THE MODERN DAY BORDER WAR: HOW KANSAS CAN END ITS ECONOMIC DEVELOPMENT BATTLE WITH MISSOURI IN THE KANSAS CITY METROPOLITAN AREA

*By Michael T. McGee**

I. INTRODUCTION

In June of 2014, Leawood, Kansas-based businesses Cbiz Inc. and Mayer Hoffman McCann, PC chose to move their headquarters and 450 employees to the Country Club Plaza in Kansas City, Missouri.[1] This move of just a few miles across the state line triggered incentives from the state of Missouri that could potentially reach a value of over $25 million if the companies meet certain job creation and investment standards in coming years.[2] In an interview with the *Kansas City Business Journal*, Cbiz Financial Services' Chief Operating Officer said that the company had planned to move to the Country Club Plaza area before going through the application process to receive incentives.[3] Missouri's act of enticing businesses across the state line is far from a one-sided affair. In 2011, AMC Entertainment, Inc. received over $40 million from the state of Kansas in exchange for a commitment to move its corporate headquarters from downtown Kansas City, Missouri to a suburban development just across the state line in Johnson County, Kansas.[4]

The economic "border war" between Kansas and Missouri is just one example of government officials across the country leveraging taxpayer dollars in the name of economic development.[5] But, nowhere have economic incentives

---

* J.D. Candidate 2016, University of Kansas School of Law. I would like to thank Professor Christopher Drahozal and Professor Quinton Lucas for their insightful comments as well as my fellow members of the Kansas Journal of Law & Public Policy who helped ready this paper for publication. I would also like to express my appreciation for the many community leaders in Kansas City who have worked diligently to shed light on the "border war" issue that this paper addresses.

1. Mark Davis, *Cbiz and Mayer Hoffman McCann are crossing the state line to the Plaza Steppes building in Missouri*, KANSAS CITY BUS. J. (Jul. 22, 2014, 5:07 PM), http://www.kansascity.com/news/business/development/article783610.html.

2. *Id.*

3. *Id.*

4. David Twiddy, *AMC Entertainment will move its headquarters to Leawood's Park Place*, KANSAS CITY BUS. J. (Sept. 14, 2011, 5:26 PM), http://www.bizjournals.com/kansascity/news/2011/09/14/amc-entertainment-will-move-hq-to-ks.html?page=all.

5. Greg LeRoy et al., *The Job Creation Shell Game: Ending the Wasteful Practice of*

caused more controversy amongst policymakers, business leaders, and civic groups than in metropolitan areas like Kansas City where urban centers are split between multiple states.[6] This article identifies issues raised regarding Kansas and Missouri's use of economic development incentives in the Kansas City metropolitan area. Next, it addresses the arguments for and against state tax incentives, then analyzes the effectiveness of Kansas and Missouri's incentive policies in terms of job growth and economic activity in Kansas City. This article offers two different policy proposals to end the Kansas-Missouri border war. The first proposal recommends creation of a bi-state commission that oversees state and local tax incentives in Kansas City as a part of a larger regional agreement between Kansas and Missouri economic development players to work together on job creation and economic growth in Kansas City. The second proposal consists of a model statute that the Kansas Legislature could enact in order to end the border war with Missouri while ensuring that Kansas remains an attractive place to do business. The article concludes by discussing the constitutional implications of both a statutory truce as well as the overall use of tax incentives by states.

II. The Current Problem

A. A History of Economic Development Incentives

New Jersey provided the first known state location incentive in the United States to Alexander Hamilton in 1791 when he agreed to move a manufacturing facility to Paterson, New Jersey in exchange for "no tax[,] charges[,] and impositions whatsoever" by the state.[7] Use of specific tax incentives first occurred in the 1930's when southern states provided property tax exemptions to businesses in order to help kick-start their struggling economies.[8] In the 1980s', the popularity of "supply side" economic growth theories led states to dramatically increase the amount of economic development incentives available.[9] Today, almost all fifty states have some form of a tax incentive program that attempts to lure and keep businesses within their borders.[10]

B. Incentives in Kansas (PEAK)

In 2009, the Kansas Legislature passed a bill that created its primary economic incentive program, Promoting Employment Across Kansas (PEAK).[11]

Subsidizing Companies That Move Jobs From One State to Another, GOOD JOBS FIRST, at i (2013), http://www.goodjobsfirst.org/sites/default/files/docs/pdf/shellgame.pdf.

6. *Id.*

7. Booker T. Coleman Jr., *Location Incentives and the Negative Commerce Clause: A Farewell to Arms?*, 89 MARQ. L. REV. 583, 584 (2006).

8. Peter Enrich, *Saving The States From Themselves: Commerce Clause Constraints on State Tax Incentives For Business*, 110 HARV. L. REV. 377, 382 (1996).

