Cuno: The Property Tax Issue

Edward A. Zelinsky
Benjamin N. Cardozo School of Law, zelinsky@yu.edu

Follow this and additional works at: https://larc.cardozo.yu.edu/faculty-articles

Part of the Law Commons

Recommended Citation
Available at: https://larc.cardozo.yu.edu/faculty-articles/426

This Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact christine.george@yu.edu, carissa.vogel@yu.edu.
Cuno: The Property Tax Issue

EDWARD A. ZELINSKY*

Most discussions of Cuno v. DaimlerChrysler, Inc.1 (including my own)2 have focused on the state income tax credit which Ohio granted to DaimlerChrysler for DaimlerChrysler’s new plant in Toledo. In Cuno, the U.S. Court of Appeals for the Sixth Circuit struck this income tax credit on dormant Commerce Clause grounds. Less attention has been paid to the municipal personal property tax exemption also extended to DaimlerChrysler. In contrast to the Cuno court’s conclusion that the Ohio income tax credit is unconstitutional,3 that court upheld the Ohio property tax exemption and rejected the claim that the exemption unconstitutionally discriminates against interstate commerce.

At one level, the intense focus placed on the Sixth Circuit’s treatment of the Ohio income tax credit is unsurprising because the Sixth Circuit’s invalidation of that credit endangers a widespread network of similar tax credits. Disruption draws attention. And Cuno, if it accurately states the law under the dormant Commerce Clause, will disrupt state laws and economic development programs throughout the nation. Those laws and programs typically attract and retain businesses using the type of income tax credit struck on constitutional grounds by the Cuno court. The Supreme Court’s decision4 to hear the Cuno case to review the constitutionality of the Ohio income tax credit focuses further attention upon that credit and its status under the dormant Commerce Clause.

In contrast, the appeals panel’s decision sustaining the municipal property tax exemption reinforces the status quo; i.e., the property tax exemptions routinely extended to firms like DaimlerChrysler to attract or retain such firms. Moreover, the Supreme Court has yet to indicate whether it will review the property tax

---

* The Morris and Annie Trachman Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. For comments on an earlier draft, Professor Zelinsky thanks Professor Walter Hellerstein. This article is dedicated to the memory of Professor Boris I. Bittker. In the words of the traditional Jewish prayer of remembrance, “may his place of rest be in paradise.”


3. The Cuno court’s conclusion that the Ohio income tax credit violates the dormant Commerce Clause is limited to firms like DaimlerChrysler with “pre-existing” presence in Ohio. See Cuno, 386 F.3d at 747.

4. On September 27, 2005, the U.S. Supreme Court granted the writ of certiorari sought by the defendants in Cuno to review the Sixth Circuit’s decision invalidating the Ohio income tax credit extended to DaimlerChrysler. DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 36 (Sept. 27, 2005).

As part of its September 27th order, the Court requested that the parties brief the issue of the Cuno taxpayers’ standing to challenge the Ohio income tax credit. The Court was divided the last time it considered state taxpayers’ standing to sue in federal court. Asarco Inc. v. Kadish, 490 U.S. 605 (1989).
portion of the *Cuno* opinion.⁵

It is, however, probable that plaintiffs emulating the *Cuno* taxpayers will challenge property tax exemptions in other states. Now pending before the Wisconsin Supreme Court is a *Cuno*-style challenge to Wisconsin’s personal property tax exemption for any airline maintaining a “hub facility” in that state. ⁶ Other courts are likely to address the constitutional status of similar property tax exemptions in the years ahead.

I accordingly write to help remedy the relative neglect of the *Cuno* property tax issue. In particular, I write to explore the contention of the *Cuno* plaintiffs that the municipal personal property tax exemption extended to DaimlerChrysler discriminates in violation of the dormant Commerce Clause and to examine the Sixth Circuit’s rejection of that contention.

The taxpayers’ dormant Commerce Clause challenge to the Ohio property tax exemption raises three basic issues. Two of these—the equivalence of tax and direct expenditures for Commerce Clause purposes and the indeterminacy of the concept of Commerce Clause discrimination—also arise in the context of the Ohio income tax credit. However, the third issue—the Commerce Clause status of the conditions attached to the personal property tax exemption—is unique to that exemption.

