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THE "NEW PROTECTIONISM" AND THE AMERICAN COMMON MARKET

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For nearly two centuries, the U.S. Constitution through the dormant Commerce Clause has protected the American common market from protectionist commercial state regulations and taxes. During the past two terms, however, the U.S. Supreme Court created a new exception to the dormant Commerce Clause for protectionist state and local taxes and regulations that favor public rather than private entities. In this Article, we describe this "New Protectionism" and argue that the Court's embrace of it is profoundly misguided. As we document, there is no material difference, economically or constitutionally, between public protectionism and private protectionism. As illustrated by the variety of ways in which government and private enterprise interact, there is no coherent distinction between public and private activities, and ensuing efforts to draw such a line will only serve to embroil the courts in tasks for which it is ill suited. Worse, this new exception only encourages state and local governments to engage in protectionism in a variety of contexts, such as education and local economic development, in which the dangers to national economic union are paramount. Coupled with the Court's recently declared unwillingness to subject nondiscriminatory regulations and taxes to minimal judicial scrutiny, this endorsement of public protectionism threatens to emasculate the constitutional protections for the American common market and should therefore be rethought by the Court or legislatively superseded by Congress.

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INTRODUCTION

For close to two centuries, the United States Supreme Court has actively sought to protect interstate trade from undue disruption by state or local governments. Pursuant to the so-called "dormant Commerce Clause," the Court has reviewed state and local legislation to ensure that local measures do not unreasonably disrupt the American common market.[1] Although the Court has deployed different doctrinal formulas over the years to distinguish between legitimate state commercial regulations and illegitimate measures that unduly interfere with interstate trade,[2] one constant has been a strict prohibition on protectionist measures that seek to insulate in-state economic activity from out-of-state competition. Beginning as early as the middle of

1 *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

2 *See* Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1929–30 (2007).

the nineteenth century, the Court actively rooted out and invalidated state laws that sought to discourage the sale of out-of-state goods or services so as to favor local economic interests.[3] Since then, numerous "discriminatory" measures have been struck down by the Court.[4] Indeed, as others have noted, this antipathy to local protectionism has been a hallmark of the Court's Commerce Clause jurisprudence.[5]

Change, however, is afoot. In the past two years, the Court has signaled that some state or local protectionism is constitutionally permissible. In 2007, in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*,[6] the Court upheld county ordinances that required all solid waste be processed at a local, municipally owned facility, thereby displacing out-of-state private competition. Meanwhile, in the spring of 2008, in *Department of Revenue v. Davis*,[7] the Court upheld a nakedly protectionist tariff on out-of-state municipal bonds, holding that states could tax the interest on municipal bonds issued by other states (or their political subdivisions) even when they exempt the interest on their own bonds.[8] In defending the constitu-

3 *See* Welton v. Missouri, 91 U.S. 275, 281 (1876) (invalidating discriminatory state law and decrying the "evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other states"); *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring) (declaring that such "iniquitous laws and impolitic measures" were "destructive to the harmony of the States" and were therefore unconstitutional).

4 *See* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 428–48 (discussing doctrinal evolution of the dormant Commerce Clause); *see also* Williams, *supra* note 2, at 1865–66 & nn.74, 80 (citing cases pertaining to "state" discriminatory measures).

5 Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1206–20 (1986).

6 550 U.S. 330 (2007).

7 128 S. Ct. 1801 (2008).

8 For convenience sake, we refer to all bonds issued either by state or local governments, or their political subdivisions, as municipal bonds. For additional commentary on *United Haulers* and *Davis*, see Dan T. Coenen, *Where* United Haulers *Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. (forthcoming 2009) [hereinafter Coenen, United Haulers], *available at* http://works.bepress.com/dan_coenen/22; Walter Hellerstein & Eugene W. Harper, Jr., *Discriminatory State Taxation of "Private Activity Bond" Income After* Davis, 123 TAX NOTES 447 (2009); Daniel R. Ray, *Cash, Trash, and Tradition: A New Dormant Commerce Clause Exception Emerges from* United Haulers *and* Davis, 61 TAX LAW. 1021 (2008); Dan T. Coenen, *The Supreme Court's Municipal Bond Decision and the Market-Participant Exception to the Dormant Commerce Clause* (2009) (unpublished manuscript), *available at* http://works.bepress.com/dan_coenen/21/ [hereinafter Coenen, *The Supreme Court's Municipal Bond Decision*]; Edward A. Zelinsky, *The False Modesty of* Department of Revenue v. Davis*: Disrupting the Dormant Commerce Clause Through the Traditional Public Function Doctrine* (Benjamin N. Cardozo Sch. of Law Jacob Burns

tionality of both measures, the Court pointed to the fact that the protected activities were governmental rather than private in nature.[9]

In our view, these decisions create a new exception to the dormant Commerce Clause, one for protectionist state and local taxes and regulations that favor *public* rather than *private* entities. Under the Court's new approach, which we call the "New Protectionism," state and local governments may not favor local private businesses as such, but they may adopt taxes and regulations that protect state or local governmental operations from out-of-state competition, whether public or private.[10] In short, in the Court's view, public protectionism is not constitutionally proscribed.

As one might expect, it is difficult normatively to reconcile the New Protectionism with the Court's longstanding condemnation of protectionism generally. In both *United Haulers* and *Davis*, the Court ruled that measures that protect governmental operations from out-of-state competition are not discriminatory and, therefore, are exempt from the rigorous judicial review reserved for discriminatory measures.[11] To the same end, in *Davis*, a plurality of Justices declared that public protectionism fits within the "market-participant" exception to the dormant Commerce Clause, which exempts state or local governments from constitutional review when acting as "market participants" rather than "market regulators."[12] The net effect of these doctrinal moves is to exempt public protectionism from the stringent judicial scrutiny reserved for discriminatory measures and to subject it instead to the lenient review applied to nondiscriminatory measures.[13] Meanwhile, in *Davis*, the Court refused to apply even that minimal level of scrutiny on the ground that such review was inappropriate for the

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Inst. for Advanced Legal Studies, Working Paper No. 255, Mar. 2009), *available at* http://ssrn.com/abstract=1352687.

9 *See Davis*, 128 S. Ct. at 1815.

10 *See id.* at 1815–17.

11 Discriminatory measures are "'virtually *per se*'" invalid, Maine v. Taylor, 477 U.S. 131, 148 (1986) (quoting City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978)), and can be upheld only when the state demonstrates that the law "'serves a legitimate local purpose' and that this purpose could not be served as well by available nondiscriminatory means." *Id.* at 138 (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)).

12 *See Davis*, 128 S. Ct. at 1811–14.

13 In *United Haulers*, the Court subjected the county flow-control ordinances to the so-called "*Pike* balancing test" from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Interestingly, however, in *Davis*, the Court refused to apply *Pike* because, as the Court explained, the benefits and costs of Kentucky's municipal bond taxation scheme could not be measured and evaluated by courts in a principled or coherent fashion. *See Davis*, 128 S. Ct. 1817–19.

judicial branch to perform, thereby leaving public protectionism exempt from all Commerce Clause review.[14]

In our view, the Court's embrace of the New Protectionism is profoundly misguided. Despite its best efforts, the Court has failed to provide a theoretically sound, normatively attractive justification for treating public protectionism as materially different from private protectionism, which the Court continues to condemn in earnest terms. Its conclusory designation of such protectionist measures as nondiscriminatory blinks reality. Meanwhile, the *Davis* plurality's capacious but bizarre reinterpretation of the market-participant exception collapses the fundamental distinction upon which that exception rests—namely, that there is a constitutionally significant difference between state taxes and regulations on the one hand and state market transactions on the other hand. Finally in this regard, although the Court has repeatedly made clear that nondiscriminatory regulations and taxes are subject to dormant Commerce Clause review,[15] the Court's refusal in *Davis* to perform even that minimal level of review unjustifiably leaves public protectionism exempt from all forms of judicial review, strict or lenient, under the Commerce Clause.

Such analytical shortcomings and the confusion they sow are bad enough, but the implications for interstate commerce posed by the Court's endorsement of public protectionism are truly breathtaking. The Court's embrace of taxes and regulations that favor public entities only encourages state and local governments to engage in more public protectionism. Worse, because private and public enterprises often commingle and cooperate[16]—a fact that, critically, the Court has failed to appreciate—the public-entities exception created by the Court opens the door to governmental efforts to protect private enterprises from out-of-state competition through cleverly constructed public-private partnerships. Coupled with the plurality's incomprehensibly broad and muddled conception of the market-participant exception, this endorsement of public protectionism threatens to emasculate the constitutional protections for the American common market. In other words, the logic underlying the Court's New Protectionism is not easily cabined, and could—with just a little push—lead to the elimination of the dormant Commerce Clause itself.

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14 *See Davis*, 128 S. Ct. at 1810.

15 *Pike*, 397 U.S. at 145–46.

16 For cases that provide an example of "cooperation," see BORIS I. BITTKER & BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE 187 n.181.2 (2009 Cum. Supp.).

Recent developments only bolster these concerns. Parochial political pressures often induce lawmakers to adopt protectionist measures even in the best of times.[17] Economic crises, such as the current one, only add further urgency to calls to undertake protectionist actions to create and preserve local jobs.[18] One prominent protectionist mechanism used by state and local governments is economic development or so-called "private activity" bonds: a state issues bonds whose proceeds are given to local companies to underwrite local economic development. Despite the bond's nominal status as a government bond, the principal and interest on such bonds are typically repaid by the private companies that received the bond proceeds.[19] Nevertheless, because the bonds are technically issued by the state government, the interest earned on such bonds is exempt from federal income taxation and, because of *Davis*, exempt from taxation by the state that issued them (but not other states).[20] This favorable tax treatment significantly reduces the private companies' cost of borrowing, and, coupled with the protectionist tax treatment upheld as constitutional by the Court in *Davis*, provides local private enterprises with a substantial economic edge over their out-of-state competitors. To be sure, because of the potential for abuse, federal law has historically limited the scope of such financing,[21] but the current economic crisis has led Congress to consider reducing those limitations, allowing states to engage in ever greater protection of private local industry.[22] In Part I, we briefly describe the modern dormant Commerce Clause doctrine and give a brief account of the Court's decisions in *United Haulers* and *Davis* that create this new exception for the New Protectionism. In Part II, we identify and analyze the shortcomings of the Court's efforts to reconcile public protectionism with its continuing condemnation of private protectionism. Specifically, we scrutinize and reject the Court's creation of a public-entities excep-

17 *See, e.g.*, Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 346–49 (1992) (invalidating protectionist measure adopted for environmental, not economic, reasons).

18 *Cf.* David Stevenson, *The Return of Protectionism*, MONEYWEEK, Jan. 16, 2009, http://www.moneyweek.com/news-and-charts/economics/the-return-of-protectionism-14462.aspx (explaining that, given the global economic slowdown, "[i]ndustries worldwide are asking their governments for protection from imports," with American companies leading the way).

19 *See* James R. Ramsey & Merl Hackbart, *State and Local Debt Policy and Management*, *in* HANDBOOK OF DEBT MANAGEMENT 255, 261 (Gerald J. Miller ed., 1996).

20 26 U.S.C. § 103 (2006).

21 *See id.* § 141.

22 *See* H.R. 425, 111th Cong. (2009); H.R. 537, 111th Cong. (2009); *see also* Peter Schroeder & Audrey Dutton, *House Eyes Muni, Tax Cut Bills*, BOND BUYER, Jan. 16, 2009, at 19 (discussing the muni provisions in the stimulus package).

tion to the prohibition on discriminatory taxes and regulations. Part III explores how this doctrinal innovation will deleteriously impact state and local regulation and taxation of interstate commerce and the judicial review thereof in the future.

In Part IV, we discuss the efforts of a plurality of the Court to expand the market-participant doctrine sufficiently to cover the decision in *Davis*. If ultimately adopted by the Court, we argue, the market-participant doctrine will no longer be an exception to the dormant Commerce Clause, but will swallow that doctrine completely. In Part V, we assess the Court's shift toward the position that nondiscriminatory state and local regulations are entirely immune from judicial scrutiny under the dormant Commerce Clause no matter how burdensome they are. This would represent a break with over a century's worth of precedent and effectively exempt public protectionism from all judicial scrutiny under the Commerce Clause. For that reason, we conclude by calling upon the Court to reassess (and ultimately reverse) its embrace of the "New Protectionism." Failing that, we urge Congress to use its constitutional authority with respect to interstate commerce to prohibit states and local governments from engaging in this constitutionally nefarious behavior.

I. THE DORMANT COMMERCE CLAUSE, *UNITED HAULERS*, AND *DAVIS*

Before making the argument that the Court's recent dormant Commerce Clause cases endorse a New Protectionism, we need to clear away some brush. First, we offer a thumbnail sketch of the pre-*United Haulers* doctrine. Then, we offer a brief summary of the Court's decisions in *United Haulers* and *Davis*.[23] In Part II, we will draw specific attention to those aspects of *Davis* and *United Haulers* that depart dramatically from the case law as understood prior to the cases, while Part III discusses the implications of the public-entities exception for the dormant Commerce Clause generally.

*A. The Pre-*United Haulers *Dormant Commerce Clause: A Doctrinal Summary*

Prior to the Court's recent cases, the rules governing the dormant Commerce Clause were thought to be settled.[24] There was a two-tiered standard of review. For state or local laws that were "discriminatory"—facially, purposefully, or effectively—a form of strict

23 The summaries of *United Haulers* and *Davis* draw freely on BITTKER & DENNING, *supra* note 16.

24 *See* Maine v. Taylor, 477 U.S. 131, 138 (1986).

scrutiny applied, requiring the government to demonstrate (1) a legitimate (i.e., nonprotectionist) purpose and (2) that it lacked less discriminatory means to effectuate that interest.[25] We'll call this the "antidiscrimination principle." Other laws alleged to burden interstate commerce were subject to the so-called "*Pike* balancing test," whose canonical formulation required the challenger to demonstrate that the burden on interstate commerce "is clearly excessive in relation to the putative local benefits."[26]

There were two primary exceptions to the antidiscrimination principle. First, it (and the dormant Commerce Clause doctrine generally) was understood to be a default rule that Congress could, by affirmative legislation, alter.[27] The second exception, the market-participant doctrine, permitted states acting as market "participants" as opposed to market "regulators" to favor in-state interests over those from out-of-state so long as the state did not attempt to impose restrictions "downstream" from the market in which it was participating.[28] In addition to this last limit, the Court also consistently rejected attempts to invoke the market-participant doctrine to sustain discriminatory tax credits or tax exemptions, holding that the use of the taxing power was a "primeval governmental activity"[29] unavailable to private market participants.[30] *United Haulers* and *Davis* have greatly unsettled the "black-letter" law of the dormant Commerce Clause doctrine.

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25 *See id.*

26 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

27 *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427–40 (1946) (upholding both the McCarran-Ferguson Act's delegation to states of power to regulate the insurance business and a discriminatory state law passed in its wake). *But see* Norman R. Williams, *Why Congress Cannot "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153 (2005) (criticizing this exception).

28 *See generally* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 396–405 (1989) (describing the development of the market-participant doctrine).

29 New Energy Co. v. Limbach, 486 U.S. 269, 277 (1988).

30 *See generally* Coenen, *supra* note 28, at 409 (providing a history and critique of the market-participant doctrine); Norman R. Williams, *Taking Care of Ourselves: State Citizenship, the Market, and the State*, 69 OHIO ST. L.J. 469, 493–99 (2008) (offering a framework to reconcile competing demands of interstate equality and state autonomy). Though the Court has never explicitly so held, it is generally assumed that states may subsidize in-state businesses in a discriminatory manner. *See* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 978 (1998). For more on the market-participant doctrine and *Davis*, see discussion *infra* Part IV.

B. United Haulers

The stage for *United Haulers* was set in 1994, when the Court decided *C & A Carbone, Inc. v. Town of Clarkstown*,[31] in which it invalidated a local "forced use" law requiring all garbage haulers in a New York town to process their garbage at a private processing facility.[32] The effect of the law was to prohibit the export of garbage for processing anywhere outside the town. Applying the antidiscrimination principle described above, the Court had little trouble striking down the Clarkstown ordinance.[33]

In what would become the majority position in *United Haulers*, Justice Souter dissented in *Carbone*, arguing that the majority ignored the essentially public nature of the processing plant—Clarkstown had agreed to purchase the plant for a nominal sum after five years, first guaranteeing the company a sufficient volume of trash to recoup its initial capital investment in the plant[34]—and that the de facto municipal ownership should have immunized the ordinance from invalidation.[35]

For over a decade after *Carbone*, scholars criticized the Court's opinion[36] and lower court judges attempted to deal with the numerous challenges that arose in its wake.[37] A split developed over whether *Carbone* applied to ordinances requiring disposal at publicly owned, as opposed to private, sites.[38] Questions also arose regarding the applicability of the market-participant exception to the dormant Commerce Clause doctrine.[39]

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31 511 U.S. 383 (1994).

32 *See id.* at 392–95.

33 *See id.*

34 *Id.* at 387.

35 *See id.* at 410–11 (Souter, J., dissenting).

36 *See, e.g.*, Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion About the Dormant Commerce Clause*, 50 OKLA. L. REV. 155, 185–89 (1997); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 47–52 (2003); Bradford C. Mank, *Are Public Facilities Different from Private Ones?: Adopting a New Standard of Review for the Dormant Commerce Clause*, 60 SMU L. REV. 157, 176–78 (2007); Paula C. Murray & David B. Spence, *Fair Weather Federalism and America's Waste Disposal Crisis*, 27 HARV. ENVTL. L. REV. 71, 72, 89–91 (2003).