9. *Id.*

10. *Id.*

11. KAN. STAT. ANN. §§ 74-50,210–19 (2009).

Under PEAK, qualifying companies, accepted at the discretion of the Secretary of Commerce, are able to retain 95 percent of the payroll tax withholding on PEAK-eligible jobs for a period of five to ten years, depending on the number of jobs they bring and the wages they pay their employees in relation to the county median wage.[12] To qualify for PEAK funding, a business must meet certain standards like having an average wage above the county median wage and providing full-time employees with adequate health care coverage, for which the business pays at least 50 percent of the premiums.[13] Additionally, companies must agree to hire at least ten new employees, if located in a metropolitan area, or five employees, if located in a non-metropolitan area, to receive the payroll tax withholding.[14]

Originally, PEAK was focused solely on companies who relocated out-of-state jobs to Kansas.[15] However, it was amended to provide incentives to start-ups and Kansas businesses that were expanding or considering relocating elsewhere.[16] As of October 2014, $369.7 million in incentives had already been given to qualifying businesses through the PEAK program.[17]

C. Incentives in Missouri (Missouri Works)

In 2013, the Missouri Legislature consolidated three different economic incentives programs into one, called Missouri Works, which lowered the threshold for business to receive state tax incentives.[18] Under the new program, businesses may retain 100 percent of the payroll tax withholding from new jobs brought into or expanded within Missouri for a period of either five or six years.[19] To qualify, businesses in metropolitan areas must create ten or more new jobs and their average wage must equal 90 percent of the county average wage.[20] For businesses in rural areas or enhanced enterprise zones, qualification standards mandate that at least two new jobs be created, average wage requirements be met, and the incentivized business make a capital investment of at least $100,000 at the project facility within the first two years of program funding receipt.[21] On top of the statutory incentives that businesses can automatically qualify for, the Missouri Department of Economic Development

12. *Id.* at § 74-50,212.

13. *Id.* at §§ 74-50,211–12.

14. *Id.* at § 212(b).

15. Kevin P. Kennedy, *Credits and Incentives in Kansas, and How They May be Impacted By Recent Changes in Income Tax Laws*, 82 J. KAN. B. ASS'N 20, 26 (2013).

16. KAN. STAT. ANN. § 74-50,212.

17. Rob Roberts, *Disclosed PEAK grants total $369.7M; 87 percent deployed at border*, KANSAS CITY BUS. J. (Feb. 19, 2015, 3:07 PM), http://www.bizjournals.com/kansascity/news/2015/02/19/disclosed-peak-grants-total-369-7m-87-percent.html.

18. MO. ANN. STAT. § 620.2000–2020 (West 2013); James Dornbrook, *New Missouri Works Law broadens incentives eligibility*, KANSAS CITY BUS. J. (Jul. 16, 2013, 2:34 PM), http://www.bizjournals.com/kansascity/news/2013/07/16/new-missouri-works-law-includes.html.

19. MO. ANN. STAT. § 620.2010 (West 2013).

20. *Id.*

21. *Id.*

has the discretion to award additional economic incentives.[22] Discretionary incentives are determined according to a set of statutory factors that include:

(1) significance of a company's need for additional credits;
(2) amount of net projected fiscal benefit;
(3) overall size and quality of the proposed project;
(4) financial stability and credibility of the company;
(5) level of economic stress in the area of the projected facility;
(6) an evaluation of the competitiveness of alternate locations for the projected facility; and
(7) the percentage of local incentives committed to the proposed project.[23]

In the 2012 fiscal year alone, Missouri Quality Jobs, one of the predecessors to the Missouri Works Program, authorized more than $99 million in tax credits to businesses.[24] More recently, Missouri Works has authorized more than $41 million in tax credits and more than $75 million in tax withholdings in 2014 alone.[25]

D. State Incentives in Kansas City

The Kansas City metropolitan area is split between two states that proactively use tax incentives to attract business. As both Kansas and Missouri work to create a business environment that remains competitive with other states, it is the competition between each other to draw businesses already located in the Kansas City area that has created controversy.[26] National commentators have noted the extensive use of incentives by both states to lure companies just a few miles across the Missouri-Kansas state line.[27] Two main questions arise when analyzing economic development incentives in Kansas City: 1) whether the incentives are successful in bringing new jobs and economic activity to the state, and 2) whether the use of incentives is either a) a positive

22. *Id.*

23. *Id.*

24. MO. TAX CREDIT REV. COMM'N, REPORT OF THE MISSOURI TAX CREDIT REVIEW COMMISSION 13 (2012), *available at* http://tcrc.mo.gov/pdf/2012-tcrc-report.pdf.

25. MO. DEPT. OF ECON. DEV., MISSOURI WORKS, REPORT TO THE GENERAL ASSEMBLY FOR THE QUARTER ENDING MARCH 31, 2014, (2014), *available at* http://ded.mo.gov/upload/MOWorksQtrlyReport03312014.pdf; MO. DEPT. OF ECON. DEV., MISSOURI WORKS, REPORT TO THE GENERAL ASSEMBLY FOR THE QUARTER ENDING JUNE 30, 2014 (2014), *available at* http://ded.mo.gov/upload/MoWorksQuarterlyReport6302014.pdf [hereinafter MISSOURI WORKS 2014 REPORT]; MO. DEPT. OF ECON. DEV., MISSOURI WORKS, REPORT TO THE GENERAL ASSEMBLY FOR THE QUARTER ENDING SEPTEMBER 30, 2014 (2014), *available at* https://ded.mo.gov/upload/MOWorksQrtlyReport9-30-2014.pdf; MO. DEPT. OF ECON. DEV., MISSOURI WORKS, REPORT TO THE GENERAL ASSEMBLY FOR THE QUARTER ENDING DECEMBER 31, 2014 (2015), *available at* https://ded.mo.gov/upload/MoWorks Mar2015.pdf.