My basic conclusion about the DaimlerChrysler property tax exemption is the same as my earlier conclusion about the Ohio tax credit: it is wrong as a matter of tax policy but permitted as a matter of constitutional law. A direct expenditure subsidy from Ohio to DaimlerChrysler would have had the same economic effect on interstate commerce as the tax exemption actually granted. Since the direct spending subsidy should pass dormant Commerce Clause muster, so too should the comparable tax exemption. Policies with identical economic effects on interstate commerce should have the same status for dormant Commerce Clause nondiscrimination purposes.

I also conclude that, if municipalities proceed with property tax exemptions, municipalities are, as a matter of policy, well-advised to attach to such exemptions the kind of conditions challenged by the *Cuno* taxpayers. Such conditions ensure that municipalities actually receive the performance promised by the firms subsidized by tax exemption. Such conditions thus constitute a reasonable quid pro quo for the subvention entailed in tax exemption. The dormant Commerce Clause has not and should not be interpreted as precluding such quid

---

⁵ The Supreme Court has yet to act on the certiorari petition of the *Cuno* taxpayers. That petition asks the Court to review the Sixth Circuit’s opinion sustaining the municipal personal property tax exemption granted to DaimlerChrysler for its new Ohio plant. Petition for Writ of Certiorari, *Cuno* v. DaimlerChrysler, Inc., No. 04-1407 (Apr. 18, 2005) [hereinafter, Taxpayers’ Petition].

⁶ See *Northwest Airlines, Inc.* v. Wis. Dep’t. of Revenue, No. 04-0319, 2005 WL 487882 (Wis. Ct. App. Mar. 3, 2005) (dormant Commerce Clause challenge to personal property tax exemption certified to Wisconsin Supreme Court). The considerations leading me to conclude that Ohio’s personal property tax exemption constitutes bad tax policy but is constitutional lead me to the same conclusions about the Wisconsin exemption.
pro quo conditions when a state or locality subsidizes a business firm via a cash grant, favorable loan, in-kind service or other nontax assistance. Consequently, the dormant Commerce Clause should pose no barrier to such conditions when a state or locality subsidizes through an economically equivalent tax break.

In the final analysis, there is no principled basis for declaring the Cuno property tax exemption discriminatory for dormant Commerce Clause purposes while an economically equivalent direct expenditure subsidy passes Commerce Clause muster.

BACKGROUND

As readers of the now-extensive Cuno oeuvre know, DaimlerChrysler replaced its existing manufacturing plant in Toledo with a new nearby facility. For this new plant, DaimlerChrysler received an investment tax credit against DaimlerChrysler's Ohio income tax liability. In addition, as part of Ohio's enterprise zone program, DaimlerChrysler received for this new plant a ten year exemption from municipal personal property taxes.

To retain its property tax exemption, DaimlerChrysler was (and is) obligated under Ohio law to make a stated level of investment and to maintain employment in the new plant at specified levels. If DaimlerChrysler fails to satisfy these obligations, the property taxes forgiven by the exemption become payable retroactively and the exemption can also be withdrawn prospectively.8

The Cuno plaintiffs did not (and do not) contend that personal property tax exemptions per se violate the dormant Commerce Clause: “[T]he Commerce Clause would raise no barrier against a state granting a general exemption from personal property taxation for all business property, or for certain categories of personal property, located within the state.”9 Rather, the Cuno plaintiffs argued before the Sixth Circuit and assert in their petition for certiorari that the conditions Ohio attaches to such property tax exemption (commonly called “clawback” provisions)10 cause the exemption to discriminate against interstate commerce in violation of the dormant Commerce Clause: “It is these conditions upon the granting of tax exemptions”—the requirements that DaimlerChrysler

---


9. Taxpayers' Petition, supra note 5.

10. See infra, note 31 and accompanying text.
make a specified investment and maintain minimum levels of employment—which “impose[] unconstitutionally ‘discriminatory burdens.’”

