
LEADING CASES

I. CONSTITUTIONAL LAW

A. Commerce Clause

Dormant Commerce Clause — State Taxation of Municipal Bonds. — Fueled by concerns about economic protectionism,¹ modern dormant commerce clause jurisprudence is based on the presumption that a facially discriminatory state law affecting interstate commerce is unconstitutional.² The presumption can be overcome if the state can demonstrate that the discriminatory law serves a compelling and legitimate state purpose,³ or if the state goes beyond regulation of the market and is itself a market participant.⁴ With its 2007 ruling in *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,⁵ the Supreme Court provided another exception to the presumption of unconstitutionality by introducing a government entity exemption that allows for state laws favoring government entities to be exempt from traditional dormant commerce clause scrutiny.⁶ Last Term, in *Department of Revenue of Kentucky v. Davis*,⁷ the Court held that Kentucky’s differential bond tax scheme, which exempts interest on bonds issued by Kentucky or its political subdivisions from state income tax but does not exempt the interest of bonds issued by other states, does not violate the dormant commerce clause.⁸ The Court

¹ *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988) (describing the Commerce Clause as “directly limit[ing] the power of the States to discriminate against interstate commerce” and thus giving rise to the dormant commerce clause, which “prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors”).

² *See, e.g., Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 100 (1994) (invalidating an Oregon surcharge and finding that “[b]ecause the Oregon surcharge is discriminatory, the virtually *per se* rule of invalidity provides the proper legal standard”); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (“[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.”).

³ *See Maine v. Taylor*, 477 U.S. 131, 151 (1986) (holding that a Maine ban on the importation of live baitfish is constitutional, despite its facially discriminatory characteristics, because it “serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives”).

⁴ *See Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) (describing state proprietary activities as frequently burdened by the same restrictions as private market participants and reasoning that “[w]hen acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause”).

⁵ 127 S. Ct. 1786 (2007).

⁶ *See id.* at 1795–97.

⁷ 128 S. Ct. 1801 (2008).

⁸ *See id.* at 1811.

rightly relied on its *United Haulers* holding to validate Kentucky's tax scheme, and in turn provide a much-needed signal of stability to the debt markets. Although some members of the business community praised *Davis* as a victory for the municipal debt markets, the *Davis* ruling is only a hollow victory for them because it does not rule on the tax treatment of an important form of municipal debt issuance — private activity bonds. Until the Court is presented with a case that enables it to rule on the tax treatment of private activity bonds, uncertainty on this issue will continue to affect the municipal bond market.

For nearly two centuries, states and their political subdivisions have issued bonds to fund public projects.⁹ For almost a century, states have exempted the interest generated by their own bonds from state income tax.¹⁰ Today, Kentucky, along with forty other states,¹¹ taxes its residents' income, exempting interest on bonds issued by the state or its political subdivisions while including in taxable income the "interest income derived from obligations of sister states and political subdivisions thereof."¹² George and Catherine Davis are Kentucky residents who paid income tax on interest income derived from out-of-state municipal bonds.¹³ In 2003, the Davises filed a class action complaint against the Kentucky Department of Revenue on behalf of all Kentucky residents who had paid taxes on interest income derived from out-of-state municipal bonds,¹⁴ claiming that Kentucky's discriminatory taxation of out-of-state bonds violated the dormant commerce clause.¹⁵

The trial court granted summary judgment to Kentucky.¹⁶ Relying on the market participant doctrine,¹⁷ the trial court upheld Kentucky's municipal bond tax scheme, reasoning that "[w]hen a state issues municipal bonds, it participates in the bond market" and "it clearly may

⁹ *Id.* at 1804.

¹⁰ *Id.*

¹¹ *Id.* at 1806–07.

