Administrative Law and Regulation

DaimlerChrysler Corp. v. Cuno and the Constitutionality of State Tax Incentives for Economic Development

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In October 2005, legal scholars, economists, and other experts gathered in Minneapolis at an event co-sponsored by the University of Minnesota Law School and the Federalist Society's Tax Subcommittee and Minneapolis Lawyer's Chapter to discuss issues raised by *DaimlerChrysler Corp. v. Cuno*, on which the Supreme Court heard oral arguments on March 1, 2006. Essays written in conjunction with this symposium are forthcoming shortly in the *Georgetown Journal of Law and Public Policy*. The following summarizes *Cuno*'s background and some of the topics discussed in Minneapolis.

The power to tax is one of the most fundamental elements of state sovereignty. Yet the States must employ that power with due recognition for requirements and limitations imposed by the United States Constitution. As the Supreme Court has noted on several occasions, there is "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."[1]

In *DaimlerChrysler Corp. v. Cuno*, the plaintiffs as citizens and taxpayers challenged the constitutionality of an Ohio state-level investment tax credit for economic development. The case comes from the Sixth Circuit, which declared the Ohio investment tax credit to be in violation of the Commerce Clause of the United States Constitution.[2] To some extent, the *Cuno* case merely reflects a long standing debate over the constitutionality, efficacy, and wisdom of state tax incentives as a mechanism for economic development.[3] *Cuno* has brought new attention to these old debates, however, and additionally offers fresh fodder for consideration and commentary.

Background

The story of the *Cuno* case is a familiar one in today's business climate. In the late 1990s, DaimlerChrysler decided to expand its capacity to build Jeeps. DaimlerChrysler already had an assembly plant in Toledo, Ohio. So DaimlerChrysler approached Toledo municipal and Ohio state government officials to inquire about tax incentives that might be available should the company choose to expand its facilities in Toledo rather than across the border in nearby Michigan.[4]

The Ohio Revenue Code includes a non-refundable investment tax credit against Ohio corporate franchise tax for new machinery and equipment installed in Ohio facilities and also allows municipalities to offer personal property tax waivers to businesses that invest designated enterprise zones certified by the state as economically depressed.[5] After working with local and state officials, DaimlerChrysler accepted a $280 million incentive package that included, but was not limited to, assistance in securing the investment tax credit and a ten-year, 100% personal property tax waiver in exchange for building its new facility in Toledo.[6]

Charlotte Cuno, a self-described Toledo resident, homeowner, and taxpayer, joined several similar plaintiffs from Ohio and Michigan in suing DaimlerChrysler, the State of Ohio, the City of Toledo, local school boards, and various individual government officials over that incentive package.[7] The plaintiffs alleged that the state investment tax credit and local property tax exemptions granted to DaimlerChrysler violated the Commerce Clause by "providing preferential treatment to in-state economic activity."[8]

The federal district court dismissed the plaintiffs' suit for failure to state a claim upon which relief may be granted.[9] On appeal, however, the Sixth Circuit found the investment tax credit, but not the property tax waiver, in violation of the Commerce Clause.[10] Both sides petitioned for Supreme Court review of the Sixth Circuit's conclusions. Thus far, the Supreme Court has granted only the petitions of DaimlerChrysler and various state and local government defendants for review of the investment tax credit piece of the Sixth Circuit's decision. The Court has left pending the petition of Charlotte Cuno and her fellow plaintiffs concerning the corresponding property tax waiver.

In granting DaimlerChrysler's petition, the Court ordered the parties to brief the question, "Whether the respondents have standing to challenge Ohio's investment tax credit." The Court's raising of this issue *sua sponte*, together with its treatment of the petitions for certiorari, suggests that the Court may be looking to overturn the Sixth Circuit's decision on standing grounds while avoiding what I consider the more difficult Commerce Clause issue.[11] Frustrating though such an outcome would be to the *Cuno* plaintiffs, the standing question raised by the Court may represent the best means by which the Court could overturn the Sixth Circuit, avoid far-reaching economic policy implications, and at least for now remove the federal judiciary from the debate.

