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Sue Ann Mota

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# **DAIMLERCHRYSLER V. CUNO — PLAINTIFFS LACK STANDING TO CHALLENGE STATE FRANCHISE TAX CREDIT IN FEDERAL COURT, ACCORDING TO THE SUPREME COURT**

SUE ANN MOTA\*

## I. INTRODUCTION

“The judicial power shall extend to all Cases . . . [and] Controversies.”<sup>1</sup> “The Congress shall have the Power . . . to regulate Commerce . . . among the several States.”<sup>2</sup>

In May 2006, the U.S. Supreme Court in *DaimlerChrysler Corp. v. Cuno*<sup>3</sup> unanimously held that plaintiffs did not establish the requisite standing to challenge Ohio’s franchise tax credit in the federal courts. The plaintiffs included taxpaying and displaced residents of Toledo, Ohio, as well as residents of Michigan.<sup>4</sup> The Court vacated in part and remanded the decision of the Court of Appeals for the Sixth Circuit,<sup>5</sup> which held that Ohio’s investment tax credits violated the Commerce Clause.<sup>6</sup> This case is very important in its holding on the standing issue, but the important issue of state incentives to obtain and keep business in the state remains.

This article will examine the issue of standing in federal court by taxpayers challenging governmental action. The article will then address the *DaimlerChrysler Corp. v. Cuno*<sup>7</sup> case and will conclude with thoughts on changing or challenging these state tax incentives to companies.

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\* Sue Ann Mota, Professor of Legal Studies, Bowling State University, J.D., University of Toledo College of Law, Order of the Coif; M.A. and B.A., Bowling Green State University.

1. U.S. CONST. art III, § 2, cl. 1.
2. U.S. CONST. art. I, § 8, cl. 3.
3. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006), *cert. denied*, 126 S. Ct. 2286 (2006).
4. *Id.*
5. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004).
6. *Id.* at 746.
7. *DaimlerChrysler Corp.*, 126 S. Ct. 1854 (2006).

## II. TAXPAYER STANDING TO CHALLENGE STATE TAX CREDIT IN FEDERAL COURT

The issue of taxpayer standing to bring suit in federal court is an important preliminary issue before the merits of any such case are reached. This section will chronologically, briefly, and more exhaustively examine selected Supreme Court jurisprudence on the issue as background to the 2006 unanimous decision by the Court in *Daimler-Chrysler Corp. v. Cuno*.<sup>8</sup>

The Supreme Court in 1923, in *Frothingham v. Mellon*,<sup>9</sup> held that a suit by a federal taxpayer to enjoin the enforcement of the Congressionally enacted Maternity Act,<sup>10</sup> which offered financial aid to states to supplement their own efforts to reduce maternal and infant mortality and to protect the health of mothers and infants, had to be dismissed for lack of jurisdiction.<sup>11</sup> The taxpayer had neither an “interest in the subject-matter” nor any “injury inflicted or threatened,” which enabled her to sue.<sup>12</sup> Thus, the suit was dismissed without considering the merits of the constitutional question.<sup>13</sup>

The U.S. Supreme Court in 1952, in *Doremus v. Board of Education of the Borough of Hawthorne*, held similarly, in a case where a parent and a taxpayer challenged a state statute.<sup>14</sup> A student and parents challenged a New Jersey statute<sup>15</sup> requiring the reading of five verses of the Old Testament at the start of each day in the public schools under the First Amendment.<sup>16</sup> The New Jersey Supreme Court held in a declaratory judgment that the act did not violate the Constitution.<sup>17</sup> On appeal to the Supreme Court, the Court granted the motion to dismiss the appeal<sup>18</sup> because the Court’s jurisdiction is limited to “Cases [or] Controversies.”<sup>19</sup> Citing *Massachusetts v. Mellon*,<sup>20</sup> the

8. *Id.*

9. *Frothingham v. Mellon*, 262 U.S. 447 (1923).

10. 42 U.S.C.S. §§ 161-163 (2006) (repealed 1927).