26. LeRoy et al., *supra* note 5, at 21–23.

27. *See, e.g.*, Mac Bishop, *Border War: Kansas City*, N.Y. TIMES (Dec. 1, 2012), http://www.nytimes.com/video/business/100000001832941/border-war.html; *The New Border War*, ECONOMIST, Mar. 22, 2014, at 32, 33, *available at* http://www.economist.com/news/united-states/21599368-missouri-calls-economic-truce-kansas-new-border-war.

example of competition between two states that leads to overall economic growth, or b) creating a situation that enables businesses to pit Kansas and Missouri against each other in a bidding war in which the only potential winner is the business itself.[28] This discord is a result of the fact that while the incentive cost is directly quantifiable, the resulting economic benefit cannot be reflected in an exact dollar amount.[29]

Although the direct economic impact of incentives used in Kansas City remains unquantifiable, there are studies lending weight to both proponents and detractors of economic development incentives. A January 2014 report by the Docking Institute of Public Affairs at Fort Hays State University found that each dollar invested in the PEAK program led to $960 in total economic activity.[30] However, a 2013 Hall Family Foundation study concluded that since 2009, Kansas has spent $140 million on incentives to bring 3,289 Kansas City, Missouri jobs to Johnson and Wyandotte Counties. Meanwhile, Missouri has spent $72 million to entice Johnson and Wyandotte County businesses that brought 2,824 jobs to Jackson County.[31] Thus, Kansas netted a total of 465 jobs from the $140 million it spent on incentives, amounting to approximately $301,000 per job.[32]

In response to this economic border war, a group of Kansas City area business leaders wrote a public letter to the governors of Kansas and Missouri urging them to end the use of state incentives that lure businesses across the state line.[33] Missouri Governor Jay Nixon signed a bill on July 1, 2014, that, contingent upon comparable action by Kansas, would impose a bi-state moratorium on tax incentives used to attract businesses from a border county in Kansas City across the state line.[34] Specifically, the "truce bill" prevents incentives from being offered to businesses in Wyandotte, Johnson, Douglas, and Miami Counties in Kansas and Jackson, Clay, Platte, and Cass Counties in Missouri.[35] To date, neither Kansas Governor Sam Brownback nor the Kansas Legislature has acted upon the truce offered by Missouri.[36] However, Kansas has created a committee to advise Governor Brownback on border war issues, and officials from the Kansas Department of Commerce have recently met with

28. LeRoy et al., *supra* note 5.

29. *See* MISSOURI WORKS JUNE 2014 REPORT, *supra* note 25 (showing how state economic development agencies can only estimate the financial impact an incentive will have).

30. PRESTON GILSON & GARY BRINKER, DOCKING INST. OF PUB. AFFAIRS, PROMOTING EMPLOYMENT ACROSS KANSAS PROGRAM EVALUATION AND ECONOMIC IMPACT ANALYSIS 5 (2013).

31. Rob Roberts, *Kansas Shoots Down Missouri Truce Bill; Silvey Fires Back*, KANSAS CITY BUS. J. (Mar. 11, 2014, 1:46 PM), http://www.bizjournals.com/kansascity/news/2014/03/11/kansas-shoots-down-missouritruce-bill-silvey-fires.html.

32. *Id.*

33. LeRoy et al., *supra* note 5, at 23.

34. MO. ANN. STAT. § 135.1670 (West 2014).

35. *Id.*

36. Roberts, *supra* note 31.

their counterparts in Missouri to try to negotiate an agreement on future use of economic development incentives in the Kansas City metropolitan area.[37]

III. POLICY ANALYSIS

A. State Tax Incentive Viewpoints

When evaluating the effectiveness of state tax incentive policy, the threshold question is whether the benefit the state receives from offering the incentive is outweighed by the cost incurred.[38] Because the economic benefit realized due to incentives is largely unquantifiable, both proponents and detractors of state tax incentives are able to interpret the data in a manner that supports their respective positions.[39] Both sides have used empirical research and economic theory to argue that a cost-benefit analysis weighs in their favor.

1. Arguments for State Tax Incentives

Advocates of state tax incentives argue that incentives succeed when other market solutions may fail.[40] They provide capital to businesses that are looking to expand when banks are unwilling to lend due to regulatory constraints or heavy competition for available loans.[41] Some tax credits are utilized to enhance a public good or reduce local unemployment when it exceeds the national average.[42] Attracting new business through tax incentives has the potential to generate positive externalities for the market; property values may rise or other businesses may similarly relocate, which creates a cluster of economic activity.[43]

Proponents also postulate that income from tax incentives is better off in the private sector because it increases incomes and subsequent investment since consumers use tax income more efficiently than state governments.[44] Also, tax revenue reductions due to incentives force state governments to take a closer look at their spending and be more responsive to businesses in the face of competition from other states.[45]

37. Rob Roberts, *KC-Area Leaders Advise Kansas on Border War Truce*, KANSAS CITY BUS. J. (Jan. 15, 2014, 2:16 PM), http://www.bizjournals.com/kansascity/news/2014/01/15/kc-area-leaders-advising-kansas-on.html; Austin Alonzo, *States are Negotiating an End to the Border War, George Says*, KANSAS CITY BUS. J. (Jun. 19, 2015, 5:00 PM), http://www.bizjournals.com/kansascity/print-edition/2015/06/19/states-are-negotiating-an-end-to-border-war-george.html.

38. SHIRLEY SICILIAN, INST. FOR PUB. POL. AND BUS. RES., COSTS AND BENEFITS OF BUSINESS TAX INCENTIVES IN KANSAS 1 (1987), *available at* http://ipsr.ku.edu/resrep/pdf/m117.pdf.