In support of their position, the Cuno plaintiffs analogize the Ohio personal property tax exemption extended to DaimlerChrysler to the Maine property tax exemption struck on Commerce Clause grounds by the U.S. Supreme Court in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*. The Maine exemption was conditioned upon a nonprofit summer camp serving Maine, rather than out-of-state, children. The Court held that on its face the exemption, “discriminates against interstate commerce” by “singling out camps that service mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business.”

On two grounds, the Sixth Circuit sustained the Ohio property tax exemption against the Cuno plaintiffs’ dormant Commerce Clause challenge. First, the appeals panel characterized the conditions Ohio attaches to the property tax exemption as “minor collateral requirements,” which “are directly linked to the use of the exempted personal property.” Consequently, the requirements that DaimlerChrysler make a specified investment and employ a minimum number of persons “do not independently burden interstate commerce.”

Second, the Sixth Circuit held the property tax exemption “non-coercive.” The Ohio income tax credit is unconstitutional, according to the appeals panel, because the credit “reduces pre-existing income tax liability.” In contrast, “the personal property exemption does not reduce any existing property tax liability.” Rather, “[t]he exemption merely allows a taxpayer to avoid tax liability for new personal property put into first use in conjunction with a qualified new investment.” Hence, according to the Sixth Circuit, the personal property tax exemption (unlike the Ohio income tax credit) does not discriminate against interstate commerce in violation of the dormant Commerce Clause.

Finally, the Cuno court distinguished *Camps Newfound/Owatonna* because the Ohio property tax exemption at issue in Cuno (in contrast to the Maine exemption) does not restrict “the individuals employed or served” by the institution receiving the exemption.

On September 27, 2005, the Supreme Court granted writs of certiorari in Cuno challenging the Sixth Circuit’s decision that the Ohio tax credit violates the dormant Commerce Clause. The Court has not acted on the certiorari.

---

11. Taxpayers’ Petition, supra note 5.
13. Id. at 576.
15. Id.
16. Id.
17. Id. This implies that the credit is permitted to a firm (unlike DaimlerChrysler) with no prior presence in Ohio. See Zelinsky, *Revisited*, supra note 2; Zelinsky, *Critique*, supra note 2.
18. Cuno, 386 F.3d at 747.
19. Id.
20. Id.
petition of the Cuno taxpayers which asks the Court to review the constitutional status of the municipal personal property tax exemption.

DISCUSSION

a) The Equivalence of Tax and Direct Expenditures

Like their challenge to the Ohio investment tax credit, the challenge of the Cuno taxpayers to DaimlerChrysler’s property tax exemption highlights a fundamental problem with the dormant Commerce Clause jurisprudence concept of discrimination: the economic and procedural equivalence of tax and direct expenditures. The Court’s case law holds that tax and direct outlays are, for dormant Commerce Clause purposes, different when in fact such taxes and direct outlays may be identical in their economic effects and procedural characteristics.21

Suppose, for example, that, in lieu of the personal property tax exemption granted to DaimlerChrysler, the Ohio municipalities had instead fully taxed DaimlerChrysler’s new facility, but had simultaneously given to DaimlerChrysler a cash grant equal to the property taxes paid by DaimlerChrysler. Suppose further that this cash grant was (like the property tax exemption) conditioned on DaimlerChrysler both making a specified level of investment and maintaining a minimum level of employment at the new facility.

The economic consequences of this theoretical direct cash grant would be precisely the same as the economic effect of the property tax exemption actually extended to DaimlerChrysler. The Supreme Court has stated that the fundamental inquiry under the dormant Commerce Clause is the “actual effect” of a state’s tax policies upon interstate commerce.22 From this premise, if the property tax exemption is constitutionally infirm because of its economic ramifications, the comparable cash grant must similarly violate the dormant Commerce Clause because of its equivalent economic effects on interstate commerce.

Or suppose that, in lieu of the personal property tax exemption actually extended to DaimlerChrysler, the Ohio municipalities had granted to DaimlerChrysler a no-interest loan of equivalent economic effect to the property tax exemption. Again, let us assume that this loan was, like the property tax exemption, conditioned on DaimlerChrysler’s satisfaction of minimum investment and employment targets. If the dormant Commerce Clause is about “actual effect,” this hypothetical no-interest loan must have the same constitutional status as the economically comparable property tax exemption. Both impact interstate commerce in the same way.


