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How Did We Get Here Anyway?: Considering the Standing Question in *DaimlerChrysler v. Cuno*

KRISTIN E. HICKMAN*

In *Cuno v. DaimlerChrysler, Inc.*, the Sixth Circuit simultaneously invalidated an Ohio investment tax credit as inconsistent with the "dormant Commerce Clause" of the United States Constitution and upheld a local personal property tax waiver against a similar challenge by a group of Ohio and Michigan taxpayers.[1] Academics and other experts have extensively debated the relationship between state tax incentive programs like these and the Commerce Clause.[2] Several articles, including some in this series of essays, specifically discuss the merits and implications of the Sixth Circuit's opinion in *Cuno*.[3] As I have discussed the *Cuno* decision with colleagues unfamiliar with these debates, however, the question invariably raised has been, "How did the plaintiffs establish standing?"

The Supreme Court has seen the elephant in the middle of the room. In granting the petitions of DaimlerChrysler and various state and local government defendants for review of the Ohio investment tax credit piece of the *Cuno* case, the Supreme Court directed the parties to brief and argue the question, "Whether respondents have standing to challenge Ohio's investment tax credit."[4] At the same time, the Court thus far has declined to decide whether to grant or deny certiorari to Charlotte Cuno and her fellow plaintiffs on the corresponding local personal property tax waiver question. In pursuing this path, I believe the Court is sending a signal that it finds the Sixth Circuit decision troubling but hopes to dispose of it on standing grounds and avoid the Commerce Clause issue entirely. Yet, in all the discussion of *Cuno*, the standing question has been

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1. 386 F.3d 738 (6th Cir. 2004).

2. *See, e.g.*, Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996); Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447 (1997); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789 (1996); Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?*, 23 J. LEGIS. 171 (1997); Edward R. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29 (2002).

3. *See, e.g.*, Edward A. Zelinsky, *Ohio Incentives Decision Revisited*, 37 ST. TAX NOTES 859 (Sept. 19, 2005); Jennifer Carr & Cara Griffith, *Litigation and Tax Incentives After the Downfall of Ohio's ITC*, 34 ST. TAX NOTES 367, 367-68 (May 2, 2005); Timothy H. Gillis, *Sixth Circuit Bans Ohio Tax Credit Under the Commerce Clause, Casting a Pall on Incentives*, 101 J. TAX'N 359 (2004); Matt Kitchen, Comment and Casenote, *The Ohio Investment Tax Credit: Impermissible Burden or Necessary Benefit?* Cuno v. DaimlerChrysler, Inc., 73 U. CIN. L. REV. 1685 (2005).

4. DaimlerChrysler, Inc. v. Cuno, 126 S.Ct. 36 (2005) (order granting petition for certiorari).

woefully neglected. This essay seeks to fill that void.

Standing doctrine includes both constitutional and prudential aspects. Constitutional standing doctrine derives from Article III of the United States Constitution, which limits federal court jurisdiction to "cases" or "controversies."[5] While the courts often struggle in determining whether particular plaintiffs satisfy the Article III case or controversy requirement, the Supreme Court has articulated the standard for that inquiry. To demonstrate constitutional standing to bring a claim in federal court, a plaintiff must satisfy three elements: (1) that she has suffered an "injury in fact," (2) that there is a causal connection between the injury suffered and the conduct that gives rise to her complaint, and (3) that a decision by the courts in her favor will likely redress that injury.[6] The injury in question must be "concrete and particularized" and "actual or imminent," as opposed to "conjectural or hypothetical"; the injury must be "fairly traceable to the challenged action of the defendant"; and the ability of the court to redress the injury must be "likely, as opposed to merely speculative."[7]

Beyond these constitutional standing requirements, however, the courts have also recognized certain prudential limitations on plaintiff standing in federal court.

> "[Prudential] standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[8]

Lawsuits premised upon taxpayer status are perhaps the most common example of generalized grievances lacking standing; but the "zone of interests" requirement imposes a further burden on plaintiffs alleging the illegality of government action to show that the interests they assert fall within the protective zone of the constitutional or statutory provision on which they base their claim.[9]

Standing doctrine plays an important role in a system of government that divides power among three co-equal branches and dual sovereigns.[10] Both Article III and prudential standing requirements serve the federal judiciary by

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5. U.S. CONST. art. III, § 2, cl. 1.

6. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000); Bennett v. Spear, 520 U.S. 154, 167 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

7. *Friends of the Earth*, 528 U.S. at 180-81.

8. Allen v. Wright, 468 U.S. 737, 751 (1984).

9. *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

10. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3.1 (4th ed. 2003) (discussing values of limiting standing). *But see generally* David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004) (criticizing modern standing doctrine); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (same).

limiting its jurisdiction to actual disputes between parties that judges are particularly equipped to resolve. Standing doctrine also prevents the judiciary from intruding too deeply into matters of policy better left to the states or the political branches of the federal government. In short, the federal courts have eschewed, whether for constitutional or prudential reasons, "appeals to their authority which would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'"[11]

Although the *Cuno* plaintiffs face a number of possible problems in satisfying these requirements, the *Cuno* case particularly implicates a longstanding rift among the circuits over the kind and degree of injury that a state taxpayer must establish. Standing doctrine is quite clear on the standards for evaluating taxpayer challenges to both federal and municipal government action. Longstanding jurisprudence renders it virtually impossible for federal taxpayers to establish standing but comparatively simple for municipal taxpayers to pass that hurdle.[12] The circuits are divided, however, over whether and when a taxpayer may challenge state laws in federal court. Put simply, the circuits disagree over whether states should be treated more like the federal government or like municipalities in evaluating taxpayer standing.

While it is likely that the Court recognizes the enormous economic implications of the Sixth Circuit's interpretation of the Commerce Clause in *Cuno*,[13] the Court's approach to the *Cuno* case thus far—leaving the *Cuno* plaintiffs' petition on the personal property tax waiver pending while ordering the parties to brief the standing question—suggests that the Court may be looking for a way to dodge that issue yet nevertheless reverse the Sixth Circuit. The Court could kill two birds with one stone by using *Cuno* as a vehicle to resolve the circuit split over state taxpayer standing and overturn the Sixth Circuit's decision on that basis while avoiding the Commerce Clause issue altogether. Alternatively, the Court could duck both the Commerce Clause issue and the circuit split over state taxpayer standing and still reverse the Sixth Circuit on other standing grounds. Either way, it seems most likely that the Court will reverse the Sixth Circuit and resolve the *Cuno* case by concluding that Charlotte Cuno and her fellow plaintiffs lack standing to bring their claims in federal court.

BACKGROUND

As the foreword to this series of essays lays out in more detail, the origin of the plaintiffs' claim is in a series of agreements between DaimlerChrysler and the City of Toledo and local school districts. Those agreements provided for

11. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982) (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973)).

12. *See infra*, notes 53-58 and accompanying text.

13. *See* Kristin E. Hickman & Sarah L. Bunce, *Foreword:* DaimlerChrysler v. Cuno *and the Constitutionality of State Tax Incentives for Economic Development*, 4 GEO. J.L. & PUB. POL'Y 15 (2006).

DaimlerChrysler to undertake certain construction and improvements to its facilities in Toledo in exchange for various governmental promises, including but not limited to a ten-year abatement of personal property taxes on new manufacturing equipment installed as part of the project and assistance in qualifying for a 13.5% investment tax credit against DaimlerChrysler's Ohio franchise tax obligation.[14]

The *Cuno* plaintiffs' original complaint raised several claims against a large number of defendants, including not only DaimlerChrysler but also the State of Ohio, City of Toledo, two local school districts, and various officials from each of those governmental entities.[15] The complaint is complex from a standing perspective, given the number of plaintiffs and defendants and the variety of claims brought and injuries alleged.

All of the plaintiffs resident in Ohio (referred to in the district court record as the "Ohio plaintiffs") filed their complaint collectively as citizens and taxpayers of the City of Toledo and the State of Ohio. The Ohio plaintiffs alleged that the tax subsidies granted to DaimlerChrysler deprived their state and local governments of tax revenues that otherwise would have been available for other lawful uses and also shifted to these plaintiffs as taxpayers a "disproportionate burden of supporting" such governmental functions.[16] Separately, one Ohio plaintiff, Kim's Auto and Truck Services, Inc., also alleged that its business had to be relocated under the threat of eminent domain,[17] that this dislocation caused Kim's to lose profits,[18] and that the move would have been unnecessary but for the tax incentives offered to DaimlerChrysler.[19]

Other plaintiffs resident in Michigan (the "Michigan plaintiffs") similarly relied on their status as taxpayers as the foundation for their claims. The

14. Complaint for Declaratory and Injunctive Relief at 9-10, Cuno v. DaimlerChrysler, Inc., No. CI0200002084 (Lucas Co., Ohio Mar. 28, 2000) [hereinafter *Complaint*]. The complaint referenced the agreement between the City and DaimlerChrysler, which included agreements on the part of the city to perform all of the site preparation and obtain agreements with local school districts to maximize property tax relief. *See id.* at ex. A.

