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THE POST-*CUNO* LITIGATION LANDSCAPE

Morgan L. Holcomb & Nicholas Allen Smith[†]

I. CORPORATIONS & THEIR TAX-INCENTIVIZED COMMUNITIES

Most communities seem to want more corporations to call that particular community “home.” To that end, states have enacted various sorts of tax incentive programs that reduce a particular tax burden—often a property or an income tax burden—in exchange for the corporation performing some economic activity in the state.¹ Minnesota, for example, has such an incentive program. The program is entitled Job Opportunity Building Zone, or “JOBZ.” It provides that businesses that locate in certain economically depressed (“challenged”) areas of the state receive various tax incentives.²

Tax incentive schemes like Minnesota’s are not new, and there is a sustained and vigorous debate about whether they work.³ Proponents

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¹ See Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 790 (1996) (“[E]very state provides tax and other economic incentives as an inducement to local industrial location and expansion.”).

² See generally MINN. STAT. ANN. §§ 469.310–.329 (West Supp. 2008).

³ See, e.g., Melvin L. Burstein & Arthur J. Rolnick, *Congress Should End the Economic War Among the States*, THE REGION, Mar. 1995, at 3, 6, available at <http://minneapolisfed.org/pubs/ar/ar1994.cfm> (“[When interstate competition] takes the form of preferential treatment for specific businesses . . . it interferes with interstate commerce and undermines the national economic union by misallocating resources and causing states to provide too few public goods.”); Pat Doyle, *JOBZ Program Has Major Flaws*, *State Auditor Finds*, MINNEAPOLIS-ST. PAUL STAR TRIB., Feb. 9, 2008, at A1, available at <http://www.startribune.com/politics/state/15440571.html> (reporting that Minnesota’s legislative auditor claims that Minnesota’s tax incentive program gives tax breaks to firms and communities that don’t need them, and that many businesses receiving tax incentives would have expanded to the same or to a lesser degree without the tax breaks). For an example of the conflicting popular views of tax incentives, see Mark Steil,

hope that tax incentives will “attract new and expanding businesses, create thousands of good jobs, contribute to robust economic health, and restore a sense of hope for the future.”⁴ Critics, on the other hand, argue that the incentives do not create jobs or spur economic growth, and that the tax incentives end up costing more than the economic activity they generate.⁵ Despite the debate, there is no indication that states or localities are jumping off the tax-incentive treadmill: just days after scholars gathered at Case Western Reserve law school for a symposium to discuss these sorts of economic incentives, California’s Governor Arnold Schwarzenegger announced that seven of eight expiring California enterprise zones would be renewed for an additional fifteen years (California has a total of forty-two enterprise zones throughout the state).⁶

In addition to the debate about efficacy of the tax incentives, there is an equally vigorous debate about whether the schemes are constitutional. This debate came to the fore in 1996 when Professor Peter Enrich of Northeastern University School of Law wrote in the *Harvard Law Review* that state tax incentives are not constitutional and set forth his thesis that the incentives, at least as some of them are promulgated, violate the Commerce Clause.⁷

Gubernatorial Candidates Face Farmers at Farmfest, MINNESOTA PUBLIC RADIO, Aug. 2, 2006, <http://minnesota.publicradio.org/display/web/2006/08/02/farmfestgovforum/>, in which Minnesota’s Governor Pawlenty called his JOBZ program “fantastic,” while one gubernatorial challenger called the program “a giveaway,” arguing “it’s a terrible mistake to think of JOBZ as an economic development program.” Another challenger claimed that the program simply moved jobs from town to town as companies chose the no-tax incentive. *Id.* We should note that Governor Pawlenty won reelection in 2006. See Minnesota Public Radio, Campaign 2006: Election Results for Governor, <http://minnesota.publicradio.org/collections/special/2006/campaign/results/governor.php> (last visited Sept. 25, 2008).

⁴ JOBZ AND BUS. FIN. OFFICE, MINN. DEP’T OF EMPLOYMENT AND ECON. DEV., *JOBZ 2006 ANNUAL REPORT 3* (2006), available at http://www.deed.state.mn.us/bizdev/PDFs/JOBZ_2006_Annual_Report.pdf.

⁵ See, e.g., DAVID CAY JOHNSTON, *FREE LUNCH: HOW THE WEALTHIEST AMERICAN ENRICH THEMSELVES AT GOVERNMENT EXPENSE* 89 (2007) (citing a study by Professor Kenneth P. Thomas of the University of Missouri in St. Louis, “The Sources and Processes of Tax and Subsidy Competition,” which concluded that 1996 state tax incentives amounted to \$48.8 billion in foregone revenue, and resulted in \$29.3 million that the states collected in overall corporate tax revenue in 1996 (unpublished study, copy on file with the authors, available at http://www.econ.iastate.edu/classes/crp274/swenson/CRP523/Readings/thomas_paper.pdf)). See also Alan Peters & Peter Fisher, *The Failures of Economic Development Incentives*, 70 J. AMER. PLANNING ASSOC. 27, 35 (2004) (concluding that business incentives—including tax incentives—are not efficacious and that “there is a need for a radical transformation of policy ideas on how we achieve local economic growth”).

⁶ Governor Arnold Schwarzenegger made this announcement on Jan. 31, 2008. See Laura Mahoney, *California Governor Renews Seven Enterprise Zones, Designates New Zone in Salinas Valley*, BNA DAILY TAX REPORT, No. 23, at H1 (Feb. 5, 2008).

⁷ Peter D. Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996).

Enrich's article garnered the attention of consumer activist Ralph Nader, who contacted Enrich and encouraged him to litigate the question.⁸

This article begins by describing the constitutional landscape into which Enrich cast his argument. We then turn to the litigation that Enrich's article has generated, including Enrich's own case, *Cuno v. DaimlerChrysler Corp.*, which held the promise of resolving this dormant Commerce Clause question, only to wither away on the vine of standing. Following our discussion of *Cuno*, this article will turn to an exploration of the litigation that is currently proceeding in two state courts: Minnesota and North Carolina. We conclude by offering our perspective on the trends that appear from the state court litigation.

II. THE RELEVANT FEDERAL CONSTITUTIONAL LANDSCAPE

A. *The Dormant Commerce Clause*

The Commerce Clause is the affirmative Constitutional grant of power to Congress to regulate commerce. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁹ This centralization of power over commerce resulted from the framers' view of "destructive trade wars among the states as a major problem under the Articles of Confederation."¹⁰ Taxation—and state tax competition—was instrumental in the inclusion of the Commerce Clause in the Constitution.¹¹ State policies, including "[d]ifferent state taxation policies," were of special concern to the framers because those

⁸ Professor Enrich discusses the genesis of the *Cuno* litigation on a Podcast from a symposium at the University at Buffalo Law School. *UB Law Conversations: Peter Enrich on Economic Development Tax Incentives* (University at Buffalo Law School Podcast Dec. 16, 2007), http://ublaw.classcaster.org/blog/faculty_conversations/2007/12/16/peter_enrich_on_economic_development_tax_incentives. For more discussion on the back story for the *Cuno* litigation, see JOHNSTON, *supra* note 5, at 85–94.

⁹ U.S. CONST. art. I, § 8, cl. 3.

¹⁰ KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 245 (15th ed. 2004).

¹¹ See, e.g., Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 49 (2005–2006) ("[T]he centrifugal, contentious economic interests rising among the states' at the time 'dampened . . . postwar enthusiasm and reoriented public and private views towards the Nationalists,' who warned that discrimination against the commerce of neighboring states weakened the economies of all states . . ." (first ellipsis in original) (quoting Cathy Matson, *The Revolution, the Constitution, and the New Nation*, in 1 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES: THE COLONIAL ERA 363, 373 (Stanley L. Engerman & Robert E. Gallman eds., 1996))).

policies “weakened the economies of all states.”¹² Alexander Hamilton asked, for example, “Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit?”¹³ James Madison shared similar concerns. He wrote “the desire of the commercial states to collect . . . an indirect revenue from their uncommercial neighbours, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade.”¹⁴ These taxation skirmishes, no doubt along with other concerns, paved the way for the enactment of the Commerce Clause.

The Commerce Clause itself has played a primary role in establishing our national economy.¹⁵ If Congress has not legislated in an area of commerce, however, the Supreme Court may enforce the anti-economic protectionism purpose behind the Commerce Clause by striking down state discrimination against interstate commerce through the Dormant Commerce Clause Doctrine (“DCCD”). As the Supreme Court explains:

[T]he Constitution’s express grant to Congress of the power to regulate Commerce among the several States, contains a further, negative command, known as the dormant Commerce Clause, that creates an area of trade free from interference by the States. This negative command prevents a State from jeopardizing the welfare of the Nation as a whole by placing burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.¹⁶

In the realm of state taxation, the Supreme Court has developed a four-part test—the *Complete Auto* test—to determine whether a state tax violates the DCCD.¹⁷ The *Complete Auto* test, from a 1977 case with that same name, helps determine whether a challenged tax law is unconstitutional. In particular, the test requires that any tax on interstate commerce must satisfy four prongs:

¹² Matson, *supra* note 11, at 377–78.