Or, to take yet a third variant, suppose that the Ohio municipalities had levied full property taxes against the new DaimlerChrysler plant, but had provided DaimlerChrysler with in-kind services (e.g., worker training, roads, sewers) of equal value to the exemption. Again, if compliance with the dormant Commerce Clause is a matter of "actual effect," in-kind services provided by state and local governments can have the same economic impact as tax incentives.

Procedurally, a similar story of equivalence can be told. Sometimes, tax expenditures require an affirmative vote by politically accountable decision makers. At other times, tax expenditures are structured as pre-existing entitlements for which the taxpayer is automatically eligible if the taxpayer satisfies stated criteria. The same is true of direct outlays, such as grants, loans, and in-kind services. Sometimes, politically accountable decision makers must vote to extend these outlays to a particular taxpayer. In other cases, permanent entitlement-type programs dispense direct outlay largesse automatically to any taxpayer who satisfies pre-established criteria.

In Cuno, the property tax exemption extended to DaimlerChrysler required the affirmative agreement of the affected municipalities, the City of Toledo, and two school districts. So too equivalent grants, loans or in-kind services might have required explicit approval of municipal decision makers. In short, taxes and direct outlays may be equivalent in their procedural characteristics as well as their economic effects.

The equivalence of tax incentives and direct outlays has sobering implications for the Supreme Court's dormant Commerce Clause analysis: if, as current doctrine holds, it is the Court's role under the dormant Commerce Clause to police state tax policies for their discriminatory economic effects against interstate commerce, the Court should also police substantively and procedurally equivalent direct expenditures for their discriminatory economic effects. If the Commerce Clause can be violated by one, then logically it can be violated by the other.

The problem is not one of borderlines and close cases. Rather, at the core of the concept of dormant Commerce Clause nondiscrimination, there is no principled basis for distinguishing between taxes and direct expenditures. If, as the Cuno plaintiffs contend, the personal property tax exemption given to DaimlerChrysler discriminates against interstate commerce, so too would a procedurally and substantively comparable direct outlay.

This, quite understandably, is a conclusion from which many (myself included) recoil since it would intrude the Court and the dormant Commerce Clause deeply into the routine spending decisions of states and localities.

23. Zelinsky, Tax Benefits, supra note 21, at 400-09.
24. Cuno, 386 F.3d at 741-42.
25. Nondiscrimination is one of the four elements of the widely applied Complete Auto test. Complete Auto Transit, Inc., 430 U.S. at 277-78. For a description and critique of the Court's dormant Commerce Clause case law on nondiscriminatory taxation, see Zelinsky, Abandoning, supra note 21, at 32-47.
Given, on the one hand, the equivalence of tax expenditures and direct spending, and, on the other hand, a dormant Commerce Clause jurisprudence based on “actual effect,” it is difficult to find any state or local outlay immune from the charge that it favors in-state over out-of-state interests in violation of the nondiscrimination test of that Clause. By definition, state and local spending benefits persons within the state’s or locality’s boundaries to the exclusion of those outside.

Suppose, for example, that local officials had determined that DaimlerChrysler was more likely to invest in a new Toledo facility if magnet high schools were established in Toledo. Suppose further that, in response to this insight, such schools were created and, as had been hoped, DaimlerChrysler located its new plant near its old Toledo facility. If (as the Cuno plaintiffs assert) a property tax exemption inducing DaimlerChrysler to build in-state can violate the nondiscrimination requirement of the dormant Commerce Clause, so too the dormant Commerce Clause must apply to this affirmative expenditure of public funds which constitutes a similar inducement to DaimlerChrysler to build in Ohio. “Actual effect” must mean “actual effect,” whether the policy causing the effect on interstate commerce is a tax subsidy or a direct expenditure.