Such an outcome would in all likelihood merely postpone the inevitable, however. The *Cuno* plaintiffs could proceed with their case in Ohio state court. Other litigants have relied on the Sixth Circuit's analysis in challenging tax incentive programs in other states. Unless all state courts rule against the plaintiffs in such cases, the Supreme Court most likely will be petitioned eventually to resolve a conflict among state supreme courts on the same Commerce Clause issue.

Background

Article I, section 8 of the United States Constitution grants Congress the power to "regulate Commerce. . .among the several States."[12] The goal of the Commerce Clause was to control economic rivalry among the states and to create "an area of trade free from interference by the States."[13] It was not, however, intended to eliminate the "power of the States to tax for the support of their own governments"[14] or to nationalize state taxing authority.[15]

Nevertheless, the "dormant" Commerce Clause precludes states from utilizing their taxing authority in a manner that interferes with interstate commerce.[16] "No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce. . .by providing a direct commercial advantage to local business.'"[17]

The *Cuno* case is merely the latest in a line of Supreme Court jurisprudence to consider the relationship between the Commerce Clause and state tax policy.[18] The relevant Court opinions to date reflect a case-by-case approach toward policing the boundary between the Commerce Clause and state tax policy that even the Court admits leaves "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."[19]

Edward Zelinsky has argued that the Court's distinction between discriminatory and nondiscriminatory state taxation is indeterminate, with "no convincing basis under the dormant Commerce Clause for declaring some state taxes discriminatory and others not."[20] Zelinsky suggests that even the most basic and fundamental decision by a state to reduce its overall corporate tax rate to encourage new business development would be susceptible to invalidation under the Court's current dormant Commerce Clause analysis.[21] Peter Enrich acknowledges the "slippery slope" nature of the Court's jurisprudence, yet suggests that the Court will use its discretion on a case-by-case basis to avoid "needless intrusions upon state [tax] policymaking."[22]

While DaimlerChrysler clearly highlighted these scholarly concerns for the Sixth Circuit,[23] that court largely sidestepped that debate. Instead, the Sixth Circuit followed the Supreme Court's case-by-case lead, looking only to whether the challenged provisions offered "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[24]

Looking first at the investment tax credit, the court acknowledged that the credit was equally available to both in-state and out-of-state businesses.[25] Despite this equal availability, however, the court noted that corporations would be subject to unequal tax treatment based on in-state or out-of-state investment decisions.[26] Someone paying Ohio taxes would receive a credit against Ohio taxes due in exchange for further Ohio investment, while a similar Ohio taxpayer that chose to invest in Michigan instead would not. Because "the economic effect of the Ohio investment tax [wa]s to encourage further investment in-state at the expense of development in other states," the court held the tax investment credit unconstitutional under the Commerce Clause.[27]

The Sixth Circuit dismissed the argument that the personal property tax exemption created a discriminatory economic effect, however. Here, the court identified "fundamental differences" between tax credits and exemptions: "[u]nlike an investment tax credit that reduces pre-existing income tax liability, the personal property tax exemption does not reduce any existing property tax liability."[28] Thus, the court concluded, a taxpayer's decision not to invest in Ohio simply means that the taxpayer will not be subject to the property tax at all, just like the taxpayer for whom the property tax has been waived. Recognizing that "any discriminatory treatment between a company that invests in Ohio and one that invests out-of-state cannot be attributed [to] the Ohio tax regime," the court held the property tax exemption constitutional.[29]

The Sixth Circuit expressly rejected the defendants' attempt to apply a categorical framework to the *Cuno* case, noting that the Supreme Court itself had not yet adopted such an approach. Moreover, the court dismissed the defendants' comparison of the investment tax credit to a constitutionally permissible direct subsidy. While the court acknowledged that a direct subsidy would have the same economic effect as the tax credit—an effect the court concluded to be impermissible—the court nonetheless distinguished the tax credit as constitutionally infirm due to the "fact that the tax credit involves state regulation of interstate commerce through its power to tax."[30] Ultimately, the court's stated reason for continuing down the analytical slippery slope was that the Supreme Court has provided no basis for arresting that slide.

