A Small World

To the Editor:

Congratulations to Naseem Stecker on a well-researched and timely article. As a lawyer who began his career at Wayne County Neighborhood Legal Services before moving to Florida, I did not come to know Otis M. Smith, though I have come to know him through your article in the June 2006 issue ("A Trailblazing Leader").

My former roommate at the University of Michigan, Howard Boigon, clerked for Wade McCree, Jr., and friend Peter Zubrin, counsel with General Motors, may have known Otis M. Smith during the latter's service as general counsel of General Motors. We live in a small world, where if we do not know someone directly, we know others who know that person or his community of friends. Thank you.

Jonathan P. Rose
Miami, Florida

Consensus on the Supreme Court

To the Editor:

"Chief Justice Says His Goal Is More Consensus on Court," *New York Times,* May 22, 2006, reminds me of a concept I pursued for a while when I was in law school. Justice John C. Marshall was the fourth chief justice of the United States Supreme Court, taking office in 1801. He is mainly known for establishing the Supreme Court as an equal to the executive and legislative branches at a time when it was not very highly regarded. He also was very fond of the Court speaking with one voice. His personal power for the 34 years he was chief justice was such that if the Court issued an opinion, there was rarely a dissent. Apparently, Chief Justice Roberts is following in Marshall's footsteps.

As a law student, I found Supreme Court dissents confusing, especially when the dissents and concurring opinions were printed right along with the majority opinion. As a current example, take the case of racial diversity at the University of Michigan Law School, *Grutter v Bollinger et al.,* 539 US 306 (2003). Near the end of the syllabus, the following appears: "O'Connor, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined, and in which Scalia and Thomas, JJ., joined in part insofar as it is consistent with the views expressed in Part VII of the opinion of Thomas, J. Ginsburg, J., filed a concurring opinion, in which Breyer, J., joined, post, p. 344. Scalia, J., filed an opinion concurring in part and dissenting in part, in which Thomas, J., joined, post, p. 346. Thomas, J., filed an opinion concurring in part and dissenting in part, in which Scalia, J., joined as to Parts I–VII, post, p. 349. Rehnquist, C. J., filed a dissenting opinion, in which Scalia, Kennedy, and Thomas, JJ., joined, post, p. 378. Kennedy, J., filed a dissenting opinion, post, p. 387."

It seems to me that if so many variations on the opinion are allowed, the result is muddy chaos rather than clear direction for the lower courts and the country. Who can argue a point authoritatively when there is such a range of verbiage? Recently, there was another story in the *Times,* "Judging Whether a Killer Is Sane Enough to Die," June 2, 2006. In part it says: "Other courts require more. Relying on a concurring opinion in the Supreme Court decision [*Ford v Wainwright*] . . . ." Now concurring opinions are stare decisis? This makes total hash out of trying to understand case law.

I have two suggestions. First, there should only be outcomes that are unanimous or per curium; that is, written as the writer's opinion speaking for all or as the Court's unified opinion without authorship. If the Court can't agree on a single opinion, then the lower court's opinion stands. This should be part of the rules the Supreme Court uses when it agrees to take a case. Only the one opinion will be published as the opinion of the Court.

Second, there should be a separate "Journal of Alternate Opinion" where justices can write whatever they wish about a case. This journal, however, will not be considered "case law" and will have no standing or effect on the future of a case. If there is something persuasive written as an alternate opinion, it can be cited just as any other idea. Only if it becomes part of the opinion of the Court in a new case would it become law.

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Cuno v DaimlerChrysler: Will the Supreme Court Strike Down Business Tax Incentives?

To the Editor:

The *Cuno v DaimlerChrysler* saga that we wrote about in the September 2005 issue ("The Economics of Business Attraction: Are Beneficial Michigan Tax Incentives in Jeopardy after Sixth Circuit Court Ruling?") has finally come to an end. As you may recall, in *Cuno,* local taxpayers and property owners challenged Ohio's system of tax credits and property tax exemptions, which resulted in DaimlerChrysler receiving an approximately $280,000,000 credit against its Ohio franchise taxes in exchange for expanding its facilities in Toledo. The district court held that the tax credits and exemptions were completely lawful, but the Sixth Circuit found that they violated the Commerce Clause. The U.S. Supreme Court heard the case on March 1, 2006, and issued an opinion reversing the Sixth Circuit on May 15, 2006.[1]

DaimlerChrysler and Ohio both argued that Cuno and the other taxpayers lacked standing to bring their claim. In order to bring suit in a federal court, a party has to show that it suffered an actual or imminent injury that is concrete and specific, that the conduct complained of caused the injury, and that a favorable decision will redress the injury. The plaintiffs argued that they had standing as taxpayers relying on a specific constitutional provision, the Commerce Clause.

According to the Supreme Court, a party has standing to pursue a claim when it suffered a personal injury that was caused by

the defendant's conduct and that injury can be cured by the relief requested.[2] Generally, taxpayers cannot meet these requirements because the injury is shared by millions of people, hence it is not "personal."[3] Moreover, the *Cuno* plaintiffs' claimed injuries—higher taxes and a reduction in services—were based on pure conjecture. First, it assumed that state revenue would decline.[4] Second, it assumed that the Ohio legislature would respond by increasing citizens' taxes and reducing services enjoyed by the plaintiffs.[5] Thus, the Court reasoned that if the *Cuno* plaintiffs could establish standing, anyone could, which would eviscerate the Constitution's Article III "case or controversy" requirement.[6]

DaimlerChrysler and Ohio also argued that the tax credits did not violate the Commerce Clause. Needless to say, the Court never reached the Commerce Clause issue in light of its ruling on the plaintiffs' inability to establish standing. Thus, the substantive merits of the case remain unresolved, and another party, with standing, could mount a future challenge to similar tax credits.

Although Michigan businesses and governments may have breathed a collective sigh of relief, the Court's reversal on purely procedural grounds may complicate the issue further. As stated above, the issue may be relitigated in federal courts by parties with standing. In addition, plaintiffs may be able to raise the same issues in state courts. In either case, the substantive issues will remain active. More problematically, instead of having a single uniform rule, they could potentially be subject to 50 different rules. On the other hand, any Michigan suit would apply Michigan's standing rules, which mirror those of the federal courts, and thus would likely prevent a *Cuno* claim from getting very far.

Joshua S. Smith
and John D. Miller
Lansing

FOOTNOTES

1. *DaimlerChrysler v Cuno,* 126 S Ct 1854 (2006).
2. Id. at 1861.
3. Id. at 1862–1863.
4. Id.
5. Id.
6. Id. at 1867–1868.