To summarize: unless we are prepared to apply the dormant Commerce Clause concept of nondiscrimination to virtually all expenditures of state and local governments, there is no principled basis for policing tax exemptions which are procedurally and economically equivalent to such direct expenditures.

b) The Indeterminacy of Commerce Clause Discrimination

Notwithstanding the equivalence of tax and direct expenditures, let us assume arguendo that there is a persuasive basis for subjecting taxes, but not direct outlays, to dormant Commerce Clause nondiscrimination scrutiny. This brings us to the second question highlighted by the Cuno plaintiffs’ challenge to the DaimlerChrysler personal property tax exemption: is there a convincing basis for identifying some taxes but not others as discriminating against interstate commerce?²⁶

The Cuno taxpayers acknowledge the constitutionality of a personal property tax exemption “for all business property, or for certain categories of personal property, located within the state.”²⁷ In contrast, the Cuno taxpayers condemn as unconstitutional the exemption extended to DaimlerChrysler because that exemption is conditioned upon required levels of investment and employment.²⁸

²⁶. See Zelinsky, Abandoning, supra note 21; Zelinsky, Critique, supra note 2.
²⁷. Taxpayers’ Petition, supra note 5.
²⁸. Framing the issue in this fashion ignores an important kind of property tax exemption, an exemption targeted to a particular firm but lacking any performance requirements. Suppose, for example, that DaimlerChrysler had been voted a firm-specific property tax exemption to stay in Toledo, but that Ohio law did not condition such exemption upon minimum amounts of investment and employment. Such a firm-specific exemption would not satisfy the Cuno plaintiffs’ test for constitution-
The position outlined by the *Cuno* taxpayers proves unpersuasive because the impact of the Ohio property tax exemption on interstate commerce depends upon the point in the taxpayer's decisionmaking process at which such impact is assessed. Consequently, the concept of nondiscriminatory taxation proves indeterminate in this dormant Commerce Clause context (as it does in most other dormant Commerce Clause settings).

Because DaimlerChrysler has accepted the Ohio property tax exemption with its condition of minimum investment and employment levels, DaimlerChrysler, to retain that exemption, will now assign jobs and investment to its new Toledo facility rather than send jobs and investment out-of-state and thereby jeopardize the exemption. If, in contrast, DaimlerChrysler had built a tax-exempted Ohio facility without conditions being attached to the exemption, DaimlerChrysler would have been free to move jobs and capital out-of-state without risking its exemption. Q.E.D., the *Cuno* plaintiffs conclude, the conditioned Ohio exemption discriminates against interstate commerce by inducing DaimlerChrysler to keep employment and investment in Ohio rather than sending such employment and investment out-of-state.

Note the critical, but unstated, premise of this argument: constitutionality under the dormant Commerce Clause is to be assessed after DaimlerChrysler has located its new plant. From this vantage, as the *Cuno* plaintiffs maintain, the conditions attached to the personal property tax exemption will incent DaimlerChrysler to keep jobs and investment in Ohio to protect the exemption. Indeed, it is the evident purpose of those conditions to retain employment and investment in Ohio in return for personal property tax exemption.

But a different perspective emerges if matters are assessed earlier in DaimlerChrysler's decision making process, when DaimlerChrysler chose to build in Ohio rather than elsewhere. At this prior point in the process, the conditions attached to the Ohio property tax exemption, by inhibiting DaimlerChrysler's operational flexibility, made it less attractive for DaimlerChrysler to build in Ohio. The obligations attached to the Ohio property tax exemption incented DaimlerChrysler to build in another state where property tax exemption is not tied to specified levels of investment and employment.

Suppose, for example, that DaimlerChrysler had narrowed its choice to two locations, Ohio and State X. Suppose further that the economics and taxes of State X were identical to the economics and taxes in Ohio except that State X

---

exempts from taxation all personal property of car manufacturers and attaches no conditions to that tax exemption. On these assumptions, holding all other factors constant, DaimlerChrysler would have picked State X for its new factory over Ohio since State X grants property tax exemption with no strings attached while the Ohio exemption is freighted with investment and employment obligations. Thus, from the point at which DaimlerChrysler made its locational decision, the unconditioned property tax exemption of State X was more likely to influence that decision (and thereby alter the pattern of interstate commerce) than the more constraining exemption offered by Ohio.