37 For citations to cases decided after *Carbone*, see BITTKER & DENNING, *supra* note 16, at 187 n.181.2.

38 *Compare* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 438 F.3d 150, 161–63 (2d Cir. 2006) (upholding ordinance requiring disposal at municipal authority-owned waste disposal site), *with* Nat'l Solid Wastes Mgmt. Ass'n v. Daviess County, 434 F.3d 898, 910–12 (6th Cir. 2006) (holding that similar ordinance violated the dormant Commerce Clause).

39 *See, e.g.*, BITTKER & DENNING, *supra* note 16, at 222–25 (citing cases).

The Court's decision in *United Haulers* clarified one of these questions. Oneida and Herkimer Counties banded together to solve a collective solid waste disposal problem by seeking state permission to create a solid waste disposal authority and having the counties enter into a management agreement for the disposal of solid waste.[40] The Authority "agreed to purchase and develop facilities for the processing and disposal of solid waste and recyclables generated in the Counties." [41] It also collected tipping fees to cover the costs of operating such facilities.[42] The fees charged, the Court explained, "significantly exceeded those charged for waste removal on the open market," but permitted the Authority to provide services like recycling and composting not otherwise available.[43] The Authority also enacted a flow-control ordinance, requiring all solid waste generated within the counties to be processed at the Authority's processing site.[44]

Private haulers sued, citing *Carbone* for the proposition that all flow-control ordinances requiring local processing of solid waste were discriminatory and subject to strict scrutiny. The Court disagreed, distinguishing *Carbone* because the Oneida and Herkimer waste management authority's processing station was publicly owned.[45]

The Court, per Chief Justice Roberts, first held that the constitutional significance of private versus public ownership was not settled by *Carbone*.[46] The Court rejected the haulers' (and Justice Alito's) arguments that the *Carbone* majority didn't respond to Justice Souter's arguments about the nominal private ownership of the Clarkstown facility, because the majority thought that it was irrelevant to any dormant Commerce Clause analysis.[47] On the contrary, the Court wrote that "[i]f the Court were extending this line of local processing cases to cover discrimination in favor of local government, one would expect it to have said so."[48]

The Court then cited "[c]ompelling reasons" for its holding that flow-control ordinances, like the Authority's, "do not discriminate against interstate commerce for purposes of the dormant Commerce

40 *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 334–36 (2007).

41 *Id.* at 335–36.

42 *Id.* at 335.

43 *Id.* The evidence was that "without the flow control laws and the associated $86-per-ton tipping fees, they could dispose of solid waste at out-of-state facilities for between $37 and $55 per ton, including transportation." *Id.* at 337.

44 *Id.* at 334.

45 *See id.* at 339–42.

46 *See id.* at 339–40.

47 *See id.*; *see also id.* at 359 (Alito, J., dissenting) (raising this argument).

48 *Id.* at 340 (majority opinion).

Clause."[49] First, the Court noted that "[s]tates and municipalities are not private businesses—far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens."[50] Thus, "it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism" because the former are not likely to be motivated by "'simple economic protectionism.'"[51] The Court's opinion noted that the motive here was not to enrich local business, but rather to force residents to internalize the cost of the waste they generated.[52] State and local governments ought to be able to act without "federal courts . . . decid[ing] what activities are appropriate for [them] to undertake, and what activities must be the province of private market competition."[53]

Second, the majority wrote that the Court "should be particularly hesitant to interfere with the Counties' efforts under the guise of the Commerce Clause" because waste disposal has been traditionally handled by local governments.[54] Finally, the Justices argued that the need for judicial intervention here is reduced because of the availability of political safeguards: "Here, the citizens and businesses of the Counties bear the costs of the ordinances. There is no reason to step in and hand local businesses a victory they could not obtain through the political process."[55]

In its rather desultory analysis under *Pike* balancing, the Court concluded that even assuming that there *was* a burden on interstate commerce, it did not "clearly exce[ed]" the health and environmental benefits that it produced for the counties' citizens.[56]

In his dissent, which was joined by Justices Stevens and Kennedy, Justice Alito argued that the case was indistinguishable from *Carbone*

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49 *Id.*

50 *Id.* at 342.

51 *Id.* at 343 (quoting Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992)).

52 *See id.*

53 *Id.*

54 *Id.* at 344.

55 *Id.* at 345. Political safeguards, the Chief Justice asserted, would prevent "state control of the economy." *Id.* at 345 n.7. In any event, the Chief Justice continued, Congress could step in if a state or municipality abused the exception created here. *See id.*

56 *See id.* at 346–47. Justice Scalia concurred (except for the portion of the majority's opinion engaging in *Pike* balancing). *Id.* at 348–49 (Scalia, J., concurring). For his part, Justice Thomas concurred, repeating his new position that he will not enforce the dormant Commerce Clause in any cases. He expressly repudiated his vote with the *Carbone* majority and claimed that the antidiscrimination principle finds no expression in the Commerce Clause. *Id.* at 349–55 (Thomas, J., concurring).

and accused the majority of creating the public-private distinction out of whole cloth, which, in any event, he found to be irrelevant for dormant Commerce Clause purposes.[57] Justice Alito argued "[t]he only real difference between the facility at issue in *Carbone* and its counterpart in this case is that title to the former had not yet formally passed to the municipality."[58] Having constitutionality turn on such a fine distinction, Justice Alito complained, elevated form over substance.[59]

Justice Alito then challenged the three reasons given by the majority to support the creation of its apparent new exception to the dormant Commerce Clause.[60] He found the assumption that favoring public entities is not likely motivated by economic protectionism to be unsupported. "Experience in other countries, where state ownership is more common . . . teaches that governments often discriminate in favor of state-owned businesses (by shielding them from international competition) precisely for the purpose of protecting those who derive economic benefits from those businesses, including their employees."[61] Further, he criticized the majority's apparent focus on *ends*, while ignoring the *means* used, writing that he did not "think it is realistic or consistent with our precedents to condemn some discriminatory laws as protectionist while upholding other, equally discriminatory laws as lawful measures designed to serve legitimate local interests unrelated to protectionism."[62]

He criticized the Court's resort to "'traditional' governmental functions" as a dividing line between permissible and impermissible regulation, noting that the Court had attempted, then abandoned, defining traditional governmental functions twice: "first in the context of intergovernmental tax immunity . . . and more recently in the context of state regulatory immunity."[63]

Finally, he was unimpressed by the majority's contention that the ordinance was evenhanded insofar as it prohibited both in-state and out-of-state haulers from processing their garbage other than at the Authority's site. "Again," he wrote, "the critical issue is whether the challenged legislation discriminates against interstate commerce. If it does, then regardless of whether those harmed by it reside entirely

57 *See id.* at 356 (Alito, J., dissenting).

58 *Id.* at 358–59.

59 *Id.*

60 *See supra* notes 50–55 and accompanying text.

61 *United Haulers*, 550 U.S. at 364 (Alito, J., dissenting) (footnote omitted).

62 *Id.* at 365.

63 *Id.* at 369. He also pointed out that even if waste disposal *was* a traditional governmental function, it no longer is. *Id.*

outside the State in question, the law is subject to strict scrutiny."[64] A state or municipal law "granting monopoly rights to a single, local business," he wrote in a footnote, "would not be immune from a dormant Commerce Clause challenge simply because it excluded both in-state and out-of-state competitors from the local market."[65]

About the same time it decided *United Haulers*, the Court granted certiorari in *Department of Revenue v. Davis*. The decision in *Davis* not only reaffirmed the public-private distinction created in *United Haulers*, but it expanded it in important ways.

C. Davis

Like forty-three other states with an income tax, Kentucky taxes the interest paid on state and municipal bonds, while exempting from tax the interest paid on those bonds issued by it or its political subdivisions.[66] The Davises sued, claiming that this blatant discrimination violated the dormant Commerce Clause's prohibition on discrimination. Their position was vindicated by the Kentucky Court of Appeals;[67] the U.S. Supreme Court (which granted certiorari when the Kentucky Supreme Court declined to hear the case)[68] reversed, finding that the differential treatment between in-state and out-of-state bonds did not implicate the dormant Commerce Clause doctrine.[69]

While acknowledging that the purpose of the dormant Commerce Clause doctrine is to prevent economic isolation and balkanization through rules prohibiting interstate commercial discrimination, the Court, in an opinion written by Justice Souter, began by noting exceptions to this antidiscrimination principle: the market-participant exception and the exception created in *United Haulers*.[70] After describing *United Haulers*' holding, with particular emphasis on the reasons the Court gave for *not* extending the antidiscrimination principle to cases in which a public entity was discriminating in favor of itself, the Court concluded that "[i]t follows *a fortiori* from *United Haulers* that Kentucky must prevail."[71]

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64 *Id.* at 370 (citation omitted).

65 *Id.* at 371 n.4.

66 *See* Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1804–05 (2008); Davis v. Dep't of Revenue, 197 S.W.3d 557, 560 (Ky. Ct. App. 2006).

67 *See Davis*, 197 S.W.3d at 561–65.

68 *See Davis*, 128 S. Ct. at 1801.

69 *See id.* at 1807–08.

70 *See id.* at 1809–10.

71 *Id.* at 1810.

The issuance of bonds to raise revenue for public projects was as much a "traditional governmental function," the majority noted, as the collection of garbage.[72] Thus, again the Court could presume that something more than "simple economic protectionism" was behind the differential tax treatment as was true in the case of the force-use ordinance in *United Haulers*.[73] "Bond proceeds," it wrote, "are . . . the way to shoulder the cardinal civic responsibilities listed in *United Haulers*: protecting the health, safety, and welfare of citizens."[74]

The Court also noted that all non-Kentucky bonds (public and privately issued) were treated the same. The majority stressed that "a fundamental element of dormant Commerce Clause jurisprudence" is that the entities must be similarly situated to maintain a claim for discriminatory treatment.[75] Kentucky, it argued, is entitled to favor its own bonds and those of its political subdivisions because it otherwise treats all other out-of-state issuers—public and private—the same. Kentucky's bonds were not, in the Court's view, similarly situated to other public and private bonds.[76] "Just like the ordinances upheld [in *United Haulers*], Kentucky's tax exemption favors a traditional governmental function without any differential treatment favoring local entities over substantially similar out-of-state interests."[77]

Finally, the majority emphasized "the distinctive character of the tax policy."[78] The States themselves supported schemes like Kentucky's and none "perceive[d] any local advantage or disadvantage beyond the permissible ones open to a government and to those who deal with it when that government itself enters the market."[79]

The Court was also persuaded by the argument that, absent tax schemes like Kentucky's, small municipal borrowers might be deprived of a source of funds.[80] It also observed that this fact, plus the fact that this taxing practice "often produces a net burden of tax revenues lost over interest expense saved," tend to "underscore[ ] how far the States' objectives probably lie from the forbidden protectionism for local business."[81] The opinion then concluded with the observation that upholding the lower court invalidation of Kentucky's tax

72 *Id.* at 1810–11.
73 *See id.*
74 *Id.* at 1811 (footnotes omitted).
75 *Id.*
76 *Id.* at 1810–11.
77 *Id.* at 1811.
78 *Id.* at 1815.
79 *Id.* at 1815–16.
80 *See id.* at 1816.
81 *Id.* at 1817.

exemption "would upset the market in bonds and the settled expectations of their issuers based on the experience of nearly a century."[82]

Though he could not command a majority, Justice Souter's alternative ground for upholding the exemption was that the exemption constituted market participation in the bond market by Kentucky.[83] "[T]here is no ignoring the fact that imposing the differential tax scheme makes sense only because Kentucky is also a bond issuer," Justice Souter wrote.[84] "The Commonwealth has entered the market for debt securities . . . . It simply blinks this reality to disaggregate the Commonwealth's two roles" of regulator and participant.[85]

Finally, the majority (albeit grudgingly) applied the *Pike* balancing test.[86] Not surprisingly, the Court had little trouble finding that benefits like the ability of small municipalities to obtain a source of funding outweighed any burden on interstate commerce.[87] More surprising was Justice Souter's expression of doubt that balancing in this (or any similar) case was within the institutional competence of the Court.[88] It was a portion of the majority opinion that could have been written by Justices Scalia or Thomas, balancing's perennial critics.[89]

As he did in *United Haulers*, Justice Kennedy dissented, joined only by Justice Alito.[90] Justice Kennedy accused the majority of discarding a long line of cases prohibiting the kind of discrimination in which Kentucky engaged.[91] To justify it by reference to Kentucky's police power, Kennedy argued, was tautological. "The police power concept," he wrote, "is simply a shorthand way of saying that a State is empowered to enact laws in the absence of constitutional constraints; but, of course, that only restates the question."[92] The tax exemption here, for Kennedy, was simply a tariff—previously thought to be a par-

82 *Id.* at 1819.

83 *See id.* at 1811–14 (plurality opinion). Only Justices Breyer and Stevens joined Justice Souter in this portion of the opinion. *See id.* at 1804 n.*; *id.* at 1821 (Roberts, C.J., concurring in part).

84 *Id.* at 1812 (plurality opinion).

85 *Id.* For more on this portion of the opinion, see *infra* Part IV.

86 *See id.* at 1817–19 (majority opinion). Justice Souter initially questioned whether, when the Court has concluded that an exception to the antidiscrimination principle applies, plaintiffs are entitled to a *Pike* analysis. *See id.* at 1819–20.

87 *See id.* at 1818.

88 *See id.* We discuss the implications of this grudging approach *infra* Part V.B.

89 As he has traditionally, Justice Scalia refused to join in the portion of the opinion discussing *Pike* balancing. *See id.* at 1821 (Scalia, J., concurring in part).

90 Justice Stevens, who joined both in *United Haulers*, joined the majority. *See id.* at 1819 (Stevens, J., concurring).

91 *See id.* at 1822–23 (Kennedy, J., dissenting).

92 *Id.* at 1824.

adigmatic violation of the dormant Commerce Clause doctrine and consistently invalidated by the Court.[93]

Further, Kennedy argued, the majority went further than it had in *United Haulers*. There, he argued, the local government had monopolized the waste collection market, excluding *all* haulers, in-state and out-of-state.[94] By contrast, "Kentucky has not monopolized the bond market or the municipal bond market. Kentucky has entered a competitive, nonmonopolized market and, to give its bonds a market advantage, has taxed out-of-state municipal bonds at a higher rate."[95] In any event, he noted, "[n]o precedent permits the Court to define a market in terms of the very law under challenge for protectionist purposes and effects . . . . If the discriminatory barrier did not exist, then the national market for all state and municipal bonds would operate like other free, nationwide markets."[96]

Finally, Kennedy noted that states' unanimous approval of the discriminatory tax exemptions was illustrative only of the need to adhere to the antidiscrimination principle. "In the wake of one trade barrier," he wrote, "retaliatory measures follow . . . . The widespread nature of these particular trade barriers illustrates the standard dynamics of politics and economics" and counsel enforcing the antidiscrimination principle, not creating exceptions to it.[97] If the Court felt it imperative to avoid disruption to the national market for bonds, better for it to have created a "*sui generis* exception" than to, in Justice Kennedy's view, "weaken[ ] the preventative force of the Commerce Clause and invite[ ] other protectionist laws."[98]

II. ANTIDISCRIMINATION AND THE NEW PUBLIC-ENTITIES EXCEPTION

In our view, the public-entities exception is a novel, significantly undertheorized modification to the modern dormant Commerce Clause doctrine. Although the Court has earnestly attempted to portray the exception as the natural outgrowth of the extant dormant Commerce Clause case law, we believe that the public-entities exception is an unprecedented limitation on the constitutional prohibition against protectionist taxes and regulations. Worse, the Court's efforts to provide a cogent, theoretical explanation for this new restriction on the antidiscrimination principle are woefully inadequate. As a conse-

93 *See id.* at 1824–27.
94 *See id.* at 1827.
95 *Id.*
96 *Id.* at 1828.
97 *Id.* at 1829.
98 *Id.* at 1830.

quence, we believe that the public-entities exception is an avulsive, unjustified change in judicial doctrine. In this Part, we critique the Court's proffered justifications for the exception; in Part III, we demonstrate how the logic of this new exception cannot be limited to "public" discrimination, raising the specter that the Court will find it impossible to simultaneously embrace the New (public) Protectionism while policing the Old (private) Protectionism.

A. The Court's Proffered Justifications

Prior to its decision in *United Haulers*, the Court had never before drawn a distinction between measures intended to protect private enterprises from outside competition versus those intended to protect public operations. Indeed, the Court had never even hinted that such a distinction mattered. In holding the contrary, *United Haulers* was, literally, unprecedented.[99]

A year later, in *Davis*, the Court reprised each of the three theoretical considerations it cited to justify *United Haulers*—that public-entity discrimination is different than that benefiting private discrimination, that "traditional governmental functions" ought to receive different treatment, and that political safeguards could obviate the need for judicial scrutiny[100]—but did so in a way that differed in several important respects from its discussion in *United Haulers*.