¹³ THE FEDERALIST NO. 7 (Alexander Hamilton).

¹⁴ THE FEDERALIST NO. 42 (James Madison).

¹⁵ See Matson, *supra* note 11, at 385 (“[The Commerce Clause] embodied a grant of authority to Congress that created the conditions for the free movement of people, transport of products and capital, and uniform institutions that, together, proved crucial to establishing a national market.”).

¹⁶ *Am. Trucking Ass’n, Inc. v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005) (internal quotations, alterations and citations omitted).

¹⁷ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

- (1) Nexus: the tax must be applied to an activity that has a substantial nexus with the state;
- (2) Apportionment: the tax must be fairly apportioned to activities carried on by the taxpayer in the state;
- (3) Discrimination: the tax must not discriminate against interstate commerce; and
- (4) Fairly related: the tax must be fairly related to services provided by the state.¹⁸

B. Federal Standing Doctrine

The DCCD was the driving constitutional force behind Enrich's seminal 1996 article, but another Constitutional doctrine—that of standing—proved to be just as important to Enrich's eventual case. The farthest reaches of federal courts' jurisdiction are governed by Article III's "case or controversy" requirement.¹⁹ The standing doctrine has enabled the Supreme Court to flesh out the contours of which plaintiffs may bring suit in federal courts and which cannot. In doing so, the Court has been informed by constitutional and policy considerations. Although considerations of judicial economy²⁰ and federalism²¹ are implicated, the Supreme Court has expressed that the separation of powers is the primary animating principle behind the standing doctrines.²² Separation of powers not only underlies the concept of standing, but is also a useful interpretative tool in conducting standing analysis.²³

The Supreme Court has identified three "irreducible constitutional minimum" elements of standing.²⁴ "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."²⁵ In addition to "palpable economic

¹⁸ *Id.* at 279.

¹⁹ See U.S. CONST. art III; See also *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

²⁰ Kristin E. Hickman, *How Did We Get Here Anyway?: Considering the Standing Question in DaimlerChrysler v. Cuno*, 4 GEO. J.L. & PUB. POL'Y 47, 48–49 (2006).

²¹ *Id.* at 49.

²² See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (noting that the separation of powers is the animating principle behind limiting judicial authority to cases and controversies).

²³ *Allen v. Wright*, 468 U.S. 737, 761 n.26 (1984) (rejecting the notion that the separation of powers "merely underlie standing requirements," and stating that the Court also uses separation of powers to interpret portions of the standing analysis).

²⁴ *Lujan*, 504 U.S. at 560.

²⁵ *Id.* (internal quotations and citations omitted).

injuries," which have always readily formed the basis for standing, injuries to other types of interests, including "aesthetic and environmental well-being," are also sufficient to establish standing.²⁶ Standing cannot be based, however, on a mere interest or abstract concern in the outcome of a suit; only those parties with a direct, personal stake in the litigation are granted standing.²⁷

The second constitutional requirement—causation—requires a party to show that the alleged injury is "fairly traceable to the defendant's allegedly unlawful conduct."²⁸ Where the injury complained of may have been caused not by the defendant, but by "the independent action of some third party" not joined in the action, federal courts do not have the authority to adjudicate the dispute.²⁹ Closely related to causation is the final constitutional requirement that court action, if taken, will adequately redress the injury. As with causation, redressability proves more difficult a barrier to overcome when the injury complained of may be due to third parties not joined as defendants.³⁰

In addition to these three constitutional prerequisites, the Court has also identified three "prudential" requirements to show standing.³¹ These prudential limitations on judicial power prohibit third-party suits and generalized grievances, and require the plaintiff to show that

²⁶ *Sierra Club v. Morton*, 405 U.S. 727, 733-34 (1972). Professor Erwin Chemerinsky, in cataloging the types of interests that the Supreme Court has deemed worthy of standing, has concluded: "The only conclusion is that in addition to injuries to common law, constitutional, and statutory rights, a plaintiff has standing if he or she asserts an injury that the Court deems sufficient for standing purposes." ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 68 (1997).

²⁷ See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) ("Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III."); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) ("Injury in fact reflects the statutory requirement that a person be adversely affected or aggrieved, and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." (internal quotations omitted)).

²⁸ *Allen*, 468 U.S. at 751.

²⁹ *Simon*, 426 U.S. at 41-42. In *Simon*, indigent plaintiffs complained that a change in IRS policy caused them to be denied medical care by area hospitals, which were not joined as defendants. In denying the plaintiffs standing, Justice Powell noted that "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42-43. Without a more concrete showing of causation, the majority opinion adhered to the established rule that "unadorned speculation" was insufficient to merit judicial review of the complaint. *Id.* at 44.

³⁰ *Id.* at 43 ("It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services.").

³¹ These requirements are prudential because, rather than being viewed as compelled by Article III, they are "judicially self-imposed limits on the exercise of federal jurisdiction." *Allen*, 468 U.S. at 751.

his or her injured interest falls within the “zone of interests” contemplated by the statute. It is the ban on generalized grievances that traditionally has proven most problematic for litigants seeking standing based only on their status as taxpayers.³²

C. Taxpayer Standing

In the seminal taxpayer standing case, *Frothingham v. Mellon*,³³ the Supreme Court dismissed a challenge to a congressional expenditure where the plaintiff asserted standing based on her status as taxpayer.³⁴ The Court explained:

[The federal taxpayer’s] interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial review.]³⁵

This rationale implicates both constitutional and prudential concerns. To avoid violating the principle of the separation of powers, judicial review of congressional actions must be tied to some direct injury. Because a taxpayer is only injured “in some indefinite way in common with people generally,” judicial review is inappropriate.³⁶ The Court also expressed concern that granting the taxpayer standing to challenge the congressional act at hand would open up the federal courts to innumerable suits challenging every government expenditure. The “inconveniences” of such a result led the Court to state its almost categorical rule against federal taxpayer standing.³⁷

³² Hickman, *supra* note 20, at 48.

³³ 262 U.S. 447 (1923). It is worth noting that the decision in *Frothingham* predated the rise of modern standing jurisprudence. See Hickman, *supra* note 20, at 54.

³⁴ The plaintiff alleged that because she paid federal taxes, the expenditure would “increase the burden of future taxation and thereby take her property without due process of law.” *Frothingham*, 262 U.S. at 486.

³⁵ *Id.* at 487.

³⁶ *Id.* at 488. The Court clearly expressed its concern that taking cognizance of a suit brought by a taxpayer solely because of her status as a taxpayer “would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.” *Id.* at 489. In the Court’s most recent treatment of federal taxpayer standing, it argued that taxpayers as such may not even be able to make a sufficient showing of an injury-in-fact. See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (“In light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm.”).

³⁷ *Frothingham*, 262 U.S. at 487; see also *Hein*, 551 U.S. at 593 (“[I]f every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.”).

The Warren Court expressly rejected the notion, however, that federal taxpayers could never have standing to challenge government action.³⁸ In *Flast v. Cohen*, the Court outlined a two-part test to establish when a federal taxpayer showed a sufficient personal interest in the outcome of the suit such to warrant standing. "First, the taxpayer must establish a logical link between that status [as taxpayer] and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged."³⁹ The first part requires that the challenge be brought to a specific exercise of Congress's taxing and spending power under Article I, Section 8 of the Constitution.⁴⁰ The second part requires that the plaintiff show a violation of "specific constitutional limitations" on congressional spending power, and not simply that Congress has exceeded its authority generally.⁴¹ Despite a recent opportunity to do so, the Supreme Court has declined to do away with the *Flast* exception,⁴² thus, it remains a narrow exception⁴³ to the otherwise general prohibition on federal taxpayer standing.

The general prohibition against federal taxpayer standing is at odds with the Court's liberality in granting taxpayers standing to challenge municipal expenditures.⁴⁴ In *Frothingham*, the Court drew a distinction between the "direct and immediate" interests of a municipal taxpayer and the "minute and indeterminable" interests of a federal taxpayer.⁴⁵ The Court also justified the disparate treatment by noting "the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting

³⁸ *Flast v. Cohen*, 392 U.S. 83, 101 (1968) ("[W]e find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs.").

³⁹ *Id.* at 102.

⁴⁰ *Id.*

⁴¹ *Id.* at 102-03.

⁴² *Hein*, 551 U.S. at 613-15 ("We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.").