In sum, if the impact on interstate commerce is assessed at the time DaimlerChrysler was choosing between Ohio and other locations, the Cuno plaintiffs have it exactly backward: an unconditioned property tax exemption is more attractive to a firm than an exemption like Ohio’s, burdened with performance obligations. Consequently, when a firm is deciding where to locate its new facility, the pattern of interstate commerce is more likely to be altered by a state which offers a flexible tax exemption than by Ohio which offers an exemption obligating the exempted firm to meet investment and employment levels to retain tax-free status.

There is a priori no way to choose if Commerce Clause discrimination should be assessed before or after DaimlerChrysler decided to locate its new plant in Ohio, though the outcome of the nondiscrimination inquiry depends upon that choice. It is no surprise that the dormant Commerce Clause concept of discriminatory taxation proves indeterminate in the context of the Ohio property tax exemption as that concept lacks coherence in all but the simplest cases. 30

c) The Clawback Provisions

Having placed aside the equivalence of tax and direct expenditures, let us similarly bracket the difficulty in the dormant Commerce Clause setting of distinguishing between discriminatory and nondiscriminatory taxation. This allows us to examine the third issue raised by the Cuno plaintiffs’ challenge to the DaimlerChrysler municipal property tax exemption: assuming arguendo that there are principled distinctions to be drawn for Commerce Clause purposes between tax and direct expenditures and between those taxes which discriminate and those which do not, should, as the Sixth Circuit held, the conditions placed on the DaimlerChrysler property tax exemption be disregarded?

The kind of conditions attached by Ohio to the municipal personal property tax exemption are often denoted as “clawback”31 provisions and are increasingly common. The logic of such clawback conditions is straightforward and compelling: because the state or municipality is subsidizing a business firm via tax exemption, the subsidizing state or municipality should, in return for taxes

---

30. See Zelinsky, Abandoning, supra note 21, at 32-47; Zelinsky, Critique, supra note 2.
foregone, be guaranteed promised benefits in terms of investment and employment. A deal is a deal.

The *Cuno* plaintiffs are evidently opponents of tax subsidies. However, their litigating posture—unconditioned exemptions are constitutional, constrained exemptions are not—puts them at loggerheads with those subsidy reformers who favor clawbacks to assure states and localities tangible benefits in return for tax exemptions. No doubt, some (likely many) who support the position of the *Cuno* plaintiffs do not really favor the unconditioned property tax exemptions characterized as constitutional under this position. Rather, these *Cuno* supporters hope that, if exemptions without strings are the only constitutional alternative, municipalities will abandon exemptions altogether since they can no longer attach conditions to such exemptions.

This is potentially a high stakes gamble: if, as the *Cuno* plaintiffs assert, only unconditioned exemptions are constitutionally permitted, states and municipalities may be forced to grant tax exemptions without clawback provisions rather than abandoning exemptions altogether. If this occurs, exemption opponents will have won what many would consider a Pyrrhic victory as exemptions would still be granted but without any corresponding obligation by the subsidized business firm.

Critical to understanding the *Cuno* panel’s handling of the clawback issue is an important article by Professors Hellerstein and Coenen, *Commerce Clause Restraints on State Business Development Incentives.*

Professors Hellerstein and Coenen postulate that, for dormant Commerce Clause purposes, the key difference between an unconstitutional tax incentive and a tax incentive which passes Commerce Clause muster is “coercion.” Under this theory of dormant Commerce Clause nondiscrimination, “the coercive use of [the state’s] taxing authority” makes a tax provision unconstitutional.

The *Cuno* panel had a curious relationship with the Hellerstein and Coenen article and its coercion theory of dormant Commerce Clause nondiscrimination. The original version of the *Cuno* opinion contained no references to the Hellerstein and Coenen article, though the article’s coercion theory was central to that opinion. Indeed, the *Cuno* panel’s analysis of the Ohio income tax credit is a direct application of that theory: because DaimlerChrysler had prior in-state presence in Ohio, the Ohio tax credit “pressured” DaimlerChrysler to stay in Ohio rather than relocate to another state. To its credit, the panel subsequently revised and reissued its *Cuno* opinion, acknowledging the influence of the Hellerstein and Coenen article and its coercion thesis.