11. *Frothingham*, 262 U.S. at 480. The Commonwealth of Massachusetts also sued Mellon, the Secretary of the Treasury, along with the Chief of the Children’s Bureau of the Department of Labor, the Surgeon General, and the U.S. Commissioner of Education. The last three defendants made up the Board of Maternity and Infant Hygiene under the Maternity Act.

12. *Id.*

13. *Id.* The Court held that the suit brought by the Commonwealth of Massachusetts against Mellon also failed to present a controversy, either on the states behalf or as a representative of its citizens. *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923).

14. *Doremus v. Bd. of Educ. of the Borough of Hawthorne*, 342 U.S. 429 (1952).

15. N.J. Rev. Stat., 1937, 18:14-77, cited in *Doremus*, 342 U.S. at 430.

16. *Doremus*, 342 U.S. at 430.

17. *Doremus v. Bd. of Educ. of the Borough of Hawthorne*, 75 A.2d 880, 881-82 (N.J. 1950).

18. *Doremus*, 342 U.S. at 433.

19. U.S. CONST. art III, § 2, cl. 1.

20. *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

Court stated that what was held about a federal statute is equally true when a state act is challenged.<sup>21</sup>

In 1968, in *Flast v. Cohen*,<sup>22</sup> the Court carved out an exception to the bar to taxpayer suits of *Frothingham v. Mellon*.<sup>23</sup> Flast and other taxpayers filed suit in federal district court challenging the expenditure of federal funds under the federal Elementary and Secondary Education Act of 1965.<sup>24</sup> The taxpayers alleged that the expenditure violated the Establishment and Free Exercise Clauses of the First Amendment.<sup>25</sup> While the three-judge district court held that the plaintiffs' status as federal taxpayers did not give them standing to sue,<sup>26</sup> on direct appeal to the Supreme Court,<sup>27</sup> the Court held that the plaintiffs did have standing to sue as the Establishment Clause specifically limits the taxing and spending power conferred by Article I, Clause 8.<sup>28</sup> The Court left the issue of other specific limitations to future cases.<sup>29</sup>

The Court in 1975, in *Simon v. Eastern Kentucky Welfare Rights Organization*,<sup>30</sup> held that plaintiffs, organizations composed of indigent people, as well as indigent people individually, lacked standing to challenge a revenue ruling<sup>31</sup> that allowed favorable tax-exempt status to nonprofit hospitals that offered only emergency room services to indigents,<sup>32</sup> thus "encouraging" hospitals to deny further services to

21. *Doremus*, 342 U.S. at 433. The student's case is moot, since she graduated. The parents who are taxpayers did not show the necessary direct and particular financial interest necessary to bring the case. Three dissenters would have moved to the merits, and would have denied a case only to enjoin a federal law. Justice Douglas stated, "It is odd indeed to hold there is no case or controversy within the meaning of Article III, § 2 of the Constitution." *Id.* at 436 (Douglas J., dissenting).

22. *Flast v. Cohen*, 392 U.S. 83 (1968), *rev'd by Flast v. Gardner*, 271 Supp. 1 (S.D.N.Y. 1967).

23. *See Frothingham v. Mellon*, 262 U.S. 447 (1923).

24. *See Flast*, 392 U.S. at 85, (citing 20 U.S.C. §§ 241(a), 821 (1962) (repealed 1978)).

25. *Id.*

26. *Flast v. Gardner*, 271 F. Supp. 1, 2 (S.D.N.Y. 1967), *rev'd sub nom. Flast v. Cohen*, 392 U.S. 83 (1968).

27. 28 U.S.C. §1253 (2006) ("Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying after notice and hearing an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by district court of three judges."), cited in *Flast*, 392 U.S. at 88.

28. *Flast*, 392 U.S. at 105-06. The Court expressed no view on the merits of the case.

29. *Id.* at 105.

30. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1975). The district court granted summary judgment for the plaintiffs. *E. Ky. Welfare Rights Org. v. Shultz*, 370 F. Supp. 325, 327 (D.D.C. 1973). The Court of Appeals for the District of Columbia reversed on the merits. *Simon v. E. Ky. Welfare Rights Org.*, 506 F.2d 1278 (D.C. Cir. 1974).