15. Beyond the dormant Commerce Clause challenges to the Ohio investment tax credit and personal property tax waiver provisions of the Ohio Revenue Code, the original complaint also alleged that these state statutes violate the equal protection clause of the Ohio Constitution and that some or all of the parties failed to satisfy statutory eligibility requirements for the personal property tax exemption. *See Complaint*, *supra* note 14, at 8-20. The plaintiffs dropped the statutory eligibility requirement issue on appeal to the Sixth Circuit, *see* Brief of Appellants at 4-5, Cuno v. DaimlerChrysler, Inc., 386 F.3d 738 (6th Cir. 2004) (No. 01-3960); and the plaintiffs further did not appeal the equal protection issue to the Supreme Court. *See* Petition of Charlotte Cuno for Writ of Certiorari at i, Cuno v. DaimlerChrysler, Inc., No. 04-1407 (U.S. Apr. 18, 2005), 2005 WL 952245. Because the petitions for certiorari raised only the Commerce Clause issue, this discussion of the standing question is likewise limited.

16. *Complaint*, *supra* note 14, at 11.

17. *See id.* at 6.

18. *See id.* at 11.

19. More precisely, the complaint alleges "loss of income from temporary closure due to being moved" as well as a variety of more generalized business impediments such as "temporary shutdowns," "loss of business visibility," and "loss of business customers" that are presumably intended to convey lost profits. *See id.*

Michigan plaintiffs alleged that, but for the tax incentives provided to DaimlerChrysler by the other defendants, DaimlerChrysler might have located its new facilities in Michigan rather than Ohio.[20] If DaimlerChrysler had located its new facilities in Michigan, then Michigan and the municipalities thereunder would have received more tax revenues from the resulting jobs and economic development, and the Michigan plaintiffs would have benefited from the utilization of those funds by those governments. The Michigan plaintiffs assert the deprivation of these benefits as the injury they have suffered.[21]

Regardless of the injuries alleged, the remedies sought are the same for each count. Specifically, the plaintiffs ask that the provisions of the Ohio Revenue Code permitting the property tax exemption and the investment tax credit be declared unconstitutional and that preliminary and permanent injunctions against their operation be granted.[22] The plaintiffs also request attorney fees and court costs incurred in connection with the suit.[23]

The Supreme Court is not the first court to consider the standing issue in the *Cuno* case. The plaintiffs originally filed their complaint in Ohio state court.[24] The defendants removed the case to federal district court,[25] after which the plaintiffs moved to have it remanded back to state court.[26] In arguing for remand, the plaintiffs maintained that a lack of clarity in federal standing doctrine meant that someone, at some point in the litigation, would raise a standing challenge.[27]

As the district court observed, the motion to remand on standing grounds yielded awkward arguments from both sides.[28] While the plaintiffs explicitly denied that they lacked standing to bring their claims in federal court, they nevertheless contended that the district court should remand the case to avoid the standing question entirely.[29] The Ohio state defendants contended that most of the plaintiffs lack standing to bring their claims in federal court yet opposed the remand motion on the ground that a single plaintiff, Kim's Auto and Truck Service, raised a colorable argument to support its standing to challenge the decision by the City of Toledo and relevant local school board to grant the

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20. *See id.* at 11-12.

21. *See id.*

22. *See Complaint, supra* note 14, at 13-14, 19.

23. *See id.*

24. *See Complaint, supra* note 14.

25. Notice of Removal, Cuno v. DaimlerChrysler, Inc., 154 F. Supp. 2d 1196 (N.D. Ohio 2001) (No. 3:00CV7247).

26. Plaintiffs' Motion For Remand to State Court, or Alternatively, For Abstention and Remand, Cuno v. DaimlerChrysler, Inc., 154 F. Supp. 2d 1196 (N.D. Ohio 2001) (No. 3:00CV7247) [hereinafter *Plaintiffs' Motion For Remand*].

27. *Plaintiffs' Motion For Remand, supra* note 26, at 7.

28. Order Denying Plaintiffs' Motion For Remand at 5-6, Cuno v. DaimlerChrysler, Inc., 154 F. Supp. 2d 1196 (N.D. Ohio 2001) (No. 3:00CV7247) [hereinafter *Order Denying Remand*].

29. *Plaintiffs' Motion For Remand, supra* note 26, at 7-9.

personal property tax exemption to DaimlerChrysler.[30] Similarly, DaimlerChrysler and the other defendants never conceded outright the plaintiffs' standing to raise all of their claims in federal court. Instead, these defendants took the overall position that the plaintiffs' "case for federal standing is actually stronger in important respects" than their state standing posture, and then focused their argument on only two of the many claims.[31] Specifically, DaimlerChrysler and the other defendants acknowledged that the Ohio plaintiffs' status as municipal taxpayers would be sufficient for the personal property tax challenge.[32] On the investment tax credit, these defendants also contended that Kim's Auto and Truck Services raised allegations of economic injury adequate to establish standing.[33]

In denying the plaintiffs' motion for remand, the district court concluded that, at a minimum, the Ohio plaintiffs had standing as municipal taxpayers to challenge the property tax exemption as reducing tax revenues available to their respective local school districts, an injury that the district court presumed would be redressed by invalidating the statute (and thus the waiver of taxes otherwise owed).[34] On that basis alone, the district court claimed jurisdiction and proceeded to resolve all of the plaintiffs' claims by dismissing all counts for failure to state a claim.[35]

The standing issue was not raised on appeal to the Sixth Circuit. That court agreed with the District Court's dismissal of the personal property tax waiver but invalidated the investment tax credit provision as violating the Commerce Clause of the United States Constitution. Both sides of the case petitioned the Supreme Court for review of the Sixth Circuit judgment against them, thereby splitting the personal property tax waiver and the investment tax credit into two separate petitions. The Supreme Court, in turn, only granted certiorari with respect to the investment tax credit. The Court thus has left to the side, at least

30. Memorandum of State Defendants in Opposition to Plaintiffs' Motion For Remand at 9, 12, Cuno v. DaimlerChrysler, Inc., 154 F. Supp. 2d 1196 (N.D. Ohio 2001) (No. 3:00CV7247). Although the state defendants posit outright that the Michigan plaintiffs lack constitutional standing to raise any of their claims and that the Ohio plaintiffs cannot use their status as state taxpayers to obtain constitutional standing, most of the state defendants' brief on the standing issue is dedicated to discussing which standing requirements various plaintiffs can establish. The state defendants acknowledge that the Ohio plaintiffs satisfy constitutional standing requirements as municipal taxpayers to challenge the decision by the City of Toledo and their respective school boards to grant the personal property tax exemption to DaimlerChrysler; but the state defendants admit only the possibility that Kim's Auto and Truck Service might be able to meet prudential standing requirements on its Commerce Clause claim. *See id.* at 7-14.

31. Defendants' Memorandum in Opposition to Plaintiffs' Motion For Remand at 12-21, Cuno v. DaimlerChrysler, Inc., 154 F. Supp. 2d 1196 (N.D. Ohio 2001) (No. 3:00CV7247).

32. *Id.* at 14-17.

33. *Id.* at 18. DaimlerChrysler and the other non-state defendants also suggested that the injury of depleted taxpayer funds alleged by all of the Ohio plaintiffs might be adequate to confer standing. *See id.* at 15. These defendants limited their standing argument to injury-in-fact, however, and did not at any time analyze the causation and redressability elements of constitutional standing doctrine.

34. *Order Denying Remand*, *supra* note 28, at 6-7.

35. Cuno v. DaimlerChrysler, Inc., 154 F. Supp. 2d 1196, 1203-04 (N.D. Ohio 2001).

for now, the personal property tax waiver on which the district court predicated its jurisdiction.

As highlighted by the posture of the case now before the Supreme Court, the problem with the district court's approach in evaluating the standing issue is that the property tax exemption on which the district court premised jurisdiction is not the part of the case that the Supreme Court has agreed to hear.[36] The issue before the Court is whether Kim's Auto and Truck Services, the other Ohio plaintiffs as Ohio state citizens and taxpayers, and the Michigan plaintiffs have standing to challenge the constitutionality of the investment tax credit provision of the Ohio Revenue Code.[37]

INJURY-IN-FACT AND TAXPAYER STANDING

In general, the injury-in-fact element of constitutional standing requires a plaintiff to show that it has suffered an "invasion of a legally protected interest ... in a personal and individual way."[38] As DaimlerChrysler argued before the district court, Kim's Auto and Truck Services likely has pleaded facts sufficient to satisfy the injury-in-fact element for constitutional standing. Kim's alleges a specific if undenominated financial injury in the form of lost profits incurred as a result of having to relocate its business from property condemned and transferred to DaimlerChrysler for redevelopment. Kim's claim, if true, thus articulates the sort of direct and individualized economic injury adequate to establish injury-in-fact.[39] Kim's does not seek compensation for these losses in the *Cuno* case; but while that failure bears on the redressability issue discussed below, it does not impact the injury-in-fact analysis.