¹² *Id.* at 1805 (quoting KY. REV. STAT. ANN. § 141.010(10)(c) (West 2006)) (internal quotation marks omitted). This taxation scheme is extremely significant: "Between 1996 and 2002, Kentucky and its subdivisions issued \$7.7 billion in long-term bonds to pay for spending on transportation, public safety, education, utilities, and environmental protection, among other things." *Id.* at 1806.

¹³ *Id.* at 1807.

¹⁴ *Davis v. Revenue Cabinet*, No. 03CI03282, 2004 WL 5358776, at *1 (Ky. Cir. Ct. Aug. 30, 2004).

¹⁵ *Davis v. Dep't of Revenue of the Finance & Admin. Cabinet*, 197 S.W.3d 557, 560 (Ky. Ct. App. 2006).

¹⁶ *Davis*, 2004 WL 5358776, at *3–4.

¹⁷ See *supra* note 4.

pay a higher rate of interest to resident purchasers” by not taxing that interest.¹⁸

The Court of Appeals of Kentucky reversed. Writing for a unanimous three-judge panel, Judge Minton held that Kentucky’s taxation of interest income derived from out-of-state bonds violated the Commerce Clause.¹⁹ Finding Kentucky’s taxation scheme to be “facially unconstitutional” given its favorable treatment of in-state bonds,²⁰ Judge Minton rejected the trial court’s application of the market participant doctrine.²¹ He reasoned that although the act of issuing bonds is a market activity, the act of taxation is a government activity, through which the state becomes a market regulator and not a market participant.²² The Supreme Court of Kentucky denied the State’s motion for discretionary review.²³

The Supreme Court reversed and remanded. Writing for the majority, Justice Souter²⁴ first stated that the purpose of the dormant commerce clause is to effectuate the Framers’ intent to prevent states from being economic isolationists.²⁵ Turning to the evaluation of Kentucky’s tax scheme, Justice Souter found that Kentucky must prevail based on the Court’s holding in *United Haulers*. In *United Haulers*, the Court upheld two county ordinances that required trash haulers to deliver waste to a plant owned and operated by New York State.²⁶ Justice Souter described the *United Haulers* Court as holding that “a government function is not susceptible to standard dormant Commerce Clause scrutiny [because of] its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors.”²⁷ Justice Souter characterized Kentucky’s differential taxation scheme as “parallel[ing] the ordinance[s] upheld in *United Haulers*” because both benefited a public entity while treating all private

¹⁸ *Davis*, 2004 WL 5358776, at *3. Separately, the court also found the Davises lacked standing to challenge the provisions applicable to corporations, estates, trusts, and fiduciaries. *Id.*

¹⁹ *Davis*, 197 S.W.3d at 559.

²⁰ *Id.* at 562.

²¹ *Id.* at 564. Judge Minton declined to follow an Ohio case that had upheld a similar tax scheme, finding that the Ohio court had “failed fully to analyze the issue.” *Id.* at 563 (citing *Shaper v. Tracy*, 647 N.E.2d 550 (Ohio Ct. App. 1994)). He also concluded that *Bonaparte v. Tax Court*, 104 U.S. 592 (1881), was not on point because the plaintiff in that case had relied on the Full Faith and Credit Clause rather than on the dormant commerce clause. *Davis*, 197 S.W.3d at 563–64.

²² *Davis*, 197 S.W.3d at 564.

²³ *Davis*, 128 S. Ct. at 1807–08.

²⁴ Justice Souter was joined by Justices Stevens and Breyer in full, Chief Justice Roberts and Justice Ginsburg for all except Part III-B, and Justice Scalia for all except Parts III-B and IV.

²⁵ *Davis*, 128 S. Ct. at 1808 (citing *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996)).

²⁶ See *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1790–92 (2007).

