voters for approval.

Anticipating a challenge, the NVRTA filed for a declaratory judgment that it had the constitutional power to raise taxes and issue debt. The Northern Virginia Transportation Alliance—a separate pro-NVRTA group—and the Hampton Roads Transportation Authority—a body similar to NVRTA in the Tidewater region of the state, created at the same time—joined the case to support the NVRTA.

Intervening as defendants in the challenge were Virginia House Delegate Robert Marshall, several members of the National Taxpayers Union Foundation, and Loudoun County. The case has been consolidated as *Marshall v. NVRTA*, and concerns three constitutional challenges to NVRTA’s asserted power to issue the bonds and impose the taxes.

### Constitutional Challenge 1: No Delegation to Unelected Officials

As in the federal Constitution, Virginia’s constitution explicitly vests legislative power in the legislature:

The legislative power of the Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Delegates.<sup>18</sup>

The implication of such a clause is that no one else can exercise legislative power except the General Assembly. For example, the Governor cannot simply decree a legislative act into effect.

Because legislatures are busy and not usually detail-oriented, such “vesting clauses” have more nuanced application when legislatures delegate work to other bodies. At the federal level, for instance, Congress can delegate rule-making to other agencies so long as Congress “clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”<sup>19</sup> Virginia has applied this rule also.<sup>20</sup> But a delegation that sets no guidelines and allows the agency to do whatever it wishes exceeds delegation power and violates the constitution.<sup>21</sup>

The Virginia Supreme Court has applied similar rules to its state provision. One case involved a 1987 law setting up advisory boards that had to approve certain county enactments before they could take effect.<sup>22</sup> The Court ruled this to be an unlawful delegation:

In requiring the consent of private landowners or the advisory board as a condition precedent to the County being able to implement changes in the zoning ordinance, the amendment effectively delegates the legislative authority of the County to a non-legislative body

17 Marshall Brief, at 4, citing Joint Appendix, at 109-10, *Marshall v. NVRTA* (Va. 07-1959).

18 VA. CONST. Article IV, Sec. 1.

19 *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989), citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

20 See *Ames v. Town of Painter*, 389 S.E.2d 702, 703 (Va. 1990).

21 See generally *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

22 See *County of Fairfax v. Fleet Industrial Park Limited Partnership*, 410 S.E.2d 669 (Va. 1991).

and to private individuals.... These provisions impermissibly give private individuals and a non-legislative body total discretion as to whether a land use ordinance or regulation affecting them will be enacted.<sup>23</sup>

In this case, the General Assembly authorized the NVTA to impose the taxes and issue the bonds, but did not require the NVTA to do so. The NVTA disputes this, arguing that because the General Assembly set the tax rates, it maintains “ultimate supervisory control.”<sup>24</sup> However, the General Assembly cannot impose the taxes and issue debt without a public vote. The set-up appears to allow both the General Assembly and the NVTA to point to each other as the one imposing the taxes, because whichever one imposed them did not follow the constitutional rules. The NVTA cannot have it both ways: either it imposed the taxes and therefore violated the nondelegation doctrine, or the General Assembly unconstitutionally imposed the taxes without a public vote.

If the NVTA had discretion whether or not to impose the taxes, it exercised some legislative control. Marshall’s brief argues that the delegation of taxing power to the NVTA is especially problematic:

Taxation power bestowed on individuals who are not immediately accountable to the voters and not directly elected to the office responsible for imposing the tax offends the most fundamental of principles on which the Virginia Constitution was adopted and over which the American Revolution was fought.<sup>25</sup>

Marshall argues that the General Assembly would not have the power to issue bonds itself, because the Constitution requires that debts

backed by tax revenue must be subject to voter approval. Because the General Assembly did not possess the power, it could not have delegated it to the NVTA either.<sup>26</sup> Marshall also argues that if the NVTA imposed the taxes on its own authority, it violated Article VII, Sec. 7 of the Virginia Constitution, which bars any appropriation, imposition of tax, or issuance of debt without a recorded majority vote by all the members of an elected “governing body.” Because the NVTA is not elected, it could not constitutionally issue the debt or impose the taxes.

The NVTA counters that it is not a “governing body” and is therefore outside the scope of Article VII, Sec. 7, which it argues applies only to governing bodies. The lower court judge agreed with this view, holding that because NVTA members are unelected, it is not a “governing body” and therefore not subject to the restrictions of that section.<sup>27</sup> Thus, the constitutional provision that states that debt can only be issued after a recorded vote by all members of a governing body is not restrictive if there are no members of a governing body.

This conclusion is problematic because it holds that while elected officials cannot be trusted to impose taxes or issue debt without ensuring full public consideration, unelected officials would be so trusted. If true, the Virginia legislature need never again submit a tax increase or bond issuance to an unpredictable referendum. Instead it could simply create an unelected entity to impose the tax or issue the debt. That cannot be the proper reading of the Virginia Constitution, and at oral argument, Virginia Supreme Court Justice Barbara Milano Keenan expressed this concern, asking, “Is there any limit at all? Could we literally have hundreds and thousands of these?”<sup>28</sup>

A more consistent reading would be that only an elected body can issue debt or impose

<sup>23</sup> *Id.* at 673.