31. The issuance of Revenue Ruling 69-545 led to the filing of the suit. *Simon*, 426 U.S. at 32. The Internal Revenue Code gives advantageous tax treatment to corporations organized and operated for charitable purposes. 26 U.S.C.S. § 501(c)(3) (2006).

32. *Simon*, 426 U.S. at 28.

indigents.<sup>33</sup> Justice Stewart, in his concurring opinion, stated that he could not imagine a case, outside the First Amendment, where a person whose tax liability was not affected could have standing to litigate the federal tax liability of someone else.<sup>34</sup>

In a First Amendment Establishment Clause challenge, the Court in 1982, in *Valley Forge Christian College v. Americans United for Separation of Church and State*,<sup>35</sup> held that the plaintiffs lacked standing to sue as taxpayers because the challenged act fell under Congress's power under the Property Clause of the U.S. Constitution and not the Taxing and Spending Clause.<sup>36</sup> The plaintiffs, Americans United for Separation of Church and State, challenged the transfer of surplus property, a seventy-seven acre parcel of land that had been part of a former military hospital to Valley Forge Christian College.<sup>37</sup> The transfer occurred pursuant to the Federal Property and Administrative Services Act,<sup>38</sup> which allowed the transfer of surplus property to private or public entities.<sup>39</sup> Citing *Frothingham*,<sup>40</sup> *Doremus*,<sup>41</sup> and *Flast*,<sup>42</sup> the Court stated that the test for taxpayer standing was not fulfilled because the transfer was not a Congressional action but rather an agency decision to dispose of surplus property, and the transfer was not an exercise of authority under the Taxing and Spending Clause.<sup>43</sup>

In 1984, the Court held that parents of black public school children in a nationwide class action alleging that the Internal Revenue Service had not adopted sufficient standards and procedures to deny tax-exempt status to racially discriminatory private schools lacked standing to bring the suit in *Allen v. Wright*.<sup>44</sup> The plaintiffs alleged two injuries. First, they claimed they were harmed because the government granted financial aid to racially segregated private educational institu-

33. *Id.* at 33.

34. *Id.* at 46 (Stewart, J., concurring).

35. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

36. *Id.* at 465.

37. The college was a nonprofit educational institution operated by the Assemblies of God. *Valley Forge Christian Coll.*, 454 U.S. at 468.

38. 40 U.S.C. § 484 (1976 & Supp. III) (current version at 40 U.S.C.S. §550 (2006)), cited in *Valley Forge Christian Coll.*, 454 U.S. at 466.

39. *Valley Forge Christian Coll.*, 454 U.S. at 466-67.

40. *Frothingham v. Mellon*, 262 U.S. 447 (1923).

41. *Doremus v. Bd. of Educ. of the Borough of Hawthorne*, 342 U.S. 429 (1952).

42. *Flast v. Cohen*, 392 U.S. 83 (1968).

43. *Valley Forge Christian Coll.*, 454 U.S. at 477-80.

44. *Allen v. Wright*, 468 U.S. 737, 739-40 (1984). The dissent believed that the plaintiffs did have standing as they alleged an injury in fact which was traceable to the conduct they claimed was unlawful and the separation of powers principle does not create a jurisdictional obstacle to the consideration on the merits. *Id.* at 783 (Stevens, J. dissenting).

tions.<sup>45</sup> Second, they alleged this governmental action impaired their ability to desegregate public schools.<sup>46</sup> Because Article III limits the federal courts to adjudication “cases and controversies,”<sup>47</sup> the Court held that the alleged injury was not “judicially cognizable.”<sup>48</sup>

In *Bowen v. Kendrick* in 1988,<sup>49</sup> the Court held that the Adolescent Family Life Act<sup>50</sup> did not violate the Establishment Clause on the Act’s face, but the case was remanded on the constitutionality of the Act’s validity as applied.<sup>51</sup> In *Kendrick*, the Court found it undisputed that a group of federal taxpayers had standing to challenge the Act on its face, as the Act is a program of disbursement of funds for services and research in the area of premarital adolescent sexual relations and pregnancy, and this disbursement is pursuant to Congress’s taxing and spending powers.<sup>52</sup> Thus, there is a sufficient nexus between the taxpayer’s standing as a taxpayer and Congress’s exercise of the taxing and spending power, on the Establishment Clause challenge.