²⁷ *Davis*, 128 S. Ct. at 1810.

entities the same.²⁸ Given this characterization, the majority described *United Haulers* as providing a “firm basis for reversal.”²⁹

Justice Souter proceeded to discuss the applicability of the market participation doctrine in Part III-B of the opinion, which did not command the support of a majority.³⁰ He described Kentucky as participating in the market for investment dollars when it exempted bond interest, and characterized Kentucky’s tax structure as “one of the tools of competition.”³¹ Given this analysis, he described the market participation doctrine as another means of characterizing Kentucky’s tax scheme as constitutional.³² In the final part of the majority opinion, Part IV,³³ Justice Souter discussed the applicability of the *Pike v. Bruce Church, Inc.*³⁴ balancing test to the Kentucky tax scheme. The *Pike* balancing test allows “nondiscriminatory burdens on commerce [to] be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice.”³⁵ The Davises requested that the Court remand the case for the Kentucky courts to apply this test, but the Court declined to apply the test or confirm its applicability to a case of this sort, finding that “the Judicial Branch is not institutionally suited to draw reliable conclusions”³⁶ about the costs and benefits of the tax scheme, which the Court noted was supported by all fifty states.³⁷

Justice Stevens concurred after having joined the dissents in *United Haulers*³⁸ and in *Reeves, Inc. v. Stake*,³⁹ a landmark case establishing the market participation doctrine. He described *Reeves* and *United Haulers* as distinguishable from *Davis* because they “involved state participation in commercial markets” and he viewed the differential treatment of a government entity as placing an unconstitutional bur-

²⁸ *Id.* at 1811. Justice Souter asserted that “a foreign State is properly treated as a private entity with respect to state-issued bonds that have traveled outside its borders.” *Id.*

²⁹ *Id.*

³⁰ For Part III-B of the opinion, Justice Souter was joined by Justices Stevens and Breyer.

³¹ *Davis*, 128 S. Ct. at 1812 (plurality opinion).

³² *Id.* at 1814.

³³ For Part IV, Justice Souter was joined by Chief Justice Roberts and Justices Stevens, Ginsburg, and Breyer.

³⁴ 397 U.S. 137, 142 (1970) (“If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”).

³⁵ *Davis*, 128 S. Ct. at 1817.

³⁶ *Id.*

³⁷ *Id.* at 1818.

³⁸ See *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1803 (2007) (Alito, J., dissenting).

³⁹ See 447 U.S. 429, 447 (1980) (Powell, J., dissenting).

den on commerce in those cases.⁴⁰ Chief Justice Roberts concurred in part, describing Part III-B of the majority opinion as unnecessary analysis because “the case is readily resolved by last Term’s decision in *United Haulers*.”⁴¹ Similarly, Justice Scalia concurred in part, joining all except Parts III-B and IV of the majority opinion.⁴² He maintained that the dormant commerce clause doctrine was “an unjustified judicial intervention”⁴³ which he would apply “only when *stare decisis* compell[ed] [him] to do so,”⁴⁴ and he then described *stare decisis* as providing no basis for the invalidation of Kentucky’s tax scheme.⁴⁵ He also rejected the *Pike* balancing test, arguing that he “would abandon the *Pike*-balancing enterprise altogether” in favor of leaving the balancing judgments to the legislative branch as prescribed by the Constitution.⁴⁶ Justice Thomas concurred in the judgment, characterizing the Court’s entire line of dormant commerce clause cases as contrary to the Constitution and declaring his belief that the Constitution gives Congress, not the judiciary, the power to regulate commerce among the states.⁴⁷ Given Congress’s silence regarding Kentucky’s tax scheme, Justice Thomas maintained that the Court had “no authority to invalidate” the scheme.⁴⁸

Justice Kennedy dissented.⁴⁹ He first described the importance of free trade in the United States and characterized the dormant commerce clause doctrine as “appropriate and necessary to implement the Constitution’s purpose and design.”⁵⁰ He then chastised the majority, describing the *Davis* holding as employing “unsatisfactory, brief, circu-

⁴⁰ *Davis*, 128 S. Ct. at 1819–20 (Stevens, J., concurring) (“The state entities in those cases imposed burdens on the private market for commercial goods and services. In this case Kentucky and its local governmental units engage in no private trade or business.”).