For example, while repeating that governmental favoritism of its own functions is likely motivated by something other than "the simple economic protectionism the Clause abhors,"[101] the Court did not seek to determine whether that presumption was true with respect to Kentucky and its municipal bond taxation scheme. Rather, the Court proceeded to invoke the notion of traditional governmental functions,

99 That the Court would use *United Haulers* as the vehicle to launch such a dramatic change in dormant Commerce Clause doctrine was somewhat surprising. The Court's preexisting doctrine provided a sufficient basis for resolving the case as it did. *See* Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409, 465–67 (2008). The county waste flow-control ordinances did not explicitly distinguish along state lines, and, because the entities most directly burdened by the measures were private waste processors, most (if not all) of which were in-state companies, it was almost certain that the municipal ordinances were not discriminatory in effect. As a consequence, the Court could have reached the same result by applying traditional dormant Commerce Clause doctrine. *See id.*

100 *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342–45 (2007); discussion *supra* Part I.B. *See also* Zelinsky, *supra* note 8 (manuscript at 5) ("*Davis* has broad and disruptive implications by affirming the centrality of the traditional public function doctrine for dormant Commerce Clause purposes.").

101 *Davis*, 128 S. Ct. at 1810.

observing that courts "'should be particularly hesitant to interfere . . . under the guise of the Commerce Clause' where a local government engages in a traditional government function."[102] This concern was particularly appropriate in *Davis*, the Court warned, because forty-one states employed a bond taxation scheme identical to Kentucky's and all of them supported its constitutionality.[103] In the Court's view, applying the antidiscrimination principle to tax and regulatory measures that favor governmental operations would unduly interfere with state and local governments' ability to discharge their public functions, and, hence, an exception for governmental favoritism of itself was necessary as a matter of state and local autonomy.[104]

To this point, the Court's reasoning followed in some rough form the content, if not structure, of its discussion in *United Haulers*. The Court, however, then made two striking observations that had no analogue in *United Haulers*. First, the Court declared that "this emphasis on the public character of the enterprise" was simply an outgrowth of "the principle that 'any notion of discrimination assumes a comparison of substantially similar entities.'"[105] Moreover, as counterintuitive as it seemed (and continues to seem to us), the Court then declared that one state's municipal bonds are not "substantially similar" to another state's municipal bonds.[106] Citing its 1882 decision in *Bonaparte v. Tax Court*,[107] the Court ruled that foreign states are properly treated as *private* entities when they sell their bonds to out-of-state residents.[108] As such, Kentucky's tax scheme did not discriminate on the basis of state residency but rather, in the Court's incongruous view, between private and public issuers. As the Court summed it up, "[t]here is no forbidden discrimination because Kentucky, as a public entity, does not have to treat itself as being 'substantially similar' to the other bond issuers in the market."[109]

Second, later in the opinion, to further justify its conclusion that public protectionism was not discriminatory (at least in the context of municipal bonds), the Court embarked on a curious exploration of the bond market, assessing how Kentucky's actions affect different bond markets. Taking the bond market at its broadest—as a national market in which municipal and private bonds compete—the Court

102 *Id.* (quoting *United Haulers*, 550 U.S. at 344).
103 *Id.* at 1811.
104 *Id.*
105 *Id.* (quoting *United Haulers*, 550 U.S. at 342).
106 *See id.*
107 104 U.S. 592 (1882).
108 *Davis*, 128 S. Ct. at 1811.
109 *Id.*

noted that Kentucky did not treat out-of-state municipal bonds any differently than private bonds—that is, it taxed the interest of both.[110] The implication was that, despite the fact that the statute expressly distinguished along state lines, the fact that in-state private bonds were also taxed was sufficient to render the measure nondiscriminatory. Moreover, according to the Court, even if one were to limit the relevant market to that for municipal bonds (thereby excluding private bonds), Kentucky's actions would still not be constitutionally troubling. Although Kentucky's differential treatment of out-of-state municipal bonds would be at its "most stark,"[111] all the states have supported the constitutionality of such taxation schemes.[112] As the Court declared, "no State perceives any local advantage or disadvantage beyond the permissible ones open to a government and to those who deal with it when that government itself enters the market."[113] The Court's reasoning seemed to be "if other states are okay with it, the Constitution is okay with it."

Finally, with respect to the *intrastate* market for bonds, the Court noted that there were many single-state municipal bond funds set up to benefit investors in their home state and that these bond funds purchased bonds of "smaller or lesser known municipalities that the interstate markets tend to ignore."[114] In the Court's view, Kentucky's and the other states' "differential"—not "discriminatory"—system of bond taxation was essential to the continued viability of these single-state bond funds.[115] In the absence of such tax preferences, the single-state bond funds would close, and these "smaller or lesser known" municipalities would find no market for their bonds.[116] As the Court hyperbolically warned, "[f]inancing for long-term municipal improvements would thus change radically if the differential tax feature disappeared."[117] For the Court, that consequence was evidently too much to bear;[118] but, even more striking, the Court then linked this consequentialist fear of the outcome of a contrary decision to its earlier

110 *See id.* at 1815.

111 *Id.*

112 *See* Brief for the State of North Carolina et al. as Amici Curiae in Support of Petitioners at 1–4, *Davis*, 128 S. Ct. 1801 (No. 06-666), 2007 WL 2115445.

113 *Davis*, 128 S. Ct. at 1815–16.

114 *Id.* at 1816.

115 *See id.* (noting that "many single-state funds would disappear if the current differential tax schemes were upset").

116 *See id.* at 1816–17.

117 *Id.* at 1816.

118 *See id.* at 1819 n.21 ("[P]ractical consequences have always been relevant in deciding the constitutionality of local tax laws.").

ruminations about the state's likely motives.[119] As the Court concluded:

> [T]he differential tax scheme is critical to the operation of an identifiable segment of the municipal financial market as it currently functions, and this fact alone demonstrates that the unanimous desire of the States to preserve the tax feature is a far cry from the private protectionism that has driven the development of the dormant Commerce Clause.[120]

B. Evaluating the Proffered Rationales

As the foregoing description indicates, the Court has not settled on one single animating theory to justify the public-entities exception. Rather, it has offered multiple, sometimes contradictory reasons why it is permissible for the state to favor its own functions in general or, more limitedly, to favor at least the sale of in-state municipal bonds. In our view, none of these theoretical concerns is sufficient to justify an exception to the antidiscrimination principle for public entities either in general or with respect to in-state municipal bonds. We take each proffered justification in turn.

1. The Likelihood of Nonprotectionist Motivation

Let's begin with the Court's claim made for the first time in *United Haulers* and reprised in *Davis* that governmental favoritism is unlikely to be motivated by base economic protectionism.[121] As a factual matter, it is unclear why this might be so. Certainly, the Court offered no evidence for this optimistic assessment of the probable motives for governmental favoritism of itself, and, as a matter of political theory, there is at least some reason to believe that governments are prone to favor their own operations for protectionist reasons. A state's preferential treatment of its own operations inevitably benefits local interests, such as state employees, program beneficiaries (as the Court expressly and approvingly noted in *Davis*), local governments, or some combination thereof.[122] Meanwhile, much of the economic burden of such favoritism falls on unrepresented out-of-state interests,

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119 *See id.* at 1817.

120 *Id.*

121 *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007); *see also Davis*, 128 S. Ct. at 1810 (noting that "likely motivation" for governmental favoritism is a "legitimate objective[ ] distinct from the simple economic protectionism the Clause abhors").

122 *See United Haulers*, 550 U.S. at 364 (Alito, J., dissenting).

such as other states' taxpayers or widely dispersed shareholders.[123] As a consequence, for the same reason that state and local governments are prone to adopt protectionist measures to favor local businesses at the expense of out-of-state competitors, they are predisposed to enact protectionist measures to favor their own operations at the expense of other states or private competitors.

Moreover, even if the Court's assessment of the probable reasons for governmental favoritism were true (or even true most of the time), it would not justify a categorical rule deeming such measures as per se nondiscriminatory and thereby exempting them from the very judicial scrutiny that is necessary to determine the bona fides of the government's motives. Only by asking whether a state is pursuing a legitimate governmental objective and whether there are no other reasonable, nondiscriminatory alternative means to achieve that end can the Court be sure that a state is not acting on forbidden protectionist motives.[124]

To see how, take *City of Philadelphia v. New Jersey*.[125] There, New Jersey forbade the importation of solid waste from other states. New Jersey defended the measure on the facially plausible ground that it needed to conserve scarce landfill capacity.[126] The Court, though, correctly deemed the measure as discriminatory and subjected it to rigorous scrutiny, which revealed a more sinister, protectionist origin for the law.[127] Although the state's professed interest in conserving landfill space was clearly legitimate, the means selected by New Jersey (banning out-of-state waste while allowing in-state waste generators to dump as much garbage in New Jersey landfills as they wanted) belied the notion that protectionist motives did not animate New Jersey's adoption of the law.[128] By treating the New Jersey solid waste law as discriminatory and applying the rigorous scrutiny reserved for such measures, the Court was able to see through New Jersey's protestation of innocent motives.

In contrast, *Davis* illustrates the danger of the contrary approach embraced by the Court. Kentucky's protectionist motives were, in

123 To be sure, protectionism inevitably imposes some burden on in-state interests, such as, in *Davis*, resident taxpayers who own out-of-state municipal bonds. Such in-state burdens, however, do not often translate into substantial in-state political opposition because of collective action problems and because the state often finds other ways to mollify in-state opponents. *See* Williams, *supra* note 99, at 437–44.

124 *United Haulers*, 550 U.S. at 366 (Alito, J., dissenting).

125 437 U.S. 617 (1978).

126 *See id.* at 625.

127 *See id.* at 627.

128 *See id.* at 629.

fact, readily apparent. Indeed, the Court itself approvingly acknowledged that Kentucky adopted the discriminatory taxation scheme so as to discourage Kentucky residents from purchasing bonds issued by other states and, correspondingly, to encourage them (and the single-state bond funds in which they invest) to purchase only Kentucky-originated municipal bonds.[129] This is a classic example of protectionism at work, yet, because of the Court's holding, Kentucky was excused from the need to defend its actions on nonprotectionist grounds.

2. Traditional Governmental Functions

Nor is there any more force to the Court's claim that governmental favoritism of its own functions must be tolerated as matter of state autonomy when the government is discharging its "traditional governmental functions." As the Court made clear in *Davis*, the underlying foundation for this argument is the fear that judicial review pursuant to the dormant Commerce Clause will disrupt or interfere with the states' ability to perform these functions.[130] The Court, however, cannot really mean that. Judicial review under the dormant Commerce Clause is not a roving, *Lochner*-esque license for the Court to sit as a super-legislature, second-guessing the substantive merits of state and local laws.[131] Rather, it is only when a law discriminates against interstate commerce that searching judicial scrutiny is triggered. Hence, so long as state and local governments do not enact discriminatory measures, they remain free to pursue whatever policies they wish and, not to be too snotty about it, to discharge their "traditional governmental functions" in whatever manner they wish. States, for example, can continue to issue state bonds and to tax the interest on those bonds in whatever manner they wish; they just cannot do so in a discriminatory fashion (at least without a sufficiently strong, nonprotectionist justification).

Moreover, even if we were to believe that such judicial review was inappropriately intrusive and disrespectful of state autonomy, the Court's traditional governmental functions rule would hardly serve as a clear indicator of what governmental services qualify for such favoritism. At one time, the Court deployed a similar test so as to protect

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129 *See* Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1816 (2008).

130 *See id.* at 1810–11; *see also id.* at 1820–21 (Scalia, J., concurring in part) (discussing the state's alternatives).

131 *Cf.* Lochner v. New York, 198 U.S. 45, 58–60 (1905) (striking down a restriction on bakers' hours because of disagreement with New York's assessment of the health threat posed by bakery working conditions).

state and local operations from federal interference pursuant to the Tenth Amendment. This was the "integral governmental functions" rule of *National League of Cities v. Usery*.[132] The Court, however, subsequently overruled *Usery* in *Garcia v. San Antonio Metropolitan Transportation Authority*,[133] holding that the "integral governmental functions" rule was both unworkable in practice and unsound in principle.[134] As the Court explained at that time, the line distinguishing between integral or traditional governmental functions and other state governmental functions was "elusive at best."[135] The Court particularly worried that the integral government functions rule required unelected federal judges to make unprincipled decisions as to which state functions were sufficiently important to warrant immunity from federal regulation.[136] Those same concerns apply with equal force to the Court's attempt to resurrect *Usery* in the name of protecting some state and local governmental functions from competition from other state or local governments or private enterprises.[137]

To be sure, the Court in *Davis* acknowledged this point. In a footnote, the majority reassures us that it does not intend to resurrect *Usery*; in its view, the traditional governmental functions analysis serves a different purpose and can therefore be performed in a coherent, objective manner:

> The point of asking whether the challenged governmental preference operated to support a traditional public function was not to draw fine distinctions among governmental functions, but to find out whether the preference was for the benefit of a government fulfilling governmental obligations or for the benefit of private interests, favored because they were local. Under *United Haulers*, governmental public preference is constitutionally different from commercial private preference, and we make the governmental responsibility enquiry to identify the beneficiary as one or the other. Because this is the distinction at which the enquiry about traditional governmental activity is aimed, it entails neither tautology nor the

132 426 U.S. 833, 851 (1976) (holding that Congress's commerce power did not authorize Congress to regulate the "integral governmental functions" of state and local governments).

133 469 U.S. 528 (1985).

134 *See id.* at 546.

135 *Id.* at 539.

136 *See id.* at 545–46; Zelinsky, *supra* note 8 (manuscript at 5) ("[T]he 'traditional public function' category, which has become central to the Roberts Court's dormant Commerce Clause analysis, lacks persuasive boundaries and undermines prior case law.").

137 *Cf.* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 369 (2007) (Alito., J., dissenting) (noting similarity to *Usery*).

> hopeless effort to pick and choose among legitimate governmental activity that led to *Garcia v. San Antonio Metropolitan Transit Authority*.[138]

The majority's reassurance notwithstanding, it is entirely unclear how the Court intends to avoid the subjective, unprincipled "picking and choosing" that was the downfall of the traditional government functions test in the Tenth Amendment context. The Court's declaration that the test serves a different purpose in the dormant Commerce Clause context is entirely beside the point; the problem with the "traditional governmental function" inquiry was not its purpose but its lack of objective content. To say that some governmental functions are traditional implies that there are some governmental functions that are nontraditional (and which the government can therefore not favor through discriminatory regulations and taxes). And just as the Court in *Usery* failed to offer any guidance as to how the lower federal and state courts were to distinguish between the two types of governmental functions, the Court in *United Haulers* and *Davis* failed to provide any illumination. The Court has declared without elaboration or explanation that solid waste disposal and, now, bond issuance are traditional governmental functions,[139] but the conclusory nature of those proclamations serves only to reinforce the notion that the traditional government function test lacks any objective content—that it is merely a post hoc label summarily attached by the Court to some governmental operations.

3. Virtual Representation

Likewise, there is no merit to the Court's alternative argument that judicial review of governmental favoritism of its own operations is unnecessary because other in-state interests, such as businesses that must pay higher prices for waste disposal services or resident taxpayers who must pay tax on the interest on their out-of-state municipal

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138 Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1810 n.9 (2008) (citations omitted).

139 *See id.* at 1810 ("[T]he issuance of debt securities to pay for public projects is a quintessentially public function . . . ."); *United Haulers*, 550 U.S. at 344 ("'[W]aste disposal is both typically and traditionally a local government function.'" (quoting United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245, 264 (2d Cir. 2001))). *But see* Zelinsky, *supra* note 8 (manuscript at 26) ("[I]t is arbitrary to decide when a particular public practice is old enough to be deemed 'traditional.' Tradition is very much in the eye of the beholder. It is, moreover, equally arbitrary to deem certain governmental activities as 'public' and others as not."); *id.* (manuscript at 39) (arguing that the distinction between public and nonpublic functions is so broad as to be "indeterminate").

bonds, are also harmed by such governmental favoritism.[140] Presumably, the implication is that in-state interests burdened by the measure serve as virtual representatives of out-of-state interests, and, therefore, the domestic political process can be trusted to take account of the measure's full costs and benefits.

It is hard to understand exactly what to make of this observation. On the one hand, the Court seems to be suggesting that any localized burden is sufficient to insulate regulations or taxes from stringent judicial review.[141] Yet, that view proves far too much: almost all regulations and taxes impose some local burdens, usually in the form of higher costs for local consumers or lower revenue for local producers of the regulated or taxed good or service. Tariffs on out-of-state goods impose burdens on local consumers, yet they are clearly unconstitutional despite that fact.[142] Were it sufficient to insulate governmental favoritism from judicial review on this ground, all taxes and regulations that burden in-state interests—that is to say all taxes and regulations no matter how nakedly protectionist—would be exempt from judicial review. On this view, there would be no dormant Commerce Clause at all, and close to two centuries worth of Supreme Court precedents applying the dormant Commerce Clause would have to be overturned.

Perhaps the Court meant to suggest only that judicial review of state and local taxes and regulations is not necessary when there are a sufficient number of in-state interests harmed by a measure such that the state's political processes can be trusted to ensure that the measure is not protectionist. Of course, the devil is in determining exactly what is a sufficient number: Must the measure adversely impact fifty percent of the state's electorate? Thirty-three percent? Ten percent? Resolving that question involves highly complex and contested issues of political science regarding interest group vitality and voting behavior.[143] Moreover, even if there were some consensus regarding the threshold above which native opposition could substitute for judicial review, the Court made no effort to describe how courts are to deter-

140 *See United Haulers*, 550 U.S. at 345.

141 *See id.*

142 *See* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193, 203 (1994).