⁴³ Hickman, *supra* note 20, at 55-56 ("[W]hile 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. 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. The result is that very few federal taxpayer cases survive a standing inquiry." (citation omitted)).

⁴⁴ See, e.g., *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923) (recognizing the "frequently stated" rule that "resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation").

⁴⁵ *Id.* at 486-87.

between stockholder and private corporation.”⁴⁶ Whatever the rationale, the “rule” recognized in dicta by the *Frothingham* Court that municipal taxpayers have standing as such in federal court remains good law.⁴⁷ The question of state taxpayer standing is less clear.⁴⁸

The Court extended its general prohibition against taxpayer standing to challenges of state expenditures in *Doremus v. Board of Education*.⁴⁹ Without much elaboration, the Court stated that the rationale supporting the general prohibition against federal taxpayer suits was “equally true when a state Act is assailed.”⁵⁰ The Court left open the possibility for standing, however, when a state taxpayer brings a “good-faith pocketbook action.”⁵¹ Just what constitutes a good-faith pocketbook action remained open for interpretation by lower courts.⁵²

The Supreme Court took up the case of *DaimlerChrysler Corp. v. Cuno* in 2006, perhaps in part to address the circuit split over whether and to what extent state taxpayers could gain standing in federal court.⁵³ The history of *Cuno* and the rationale behind its decision will be detailed below. But lest we keep the reader in suspense, the Supreme Court unequivocally held that “state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers.”⁵⁴ The Court also held that taxpayers cannot leverage their municipal taxpayer standing in order to have to their state claims adjudicated in federal court.⁵⁵

⁴⁶ *Id.* at 487.

⁴⁷ See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349 (2006) (citing, without challenging, the municipal taxpayer standing rule first identified in *Frothingham*). But see Kyle B. Gee, Note and Comment, *DaimlerChrysler Corp. v. Cuno—Denying State Taxpayers Standing in Federal Court: Are Municipal Taxpayers Next?*, 38 U. TOL. L. REV. 1241, 1277 (2007) (“*DaimlerChrysler*’s incorporation of modern standing requirements in its decision to deny Article III standing to state taxpayers may bring an end to *Frothingham*’s rule of municipal taxpayer standing. The *DaimlerChrysler* Court concluded that the limitations on standing in federal taxpayer suits should apply with undiminished force to state taxpayers. Arguably, these same limitations prohibiting standing should also apply to municipal taxpayers.” (internal quotation and citation omitted)).

⁴⁸ See Hickman, *supra* note 20, at 56–60.

⁴⁹ 342 U.S. 429 (1952).

⁵⁰ *Id.* at 434.

⁵¹ *Id.*

⁵² For a brief discussion of the circuit split created by *Frothingham*, *Doremus*, and *Flast*, see Hickman, *supra* note 20, at 59–60. The Court addressed the issue of state taxpayer standing again in *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), but only a four-justice plurality concluded that “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.” *Id.* at 613–14 (citing *Doremus*, 342 U.S. at 434).

⁵³ 547 U.S. 332 (2006).

⁵⁴ *Id.* at 346.

⁵⁵ *Id.* at 349–52.

To be sure, states are not required to adhere to either the constitutional or the prudential doctrines that control standing in federal court. State courts are free to abandon all of the federal rules in favor of their own rules, even when adjudicating federal claims.⁵⁶ We discuss later a few examples of states that have “chose[n] a different path”⁵⁷ for taxpayers seeking standing in state court.

III. A MEETING OF THE DOCTRINES: THE *CUNO* CASE

The two doctrines described above, taxpayer standing and the dormant Commerce Clause, played key roles in the *Cuno* case. The seeds of the *Cuno* case were sown when Ohio created a two-part tax incentive system to “encourage industrial investment and development in Ohio, particularly in economically troubled areas.”⁵⁸ One part of the scheme allowed up to a 100 percent exemption of property taxes owed on certain personal property if a business agreed to increase economic activities in economically depressed areas.⁵⁹ Specifically, the business had to “establish, expand, renovate, or occupy a facility and hire new employees, or preserve employment opportunities for existing employees.”⁶⁰ Ohio also allowed an investment tax credit against a business’s state franchise tax liabilities if the company bought new equipment and installed it in Ohio. The business could claim up to a 13.5 percent credit if the equipment was installed in an economically depressed area.⁶¹ Using this exemption and credit scheme, Ohio offered DaimlerChrysler approximately \$280 million in tax breaks in order to induce it to build a new vehicle assembly plant near its Jeep plant in Toledo.⁶² DaimlerChrysler expected to pour \$1.2 billion into the project, and Ohio was eager to gain the thousands of new jobs the plant would provide.⁶³

Several taxpayers represented by Enrich challenged the two-part system as violative of the dormant Commerce Clause. They originally filed in Ohio state court, but the defendants removed the case to federal court.⁶⁴ Plaintiffs moved to remand the case, in part because they doubted they would be able to establish standing in federal court. The district court denied their motion because it

⁵⁶ See *ASARCO Inc.*, 490 U.S. at 617.

⁵⁷ *Id.*

⁵⁸ *Cuno v. DaimlerChrysler, Inc.*, 154 F. Supp. 2d 1196, 1201 (N.D. Ohio 2001).

⁵⁹ See OHIO REV. CODE ANN. §§ 5709.62(C)(1) & 5709.631 (West 2007).

⁶⁰ *Id.* § 5709.62(C)(1).

⁶¹ See *id.* § 5733.33.

⁶² *Cuno*, 154 F. Supp. 2d at 1198.

⁶³ *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 741 (6th Cir. 2004).

⁶⁴ *Cuno*, 154 F. Supp. 2d at 1198.

concluded the plaintiffs established at least the minimum standing requirements for municipal taxpayers.⁶⁵ The district court adjudicated the case on the merits, dismissing in turn all of the plaintiffs' complaints.⁶⁶

On appeal, the plaintiffs contended that a business subject to Ohio taxation could reduce its tax burden only by investing in Ohio; investments made outside of Ohio would have no effect on its tax bill. Thus, the plaintiffs argued that the investment tax credit coerced businesses already in the state to "further invest[] in-state at the expense of development in other states."⁶⁷ The defendants, on the other hand, urged a more narrow reading of United States Supreme Court precedent that would only invalidate tax incentive schemes that "benefit local interests by burdening out-of-state commerce."⁶⁸ Because the Ohio credit was neither a protective tariff nor took into account out of state activity when determining the credit amount, the defendants argued that the credit scheme did not discriminate against interstate commerce. The defendants also contended that the credit was akin to a direct subsidy, which the Supreme Court has indicated will ordinarily pass muster under the Commerce Clause.⁶⁹

The Court of Appeals for the Sixth Circuit reversed the district court and held that the investment tax credit violated the Commerce Clause. It specifically rejected the defendants' suggestion that only two types of tax schemes violate the Clause, because "it is clear that the [Supreme] Court itself has not adopted this approach."⁷⁰ The distinction between burdening out of state commerce and benefiting in state commerce was illusory: "economically speaking, the effect of a tax benefit or burden is the same."⁷¹ Thus, for purposes of the Commerce Clause, it did not matter that Ohio reduced the tax burden for in state activity rather than increase the tax burden for out of state activity. The court of appeals also distinguished tax credits from direct subsidies, which "do not ordinarily run afoul of the Commerce Clause because they are not generally connected with the State's regulation of interstate commerce."⁷² Unfortunately, the court provided little by way of analysis of the distinction. Although noting that the "end-result economic impact" of both subsidies and

⁶⁵ See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 339 (2006).

⁶⁶ *Cuno*, 154 F. Supp. 2d at 1198.

⁶⁷ *Cuno*, 386 F.3d at 745.

⁶⁸ *Id.*

⁶⁹ *Id.* at 746.

⁷⁰ *Id.* at 745.

⁷¹ *Id.*

⁷² *Id.* at 746 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)) (internal quotations and alterations omitted).

investment credits is similar, the court determined rather abruptly that the tax credit was constitutionally distinct from a subsidy, because it involved “state regulation of interstate commerce through its power to tax.”⁷³

The property tax exemption, on the other hand, survived Commerce Clause scrutiny. The plaintiffs argued that the conditions placed on receiving the exemption had the practical effect of favoring businesses that committed to maintaining certain employment and investment levels in Ohio.⁷⁴ Conditions on property tax exemptions can violate the Commerce Clause if they require the taxpayer to engage in another form of business or are only available “to businesses with a specified economic presence.”⁷⁵ The appellate court, however, was convinced that the Ohio conditions were only “minor collateral requirements . . . directly linked to the use of the exempted personal property.”⁷⁶ The court specifically distinguished the investment tax credit, which reduces pre-existing franchise tax liability, from the property tax exemption, which “merely allows a taxpayer to avoid tax liability for new personal property.”⁷⁷ The practical effect of the investment tax credit, then, was to coerce in-state investment by businesses that already had an economic presence in Ohio; whereas, “any discriminatory treatment between a company that invests in Ohio and one that invests out-of-state cannot be attributed [to] the Ohio [property tax exemption] regime or its failure to reduce current property taxes.”⁷⁸

A. *Cuno at the Supreme Court*

The parties cross-appealed the Sixth Circuit’s decision, and the Supreme Court granted certiorari on the investment tax credit question. The Court also requested supplemental briefings on the question of whether taxpayer plaintiffs had standing to bring suit. Ultimately, the Supreme Court declined to adjudicate the dormant Commerce Clause question on its merits because of deficiencies it found in the plaintiffs’ standing.⁷⁹

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (citing *Maryland v. Louisiana*, 451 U.S. 725, 756–57 (1981)).