39. *See* MISSOURI WORKS JUNE 2014 REPORT, *supra* note 25.

40. HOWARD J. WALL, SHOW-ME INST., TAX CREDITS AS A TOOL OF STATE ECONOMIC DEVELOPMENT POLICY 5 (2011), *available at* http://showmeinstitute.org/publications/policy-study/corporate-welfare/640-tax-credits-as-a-tool.html.

41. *Id.*

42. *Id.* at 6, 8.

43. *Id.* at 7.

44. Tracy A. Kaye, *The Gentle Art of Corporate Seduction: Tax Incentives in the United States and the European Union*, 57 U. KAN. L. REV. 93, 113 (2008).

45. *Id.* at 114.

Finally, tax incentives are considered an important business development tool within a state.[46] Among other objectives, Kansas has offered incentives to facilitate development in historic buildings or blighted areas, to create jobs, and to encourage business investment.[47] From a policy perspective, incentives have become essential for states that look to tout a pro-business environment. States face competition for economic development from both other states and abroad, and this competition does not appear to be slowing.[48]

2. Arguments Against State Tax Incentives

Opponents of state tax incentives argue their cost is excessive considering that incentives are just one of many factors that influence where businesses choose to locate.[49] Businesses look to other things like workforce education, site location, and infrastructure, in conjunction with state tax incentives, to determine which state's business climate best fits their needs.[50] Also, businesses put pressure on states to offer incentives even after they have already made plans to move.[51] State and local politicians often give in to this pressure because they do not want to undergo scrutiny from their constituents when jobs are moved to another state.[52] Essentially, tax incentive competition that encourages the constant relocation of businesses from one state to another is a zero-sum game on the national level.[53] For states that fail to offer attractive incentive packages or choose to provide incentives to companies that end up creating minimal economic activity, a net loss in jobs or tax revenue can result.[54]

The literature available on the effectiveness of economic development incentives and tax credits has not conclusively indicated that these tools have successfully increased economic activity or job growth.[55] In part, this is due to states' inability to effectively audit and evaluate their own tax incentive programs.[56] As a result, those who oppose tax incentives argue states should not

46. Steve Vockrodt, *Kansas-Missouri Eco-Devo Border War Brings Only Losses, Study Says*, KANSAS CITY BUS. J. (Mar. 20, 2013, 9:16 AM), http://www.bizjournals.com/kansascity/print-edition/2013/03/01/kansas-missouri-eco-devo-border-war.html?page=all.

47. Kennedy, *supra* note 15, at 21–28.

48. Kaye, *supra* note 44, at 120–21; Amy Liu & Owen Washburn, *If No End to Incentives for Jobs, then What?*, BROOKINGS INST. (Sept. 28, 2014 7:30 PM), http://www.brookings.edu/blogs/the-avenue/posts/2014/09/28-incentives-jobs-liu-washburn.

49. Enrich, *supra* note 8, at 397.

50. *Border War Guest Column*, (Mar. 5, 2014), http://www.westwoodks.org/vertical/sites/%7B15EFBA29-5AD1-451A-8674-DF587143350D%7D/uploads/Mayor_Report1.pdf.

51. Kaye, *supra* note 44, at 115.

52. *Id.* at 121.

53. *Id.* at 115–16.

54. *Id.* at 116.

55. Zhe Zhao, *Literature Survey: The Effect of State Economic Development Incentives on Regional Economic Growth,* URB. ECON. (Apr. 20, 2013, 2:16 AM), http://sites.duke.edu/urbaneconomics/?p=738.

56. NATHAN M. JENSEN, EWING MARION KAUFFMAN FOUND., EVALUATING FIRM-SPECIFIC LOCATION INCENTIVES: AN APPLICATION TO THE KANSAS PEAK PROGRAM (2014), http://www.kauffman.org/~/media/kauffman_org/research%20reports%20and%20covers/2014/04/evaluating_firm_specific_location_incentives.pdf.

be investing in these high-dollar programs without greater probability and clearer evidence of a benefit that outweighs the cost.[57]

B. Tax Incentives Border War in Kansas City

While there is empirical evidence to suggest that both PEAK and the Missouri Works Program are having some positive impacts in their respective states, the same cannot be said with confidence when looking specifically at Kansas City.[58] The costs incurred by Kansas and Missouri, as well as local municipalities, to entice companies to move a few miles across the state line likely outweigh the purported benefits of net job creation and total economic activity generation. When companies move such a short distance, new jobs are not created because many of the existing employees are retained and simply commute a longer distance to work.[59]

Additionally, the state providing incentives does not realize a direct economic benefit from the employee's state income tax since the incentivized company is able to retain most, if not all, of their employees' income tax withholdings.[60] The end result is little new tax revenue for the incentivizing state and no net new jobs in Kansas City.[61] Businesses in Kansas City are able to use the threat of moving across the state line when their current lease is up or they are looking to expand because they know that both Missouri and Kansas will be willing to put together a competitive tax incentive package to attract or retain them.[62]

All Kansans are bearing the burden of this border war, yet 86.7 percent of PEAK incentives go to companies moving to, or already located in, Johnson and Wyandotte Counties.[63] Also, the PEAK statute is written to give more incentives to those companies who bring a large number of jobs to Kansas.[64] Thus, a significant portion of the program's nearly $400 million budget is made up a few sizable incentives given to large companies who have crossed the state line without hiring new employees.[65] Even though the overall success of PEAK is indeterminate to date, in Kansas City, it is clear that Kansas's continued

57. *Id.*; WALL, *supra* note 40, at 15.