However, in upholding against constitutional challenge the conditions at-

---


35. 386 F.3d 738.
attached to the DaimlerChrysler municipal personal property tax exemption, the *Cuno* panel eschewed the Hellerstein and Coenen coercion framework without giving an explanation. Professors Hellerstein and Coenen conclude that, under the dormant Commerce Clause, it is unconstitutionally coercive for a state to condition a property tax exemption upon the taxpayer's "independent activity." In particular, Professors Hellerstein and Coenen state that "property tax incentives limited to businesses that create a certain number of new jobs in the state" violate the dormant Commerce Clause by using the state's "taxing power to coerce taxpayers to engage in in-state activity." This describes the Ohio tax exemption, conditioned on DaimlerChrysler maintaining required employment levels at its new Toledo plant. The Hellerstein and Coenen coercion analysis indicates that such employment-related clawback provisions violate the dormant Commerce Clause by demanding of the exempted firm "independent activity" in the form of guaranteed employment levels. Nevertheless, the Sixth Circuit, while it chose to follow the Hellerstein-Coenen coercion theory in the context of the Ohio income tax credit, abandoned that analysis as to the property tax exemption, upholding the exemption despite the employment-related conditions attached to it.

The Sixth Circuit never explains why it cherry picks from the Hellerstein and Coenen article in this fashion, using the article's coercion theory to hold unconstitutional the income tax credit, but not the property tax exemption. The closest *Cuno* comes to an explanation for upholding the exemption conditions is *Cuno*'s characterization of the Ohio clawback provisions as "minor collateral requirements" which "are directly linked to the use of the exempted personal property." The *Cuno* plaintiffs are properly critical of this statement. It is, as they suggest, difficult to see how the employment-related clawback provisions are either "minor" or "collateral." Rather, those conditions go to the heart of the deal Ohio and its localities offered to DaimlerChrysler: guarantee Ohio jobs and pay no personal property taxes.

Similarly hard to understand is the Sixth Circuit's observation that DaimlerChrysler's obligation is "directly linked" to the use of the tax-exempted plan.

---

37. Id. at 826-27.
38. One possibility is that the Sixth Circuit simply misread the Hellerstein and Coenen article. The revised *Cuno* opinion cites the opening portion of that article in which Professors Hellerstein and Coenen label as noncoercive and thus constitutional a straightforward property tax exemption. However, the opinion ignores the latter part of the article in which Professors Hellerstein and Coenen identify as unconstitutionally coercive a property tax exemption tied to requirements such as the maintenance of in-state employment levels. Compare *Cuno* v. DaimlerChrysler, Inc., 386 F.3d at 747-48 (citing pages 806-09 of the Hellerstein-Coenen article) with *Cuno*, 386 F.3d at 826-28.
40. See Taxpayers' Petition, *supra* note 5, at 6 n.6 ("The court offered no explanation of why it characterized Ohio's requirements of agreed levels of investment and jobs as 'minor collateral requirements. . . .'").
This linkage, the appeals court indicates, makes the employment conditions constitutional. Professors Hellerstein and Coenen, however, come to the opposite conclusion: linking tax exemption to employment levels makes the exemption unconstitutionally coercive under the dormant Commerce Clause.

The Sixth Circuit panel may have had a good reason for treating the Hellerstein and Coenen coercion theory as authoritative as to the Ohio tax credit but not as to the property tax exemption. If so, that reason does not appear on the face of the Cuno opinion.

I myself am skeptical of the Hellerstein and Coenen coercion thesis, viewing it as a skilled, but ultimately unsuccessful, effort to salvage a body of dormant Commerce Clause case law which cannot be salvaged.\footnote{Zelinsky, \textit{Abandoning}, supra note 21, at 70-76.} Nevertheless, since the Sixth Circuit embraced that thesis as to the Ohio tax credit, the appeals court had an obligation to explain its rejection of that thesis as to the personal property tax exemption.