143 *Compare* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 460–61 (1982) (arguing that judicial review is necessary only when out-of-state interests are disproportionately affected by a measure), *with* James M. O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 OR. L. REV. 395, 413 (1982) ("The presence of adversely affected constituents, even in significant numbers, by no means assures that the balance of interests represented accurately reflects the balance of interests in the nation as a whole.").

mine whether the adversely affected residents are sufficiently numerous to serve as a politically substantial opposition. In short, despite the Court's professed concern for respecting state and local political processes, this rationale actually would embroil the Court in difficult and politically charged tasks far beyond the Court's traditional competence.

4. Public vs. Private Protectionism

In light of the weaknesses in the foregoing justifications, which first appeared in *United Haulers*, perhaps it is not surprising that the Court in *Davis* attempted to augment them in several respects. Most notably, the Court ruled that governmental favoritism of its own operations is acceptable because the favored operations are not "substantially similar" to private operations.[144] When the government engages in trash processing, for example, it is not like private trash processors.[145] Moreover, in the Court's view, it is only when a government regulates or taxes so as to favor *private*, in-state economic interests that its actions are protectionist.[146] From these two premises—that governmental favoritism of itself is different in character from governmental favoritism of private entities and that only the latter is truly protectionist—the Court concludes that the dormant Commerce Clause does not prohibit public entities from favoring their own operations either at the expense of private enterprises (*United Haulers*) or out-of-state governments (*Davis*).

Unfortunately for the Court, neither premise holds water, and, therefore, the Court's conclusion is a non sequitur. Take the first step in this syllogism—that governmental operations are not "substantially similar" to private operations of the same character. The substantially similar inquiry traces its roots to *General Motors Corp. v. Tracy*,[147] in which the Court used the analysis to determine whether an Ohio statute that exempted natural gas utilities from the state's sales and use taxes on natural gas was discriminatory.[148] The statute did not expressly discriminate along state lines, but, because all interstate gas marketers were out-of-state and all the benefited natural gas utilities

144 *See Davis*, 128 S. Ct. at 1811.

145 *See United Haulers*, 550 U.S. at 342–43 (noting that the responsibilities of "health, safety, and welfare" for citizens "set state and local government apart from a typical private business").

146 This is implicit in the Court's repeated statements that governmental favoritism is unlikely to be protectionist and the Court's condemnation only of, as it tellingly put it, "private protectionism." *See Davis*, 128 S. Ct. at 1817.

147 519 U.S. 278 (1997).

148 *See id.* at 298–310.

were in-state, there was at least the suspicion that Ohio had acted so as to benefit in-state entities at the expense of their out-of-state competitors.[149] As the Court explained, to determine whether that was in fact the case required it to ascertain whether the utilities were substantially similar to the natural gas wholesalers, which involved a two-step analysis of whether the products offered were the same and, if so, whether the utilities and wholesalers competed in the same market.[150] According to the Court in *Tracy*, the whole purpose of the "substantially similar" inquiry was to determine whether there was a competitive relationship between the favored and disfavored goods or companies.[151] Only if such a competitive relationship existed was the differential treatment protectionist.[152] On the other hand, if the favored and disfavored entities produced different products serving different markets, "eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors."[153]

In *Davis*, however, the Court grossly distorted the "substantially similar" inquiry. To begin with, the Court in *Tracy* had made clear that the substantial inquiry was applicable only to facially neutral statutes that were allegedly discriminatory in effect;[154] facial discriminatory statutes, such as Kentucky's municipal bond taxation statute, did not require such a threshold inquiry, presumably because the mere fact that the state has legislated expressly along state lines raises a presumption of likeness among the excluded and included entities.[155] Even so, the *Davis* Court made no effort to undertake the two-step process outlined in *Tracy*. Had it done so, of course, the result would have been clear (and contrary to the Court's ultimate conclusion): A municipal bond is a municipal bond, and there is no doubt that Kentucky and its local governments competed in the same nationwide municipal bond market as other states. Indeed, in *Davis*, the Court relied precisely on the need to prevent competition from other states'

149 *Id.* at 287–88. GM characterized such discrimination as "facial" or "patent," but the Court's treatment of the case demonstrates that it viewed the relevant discrimination as one "in effect." *See id.* at 287, 307 n.15.

150 *See id.* at 298–99.

151 *See id.*

152 *Id.* at 300.

153 *Id.* at 299.

154 *See id.* at 307 n.15.

155 *See id.*

municipal bonds as a constitutionally sufficient justification for Kentucky's and the other states' actions.[156]

More fundamentally, the Court's more general, implicit supposition that public entities are different from private entities when they perform the same tasks is deeply flawed. According to the Court, even when the government performs functions in competition with other private entities, the government differs from private entities because it acts on behalf of the public's health, safety, and welfare.[157] Of course, that hardly differentiates one public entity (e.g., Kentucky) from other public entities (e.g., Ohio), who presumably also act on such concerns. More importantly, the Court's answer begs the question—whether the public entity is motivated by protectionism or bona fide public policy concerns is precisely the issue before the Court in these cases. Once again, the Court is excusing states from the obligation to demonstrate the bona fides of their action by assuming the bona fides of their action. Moreover, even if the governments entered the competitive market for altruistic reasons, those reasons are not sufficient to justify their adoption of protectionist taxes or regulations designed to insulate their operations from competition.[158] A county may decide to offer waste-processing services to its citizens because it believes it can do so in a more environmentally responsible manner than private companies, but that does not mean that its distinct and subsequent policy decision to use its tax or regulatory powers to insulate its operations from private or public competition was similarly motivated by altruistic, nonprotectionist reasons.

Likewise, the Court's second premise—that only governmental favoritism of private entities constitutes protectionism—fails to withstand scrutiny. Again, the Court never explains why public protectionism is of no constitutional moment. Prior to *United Haulers*, the Court had routinely defined the protectionism forbidden by the dormant Commerce Clause in a broad, categorical fashion as that governmental action "designed to benefit in-state economic interests by burdening out-of-state competitors."[159] Nor does it make any sense to treat

156 *See* Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1816–17 (2008).

157 *See id.* at 1811; United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342–43 (2007).

158 As the Court noted in *City of Philadelphia*, protectionism can manifest itself in the legislative means employed by the state. *See* City of Phila. v. New Jersey, 437 U.S. 617, 627 (1978).

159 New Energy Co. v. Limbach, 486 U.S. 269, 273–74 (1988); *see also Davis*, 128 S. Ct. at 1808 (identifying the concern addressed by the modern dormant Commerce Clause as regulatory measures designed to benefit in-state interests by burdening out-of-state competitors).

public protectionism any differently as a constitutional matter than private protectionism. The same dangers posed by private protectionism—the disruption of economic union, the encouragement for other states to retaliate in kind, and the distortion of the national common market—are also presented by public protectionism. When a government undertakes some action or function that competes with other entities, it will have every incentive to use its taxation and regulatory authority to protect its operation from such competition, and its efforts in that respect will produce the same dangerous centrifugal tendencies that the dormant Commerce Clause was meant to forestall. Thus, in our view, a protectionist tax is a protectionist tax, regardless of whether the beneficiary of the tax is public or private.

To be sure, the Court attempted to deflect this concern about national disunion, at least with respect to public protectionism in the context of municipal bond taxation, by noting at several points in *Davis* that virtually every state has a similarly discriminatory bond taxation scheme and that all fifty states support the constitutionality of such a scheme.[160] The Court evidently reads this unanimity as evidence that public protectionism in this area does not threaten the union.[161] Yet, what is more telling in our view is that every state but one with a state income tax has adopted a similarly discriminatory municipal bond taxation scheme.[162] In short, the proof of the retaliatory impetus created by such discriminatory measures is in the pudding: all but one state with a state income tax has responded to other states' discrimination by adopting similarly discriminatory measures.[163] And the fact that, now, all the states are happy with the status quo is both entirely unsurprising—states are likely to overestimate the costs and underestimate the benefits of moving to a national common market for municipal bonds[164]—and entirely beside the point as a

160 *See, e.g.*, *Davis*, 128 S. Ct. at 1811. Besides Kentucky, which is a party to the case, the other forty-nine states signed an amicus brief supporting the constitutionality of such discriminatory municipal bond taxation. *See id.*

161 *See id.* at 1815–16.

162 As the Court noted, forty-one states tax the interest earned on out-of-state municipal bonds while exempting the interest on some or all in-state municipal bonds. *Id.* at 1806–07 & n.7. Seven states do not have a state income tax. *See id.* Only Indiana exempts from its state income tax the interest earned on all municipal bonds regardless of source. *See id.* at 1807 n.7; *see also* IND. CODE § 6-3-1-3.5 (2007 & Supp. 2009) (providing this exemption).

163 *See Davis*, 128 S. Ct. at 1829 (Kennedy, J., dissenting).

164 Indeed, as the Court itself noted and emphasized, an entire industry dependent upon this system of protectionism has emerged. *Id.* at 1816 (majority opinion); *see also id.* at 1822–23 (Kennedy, J., dissenting) (describing how such protectionism has "distorted" state and municipal bond markets). It is hardly surprising that this

legal matter—unanimous consent by all the states to a system of protectionist taxes and regulations would not (and should not) insulate them from dormant Commerce Clause scrutiny.[165]

5. Municipal Bond Market Exceptionalism

All of the foregoing justifications are alike in one respect: they all bear upon the broad issue whether, generally speaking, governmental favoritism of itself is immune from dormant Commerce Clause scrutiny. For the reasons already discussed, we do not believe that these rationales are persuasive. In *Davis*, however, the Court appended one last justification that is unique to (and therefore limited to) the taxation of municipal bonds. Specifically, the Court argued that no matter in which bond market Kentucky's actions are evaluated (national, municipal, or intrastate), such favoritism does not bespeak the type of protectionist action with which the dormant Commerce Clause is concerned.[166] Moreover, focusing on the intrastate bond market in particular, the Court feared that a contrary ruling would decimate the ability of small, local governments to find willing purchasers for their bonds, thereby severely hampering the financing of public projects in these communities. The unstated implication was that, even if a broad exception to the dormant Commerce Clause for all governmental favoritism of itself was not justified, at least favorable tax treatment for in-state municipal bonds poses no constitutional concern.[167]

As an initial matter, we do not see any legitimate basis for the Court to pick and choose the market in which to analyze state regulations or taxes. If a state law is discriminatory with respect to any market, it is discriminatory period. Thus, once the Court acknowledged in *Davis* that Kentucky's municipal bond tax actions were discriminatory when viewed in light of the national municipal bond market,[168] that should have been the end of the story.

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industry now warns both the states and the Court of the disaster that would allegedly befall the nation were municipal bonds treated the same way as and subject to the same constitutional rules as milk (*West Lynn Creamery v. Healy*) or solid waste (*City of Philadelphia v. New Jersey*). *See, e.g.*, Amicus Curiae Brief of the Securities Industry and Financial Markets Association in Support of Petitioners at 5, *Davis*, 128 S. Ct. 1801 (No. 06-666), 2007 WL 2115447 ("If the municipal bond tax incentive evaporates, the demand for such bonds may likewise vanish, thus drying up a major source of funding for State projects.").

165 *See Davis*, 128 S. Ct. at 1828–29 (Kennedy, J., dissenting).

166 *See id.* at 1815–17 (majority opinion).

167 *See id.* at 1830 (Kennedy, J., dissenting).

168 *See id.* at 1815 (majority opinion). The Court dismisses the relevance of this conclusion on the ground that all forty-nine states have consented to such discrimina-

Of course, it is precisely to avoid the consequences of that indisputable conclusion that the Court evaluated the impact of Kentucky's actions in light of other markets in which the discriminatory character of Kentucky's action disappears. By viewing Kentucky's actions from the broader perspective of the national bond market generally, the Court was able to declare that Kentucky has not discriminated against out-of-state municipal bonds because they are treated no differently than private bonds issued by Kentucky companies.[169] In raising the level of market generality at which Kentucky's actions are evaluated in this way, the discriminatory character of Kentucky's actions evaporates. Likewise, by analyzing Kentucky's actions more narrowly in light only of the intrastate bond market, the discriminatory character of Kentucky's actions also disappears because, viewed in this artificial light, the only disfavored bonds are those issued by in-state private companies.[170] As the Court noted without the least sense of irony, "[b]y definition, there is no discrimination against interstate activity within the [intrastate] market itself."[171]

We do not see nor did the Court explain how those observations render moot or trump the fact that Kentucky's action is discriminatory when viewed against the national municipal bond market in which Kentucky indisputably participates. More importantly, this analytical approach poses great dangers for dormant Commerce Clause adjudication in other cases, because the discriminatory character of all protectionist actions, even manifestly unconstitutional tariffs, can be concealed in this fashion. For that reason, until *Davis*, the Court had rejected such analytical sophistry. For example, in *New Energy Co. v. Limbach*,[172] the Court invalidated Ohio's sales tax credit for ethanol manufactured in the state. The Court evaluated Ohio's action in light of the market for ethanol, against which the discriminatory character of Ohio's tax credit was manifestly apparent.[173] Of course, had the Court (as it did in *Davis*) abstracted a bit and viewed Ohio's action in light of the market for all fuel products generally, the discriminatory character of the ethanol tax credit would have disappeared because in-state gasoline was being treated no differently than out-of-state ethanol. Similarly, had the Court (as it did in *Davis*) narrowed its focus and viewed Ohio's action in light of the intrastate market for fuel, the

tion. *See id.* For the reasons discussed above, however, that response is entirely inapposite. *See supra* text accompanying notes 160–65.

169 *See Davis*, 128 S. Ct. at 1815.

170 *Id.* at 1816.

171 *Id.*

172 486 U.S. 269 (1988).

173 *Id.* at 274.

discriminatory character of the ethanol tax credit would have disappeared because it only burdened in-state gasoline producers. That the Court did not engage in such misleading analytical perspectives in *New Energy* (or other cases) suggests the error of its doing so in *Davis*.

Lastly, we are entirely unmoved by the Court's corollary, consequentialist fear that a contrary ruling would decimate public financing by small municipalities.[174] Even were the Court's fear likely to be proven true—and we have our doubts[175]—that would at most suggest carving a minimal exception to the dormant Commerce Clause exclusively for municipal bonds issued by local governments with limited access to national capital markets, not all public bonds.[176] More to the point, however, the answer to this concern was made most powerfully more than a half-century ago by Justice Cardozo, who rejected a similar defense of protectionism made on behalf of small dairy farmers:

> Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.[177]

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174 *Davis*, 128 S. Ct. at 1816.

175 Kentucky seeks to discourage Kentucky residents from buying out-of-state municipal bonds so as to encourage them to buy the bonds offered by in-state local governments. Yet small Kentucky cities are only better off if Kentucky's protectionist tax scheme produces more native investment in its cities' bonds than they would obtain from nonresidents if the latter were able to purchase Kentucky bonds on a nondiscriminatory basis. For small states with relatively small amounts of private capital held by residents available for such domestic investment, the superiority of the current system versus that of a national common market in public financing (where Kentucky municipalities would be on equal footing with all other municipalities in attracting capital from investors in all the states) is far from certain.

176 One might add that, even if such an exception is desirable, it should be made by Congress pursuant to its authority to authorize discriminatory action pursuant to its commerce power. *But see* Williams, *supra* note 27 (criticizing the validity of such congressional power).

177 Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

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In sum, *United Haulers* and *Davis* mark a fundamental turn in the Court's approach to the dormant Commerce Clause. Its embrace of a public-entities exception to the antidiscrimination principle is truly revolutionary. Unfortunately, the Court has failed to provide a sufficient justification for such an avulsive change in its doctrine. The hodgepodge of policy concerns identified by the Court do not withstand serious scrutiny, and its most comprehensive explanation for the change—that public protectionism is different than private protectionism—is rooted in neither the text, history, nor theory of the dormant Commerce Clause. Indeed, it is drawn out of thin air.

III. THE PUBLIC-ENTITIES EXCEPTION AND THE BIRTH OF THE NEW PROTECTIONISM

While we believe the public-entities exception to the antidiscrimination principle to be an unprecedented and unjustified departure from the modern dormant Commerce Clause doctrine, we take the exception as a given and focus in this part on what it portends for the future. In our view, the exception invites state and local governments to engage in protectionism in a variety of contexts and will embroil the courts, both federal and state, in the difficult task of distinguishing between public and private protectionism.[178] More fundamentally, the underlying jurisprudential forces that gave rise to it are likely to destabilize the modern dormant Commerce Clause doctrine, opening the door to a new reassessment by the Court of its role in reviewing state and local taxes and regulations.[179]

A. Municipal Garbage Processing and Bond Favoritism

Obviously, the most immediate impact of the *United Haulers* and *Davis* decisions will be felt, respectively, in the municipal solid waste processing and municipal bond arenas. In *United Haulers*, the Court upheld solid waste flow-control ordinances adopted by two counties in the middle of New York. Because of the counties' geographic location, it was unlikely that out-of-state garbage processors bore much, let alone a disproportionate share, of the burden of the measure.[180] The

178 For a similar discussion of the potential ramifications of this exception, see Coenen, United Haulers, *supra* note 8 (manuscript at 23–79).

179 *See also id.* (manuscript at 5) ("[C]ourts must be ever-mindful that *United Haulers* and *Davis* reflect a doctrinal amibitiousness that the opinions in those cases tend to understate.").

180 *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345–46 (2007).