Implications

While the relationship between the dormant Commerce Clause and state tax policy will strike many followers of Supreme Court jurisprudence as a dry and esoteric issue, the *Cuno* decision could have far-reaching impact. Ohio is not the only state with a potential *Cuno*-style problem. Most states have enacted various tax incentive provisions designed to encourage economic development.[31] Some of these other states face litigation similar to the *Cuno* case. The Sixth Circuit's opinion calls into question existing tax statutes and economic development policies of many if not most states, as well as the future of state tax policy, and raises important questions about the role of the courts in guiding state tax decision-making.

A. What Does* Cuno *Mean for the States?

Although the Supreme Court has acknowledged that states are free to compete with one another for a share of interstate commerce, the antidiscrimination principle of dormant Commerce Clause analysis developed by the Court and pursued by the Sixth Circuit in *Cuno* threatens to restrain variation and innovation severely in the area of state taxation.[32] Many if not most state tax policies aimed at encouraging business growth by their very nature entail favoring local over out-of-state investments; and the Sixth Circuit's reasoning leaves a lot of room for courts to invalidate state tax provisions.

Arguably, states could replace tax incentives with direct subsidies. Direct subsidies are generally regarded as constitutionally permissible.[33] While it is true one of the original purposes for the Commerce Clause was to eliminate the discriminatory taxation between and among the states, however, it does not logically follow that practices that produce the same economic results are acceptable as long as the state's taxing power is not implicated. And the *Cuno* court's emphasis on the discriminatory *effect* of the state tax incentive suggests that just such a distinction between tax and non-tax is not possible.[34]

Supporters of the Sixth Circuit's decision, like Peter Enrich, dismiss the importance of doctrinal clarity and contend that the courts can address these questions on a case-by-case basis.[35] Admittedly, it seems unimaginable that the courts would ever go

so far as to invalidate a general reduction in tax rates as a violation of the Commerce Clause.[36] Left unanswered, however, is the question of how states should distinguish between permissible state tax competition and unconstitutional discriminatory tax schemes in developing coherent tax systems. Given the prevalence of state tax incentives, many states are left wondering what to do in light of the Sixth Circuit's decision.

Most states have remained steadfast, continuing to offer tax incentives.[37] Other states have braced themselves for litigation, defending against constitutional challenges of tax incentives of their own.[38] In Minnesota, plaintiffs have brought suit alleging that two enterprise zone programs enacted to promote economic development—the Job Opportunity Building Zone (JOBZ) and the Biotechnology and Health Sciences Industry Zone (Biotech Zone)—violate the Commerce Clause and other provisions of the Minnesota and United States Constitutions.[39] In North Carolina, the N.C. Institute for Constitutional Law has brought suit against state and local government officials challenging on Commerce Clause and Equal Protection Clause grounds certain tax incentives and subsidies enacted to encourage Dell Computers to locate a facility in the Winston-Salem area.[40] In both the Minnesota and North Carolina cases, the plaintiffs have cited the Sixth Circuit's *Cuno* decision as supporting their claims.

The litigation in Minnesota and North Carolina is representative of the exposure to litigation many other states face as a result of the *Cuno* decision.[41] The likelihood of nationwide litigation on state tax incentive issues serves to underscore the impact and the significance of the *Cuno* decision. Far from supplying the principled guidance states need to conform their tax policies to constitutional requirements, the Sixth Circuit has instead merely contributed to the controversy and confusion.

B. Who Should Be Able to Decide?

Though the states and taxpayers are crying out for guidance, perhaps they should be careful in wishing for broader standards for evaluating the Commerce Clause implications of state tax policy. True, the case-by-case model employed by the courts offers few principles on which states can rely. But at a time when "judicial restraint" has become something of a mantra, it is perhaps unrealistic or even undesirable to ask the courts to provide a broad but arbitrary test for evaluating the discriminatory effect of a panoply of state tax exemptions, credits, and deductions. While scholars have long criticized the lack of guiding principles for addressing the relationship between tax incentives and the Commerce Clause, the Court's jurisprudence to date has at least not intruded that far into the realm of state tax competition.