By contrast, it is difficult to imagine any scenario in which the Michigan plaintiffs can establish injury-in-fact. The only injury asserted by the Michigan plaintiffs—that they were denied the benefits of spending their state and municipal governments might have undertaken had DaimlerChrysler chosen to invest and paid taxes in Michigan rather than Ohio—is the very picture of the sort of generalized, abstract, and conjectural injury that the injury-in-fact inquiry re-

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36. Even if the Court had agreed to consider the property tax waiver, the Court could still raise the question of standing with respect to the Ohio investment tax credit issue. But if the district court was correct in its assessment that Kim's Auto and Truck Services had municipal taxpayer standing to challenge the personal property tax waiver, then Kim's arguably might be able to bring in the Ohio investment tax credit issue as a matter of supplemental jurisdiction. *See* 28 U.S.C. § 1367 (2005); United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); Ruiz v. Estelle, 161 F.3d 814, 832 n.27 (5th Cir. 1998). As noted below, however, I believe the district court erred in characterizing Kim's claims as municipal rather than state taxpayer actions. *See* discussion *infra* note 106. All of the remaining claims raised by the plaintiffs before the district court were state statutory and constitutional claims over which the federal courts would not ordinarily have primary jurisdiction.

37. *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 615-16 (1989) (emphasizing the need to establish standing separately for each plaintiff or group of plaintiffs).

38. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 & n.1 (1992).

39. *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970) (recognizing standing to sue for lost profits); Savage v. Jones, 225 U.S. 501, 520-21 (1912) (conferring standing upon plaintiff complaining of lost sales).

jects.[40] The Michigan plaintiffs highlight their taxpayer status, but they are taxpayers of *Michigan* suing *Ohio* and its officials as well as private parties. Consequently, the Michigan plaintiffs cannot even cast their claim as one of taxpayers challenging the wrongdoing of their own government. The Michigan plaintiffs simply have presented no cognizable injury to sustain their cause.

Evaluating the standing of the remaining Ohio plaintiffs is more difficult. For these plaintiffs, the three-part test for constitutional standing is barely a starting point for analyzing their case. The Ohio plaintiffs allege as their sole injury the investment tax credit's "effect of reducing the funds available for the operation of" the City of Toledo and the local school districts, which effect the Ohio plaintiffs also characterize as shifting to them "a disproportionate burden of supporting these governmental functions."[41] With regard to these plaintiffs, therefore, *Cuno* is primarily a case of parties suing as citizens and taxpayers of the State of Ohio. Standing doctrine poses a significant, though not insurmountable, hurdle for any plaintiff who sues in either of these capacities.

Federal and Municipal Taxpayer Standing

As a rule, the Court does not recognize a plaintiff who contests government action merely on the basis of her citizenship without some more concrete and particularized injury.[42] Similarly, long before articulating its modern test for constitutional standing, the Court in *Frothingham v. Mellon* held that federal taxpayers do not, merely through that status, possess standing to challenge the constitutionality of federal statutes.[43] While even a small injury may be enough to confer standing upon a plaintiff if it is direct and individualized,[44] the interest of a taxpayer in the federal treasury is "generalized," "remote," "indeterminable," and "shared with millions of others," so is inadequate for standing purposes.[45]

Frothingham predates by several decades the Court's current three-part test for constitutional standing and is often characterized as implicating only prudential concerns and not Article III standing requirements.[46] Nevertheless, *Frothing-*

40. *See, e.g.*, *Lujan*, 504 U.S. at 573-78 (1992); Allen v. Wright, 468 U.S. 737, 754-55 (1984); Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

41. *Complaint*, *supra* note 14, at 11.

42. *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 64-66 (1997); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216-27 (1974); United States v. Richardson, 418 U.S. 166, 178 (1974); *see also* Allen v. Wright, 468 U.S. at 754 ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

43. *See* Frothingham v. Mellon, 262 U.S. 447, 487-89 (1923). *Frothingham* is a companion case to *Massachusetts v. Mellon.* While *Frothingham v. Mellon* involved an individual taxpayer suit against a federal statute, *Massachusetts v. Mellon* concerned a challenge by the state of Massachusetts against the same statute. *See id.* at 480.

44. *See, e.g.*, United States v. SCRAP, 412 U.S. 669, 683-90 & n.14 (1973).

45. *Frothingham*, 262 U.S. at 487-88.

46. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 497 n.8, 499 (1982); Flast v. Cohen, 392 U.S. 83, 92 & n.6 (1968); *see also* Nancy C. Staudt,

ham's holding reconciles easily with the injury-in-fact prong of the constitutional standing inquiry when read to say that the economic injury of increased taxes suffered by a federal taxpayer from allegedly illegal congressional action is simply not enough of an injury to confer standing.[47]

In *Flast v. Cohen*, however, the Court adopted one exception from the *Frothingham* rule on taxpayer standing where "there is a logical nexus between the status asserted and the claim sought to be adjudicated."[48] This "logical nexus test" holds that the otherwise generalized, remote, and indeterminable injury suffered by federal taxpayers will be adequate to support federal jurisdiction where (1) the allegedly unconstitutional act is an exercise of Congress's taxing and spending power under Article I, section 8 of the United States Constitution and (2) the violation in question implicates a specific constitutional limitation imposed upon that power.[49] The logical nexus test only applies where Congress has exercised its taxing and spending power, as opposed to any of its various other Article I powers.[50] In addition, while the *Flast* Court recognized the First Amendment's Establishment Clause as limiting Congress's taxing and spending power, in almost forty years of subsequent jurisprudence, the Court has shown no inclination to recognize any other constitutional provision as imposing like restraint, at least for purposes of taxpayer standing.[51] Moreover, in adopting a more lenient view of taxpayer standing in Establishment Clause cases, the Court has not exempted such plaintiffs from the Article III standing requirements of causation and redressability.[52] The result is that very few

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Modeling Standing, 79 NYU L. REV. 612, 627 n.70 (2004); Georgene M. Vairo, *Selected Problems in Federal Jurisdiction: Standing, Implied Rights of Action, Pendent Jurisdiction, and Abstention*, C607 ALI-ABA 363, 369 (1991); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1378-79 (1988). *But see* CHEMERINSKY, *supra* note 10, § 2.3.5, at 95 (linking taxpayer standing cases and injury-in-fact element).

47. *See, e.g.*, Nancy Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 792 & n.107 (2003) (suggesting a potential Article III connection).

48. Flast v. Cohen, 392 U.S. 83, 102 (1968).

49. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 618-20 (1988); *Flast*, 392 U.S. at 102-03.

50. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464 (1982) (ruling taxpayers did not have standing to challenge a decision by the Secretary of Health, Education and Welfare); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 210-11, 227-28 (1974) (denying standing for taxpayers raising challenge under Article I, section 6 Incompatibility Clause); United States v. Richardson, 418 U.S. 166, 174-75 (1974) (denying standing when taxpayer challenged statutes regulating the CIA as violating Article I, section 9 Accounts Clause).

51. "Although we have considered the problem of standing and Article III limitations on federal jurisdiction many times since [*Flast*], we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing established in *Frothingham*. . . ." *Bowen*, 487 U.S. at 618. *See also* CHEMERINSKY, *supra* note 10, § 2.3; 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.1, at 367 (1982) ("Fate has not been kind to the *Flast* decision. In the field of taxpayer standing, it has been limited to very narrow confines.").

52. *See, e.g.*, ASARCO Inc. v. Kadish, 490 U.S. 605, 615-16 (discussing causation and redressability requirements in taxpayer standing context); Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (same).

federal taxpayer cases survive a standing inquiry.[53]

While the Court has been generally unwilling to acknowledge federal taxpayer standing, the Court has exhibited greater willingness to entertain taxpayer suits that challenge municipal government action. In *Frothingham*, the Court expressly distinguished federal and municipal taxpayers.[54] The Court also suggested that the comparative interest of municipal taxpayers in the use of their tax dollars is sufficiently "direct and immediate" to confer standing.[55] The Court has not subsequently addressed the standing issue in connection with a municipal taxpayer case,[56] but the Court on several occasions has reiterated the same federal/municipal distinction in the standing context.[57] In light of such guidance, the lower courts have been significantly more lenient in permitting taxpayer challenges to municipal government action.[58]

The State Taxpayer Standing Divide

Although the Ohio plaintiffs' complaint stems from an agreement between Daimler Chrysler, the City of Toledo, and local school board officials, the complaint does not seek merely to invalidate that agreement. Instead, the plaintiffs challenge outright the constitutionality of the state statute granting the investment tax credit that is a subject of the underlying agreement. Accordingly, the plaintiffs seek standing as state taxpayers and not as federal or municipal taxpayers.[59] Falling somewhere between federal and municipal taxpayer suits, state taxpayer challenges present an interesting question: are states more like municipalities or the federal government for purposes of the standing inquiry? On this point, the Court has offered mixed signals, which of course have resulted in confusion among the lower courts.

The Court on several occasions has likened state taxpayers to federal taxpayers in discussing the need for a direct, individual injury to establish standing.[60] In *Williams v. Riley*, decided a few years after *Frothingham*, the Court considered whether California taxpayers had standing to contest a state gas tax of three

53. *See* Staudt, *supra* note 47, at 800 (noting that the Court rarely grants taxpayer standing to federal taxpayers).

54. Frothingham v. Mellon, 262 U.S. 447, 486-87 (1923).

55. *Id.* at 486.