Court's approval of such municipal favoritism, however, did not turn on such geographic fortuity.[181] Hence, *United Haulers* licenses counties on or near state borders—where the impact of such flow-control ordinances may be felt primarily or exclusively by out-of-state processors—to adopt such flow-control ordinances. And, if a county can do it, so too can a state. Hence, states may similarly "nationalize" their solid-waste-processing facilities and then require all in-state waste generators to have their waste processed at the state-owned facilities. The impact on private waste processors could be immense.

Meanwhile, while *Davis* dealt with only a modest tax break for in-state municipal bonds,[182] the decision's *ratio decendi*—that state efforts to privilege in-state municipal bonds over their out-of-state competitors are nondiscriminatory and therefore exempt from "standard dormant Commerce Clause scrutiny"[183]—licenses states to adopt more robust measures to encourage residents to purchase in-state municipal bonds. States, for example, might levy a punitive tax on the interest of out-of-state bonds or, better yet, simply forbid state residents from purchasing or owning out-of-state municipal bonds.[184] The only difference between Kentucky's modest tax break and these hypothetical measures is the degree of the favoritism, but the Court has long made clear that the extent of the favoritism is irrelevant to the determination of whether a measure is discriminatory.[185] Thus, at a minimum, *Davis* will likely encourage states to experiment with more robust mechanisms to "encourage" state residents to purchase in-state municipal bonds rather than out-of-state municipal bonds.

B. Public Protectionism

More profoundly, *United Haulers* and *Davis* embrace an exception to the antidiscrimination principle for state and local taxes and regulations that favor governmental operations over private and public competitors. While *United Haulers* formally dealt only with favoritism with respect to municipal waste processing and *Davis* with respect to municipal bonds, the Court's language and reasoning suggest a much broader rule endorsing governmental favoritism of itself generally. As a consequence, another likely impact of the Court's embrace of public protectionism will be to encourage state and local governments to

181 *See id.* at 342–47.

182 The value of the preference is greatest in those states with the highest state income taxes.

183 Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1810 (2008).

184 *Id.* at 1829 (Kennedy, J., dissenting).

185 *See* Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 269 (1984).

adopt taxes and regulations that protect other governmental operations from competition.

The practical impact of this exception could be huge. In modern America, state and local governments perform many functions and provide many services to state and local residents. For example, they own and operate solid waste processing or disposal facilities; they operate public schools, including public universities and graduate schools; and they provide health care through publicly owned health centers and hospitals, to name just a few prominent ones. Under the public-entities exception, states could adopt taxes or regulations that encourage or even require state residents to use these municipal facilities rather than other facilities. Thus, for example, to encourage more in-state students to attend the state's own university, a state could levy a higher tax on the income of every graduate of private or out-of-state universities. Or, to ensure maximum occupancy at state-owned hospitals, a state could forbid residents from seeking medical care at non–state owned hospitals.[186] For every state or municipally owned facility, *United Haulers* and *Davis* ostensibly license the adoption of taxes and regulations to protect such facilities from competition.

To be sure, we do not expect the widespread proliferation of such taxes and regulations, at least not immediately. The benefits of free trade in such goods and services may discourage state and local governments from adopting many such mercantilist measures, and, even if they do, some of the most egregious examples of such public protectionism may run afoul of other constitutional guarantees.[187] Moreover, Congress could potentially respond by statutorily forbidding public protectionism in particular industries.[188] At the same time, however, these alternative safeguards have their own weaknesses. State political processes are prone to overestimate the benefits of protectionism; other federal constitutional guarantees do not cover the full range of possible governmental favoritism; and Congress may not

186 These are not the only examples. State and local governments are engaged in a myriad of activities. South Dakota, for example, used to own and operate a cement factory. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 446–47 (1980) (upholding state requirement banning out-of-state individuals from purchasing cement from state-owned cement plant). Under *Davis*, South Dakota could have adopted a regulation requiring all construction projects in the state to use cement from the factory.

187 *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1925) (holding that state law requiring all elementary school children to attend public schools violated Fourteenth Amendment's Due Process Clause).

188 *Cf.* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345 n.7 (2007) (noting that Congress may use its commerce power "to limit state use of exclusive franchises").

respond to such public protectionism, particularly that at the local level, which may escape its radar.[189]

C. *Quasi Public-Private Protectionism*

Perhaps most dangerously, the Court has unwittingly opened the door to governmental efforts to use discriminatory taxes and regulations to favor private businesses in certain circumstances. At the heart of these decisions lie the Court's twin beliefs that there is a difference between public and private operations and that it is easy to distinguish between the two.[190] In our view, however, the Court has fundamentally failed to appreciate the extent to which government and private operations are and can be comingled, thereby inviting state and local governments to use the public-entities exception to benefit nominally private entities that have some connection with the government. Moreover, as to these "mixed" entities, the Court itself has offered no guidance regarding the applicability of the public-entities exception, and, therefore, lower courts will find themselves embroiled in the difficult task of determining whether particular entities favored by the state through some discriminatory tax or regulatory provision qualify as public entities for purposes of this exception to the antidiscrimination principle.

State and local governments interact with nominally private companies in a variety of ways that muddle the distinction between the two. Most notably, state and local governments often possess a substantial ownership interest in private companies. Such ownership is typically not held directly by the state itself, as it is in Europe; rather, in the United States, state and local governments typically own substantial shareholdings through their public pension funds. In particular, there are over 2600 state and local government pension funds, which collectively control almost $2.9 trillion in assets.[191] Although much of these funds are invested in fixed-income debt securities (e.g., government and corporate bonds), state and local governmen. pension funds own over $1.1 trillion of shares of private companies.[192] Several of the pension funds are truly huge, even by national standards. The California state pension system for example has, as of July

189 *See* Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring in the result); *see also infra* text accompanying notes 225–26.

190 *Davis*, 128 S. Ct. at 1810 n.9.

191 *See* U.S. CENSUS BUREAU, 2006 STATE AND LOCAL GOVERNMENT EMPLOYEE-RETIREMENT SYSTEMS, at tbl. 5A (2008), *available at* http://www.census.gov/govs/retire/2006ret05a.html.

192 *See id.* at tbl. 4a(3), *available at* http://www.census.gov/govs/retire/2006ret04a-3.html.

31, 2009, over $190 billion in funds under management, $119 billion of which is invested in the stock of private companies.[193]

Moreover, even apart from the government's ownership of shares, state and local governments also interact with private companies in other ways. For example, state and local governments often contract with private companies to render services to state and local residents. This movement toward the "privatization" of public services by state and local governments has been widely documented and discussed.[194] Likewise, state and local governments provide financial assistance to local companies through direct subsidies, tax exemptions, and tax abatements.[195] Many of these subsidies take the form of a business development incentive, in which the state or local government provides some subsidy or tax break in return for a company's agreement to build or expand its operations in the state or municipality.[196]

Not all private companies will qualify as public entities for purposes of this exception by virtue of these types of relationships with the government, but many will, and identifying the nature and scope of the requisite relationship to the government will prove no easy task. Take, for example, governmental stock ownership. Surely a company in which the state government owns ninety percent of the outstanding shares constitutes a public entity.[197] But what about closer cases, such when the government owns only sixty percent of the shares? Or forty percent? Or does the answer turn on the actual dollar amount invested? New York's public pension fund, for example, owns over $1.5 billion in shares of Exxon Mobil Corporation.[198] That may be a small percentage of the total market value of Exxon Mobil,[199] but that

193 *See* CalPERs, *Investments*, FACTS AT A GLANCE (Cal. Public Employees' Retirement System, Sacramento, Cal.), Oct. 2009, at 1, *available at* http://www.calpers.ca.gov/eip-docs/about/facts/investme.pdf.

194 *See, e.g.*, Janna J. Hansen, *Limits of Competition: Accountability in Government Contracting*, 112 YALE L. J. 2465, 2465 (2003) ("Government contracts with private providers for the supply of goods and services have grown in number and magnitude over the last several decades.").

195 *See* Williams, *supra* note 30, at 478–79.

196 Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 397 (1996).

197 *Cf.* 28 U.S.C. § 1603(b)(2) (2006) (defining corporations in which a foreign state owns a majority of shares as instrumentalities of the foreign state).

198 *See* N.Y. STATE COMMON RET. FUND., ASSET LISTING AS OF MARCH 31, 2007, at 22, *available at* http://www.osc.state.ny.us/retire/word_and_pdf_documents/publications/catr/asset_listings_07.pdf (last visited Oct. 9, 2009).

199 As of March 28, 2008, Exxon Mobil's total market value was almost $456 billion. *See Our Annual Ranking of America's Largest Corporations*, FORTUNE, May 5, 2008,

is a lot of money to New York State and its pensioners. One can imagine a state arguing that the value of its investment is so great and so important to the state itself that the company should be treated as a public entity for purposes of allowing the state to favor its operations. Indeed, doesn't New York have a greater interest in protecting Exxon Mobil (and the state's $1.5 billion investment) than it would with respect to a hypothetical company worth only $10 million but of which New York owns ninety-nine percent of the stock? Lastly in this regard, what if the shares are owned only indirectly by the government through some other entity, such as its governmental pension fund? Is such indirect ownership sufficient to render the company a public entity for purposes of this exception to the dormant Commerce Clause?[200]

Moving away from state ownership of corporate shares, the task of distinguishing public and private entities becomes even more difficult. Take, for example, companies that contract with state and local governments to provide services to their residents. It seems strange to view a government contractor as a public entity by virtue of that relationship, yet the Court's decision in *United Haulers* offers some support for this view, thereby clouding the picture. There, the Court upheld regulatory measures that favored municipally owned waste-processing facilities.[201] What is often overlooked, however, is that one of the favored processing facilities was actually operated and managed by a private company pursuant to a contract with the relevant governmental authority.[202]

United Haulers' endorsement of regulatory favoritism for a facility "owned" by the municipality but operated by a private contractor raises the prospect that other government contractors may similarly be protected under the aegis of the public-entities exception. Suppose that a municipality leases public land to a company, which builds and operates a plant to produce, say, ethanol. Is the facility "owned" by the municipality, such that the municipality can adopt regulatory or tax measures to favor ethanol produced by the company? Must the

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available at http://money.cnn.com/magazines/fortune/fortune500/2008/snapshots/387.html.

200 *Cf.* Dole Food Co. v. Patrickson, 538 U.S. 468, 477 (2003) (holding that, in the context of the Foreign Sovereign Immunities Act, a foreign state's indirect ownership of majority of shares of private corporation through several intermediate subsidiaries does not render corporation an instrumentality of the foreign state).

201 *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345 (2007).

202 *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245, 250 (2d Cir. 2001).

municipality also own the building or the machinery in it in order for the ethanol to qualify for municipal tax or regulatory favoritism? Must the workers at the facility be public employees, or can they be the employees of the private contractor? At what point is the facility "municipally owned" within the meaning of *United Haulers*?

And, even more perplexingly, what about government contractors who do not operate from "municipally owned" facilities but who provide goods or services to local residents? Prior to *United Haulers*, the Court had invalidated regulatory favoritism for a private company providing public services to municipal residents from a nominally private facility,[203] but, after *United Haulers* and *Davis*, it is unclear why exactly a municipality must "own" the favored facility. Both *United Haulers* and *Davis* emphasize the need to free state and local governments from dormant Commerce Clause restraints in the discharge of "traditional government function[s]."[204] On that basis, municipal ownership of the favored facility seems irrelevant. A municipality surely discharges its "traditional governmental functions" as much by contracting with a private entity to provide those services directly to local residents from a private facility as it does by providing those services itself via public employees. Yet, on the other hand, allowing state and local governments to adopt tax and regulatory measures that favor private companies merely by entering into a contract with the company to provide goods or services to local residents on certain terms runs the risk of licensing widespread protectionism. For example, suppose a state government contracts with a private company to provide gasoline to state residents at a specified price. Could it then tax other companies' gasoline at a higher rate or ban residents from purchasing gasoline from other companies?[205] If so, state and local governments may protect every local business from outside competition merely by "contracting" with the business to provide goods and services to local residents on certain terms and then adopting a protectionist tax or regulation to "assist" the company to perform its "public service" under the contract. It is to prevent this circumstance that the "traditional governmental function" test is evidently aimed, but, as discussed above,[206] it is far from clear whether that test is up to the task.

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203 C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 394 (1994).

204 *See* Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1811 (2008); *United Haulers*, 550 U.S. at 343–44.

205 *Cf.* New Energy Co. v. Limbach, 486 U.S. 269, 280 (1988) (invalidating tax credit for ethanol manufactured in state).

206 *See supra* Part II.B.

Or, perhaps furthest afield, take situations in which the government provides financial assistance to private companies. Such assistance can come in a variety of forms. Ironically, *Davis* itself dealt obliquely with one such mechanism: the economic development or "private activity" municipal bond.[207] State and local governments regularly issue these types of bonds, the proceeds of which go to private entities to subsidize economic development in the state or municipality.[208] The bonds are issued in the name of the municipality, but the debt service payments are typically funded from the revenues received by the municipality from the benefited private company.[209] As one commentator succinctly put it, such private activity bonds "are essentially corporate bonds."[210] Such private activity bonds constitute roughly one quarter of all municipal bonds issued in the United States.[211]

Again, it seems odd to characterize a private company as a public entity merely by virtue of its receipt of such assistance,[212] but *Davis* muddies the water even here. In *Davis*, the Court refused to address a challenge to the favorable tax treatment for this subset of municipal bonds on procedural grounds, leaving the question open for resolution another day.[213] Yet, the Court also indicated that such private activity bonds might appropriately be entitled to favorable tax treatment under the public-entities exception: "[W]e cannot tell with certainty what the consequences would be of holding that Kentucky violates the Commerce Clause by exempting such bonds; we must

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207 *See* Brief for the National Federation of Municipal Analysts, as Amicus Curiae in Support of Neither Party at 6, *Davis*, 128 S. Ct. 1801 (No. 06-666), 2007 WL 2115441.

208 *See id.* at 6–7.

209 *See id.* at 7 n.3.

210 Michael J. Stutzer, *The Statewide Economic Impact of Small-Issue Industrial Revenue Bonds*, FED. RES. BANK OF MINNEAPOLIS Q. REV., Spring 1985, at 2; *see also* Joel Michael, Kentucky v. Davis*: Implications for State Tax Policy and the Dormant Commerce Clause*, 45 ST. TAX NOTES 753, 759 (2007) (noting that "with traditional industrial development revenue bonds, the bonds are, in all but name, corporate bonds").

211 Brief of Alan D. Viard et al. as Amici Curiae Supporting Respondents at 25, *Davis*, 128 S. Ct. 1801 (No. 06-666), 2007 WL 2808465. Prior to the federal Tax Reform Act of 1986, which limited the federal income tax benefit for such private activity bonds, such bonds comprised sixty-eight percent of all municipal bonds. *See* Michael, *supra* note 210, at 759 & n.51.

212 *Cf.* Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (holding that a private school that received ninety percent of its funding from the state did not constitute a state actor).

213 *See Davis*, 128 S. Ct. at 1805 n.2.

assume that it could disrupt important projects that the States have deemed to have public purposes."[214]

This seemingly innocuous observation regarding the "public purpose" served by such "private activity" bonds sows the seeds of substantial legal uncertainty. On the one hand, were the Court to hold that private activity bonds do not qualify for the public-entities exception, the constitutionality of the tax-exempt status of municipal bonds would presumably have to turn upon the recipient and use of the proceeds of the bonds. The Court might be appropriately fearful of engaging in the difficult task of tracing the proceeds of particular municipal bonds.[215] Moreover, even if some proceeds were easily traced to a nominally private recipient, there would still remain the unenviable task of distinguishing between private activity bonds and "true" municipal bonds, whatever they are. As noted above, state and local governments often use private companies to perform public services for the benefit of residents.[216] Is there any constitutionally significant difference between bonds, the proceeds of which are used by the municipality to pay a private contractor to build a waste-processing facility to be operated by the municipality itself, and bonds, the proceeds of which are given to a private company to build a waste-processing facility to be operated by the company? Is the ownership of the facility the dispositive factor? And, if so, again, why should that matter, particularly if the bonds are secured by a mortgage on the facility (as they typically are in these cases)?

On the other hand, virtually all protectionist tax and regulatory measures can be defended on the ground that they serve some "public

214 *Id.*

215 The proceeds of bonds can be deposited either in a segregated fund that is used for a particular project or in the general fund, which is used to fund legislatively specified appropriations. One suspects that, were the Court to invalidate discriminatory tax treatment for private activity bonds, states and municipalities might try to conceal such bonds by depositing all bond proceeds in the general fund and then providing cash subsidies via appropriation from the general fund to the same private companies. *Cf.* Cumberland Farms, Inc. v. Tax Assessor, 116 F.3d 943, 944–45 (1st Cir. 1997) (noting that Maine's response to invalidation of a discriminatory milk tax-and-rebate scheme was to amend statute to provide that milk tax proceeds were deposited in a general fund, which was then used to fund a subsidy to in-state dairy farmers). Moreover, further complicating matters (and encouraging such formalist responses by state and local governments), such direct cash subsidies are assumed by the Court to raise no dormant Commerce Clause issue. *See* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 & n.15 (1994); Williams, *supra* note 30, at 478–81.