Cuno arguably breaks new ground in pushing the courts further toward compelling tax uniformity among the states; but perhaps that is less due to the Court's interpretation of the Commerce Clause than the lower courts' willingness to entertain a more aggressive strain of lawsuits. One distinguishing factor between *Cuno* and the cases preceding it is the identity of the plaintiffs. In all of the cases relied upon by the *Cuno* court, the plaintiffs were states, businesses, or both—that is, parties with a broader interest in not pushing the Court's antidiscrimination analysis too far, lest they lose their own ability to participate in and benefit from state tax competition. It is in these parties' interests to pursue a careful balance between national and local interests in Commerce Clause jurisprudence.

By contrast, the *Cuno* plaintiffs have no reason to pursue or even respect such balance. Unlike plaintiffs in previous cases addressing the Commerce Clause implications of state tax policy, the *Cuno* plaintiffs do not allege that a state is using a particular tax credit or exemption to favor a local competitor's business interests over their own or otherwise to discriminate against them personally. While some taxpayer suits are motivated by idealistic dedication to lofty constitutional goals such as free speech or equal protection, the plaintiffs in *Cuno* and similar litigation are hardly motivated by similar allegiance to Commerce Clause principles. Instead, the *Cuno* case merely reflects an underlying policy disagreement between those like the *Cuno* plaintiffs who see state tax incentives as an improper allocation of state funds and a drain on state tax revenues and state government officials who remain adamant that the incentives are needed to encourage economic development; and the *Cuno* plaintiffs are simply taxpayers who disagree with the economic development policies pursued by their government officials. The Commerce Clause is merely one mechanism by which the *Cuno* plaintiffs hope that the courts will mandate the policy outcome that incentive opponents have been unable to achieve legislatively.

Opponents of state tax incentives argue that the very nature of state tax competition prevents state legislatures from ending the economic war, even though doing so would be in their own best interests. Accordingly, ending inefficient state reliance on state tax incentives may require a federal solution. But federal involvement does not necessarily entail a judicial response. The Court is ill-equipped to wade through competing economic studies of state tax incentives to develop a test for distinguishing the good from the bad. Edward Zelinsky has advocated returning the issue of state tax incentives to the political branches,[42] and Brannon Denning correspondingly urges the Court toward a minimalist resolution of the *Cuno* case.[43]

Along these lines, many have urged Congress to take action to end state tax competition.[44] With that goal in mind, former U.S. Representative David Minge of Minnesota endeavored to persuade Congress to impose an excise tax on businesses benefiting from state tax incentive programs and prohibit states from using federal funds in connection with such activities.[45] By contrast, in response to the *Cuno* decision, state governments have lobbied Congress to enact the Economic Development Act of 2005, which purports to preserve the ability of the states to pursue state tax incentive programs.[46] It is not at all clear that congressional action will be a panacea, however. As Walter Hellerstein argues, the current proposed federal legislation appears to do little more than codify the muddled Supreme Court precedent.[47] Such "guidance" could merely shift the litigation focus from constitutional attacks to statutory attacks.

C. A Mountain or a Molehill?

Taking the federal judiciary out of the equation would do nothing to resolve the policy debate over state tax incentives, however. Moreover, overturning the *Cuno* decision could remove the primary incentive for prompt congressional action and simply

return the matter to the states. Should we be worried about that outcome?

Notwithstanding the dire predictions of both sides in the economic debate over state tax incentives, it seems as plausible as not that the *Cuno* case could have very little practical impact on state government operations, regardless of how the Court resolves it. On the one hand, while some state tax incentive programs may be economically unwise, it seems unlikely that overturning the Sixth Circuit's opinion in *Cuno* and returning the matter to the states would lead to state economic Armageddon. For some time now, state and local government have been using tax incentives as a mechanism for economic development, and even if such programs are not particularly effective in achieving the desired ends, the republic has not fallen.