More persuasive is the Cuno panel’s rejection of the asserted similarity of the Ohio municipal personal property tax exemption to the Maine tax exemption invalidated in \textit{Camps Newfound/Owatonna}. Ohio required DaimlerChrysler neither to hire Ohio residents nor to purchase in Ohio the personal property installed in the new Toledo plant. Without such requirements, it is difficult to equate Ohio’s exemption with Maine’s.

In the final analysis, the equivalence of tax and direct expenditures suggests the propriety of Ohio’s clawback provisions, both as a matter of policy and as a matter of constitutional law. Suppose, again, that Ohio had given DaimlerChrysler a grant, loan or in-kind subsidy and had attached to that largesse the requirement that DaimlerChrysler build a Toledo facility and maintain minimum employment levels there.

In this theoretical case, critics would have gained little traction from the argument that such a nontax subsidy of DaimlerChrysler violated the dormant Commerce Clause. Similarly, such critics would have mustered little, if any, support for the contention that this direct subsidy of DaimlerChrysler must, for Commerce Clause purposes, be shorn of the obligations to build a Toledo plant and to maintain minimum employment levels there. As a matter of policy, this nontax subsidy and the conditions attached to it constitute a plausible \textit{quid pro quo}, given the premise that subsidization should occur in the name of economic development.\footnote{A premise of which I am skeptical as a matter of tax policy, but which I assume for purposes of this dormant Commerce Clause analysis.}

There is, as a matter of policy and constitutional law, no principled basis for distinguishing between this theoretical direct subsidy to DaimlerChrysler with its clawback provisions and the economically and procedurally comparable tax exemption which actually occurred with such provisions attached. The economic effects of the two subsidies are identical. If one is permitted under the
dormant Commerce Clause, so should the other.

Quite properly, the Supreme Court has been unwilling to extend the dormant Commerce Clause nondiscrimination principle to direct expenditure subsidies whether or not conditioned upon the performance of the subsidized firm. It consequently makes no sense to apply the dormant Commerce Clause nondiscrimination principle to economically comparable tax incentives freighted with such clawback conditions.

Thus, my final verdict on the Cuno court's decision upholding against dormant Commerce Clause challenge Ohio's property tax exemption with its clawback provision: right result, poorly reasoned.

CONCLUSION

I remain skeptical on policy grounds of the kind of tax incentives extended by Ohio and its municipalities to DaimlerChrysler. However, that such incentives are unwise as a matter of policy does not make them unconstitutional as a matter of law. Current dormant Commerce Clause nondiscrimination doctrine rests on two untenable distinctions, between tax and direct expenditures and between discriminatory and nondiscriminatory taxation. Ultimately, neither distinction proves coherent.

The economic result Ohio achieved by granting property tax exemption to DaimlerChrysler could alternatively have been accomplished by comparable direct expenditures, whether in the form of grants, loans or in-kind services to DaimlerChrysler. Thus, despite the analytical weakness of the Cuno opinion, the Sixth Circuit reached the correct result in sustaining that personal property tax exemption against dormant Commerce Clause challenge. That exemption had the same economic effect on interstate commerce as a comparable direct outlay would have had. So far at least, the Supreme Court has been unwilling (as it should be) to intrude the dormant Commerce Clause nondiscrimination principle into states' and localities' direct expenditures. It consequently is unpersuasive to strike on dormant Commerce Clause grounds economically identical tax subsidies, like the personal property tax exemption extended to DaimlerChrysler.

If states and municipalities can, consistent with the dormant Commerce Clause, undertake direct expenditures with the "actual effect" of recruiting and retaining in-state firms, there is no persuasive reason for striking under that Clause economically comparable tax incentives.

While I am skeptical as a matter of policy of the kind of tax exemption granted to DaimlerChrysler, if states and municipalities are going to grant such exemptions, they should attach to such exemptions the kind of clawback obligations challenged by the Cuno plaintiffs. Such obligations are a reasonable quid pro quo, once the state or locality has decided to subsidize.

The dormant Commerce Clause has not and should not be construed as precluding states and municipalities from attaching clawback conditions to direct subsidies to firms like DaimlerChrysler. There is no principled basis for treating comparable tax incentives under the Commerce Clause any differently.