216 *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 335 (2007) (noting that private companies were used to "pick up citizens' trash").

purpose." The "public purpose" ostensibly served by private activity bonds is to assist private companies expand their operations, which increases local employment and furthers economic development within the municipality generally.[217] Yet, that is precisely the same rationale for providing all sorts of discriminatory tax exemptions and business development incentives to private companies.[218] And, not to gild the lily, that is precisely the same rationale for imposing tariffs and other discriminatory regulatory burdens on out-of-state competitors of local companies.[219] If such a public purpose is sufficient to allow a state to issue tax-favored municipal bonds, the proceeds of which go to local private companies, surely too it is sufficient to allow the state to authorize local private companies to issue tax-free bonds directly. And, surely, then, it is sufficient to allow the state to impose a tariff on the goods of companies that compete with the local companies, or perhaps even ban the importation of such competing goods. In short, treating the public-entities exception as applicable to tax and regulatory measures that favor private businesses that perform some "public purpose" as defined by the government opens the door to myriad protectionist measures.

Several consequences flow from the Court's inability to perceive, let alone to grapple with, these issues and delineate the scope of the public-entities exception. First and perhaps most immediately, lower courts (and ultimately the Court itself) will be forced to address the precise scope of the public-entities exception and its applicability to nominally private companies that interact with the government in ways that muddle the difference between the two. As the foregoing discussion illustrates, that will be no easy task, for the questions that *United Haulers* and *Davis* necessarily raise—and they raise more questions than they answer—are truly difficult ones.

The extent of the task before the courts can be more fully perceived by looking to the Court's work in the context of the Eleventh Amendment and the Foreign Sovereign Immunities Act[220] (FSIA). Those provisions provide sovereign immunity from suit in federal court to state and foreign governments, respectively. More importantly for present purposes, such sovereign immunity extends to instrumentalities of the state, which includes nominally private enti-

217 *See generally* Stutzer, *supra* note 210, at 400–05 (discussing the use and impact of such bonds).

218 *See, e.g.*, Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 400–01 (1984) (invalidating tax exemption for companies that expanded in-state operations with regard to foreign exports).

219 *W. Lynn Creamery*, 512 U.S. at 204–05 & n.20.

220 28 U.S.C. § 1602 (2006).

ties under certain circumstances.[221] In short, like the public-entities exception, these areas of law require the courts to distinguish between private and public entities.

With respect to both the Eleventh Amendment and FSIA, the courts have labored to define the circumstances in which a nominally private corporation qualifies as a public entity for purposes of sovereign immunity. In the Eleventh Amendment context, the courts have eschewed any bright-line rule and instead adopted a multifactor test to determine whether the entity is an "arm of the state."[222] The FSIA offers a little more guidance because, by express statutory provision, all corporations in which a foreign sovereign owns a majority of the shares qualify as public entities.[223] With respect to other private entities, which may still qualify as an "organ of a foreign State,"[224] however, FSIA offers no guidance. Courts have responded to this statutory lacuna with a multi-factor inquiry somewhat similar to that used in the Eleventh Amendment context.[225] As one might expect with regard to such multifactor inquiries, these "tests" have produced much confusion in both the Eleventh Amendment and FSIA context and have led to seemingly contradictory results in individual cases.[226]

221 *See id.* § 1603(b)(2); Dole Food Co. v. Patrickson, 538 U.S. 468, 471 (2003).

222 *See* Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429–31 (1997); Pastrana-Torres v. Corporacion de P.R. Para la Difusion Publica, 460 F.3d 124, 126–27 (1st Cir. 2006); Aguon v. Commonwealth Ports Auth., 316 F.3d 899, 901 (9th Cir. 2003) ("In the Eleventh Amendment context, we employ a five-factor test to determine whether an entity is an arm of the state: (1) 'whether a money judgment would be satisfied out of state funds,' (2) 'whether the entity performs central governmental functions,' (3) 'whether the entity may sue or be sued,' (4) 'whether the entity has the power to take property in its own name or only the name of the state' and (5) 'the corporate status of the entity.'" (quoting Mitchell v. L.A. Cmty. Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1989))).

223 *See* 28 U.S.C. § 1603(b)(2).

224 *Id.*

225 *See, e.g.*, Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co., 476 F.3d 140, 143 (2d Cir. 2007) (noting that test requires analysis of following factors: "'(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law'" (alteration in original) (quoting Filler v. Hanvitt Bank, 378 F.3d 213, 217 (2d Cir. 2004))); Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 847 (5th Cir. 2000) (noting that, while these factors "provide a helpful framework, we will *not* apply them mechanically or require that all five support an organ-determination").

226 *Compare Pastrana-Torres*, 460 F.3d at 128 (holding that Public Broadcast Corporation of Puerto Rico is not arm of commonwealth, despite substantial governmental control), *with* Villegas Davila v. Pascual, 631 F.Supp. 919, 921–22 (D.P.R. 1986) (hold-

Indeed, both courts and commentators have bemoaned the absence of a "clear test."[227] If this is what awaits the courts (and the nation generally) in the context of the public-entities exception—and we think it is—there is good reason to be apprehensive that analytical confusion rather than clarity will be the result.

Second, as the courts struggle to identify the contours of the public-entities exception, state and local governments will no doubt actively seek to exploit the ambiguities in the doctrine. State or local governments wishing to adopt discriminatory tax or regulatory measures to favor local companies may seek to purchase a majority ownership in the favored companies. Or, if that is too expensive, maybe they will enter into "joint venture" contracts with the favored companies to provide particular goods or services to local residents, which contract will denominate the companies' efforts as the provision of some "public service." Or maybe they will simply authorize the companies to issue tax-free bonds or will exempt their goods or services from the state sales tax on the ground that the company serves some "public purpose." The form in which such protectionist maneuvers manifest themselves will be bounded only by the imagination of state and local officials.

To be sure, the Court is not oblivious to this possibility, but the Court dismissed it as both unlikely and remediable by Congress, which can statutorily prohibit the most egregious forms of state protectionism.[228] We agree that a wholesale nationalization of private industry by state and local governments is unlikely, but the Court misses the point that its new rule incentivizes precisely that type of behavior. Given the numerous efforts throughout American history of state and local governments seeking to protect local industries from out-of-state competition, it would be anomalous for state and local governments *not* to seek to use the Court's new rule to achieve those forbidden ends. And, as for Congress being able to step in and prohibit some forms of such protectionism, again, there is good reason to doubt Congress's ability and desire to police each and every tax and regula-

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ing that corporation was arm of state, despite commonwealth statute expressly providing that corporation was distinct from commonwealth and that debts of corporation were not that of commonwealth).

227 *See, e.g.*, *Kelly*, 213 F.3d at 847; Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 WILLAMETTE J. INT'L L. & DISP. RES. 57, 65 (2001).

228 *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345 n.7 (2007).

tory measure adopted by the 89,000 state and local governments in this nation.[229] As Justice Jackson aptly warned:

> It is a tempting escape from a difficult question to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce. But these restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters. The practical result is that in default of action by us they will go on suffocating and retarding and Balkanizing American commerce, trade and industry.[230]

And, even if Congress does become aware of some local restraint, the constitutional limits on the legislative process, most notably the bicameralism and presentment requirements,[231] make congressional action difficult as a formal matter and therefore unlikely as a practical matter, at least in the vast run of cases. Finally, as one of us has pointed out elsewhere, when Congress exercises its affirmative power under the Commerce Clause, it is at least as apt to countenance discrimination as it is to quash it.[232]

Third and perhaps most profoundly, even if the courts can elaborate and apply a principled test to distinguish public and private entities, there is still the underlying issue as to whether it is normatively desirable to allow state and local governments to favor those entities that are deemed "public" under whatever test ultimately prevails. Suppose, for example, that the State of Georgia acquires a supermajority stake in Coca Cola, Inc. Should it therefore be permissible for the state to provide a tax exemption from the state sale tax on purchases of Coke on the ground that the state is merely trying to encourage residents to purchase Coke, thereby ensuring the profitability of Coca Cola and, correspondingly, the state's investment in the company? And, if so, what about more salient forms of protectionist tax or regulatory measures? Could Georgia impose a punitive tariff on Pepsi and other cola products imported into the state? Or what about a regulatory ban on in-state consumers drinking other colas? Instinctively, we recoil from the suggestion that these measures would be constitu-

229 *See* U.S. CENSUS BUREAU, LOCAL GOVERNMENTS AND PUBLIC SCHOOL SYSTEMS BY TYPE AND STATE: 2007 (2008), *available at* http://www.census.gov/govs/cog/GovOrgTab03ss.html.

230 Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring in the result).

231 INS v. Chadha, 462 U.S. 919, 957–58 (1983) (requiring that all legislative action satisfy bicameralism and presentment requirements).

232 *See* Brannon P. Denning, *Is the Dormant Commerce Clause Expendable? A Response to Edward Zelinsky*, 77 MISS. L.J. 623, 646–50 (2007).

tional, but there is nothing in either *United Haulers* or *Davis* itself to give us comfort in that regard.

D. Whither the Dormant Commerce Clause?

Lastly, the Court's embrace of the public-entities exception poses a subtle, yet profound, threat to current dormant Commerce Clause doctrine. For the past sixty-some years, the Court's dormant Commerce Clause doctrine has been fairly stable. Although there have been heated exchanges on the Court regarding the role of the Court in policing nondiscriminatory taxes and regulations,[233] there has been widespread consensus among the Justices that the Court was acting appropriately in rooting out and scrutinizing discriminatory taxes or regulations to ensure that states and municipalities were not attempting to engage in protectionism.[234] Indeed, since the New Deal, only Justice Thomas (and maybe Justice Black) has called for a wholesale repudiation of the Court's role in this context.[235]

In our view, *Davis* and, to a lesser extent, *United Haulers* signal the fragmentation of this post–New Deal consensus among the Justices. The *Davis* majority's ruminations about the need to free state and local governments from dormant Commerce Clause restrictions evince both a fear that the current doctrine has inappropriately constrained state regulatory and taxation autonomy and, concomitantly, a skepticism regarding the need for judicial scrutiny of state and local taxes and regulations.[236] Whether or not one agrees with the Court on these points—and we do not—it is hard to see how these twin beliefs do not seep into and destabilize other aspects of the Court's dormant Commerce Clause doctrine.

Take, for example, the Court's apprehension that the dormant Commerce Clause must not interfere with the state's ability to discharge its "traditional governmental functions." Surely it is a "traditional governmental function" to protect the health, safety, and welfare of citizens. Indeed, that is the very definition of the states'

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233 *See, e.g., infra* note 235.

234 *See* Hillside Dairy Inc. v. Lyons, 539 U.S 59, 66–67 (2003); W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 204–05 (1994); Sporhase v. Nebraska, 458 U.S. 941, 957–58 (1982); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810–14 (1976).

235 *See* Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1821–22 (2008) (Thomas, J., concurring in the judgment); H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 551 n.2 (1949) (Black, J., dissenting) (noting that he had "acquiesced" in the dormant Commerce Clause rule against discrimination against interstate commerce, though he thought there was no dormant Commerce Clause).

236 *See, e.g., Davis*, 128 S. Ct. at 1810–11; *id.* at 1821 (Scalia, J., concurring in part); *id.* at 1822 (Thomas, J., concurring in the judgment).

police power. And, equally surely, a state protects the welfare of its citizens by encouraging employment in the community. Yet, on that ground, it is very much unclear why a state or local government should not be able to adopt patently protectionist taxes or regulations to protect private companies from out-of-state competition (and thereby promote local employment). The state discharges its traditional governmental function as much by imposing a tariff on the goods of companies outside the state (so as to encourage local production) as it does by nationalizing a local producer and then, as *Davis* and *United Haulers* expressly endorse,[237] adopting a discriminatory tax or regulation to protect the now-public company from outside competition. Stated differently, if the latter measure can be defended on the ground that the state is discharging its traditional government functions, so too can the former. Of course, that line of analysis swallows the dormant Commerce Clause itself.[238]

Or take the Court's faith that Congress can better or more appropriately address any disruption in interstate trade created by state and local regulations or taxes. Once again, that view cannot be cabined to the public-entities exception. True, as the Court observed, Congress can forbid states from nationalizing all fast-food hamburger stands or imposing protectionist tariffs or regulations to promote publicly owned hamburger stands,[239] but the same is true with regard to protectionist regulations or tariffs on other out-of-state goods, such as ethanol, milk, or solid waste. Yet, for close to two centuries, Congress's formal authority to regulate interstate commerce has not been understood as removing the need for or legitimacy of judicial review of state and local measures that may undermine the national common market.[240]

Our point is not that the Court has overstated the dormant Commerce Clause's impact on state autonomy or overestimated Congress's ability to protect interstate trade—though we do believe that to be the case—rather, it's that the Court's line of analysis applies across-the-board to all facets of the dormant Commerce Clause doctrine. It does not merely justify the public-entities exception to the antidiscrimination principle; it arguably invites a wholesale reappraisal of other, widely accepted features of that doctrine, such as the ban on protectionist taxes and regulations that favor purely private businesses. In

237 *See id.* at 1813–18 (majority opinion); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343–47 (2007).

238 *See Davis*, 128 S. Ct. at 1824 (Kennedy, J., dissenting).

239 *See United Haulers*, 550 U.S. at 345 n.7.

240 *See* Best & Co. v. Maxwell, 311 U.S. 454, 455–56 (1990).

that respect, the final implication arising from these cases may be their most revolutionary. *United Haulers* and *Davis* may not simply license public protectionism; they may turn out to be the first salvo in a more profound reassessment and recalibration of dormant Commerce Clause doctrine—one that narrows substantially (or maybe even eliminates) the scope of judicial protection for the American common market. The New Protectionism and the Old could very easily merge—all but eliminating the judicial role created by the dormant Commerce Clause nearly two centuries ago.

IV. THE NEW PROTECTIONISM AND THE MARKET-PARTICIPANT EXCEPTION

Alternatively (and more surprisingly), three Justices in *Davis* sought to justify the Court's embrace of public protectionism by invoking the market-participant exception to the dormant Commerce Clause.[241] As we explain in this section, however, the plurality's effort to situate public protectionism within the market-participant exception rests on a misguided, overly broad interpretation of that exception. Worse, were the plurality's capacious conception of the doctrine accepted by the Court, it would represent a substantial expansion of the exception—so substantial, in fact, that such an "exception" would come perilously close to swallowing the antidiscrimination principle itself.

A. Summary of the Market-Participant Exception

State governments are exempt from the dormant Commerce Clause when acting not as market regulators (such as when they use their tax or regulatory powers) but as market participants (such as when they use their spending or purchasing authority).[242] Thus, for

241 *See Davis*, 128 S. Ct. at 1811–17 (reflecting that Justices Breyer and Stevens joined Justice Souter's market-participant exception and all other Justices disagreed with its reasoning); Coenen, *The Supreme Court's Municipal Bond Decision*, *supra* note 8 (manuscript at 10) (terming the plurality's recharacterization, in *Davis*, of *United Haulers* as a market-participant case "a radically revisionist treatment of the decision").

242 *See* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810–14 (1976) (upholding state program to encourage recycling of abandoned automobiles, where paperwork requirements on out-of-state scrap processors were more onerous than those imposed on in-state competitors); *see also* White v. Mass. Council of Constr. Employers, 460 U.S. 204, 214–15 (1983) (upholding executive order requiring city residents to compose one-half of work force on all city-funded or -administered construction projects). For scholarly commentary on the exception, see BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §§ 7.01–7.07 (Brannon P. Denning ed., 1999 & 2008 Supp.); Coenen, *supra* note 28; Williams, *supra* note 30.

example, a state may decide to sell cement from a state-owned cement plant only to state residents.[243] Likewise, a state may choose to purchase printing services or supplies for its own use from in-state companies.[244]

Acknowledging that states could use the "market-participant exception" to undermine the national common market, the Court limited the scope of this exception in two significant ways. First, states may not use their market power in one market to regulate the behavior of private individuals outside that market. In *South-Central Timber Development, Inc. v. Wunnicke*,[245] the State of Alaska sold timber subject to the contractual proviso that, prior to export, the timber be processed in the state, so as to benefit the local timber-processing industry.[246] A plurality of the Court invalidated the restriction on the ground that a state may not use its market power to exert influence over the disposition of property after a sale has been completed. In the plurality's view, state efforts to control the subsequent disposition of state-sold goods or services smacked more of regulation than of participation, since ordinarily sellers of goods don't care what buyers do with those goods after the sale.[247] "The State," the plurality wrote, "may not impose conditions . . . that have a substantial regulatory effect outside of [a] particular market."[248] Because the market in which Alaska was participating was the timber-sale market, not the timber-processing market, Alaska's timber-processing export restriction was a "downstream restriction[ ]" with regulatory effects.[249] A majority of the Court has subsequently embraced the *South-Central Timber* limitation on the market-participant exception.[250]

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243 *See* Reeves, Inc. v. Stake, 447 U.S. 429, 446–47 (1980).

244 The market-participant doctrine is of a piece with the assumed exception to the dormant Commerce Clause for discriminatory cash subsidies. *See, e.g.*, New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988) ("Direct subsidization of domestic industry does not ordinarily run afoul of [the dormant Commerce Clause] . . . ."). *But cf.* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 n.15 (1994) ("We have never squarely confronted the constitutionality of subsidies, and we need not do so now."). *See generally* Coenen, *supra* note 30 (exploring the constitutionality of, and creating an analytic structure for, business subsidies after *West Lynn Creamery*).

245 467 U.S. 82 (1984).

246 *See id.* at 85.

247 *See id.* at 97–98 (plurality opinion).

248 *Id.* at 97.

249 *Id.* at 99.