In *Lujan v. Defenders of Wildlife*,<sup>53</sup> in 1992, the Court held that environmental organizations lacked the requisite standing to challenge a regulation interpreting the Endangered Species Act.<sup>54</sup> The only issue reached by the Court was whether the wildlife conservation group and other environmental groups had standing in their action seeking a declaratory judgment that the regulation was in error and an injunction requiring the promulgation for a new regulation.<sup>55</sup> The party invoking federal jurisdiction must establish standing including the following three elements: the plaintiff must have suffered an injury-in-fact of a legally protected interest that is both concrete and particularized, as well as actual and imminent; there must be a causal connection between the injury and the conduct complained of and not the result of some independent action of a third party; and it must be likely that the injury will be redressed by a favorable decision.<sup>56</sup> The Court held

45. *Id.* at 752.

46. *Id.* at 752-53. The parents did not allege that their children had been discriminatorily excluded from the private schools. *Id.* at 746.

47. *Id.* at 750, (citing U.S. CONST. art 3).

48. *Id.* at 755.

49. *Bowens v. Kendrick*, 487 U.S. 589 (1988).

50. 42 U.S.C. §3002 (1982 ed. and Supp. IV), cited in *Bowens*, 487 U.S. at 593.

51. *Bowens*, 487 U.S. at 589.

52. *Bowens*, 487 U.S. at 619-20. The Court did not consider the standing of other plaintiffs, members of the clergy and the American Jewish Congress. *Id.* at 620 n.15. The standing of the taxpayer appellars to challenge the Act as applied was disputed; the Court remanded the case to determine the merits of this issue. *Id.* at 621.

53. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

54. 50 C.F.R. § 402.01 (2006) (interpreting 16 U.S.C. §1536(a)(2) (2006)). The regulation limits the applicability of the statute to actions only involving the U.S. or on the high seas.

55. *Lujan*, 504 U.S. at 558.

56. *Id.* at 560-61.

that there was no standing because there was no showing of injury-in-fact<sup>57</sup> as redress ability.<sup>58</sup>

The court in 2004, in *Elk Grove Unified School District v. Newdow*,<sup>59</sup> rejected the standing of a student's father to challenge the words "under God" in the pledge of allegiance recited daily in the public school.<sup>60</sup> Newdow claimed standing to challenge this under the First Amendment's Establishment and Religious Clauses on his own behalf, as well as being the next friend of his daughter.<sup>61</sup> Citing *Allen v. Wright*,<sup>62</sup> the Court stated that Newdow lacked prudential standing, which prohibits a litigant from raising another person's right.<sup>63</sup>

This background of Supreme Court jurisprudence on standing set the stage for the Court's 2006 decision in *DaimlerChrysler Corp. v. Cuno*.<sup>64</sup>

### III. DAIMLERCHRYSLER V. CUNO

According to Chief Justice Roberts's opinion in *DaimlerChrysler v. Cuno*, Jeeps were first mass-produced in 1941 in Toledo, Ohio for the U.S. Army.<sup>65</sup> In 1998, defendants, City of Toledo and two local school districts, offered DaimlerChrysler, the current Jeep manufacturer, \$280 million in tax benefits to keep it in Toledo, Ohio<sup>66</sup> and to expand its Jeep assembly plant. Ohio has a franchise tax<sup>67</sup> that allows taxpayers that purchase new manufacturing machinery and equipment and

57. *Id.* at 563. Affidavits of members showing an intent to return to foreign project sites at which time they will presumably be denied the opportunity to observe endangered species is not imminent injury. Similarly, other "novel" standing theories also fail. The alleged "ecosystem nexus," whereby anyone who uses any part of an ecosystem has standing, even if the activity is distant, is not sufficient to establish standing, nor is the "animal nexus," whereby anyone who has an interest in seeing endangered animals, anywhere on the globe, has standing. *Id.* at 565.