⁷⁶ *Id.* at 747.

⁷⁷ *Id.* at 747–48.

⁷⁸ *Id.*

⁷⁹ Professor Brannon Denning has argued that the Supreme Court’s holding managed to buy it time before having to decide the harder issue of what “discrimination” means in the context of state investment tax incentives, but “[c]ases like *Cuno* will continue to bedevil courts unless the Supreme Court clarifies what it means when it says that the [dormant Commerce Clause Doctrine] is primarily concerned with eliminating state laws that discriminate against

Although the Court's decision was not surprising,⁸⁰ the path the majority took to deny the state taxpayers standing was explicitly rooted in modern Article III requirements, rather than relying solely on language from the *Frothingham* line of taxpayer standing cases.⁸¹ As a threshold matter, the Court questioned the plaintiffs' assumption that the tax credit necessarily depleted the public treasury: "[t]he very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues."⁸² Even if the treasury was in fact depleted, to show an injury-in-fact the plaintiffs would have to show that the legislature would increase taxes to fill the void, an act on which the plaintiffs could only speculate.⁸³ The plaintiffs also had to speculate about redressability, i.e., that the legislature would "pass along the supposed increased revenue" resulting from invalidating the tax credit to the taxpayers "in the form of tax reductions."⁸⁴ Finally, even the contention that the tax credit caused the plaintiffs' alleged injury required similar speculation about the future decisions of the legislature.⁸⁵ A complaint fraught with this sort of speculation could not "suffice[] to support standing."⁸⁶

The decision in *Cuno* also unanimously⁸⁷ settled the question of whether state taxpayers were more like municipal or federal taxpayers. The Court reaffirmed its reasoning in *Doremus* that state taxpayers had to meet the same burdens for standing as federal taxpayers; "[t]he . . . rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers."⁸⁸ The state taxpayers' interest in the public treasury was equally "indeterminable, remote, uncertain and indirect."⁸⁹ The state taxpayers had no more

out-of-state goods or out-of-state economic actors." Brannon P. Denning, *DaimlerChrysler Corp. v. Cuno, State Investment Incentives, and the Future of the Dormant Commerce Clause Doctrine*, in *CATO SUP. CT. REV.* 2005–2006, at 173, 174 (2006).

⁸⁰ See generally Hickman, *supra* note 20, at 47–49.

⁸¹ See Gee, *supra* note 47, at 1260.

⁸² *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006).

⁸³ *Id.* at 344–45.

⁸⁴ *Id.* at 344.

⁸⁵ *Id.* at 346. ("Federal courts may not assume a particular exercise of this state fiscal discretion in establishing standing; a party seeking federal jurisdiction cannot rely on such '[s]peculative inferences . . . to connect [his] injury to the challenged actions of [the defendant.]'" (alterations in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976))).

⁸⁶ *Id.* at 344.

⁸⁷ Justice Kennedy's opinion in *ASARCO Inc. v. Kadish*, 490 U.S. 605, 612–17 (1989), which explicitly suggested that state taxpayers, as such, are subject to the same almost categorical ban from federal courts as are federal taxpayers, garnered support only from three other justices.

⁸⁸ *Cuno*, 547 U.S. at 345.

⁸⁹ *Id.* (quoting *Doremus v. Bd. of Educ.*, 342 U.S. 429, 433 (1952)).

authority to force state lawmakers to pass along tax savings than did federal taxpayers *vis-à-vis* federal lawmakers.⁹⁰ Moreover, “affording state taxpayers standing” in federal court “would interpose the federal courts as ‘virtually continuing monitors of the wisdom and soundness’ of state fiscal administration,”⁹¹ just as general federal taxpayer standing would convert the Article III courts into “general complaint bureaus.”⁹² The Court held that “state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers.”⁹³

The Court also rejected the plaintiffs’ argument that their Commerce Clause challenge was permitted under the exception recognized in *Flast*. The plaintiffs argued that the Commerce Clause, just like the Establishment Clause, served as a limit on the way that states could spend public money.⁹⁴ Although *Flast* left room for taxpayer suits under other constitutional limits on Congress’s Article I, section 8 spending power, the Court was again unwilling to extend the exception beyond Establishment Clause challenges. The Court again rooted its decision in *Flast* in modern standing jurisprudence: an Establishment Clause challenge is permissible because the government expenditure is the very injury required for Article III standing, and “an injunction against the spending would of course redress [the] injury.”⁹⁵ Challenges under the Commerce Clause, on the other hand, require speculation about future legislative action to establish injury and redressability.⁹⁶ Allowing such actions would simply open up the federal courts to hear a substantial number of “generalized grievances.”⁹⁷

Finally, the Court held that the plaintiffs could not leverage their standing as municipal taxpayers to challenge a state tax incentive.⁹⁸

⁹⁰ *Id.* at 345–46.

⁹¹ *Id.* at 346 (quoting *Allen v. Wright*, 468 U.S. 737, 760–61 (1984)) (internal quotation omitted).

⁹² *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007).

⁹³ *Cuno*, 547 U.S. at 346. The Court’s opinion leaves open the question whether *Doremus*’ “good-faith pocketbook action” remains a valid exception to *Cuno*’s plain rule against state taxpayer standing. Any such action after *Cuno* will have to meet the requirements for Article III standing. We predict that, unless the challenge is against a state expenditure allegedly at odds with the establishment clause and therefore allowed by *Flast*, state taxpayers’ suits will be dismissed for lack of standing.

⁹⁴ *Id.* at 347–48.

⁹⁵ *Id.* at 348. The rights asserted by the plaintiffs under the Commerce Clause were “fundamentally unlike the right to ‘contribute three pence . . . for the support of any one [religious] establishment.’” *Id.* at 347–48 (quoting *Flast v. Cohen*, 392 U.S. 83, 103 (1968)) (internal quotation omitted).

⁹⁶ See *supra* notes 83–86 and accompanying text.

⁹⁷ *Cuno*, 547 U.S. at 348 (quoting *Flast*, 392 U.S. at 106).

⁹⁸ *Id.* at 349–53.

The plaintiffs relied on two theories. First, they argued that because municipalities received funds from the franchise tax collected by the state, any credit given to DaimlerChrysler reduced the amount of money available to the municipality.⁹⁹ The Court concluded this claim was simply a complaint against the state dressed up as a municipal claim, and it only served to “introduce yet another level of conjecture” to the plaintiffs’ speculative state claim.¹⁰⁰

Equally unavailing was the plaintiffs’ supplemental jurisdiction theory—that once a federal court had jurisdiction over a municipal taxpayer action, it could take cognizance over other taxpayer claims it would not otherwise be able to adjudicate.¹⁰¹ The Court, however, had never “permit[ted] a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of the Article III inquiry,”¹⁰² including standing, mootness, ripeness, and the limitation on hearing political questions. The separation of powers dictated that Article III remain a meaningful limit on the power of the judiciary.¹⁰³

The unanimous Court¹⁰⁴ concluded that none of the plaintiffs had standing to challenge Ohio’s investment tax credit. It thus vacated the Sixth Circuit’s decision and remanded to the lower court to dismiss the taxpayers’ challenge to the credit.

B. Status of the Cuno Litigation

One of the authors spoke briefly with Enrich in early January 2008.¹⁰⁵ Enrich reported that by the time the Supreme Court finished with the case, and it was in a procedural position to return to Ohio state court, the tax climate in Ohio had shifted drastically, and the incentives were a year or so from being phased out completely. Given the probable litigation strategy of the defendants, which was predicted to be to delay until the incentives were gone and then move for dismissal on the ground of mootness, the plaintiffs decided not to go forward with the lawsuit.

⁹⁹ *Id.* at 349–50.

¹⁰⁰ *Id.* at 350.

¹⁰¹ *Id.* at 350–51.

¹⁰² *Id.* at 351–52.

¹⁰³ *Id.* at 353.