⁴¹ *Id.* at 1821 (Roberts, C.J., concurring in part).

⁴² *Id.* (Scalia, J., concurring in part). Justice Scalia declined to join Part III-B because he viewed Part III-A as “adequately resolv[ing] the issue.” *Id.* He declined to join Part IV because he did not view the applicability of the *Pike* balancing test as an open question. *Id.*

⁴³ *Id.* (quoting *General Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring)) (internal quotation mark omitted).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1821–22 (Thomas, J., concurring in the judgment).

⁴⁸ *Id.* at 1822.

⁴⁹ Justice Kennedy was joined by Justice Alito.

⁵⁰ *Davis*, 128 S. Ct. at 1822 (Kennedy, J., dissenting). Justice Kennedy considered the majority’s argument that the tax scheme served a “traditional government function” to be nothing more than an invocation of the concept of “police power,” which was a “tautology” that “the Court had ceased to view . . . as saying anything instructive.” *Id.* at 1824 (citing *id.* at 1811 & nn.10–12 (majority opinion)). The majority countered by arguing that the invocation of traditional government functions was not mere “circular rationalization” because “under *United Haulers*, governmental private preference is constitutionally different from commercial private preference, and we make the governmental responsibility enquiry to identify the beneficiary as one or the other.” *Id.* at 1810 n.9 (majority opinion).

lar reasoning⁵¹ that put the Court's Commerce Clause jurisprudence (and in turn free markets) at risk of erosion.⁵² Justice Kennedy challenged the majority's description of the Kentucky law as fulfilling the government function of raising revenue, reasoning that because the law "operates on those who hold the bonds and trade them, not those who issue them," the "relevant legal framework" is "taxation of bonds already issued" and not "bond issuance."⁵³ He argued that prior cases had established the rule that "[a] State has no authority to use its taxing power to erect local barriers to out-of-state products or commodities," and that the Kentucky tax scheme was such a barrier.⁵⁴ He concluded by denouncing Justice Souter's analysis surrounding market participation,⁵⁵ describing "tax exemption [a]s not the sort of direct state involvement in the market that falls within the market-participation doctrine."⁵⁶ Justice Alito, besides joining Justice Kennedy's dissent, wrote a short separate dissent in which he reaffirmed his opposition to the government entity exception that the Court had adopted in *United Haulers*.⁵⁷

In *Davis*, the Court rightly identified the *United Haulers* holding as providing clear grounds for reversal. Although some commentators in the business community praised *Davis* as a victory for the municipal debt market, *Davis* is notably only a hollow victory because it explicitly did not decide on the constitutionality of private activity bonds, which are an important form of municipal debt. In both its *United Haulers* and *Davis* opinions, the Court did not provide detail around the scope of state actions that fall within the government entity exception to the dormant commerce clause, and thus the rulings provide little clarity about how a case challenging the tax treatment of private activity bonds would be decided. Until the Court gets the opportunity to rule on the tax treatment of private activity bonds, there will continue to be uncertainty in the market surrounding municipal debt taxation.

Writing for the majority in *United Haulers*, Chief Justice Roberts described the flow control ordinances in question as benefiting a "clearly public facility, while treating all private companies exactly the

⁵¹ *Id.* at 1823 (Kennedy, J., dissenting).

⁵² *Id.* at 1822–23.

⁵³ *Id.* at 1825.

⁵⁴ *Id.* (citing, inter alia, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977)).

⁵⁵ *Id.* at 1811–14 (plurality opinion).

⁵⁶ *Id.* at 1829 (Kennedy, J., dissenting) (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 593 (1997)) (internal quotation marks omitted).