250 *See, e.g.*, Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 65–66 (2003) (preventing state from regulating milk prices in connection with its regulation of labeling and composition of milk); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 403 (1994) (O'Connor, J., concurring) (listing cases where the Court has embraced such

Second, a state does not "participate" in a market within the meaning of the exception by taxing either entities that do not deal with the government or, relatedly, transactions to which the government is not a party. In *New Energy Co. v. Limbach*, for example, the Court invalidated Ohio's state fuel tax credit offered for sales of ethanol produced in state.[251] Rejecting the state's contention that the tax credit was simply a form of market participation, the Court concluded that the market-participant exception did not apply because the state was neither purchasing nor selling ethanol. Rather, in the Court's view, the state's action involved the "assessment and computation of taxes—a primeval governmental activity."[252] Likewise, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,[253] the Court held that a property tax exemption for charitable institutions serving in-state citizens was not a form of market participation (i.e., the state was not purchasing charitable services for its citizens via the tax exemption) but rather an impermissible tariff on charities that served out-of-state citizens.[254]

B. Davis*'s Market-Participant Revisionism*

The Court in *United Haulers* did not suggest, let alone hold, that the county solid waste flow-control ordinances fit within the market-participant exception. In *Davis*, though, a plurality sought to cast the public-entities exception as simply an extension or outgrowth of the market-participant exception. Kentucky's imposition of a tax on out-of-state municipal bonds, the plurality argued, "may also be seen under the broader rubric of the market participation doctrine" because, according to the plurality, Kentucky "has entered the market for debt securities."[255] To be sure, the plurality acknowledged that taxes are typically an example of state market regulation outside the

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a limitation); Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992) (declining to extend state ratemaking authority to related areas of regulation).

251 *See* New Energy Co. v. Limbach, 486 U.S. 269, 280 (1988). The Ohio statute also extended its tax credit to ethanol produced in other states that granted a similar credit for Ohio-produced ethanol. As the Court has long made clear, however, such reciprocal tax or regulatory favoritism is discriminatory and subject to strict judicial scrutiny. *See* Sporhase v. Nebraska, 458 U.S. 941, 957–58 (1982); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370–81 (1976).

252 *New Energy Co.*, 486 U.S. at 277.

253 520 U.S. 564 (1997)

254 *Id.* at 594 ("Maine's tax exemption . . . must be viewed as action taken in the State's sovereign capacity rather than a proprietary decision to make an entry into all of the markets in which the exempted charities function.").

255 Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1811–12 (2008).

scope of the exception, but the plurality dismissed the significance of that fact on the ground that Kentucky was "act[ing] in two roles at once, issuing bonds and setting taxes."[256] For the plurality, attempting to separate those roles "blinks this reality" by "pretend[ing] that in exempting the income from its securities, Kentucky is independently regulating or regulating in the garden variety way that has made a State vulnerable to the dormant Commerce Clause."[257] In short, the plurality was suggesting that taxes and regulations designed to promote governmental operations—that is, public protectionism—fit within the exception so long as the taxes or regulations were related in some, unspecified manner to some underlying market participation by the state (in this case, the issuance of municipal bonds).

In our view, the plurality's attempt to conjoin classic regulatory or tax measures with state spending or purchasing acts reflects a profoundly misguided understanding of the scope of the market-participant exception and the basis for that exception in the dormant Commerce Clause. As the Court has historically understood, a state participates in a market (in the meaning of this exception) by providing state-created or -financed goods or services to state residents on preferential terms.[258] A state may seek to limit the benefits of state-created goods and services to state residents, who were the ones who paid the taxes to subsidize their creation in the first place. Thus, for example, had Oneida and Herkimer counties merely refused to provide garbage-processing services to out-of-state waste or had Kentucky merely refused to sell its municipal bonds to outsiders, the exception would properly insulate such preferential distribution of government-owned resources from constitutional challenge. In contrast, regulatory measures requiring residents to purchase the government-owned goods or services (as in *United Haulers*) and taxes penalizing those who fail to purchase the government-owned goods or services (as in *Davis*) are manifestly outside the exception. Once it mandates that residents deal only with it or taxes more heavily those who refuse to do so, it is no longer participating in the market; it is trying to shape the market to its benefit.

The plurality's failure to grasp this basic distinction between market regulation and market participation is reflected in its inability to identify a single case in which the Court has upheld a regulatory or tax measure of this sort. Indeed, the foundational decisions upholding state preferences for local residents under this exception—*Hughes*

256 *Id.* at 1812.

257 *Id.*

258 *See id.* at 1808–10.

v. Alexandria Scrap Corp.,[259] *Reeves, Inc. v. Stake*,[260] and *White v. Massachusetts Council of Construction Employers*[261]—all involved governmental measures that channeled government resources to local residents. Thus, in *Alexandria Scrap*, the Court upheld a preferential subsidy to in-state automobile hulk processors; it did not uphold a regulation requiring local residents to use in-state processors or a tax on those who refused to do so.[262] In *Reeves*, the Court upheld a state's refusal to sell cement from the state-owned plant to nonresidents; it did not uphold a regulation requiring local residents purchase cement from the state plant or a tax on those who purchased their cement from out of state.[263] And in *White*, the Court upheld a city requirement that contractors working on city-financed public work construction projects use a certain percentage of local workers; it did not uphold a regulation requiring contractors on other projects to use local residents or a tax on those who employed out-of-state workers on projects financed by private companies or other municipal instrumentalities.[264] At the same time, the Court has uniformly refused to apply the market-participant exception to regulations and taxes that favor in-state economic activity.[265]

Despite the clarity of these holdings, the plurality creatively reinterprets the Court's decisions to eviscerate that fundamental distinction between market regulation and market participation. According to the plurality, the Court's prior cases applying the exception actually did validate regulatory measures, albeit ones linked to some other form of market participation by the state. For the plurality, in cases like *White* and *Alexandria Scrap*:

> [T]he commercial activities by the governments and their regulatory efforts complemented each other in some way, and in each of them the fact of tying the regulation to the public object of the foray into the market was understood to give the regulation a civic objective different from the discrimination traditionally held to be unlawful: in the paradigm of unconstitutional discrimination the law chills interstate activity by creating a commercial advantage for goods or services marketed by local private actors, not by governments and those they employ to fulfill their civic objectives . . . .[266]

259 426 U.S. 794 (1976).

260 447 U.S. 429 (1980).

261 460 U.S. 204 (1983).

262 *See Alexandria Scrap*, 426 U.S. at 812–14.

263 *See Reeves*, 447 U.S. at 443–47.

264 *See White*, 460 U.S. at 214–15.

265 *See, e.g.*, New Energy Co. v. Limbach, 486 U.S. 269, 277–78 (1988).

266 Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1813–14 (2008).

Meanwhile, according to the plurality, those cases rejecting the applicability of the exception did not involve taxes or regulations conjoined to some other form of market participation. Thus, the plurality distinguished the tax exemption invalidated in *Camps Newfound* on the ground that there "the tax exemption was unaccompanied by any market activity by the State; it favored only private charitable institutions."[267] And *South-Central Timber* was distinguishable not only because it involved "'foreign commerce,'" which the plurality claimed brought on "'more rigorous' Commerce Clause scrutiny," but because it involved post-sale restrictions on goods in private hands.[268]

In our view, the plurality's attempt to situate public protectionism within the ambit of the market-participant exception is utterly tendentious. None of the Court's decisions ever hinted, much less held, that the determination that tax and regulatory measures were not market participation depended upon the nature of the beneficiary (public or private).[269] Nor does it make any sense to treat taxes or regulations that favor government operations as a form of market participation.

To the contrary, conflating the two forms of state action as the plurality does swallows the rule against protectionism because all state regulation and taxation can be tied to some state participation somewhere. In *New Energy*, for example, the state was surely purchasing gas and ethanol for state-owned car fleets; on the plurality's approach, the ethanol tariff would be perfectly constitutional on the ground that the tariff fosters local production of ethanol for purchase by the state for its fleet. Similarly, in *Camps Newfound*, the State of Maine was participating in the market for charitable services for its citizens—that was why it offered the tax exemption in the first place—yet, that was not sufficient to bring the discriminatory tax within the ambit of the exception.[270]

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267 *Id.* at 1814 n.17.

268 *Id.* (quoting S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984)).

269 In particular, it seems preposterous to argue (as the plurality does) that *United Haulers* could be explained as resting on this ground. The Court in *United Haulers* said no such thing—and for good reason: the county was not trying to induce residents to use the municipally owned processing facilities through some financial incentive; it was mandating it. Unlike the counties, private companies lack the ability to *force* consumers to purchase services from a single supplier—at least not without drawing the attention of the Department of Justice. The counties' waste flow-control ordinances were manifestly regulatory in nature, which is why Oneida and Herkimer Counties abandoned their market-participant exception argument. *Cf.* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 363–64 (2007) (Alito, J., dissenting).

270 *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 593–95 (1997).

To say that Maine or Ohio's exemption benefited only private parties—as the plurality does to distinguish both from *Davis*—engages in the same sort of disaggregation of participation and regulation that the plurality condemns. Neither Alaska, Ohio, nor Maine seemed intent on enacting naked preferences in favor of local, private businesses or to hobble their out-of-state competitors with ruinous taxes. Rather, they sought to stimulate production of a certain type of public good—jobs,[271] charity,[272] and alternative fuels.[273] Why the recipients of those exemptions could not be viewed as "those [the government] employ[s] to fulfill their civic objectives"[274] is not readily apparent. One might easily view beneficiaries of the tax exemptions in *New Energy* and *Camps Newfound*—as the plurality obviously views the private contractors and subcontractors in *White*—as "employees" of the State whose tax exemptions are intended to grow the market for charitable services or for locally produced ethanol through the use of its tax code.[275] Conversely, to say that *only* public entities benefited from the tax exemption makes the same framing error: private parties—those who bought the bonds—*did* benefit vis-á-vis those parties who bought private or out-of-state income-producing bonds. In short, any and all taxes and regulations, no matter how protectionist, are constitutional on this theory.

More fundamentally, the Court's market-participant cases *depend* on the ability to disaggregate (and distinguish) the participatory and regulatory activities of the state. In prior cases the Court certainly assumed that participation and regulation could be distinguished—indeed, *had* to be distinguished, if the market-participant exception was to be cabined.[276] The exception itself was born of a desire to per-

271 *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 85 (1984).

272 *See Camps Newfound/Owatonna*, 520 U.S. at 568.

273 *See* New Energy Co. v. Limbach, 486 U.S. 269, 271 (1988).

274 Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1814 (2008).

275 *See* White v. Mass. Council of Constr. Employers, 460 U.S. 204, 220–21 (1983).

276 *See, e.g., Camps Newfound/Owatonna*, 520 U.S. at 592–93 (stating that the Court's cases "stand for the proposition that, for purposes of analysis under the dormant Commerce Clause, a State acting in its proprietary capacity as a purchaser or seller may 'favor its own citizens over others'" (quoting Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976))); *Wunnicke*, 467 U.S. at 93 ("Our cases make clear that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities."); *White*, 460 U.S. at 208 (reading *Reeves* and *Alexandria Scrap* as standing "for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause"); Reeves, Inc. v. Stake, 447 U.S. 429, 436–37 (1980) (characterizing *Alexandria Scrap* as turning on the characterization of the State as a participant, not as a regulator; endorsing the distinction as "mak[ing] good sense

mit states freedom and autonomy to distribute certain benefits to their citizens without having to share with everyone.[277] The rough-and-ready rule the Court devised was one that permitted the strictures of the dormant Commerce Clause doctrine to be relaxed where the State was buying or selling on its own account.[278] But the Court was emphatic that wherever the shadowlands between regulation and participation lie, distribution of benefits via a state's tax code fell squarely on the "regulation" side of the boundary.[279]

C. The Implications of an Expanded Market-Participant Exception

The plurality's disregard of the Court's traditional presumption that the use of the taxing power is paradigmatically regulatory (not participatory) and, more generally, its conflation of market participation and regulation would mean that instead of a limited exception to the dormant Commerce Clause doctrine, the market-participant exception would likely be the doctrine's undoing.

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and sound law"; and arguing that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market").

277 As Larry Tribe put it, "Central heating is a marvelous thing, but it makes little sense in a house without walls." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1095 (3d ed. 2000).

278 *See New Energy Co.*, 486 U.S. at 277. Dan Coenen shares our concerns, writing that Justice Souter's argument posed three dangers to the market-participant exception:

> First, that analysis involves a deeply problematic recrafting of the basic rhetoric of market-participant analysis. Second, there exists a serious risk that this new rhetoric will reshape dormant Commerce Clause decisionmaking in undesirable ways. Third, an embrace of Justice Souter's methodology would at least inject new and far-reaching doctrinal uncertainties into this field of law.

Coenen, *The Supreme Court's Municipal Bond Decision*, *supra* note 8 (manuscript at 15–16).

279 *See New Energy Co.*, 486 U.S. at 277 (holding that simply because a discriminatory tax subsidy "has the purpose and effect of subsidizing a particular industry" it does not therefore become "a form of state participation in the free market"); *id.* at 278 ("Ohio's assessment and computation of its fuel sales tax, regardless of whether it produces a subsidy, cannot plausibly be analogized to the activity of a private purchaser."); *see also Davis*, 128 S. Ct. at 1829 (Kennedy, J., dissenting) ("Taxation is a quintessential act of regulation, not market participation."); *Camps Newfound/Owatonna*, 520 U.S. at 593 ("A tax exemption is not the sort of direct state involvement in the market that falls within the market-participation doctrine."); *id.* at 594 ("Maine's tax exemption—which sweeps to cover broad swathes of the nonprofit sector—must be viewed as action taken in the State's sovereign capacity rather than a proprietary decision to make an entry into all of the markets in which the exempted charities function.").

To illustrate the implications of the plurality's theory, imagine State A produces a type of widget from local materials. The widget competes against other states' widgets, and the materials from which State A's widget is produced make it slightly less desirable than those produced out of state. Assume further that State A imposes a wholesale tax on widget sales within the state. In order to stimulate sales of the local widgets, prop up the local widget industry, and improve its competitiveness vis-à-vis out-of-state producers, State A exempts its locally produced widgets from that tax. The out-of-state widget manufacturers sue, claiming a violation of the dormant Commerce Clause.

Under current law, a reviewing court would apply strict scrutiny to such a facially discriminatory exemption. The market-participant exemption would be unavailable because the law at issue is a tax exemption. That State A intended to benefit in-state producers rather than burden those from out of state is irrelevant under current doctrine, because protectionist means, as well as ends, are treated the same.

Were the plurality's theory to become the law, though, State A would have a colorable argument that the market-participant doctrine applies. Sure, a court might say, State A is *regulating* the widget market through the use of its tax code, but the *Davis* plurality's rejection of other Courts' categorical exclusion of "primeval governmental activities" like tax would not end the inquiry. The state could argue that its use of the taxing power was a form of participation in the market for locally produced widgets, since it used those exemptions to stimulate their production. Economic development, moreover, is surely a "traditional governmental function." And while private industries benefited from the exemption, there are public benefits as well—increased demand enables workers to keep their jobs and pay taxes, which enriches State A and indirectly benefits other citizens who depend on revenue from those taxes for myriad services.

These arguments are not new. State and local governments have made them before in an attempt to preserve protectionist laws. In *Bacchus Imports, Ltd. v. Dias*,[280] for example, a case with essentially the same facts as the opening hypothetical, Hawaii sought to defend a tax exemption for locally produced liquor and wine by claiming the exemption was intended to aid in-state producers, as opposed to discriminating against out-of-state producers.[281]

The Court conceded that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domes-

280 468 U.S. 263 (1984).

281 *See id.* at 271.

tic industry."[282] But it stressed that "the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal."[283] Thus, it was of no significance that Hawaii's *purpose* was to aid a particular industry: "the propriety of economic protectionism may not be allowed to hinge upon the State's—or this Court's—characterization of the industry as either 'thriving' or 'struggling.'"[284] Nor was the Court persuaded by Hawaii's argument that its intent was to aid its local producers:

> If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory. Virtually every discriminatory statute . . . can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. . . . [I]t could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other. Consequently, it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers.[285]

This strikes us as indisputably correct. But such sensible rules would be thrown to the winds by the *Davis* plurality's expansion of the market-participant doctrine. Thereafter courts would inevitably be thrown back on questions of motive, beneficiaries, and the regulatory or participatory nature of particular regulations. As was true of Hawaii's arguments in *Bacchus Imports*, such questions could easily make it all but impossible for plaintiffs to prevail in dormant Commerce Clause cases, since nearly every law could conceivably fall under the plurality's conception of the market-participant "exception."

* * * *

We take comfort in the fact that only two other members of the Court endorsed Justice Souter's market-participant revisionism. But given the capaciousness of the public-entities exception, described above, we fear that the dormant Commerce Clause is still in considerable peril. As we discuss in the next section, the Court's—and a majority of the Court at that—profound skepticism about the future of *Pike* balancing leaves us even more certain that the dormant Commerce

282 *Id.*
283 *Id.*
284 *Id.* at 273.
285 *Id.*

Clause doctrine will undergo significant alteration under the Roberts Court.