¹⁰⁴ Justice Ginsburg concurred in the result, but would have arrived at it on the strength of *Frothingham*, *Doremus*, and *Flast* alone, without relying on modern standing jurisprudence. *Id.* at 354–55 (Ginsburg, J., concurring).

¹⁰⁵ Telephone Communication Between Peter Enrich and Morgan L. Holcomb (notes from the conversation on file with the authors). This article addresses ongoing litigation, and relied in part on telephone conversations with counsel. Notes of those conversations are on file with the author and with *Case Western Reserve Law Review*.

In the author's discussion with Enrich, and in his remarks at a recent symposium at Buffalo Law School, he intimated that he will continue to challenge state tax incentives in the appropriate case. Enrich identified three key attributes in a putative plaintiff: (1) a good target statute; (2) standing; and (3)—what he indicated as a critical factor—the ability to put forth a grassroots organizing effort. Enrich expressed regret, on the Buffalo podcast, that an opportunity for public education and grassroots organization was missed in the *Cuno* case.¹⁰⁶

IV. THE STATE COURT LITIGATION

We now turn to the status of litigation in two states: Minnesota and North Carolina. In both states, two lawsuits have been filed, with one case now concluded and one still in the early stages. We begin with Minnesota.

A. Minnesota: The Land of 10,000 Subsidies

As noted in the introduction, Minnesota's tax incentive program is called "JOBZ"—the Jobs Opportunity Building Zone. The JOBZ program was promulgated in 2003,¹⁰⁷ and was considered a major economic program of Minnesota's then-newly elected Republican governor, Tim Pawlenty.¹⁰⁸ JOBZ provides exemptions from property, income, sales, and motor vehicle sales tax, as well as a refundable jobs credit for certain businesses.¹⁰⁹ Rather than identify which economically challenged geographic areas in the state qualified for JOBZ treatment, the legislature delegated the responsibility of identifying JOBZ zones to the Department of Employee and Economic Development (Minnesota DEED).¹¹⁰

¹⁰⁶ *Id.*; *UB Law Conversations: Peter Enrich on Economic Development Tax Incentives*, *supra* note 8.

¹⁰⁷ *Olson v. State*, 742 N.W.2d 681, 683 (Minn. Ct. App. 2007).

¹⁰⁸ *See Doyle, supra* note 3, at A1 (noting that JOBZ is "[t]he state's leading program to create rural jobs," and that Gov. Tim Pawlenty created the program); Charley Shaw, *Gov. Pawlenty's JOBZ Program Challenged, Again*, ST. PAUL LEGAL LEDGER, July 7, 2007 (calling the JOBZ program "Gov. Tim Pawlenty's signature rural economic development initiative"). The JOBZ portion of the Department of Employment and Economic Development website variously refers to JOBZ as "key initiative" and "marquee rural economic development stimulus program." Minn. Dep't of Employment and Econ. Dev., *Job Opportunity Building Zones (JOBZ): What is JOBZ?*, <http://www.deed.state.mn.us/bizdev/jobzwhat.htm> (last visited May 22, 2008).

¹⁰⁹ MINN. STAT. ANN. §§ 469.310–3201 (West 2008).

¹¹⁰ *Id.* § 469.314 (providing that the "commissioner [of economic development], in consultation with the commissioner of revenue, shall designate not more than ten job opportunity building zones"); *Id.* § 469.310 (defining "Commissioner" as "the commissioner of employment and economic development").

In 2005, the first lawsuit challenging JOBZ was filed in Ramsey County District Court. Plaintiffs in the first lawsuit included former democratic Lieutenant Governor Alec Olson.¹¹¹ Olson filed as a taxpayer and homeowner and claimed damages as a result of higher property taxes and as a result of “being forced to bear a disproportionate burden of supporting government functions of all types.”¹¹² One of the plaintiffs’ attorneys in the *Olson* lawsuit was John P. James, a former Commissioner of Revenue for the state of Minnesota.¹¹³

The *Olson* plaintiffs alleged that the JOBZ program suffered from numerous state and federal constitutional infirmities. In particular, plaintiffs claimed that JOBZ violated Minnesota’s constitutional requirement of uniformity in taxation; that the program unconstitutionally surrendered and/or contracted away the power of taxation; and that it violated the prohibition in the Minnesota Constitution of granting local or special laws exempting property from taxation, or granting special or exclusive privileges. The plaintiffs also claimed the program violated the right to due process (under both the Fourteenth Amendment and Article I, Section 7 of the Minnesota Constitution). Finally, the plaintiffs raised an “Enrich-style” dormant Commerce Clause argument: claiming that the program discriminated against interstate commerce by using tax exemptions and credits to induce businesses with Minnesota operations to expand in Minnesota rather than in other states.¹¹⁴

The state answered on the merits, but then moved for summary judgment on the ground that the plaintiffs did not have standing.¹¹⁵ The district court agreed with the state’s interpretation of Minnesota taxpayer standing jurisprudence, and dismissed the complaint. The Minnesota Court of Appeals affirmed the district court.¹¹⁶

As the Minnesota Court of Appeals had the *Olson* case under advisement, another case was filed challenging the JOBZ program. This second case is captioned *Interstate Motor Trucks, Inc. v. State*.¹¹⁷ Joining attorney James (the former Commissioner of Revenue) is

¹¹¹ Complaint at ¶ 4, *Olson v. State*, No. 62-C8-05-002727 (2d Jud. Dist. Minn., dismissed Oct. 17, 2006).

¹¹² *Id.* ¶ 43.

¹¹³ *Id.* Plaintiffs are also represented by Stephen C. Rathke. *Id.*

¹¹⁴ *Id.* ¶ 3.

¹¹⁵ The state did not assert standing as a defense in their answer; rather, it was raised in a summary judgment motion. See Joint Answer of Defendants, *Olson*, No. 62-C8-05-002727; Respondents’ Brief and Appendix, *Olson v. State*, 742 N.W.2d 681 (Minn. Ct. App. 2007).

¹¹⁶ *Olson*, 742 N.W.2d 681.

¹¹⁷ No. 62-CV-07-845 (2d. Jud. Dist. Minn., filed Aug. 16, 2007). The case was filed in Ramsey County District Court.

attorney Robert Leighton. Leighton also has a political past—having served four terms in the Minnesota House of Representatives, where he was variously the Assistant Majority Leader and Assistant Minority Leader.

In this second lawsuit the new plaintiffs, including several companies that claim to compete directly with recipients of JOBZ benefits,¹¹⁸ raise many of the same claims raised by the *Olson* plaintiffs. Specifically, the *Interstate Motor Trucks* plaintiffs raise five claims of constitutional violation of the Minnesota Constitution.¹¹⁹ Notable for our purposes is what is not pled in the Complaint—there is no Enrich-style claim of a dormant Commerce Clause violation.

The state is not waiting for summary judgment this time, but has raised the alleged lack of standing as an affirmative defense.¹²⁰ The litigation is in its very early stages,¹²¹ but the plaintiffs remain guardedly optimistic on the standing issue. During a brief conversation with one of the plaintiffs' attorneys, counsel indicated they feel they have a strong case on standing, and that their litigation strategy will result in a court finding that the plaintiffs have standing. Similarly, shortly after the *Interstate Motor Trucks* case was filed, attorney Leighton was quoted in a Minnesota Public Radio story as having said "each of these plaintiffs feel they've been directly harmed economically because of [the JOBZ program]."¹²² The plaintiffs include cabinetmakers, engineering, printing, telemarketing, and trucking companies.¹²³

B. Taxpayer Standing in Minnesota Courts

As was made clear in the above discussion, federal taxpayer standing jurisprudence has had something of a convoluted history. An equally apt, perhaps even more apt, observation is seen in Minnesota's taxpayer standing jurisprudence. To have standing in

¹¹⁸ Complaint at ¶ 1, *Interstate Motor Trucks, Inc.*, No. 62-CV-07-845.

¹¹⁹ *Id.* ¶ 2. The claims overlap with those of the *Olson* plaintiffs: an unconstitutional surrender of the taxing power (through delegation and contract); a violation of Minnesota's constitutional right to due process; a violation of the Minnesota constitutional provision against local or special laws that exempt property from taxation or grant special or exclusive privileges or immunities; and a violation of the Minnesota constitutional uniformity provision. *Id.*

¹²⁰ Joint Answer of Defendants at ¶¶ 83–84, *Interstate Motor Trucks, Inc.*, No. 62-CV-07-845.

¹²¹ Tim Pugmire, *Report: JOBZ Subsidy Program Unfocused and Lacking Oversight*, MINN. PUB. RADIO, Feb. 8, 2008, <http://minnesota.publicradio.org/display/web/2008/02/08/jobz/> ("Leighton said the case is currently in the discovery phase.")