⁵⁷ *Id.* at 1830 (Alito, J., dissenting) (citing *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1803–12 (2007) (Alito, J., dissenting)).

same,”⁵⁸ thus distinguishing *United Haulers* from *C & A Carbone, Inc. v. Clarkstown*,⁵⁹ in which a municipal control flow ordinance that benefited a private entity was struck down under the dormant commerce clause.⁶⁰ Chief Justice Roberts then asserted that “[c]ompelling reasons justify treating [laws benefiting a public facility] differently from laws favoring particular private businesses over their competitors”⁶¹ because there is a high likelihood that government entities are motivated by “any number of legitimate goals unrelated to protectionism.”⁶² From this analysis came the government entity exemption to dormant commerce clause scrutiny.⁶³ The *Davis* Court found that the holding and reasoning in *United Haulers* “applie[d] with even greater force to laws favoring a State’s municipal bonds, given that the issuance of debt securities to pay for public projects is a quintessentially public function.”⁶⁴ Thus the nature of municipal debt issuance coupled with the Court’s deference to the favorable treatment of state and local government functions enabled the *Davis* Court to rely on *United Haulers* in upholding the Kentucky tax scheme.

Proponents of Kentucky’s differential tax scheme in the business community characterized the *Davis* ruling as a victory for the municipal debt market. For example, Diana Herrman, Chief Executive Officer of Aquila Investment Management, said the *Davis* ruling “represents a victory for the single-state bond market and re-emphasizes the fundamental role it plays in financing vital municipal projects, such as roads, schools, and hospitals at both the state and municipal level.”⁶⁵ Similarly, John Miller, Chief Investment Officer of Nuveen Asset Management, described the ruling as “very definitive” and “help[ing]

⁵⁸ *United Haulers*, 127 S. Ct. at 1796. In *United Haulers*, the Court evaluated the constitutionality of two New York counties’ flow control laws that required all solid waste generated within the counties to be delivered to facilities managed by the Oneida-Herkimer Solid Waste Management Authority (a public benefit corporation created to combat the solid waste “crisis” caused by poorly operating local landfills in New York’s Oneida and Herkimer counties). *Id.* at 1790–91.

⁵⁹ 511 U.S. 383 (1994).

⁶⁰ *Id.* at 386, 394–95.

⁶¹ *United Haulers*, 127 S. Ct. at 1795.

⁶² *Id.* at 1796.

⁶³ Chief Justice Roberts declared that “[t]he contrary approach of treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government.” *Id.*

⁶⁴ *Davis*, 128 S. Ct. at 1810.

⁶⁵ Press Release, Aquila Investment Management, Aquila Investment Management Praises Supreme Court Ruling on Municipal Bonds as Victory (May 19, 2008), <http://www.reuters.com/article/pressRelease/idUS188864+19-May-2008+BW20080519>.

things considerably by resolving one of the undecided issues hanging over the market.”⁶⁶

In part, this declaration of victory is warranted. By holding that Kentucky’s tax scheme is constitutional, the Court likely prevented a major disruption of the U.S. municipal bond markets, which are currently collectively valued at \$2.6 trillion⁶⁷ (with \$374 billion of assets invested in municipal bond mutual funds, \$156 billion of which is managed by single-state bond mutual funds⁶⁸). The economic implications of *Davis* are particularly significant given the market environment in which the ruling was made. Since the summer of 2007, the U.S. economy has been in the midst of a “credit crisis,” primarily initiated by the collapse of the collateralized debt obligation (CDO) market.⁶⁹ The current U.S. economic environment is characterized by limited access to credit and high costs of borrowing.⁷⁰ In his dissent, Justice Kennedy advocated for a national free market of municipal bonds,⁷¹ but his position ignored the economic pains that would be experienced during the transition to such a market — pains that would be particularly damaging in current market conditions. A ruling affirming the Kentucky Court of Appeals decision would have transformed the municipal bond market and resulted in an increased cost of capital for municipalities.⁷² The forty-one states currently employing

⁶⁶ Greg Stohr, *Muni Bond Tax Exemptions Upheld by U.S. Supreme Court*, BLOOMBERG, May 19, 2008, <http://www.bloomberg.com/apps/news?pid=20601087&sid=alFyqR.UGCaE&refer=home> (internal quotation marks omitted).