58. This paper does not argue against state tax incentives collectively. Instead, it points to Kansas City as a unique situation where the negative effects of competition are exacerbated.

59. LeRoy et al., *supra* note 5, at 1.

60. *Id.*

61. *Id.*

62. *Id.*; *See, e.g.*, Davis, *supra* note 1.

63. Roberts, *supra* note 17; *see* KAN. DEP'T OF COMMERCE, PEAK PROJECTIONS THROUGH FY 2016 (2015), *available at* http://kanview.ks.gov/EcoDev/Documents/PEAK%20projections %20through%20FY%202016%20as%20of%208-31-15.xlsx (last visited Nov. 29, 2015).

64. KAN. STAT. ANN. § 74-50,212 (2009).

65. *See* KAN. DEP'T OF COMMERCE, *supra* note 63; *see* Roberts, *supra* note 17. The PEAK statute requires the Secretary of Commerce to submit an annual report detailing the nature of the PEAK incentives granted in the past year. KAN. STAT. ANN. § 74-50, 216 (2009). However, until recently the Kansas Department of Commerce did not release PEAK program information to the public without an open records request. Information on PEAK grant recipients and Kansas' projected economic benefit can now be found on the state's KanView website.

financing of the border war with Missouri is a risky endeavor.[66] Therefore, Kansas should find a solution to end the border war with Missouri.

IV. A REGIONAL APPROACH TO ENDING THE BORDER WAR

A. Louisville: An Example of Bi-State Cooperation

Kansas City is not the only city in the country going through an economic development border war.[67] In fact, metropolitan areas such as New York City, Memphis, Charlotte, and others have witnessed the effects of increased competition between multiple states for jobs and other forms of economic growth.[68] However, there are examples for Kansas City to follow where two states have learned to combine forces in a regional effort to achieve economic growth.[69]

The metropolitan area of Louisville has a population of 1.2 million people with approximately 700,000 living in the city of Louisville, Kentucky.[70] One-fifth of the population in the Louisville metropolitan area resides across the Ohio River in the suburbs of southern Indiana.[71]

To fix the area's economic and social issues that were exacerbated by an economic recession in the 1970's and 1980s', Louisville's government and business leaders pushed for a series of changes to the city's economic development strategy.[72] One key change was the agreement of private and public interests in Louisville, Kentucky to combine into one economic development organization with sole control over the city's economic development efforts.[73] As opposed to a number of uncoordinated private and public entities working to achieve economic growth in Louisville, Greater Louisville, Inc.-The Metro Chamber of Commerce (GLI) took on the city's business retention programs, minority-business development, chamber of commerce member services, and other responsibilities.[74] The organization also assumed the lead role in promoting regional cooperation with regards to economic growth.[75]

In the 1990's, parties in both Kentucky and Indiana recognized the shared interest of updating infrastructure in order to decrease traffic congestion for

---

66. JENSEN, *supra* note 56.

67. LeRoy et al., *supra* note 5, at ii–iii.

68. *Id.*

69. EDWARD BENNET & CAROLYN GATZ, METRO. POL'Y PROGRAM, LOUISVILLE, KENTUCKY 24–26 (2008), *avaialable at* http://www.brookings.edu/~/media/Research/Files /Papers/2008/9/17%20louisville%20bennett%20gatz/200809_Louisville.PDF.

70. *Id.* at 3.

71. *Id.* at 25. Although the population of Kansas City is much more balanced between Kansas and Missouri, this demographic difference has no bearing on the success of a cooperative approach in Kansas City.

72. *Id.* at 15.

73. *Id.* at 24.

74. BENNET & GATZ, *supra* note 69, at 24.

75. *Id.*

those crossing the Ohio River.[76] With heavy debate surrounding the prospect of building a new bridge, a multi-county Regional Leadership Coalition was formed in 2001 to help move the bridge project forward and look for other areas of shared interest between the different states, counties, and municipalities that were a part of the Louisville metropolitan area.[77] Soon after, three economic development organizations in southern Indiana combined into one chamber of commerce called One Southern Indiana.[78]

Continued cooperative efforts between leaders in Kentucky and Indiana finally came to fruition in 2007.[79] The board of directors for both GLI and One Southern Indiana signed an agreement to market Louisville to businesses as one metropolitan area.[80] While not legally binding like the truce legislation proposed by Missouri, the GLI-One Southern Indiana agreement was an effort to "recognize that economic growth will be achieved for the entire region through cooperation and collaboration."[81] In fact, the advocacy group Good Jobs First favors regional cooperation over a truce bill in Kansas City because laws that treat two states as adversaries fail to see the benefits of a cooperative, regional approach to economic development.[82] The GLI-One Southern Indiana agreement set out twelve ways that the two organizations would look to cooperate on future economic development efforts:

> (1) To work cooperatively to market the Greater Louisville – Southern Indiana region to the nation and the world.
> (2) To work cooperatively to attract and retain business to the regional community and ensure that when prospect companies are shown sites in Louisville or Southern Indiana, the local economic development representatives for those sites will be present.
> (3) To recognize that while we may compete for projects, the attraction, expansion or retention of a business to any location in an area within the 25-county regional economy is a win for the area as well as a win for the entire region.
> (4) To inform each other of existing companies looking to move "across the river" and recommend incentives for company growth based only on net new job and capital investment growth to the economic area, not based on simply moving jobs and investment from one site to another within the economic area.