<sup>24</sup> NVTA Brief, at 9.

<sup>25</sup> Marshall Brief, at 11.

<sup>26</sup> *See* Marshall Brief, at 15.

<sup>27</sup> Transcript of Judge Benjamin N.A. Kendrick’s Ruling, *Marshall v. NVTA*, at 5 (Arlington Co. Cir. Ct. Aug. 28, 2007).

<sup>28</sup> Dan Genz, “Va. Justices Question NVTA Power to Tax,” D.C. EXAMINER (Jan. 9, 2008).

taxes. Here, the NVTa (not the legislature) is imposing taxes and issuing debt, and because its members are not elected, its actions should be held to violate Article VII, Section 7.

### Constitutional Challenge 2: No Debt Issuance Without Referendum

Unless the General Assembly authorizes it, debt cannot be issued “by or on behalf of any county or district thereof or by or on behalf of any regional government or district thereof.”<sup>29</sup> To authorize it, the General Assembly must submit the debt issuance to a public vote for approval or rejection.<sup>30</sup> The provision specifically applies to counties, districts, and regional governments, and because of this, both sides in the *Marshall* litigation concede that counties, districts, and regional governments could not issue the NVTa bonds without voter approval.

Neither can the state government, because Article X, Section 9(b) requires that any debt authorized by the General Assembly be backed by the full faith and credit of the state and be approved by the public at a referendum. This is why the state government could not simply issue bonds for the NVTa projects itself, without submitting the issuance to voter referendum.

The NVTa argues that while the debt cannot be issued without voter approval by a county, district, or regional government, the NVTa is not defined as any one of these, so it is not prevented from levying taxes and issuing debt. Judge Kendrick adopted this argument in his opinion:

Because the Northern Virginia Transportation Authority is not a county or a district thereof and is not a regional government or district thereof, the referendum requirement of Section 10(B) is not applicable.

The General Assembly has provided that the Northern Virginia Transportation Authority is an independent political subdivision. It is a unit organized for special purposes. The enabling legislation affirms that the debt incurred is the debt of the Northern Virginia Transportation Authority, not the Commonwealth or any county, city, town, or other political subdivision.<sup>31</sup>

In essence, the NVTa concedes that the legislature cannot constitutionally issue the NVTa bonds without voter approval, and neither could any other elected body in the state with power delegated from the legislature. However, they argued, an *unelected* body can be delegated the power to issue bonds without voter approval, because “regional authorities” are not prohibited from doing so by the state constitution.<sup>32</sup> The NVTa compares itself to sanitary districts that operate water and sewer systems, and do not require public votes for the issuance of debt.<sup>33</sup>

Marshall responds that this is “clearly contrary to the structure of the Constitution....”<sup>34</sup> Because the General Assembly does not have the power to issue bonds backed by tax revenues without approval by voters, it cannot be able to delegate this power to someone else. “If that were not the rule, the prohibition against issuing tax-supported debt without a referendum could be readily circumvented, thereby rendering Article X, Section 9(b) a virtual nullity.”<sup>35</sup>

Even conceding the NVTa’s argument that it is not a “regional government,” this case involves little more than a word game. So long as it avoids the magic words of “counties, districts, or regional governments,” the NVTa believes it can avoid constitutional requirements imposed on government entities that

29 VA. CONST. Article VII, Section 10(B).

30 *See id.*

31 *NVTa v. Marshall*, at 9.

32 *See* Joint Appendix, at 146-47, 190.

33 *See* NVTa Brief, at 17.

34 Marshall Brief, at 21.

35 Marshall Brief, at 17.

engage in similar activities. The one exception pointed to by the NVTA is sanitary districts. If they are constitutional, it is because the charges they assess on users of their services are “fees” as defined and understood in public finance. In contrast, the NVTA imposes *taxes* on a variety of activities beyond its control, and this scope of taxation is meant to have limits placed upon it by the Virginia Constitution.

### Constitutional Challenge 3: Violation of the One-Object Rule

Two of the most reviled legislative practices in American history are “logrolling” (legislators who support two different bills agreeing to trade votes to get both passed), and “omnibus bills” (combining many ideas that could not pass separately into one bill that can be passed with them together). Such actions put enormous pressure on a bill’s passage, even as the ability to understand what the bill includes grows more difficult. Consequently, many state reformers enacted “one-object” rules in state constitutions; they forbid bills from encompassing more than one object which usually must be clearly explained in the title.

Virginia has such a provision in its constitution, motivated by such concerns.<sup>36</sup> Subsequent cases have clarified that the unifying idea between the various items in a bill and the title may be a general one, but the connec-

tions between them must be “necessary” and “natural.”<sup>37</sup> Of course, a title so vague as to encompass anything that might come up would be problematic under the one-object rule. At what point a title becomes so vague as to be unconstitutional has been a difficult line to draw.