⁶⁷ Mark H. Anderson & Shefali Anand, *Muni-Bond Tax Break Is Upheld*, WALL ST. J., May 20, 2008, at A3. *But cf.* Joel Michael, *Kentucky v. Davis: Implications for State Tax Policy and Dormant Commerce Clause Doctrine*, 45 STATE TAX NOTES 753, 754 (2007) (“Although [nondiscriminatory taxation] is likely to be painful for their budgets in the short run . . . , it probably will be beneficial to states in the long run. The motivation for exempting in-state bond interest is to reduce state and local borrowing costs. But economic theory and available empirical evidence suggest that state tax exemptions are not a cost-effective way to do so.”).

⁶⁸ Anderson & Anand, *supra* note 67. These single-bond municipal funds capitalize on the in-state tax exemption policies and would be particularly hurt by the elimination of the differential tax treatment of municipal bonds. *See* Jonathan Berr, *Shaky Times for Munis*, BUSINESS WEEK, Sept. 3, 2007, at 90.

⁶⁹ For more information about the causes and effects of the current credit crisis, see, for example, Aleksandrs Rozens, *The Aftermath*, INVESTMENT DEALERS’ DIGEST, Aug. 18, 2008, at 12, 13 (“The fallout within CDOs permeated other businesses at banks and brokerages that had little to do with subprime mortgage lending. Massive mergers and acquisitions were financed with debt and this debt was routinely scooped up by investors creating CDOs. . . . Now, a year later, Wall Street is still reeling from the credit storm.”). *See also* Ethan Penner, *How Low Interest Rates Contributed to the Credit Crisis*, WALL ST. J., Aug. 18, 2008, at A15.

⁷⁰ *See* Rozens, *supra* note 69. Recent evidence suggests that the economic slowdown in the United States is increasingly becoming a global problem. *See, e.g.*, Justin Lahart et al., *World Economy Shows New Strain*, WALL ST. J., Aug. 15, 2008, at A1.

⁷¹ *See Davis*, 128 S. Ct. at 1826 (Kennedy, J., dissenting).

⁷² *See* Anderson & Anand, *supra* note 67; *see also* Robert Barnes, *High Court Allows State Tax Breaks for Bonds*, WASH. POST, May 20, 2008, at D1 (“The ruling was welcomed in the bond market, which has been through a tumultuous period as the credit crisis spread to products tradi-

such a scheme would have been faced with billions of dollars of refund claims in addition to having to alter their tax schemes to provide tax breaks to out-of-state bonds or eliminate the tax breaks on municipal bonds altogether.⁷³

While the *Davis* holding did lift “a meaningful cloud of uncertainty” that had been “hanging over the market,”⁷⁴ it did not resolve all uncertainty surrounding municipal bond taxation because the Court chose to reserve judgment on the differential tax treatment of private activity bonds.⁷⁵ “Private-activity bonds are municipal bonds issued by a state on behalf of a private entity with the idea that the entity serves some sort of public good. Such bonds include those issued on behalf of airports, hospitals, housing or economic development.”⁷⁶ By some estimates, this type of municipal bond accounts for nearly one-fourth of the municipal bond market.⁷⁷ Under federal tax regulations, states and the District of Columbia can issue tax-exempt private activity bonds in the greater amount of a fixed per capita volume (calculated by population) or a set dollar limit.⁷⁸ In 2007, the housing segment (which consists of single family bonds, multifamily housing bonds, mortgage credit certificates, and other housing-related projects) received the largest portion of the private activity bond volume cap at 62.4% of total issuance, followed by issuances in the segments of student loans and industrial development.⁷⁹

tionally considered virtually risk-free and drove up the cost of borrowing for many state agencies and local governments.”); Stohr, *supra* note 66; Brian Wingfield, *Court Holds with Tradition on Taxing Muni Bonds*, FORBES, May 19, 2008, http://www.forbes.com/business/2008/05/19/scotus-taxes-bonds-biz-beltway-cx_bw_0519scotus.html (“At a time of state budget shortfalls and economic uncertainty, a reversal of a nearly century-old practice of collecting income is the last thing the states need.”).