¹²² Tim Pugmire, *Minnesota JOBZ Program Faces Another Lawsuit*, MINN. PUB. RADIO, June 27, 2007, <http://minnesota.publicradio.org/display/web/2007/06/27/jobz/>.

¹²³ *Id.*

Minnesota courts, a non-taxpayer plaintiff typically must have a sufficiently personal stake in a justiciable controversy.¹²⁴ Minnesota courts consistently have recognized, however, that in certain circumstances, taxpayer standing deviates from both the typical Minnesota standing requirements, as well as the federal standing doctrine.¹²⁵ In particular, at the very least, unlike plaintiffs invoking “regular” Minnesota standing, plaintiffs invoking taxpayer standing do not have to show a direct injury to maintain an action to enjoin “unlawful disbursements of public moneys . . . [or] illegal action on the part of public officials,”¹²⁶ because “expenditure of tax monies” can suffice as a proxy for any “injury in fact” requirement.¹²⁷

In contrast, federal taxpayers, as discussed above, must show a direct injury, unless they qualify for the narrow *Flast*-Establishment Clause exception. That is, federal taxpayers can circumvent the injury-in-fact requirement only in cases in which Congress has utilized its taxing and spending powers in contravention of the Establishment Clause. Since Minnesota taxpayers can circumvent the injury-in-fact requirement by showing (apparently) any illegal expenditure, Minnesota taxpayer standing is broader than federal taxpayer standing. Indeed, the Minnesota courts explicitly have recognized that Minnesota’s standing requirements are less stringent than federal requirements.¹²⁸ Despite this recognition, the Minnesota courts have warned putative plaintiffs that there are limits to taxpayer standing, and the Minnesota Supreme Court has occasionally rejected taxpayer standing.¹²⁹

Another notable distinction between standing in Minnesota state court and federal standing is that Article III federal courts are constitutionally limited to hear “cases and controversies.” As discussed above, although there are prudential standing norms, standing in federal court is jurisdictional—if a federal court plaintiff

¹²⁴ *State v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (“Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court. . . . Standing is acquired in two ways: either the plaintiff has suffered some ‘injury-in-fact’ or the plaintiff is the beneficiary of some legislative enactment granting standing.”). As the *Philip Morris* Court noted, standing can be conferred by statute. *Id.* at 495 (“The legislature may, by statute, expand the connection between conduct and injury necessary to permit suit.”).

¹²⁵ *Olson v. State*, 742 N.W.2d 681, 684 (Minn. Ct. App. 2007) (“In contrast with standing rules in federal courts, it is generally recognized that a Minnesota taxpayer has a broader basis for standing than a litigant in federal court.” (citing *McKee v. Likins*, 261 N.W.2d 566, 570 (Minn. 1977)).

¹²⁶ *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977) (quoting *Oehler v. City of St. Paul*, 219 N.W. 760, 763 (Minn. 1928)).

¹²⁷ *Id.* at 570.

¹²⁸ *Olson*, 742 N.W.2d at 684.

¹²⁹ *See, e.g.*, *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 588 (Minn. 1977); *State ex rel. Smith v. Haveland*, 25 N.W.2d 474, 477 (Minn. 1946).

cannot demonstrate standing, the federal court is powerless to act. Minnesota state courts are not so strictly limited.¹³⁰ In Minnesota state courts the “doctrine of standing is premised” not on a constitutional command, but “on the preference of courts that cases be litigated by those with a personal interest.”¹³¹

The Minnesota Court of Appeals refers to the exception to the typical injury requirement as the “illegal expenditure” doctrine.¹³² The *Olson* court addressed the illegal expenditure doctrine, and ultimately held that the illegal expenditure requirement was not met by the Olson plaintiffs. In so holding, the *Olson* court intimated that the illegal expenditure doctrine is the sole exception to the injury-in-fact requirement for Minnesota taxpayers.

The *Olson* court began by observing that “[t]axpayers without a personal or direct injury may still have standing *but only* to maintain an action that restrains the ‘unlawful disbursements of public money . . . [or] illegal action on the part of public officials.’”¹³³ For this proposition, the *Olson* court cited *McKee v. Likins*, a 1977 case brought “principally as a taxpayers’ suit” in which a plaintiff was held to have taxpayer standing to challenge the use of state funds to provide nontherapeutic abortions.¹³⁴ The taxpayer had standing because the “policy bulletin” permitting the payments had been promulgated in violation of the Minnesota Administrative Procedure Act.¹³⁵ In addition to *McKee v. Likins*, the Minnesota Court of Appeals in *Olson* referenced other Minnesota Supreme Court cases,¹³⁶

¹³⁰ For example, Minnesota courts are permitted by statute to issue declaratory judgments. MINN. STAT. ANN. § 555.01 (West 2000). Minnesota appellate courts may issue advisory opinions in the form of answers to certified questions. MINN. STAT. ANN. § 480.065 (West 2002 & Supp. 2008) (permitting supreme court to answer questions certified by federal courts and appellate courts in other states); MINN. R. CRIM. P. 28.03 (permitting district courts to certify criminal-law questions to a court of appeals). Finally, under special circumstances, Minnesota courts are permitted to issue purely prospective rulings. *State v. Baird*, 654 N.W.2d 105, 110–11 (Minn. 2002) (outlining function and limits of special-circumstances rule).

¹³¹ *Metro. Sports Facilities Comm’n v. County of Hennepin*, 451 N.W.2d 319, 321 (Minn. 1990). The Minnesota courts have, however, recognized some constitutional basis for their jurisdiction. *E.g.*, *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. Ct. App. 2007) (noting that the injury and redressability requirements are “rooted in constitutional text, the nature of judicial decision-making, and prudential concerns”).

¹³² For example, the Minnesota Court of Appeals noted that “[t]axpayers have a ‘real and definite interest in preventing an illegal expenditure of tax money’ and have standing to challenge projects likely to increase their overall tax burden.” *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 147 (Minn. Ct. App. 1999) (quoting *Arens v. Vill. of Rogers*, 61 N.W.2d 508, 514 (Minn. 1953)).

¹³³ *Olson*, 742 N.W.2d at 684 (quoting *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977)) (emphasis added) (other alterations in original).

¹³⁴ *McKee*, 261 N.W.2d at 568.

¹³⁵ *Id.*

¹³⁶ For example, the appellate court cited *St. Paul Area Chamber of Commerce v. Marzielli*, 258 N.W.2d 585, 589 (Minn. 1977). *Olson*, 742 N.W.2d at 685. In *Marzielli*, the

but relied primarily on Minnesota Court of Appeals cases for its reasoning and its ultimate conclusion that, because the *Olson* plaintiffs demonstrated no illegal expenditure, the plaintiffs failed the test for standing.¹³⁷

The *Olson* court's analysis begs at least two questions. First, the type of expenditure that qualifies as an "illegal" expenditure is far from clear.¹³⁸ Further, in addition to some clarification around what qualifies as an illegal expenditure, the *Olson* case is not persuasive in its suggestion that the illegal expenditure doctrine is the only way Minnesota taxpayers can establish standing. At least the intermediate court is not persuasive in its suggestion that the Minnesota Supreme Court opinions must be read as foreclosing any other taxpayer standing understanding.

There is no question that the illegal expenditure doctrine is one strand of the Minnesota Supreme Court's taxpayer standing jurisprudence, but the Minnesota Supreme Court has suggested that it is not the only exception. For example, the state supreme court has noted that "[o]ne recognized exception to this rule [against citizen standing] is an action brought by a taxpayer to challenge an illegal expenditure."¹³⁹ The express recognition that the illegal expenditure doctrine is "one" recognized exception seems to presuppose other recognized exceptions as well. There is no clear statement by the Minnesota Supreme Court that the *only* taxpayer actions that satisfy the standing requirement are those falling within the ill-defined "illegal expenditure" exception. Indeed, the *Olson* court itself discusses what appears to be another exception to taxpayer standing—that enabling Minnesota taxpayers to "bring an action to compel county officers to perform their public duties."¹⁴⁰ Though the

plaintiffs actually sued to require expenditures—the plaintiffs complained about a state statute that halted construction of a state highway, alleging that the failure to construct the highway would result in a loss of federal matching funds. The Minnesota Supreme Court rejected the taxpayer's standing argument in part because any money lost as a result of the state statute would have originated from federal funds, not the illegal expenditure of funds. *Marzitelli*, 258 N.W.2d at 589.

¹³⁷ One intermediate case on which *Olson* relied, for example, was *Rukavina v. Pawlenty*, 684 N.W.2d 525 (Minn. Ct. App. 2004). The *Olson* court, quoting *Rukavina*, noted that "disagreement with policy or the exercise of discretion by those responsible for executing the law' does not supply the 'unlawful disbursements' or 'illegal action' of public funds required for [taxpayer] standing." *Olson*, 742 N.W.2d at 685 (quoting *Rukavina*, 684 N.W.2d at 531).