Marshall claims that the act challenged in the case violates the one-object rule on two grounds. First, Marshall claims that the object added at the last minute to the bill’s title, “relating to transportation,” is too broad:

Virtually every aspect of human activity somehow relates to transportation. The analysis suggested by the NVTA would render [the one-object rule] a nullity because it would allow all legislation introduced at a session of the General Assembly to be combined into a single law under a title declaring as its object “the improvement of the condition of the Commonwealth’s citizenry” or “providing solutions to peoples’ [sic] everyday problems....” Simply adding the phrase “relating to transportation”... does not cure its constitutional defect of including multiple objects....<sup>38</sup>

Second, Marshall argues that even if “relating to transportation” is not an overly broad object, many of the bill’s provisions do not actually relate to transportation. Examples given by Marshall, with NVTA’s response, appear in the table to the left.

The NVTA’s responses are based on indirect causation and speculation, and it is difficult to believe that the challenged law is anything other than an omnibus bill with many unrelated provisions thrown in, including ones not related to even the overly general concept of transportation. However, courts have treated legislative acts deferentially under

Marshall Claim <sup>39</sup>	NVTA Response <sup>40</sup>
Funding salaries of Virginia Tech professors	Funded by gas taxes already
Funding the Virginia Truck and Ornamentals Research Station	Funded by gas taxes already
Mandating civil remedial surcharges on drivers	“The fees may reduce bad driving and reduce the number of accidents which contribute substantially to congestion.”
Acquisition of open space by localities	Acquisitions “encourage more intensive, denser development, which may reduce traffic on main arteries and thereby congestion.”
Requiring audit reports by the Washington Metropolitan Area Transit Authority	Not addressed

36 VA. CONST. Article IV, Sec. 12. See also Marshall Brief at 29-32; A. Howard, *Commentaries on the Constitution of Virginia* 528 (1974).

37 See, e.g., *Commonwealth v. Dobson*, 11 S.E. 120, 131-32 (1940).

38 Marshall Brief, at 29-30.

39 See Marshall Brief, at 32-33.

40 See NVTA Brief, at Addendum.

the one-object rule, and judges often accept legislative rationales at face value.

---

*Prior to the state legislature's creation of NVTAs and grant of taxing power to it, Virginia voters consistently rejected ballot measures that would have allowed regional bodies to impose taxes and issue debt for transportation purposes.*

---

### Conclusion

The law authorizing the NVTAs to impose taxes and issue debt was a cleverly crafted one. Understanding the constitutional restraints, and frustrated by voter refusal to exempt transportation spending from those restraints, the bill's authors made just enough changes to give the law a veneer of constitutionality.

Only with voter approval can debt be issued or local taxes imposed. If the General Assembly enacted the NVTAs taxes, it violated the public vote requirement. If the NVTAs enacted the taxes, it exercised legislative power in violation of the "vesting" clause. The law as passed makes it unclear which entity actually imposes the taxes, enabling NVTAs to adopt whichever legal argument best suits the moment. The lower court even held that unelected bodies can impose taxes without any public vote, essentially writing an important taxpayer protection out of the Virginia Constitution.

Similarly, because regional governments or bodies with unelected officials cannot issue

debt or impose taxes without voter approval, the bill's authors created a regional "authority" composed of "indirectly elected" officials. These create sufficient ambiguity about whether the relevant constitutional provisions apply. But when one understands the purpose and meaning behind the provisions, a mere shift in wording should not be enough to overcome the same substance. Northern Virginians cannot vote out the NVTAs Board as such, and the NVTAs should not be able to exercise powers constitutionally denied to other governmental entities.

---

*The NVTAs cannot have it both ways: either it imposed the taxes and therefore violated the nondelegation doctrine, or the General Assembly unconstitutionally imposed the taxes without a public vote.*

---

Concerned about the one-object rule, the bill's proponents appended the phrase "relating to transportation" at the end of the bill's title even after it had initially passed the General Assembly. If the Virginia Supreme Court holds that such a minimal and non-descript effort is all it takes to comply with the one-object rule, then the rule has lost all effectiveness in restraining the exercise of state power.

Because many state constitutions have similar provisions to those at issue in the *Marshall v. NVTAs* case, its outcome should be watched and considered by all who wish to protect taxpayers from politicians seeking to impose new taxes or issue new debt without following the rules.



**SPECIAL REPORT**  
(ISSN 1068-0306) is published at least 6 times yearly by the Tax Foundation, an independent 501(c)(3) organization chartered in the District of Columbia.

4–20 pp.  
Single copy: free  
Multiple copies: \$5 each

The Tax Foundation, a nonprofit, nonpartisan research and public education organization, has monitored tax and fiscal activities at all levels of government since 1937.

©2008 Tax Foundation

Editor and Communications  
Director, Bill Ahern

Tax Foundation  
2001 L Street, NW, Suite 1050  
Washington, DC 20036  
(202) 464-6200  
(202) 464-6201 fax  
[www.TaxFoundation.org](http://www.TaxFoundation.org)  
[TF@TaxFoundation.org](mailto:TF@TaxFoundation.org)