56. *See* Staudt, *supra* note 47, at 825-26; Staudt, *supra* note 46, at 631.

57. *See, e.g.*, *ASARCO*, 490 U.S. at 613; *Valley Forge Christian Coll.*, 454 U.S. at 497-98; Coleman v. Miller, 307 U.S. 433, 445 (1939).

58. *See, e.g.*, PLANS, Inc. v. Sacramento City Unified Sch. Dist., 319 F.3d 504, 506 (9th Cir. 2003); *see also* Staudt, *supra* note 47, at 827-34 (surveying cases).

59. Although the Court thus far has declined to grant certiorari to consider the Sixth Circuit's decision regarding the personal property tax waiver, that challenge likewise seeks solely to invalidate a state statute and, thus, should be viewed as a state taxpayer standing claim rather than a municipal taxpayer action. *See ASARCO*, 490 U.S. at 613 (1989) (treating constitutional challenge against state law as involving state taxpayer standing).

60. *See, e.g.*, ASARCO Inc. v. Kadish, 490 U.S. 605, 613-14 (1989); Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429, 434 (1942); Williams v. Riley, 280 U.S. 78, 79-80 (1929).

cents per gallon on federal constitutional and statutory grounds.[61] Notwithstanding that these taxpayers actually had to pay the excise tax being challenged (rather than suffer an allegedly higher tax burden as a result of government spending), the Court in a very brief opinion said that the taxpayer standing doctrine announced in *Frothingham* applied to preclude standing in the case at bar.[62]

> The federal courts have no power per se to review and annul acts of state Legislatures upon the ground that they conflict with the federal or state Constitutions. "That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act."[63]

A few decades later, in *Doremus v. Board of Education of Hawthorne*, the Court took up a claim by New Jersey taxpayers against a state statute providing for daily Bible reading in public schools.[64] In considering the taxpayers' standing, the Court acknowledged its more relaxed approach to municipal taxpayer standing[65] but said of state taxpayer challenges,

> [W]e reiterate what the Court said of a federal statute as equally true when a state Act is assailed: "The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in come [sic] indefinite way in common with people generally."[66]

Most recently, in *ASARCO, Inc. v. Kadish*, the Court confronted a claim by Arizona taxpayers that a state statute governing mineral leases was inconsistent with federal laws originally granting the subject lands to the state, with the ultimate result that higher taxes were necessary to support the state's public schools.[67] The Court ultimately concluded that the state of Arizona had standing as the petitioner from a state Supreme Court decision invalidating the statute.[68] In explaining its conclusion, however, the Court additionally discussed at length whether the original plaintiff taxpayers would have had standing if they had brought the case originally in federal

61. *Williams*, 280 U.S. at 79.
62. *See id.* at 79-80.
63. *Id.* at 80 (quoting Frothingham v. Mellon, 262 U.S. 447, 487 (1923)).
64. *See Doremus*, 342 U.S. at 430. Although *Doremus* involves an Establishment Clause claim, *Doremus* is still good law notwithstanding *Flast v. Cohen* at least because the *Doremus* plaintiff did not relate the government action in question to taxing and spending. *See id.* at 434-35.
65. *See id.* at 434.
66. *Id.* (quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923)).
67. ASARCO Inc. v. Kadish, 490 U.S. 605, 609-10 (1989).
68. *Id.* at 623-24.

district court.[69] In so doing, the Court expressly analogized state taxpayers to federal taxpayers and distinguished them from municipal taxpayers: "Yet we have likened state taxpayers to federal taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise."[70]

Such language supports the view that standing doctrine is the same for both federal and state taxpayers, which in turn suggests the applicability in both contexts of *Frothingham*'s general rejection of taxpayer standing with only the limited *Flast* exception. Nevertheless, only four of eight participating justices joined in the *ASARCO* majority's discussion of the original plaintiffs' standing in that case.[71] Moreover, other rhetoric of the Court in *Frothingham, Doremus,* and *Flast* arguably indicates greater openness to state taxpayer claims along lines resembling the municipal taxpayer standing jurisprudence, at least in the view of the Ninth Circuit.[72]

Perhaps because the relevant *ASARCO* language is dicta, the *Doremus* case is widely recognized as offering the principal guidance on the question of state taxpayer standing. Apart from its language equating federal and state taxpayers, the *Doremus* Court identified the principal problem facing the taxpayer's claim as being that the state statute in question did not involve an identifiable outlay of public funds other than those otherwise expended to support the public schools.[73] In other words, there was no link between the purportedly illegal state statute and taxpayer funds and thus no connection between the plaintiff's status as taxpayer and the alleged wrongdoing. By way of contrast, the *Doremus* Court offered the case of *Everson v. Board of Education,* which involved the use of public funds to transport children to Catholic parochial schools.[74] In distinguishing the two cases, the *Doremus* Court noted that Everson's "measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of" would be sufficient to establish standing.[75] The Court thus concluded its analysis in *Doremus* with the suggestion that a state taxpayer could satisfy standing requirements merely by pleading "a good-faith pocketbook action."[76]

Both *Doremus* and *Everson* are Establishment Clause cases; yet because they

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69. *Id.* at 613-17.

70. *Id.* at 613-14 (quoting Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429, 434 (1952)). The *ASARCO* Court also discussed the plaintiffs' inability to establish redressability and the abstractness of non-economic injuries asserted by the plaintiffs. *Id.* at 614-16.

71. *See ASARCO,* 490 U.S. at 612-17. The remaining four participating justices—Justices Brennan, White, Marshall, and Blackmun—believed that part of the opinion to be unnecessary. *Id.* at 633-34. Justice O'Connor did not participate in the ASARCO case.

72. *See* Arakaki v. Lingle, 423 F.3d 954, 968-69 (9th Cir. 2005); Hoohuli v. Ariyoshi, 741 F.2d 1169, 1177-81 (9th Cir. 1984).

73. *See id.* at 433.

74. Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429, 434 (1952); *see* Everson v. Bd. of Educ., 330 U.S. 1, 3 (1947).

75. *See Doremus,* 342 U.S. at 434 (distinguishing Everson v. Bd. of Educ., 330 U.S. 1 (1947)).

76. *Id.*

predate *Flast v. Cohen*, the logical nexus test developed in that latest case cannot explain the Court's conclusions in the former two. Instead, as the Ninth Circuit argues, the Court's emphasis on a "measurable appropriation or disbursement of funds" in comparing *Doremus* and *Everson* and the Court's reference to pleading "a good-faith pocketbook action" hints at a relationship among federal, state, and municipal standing based on "economic relativity."[77] The *Frothingham* Court's description of federal taxpayer interest in Treasury funds as minute, indeterminate, and shared with millions is arguably consistent with this economic relativity theory. The *Flast* Court likewise alluded to economic relativity when it cited *Doremus* for the proposition that, in establishing a connection between the taxpayer's status as such and the statute being challenged, "[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute."[78] By contrast, the Court in *Flast* did not mention *Doremus* in requiring a taxpayer also to show that the alleged violation involved a constitutional limitation on the taxing and spending power. Even though the Court in *Doremus* and elsewhere compared states to the federal government and distinguished them from municipalities, the simple fact is that some municipalities are larger in population than many states, giving taxpayers a relatively similar interest in the use of their tax dollars at the state and municipal governmental levels.[79] Thus, if doctrinally supportable, an economic relativity rationale could support treating state and municipal taxpayers similarly.

Hence, the circuit courts of appeal are divided over the relationship among *Frothingham*, *Doremus*, and *Flast* or, more precisely, what it means for a state taxpayer suit to be a good-faith pocketbook action. Several circuits have held

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77. Hoohuli v. Airyoshi, 741 F.2d 1169, 1178 (1984) ("The difference between state taxpayer standing and federal taxpayer standing at the time of *Doremus*, then, was essentially one of economic relativity.").

78. Flast v. Cohen, 392 U.S. 83, 102 (1968).

79. This was as true in 1923 as it is today. For example, the 1920 decennial census recognized 5,620,048 residents of New York City, 2,710,705 residents of Chicago, and 1,823,779 residents of Philadelphia. Including those three, twelve individual cities had populations in excess of 500,000 residents. *See* Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1970-1990*, http://www.census.gov/population/documentation/twps0027/tab15.txt. By comparison, more than half of the states had populations smaller than that of Philadelphia, and twelve states had fewer than 500,000 residents. *See* U.S. Census Bureau, *Statistical Abstract of the United States, Resident Population by State: 1900-2002*, http://www.census.gov/statab/hist/HS-04.pdf. The 2000 decennial census similarly recognized 8,008,278 residents of New York City, 3,694,820 residents of Los Angeles, and 2,896,016 residents of Chicago. Including those three, nine individual cities had populations of more than 1 million people. *See Census 2000 Ranking Tables for Incorporated Places of 100,000 or More: 1990 and 2000*, http://www.census.gov/population/cen2000/phc-t5/tab02.pdf. By comparison, twenty states had populations smaller than that of Chicago, and seven states had populations of fewer than 1 million. *See Census 2000 Ranking Tables for States: 1990 and 2000*, http://www.census.gov/population/cen2000/phc-t2/tab01.pdf. While I do not suggest that the Supreme Court considered the Census Bureau's population tables in drafting *Frothingham, Doremus*, or *Flast*, it seems highly unlikely that the Justices in any of these cases were unaware that the country's largest cities contained populations larger than those of many states.

that, just like federal taxpayers, a state taxpayer must either show, as in *Flast*, that the state has appropriated taxpayer dollars in a manner inconsistent with a particular constitutional limitation on the state's taxing and spending power, or alternatively establish the direct and individualized injury, such as an increased personal tax burden, otherwise required by *Frothingham*.[80] Like the Supreme Court, these courts have been reluctant to extend *Flast*'s reasoning beyond Establishment Clause cases.[81] The Ninth Circuit, by contrast, holds the view that *Flast* does not apply in the state taxpayer context at all. Instead, the Ninth Circuit reads the good-faith pocketbook language of *Doremus* and the economic relativity elements of *Frothingham*, *Doremus*, and *Flast* as requiring a state taxpayer, like a municipal taxpayer, only to plead with specificity that state taxpayer funds generally have been appropriated and spent in an unconstitutional manner.[82] Ultimately, therefore, the circuit split comes down to whether federal or municipal taxpayer standing doctrine applies to state taxpayers.