Moreover, even if the Court were to uphold the Sixth Circuit in *Cuno*, it is unrealistic to expect that the states will give up competing for new business. As it stands, the *Cuno* decision does not reject all state economic competition. Upholding the Sixth Circuit's opinion in *Cuno* may only cause states to adjust their policies to a new constitutional reality and shift the debate from tax incentives to direct expenditures. At a minimum, the Sixth Circuit's decision leaves open the opportunity for states to use direct subsidies instead of tax incentives to lure new business development. Indeed, Ohio is already adjusting its economic development activities in that direction in response to *Cuno*.[48]

Conclusion

Ultimately, therefore, the *Cuno* decision presents more questions than it answers. With the Supreme Court granting certiorari, it is possible that at least some answers will come soon, one way or another. It is equally conceivable, however, and probably preferable, that the Supreme Court will sidestep the heart of the issue, resolve the case on standing grounds without reaching the merits, and leave the matter of state tax incentives to the state courts and/or the political branches, at least for now. Either way, the debate over the constitutionality of state tax incentives seems likely to continue.

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Footnotes

[1] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959).

[2] *See* Cuno v. DaimlerChrysler, Inc., 386 F.3d 738 (6th Cir. 2004).

[3] *See, e.g.*, Melvin L. Burstein & Arthur J. Rolnick, *Congress Should End the Economic War Among the States*, 10 State Tax Notes 1895 (1995); 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); Alan Peters & Peter Fisher, *The Failures of Economic Development Incentives*, 70 J. Amer. Planning Assoc. 27 (2004); James R. Rogers, *State Tax Competition and Congressional Commerce Power: The Original Prudence of Concurrent Taxing Authority*, 7 Regent U. L. Rev. 103 (1996); 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 (2002-03).

[4] *See Cuno*, 386 F.3d at 741.

[5] Ohio Rev. Code Ann. §§ 5733.33, 5709.62, 5709.631.

[6] *See Cuno*, 386 F.3d at 741.

[7] Brief of Appellants at 4-5, Cuno v. DaimlerChrysler, Inc., 386 F.3d 738 (6th Cir. 2004) (No. 01-3960); *see also* Complaint for Declaratory and Injunctive Relief at 5-7, Cuno v. DaimlerChrysler, Inc., No. CI0200006084 (Lucas Co., Ohio Mar. 28, 2000). The plaintiffs were assembled by Ralph Nader in order to attack the incentive package as a form of "corporate welfare." *See* J.T. Young, *Benedict Arnold Courts*, Wash. Times, July 24, 2005, at B4.

[8] Brief of Appellants, *supra* note 7, at 12-13.

[9] Cuno v. DaimlerChrysler, Inc., 154 F. Supp. 2d 1196, 1203-04 (N.D. Ohio 2001), *aff'd in part, rev'd in part*, 386 F.3d 738 (6th Cir. 2004).

[10] Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 746-48 (6th Cir. 2004).

[11] *See* Kristin E. Hickman, *How Did We Get Here Anyway?: Considering the Standing Question, in* DaimlerChrysler v. Cuno, 4 Geo. J.L. & Pub. Pol'y (forthcoming 2006) (arguing that the Supreme Court could deny standing to all of the plaintiffs on several independent bases).

[12] U.S. Const. art I, § 8, cl. 3.

[13] Freeman v. Hewit, 329 U.S. 249, 252 (1946).

[14] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 199 (1824).

[15] *See* Rogers, *supra* note 3, at 126.

[16] *See* Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992).

[17] Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)).

[18] *See, e.g.*, West Lynn Creamery, Inc. v. Healey, 512 U.S. 186 (1994); New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988); Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984); Westinghouse Elec. Corp. v. Tulley, 466 U.S. 388 (1984); Maryland v. Louisiana, 451 U.S. 725 (1981); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977).

[19] *See, e.g.*, Westinghouse, 466 U.S. at 403; Boston Stock Exch., 429 U.S. at 329.

[20] Zelinsky, *supra* note 3, at 36

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[21] *See id.*

[22] *See* Enrich, *supra* note 3, at 461. Notwithstanding his own opposition to state tax incentive programs generally, Enrich agrees that it would be a "shocking development" for some state tax policies to come under Commerce Clause scrutiny. *See id.* at 459.

[23] *See* Final Brief of Appellee DaimlerChrysler Corp., Cuno v. DaimlerChrysler, Inc., 386 F.3d 738 (6th Cir. 2004).

[24] Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 743 (6th Cir. 2004).

[25] *See id.*

[26] *See id.*

[27] *Id.* at 745.

[28] *Id.* at 747.

[29] *Cuno*, 386 F.3d at 747-48.

[30] *Id.* at 746.