¹³⁸ Although the court conceded that generally "taxpayers have a real and definite interest in challenging such illegal expenditures," the plaintiffs lacked standing because "there are no such expenditures here." *Id.*

¹³⁹ *Channel 10, Inc. v. Indep. Sch. Dist. No. 709, St. Louis County*, 215 N.W.2d 814, 820 (Minn. 1974) (emphasis added).

¹⁴⁰ *Olson*, 742 N.W.2d at 684 (citing *State ex rel. Currie v. Weld*, 40 N.W. 561, 562 (Minn.

Minnesota Court of Appeals has reiterated its understanding of the narrow taxpayer standing exception in other recent opinions,¹⁴¹ that sentiment is absent from Minnesota Supreme Court opinions.

To be fair to the Minnesota Court of Appeals, the Minnesota Supreme Court has not given the intermediate court much to work with. Taxpayer standing cases from the state's high court are few and far between, and several taxpayer standing cases have had unique procedural facts—such as a remarkable case in which the taxpayers sued to establish the right to be taxed.¹⁴² Other recent cases permit taxpayer standing with absolutely no discussion of how such standing is established.¹⁴³ Despite the absence of clarifying recent precedent, the court of appeals remains bound by Minnesota Supreme Court precedent. It is far from clear that the court of appeals is being true to that precedent.

The other question begging following the *Olson* case is the proper scope of an “illegal expenditure.” The *Olson* plaintiffs argued for a broad construction of “illegal expenditure” when they suggested that because state and local employees are paid with public funds when those employees administer the program, the illegal expenditure doctrine is satisfied. This broad understanding of “expenditure” would provide almost limitless taxpayer standing. Such a broad reading finds little support in Minnesota Supreme Court cases. In contrast, the State argued for a construction of “illegal expenditure” that seems hardly different from federal, or non-taxpayer, “injury in fact” requirements.¹⁴⁴ That cannot be right either. The Minnesota

1888)).

¹⁴¹ See, e.g., *Olson*, 742 N.W.2d 681; *Rukavina*, 684 N.W.2d 525.

¹⁴² *State ex rel. Smith v. Haveland*, 25 N.W.2d 474 (Minn. 1946). The court held that, while “relator renounces the benefits of exemption and seeks to be taxed,” the “mere denial of a desire to be taxed is not an act adverse or hostile to any legal interest of relator. No legal right has been placed in jeopardy, and he is in no need of protection, unless it be from the improvidence of his own desire. By exemption he has received a concrete benefit and not a prejudicial burden.” *Id.* at 477. The court illustrated the point with an analogy: “S vehemently contends that he owes \$1,000 to H, which H denies and which sum H refuses to accept or collect. What bona fide legal interest or right of S has been jeopardized by the refusal of H to assume the role of a creditor and accept payment of money not believed to be owing?” *Id.*

¹⁴³ E.g., *Walker v. Zuehlke*, 642 N.W.2d 745 (Minn. 2002) (holding that taxpayers, including the local mayor, had standing to challenge the constitutionality of a state statute conferring tax benefits on communities within specified geographic area, while dismissing the City of Cohasset for lack of standing—but providing no discussion of standing).

¹⁴⁴ See Memorandum in Support of Defendants' Motion for Summary Judgment at 5–8, *Olson v. State*, No. 62-C8-05-002727 (2d Jud. Dist. Minn., dismissed Oct. 17, 2006) (noting that the *Cuno* case dealt with federal taxpayer standing, but nonetheless arguing that the rationale of *Cuno* was applicable to deny the *Olson* plaintiffs standing).

Supreme Court advises that “injury in fact” is broadly construed in taxpayer standing cases.¹⁴⁵

The Minnesota Supreme Court has not explicitly defined an “illegal expenditure.” Indeed, in an early taxpayer standing case the court noted that its cases were “illustrative of the attitude which has prevailed in this court concerning the interest of a taxpayer in the illegal expenditure of his tax dollar.”¹⁴⁶ It has generally been up to the appellate court and litigants to decipher that judicial attitude in taxpayer standing cases. One example of that attitude can be found in *Phillips v. Brandt*,¹⁴⁷ in which the Minnesota Supreme Court held that a taxpayer had standing to challenge the allegedly illegal payment of salary for a city position because taxes were a source of the funds used. More recently, in a case involving a tax exemption for professional sports teams, the Minnesota Supreme Court held that a government unit (the county) had standing to challenge the constitutionality of exempting certain property from taxation.¹⁴⁸ Despite the supreme court’s recognition of the “general rule . . . that a public official or governmental unit, in performing a ministerial duty under a statute, may not question the constitutionality of that statute,”¹⁴⁹ the court permitted standing because the public interest dictated judicial resolution of the dispute.¹⁵⁰

The *Interstate Motor Truck* plaintiffs might not have to wade through this standing muddle. If the plaintiffs can show a direct, personalized injury, they need not meet the “direct expenditures” test. To that end, the *Interstate Motor Trucks* plaintiffs might be able to use the state’s own words to their advantage. In particular, in the *Olson* summary judgment brief, the defendant state suggested that, were the plaintiffs “competitors of any qualified business,” the plaintiffs would have standing under Minnesota Supreme Court precedent.¹⁵¹ It should come as no surprise that this second group of plaintiffs is just that—competitors of qualified businesses. Since most lawyers are “belts and suspenders” types, however, it would not be surprising to see the plaintiffs attempting to demonstrate both injury-in-fact standing as well as the type of expenditure that would

¹⁴⁵ *In re Sandy Pappas Senate Comm.*, 488 N.W.2d 795, 798 (Minn. 1992).

¹⁴⁶ *Arens v. Vill. of Rogers*, 61 N.W.2d 508, 513 (Minn. 1953).

¹⁴⁷ 43 N.W.2d 285, 289 (Minn. 1950).

¹⁴⁸ *Metro. Sports Facilities Comm’n v. County of Hennepin*, 451 N.W.2d 319 (Minn. 1990).

¹⁴⁹ *Id.* at 321.

¹⁵⁰ *Id.* at 322–23.

¹⁵¹ Reply Memorandum in Further Support of Defendants’ Motion for Summary Judgment at 5, *Olson v. State*, No. 62-C8-05-002727 (2d Jud. Dist. Minn., dismissed Oct. 17, 2006).

sanction taxpayer standing under the expenditure analysis set forth in *Olson*.

C. North Carolina

Like its sister courts in Minnesota, North Carolina courts are also dealing with litigation surrounding tax incentives. And like the Minnesota intermediate court, the North Carolina Court of Appeals has recently upheld the state's incentive schemes. In *Blinson v. State*,¹⁵² a group of plaintiffs led by former North Carolina Supreme Court justice Robert F. Orr and his North Carolina Institute for Constitutional Law ("NCICL") launched a failed attack on the "Dell incentives." The litigation involved tax incentives enacted for "certain major computer manufacturing facilities."¹⁵³ Although Dell was not named in the enabling legislation or the legislative history, there was no question but that the incentives were directed at Dell. The legislation enhances "existing tax incentives and . . . provide[s] a tax credit for certain major computer manufacturing facilities."¹⁵⁴ The incentive package, which Dell negotiated with not only the state, but also the City of Winston-Salem and Forsyth County, granted Dell what is now estimated to run between \$280 and \$305 million in tax breaks.¹⁵⁵

The Dell plaintiffs brought suit in Wake County District Court, where the trial judge dismissed the complaint after finding that the plaintiffs lacked standing.¹⁵⁶ The plaintiffs appealed to the North Carolina intermediate court and pursued five claims. Several claims were premised on the North Carolina Constitution, including claims that the Dell incentives violated the public purpose doctrine, the exclusive emoluments clause, and the uniformity provisions of the state constitution. Plaintiffs also asserted that the incentives were unauthorized under the local development statute. Finally, plaintiffs pursued their "Enrich-style" dormant Commerce Clause claim, and

¹⁵² 651 S.E.2d 268 (N.C. Ct. App. 2007).

¹⁵³ *Id.* at 271 (describing the incentives); see also Act of Nov. 5, 2004, ch. 105, 2004 N.C. Sess. Laws 204 (providing "Tax Incentives For Major Computer Manufacturing Facilities").

¹⁵⁴ *Blinson*, 651 S.E.2d at 271.