⁷³ Stohr, *supra* note 66. “It was estimated that if the court determined that all municipal bonds should be taxed equally, New York alone would have been exposed to \$200 million in refund claims dating back to 2001. That doesn’t include the \$70 million it would have lost in tax revenue if it couldn’t collect taxes on out-of-state bonds.” Wingfield, *supra* note 72.

⁷⁴ Anderson & Anand, *supra* note 67 (quoting John Miller of Nuveen Investments) (internal quotation mark omitted).

⁷⁵ *Davis*, 128 S. Ct. at 1805 n.2.

If the Court construes the exemption broadly, it likely will need to face the issue of whether all or nearly all types of government borrowing qualify, including conduit type bonds issued to benefit private businesses and in-state individuals. Limiting the exemption to bonds issued to finance ‘traditional’ government functions could create a great deal of uncertainty about the status of many municipal revenue bonds, such as private activity bonds.

Michael, *supra* note 67, at 762.

⁷⁶ David Hoffman, *Private-Activity Bonds in Court’s Cross Hairs*, INVESTMENT NEWS, Nov. 26, 2007, at 12.

⁷⁷ See Stohr, *supra* note 66; Michael, *supra* note 67, at 760.

⁷⁸ Peter Schroeder, *PAB Carryforward Down for the 2d Year in Row*, BOND BUYER, June 9, 2008, at 1.

⁷⁹ *Id.* “[N]ew population estimates and an inflation adjustment for 21 states and the District of Columbia will boost the amount of private-activity bonds that can be issued nationwide in

The Court justified its decision to exclude private activity bonds from the *Davis* ruling in part by citing the fact that the Davises did not press the requisite argument at trial.⁸⁰ While as a matter of judicial responsibility, the Court's exclusion of private activity bonds was sound, the importance of private activity bonds in the U.S. economy and the current volatile market environment make the exclusion of private activity bonds noteworthy, particularly for municipal debt market participants. Because the Court did not explicitly define the outer bounds of government entity activity that is exempt under *United Haulers* and *Davis*, it is not clear if the Court will apply the government entity exemption to the issuance of private activity bonds.⁸¹ Arguably the ultimate purpose and benefit of private activity bonds — to develop projects that improve communities — very closely mirror that of municipal bonds issued by the government to fund public works.⁸² But the analysis of the tax treatment of private activity bonds is complicated by the presence of private entities acting as intermediaries between the government and the creation of public goods,⁸³ and thus it is unclear how the Court will rule when and if it is faced with a constitutional challenge to that differential tax treatment.

Until the Court is given an opportunity to rule on the tax treatment of private activity bonds, uncertainty will continue to affect the municipal debt market. Proponents of the differential tax treatment of municipal debt can find comfort in the *Davis* ruling, but the ruling is

2008 to \$28.48 billion — a 1.03% increase over 2007's \$28.19 billion." Andrew Ackerman, *Private-Activity Bonds*, FINANCIAL PLANNING, Feb. 2008, at 34.

⁸⁰ *Davis*, 128 S. Ct. at 1805 n.2.