[31] *See* Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 Minn. L. Rev. 413, 421-23 (1997); Young, *supra* note 7, at B4.

[32] *See* Enrich, *supra* note 3, at 466.

[33] *See* West Lynn Creamery, Inc. v. Healey, 512 U.S. 186, 199 n.15 (1994); Hellerstein & Coenen, *supra* note 3, at 836 (discussing).

[34] *See* Enrich, *supra* note 3, at 459 ("[C]ash subsidies. . .surely distort economic decisions in precisely the same way as tax benefits.").

[35] *See id.* at 462 (quoting *West Lynn Creamery*, 512 U.S. at 201).

[36] *See id.* at 459 ("As the Court has emphasized, '[t]he simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution.'").

[37] *See, e.g.*, Tom Ramstack, *Justices to Mull Business Tax Lures*, Wash. Times, Sept. 28, 2005; *Tax Incentives Will Be Tested by High Court*, Lincoln Journal Star, Sept. 28, 2005, at B1; *Kentucky Business Incentives*, http://www.thinkkentucky.com/kyedc/kybizince.asp (last visited Nov. 6, 2005). As Clay Gillette has noted, "[N]o state, aware of the incentive programs offered by other jurisdictions, can escape from the cycle . . . for fear that doing so will place it at a competitive disadvantage in the search for economic development." Gillette, *supra* note *3*, at 479.

[38] *See* Young, *supra* note 7, at B4 ("Unsurprisingly, other cases attempting to take advantage of this novel interpretation are already pending (with suits filed in Minnesota and Wisconsin, with additional cases expected in Nebraska, Oklahoma, and North Carolina.)").

[39] *See* Jennifer Carr & Cara Griffith, *Litigation and Tax Incentives After the Downfall of Ohio's ITC*, State Tax Notes, 367-68 (May 2, 2005).

[40] *See, e.g.*, *Dell Deal Challenge Merits Legal Answer*, Greensboro News & Record, Oct. 14, 2005, at A12; *Suit Filed in North Carolina to Enjoin Incentives Offered to Computer Manufacturing Facility*, 66 State Tax Review 1 (July 6, 2005); *Group Sues N.C. over Dell Incentives*, N.C. Observer, June 24, 2005, *available at* http://www.charlotte.com/mld/charlotte/business/11972408.htm.

[41] *See* Carr & Griffith, *supra* note 40, at 369.

[42] *See, e.g.*, Edward A. Zelinsky, *Ohio Incentives Decision Revisited*, 37 State Tax Notes 859 (Sept. 19, 2005) ("There is much to be said for. . .federal legislation producing the kind of targeted tax breaks challenged in Cuno.").

[43] Brannon Denning, *Cuno and the Court: The Case for Minimalism*, 4 Geo. J.L. & Pub. Pol'y (forthcoming 2006).

[44] *See* Burstein & Rolnick, *supra* note 3, at 1900 ("[I]t is now time for Congress to exercise its Commerce Clause power to end another economic war among the states."). *But see* Gillette, *supra* note 3, at 478 ("It. . .does not follow that federal intervention to save states from themselves is warranted.").

[45] *See, e.g., Minge Testimony at W&M Oversight Hearing on Tax Code and Economy*, 2000 Tax Notes Today 188-22 (Sept. 27, 2000); *Minge Testimony at House Budget Hearing on Unnecessary Business Subsidies*, 1999 Tax Notes Today 127 (July 2, 1999); *Minge Bill Would Tax Companies' State, Local Relocation Subsidies*, 1999 Tax Notes Today 58 (March 26, 1999); *Minge Bill, H.R. 3044, Would Tax State, Local Subsidies for Businesses*, 1997 Tax Notes Today 228 (Nov. 26, 1997).

[46] S. 1106, 110th Cong. (2005).

[47] *See* Walter Hellerstein, *Cuno and Congress: An Analysis of Proposed Federal Legislation Authorizing State Economic Development Incentives*, 4 Geo. J.L. & Pub. Pol'y (forthcoming 2006).

[48] *See* Zelinsky, *supra* note 43, at 859 (discussing congressional testimony of Ohio Lt. Gov. Bruce Johnson).