Resolving the Circuit Split

Regardless, resolving the debate over state taxpayer standing doctrine would render the injury-in-fact element of the standing analysis relatively straightforward, at least for the Ohio plaintiffs in *Cuno*. If state taxpayers are like municipal taxpayers, then the *Cuno* plaintiffs have satisfied their burden by alleging that the investment tax credit reduces the tax burdens of those who receive it, like DaimlerChrysler, and thus takes away from the Ohio general fund.[83] By contrast, if state taxpayers are like federal taxpayers, and *Flast v. Cohen* applies, it seems highly unlikely that the Court would recognize the

80. *See* Bd. of Educ. of the Mt. Sinai Union Free Sch. Dist. v. N.Y. State Teachers Ret. Sys., 60 F.3d 106, 111 (2d Cir. 1995); Colo. Taxpayers Union, Inc. v. Romer, 963 F.2d 1394, 1401 (10th Cir. 1992); Taub v. Kentucky, 842 F.2d 912, 918-19 (6th Cir. 1988); Korioth v. Briscoe, 523 F.2d 1271, 1277 & n.16 (5th Cir. 1975). The Tenth Circuit explicitly disavows *Flast*'s applicability in the state taxpayer context. *See Colo. Taxpayers Union*, 963 F.2d at 1399. Nevertheless, the Tenth Circuit similarly distinguishes between Establishment Clause and other cases and adopts precisely the same approach to state taxpayer standing as the Second, Fifth, and Sixth Circuits in the non-Establishment Clause context. *See id.* at 1401.

81. *See, e.g.*, Booth v. Hvass, 302 F.3d 849, 852-54 (8th Cir. 2002) (declining to extend *Flast v. Cohen* to grant state taxpayer challenge on Equal Protection Clause grounds); Tarsney v. O'Keefe, 225 F.3d 929, 938 (8th Cir. 2002) (same with Free Exercise Clause challenge); *Taub*, 842 F.2d at 918-19 (same with suit alleging Article I, section 10 and due process violations).

82. *See* Arakaki v. Lingle, 423 F.3d 954, 971-73 (9th Cir. 2005); Hoohuli v. Ariyoshi, 741 F.2d 1169, 1178-81 (9th Cir. 1984).

83. Tax cuts are routinely characterized as government spending. *See, e.g.*, Daniel N. Shaviro, *Rethinking Tax Expenditures*, 57 TAX L. REV. 187, 191 (2004) (equating spending dollars with tax cut dollars); Zelinsky, *supra* note 3 (comparing tax incentives and direct subsidies). Politicians and economists argue over whether economic development in the vein of the DaimlerChrysler plant leads to additional revenue collections sufficient to offset the investment tax credit decrease; but it seems unlikely that the Supreme Court would pursue such economic analysis in evaluating standing. *Compare* Allen v. Wright, 468 U.S. 737, 773 & n.4 (1984) (Brennan, J. dissenting) (analyzing economic linkage between tax exemption and proliferation of private schools) *with id.* at 758 & n.23 (rejecting Justice Brennan's economic analysis).

standing of the *Cuno* plaintiffs to challenge the Ohio investment tax credit. *Cuno* is not an Establishment Clause case, and while *Flast* by its own terms is not limited to Establishment Clause cases, the Commerce Clause seems an odd candidate for extending *Flast*'s applicability.[84]

Unfortunately for the Ohio plaintiffs, the majority rule is the superior reading of the Court's discussion to date of state taxpayer standing. The Court has unequivocally, if infrequently, compared federal and state taxpayers and expressed the view that state taxpayers must show a direct and individualized injury to establish standing. The Court in *Williams v. Reilly* clearly applied the *Frothingham* standard to deny state taxpayer standing; in both *Doremus* and *ASARCO*, the Court expressly made the same comparison and reiterated the direct injury requirement. Although Justice Kennedy's discussion in *ASARCO* did not enjoy majority support, the dissenters did not express disagreement with his analysis but rather their view that it was unnecessary to resolve the case at bar.[85] By contrast, the comparison with *Everson* and the good-faith pocketbook reference in the *Doremus* opinion may lend themselves to the Ninth Circuit's broader interpretation when considered in isolation; but when placed in the context of the Court's more explicit association of federal and state taxpayers and the direct injury requirement, the narrower reading adopted by the other circuits seems more likely. In short, the Ninth Circuit relies on snippets of rhetoric taken at least partly out of context to support its theory of state taxpayer standing, while the other circuits take the Court's more explicit statements at face value.

Moreover, upon careful reading of the relevant cases, the Ninth Circuit's economic relativity explanation for the distinction between federal and municipal taxpayers seems largely invented, even when one acknowledges the bits of

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84. Whereas the Establishment Clause expressly limits the scope of congressional action, the Commerce Clause on its face grants rather than limits federal legislative power and says nothing about state taxing and spending authority. *Compare* U.S. CONST. amend. I ("Congress shall make now law respecting an establishment of religion . . .") *with* U.S. CONST. art. 1, § 8 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ."). The Court has inferred from the Commerce Clause a limitation on state action that discriminates against interstate commerce; but, unlike the Establishment Clause, the Court's dormant Commerce Clause jurisprudence is rooted in structural rather than individual rights concerns. *See* BORIS I. BITTKER AND BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §6.01[B] (characterizing dormant Commerce Clause analysis as a "judicial allocation of the burden of [congressional] inertia"); *see also* Flast v. Cohen, 392 U.S. 83, 103-04 (1968) (describing the Establishment Clause in personal liberty terms). *But see generally* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998) (acknowledging the common understanding of the Establishment Clause as securing individual rights but arguing instead for reading the Establishment Clause as a structural provision regulating the boundary between government and religion). To the extent that the dormant Commerce Clause secures any right, it is the "'right' to engage in interstate trade free from restrictive state regulation." Dennis v. Higgins, 498 U.S. 439, 448 (1991) (discussing structural versus individual rights implications of Commerce Clause). This right obviously is not implicated with respect to the taxpayer plaintiffs in this case.

85. Moreover, none of the dissenters in *ASARCO* remains on the Court today. *See* discussion *supra* note 71.

language on which the Ninth Circuit relies. The Court has never used the phrase "economic relativity" in connection with taxpayer standing. The *Doremus* Court focused on the fact that *Doremus* had failed to allege that any taxpayer funds were involved at all in the challenged state action. The *Frothingham* Court likewise emphasized a wholly different basis for distinguishing between federal and municipal taxpayers and denying standing to the former.

In fact, the *Frothingham* Court's primary emphasis in distinguishing federal and municipal taxpayers was the nature of the *legal* relationship between taxpayers and the different levels of government, irrespective of economics. The Court noted expressly as the reason for recognizing municipal taxpayer standing "the peculiar relation of the corporate taxpayer to the [municipal] corporation, which is not without some resemblance to that subsisting between stockholder and private corporation."[86] For this proposition, the Court cited a theory known as Dillon's Rule.[87] Named for John Forest Dillon, an Iowa Supreme Court Justice and prominent nineteenth-century scholar of local government law, Dillon's Rule maintains that, like a private corporation, a municipal corporation possesses and can exercise only those powers expressly granted to it by the state under which it is organized and that grants its charter.[88] The Rule relied on Dillon's presumption that municipal corporations have no authority and, indeed, would not even exist but for state-level government. Accordingly, the appropriate scope of municipal power was a pure question of legal interpretation, subject to judicial review like any other. Viewed in this light, granting municipal taxpayers standing to challenge municipal exercise of taxing and spending powers seems wholly reasonable. In fact, one of the primary effects of Dillon's Rule is "to shift the decision about the scope of local authority from political institutions . . . to the courts."[89]

By contrast, established legal doctrine of both that era and now held that states, like the federal government, are sovereign entities whose actions are only reviewable on a comparatively limited basis.[90] In saying this, I am not suggesting that the Eleventh Amendment bars Charlotte Cuno and her fellow plaintiffs from suing the state of Ohio in this case. Rather, I contend only that the *Frothingham* Court distinguished municipalities from the federal government not on grounds of economic relativity but rather on the basis of a theory that views municipalities as something other than sovereign entities. The states, like

86. *See* Frothingham v. Mellon, 262 U.S. 447, 487 (1923).