58. *Lujan*, 504 U.S. at 568. The agencies funding the projects were not parties to the case.

59. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

60. *Newdow*, 542 U.S. at 17. See generally, Katherine A. Meng, Note, *In Light of Elk Grove Unified School District v. Newdow, Where Does the Court Stand on Standing?*, 14 WIDENER L.J. 1021, 1021-22 (2005).

61. *Newdow*, 542 U.S. at 1.

62. *Allen v. Wright*, 468 U.S. 737 (1984).

63. *Newdow*, 542 U.S. at 2. California law did vest the father with the right to influence his child's religious upbringing, but nothing impaired that right. California law did not give Newdow the right to sue as next friend and other grounds asserted for standing, such as that the father sometimes did attend and would attend classes with his child or would consider teaching at the public school, did not respond to the prudential concerns.

64. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006), *cert. denied*, 126 S. Ct. 2286 (2006).

65. *Id.* at 1859.

66. *Cuno v. DaimlerChrysler*, 154 F. Supp. 2d 1196, 1198 (N.D. Ohio 2001), *cert. granted*, 126 S. Ct. 36 (2005).

67. *DaimlerChrysler*, 126 S. Ct. at 1859 (citing 1854 OHIO REV CODE ANN. § 5733.01 (2005)). Ohio is phasing out the franchise tax. *DaimlerChrysler*, 126 S. Ct. at 1859 n.1.

install it in Ohio to receive a credit against that franchise tax.<sup>68</sup> Municipalities may offer partial property tax waivers to businesses that invest in qualifying areas,<sup>69</sup> and this may become a complete property tax waiver with consent from local school districts.<sup>70</sup>

Eighteen plaintiffs sued to challenge the tax credits and exemptions under the Commerce Clause.<sup>71</sup> The plaintiffs included taxpayers in Toledo who claimed injury because the tax incentives diminished city and state tax funds, creating a disproportionate burden on them.<sup>72</sup> Other plaintiffs included residents of Michigan who claimed injury because DaimlerChrysler would have expanded in Michigan if the Ohio tax scheme were not offered.<sup>73</sup> Other plaintiffs were residents of Toledo who claimed injury because they were displaced by the Jeep plant expansion.<sup>74</sup> Defendants included the municipal defendants, above, then and current Toledo Mayor Carleton Finkbeiner, and the State of Ohio and Ohio officials.<sup>75</sup>

The plaintiffs originally filed suit in state court; the defendants removed the case to federal court.<sup>76</sup> The plaintiffs moved to remand the case to state court, but this was denied by the district court.<sup>77</sup> The district court granted the defendants' motions to dismiss.<sup>78</sup> The district court stated that despite the plaintiffs' clever arguments, the municipal property tax exemption and state investment tax credit did not

68. OHIO REV. CODE ANN §5733.33 (2004), which states in pertinent part: "A nonrefundable credit is allowed against the tax imposed by Section 5733.06 of the Revised Code for a taxpayer that purchases new manufacturing machinery and equipment during the qualifying period, provided that the new manufacturing machinery and equipment are installed in this state no later than December 31, 2016." The State of Ohio has discontinued offering new credits against the franchise tax. *Cuno*, 126 S. Ct. at 1859 n.1. See generally, Kirk J. Stark & Daniel J. Wilson, *What Do We Know About the Interstate Economic Effects of State Tax Incentives?*, 4 GEO. J.L. & PUB. POL'Y 133 (2006); Matt Kitchen, Comment, *The Ohio Investment Tax Credit Impermissible Burden or Necessary Benefit?* *Cuno v. DaimlerChrysler, Inc.*, 73 U. CIN. L. REV. 1685 (2005).

69. OHIO REV. CODE ANN § 5709.62(C)(1)(a) (2005). See generally, Edward A. Zelinsky, *Cuno: The Property Tax Issue*, 4 GEO. J.L. & PUB. POL'Y 119 (2006).

70. OHIO REV. CODE ANN § 5709.62(D)(1).

71. U.S. CONST. art I, § 8, cl. 3. The plaintiffs also claimed a violation of the Equal Protection Clause of the Ohio Constitution. OHIO CONST. art. I, §2. See *Cuno v. DaimlerChrysler*, 386 F.3d 738, 741 (6th Cir. 2004).

