we uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer . . . .” [1153]

In *Department of Revenue of Kentucky v. Davis*,[1154] the Court considered a challenge to the long-standing state practice of issuing bonds for public purposes while exempting interest on the bonds from state taxation.[1155] In *Davis*, a challenge was brought against Kentucky for such a tax exemption because it applied only to government bonds that Kentucky issued, and not to government bonds issued by other states. The Court, however, recognizing the long pedigree of such taxation schemes, applied the logic of *United Haulers Ass'n, Inc.*, noting that the issuance of debt securities to pay for public projects is a “quintessentially public function,” and that Kentucky's differential tax scheme should not be treated like one that discriminated between privately issued bonds.[1156] In what may portend a significant change in dormant commerce clause doctrine, however, the Court declined to evaluate the governmental benefits of Kentucky's tax scheme versus the economic burdens it imposed, holding that, at least in this instance, the “Judicial Branch is not institutionally suited to draw reliable conclusions.” [1157]

Drawing the line between regulations that are facially discriminatory and regulations that necessitate balancing is not an easy task. Not every claim of unconstitutional protectionism has been accepted. Thus, in *Minnesota v. Clover Leaf Creamery Co.*,[1158] the Court upheld a state law banning the retail sale of milk products in plas-

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[1153] 550 U.S. at 334. The Commerce Clause test referred to is the test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). “Under the *Pike* test, we will uphold a nondiscriminatory statute . . . ‘unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.’” Id. at 1797 (quoting *Pike*, 397 U.S. at 142). The fact that a state is seeking to protect itself from economic or other difficulties, is not, by itself, sufficient to justify barriers to interstate commerce. Edwards v. California, 314 U.S. 160 (1941) (striking down California effort to bar “Okies”—persons fleeing the Great Plains dust bowl during the Depression). *Cf.* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (without tying it to any particular provision of the Constitution, the Court finds a protected right of interstate movement). The right of travel is now an aspect of equal protection jurisprudence.

[1154] 128 S. Ct. 1801 (2008).

[1155] This exemption from state taxes is also generally made available to bonds issued by local governmental entities within a state.

[1156] 128 S. Ct. at 1810–11. The Court noted that “[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.” Id. at 1811. Three members of the Court would have also found this taxation scheme constitutional under the “market participant” doctrine, despite the argument that the state, in this instance, was acting as a market regulator, not as a market participant. Id. at 1812–14 (Justice Souter, joined by Justices Stevens and Breyer).

[1157] 128 S. Ct. at 1817.

[1158] 449 U.S. 456, 470–74 (1981).