76. *Id.* at 26.
77. *Id.*
78. *Id.*
79. BENNET & GATZ, *supra* note 69, at 26.
80. Sarah Jeffords, *GLI, One Southern Indiana Sign Regional Agreement*, LOUISVILLE BUS. FIRST (Apr. 23, 2007, 12:00 AM), http://www.bizjournals.com/louisville/stories/2007/04/23/story4.html?page=all.
81. ONE SOUTHERN INDIANA & FOR GREATER LOUISVILLE, INC., COMMITMENT TO REGIONAL GROWTH FOR THE LOUISVILLE, KENTUCKY – SOUTHERN INDIANA ECONOMIC AREA (2007), *available at* http://www.acce.org/clientuploads/directory/samples/assets/0072520B-9432-449E-8E4B-87B4E4C3556B.pdf [hereinafter COMMITMENT TO REGIONAL GROWTH].
82. LEIGH MCILVAINE & GREG LEROY, GOOD JOBS FIRST, ENDING JOB PIRACY, BUILDING REGIONAL PROSPERITY 7 (2014), *available at* http://www.goodjobsfirst.org/sites/default/files/docs/pdf/endingjobpiracy.pdf.

(5) To focus on supporting and retaining existing expanding companies and encouraging entrepreneurial enterprises to stay in the region.
(6) To work together to raise the educational attainment levels of all citizens within the region.
(7) To work collaboratively to develop grants and other funding to address educational attainment, workforce skills and economic development issues.
(8) To share data and information – labor market research, wage surveys, etc. – that can be used collectively to further the economic development mission of the region.
(9) To work together on projects that will promote an improved quality of life in the region.
(10) To work together to support community branding and marketing initiatives.
(11) To work together to create an inclusive community for business and individuals who seek to make this region their home.
(12) To work collaboratively in encouraging business to promote environmentally friendly practices.[83]

Since the GLI-One Southern Indiana agreement, both organizations have continued to successfully attract jobs and business investment to Louisville.[84] In 2011, One Southern Indiana brought in 700 new jobs, $54 million in capital investment, and $29 million in new annual payroll.[85] Since 2008, GLI has helped facilitate 160 expansions and 27 manufacturing company relocations in the Louisville region.[86] The Louisville metropolitan area provides Kansas and Missouri with an example of a cooperative, regional approach to fostering economic growth and job creation in Kansas City.

B. A Metro-Wide Agreement in Kansas City

Instead of passing legislation in response to Missouri's truce, Kansas could propose a bi-state agreement similar to the GLI-One Southern Indiana compact. The agreement would create an umbrella organization that oversees all private and public economic development entities in the Kansas City metropolitan area. The agreement would also encourage economic development entities to consolidate, where possible, so as to form a unified, regional approach to attracting new business.[87] The umbrella organization would have authority over establishment of a regional marketing strategy, collecting area business and

83. COMMITMENT TO REGIONAL GROWTH, *supra* note 81; Jeffords, *supra* note 80.

84. THE LANE REP., MARKET REVIEW OF GREATER LOUISVILLE AND SOUTHERN INDIANA 2012 14 (2012), *available at* http://ae-lane-report.s3.amazonaws.com/images/pdf/special/Market-Review-Greater-Louisville-Southern-Indiana.pdf.

85. *Id.*

86. *Id.* at 18.

87. *See, e.g.*, BENNET AND GATZ, *supra* note 69, at 24. There are at least ten local economic development organizations in Johnson County, Kansas and Wyandotte County, Kansas alone. *Kansas Directory of Economic Development Organizations*, GLOBAL DIRECT INVESTMENT SOLUTIONS, http://www.gdi-solutions.com/directory/edo/kansas.htm (last visited Oct. 30, 2015).

employment data, facilitating communication between local member entities, and fundraising to support area entrepreneurs as well as the educational needs of the city's businesses and workforce.

The umbrella organization would also create a bi-state commission to advise the Kansas Department of Commerce, the Missouri Department of Economic Development, and area municipalities on their tax incentive practices in Kansas City. The commission's focus would be to encourage responsible use of government incentives that spur economic growth and create net new jobs without continuing the economic development border war. The commission would be made up of individuals across Kansas City who have area economic development experience: members of the Kansas City Area Development Council, the Mid-America Regional Council, the Greater Kansas City Chamber of Commerce, other area chambers of commerce, and state and local government leaders.[88] Creation of a tax incentives commission as a part of a Kansas-Missouri economic development agreement would allow Kansas City residents and businesses to benefit from a regional approach to economic development and bring an end to the current border war.

V. A MODEL TRUCE BILL FOR KANSAS

If a regional approach to ending the border war is unfeasible, Kansas could give effect to a statutory moratorium on economic development incentives in the Kansas City metropolitan area by taking action equivalent to the truce bill passed by the Missouri Legislature in 2014.[89] Because the tax incentive programs in Kansas are discretionary, either executive or legislative action may be taken to reach a compromise with Missouri.[90] But, a legislative truce bill is favorable because legislative action is less likely to be reversed in the future than an executive order. Below is a model truce bill that the Kansas Legislature could enact to put an end to the economic incentives border war in Kansas City:

(a) Defining Terms

(1) "Missouri border county," Jackson, Platte, Clay, and Cass Counties in Missouri.

