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**Municipal Bonds, State Income
Taxes, and Interstate Commerce:
A Legal Perspective on *Davis v.
Kentucky Dep't of Revenue***

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Constitutional Overview

- Specific Limitations on State Taxation
- Implied Limitations on State Taxation
- The Commerce Clause
 - The "Affirmative" Commerce Clause
 - The "Dormant" or "Negative" Commerce Clause



Dormant Commerce Clause Principles

- Substantial Nexus
- Fair Apportionment
- Nondiscrimination
- Fair Relation Between Tax and Services Provided by State



Nondiscrimination Principles

- Residence-Based Discrimination
 - International Analogue (Bilateral Tax Treaties)
- Product-Based Discrimination
 - International Analogue (World Trade Organization Disciplines)
- Production-Based Discrimination
 - International Analogue (IRC § 199)



Related Commerce Clause Doctrines

- “Virtually Per Se Rule” Against Facial Discrimination
- Discriminatory Purpose or Effect
- No “De Minimis” Concept of Discrimination
- Regulatory Cases: Balancing Tests
 - Least Discriminatory Alternative
- “Market Participant” Exception



Application of Principles to *Davis*

- Facial Discrimination
- Favors In-State “Product” (Capital) Over Out-of-State Product
- Favors In-State Borrower Over Out-of-State Borrowers
- Discrimination in Effect (“Balkanization” of Markets)
- Not Least Discriminatory Alternative
- Not “Market Participant”
 - But see *Shaper v. Tracy*, 647 N.E.2d 550 (Ohio App. 1994)



Private Sector Case Law

- *Dominion National Bank v. Olsen*
 - 771 F.2d 108 (6th Cir. 1985)
 - Exemption of interest from CDs issued by in-state but not out-of-state financial institutions violates Commerce Clause
- *Smith v. New Hampshire*
 - 692 A.2d 436 (N.H. 1997)
 - Exemption of interest and dividends received from in-state but not out-of-state financial institutions violates Commerce Clause



United Haulers

- *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*
 - 127 S. Ct. 1786 (2007)
- Monopoly for County Trash Processing Facility
- "Laws favoring local government ... may be directed toward any number of legitimate goals unrelated to protectionism"
- Ordinance "treated in-state private business interests exactly the same as out-of-state ones"
- "Any notion of discrimination assumes a comparison of substantially similar entities"
- No Discrimination Against Interstate Commerce Within Meaning of Dormant Commerce Clause



Whither *Davis* in Light of *United Haulers*?

- Doctrinal Issues
- Nondoctrinal Issues
 - Roberts Court and the Commerce Clause
 - Shadows of *Cuno*
 - Settled Expectations
 - Consequences of Affirmance (Retroactivity and Refunds)
 - State Sovereignty Concerns



CONCLUSION

