

**Tax Incentives:  
Status following *Cuno v.  
DaimlerChrysler?***

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***Cuno* Decision Revives Debate Over  
Constitutionality of Incentives**

- Case History
  - DaimlerChrysler expands in-state Jeep factory, rather than building new plant in Michigan.
  - Plaintiffs pursue national litigation strategy.
  - Jurisdiction of Federal courts: Tax Injunction Act does not apply.
  - Taxpayer Standing? Ohio v. Sixth Circuit Rule

## Supreme Court's Discrimination Analysis

- State Investment Tax Credit: Unconstitutionally Discriminatory
  - “Coerces” businesses already subject to Ohio tax to expand locally rather than out-of-state.
  - Forecloses tax neutral decision-making.
- Municipal Property Tax Exemption: Valid Incentive
  - No “coercion” – no reduction of in-state tax liability.
  - No independent collateral requirements (e.g., new jobs, other commerce).

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## Is *Cuno* a Doctrinal Aberration?

- Supreme Court's Framework for Analysis: Discrimination against Interstate Commerce under Dormant Commerce Clause
  - Dormant C.C. prevents states from imposing undue burdens on interstate commerce, even where Congress has failed to act.
  - Discrimination against interstate commerce is one of 4 restrictions set forth in *Complete Auto Transit* (1977).
  - C.C. prevents state from imposing tax that provides direct commercial advantage to local business.
  - C.C. goal is area of free trade among the states.

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## **Is *Cuno* a Doctrinal Aberration?**

- Boston Stock Exchange v. State Tax Comm'n (1977)
- Maryland v. Louisiana (1981)
- Bacchus Imports v. Dias (1984)
- Westinghouse Electric Corp. v. Tully (1988)
- New Energy Co. v. Limbach (1988)
- Associated Ind. of Missouri v. Lohman (1994)

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## **Constitutional Carrot v. Unconstitutional Stick?**

CONSTITUTIONAL "CARROTS"  
INCLUDE:

- Subsidies
- Property Tax Exemption
- Refundable Credit

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## **Constitutional Carrot v. Unconstitutional Stick?**

### UNCONSTITUTIONAL “STICKS” INCLUDE:

- Credit that is inversely proportional/available to taxpayer’s out-of-state activity [penalty principle]
- Incentive that “forecloses tax-neutral decision-making”
- Coercion on Taxpayer already subject to State’s tax jurisdiction [What if Taxpayer is not yet in-state?

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## **Reviewing and Protecting Incentives In Light of Current Uncertainty**

- Analyze and Classify Existing Incentives by Reference to Case Law Principles, Then:
  - Consider immediate impact on tax return filings.
  - Consider impact on financial reporting.
  - Consider strategic options (renegotiating incentives; statutory amendments, etc.).

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## **Congressional Proposal on State Tax Incentives**

- Approach
  - Broad vs. narrow scope
- Balance
  - Affirm state authority to offer
  - Preserve existing jurisprudence
- Legislation would not:
  - Require a state to offer
  - Prohibit any tax incentives
- Next Step