⁸¹ In both *Davis* and *United Haulers*, the state law in question involved favorable treatment of a government entity that was conducting "traditional" government activity (municipal bond issuance and waste collection, respectively) and did not favor private entities. *Davis*, 128 S. Ct. at 1811. Given these similarities, the Court likely did not feel compelled to provide additional clarity about the scope of government entity activity included in the exemption. Some observers have simply interpreted the extension of *United Haulers* to *Davis* as affirming the existence of a broad exemption doctrine for government entities. See, e.g., Posting of Gregory Germain to TaxProf Blog, http://taxprof.typepad.com/taxprof_blog/2008/05/us-supreme-cour.html (May 19, 2008) (describing the *Davis* majority as adopting a "broad doctrine of abstention"). But because the Court has not explicitly defined the outer bounds of the exemption's scope, future application of the exemption will be complicated when the cases do not neatly align with *Davis* and *United Haulers*. For a discussion of the implications of the scope of the government entity exemption, see Michael, *supra* note 67, at 764.

⁸² Justice Souter alluded to the similar end-goals of municipal bonds and private activity bonds, stating that if the tax treatment of private activity bonds were held unconstitutional, the Court "must assume that it could disrupt important projects that the States have deemed to have public purposes." *Davis*, 128 S. Ct. at 1805 n.2.

⁸³ See Peter Schroeder, *Supreme Court Rules for Kentucky in Davis Case*, BOND BUYER, May 20, 2008, at 1 (describing the argument in Brief of Alan D. Viard et al. as Amicus Curiae Supporting Respondents, *Davis*, 128 S. Ct. 1801 (2008) (No. 06-666), that "private-activity bonds are a stronger example of commercial discrimination by a government than other municipal bonds because they benefit private parties").

not a complete victory for them. Market participants likely will (and should) remain conscious of the continued susceptibility of a significant portion of the municipal debt market to a constitutional challenge because an upheaval in the private activities bond market would have far-reaching and detrimental economic consequences in an already volatile market environment.

B. Criminal Law and Procedure

1. *Eighth Amendment — Death Penalty — Lethal Injection Drug Protocol.* — In a widely reported speech at the 2006 Georgetown University Law Center graduation, Chief Justice Roberts called for “broader consensus” on the Court, with a focus on achieving more unanimous or nearly unanimous decisions.¹ Last Term, in *Baze v. Rees*,² the Court affirmed the constitutionality of the three-drug protocol used in lethal injections in the United States, holding that a state’s refusal to adopt an alternative method of execution violates the Eighth Amendment only if the method “effectively address[es] a ‘substantial risk of serious harm[]’ [— that is, it is] feasible, readily implemented, and [would] in fact significantly reduce a substantial risk of severe pain.”³ The decision’s 7–2 vote led commentators to write that *Baze* was a sign of the Court’s moving toward greater consensus.⁴ However, the Justices’ conflicting rationales and the multiple opinions both showed that Chief Justice Roberts did not achieve his desired “broader consensus” and indicated why he likely will not be able to do so on other controversial issues. Moreover, the opinions demonstrated why such consensus is not actually desirable. The additional opinions provided guidance both to future litigants about where the Justices stand on the constitutionality of capital punishment and to states about how they can avoid future litigation over methods of execution.

The petitioners had each been tried and convicted of unrelated murders in the Commonwealth of Kentucky and sentenced to death.⁵ In 2004, both men brought an action in Kentucky’s Franklin Circuit Court seeking a declaratory and injunctive judgment that the Commonwealth’s lethal injection protocol constituted cruel and unusual punishment and was therefore unconstitutional “under the Eighth Amendment to the United States Constitution and Section 17 of the

¹ Chief Justice John Roberts, Address at the Georgetown University Law Center Commencement (May 21, 2006).

² 128 S. Ct. 1520 (2008).

³ *Id.* at 1532 (plurality opinion) (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

⁴ See, e.g., Linda Greenhouse, *On Court That Defied Labeling, Kennedy Made the Boldest Mark*, N.Y. TIMES, June 29, 2008, at 1.

⁵ *Baze v. Commonwealth*, 965 S.W.2d 817, 819 (Ky. 1997); *Bowling v. Commonwealth*, 873 S.W.2d 175, 179 (Ky. 1994).