(2) "Kansas border county," Johnson, Wyandotte, Douglas, and Miami Counties in Kansas.

(3) "entitlement program," a state economic development incentives program that solely requires a business to meet certain statutory requirements in order to qualify for state tax incentives.

(4) "discretionary program," a state economic development incentives program that requires a business to meet certain

88. Creation of a bi-state tax incentives commission would also provide a forum for community leaders to tackle other economic development issues facing the Greater Kansas City area.

89. MO. ANN. STAT. § 135.1670 (West 2014).

90. KAN. STAT. ANN. § 74-50,210–19 (2009).

statutory requirements and receive executive approval in order to qualify for state tax incentives.

(b) If any job that qualifies for a tax credit under sections 74-50, 131 to 133, a loan, grant, or bond under section 74-99b09(c), or retention of state withholding taxes under sections 74-50, 210 to 219, relocates to a Kansas border county from a Missouri border county, no tax credits shall be issued, loan, grant, or bond provided, or retention of withholding taxes authorized for such job under such sections.

COMMENT: This section addresses three programs that the state of Kansas uses to attract out-of-state businesses. First, the High Performance Incentive Program (HPIP) is the largest tax credit program in Kansas.[91] Under the program, companies can receive a 10 percent credit on any investment over $1 million in Johnson, Wyandotte, or Douglas County, or an investment over $50,000 in Miami County.[92] Businesses may also receive up to $50,000 per year as a credit on training expenditures and a sales tax exemption for all business purchases.[93] Second, the Kansas Bioscience Authority's Expansion and Attraction Program collaborates with the Department of Commerce and other economic development organizations to offer businesses low-interest loans, grants, and bonds.[94] Finally, as described above, the Promoting Employment Across Kansas (PEAK) program allows qualifying companies to retain 95 percent of their payroll withholding tax on program-eligible jobs.[95]

(c) The provisions of Section (b) shall not apply to incentives or credits reserved on behalf of and awarded prior to the provisions of Section (b) taking effect.

COMMENT: Like the Missouri truce legislation,[96] this section ensures that the Kansas truce bill will not abolish any incentives that the Kansas Department of Commerce already contracted to award businesses in the four Missouri counties listed in Section (a)(1).

(d) If the Secretary of the Kansas Department of Commerce determines that the Missouri Department of Economic Development or any other Missouri department is providing economic incentives for jobs that relocate from a Kansas border county to a Missouri border

91. Kennedy, *supra* note 15, at 22.

92. *Id* at 23.

93. *Id.*

94. *Id.* at 27. Although the Kansas Bioscience Authority has invested millions of dollars in the Kansas biotech industry in the past, since 2012 the Kansas Legislature has made drastic cuts to the program's budget. Bryan Lowry, *Kansas Bioscience Authority Halts New Investment, Lays Off Staff*, WICHITA EAGLE (July 21, 2015), http://www.kansas.com/news/politics-government /article27998635.html.

95. KAN. STAT. ANN. § 74-50,212.

96. MO. ANN. STAT. § 135.1670 (West 2014).

county, then the Secretary shall deliver to the Governor a written certification of such finding. Upon the execution and delivery of such written certification and the Governor receiving certification provides a written affirmation, the provisions of Section (b) shall not be effective until such time as the Secretary determines that the Missouri Department of Economic Development, or any other Missouri department is not providing economic incentives for jobs that relocate from a Kansas border county to a Missouri border county, and the Secretary has executed and delivered to the Governor a written certification of such determination and the Governor receiving such certification provides written affirmation.

COMMENT: This section outlines the process for Kansas to end its moratorium on tax incentives if Missouri were to break the truce by offering incentives to business located in Kansas counties listed in Section (a)(2). The Missouri truce bill has a comparable provision.[97]

(e)(1) The provisions of Section (b) will only become effective once all municipalities within Missouri border counties have ceased their use of municipal tax incentives to attract businesses from municipalities in Kansas border counties. Prohibited municipal tax incentives include:

(i) Property tax abatements

(ii) Tax Increment Financing (TIF) funds

(iii) Enterprise Zone tax credits

(iv) Historic Tax Credits

(v) Sales Tax Exemptions

(2) If the Secretary of Commerce finds that the state of Missouri has taken action to prohibit municipalities within Missouri border counties from using prohibited municipal tax incentives under Subsection 1 of Section (e) to attract businesses from Kansas border counties, then the Secretary shall execute and deliver to the Governor a written certification of such determination. Upon the execution and delivery of such determination, the Governor shall exercise his authority to prohibit municipalities within Kansas border counties from using prohibited municipal tax incentives under Subsection 1 of Section (e) to attract businesses from Missouri border counties.

(3) If the Secretary of Commerce finds, through his own investigation or that of a municipal executive in a Kansas border county, that a municipality within a Missouri border county is using prohibited municipal tax incentives to attract businesses from Kansas border counties, then the Secretary shall execute and deliver to the Governor written certification of such findings. Upon the Governor's receiving certification and providing written affirmation of the Secretary's findings, the provisions of

97. *Id.*

> Sections (b) and (e) shall not be effective until the Secretary determines that municipalities in Missouri border counties are no longer using prohibited municipal tax incentives to attract businesses in Kansas border counties.
> **(4)** Contingent upon similar legislative approval by the Missouri Legislature and the Governor of Missouri, municipalities located within Kansas border counties have the ability to petition the Secretary of Commerce to offer incentives to a business located in a Missouri border county. Upon approval, the Secretary of Commerce then must receive subsequent approval from the Missouri Department of Economic Development before the municipality may offer incentives.