V. THE TWILIGHT OF *PIKE* BALANCING

The third notable feature of the *Davis* opinion is its skeptical attitude towards balancing. To be sure, balancing has always had its critics, notably Justices Scalia and Thomas. And balancing has not done all that much work during the Rehnquist Court. By our count, a majority of the Court has not invalidated a law using *Pike* balancing in over twenty years,[286] though it is not unheard of for lower courts to do so. As recently as last year, the Court—though in a rather desultory fashion—applied *Pike* balancing in *United Haulers*.[287] But *Davis* further diluted *United Haulers*' rather tepid application of *Pike* to the point of abnegation, calling into question the future viability of balancing as a feature of the dormant Commerce Clause doctrine.[288] Many see *Pike* as a useful check on burdensome, yet ostensibly nondiscriminatory regulations, especially of nationwide networks where the possibility exists of interstate actors being subjected to multiple, conflicting regulatory regimes. Donald Regan, moreover, argued that balancing in fact sought out subtle, well-disguised forms of protectionism.[289] Therefore, *Davis*'s near-disavowal of *Pike* balancing presents a third facet of the Court's dilution of the dormant Commerce Clause and its further embrace of the New Protectionism.

A. Davis *on Balancing*

The Court initially asserted that *Pike*'s applicability in cases like *Davis*—that is, where the antidiscrimination principle is held inappli-

286 The last case to do so appears to be *Edgar v. MITE Corp.*, 457 U.S. 624, 643–46 (1982).

287 *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345–47 (2007). Dan Coenen views the willingness of the Court to apply balancing in *United Haulers* as an ameliorating feature of what he calls the "state-self-promotion exception." Coenen, United Haulers, *supra* note 8 (manuscript at 27) ("The key point is that the state-self-promotion 'exception' provides an exception only to the antidiscrimination component of the dormant Commerce Clause analysis. It does not provide a wholesale exception that negates dormant Commerce Clause scrutiny altogether.").

288 *See* Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1818–20 (2008); *see also* Coenen, United Haulers, *supra* note 8 (manuscript at 28) ("But wait again! In *Davis*, the Court identified a new and potentially sweeping limit on the operation of *Pike* balancing analysis" by questioning the institutional capacity of courts to weigh benefits and burdens (footnote omitted)).

289 *See* Regan, *supra* note 5, at 1105–07.

cable—is an "an open question" noting that *Pike* is not usually applied when the market-participant exception is successfully invoked.[290] Assuming that it was[291] available, the Court then voiced doubts that, based on "the current record and scholarly material, . . . the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary for the Davises to satisfy a *Pike* burden."[292]

The majority quoted the Davises' brief on the alleged burdens to interstate commerce:

> "First, it harms out-of-state issuers (*i.e.*, other States and their subdivisions) by blocking their access to investment dollars in Kentucky. Second, it similarly harms out-of-state private sellers (*e.g.*, underwriters, individuals, and investment funds) who wish to sell their bonds in Kentucky. Third, it harms the national municipal bond market and its participants by distorting and impeding the free flow of capital. Fourth, it harms Kentucky investors by promoting risky, high-cost investment vehicles. Fifth, it harms the States by compelling them to enact competing discriminatory laws that decrease their net revenues."[293]

The Court then observed that "weighing or quantifying [the alleged harms] for a cost-benefit analysis would be a very subtle exercise."[294] Referring to possible benefits of the taxing scheme (e.g., facilitating the borrowing of small towns), the Court asked, "Is any court in a position to evaluate the advantage of the current market for bonds issued by the smaller municipalities, the ones with no ready access to any other bond market than single-state funds?"[295] A veritable cascade of rhetorical questions followed,[296] and concluded with this observation:

> What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty

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290 *See Davis*, 128 S. Ct. at 1817. Justice Souter might have added that *Pike* balancing is not a feature of the *Complete Auto* test, which assesses the validity of state and local taxes under the dormant Commerce Clause. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). While *Davis* does concern a tax *exemption*, the Court treats it more like a non-tax regulation. In any event, the antidiscrimination principle is a feature of the *Complete Auto* test.

291 Justice Souter added that "Kentucky ha[d] not argued that *Pike* is irrelevant." *Davis*, 128 S. Ct. at 1817.

292 *Id.*

293 *Id.* at 1817–18 (quoting Brief for Respondents at 9, *Davis*, 128 S. Ct. 1817 (No. 06-666)).

294 *Id.* at 1818.

295 *Id.*

296 *See id.*

> of the predictions that might be made in trying to come up with answers, *but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all.*[297]

Surely Justices Scalia and Thomas smiled broadly when they read those lines.

In the end, there was no question that the Davises didn't demonstrate the burdens "clearly exceeded" the local benefits. But the majority went further, suggesting that failure to satisfy the standard was almost beside the point: courts could neither make such assessments, nor really even ought to try.[298]

B. The End of Balancing? Four Readings of Davis

There are four possible ways in which to interpret the Court's moves in *United Haulers* and *Davis*. First and most minimally, one might view the repudiation of *Pike* in *Davis* as confined to the facts of that case. In the Court's view, it was difficult, if not impossible, to quantify and evaluate the Kentucky measure's costs to out-of-state municipal bond issuers and the corresponding benefits to local issuers.[299] Given those doubts, perhaps *Davis* presented too close a case on the merits for the Court to feel comfortable in invalidating municipal bond favoritism. On this view, *Pike* incorporates a neo-Thayeristic deference to state authority such that only in clear cases in which the costs vastly exceed the benefits of a measure will the Court intervene.[300] So viewed, the judicial review of nondiscriminatory measures is not illegitimate but rather is only broadly deferential to state authority. There is some support in *Davis* for this limited reading.[301] The problem with it, however, is that the Court also expressly pointed to "the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all" as required by *Pike*.[302] That is a condemnation of *Pike* that applies more broadly than just to municipal bond favoritism.

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297 *Id.* (emphasis added).

298 *See id.* at 1818–20.

299 *See id.* at 1818.

300 *Cf.* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 139–52 (1893) (arguing that courts should invalidate measures only when unconstitutionality is clear).

301 *See Davis*, 128 S. Ct. at 1817 ("[T]he current record and scholarly material convince us that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary for the Davises to satisfy a *Pike* burden *in this particular case*." (emphasis added)).

302 *Id.* at 1818.

Second, one might read *Davis* as rejecting balancing only in the context of state *taxes* but not state *regulations*. This reading has the benefit of reconciling the tension between *Davis*, which refused to apply *Pike* to a state tax, and *United Haulers*, which applied *Pike* to a local regulation. Moreover, there is some normative justification for rejecting *Pike* in such cases. Nondiscriminatory taxes are typically subject to judicial review under the *Complete Auto* test, which eschews balancing and instead focuses on whether the tax is jurisdictionally limited and fairly apportioned so as to avoid the double taxation of interstate commerce.

In contrast, because of the difficulty of assessing the costs and economic incidence of a given tax and because state and local governments have an undoubtedly legitimate interest in (and need for) revenue, the weight of which interest courts might be loathe to question, courts might be duly wary of balancing the costs and benefits of tax measures. Indeed, the Court has never expressly applied *Pike* to a state tax,[303] and the Court in *Davis* itself hinted that its condemnation of balancing was limited to taxes.[304] On this reading, nondiscriminatory state and local regulations are still appropriately subject to *Pike* balancing.[305] The problem with this view, however, is that, again, the Court did not expressly invoke it in rejecting *Pike*'s applicability to the Kentucky municipal bond tax. Indeed, the fact that the Court did not apply *Complete Auto* to the Kentucky municipal bond tax in *Davis*, as this interpretation would suggest, is some evidence that the Court's concern about the judicial review of nondiscriminatory taxes is more global still.[306]

Third, one might read *Davis* as rejecting the applicability of *Pike* to instances of public protectionism. Indeed, the Court in *Davis* hinted at this view, virtually inviting future challenges to *Pike* on this ground.[307] On this view, *Pike* remains applicable to nondiscriminatory regulations (and maybe taxes) that favor private entities. The problem with this approach, however, is that it is not clear why *Pike* should

303 Mark L. Mosley, *The Path out of the Quagmire: A Better Standard for Assessing State and Local Taxes Under the Negative Commerce Clause*, 58 TAX LAW. 729, 739 (2005).

304 *See Davis*, 128 S. Ct. at 1818–19.

305 One of us believes that this is the normatively correct approach to the review of nondiscriminatory taxes.

306 In one of our views, that is not fatal to this interpretation. The litigants had not sought such review, and, more importantly, the Kentucky measure so clearly satisfied *Complete Auto* that there was no point in the Court expressly subjecting the measure to such review.

307 *See Davis*, 128 S. Ct. at 1817 (calling the applicability an "open question" and noting that market-participant cases do not engage in *Pike* analysis once the exception is deemed to apply).

be jettisoned only with respect to public protectionism. If the underlying concern (as the Court has indicated) is that balancing embroils the judiciary in tasks for which it is institutionally ill suited or illegitimate to perform, that concern surely applies across the board to the judicial review of all state and local measures under *Pike*. Stated differently, there is no a priori justification for drawing the line where the Court does.

Fourth and most globally, one might read *Davis* as endorsing the wholesale repudiation of the judicial review of nondiscriminatory measures. In his concurrence, Justice Scalia endorsed this view and criticized the majority for refusing to abjure balancing in all cases as a pusillanimous half-measure. "The problem is," he wrote, "that courts are less well suited than Congress to perform this kind of balancing in every case. The burdens and the benefits are always incommensurate, and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them."[308] Moreover, despite Justice Scalia's charge, the Court did not explicitly disagree with him or otherwise make clear that balancing was appropriate in other types of cases.

On this view, *Davis* marks the deathknell of *Pike* balancing. To be sure, it has been a long time since a majority of the Supreme Court has invalidated a state or local law as violating *Pike* balancing.[309] Even when the Court was willing to wield *Pike*, there were credible claims made that the Court was really policing discrimination and protectionism, as opposed to balancing burdens and benefits.[310] While lower courts occasionally strike down laws whose burdens on interstate commerce judges deem excessive relative to their benefits, these are the exceptions that prove the rule that laws almost always survive. Among these cases, there are a few whose outcomes seem driven by lingering suspicion that the laws' facial neutrality masks protectionist purposes, effects, or both.[311] In other cases, laws invalidated under

308 *Id.* at 1821 (Scalia, J., concurring in part).

309 *See supra* note 286 and accompanying text.

310 *See* Regan, *supra* note 5, at 1212–20.

311 *See, e.g.*, Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc., 401 F.3d 560, 570–74 (4th Cir. 2005) (striking down provision of Virginia franchise law); PSINET, Inc. v. Chapman, 362 F.3d 227, 239–47 (4th Cir. 2004) (striking down Virginia Internet statute); Union Pac. R.R. Co. v. Cal. Pub. Util. Comm'n, 346 F.3d 851, 871 (9th Cir. 2003) (holding that California train safety rules on interstate commerce are a "clearly excessive" burden when compared to local benefits); Fla. Transp. Serv., Inc. v. Miami-Dade County, 343 F. Supp. 2d 1315, 1333–34 (S.D. Fla. 2008) (finding that stevedore permitting scheme in operation protected entrenched groups of stevedores and prevented award of permits to new companies and thus imposed an "undue burden" on interstate commerce).

the antidiscrimination principle are also found to fail *Pike* balancing—a belts and suspenders approach, presumably.[312] Given this reality, the debate regarding the continuing vitality of *Pike* might be viewed as much ado about nothing.

C. *Against Premature Abandonment of Balancing*

And yet, to repudiate *Pike* is to jettison an element of the dormant Commerce Clause with deep roots. The *Pike* balancing test is an outgrowth of the *Cooley* Court's attempt to separate permissible from impermissible state laws regulating interstate commerce, which gave rise to the distinction between "national" and "local" subjects.[313] Unable to articulate criteria for distinguishing between those subjects, the Court employed "direct" and "indirect" effects as proxies.[314] Justice Stone urged the Court to replace those conclusory labels with a frank assessment of benefits and burdens, which the Court eventually did.[315] Since then, the Court has applied *Pike* in numerous cases. Indeed, the Court itself applied *Pike* just two years ago in *United Haulers*.[316] Consequently, at the very least, stare decisis demands that the Court bear its burden to show either that it was a mistake to adopt balancing in the first place, that balancing in the dormant Commerce Clause has become unworkable, or both.[317]

As a historical matter, the Court was surely not wrong to adopt a balancing test when it did so in the 1930s. At the time, balancing was clearly superior to the indeterminate-to-the-point-of-capricious direct/indirect test, which preceded it. As its proponents argued, balancing introduced some transparency into what the judges and commenta-

312 *See, e.g.*, Island Silver & Spice, Inc. v. Islamorada, 475 F. Supp. 2d 1281, 1292–94 (S.D. Fla. 2007) (concluding that formula retail ordinance failed *Pike* balancing as well as heightened scrutiny).

313 *See* Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851) (distinguishing national and local subjects).

314 *See* Denning, *supra* note 4, at 437–40 (discussing the rise of the direct/indirect test); *see also* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1146–48 (2000) (discussing Chief Justice Stone's criticism of the direct/indirect test as "'too mechanical'" (quoting Parker v. Brown, 317 U.S. 341, 362 (1943))).

315 *See* Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting); *see also* So. Pac. Co. v. Arizona, 325 U.S. 761, 783–84 (1945) (adopting balancing); S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 189–90 (1938) (using the terms "burden" and "benefit").

316 *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346–47 (2007).

317 *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (joint op.) (discussing factors in deciding whether to overrule precedent).

tors of the time saw as the policy choices judges inevitably made. Moreover, balancing tests are still the stock-in-trade of constitutional courts around the world, even as they have shrunk in importance in the United States. As for being unworkable, it is not clear that the Court is required, under *Pike*, to balance "incommensurables" any more than when, for example, it engages in "hard look" review under the Administrative Procedure Act[318] or when it must balance the rights of individuals generally against the interests of society and its orderly governance.[319]

In sum, whether balancing is normatively justified as a matter of first principles,[320] the repudiation of *Pike* would have a substantial impact on the judicial review of nondiscriminatory state and local regulations under the dormant Commerce Clause. Coupled with the Court's public-entities exception, the elimination of *Pike* balancing would leave instances of public protectionism entirely exempt from all judicial review under the Commerce Clause. As a consequence, the remedies for public protectionism would lie predominantly, if not entirely, in the political process. That would truly mark a revolution—and a bad one at that—in the constitutional protection of the American common market.

CONCLUSION

In our view, the Court's embrace of the New Protectionism is a profoundly misguided and ultimately dangerous development. As the Court sadly failed to appreciate, protectionism is protectionism, regardless of whether the intended beneficiary is a private enterprise or the government itself.

For that reason, we urge the Court to reappraise its embrace of public protectionism and make clear—as it had for a century and a half prior to *United Haulers*—that the Commerce Clause forbids protectionist taxes and regulations. At a bare minimum, the Court should confine *United Haulers* and *Davis* to their facts and announce that it will not extend its endorsement of public protectionism beyond the particular contexts of those cases. Indeed, the *Davis* opinion, which at one point emphasizes the unique circumstances confronting

318 *See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 49–52 (1983).

319 *See, e.g.*, Herring v. United States, 129 S. Ct. 695, 700–03 (2009) (balancing need for criminal justice enforcement against individual's Fourth Amendment right to be free from unreasonable searches).

320 *Compare* Denning, *supra* note 4, at 453–58 (arguing that *Pike* balancing should be abandoned), *with* NORMAN R. WILLIAMS, THE AMERICAN COMMON MARKET 42–43 (forthcoming 2011) (manuscript on file with author) (arguing for retaining *Pike*).

states in the municipal bond market,[321] sets the stage for such a limiting doctrinal move. While the Court would undoubtedly draw criticism for acting in an unprincipled fashion were it to cabin its endorsement of public protectionism in this fashion, the Court has limited the precedential scope of its rulings in other contexts,[322] and the cost of acting in an allegedly unprincipled fashion is far less than the cost to the nation of allowing public protectionism to run rampant.

Failing that, we urge Congress to take the Court up on its invitation and enact legislation to ban public protectionism. As noted above, there are significant constitutional and practical political obstacles that make it difficult for Congress to respond to particular state or local laws (which is why we would prefer for the Court to clean up its own mess). Nevertheless, Congress has plenary authority under the Constitution to regulate interstate commerce, spend federal funds, and impose income taxes. With the stakes so great, Congress should use all the available tools at its disposal to prevent the proliferation of public protectionism at the state and local level.

At the broadest, Congress could forbid the manufacture or sale of goods and services in interstate commerce by state and local governments where such governments have adopted protectionist taxes or regulations favoring such goods or services.[323] This would, in essence, restore the status quo ante, requiring as a statutory matter the judiciary on a case-by-case basis to determine whether a particular state tax or regulation is protectionist. More narrowly, Congress could make the receipt of federal financial grants to states contingent on the states repeal of any protectionist taxes or regulations.[324] Finally, to directly address *Davis*, Congress could remove the federal tax exemption for municipal bonds issued by states that exempt their own bonds but not other states' bonds from state income taxation. There are other legislative responses available.

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321 *See* Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1815–17 (2008).

322 *See, e.g.*, Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."); *see also* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (limiting endorsement of affirmative action in education to twenty-five years from decision).

323 *Cf.* United States v. Darby, 312 U.S. 100, 124–26 (1941) (upholding Fair Labor Standards Act, which prohibited manufacture of goods for interstate commerce in violation of act). Our reference in the text to "protectionist taxes or regulations" serves to exempt the market-participant exception from congressional prohibition.

324 *Cf.* South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (upholding such conditional grants to states).

The exact form of the response is less important than that there be a response. The Supreme Court's embrace of public protectionism threatens the integrity of the American common market and does so at a particularly precarious time economically. Sadly, the "New Protectionism" is very much like the "Old Protectionism"—the motives behind it may be understandable, but its threat to the national economy, especially at this time of severe financial distress, is profoundly ominous. If the Court does not act to correct its error, Congress must.