¹⁵⁵ Michael Hewlett, *Company Considers Building in Davidson*, WINSTON-SALEM J. (North Carolina), May 1, 2008, at B1, available at <http://www2.journalnow.com/content/2008/may/01/company-considers-building-in-davidson> ("In 2005, Davidson County offered about \$23.1 million to Dell Inc. for a \$115 million plant. That plant was eventually built in Forsyth County, and Dell received state and local incentives of up to \$305 million."); *States Need Gumption to End Economic Incentives Game*, ASHEVILLE CITIZEN-TIMES (North Carolina), Dec. 6, 2007, at 4B ("In 2004, the state handed out \$280 million in state and local incentives to attract a Dell computer plant to Winston-Salem.").

¹⁵⁶ *Blinson*, 651 S.E. 2d at 273.

asserted that the incentive package violated the dormant Commerce Clause of the United States Constitution.

The North Carolina Court of Appeals first held that the plaintiffs did in fact have standing to challenge plaintiffs' state constitutional claims of violations of the public purpose and exclusive emoluments clauses.¹⁵⁷ But the plaintiff's victory was fleeting. Reasoning that it was bound by a previous North Carolina Supreme Court decision, the error correcting court went on to hold that plaintiffs' claim failed on the merits.¹⁵⁸

Although the *Blinson* court held that the plaintiffs had standing to challenge two of the state constitution-based claims, the court held that the plaintiffs lacked standing to pursue their remaining claims. The court first addressed the claim that the incentives violated North Carolina's uniformity of taxation constitutional provision. The court observed that plaintiffs could not pursue the uniformity claim because the plaintiffs did not belong to the class which is prejudiced by the statute.¹⁵⁹

In the same breath, the *Blinson* court bounced the plaintiffs' federal dormant Commerce Clause claim.¹⁶⁰ The court reasoned that "it is well-established under federal law that claims under the Dormant Commerce Clause require plaintiffs to demonstrate that they are prejudiced by the operation of the challenged statute in order to establish standing."¹⁶¹ It is unclear how the court reached this last conclusion. It could be that, under relevant North Carolina taxpayer standing jurisprudence, the plaintiffs did not have standing to pursue their federal claim. But the court cited the wrong law—*federal* taxpayer standing jurisprudence will apply to federal taxpayers in *federal* court. States are free to apply less rigorous taxpayer standing rules to litigants in their own courts, regardless of whether the taxpayer asserts the claim pursuant to federal or state law.¹⁶²

Despite this initial set-back, the North Carolina plaintiffs are no less tenacious than their Minnesota counterparts. Even before the North Carolina court had a chance to rule on the Dell incentives, the

¹⁵⁷ *Id.* at 273–74 (citing *Goldston v. State*, 637 S.E.2d 876 (N.C. 2006)).

¹⁵⁸ *Id.* at 278–79 ("We hold . . . under *Maready* [*v. City of Winston-Salem*, 467 S.E.2d 615 (N.C. 1996)] and *Peacock* [*v. Shinn*, 533 S.E.2d 842 (N.C. Ct. App. 2000)], *appeal dismissed*, 546 S.E.2d 110 (N.C. 2000)) . . . that plaintiffs failed to state a claim for relief under the Public Purpose Clauses of the North Carolina Constitution. . . . [T]he trial court did not err in concluding that plaintiffs failed to state a claim for relief under the Exclusive Emoluments Clause.").

¹⁵⁹ *Id.* at 274.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997)).

¹⁶² See *supra* notes 56–57 and accompanying discussion.

NCICL had filed another lawsuit—this time challenging an incentive package that went to Internet giant Google.¹⁶³ In this nascent lawsuit, the plaintiffs make several of the same claims as were made in the Dell lawsuit.¹⁶⁴ Absent from this second lawsuit, however, is the dormant Commerce Clause argument. The Google lawsuit is in its early stages.¹⁶⁵

V. SOME MODEST OBSERVATIONS

Two groups of plaintiffs in two separate states have challenged similar tax incentive packages. Both groups initially faced what turned out to be insurmountable taxpayer standing limits. Both groups have reignited litigation in separate lawsuits. Both groups have also abandoned the Enrich-style dormant Commerce Clause claims.

The appellate court cases in both states demonstrate the tricky nature of taxpayer standing jurisprudence. Both state courts can fairly be criticized for failing to provide well-reasoned guidance to future litigants seeking to establish standing on the basis of taxpayer status.

At least one team of observers foresees little luck for the Google plaintiffs.¹⁶⁶ In an article published in *State Tax Notes*, authors affiliated with Tax Analysts¹⁶⁷ predicted that the Google plaintiffs would face overwhelming procedural and substantive hurdles. North Carolina case law that developed after the *State Tax Notes* article proves that the analysts were off on their first prediction—the Google plaintiffs will have standing, at least to pursue some of their claims. But the Google plaintiffs still face the critical substantive hurdle of

¹⁶³ Complaint, and Petition for Declaratory Judgment, *Munger v. State*, No. 07 CVS 011756 (N.C. Sup. Ct. filed July 25, 2007). The Google suit was signed by counsel on July 25, 2007, and the *Blinson* decision was filed on October 16, 2007. See also Press Release, N.C. Inst. for Constitutional Law, NCICL Files Lawsuit Challenging the Constitutionality of State Economic Subsidies to Google, Inc. (July 25, 2007) (noting the filing) (on file with author).

¹⁶⁴ See Complaint, and Petition for Declaratory Judgment, *supra* note 163, ¶¶ 60–87.

¹⁶⁵ *Id.* Bob Orr has launched a campaign for governor, and Orr's campaign website discusses the folly of tax incentives. See Orr for Governor 2008, Economic Policy Overview, <http://www.orr2008.com/Issues/EcDev/EcDev.html> (last visited May 24, 2008) (“Despite what some politicians would like you to believe, the answer is not for state and county governments to take your tax dollars and give them to a few giant global corporations, hoping for the outsourcing of a small part of their operation to North Carolina, creating a few hundred jobs with profits flowing out of state.”).

¹⁶⁶ Jennifer Carr & Cara Griffith, *Can North Carolina Constitutionally Subsidize Google?* 45 STATE TAX NOTES 585 (Aug. 27, 2007).

¹⁶⁷ Tax Analysts describes itself as “a nonprofit publisher that provides the latest and most in-depth tax information worldwide.” About Tax Analysts, <http://www.taxanalysts.com> (follow “About Tax Analysts” hyperlink) (last visited May 1, 2008). It describes its methods as “working for the transparency of tax rules, fostering increased dialogue between taxing authorities and taxpayers, and providing forums for education and debate” with the goal of “encourag[ing] the creation of tax systems that are fairer, simpler, and more economically efficient.” *Id.*

the *Maready v. City of Winston-Salem*¹⁶⁸ decision, in which the North Carolina Supreme Court upheld tax incentives. Absent a reversal of the recent precedent, smart money is on the continued (state) constitutionality of the North Carolina incentives.

Because the Minnesota Supreme Court has yet to address Minnesota's incentive scheme, the outlook for the Minnesota plaintiffs is less clear. It is clear, however, that the question of the federal constitutionality of these types of incentives will have to await another group of plaintiffs, since both the Minnesota and the North Carolina plaintiffs have abandoned the federal dormant Commerce Clause doctrine ("DCCD") challenges.

Given the dogged pursuit of the state constitution-based claims, we wonder what precipitated the abandonment of the federal DCCD claims.¹⁶⁹ Watching the *Cuno* plaintiffs make it all the way to the United States Supreme Court only to be booted on the ground of standing must be a sobering observation for any incentive-challenger. Given that, it could be that plaintiffs' counsel has made a litigation strategy decision to ditch the federal DCCD claims so that they are guaranteed to stay in state court. By dropping the DCCD claims, the plaintiffs will avoid the threat of removal, and the hassle and expense of remand motions. It could also be that counsel has determined that the DCCD claims will not be winners, as was suggested by Brannon Denning when participating in the Case Western Reserve Law Review symposium.

Taxpayer standing in Minnesota and North Carolina state courts is less than clear. Why the state court plaintiffs abandoned their DCCD claims is also a mystery. One thing we know with certainty, however, is that absent an amended complaint¹⁷⁰ in either the Google case or the *Interstate Motor Trucks* case, the question of the Commerce Clause constitutionality of state tax incentives will continue to be academic.

¹⁶⁸ 467 S.E.2d 615 (N.C. 1996).

¹⁶⁹ We note that we have no special insight here. Although we talked briefly with counsel for the Minnesota plaintiffs, we did not discuss the abandonment of the federal DCCD claims.

¹⁷⁰ Once a responsive pleading has been filed, the Minnesota Rules of Civil Procedure permit amended complaints "only by leave of court or by written consent of the adverse party." MINN. R. CIV. P. 15.01. Leave to amend "shall be freely given when justice so requires." *Id.* North Carolina Rules of Civil Procedure similarly permit amended complaints "once as a matter of course at any time before a responsive pleading is served Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. R. CIV. P. 15(a).