72. *DaimlerChrysler*, 126 S. Ct. at 1859. *Cuno* and other plaintiffs were represented by Associate Professor Peter Enrich, author of *Saving States from Themselves: Commerce Clause Constraints and State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996).

73. *DaimlerChrysler*, 126 S. Ct. at 1859 n.2.

74. *Id.*

75. *Cuno v. DaimlerChrysler*, 154 F. Supp. 2d 1196, 1198 n.1 (N.D. Ohio 2001), cert. granted, 126 S. Ct. 36 (2005).

76. *Id.* at 1198. The defendants alleged federal question jurisdiction under 28 U.S.C. § 1441.

77. *Id.* The plaintiffs stated that they had substantial doubts about their standing in federal court. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1854 (2006). The district court held that the taxpayer plaintiffs had municipal taxpayer standing. *DaimlerChrysler*, 126 S. Ct. 1854 (citing *Massachusetts v. Mellon*, 262 U.S. 447 (1923)).

78. *Cuno*, 154 F. Supp. 2d at 1204.

discriminate against interstate commerce and thus did not violate the Commerce Clause.<sup>79</sup>

On appeal, the Court of Appeals for the Sixth Circuit upheld the district court's ruling on the constitutionality of the Ohio property tax exemption, but reversed the district court on the constitutionality of Ohio's investment tax credits.<sup>80</sup> The Court of Appeals did not address the standing issue. While the Court of Appeals was sympathetic to the efforts by Toledo to attract and keep business in its economically depressed areas, the investment tax credit did not stand up under dormant Commerce Clause scrutiny.<sup>81</sup>

The U.S. Supreme Court granted certiorari on the questions of whether the respondents had standing<sup>82</sup> to challenge Ohio's tax credit, and whether the investment tax credit violated the Commerce Clause.<sup>83</sup> The Supreme Court, in May 2006, held that the plaintiffs did not establish the requisite standing to challenge the state franchise tax credit, and the lower courts erred in even considering the claims on the merits.<sup>84</sup> Writing for the Court, Chief Justice Roberts began addressing the standing issue by citing *Marbury v. Madison*<sup>85</sup> on the role of judicial review. The federal judiciary must respect the limited role of the courts,<sup>86</sup> in order to maintain the constitutional separation of powers.<sup>87</sup> The federal courts' proper role is limited to actual cases or controversies,<sup>88</sup> as enforced by Article III of the Constitution.<sup>89</sup> A core component is that the plaintiff must have standing.<sup>90</sup>

79. *Id.* at 1203. The two categories of taxation schemes which do violate the Commerce Clause are a protective tariff or customs duty which taxes goods imported from another state but not similar products produced in the state, and a discriminatory taxation based on proportion of a business' activity carried on within a state as compared to business done in other states. *Id.*

80. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 750 (6th Cir. 2004). Associate Professor Peter Enrich was on the brief and argued for the appellants. See Kristen E. Hickman & Sarah L. Bunce, *Foreword: DaimlerChrysler v. Cuno*, 4 GEO. J.L. & PUB. POL'Y 15 (2006).

81. *Cuno*, 386 F.3d at 746. See generally, Brent Nicholson & Sue Mota, *The Dormant Commerce Clause Rises Again: Cuno v. DaimlerChrysler*, 5 HOUS. BUS. & TAX L.J. 320 (2005).

82. See generally Kristen E. Hickman, *How Did We Get Here Anyway?: Considering the Standing Question in DaimlerChrysler v. Cuno*, 4 GEO. J.L. & PUB. POL'Y 47 (2006); Kathryn Lee Dietrich, Comment, *Saving the States from Unsuitable Plaintiffs: Uncovering the Lack of Standing in Challenges to State Income Tax Credits for Business Development*, 36 CUMB. L. REV. 343 (2005 - 2006).

83. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 36 (2005) (mem.).

84. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006), *cert. denied*, 126 S. Ct. 2286 (2006).