87. *See id.* (citing 4 DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 1580 et seq. (5th ed. 1911)).

88. *See* 4 DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 1580 et seq. (5th ed. 1911); *see also* Melvyn R. Durchslag, *Should Political Subdivisions be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577, 590 (1994); Bruce P. Frohnen, *The One and the Many: Individual Rights, Corporate Rights and the Diversity of Groups*, 107 W. VA. L. REV. 789, 833 (2005).

89. Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 966 (1991).

90. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996); CHEMERINSKY, *supra* note 10, §§ 7.1, 7.3.

the federal government, are sovereign entities. Accordingly, the *Frothingham* Court's rationale for denying standing to federal taxpayers but not municipal taxpayers should apply equally to state taxpayers; it makes little sense to distinguish federal and state taxpayers on economic relativity grounds if the federal versus municipal distinction is not similarly premised.

I am also not advocating Dillon's Rule as a foundation for contemporary legal analysis. Dillon's view of the nature of municipal government was never universally accepted. The eminent Thomas Cooley, for one, suggested that municipal governments hold inherent rights independent of the state. Moreover, with the expansion of Home Rule and local government assumption of greater responsibilities, scholars question the continued viability of Dillon's Rule.[91] Regardless, in comparing the relationship of a municipality and its taxpayers to that of a corporation and its shareholders, the *Frothingham* Court both espoused Dillon's theory of the nature of the municipal corporation and cited Dillon's treatise as support.[92] Whether or not that theory is worth revisiting, the *Frothingham* Court's reliance on Dillon's Rule to justify municipal taxpayer standing undercuts extending *Frothingham* to adopt a more lenient standing doctrine for state taxpayers on economic relativity grounds.

It is important to recognize that embracing a narrow approach to state taxpayer standing would not operate to deny altogether judicial review of claims like those of the Ohio plaintiffs, but rather would merely return such challenges to the state courts or require different non-taxpayer plaintiffs to raise a federal court claim.[93] Following the majority of the circuits in adopting a strict view of state taxpayer standing thus would be consistent with several other trends in the Court's jurisprudence vis a vis the states. In cases over the last few decades, the Court has repeatedly acknowledged the need to respect the rights of states to govern affairs traditionally left to them and the corresponding limitations that such regard must impose upon federal governmental actors,[94] not least the federal judiciary.[95] In addition to giving heft to the Constitution's federalist

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91. *See, e.g.*, Durchslag, *supra* note 88; Gillette, *supra* note 89 (summarizing the scholarship).

92. *See* Frothingham v. Mellon, 262 U.S. 477, 487 (1923).

93. For example, competitors of DaimlerChrysler who do business in Ohio but choose to develop physical plants elsewhere may be better positioned than the *Cuno* plaintiffs to challenge the Ohio investment tax credit on dormant Commerce Clause grounds. *See, e.g.*, Bacchus Imp., Ltd. v. Diaz, 468 U.S. 263, 267 (allowing in-state liquor wholesalers who would be directly liable for tax and whose imports would be subject to tax on out-of-state producers to challenge the tax); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (permitting out-of-state stock exchanges with New York business to challenge discriminatorily-applied transfer tax on stock sales with New York nexus).

94. *See* Printz v. United States, 521 U.S. 898, 912 (1997) ("[S]tate legislatures are not subject to federal direction."); *see also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000).

95. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997) ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court."); *see also* Bellotti v. Baird, 428 U.S. 132 (1976); Harrison v. NAACP, 360 U.S. 167 (1959).

principles, the Court has also reinvigorated the Tenth Amendment as a limitation on Congress's ability to impose obligations on state governments[96] and reemphasized Eleventh Amendment support for state sovereign immunity.[97] As the *ASARCO* Court acknowledged, when and if the state court system invalidates a state law as violating the United States Constitution, the state will have standing to appeal that decision to the United States Supreme Court.[98] Particularly in cases such as this one where the plaintiffs raise state constitutional and statutory claims as well as federal constitutional ones, allowing state courts the first opportunity to consider state taxpayer challenges to state laws is consistent both with the federal standing principles and with the Court's reenergized respect for state governmental institutions generally.

CAUSATION, REDRESSABILITY, AND PRUDENTIAL STANDING

Although the Court could use *Cuno* as a vehicle for resolving the circuit split over the kind and degree of injury required for state taxpayer standing, such a decision is unnecessary to reverse the Sixth Circuit on the basis of standing. If the Court is in a particularly minimalist mood,[99] it could just as easily rely on the other constitutionally-required causation and redressability elements or on prudential standing zone-of-interests analysis to dispose of the case without breaking new doctrinal ground. The cases dealing with taxpayer standing have not eliminated these requirements in that context;[100] and the *Cuno* plaintiffs' allegations, even if true, raise important questions with respect to each.

Causation

The causation requirement for constitutional standing requires that the injury alleged by the plaintiff be caused by the purportedly wrongful action of the defendant.[101] While an injury can be indirect and still suffice for causation purposes,[102] a causal relationship that is too remote, attenuated, or speculative will be inadequate to confer standing.[103] Instead, the plaintiffs must allege facts fairly tracing their injuries to the defendants' allegedly wrongful actions.[104] Consequently, establishing causation

96. *See, e.g.*, *Printz*, 521 U.S. 898; New York v. United States, 505 U.S. 144 (1992).

97. *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002); *Kimel*, 528 U.S. 62; Alden v. Maine, 527 U.S. 706 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

98. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 623-24 (1989).

99. *See* Brannon P. Denning, Cuno *and the Court: The Case for Minimalism*, 4 GEO. J.L. & PUB. POL'Y 33 (2006).

100. *See, e.g.*, ASARCO Inc. v. Kadish, 490 U.S. 605, 614 (1989) (examining state taxpayer claim for causation and redressability).

101. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 505-06 (1975).

102. *See id.* at 504-05 (citing Roe v. Wade, 410 U.S. 113 (1973)).

103. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751-52 (1984); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42-43 (1976).

104. *See Simon*, 426 U.S. at 41; *see also Allen*, 468 U.S. at 753 (employing similar language to describe the causation element of constitutional standing).

is particularly difficult where the plaintiffs' purported injury arises from governmental regulation of yet another party's conduct.[105]

For Kim's Auto and Truck Services, there is little doubt that the dislocation of Kim's business is traceable to DaimlerChrysler's decision to locate its new facility in Toledo and the City's actions in condemning Kim's property on DaimlerChrysler's behalf. But that is not the question before the Court because, at least with respect to the Ohio investment tax credit, Kim's has not contested either of these actions as such.[106] Instead, Kim's has opted for a broader challenge to the constitutionality of the Ohio investment tax credit. Accordingly, the causation question before the Court is whether the provision of that tax incentive to DaimlerChrysler is responsible for DaimlerChrysler's decision and the displacement of Kim's business.[107]

The Supreme Court has declined to find causation in similar circumstances. For example, in *Simon v. Eastern Kentucky Welfare Rights Organization*, the Court considered whether an Internal Revenue Service ruling allowing hospitals to deny more than emergency services to indigent citizens and still retain tax exempt status in fact caused hospitals in the plaintiffs' area to deny the plaintiffs non-emergency care.[108] The plaintiffs claimed that, but for the ruling, the hospitals would be more likely to provide the plaintiffs with additional services.[109] Given all the factors that a hospital might consider in electing to pursue such a policy and evidence suggesting the variability of hospital dependence upon the special tax benefits conferred by exempt status, the Court considered the link between the IRS ruling and the hospitals' actions too speculative to satisfy the causation element of constitutional standing.[110]

Likewise, in *Allen v. Wright*, the Court contemplated whether an IRS grant of tax exempt status to certain racially discriminatory private schools caused the public schools attended by the plaintiffs' children to be racially segregated.[111] The Court considered speculative whether the withdrawal of such status would cause the schools in question to change their discriminatory policies or lead

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105. *See Warth*, 422 U.S. at 505.

106. The other claims not currently before the Court—that the personal property tax waiver violates the dormant Commerce Clause and that both the investment tax credit and the personal property tax waiver violate the equal protection clause of the Ohio state constitution—all likewise challenge only the validity of state statutory provisions. *See* discussion *supra* note 15 and accompanying text. Only one of the plaintiffs' claims, that the City of Toledo and DaimlerChrysler failed to conform to the statutory requirements of O.R.C. § 5709.62, challenged more directly the actions of the City of Toledo and DaimlerChrysler. *See Complaint*, *supra* note 14, at 14-15. The plaintiffs did not appeal the District Court's dismissal of that issue to the Sixth Circuit, however; and, consequently, that claim is not presently before the Supreme Court. *See* discussion *supra* note 15.

107. *See Allen*, 468 U.S. at 757-60 (finding injury not fairly traceable to defendant's action because of intervening actors); *Simon*, 426 U.S. at 41-43 (same).

108. *Simon*, 426 U.S. at 42-43.