85. *Marbury v. Madison*, 5 U.S. 137 (1803).

86. *DaimlerChrysler*, 126 S. Ct. at 1860 (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

87. *Id.* at 1861 (citing *Valley Forge Christian Coll. v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 477 (1982)).

88. *Id.* (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976)).

89. *Id.* (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)).

90. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

The Court examined the standing of the plaintiffs as Ohio taxpayers and concluded that plaintiffs lacked standing to challenge taxing or spending decisions.<sup>91</sup> The Court stated that federal taxpayers' interest in a challenge to federal appropriation, which would increase the burden in the future on taxpayers, is remote and indeterminable,<sup>92</sup> citing *Frothingham v. Mellon*.<sup>93</sup> This rationale also applies to state taxpayer standing.<sup>94</sup> While the plaintiffs argued that an exception should be granted for Commerce Clause<sup>95</sup> challenges, similar to the exception for the Establishment Clause challenge allowed by the court in *Flast v. Cohen*,<sup>96</sup> the Court termed this "misguided."<sup>97</sup> If the exception was extended, then almost any constitutional constraint on governmental power would limit a state's taxing and spending power<sup>98</sup> and could open the floodgates in federal courts for taxpayer suits.

Similarly, examining the plaintiffs' standing as municipal taxpayers, the Court stated that the plaintiffs tried to leverage municipal taxpayer standing in two unacceptable ways.<sup>99</sup> First, the plaintiffs' challenge was still to the state law that allowed the franchise tax to be distributed to municipalities,<sup>100</sup> not to a municipality's law. The effect on the municipal taxpayer is merely conjecture.<sup>101</sup> Second, the plaintiffs tried to leverage standing to all of their claims under supplemental jurisdiction from a claim that does not even, by itself, satisfy standing.<sup>102</sup> If this were allowed by the Court, it would result in "remarkable implications."<sup>103</sup>

Justice Ginsburg concurred but with a large reservation.<sup>104</sup> While the Court's decision was consistent with precedent such as *Frothingham v. Mellon*,<sup>105</sup> *Doremus v. Board of Education of Hawthorne*,<sup>106</sup> *Flast v. Cohen*,<sup>107</sup> and *Bowen v. Kendrick*,<sup>108</sup> Justice Ginsburg does not

91. *Id.* at 1864.

92. *Id.* at 1862.

93. *Frothingham v. Mellon*, 288 F. 252. (1923).

94. *DaimlerChrysler*, 126 S. Ct. at 1863 (citing *Doremus v. Bd. of Ed. of Hawthorne*, 392 U.S. 429 (1952)).

95. U.S. CONST. art. I, § 8.

96. *Flast v. Cohen*, 392 U.S. 83 (1968).

97. *DaimlerChrysler*, 126 S. Ct. at 1864.

98. *Id.*

99. *Id.* at 1865-66.

100. *Id.* (citing OHIO REV. CODE ANN. § 5733.12 (West 2005)). Additionally, the State of Ohio suspended the distribution of franchise tax distribution to municipalities starting in 2001.

101. *Id.* at 1866.

102. *Id.*

103. *Id.* at 1867.

104. *Id.* at 1869.

105. *Frothingham v. Mellon*, 262 U.S. 447 (1923).

106. *Doremus v. Bd. of Ed. of Hawthorne*, 342 U.S. 429 (1952).

107. *Flast v. Cohen*, 392 U.S. 83 (1968).

108. *Bowen v. Kendrick*, 487 U.S. 589 (1988).

endorse later limits on standing in *Simon v. Eastern Kentucky Welfare Rights Organization*,<sup>109</sup> *Valley Forge Christian College v. American United for Separation of Church and State, Inc.*<sup>110</sup> *Allen v. Wright*,<sup>111</sup> and *Lujan v. Defenders of Wildlife*.<sup>112</sup>

Thus, the Court ordered that the Court of Appeals for the Sixth Circuit's holding was vacated in part, and remanded for dismissal on the issue of the challenge to the state tax credit.<sup>113</sup>

#### IV. CONCLUSION

*DaimlerChrysler v. Cuno* is a case of ironies. Ironically, Cuno and other plaintiffs filed the case in state court, and when defendants removed the case to federal court, the plaintiffs requested a remand to state court, which was denied.<sup>114</sup> This then put the burden on the plaintiffs to establish standing, and ultimately, they failed. Ironically, the Ohio tax scheme was challenged both by Ohio taxpayers who alleged injury because of the tax incentives given to keep the Jeep plant, as well as Michigan residents who alleged injury because they did not get the Jeep plant expansion.<sup>115</sup>

While the State of Ohio may have preferred an outright ruling on the merits to clarify the constitutionality of tax credits to promote economic growth, the Court's ruling once again leveled the playing field for states.<sup>116</sup> After the ruling by the Court of Appeals for the Sixth Circuit,<sup>117</sup> only Ohio, Michigan, Kentucky, and Tennessee were not allowed to use the franchise tax credit, putting those states at a comparative disadvantage. Thus, Cuno<sup>118</sup> again leaves all states with the option to use such incentives.

This was not the result legal counsel for plaintiffs Peter Enrich desired. Mr. Enrich, author of the article *Saving States From Them-*

109. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

110. *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

111. *Allen v. Wright*, 468 U.S. 737 (1984), Justice Ginsburg cited her opinion in *Wright v. Regan*, 656 F. 2d 820 (D.C. Cir. 1981), which reversed the district court's decision dismissing this case. The Court reversed the appeals court in *Allen v. Wright*, 468 U.S. 737 (1984), holding that the parents did not have standing to challenge the tax exemptions.

112. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

113. *DaimlerChrysler v. Cuno*, 126 S. Ct. 1854, 1868 (2006).

114. *Cuno v. DaimlerChrysler, Inc.*, 154 F. Supp. 2d. 1196 (2001).

115. See *DaimlerChrysler*, 126 S. Ct. 1854. A further irony is that the displaced Ohio plaintiffs may have had a stronger case challenging the taking under eminent domain had it not been for the Court's 2005 Decision in *City of New London v. Kelo*, 125 S. Ct. 2655 (2005). See generally, Brent Nicholson & Sue Mota, *From Public Use to Public Purpose – the Supreme Court Stretches the Takings Clause in Kelo v. City of New London*, 41 GONZ. L. REV. 8 (2005).

116. Brief for Petitioners at 14, *Wilkins v. Cuno*, 126 S. Ct. 1854 (2006) (No. 04-1724).

117. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (2004).

118. *DaimlerChrysler*, 126 S. Ct. 1854 (2006).

*selves: Commerce Clause Constraints on Tax Incentives for Business*, published in the Harvard Law Review, posits that states are caught in a contest that none can win<sup>119</sup> by offering such incentives, and this results in a “race to the bottom.”<sup>120</sup> Enrich concluded that the Court should use the commerce clause to restrain this competition by the states to induce businesses to stay, expand, or move to the state.<sup>121</sup> Since that has not occurred, Enrich has suggested in the article that Congress could statutorily restrict such efforts, but this is unlikely to occur.<sup>122</sup> Alternatively, plaintiffs other than taxpayers including businesses<sup>123</sup> and states<sup>124</sup> themselves could raise the challenge. Finally, citizen taxpayers may challenge such incentives in state courts, as most states have relatively permissive standing standards.<sup>125</sup> This may be the last viable hope to challenge such incentives.

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119. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 405 (1996); see also Respondent’s Brief at 1, *DaimlerChrysler v. Cuno*, 126 S. Ct. 1854 (2006) (Nos. 04-1704, 04-1724).

120. Enrich, *supra* note 119, at 380.

121. Enrich, *supra* note 119, at 381.

122. Enrich, *supra* note 119, at 405, 406.

123. Enrich, *supra* note 119, at 412, 413. Enrich acknowledges that interstate businesses are not the object of commerce clause concerns, and businesses actually benefit from such incentives.

124. Enrich, *supra* note 119, at 422. States are suitable parties to raise the challenge. According to Enrich, “States hold their salvation in their own hands.”

125. Enrich, *supra* note 119, at 415, 416. States, however, may be less hospitable on the merits.