109. *Id.* at 42.

110. *Id.*

111. *Allen*, 468 U.S. at 757-58.

parents to decide to send their children to public instead of private schools.[112] Moreover, the Court questioned whether the number of private school officials or parents affected by the IRS's action was sufficiently large to alter the racial composition of the plaintiffs' public schools.[113]

Duke Power Co. v. Carolina Environmental Study Group, Inc. offers an interesting contrast to these cases and the one at bar. In *Duke Power*, the Court considered whether the Price-Anderson Act, which limited liability for nuclear accidents at private nuclear power plants operating under federal license, caused Duke Power Co. to build and operate a nuclear power plant near the plaintiffs' homes and, in turn, caused them to suffer various alleged injuries.[114] The Court observed that Congress had enacted the Price-Anderson Act to mitigate enormous economic liability concerns that were discouraging private companies from building nuclear power plants.[115] In finding the causation element satisfied, the Court in *Duke Power* cited evidence of the power companies' "categorical unwillingness to participate in the development of nuclear power absent guarantees of a limitation on their liability" to conclude that there was a "substantial likelihood" that Duke Power Co. would not have built and would abandon the nuclear power plant but for the Price-Anderson Act.[116]

In short, the causation inquiry in cases like *Cuno* is largely an assessment of probable outcomes regarding the behavior of independent actors. When fit into the pattern of these cases, Kim's ability to demonstrate causation seems unlikely. Certainly, the legislative and executive branch officials responsible for the tax breaks at issue in this case prefer to believe that they serve a useful purpose. It is entirely speculative, however, whether the Ohio investment tax credit actually influenced DaimlerChrysler's decision. DaimlerChrysler already had a facility in Toledo, making that city an obvious choice for expansion,[117] and the agreement between DaimlerChrysler and the City provided for several inducements beyond the investment tax credit.[118] Both facts suggest a substantial likelihood that DaimlerChrysler would have chosen to invest in Toledo regardless of the availability of the investment tax credit.

In addition, as documented by Professor Peter Enrich, lead counsel for the *Cuno* plaintiffs, much econometric and other empirical research suggests that DaimlerChrysler would have pursued the same course of action irrespective of the Ohio investment tax credit.[119] Based on that research, Enrich contends that tax incentives have little or no influence on a decision to locate new business in one place over another, and instead maintains that such programs serve the

112. *Id.* at 758.
113. *Id.*
114. 438 U.S. 59 (1978).
115. *Id.* at 63-64 (discussing Price-Anderson Act history).
116. *Id.* at 75, 77.
117. *See Complaint*, *supra* note 14, at 6-7.
118. *See id.* at ex. A.
119. *See* Enrich, *supra* note 2, at 390-92.

primarily political purpose of showing voters that their government officials are actively pursuing new business development.[120] Enrich's analysis suggests that the investment tax credit was of substantially less economic value to DaimlerChrysler even than the Court assumed was true of tax exempt status in *Eastern Kentucky* and *Allen*.

It is undoubtedly true that DaimlerChrysler inquired about available tax incentives and endeavored to satisfy the requirements for the investment tax credit in developing its new facility in Toledo, as would any business seeking the best deal it can get for a planned course of action. But Kim's has alleged no facts to suggest that DaimlerChrysler would not have made the same decision absent the investment tax credit. In fact, both the facts of this case and the potential that Ohio would have found some other method of subsidizing DaimlerChrysler suggest at least as great a likelihood that DaimlerChrysler would have developed its new facility in Toledo anyway. Based on the complaint as filed, the line between Kim's injuries and the Ohio investment tax credit provision is simply too speculative to satisfy the causation element for constitutional standing.

Causation is even more tenuous for the other plaintiffs. The Ohio plaintiffs assume that, but for the investment tax credit, the Ohio general fund would have received more tax revenues that Ohio state government officials would have used to the Ohio plaintiffs' benefit. The Ohio plaintiffs also assume that, in the absence of the Ohio investment tax credit, their contributions to the state's general fund would have been lower, in proportionate if not absolute terms. The Michigan plaintiffs allege an even longer causal chain involving (1) DaimlerChrysler locating its new facility in Michigan rather than Ohio, plus (2) Michigan state and local governments receiving additional tax revenues from that new facility, and (3) those governments using such added funds for the Michigan plaintiffs' benefit.

As discussed above, the Court has been willing on some occasions to find causation where the government action in question probably if indirectly caused the plaintiffs' injury.[121] The plaintiffs' assertions here are highly speculative, however. There is no basis for blaming the Ohio investment tax credit for the plaintiffs' relative tax burden or the limitations on their respective governments' budgets. State legislatures in either Michigan or Ohio could have granted an alternative package of direct and indirect subsidies to DaimlerChrysler or even merely lowered state franchise rates. Even if we assume that, but for the investment tax credit, more tax revenue would have flowed into government coffers (whether in Ohio or Michigan), policy makers face many demands for the limited resources under their control, and the probability that those officials would channel additional funds to the benefit of the plaintiffs' cannot be high.

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120. *Id.* at 393-94.

121. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 75-77 (1978); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 (1977).

Particularly in the case of the Michigan plaintiffs, the sheer number of parties and contingencies upon which their causal chain relies makes it unlikely that the existence of the investment tax credit means fewer government benefits to them. Indeed, the mere fact that both the Michigan and Ohio plaintiffs essentially lay claim to the same tax dollars that eliminating the investment tax credit would allegedly raise suggests the purely hypothetical nature of the causal relationship they assert.

Redressability

The redressability analysis in *Cuno* strongly resembles the causation discussion above. The redressability element of constitutional standing demands that a plaintiff demonstrate that the requested relief is likely to redress the injury claimed.[122] For this purpose, it is not enough to speculate that the remedy sought *might* alleviate the injury alleged. Instead, the plaintiff must adduce facts showing *substantial probability* of that outcome.[123] As with causation, satisfying the redressability requirement is especially hard where, as here, the "plaintiff's asserted injury arises from the government's alleged unlawful regulation (or lack of regulation) of someone else."[124] In such cases, redressability "depends upon the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict."[125]

In analyzing redressability, the Court must consider the facts as they existed at the time the plaintiffs filed their complaint, as opposed to the present time.[126] Regardless, because the only remedy sought is the invalidation of the Ohio Revenue Code provision that permits the investment tax credit, the *Cuno* plaintiffs' complaint comes nowhere near satisfying the redressability requirement for constitutional standing.

The claim raised by Kim's Auto and Truck Services most obviously fails to establish standing on redressability grounds. The sole remedial goal of the *Cuno* litigation is the invalidation of and injunction against the Ohio Revenue Code provision that permits the investment tax credit. For such relief to alleviate the dislocation losses purportedly suffered by Kim's, one would have to assume that enjoining the Ohio investment tax credit's application to DaimlerChrysler would cause the City of Toledo and DaimlerChrysler to change their plans with respect to Kim's property. To

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122. *See* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) ("[T]he relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision.").

123. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); *see also* Warth v. Seldin, 422 U.S. 490, 504 (1975) ("Petitioners must allege facts from which it reasonably could be inferred that . . . there is a substantial probability that . . . if the court affords the relief requested, [the injury] of the petitioners will be removed.").

124. *Defenders of Wildlife*, 504 U.S. at 562.

125. *Id.*

126. *See, e.g., id.* at 569 n.4 (citing and quoting Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989)).

the contrary, the fact that DaimlerChrysler already had a plant in Toledo and received a range of other unchallenged assistance from the City as part of their agreement renders it at least as likely that Kim's would have been dislocated regardless of the investment tax credit.[127] It is unlikely, therefore, that a judicial decision to grant the remedy Kim's seeks will eliminate Kim's injury.

Such lack of nexus between the injury claimed and remedy sought is ordinarily fatal to a standing claim.[128] For example, in *Linda R.S. v. Richard D.*, the Court denied standing to a single mother seeking criminal prosecution for failure to pay child support because sending the child's father to jail would in no way resolve the financial injury that inspired the complaint.[129] Likewise, in *Steel Co. v. Citizens for a Better Environment*, the plaintiffs alleged injuries caused by the defendant's failure to provide them in a timely fashion with information about toxic chemicals released into their environment, but sued for such relief as civil penalties and the right to inspect the defendants' books and records in the future.[130] Noting that the relief sought would not compensate the plaintiffs for losses caused by past late reporting, the Court denied standing.[131] While the owners of Kim's may feel personal gratification at seeing the investment tax credit declared unconstitutional, such generalized relief cannot satisfy the redressability requirement for standing.[132]

The facts alleged by both the Ohio and Michigan plaintiffs also are inadequate to show that the injuries alleged are likely to be redressed by a decision invalidating the Ohio investment tax credit provision. The Ohio plaintiffs allege that the Ohio investment tax credit deprived their state government of tax revenues and shifted the burden of supporting government spending to them.[133] To satisfy redressability, a determination by the Court that the Ohio investment tax credit is unconstitutional would have to remedy that alleged burden shifting. The likelihood of that outcome depends upon both DaimlerChrysler and state legislators and other government officials responding (or failing to respond) to such a decision by the Court in a manner that increases state tax revenues both overall and reduces the Ohio plaintiffs' relative share of that total tax burden. In fact, Ohio has responded to the Sixth Circuit's decision in *Cuno* precisely by offering more direct subsidies to businesses, actions which belie the Ohio plaintiffs' claims.[134] In *Allen v. Wright* and *Simon v. Eastern Kentucky Welfare Rights Organization*, the Court declared the likelihood that private parties would respond in a particular manner to a denial of tax exempt status as too speculative to establish

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127. *See* discussion *supra* notes 117-120 and accompanying text.

128. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."); Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973).

129. *Linda R.S.*, 410 U.S. at 618.

130. *Steel Co.*, 523 U.S. at 105-09.

131. *Id.*

132. *See id. at 107.*

133. *Complaint*, *supra* note 14, at 11.

134. *See* Zelinsky, *supra* note 3, at 861 (noting testimony of Ohio's Lieutenant Governor that Ohio has already responded to the Sixth Circuit's decision in this way).

redressability as well as causation.[135] In *ASARCO*, the Court expressed even less confidence in its ability to predict the policy decisions of state governmental actors.[136] The Ohio plaintiffs' contentions are comparable to the situations in these cases and thus are inadequate to satisfy the redressability requirement.

The Michigan plaintiffs' plan for remedying their hypothetical lost government benefits is even less likely to come true.[137] To satisfy redressability, the Michigan plaintiffs would have to allege facts demonstrating substantial likelihood that (1) a decision invalidating the Ohio investment tax credit would have prompted DaimlerChrysler to develop its facility in Michigan rather than Ohio; (2) the consequent facility would result in increased tax revenues to those state and local governments (who may well have been offering their own tax incentives to lure DaimlerChrysler to Michigan); and finally (3) those governmental entities would have employed such additional tax revenues to the Michigan plaintiffs' benefit rather than for other purposes.

Even if the Court declared the Ohio investment tax credit to be unconstitutional, the Michigan plaintiffs have offered no facts even to suggest that DaimlerChrysler or the various governmental actors involved would follow the Michigan plaintiffs' wishes. Again, the facts and circumstances of this case—DaimlerChrysler's existing facility in Toledo, the other benefits offered to DaimlerChrysler for its expansion in that city, and the empirical research suggesting that tax incentives are more politically symbolic than economically influential—all make it most likely that DaimlerChrysler would have pursued the same course of action with or without the investment tax credit.[138] The Ohio state and local governmental officials likely would have responded to an adverse judicial decision by offering DaimlerChrysler other subsidies.[139] Moreover, the relevant Michigan state and local governments are not party to the *Cuno* case, and the remedy the Michigan plaintiffs seek would not bind these governments to any course of action (other than possibly examining their own tax incentive programs).[140] Given the many uses to which state and local governments put additional tax revenues, there is a substantial likelihood that the Michigan plaintiffs would receive no benefit whatsoever from any additional tax revenues.[141] In short, the Michigan plaintiffs' claim to redressability is even more conjectural than that of the Ohio plaintiffs. Such speculation as to what might have been is simply

135. Allen v. Wright, 468 U.S. 737, 758 (1984); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42-44 (1976).

136. ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1995).

137. *See Complaint*, *supra* note 14, at 11-12.

138. *See* discussion *supra* notes 117-120 and accompanying text.

139. *See* discussion *supra* note 134 and accompanying text.

140. *See* Joshua S. Smith & John D. Miller, *The Economics of Business Attraction: Are Beneficial Michigan Tax Incentives in Jeopardy After Sixth Circuit Court Ruling?*, 84 SEP MICH. BAR J. 16 (2005).

141. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 614 (1989) ("[I]t is pure speculation whether the lawsuit would result in any actual tax relief . . . . [I]t is conceivable that . . . the State might reduce its supplement from the general funds to provide for other programs.").

inadequate to establish redressability.[142]

Prudential Standing: Zone of Interests

Finally, prudential limitations on standing even beyond those constitutionally required offer yet one more basis for denying the *Cuno* plaintiffs standing. Beyond the taxpayer standing doctrines discussed above, which may or may not be prudentially based, another relevant, prudential inquiry known as the "zone of interests test" may be relevant in this case. The zone of interests test requires analysis of "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by" the constitutional or statutory provision upon which the complainant's claim rests.[143] Thus, to satisfy this prudential requirement, the *Cuno* plaintiffs must demonstrate that the Commerce Clause protects or regulates the interests that they assert.[144]

The Court has recognized the purpose of the Commerce Clause as to enable citizens of the various states "to engage in interstate commerce free of discriminatory taxes" imposed by other states.[145] For example, in *Boston Stock Exchange v. State Tax Commission*, six stock exchanges located outside of New York challenged a New York statute that imposed a larger transfer tax on out-of-state securities sales with a New York connection than on like in-state securities sales.[146] The plaintiffs contended that the state tax provision in question was intended to and did divert business from their facilities to exchanges located in New York. The Court consequently found that, by asserting their right and that of their members to pursue interstate commerce without the burden of discriminatory taxation and alleging that the challenged tax interfered with that right, the plaintiffs were "arguably within the zone of interests to be protected" by the Commerce Clause.[147]

By contrast, none of the *Cuno* plaintiffs claim to be engaged in interstate

142. Lujan v. Defenders of Wildlife, 504 U.S. 555, 568-71 (1992) (concluding that any relief against the Secretary of Interior would not necessarily lead to the termination of funding on the part of funding agencies).

143. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970); *see also* Valley Forge Christian Coll. v. Ams. United for the Separation of Church and State, Inc., 454 U.S. 464, 474-75 (1982); Warth v. Seldin, 422 U.S. 490, 500 (1975).

144. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 321 n.3 (1977); *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153-54.

145. *Boston Stock Exch.*, 429 U.S. at 321 n. 3; *see also* Wyoming v. Oklahoma, 502 U.S. 437, 469-70 (1992) (Scalia, J. dissenting) (discussing the zone protected by the dormant Commerce Clause). Although the majority in *Wyoming v. Oklahoma* allowed the State of Wyoming to pursue a dormant Commerce Clause challenge even though the State was not itself involved in interstate commerce, the Court's opinion in that case emphasized the "seriousness" of Wyoming's need as a sovereign entity to defend its "sovereign capacity" to collect tax revenues against adverse actions of another state acting also "in its sovereign capacity." *Wyoming*, 502 U.S. at 451 (comparing the case at bar with other Commerce Clause disputes between states). In *DaimlerChrysler v. Cuno*, by contrast, the only state actors are defendants.

146. *Boston Stock Exch.*, 429 U.S. at 319-20.

147. *Id.* at 321 n.3. The Court recognized that the plaintiff exchanges had standing to raise the same claim both on their own behalf and as representatives of their respective members. *Id.*

commerce, nor do they claim that granting the investment tax credit to Daimler-Chrysler in any way interferes with their participation in interstate commerce. Kim's Auto and Truck Services alleges the right to be free of losses from the displacement of its business caused indirectly by the Ohio investment tax credit.[148] The Ohio plaintiffs seek to avoid a higher share of the overall tax liability imposed by their own state government.[149] The Michigan plaintiffs assert a claim to hypothetical benefits from possible additional tax revenues allegedly made unavailable by the influence of Ohio's investment tax credit.[150] Although the Court has at times interpreted the zone of interests test quite broadly,[151] the rights that the *Cuno* plaintiffs assert, however valid they might be generally, are neither protected nor regulated by the Commerce Clause.

PREDICTIONS

In sum, it seems highly unlikely that the *Cuno* case will survive a standing inquiry. The only question is on which ground the Court will choose to deny standing.

The *Cuno* case certainly presents an opportunity for the Court to offer guidance on the question of the kind and degree of injury a state taxpayer must allege to have standing. If the Court pursues that objective, the narrower majority rule seems more likely to prevail than the Ninth Circuit's more lax approach. Resolving the circuit split in the former fashion would follow broader trends in respecting state prerogatives reflected by the Court's federalism and state sovereign immunity decisions and would be consistent with new Chief Justice John Roberts's purportedly minimalist jurisprudential approach.

Unfortunately, settling the circuit split over the kind and degree of injury necessary for state taxpayer standing will not entirely dispose of the case at bar. Neither Kim's Auto and Truck Services nor the Michigan plaintiffs rely on their status as taxpayers of Ohio to challenge that state's investment tax credit; Kim's at least has asserted a cognizable injury-in-fact independent of its status as an Ohio taxpayer. By contrast, the claims raised by all of the *Cuno* plaintiffs should fail on grounds of causation, redressability, or prudential standing based on the zone-of-interests test. Resolving the state taxpayer standing question represents the least efficient or minimalist of all the possible standing doctrine grounds.

The Court's approach to the *Cuno* case thus far suggests that the Court hopes to overturn the Sixth Circuit's decision in the least assertive manner possible. Accordingly, the most likely outcome seems to be that the Court will reverse the Sixth Circuit on standing grounds but leave the state taxpayer standing split unresolved.

148. *See Complaint*, *supra* note 14, at 11.

149. *See id.*

150. *See id.* at 11-12.

151. *See, e.g.*, Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 491 (1998); Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399-400 (1987).