COMMENT: The Kansas Border Challenge Committee has voiced two overall concerns that the Missouri truce bill did not address.[98] First, the Missouri bill did not address the significance of municipal tax incentives like Tax Increment Financing (TIF) funding and property tax abatements in attracting out-of-state businesses.[99] Achieving the cooperation of municipalities on both sides of the state line would prevent the economic border war from continuing or recurring at any level of government. Although the amount of money being moved across the state line from local tax incentives is often used as a complement to state incentive programs, local incentives still have the ability to influence business location decisions.[100] Still, a discretionary clause is included for situations where both states approve of a municipality offering incentives to a business. This allows municipalities to continue to encourage development that Kansas and Missouri deem to be positive like business expansion or re-location that clearly stems from economic factors beyond incentives. Additionally, this clause could have a secondary benefit of encouraging municipalities in Kansas to engage in discussions with each other to prevent municipal incentives from being used to shift jobs from one Kansas municipality to another. If the Kansas truce bill were to include a local incentives provision, the Missouri Legislature should pass a corroborating law stating that municipalities should not exacerbate the border war via local tax incentives.

98. The first concern will be addressed here, while the second concern will be addressed in Section 6; *Border War Guest Column*, CITY OF WESTWOOD, KS (Mar. 5, 2014), http://www.westwoodks.org/vertical/sites/%7B15EFBA29-5AD1-451A-8674-DF587143350D%7D/uploads/Mayor_Report1.pdf.

99. Roberts, *supra* note 31.

100. Because Kansas City, Missouri is a much larger municipality than any municipality in Kansas border counties, it has more resources to devote towards economic development incentives. For example, in fiscal year 2013, Kansas City, Missouri took on 53 expansion and recruitment projects that brought in 3,400 new jobs and a projected $375 million in new investment. ECON. DEV. CORP. OF KANSAS CITY, MISSOURI, 2012-2013 ANNUAL REPORT (2013), *available at* https://edckc.s3.amazonaws.com/EDC%202012-2013%20Annual%20Report.pdf. Meanwhile, the entirety of Johnson County has averaged 3,293 new jobs per year from 2004 to 2014. CNTY. ECON. RES. INST., JOHNSON COUNTY ECONOMIC PRIMER (2014), *available at* http://www.cerionline.org/pdf/Jo%20Co%20Primer%202015.pdf.

> **(f)(1)** The provisions of Section (b) shall not apply unless the Missouri Legislature passes, and the Governor of Missouri subsequently signs, legislation amending the Missouri Works Program and Missouri's other economic development incentives programs from entitlement programs to discretionary programs.
>
> **(2)** If the Secretary of Commerce finds that the state of Missouri has enacted legislation that alters the Missouri Works Program and its other economic development incentives programs from entitlement programs to discretionary programs, then the Secretary shall execute and deliver to the Governor a written certification of such determination. Upon the execution and delivery of such determination, the Governor shall allow the provisions of Section (b) to go into effect.

COMMENT: The second concern raised by the Kansas Border Challenge Committee is that unlike the PEAK program in Kansas, Missouri Works acts primarily as an entitlement program instead of a program in which a state executive has discretionary authority.[101] Members of the Kansas Border Challenge Committee want Missouri to adopt a discretionary program so that the two states can compete to retain a Kansas City business that is considering a move outside of the area.[102] The Governors of both Kansas and Missouri should be given the power to control which businesses receive incentives from their state programs if incentives happen to play an exceptionally large role in a businesses' location decision.

> **(g)** The provisions of Sections (a) through (g) shall expire exactly two years from the date of this bill's enactment unless at such time the provisions of Sections (b) and (e) are in effect. If the provisions of Sections (a) through (g) do not expire exactly two years from the date of this bill's enactment, then the provisions of Sections (a) through (g) will expire exactly four years from the date of this bill's enactment.

COMMENT: This section provides that the entire Kansas truce bill will sunset if Missouri does not pass legislation that creates a moratorium on municipal tax incentives and makes its incentives program discretionary.

---

101. *Border War Guest Column*, *supra* note 98. An entitlement program in this context means that when a business meets required statutory standards to qualify for tax incentives then they automatically receive those incentives.

102. Roberts, *supra* note 31.

VI. CONSTITUTIONAL IMPLICATIONS

A. The Truce Bill

The constitutionality of Missouri's truce legislation has already been questioned on dormant, or negative, commerce clause grounds.[103] More specifically, by treating tax incentive applicants from four counties in Kansas differently than applicants elsewhere, Missouri would potentially be engaging in discrimination that violates the commerce clause.[104] In *Cuno v. DaimlerChrysler, Inc.*, the 6th Circuit found that "providing a direct commercial advantage to local business" discriminates against interstate commerce in purpose and effect.[105] However, the standard set by the 6th Circuit in *Cuno* was struck down by the Supreme Court due to lack of standing; the issue of whether a truce bill that manipulates access to state tax incentives would violate the dormant commerce clause remains undecided.[106]

The Supreme Court has developed a two-tiered test to determine if a state law is discriminatory under the dormant commerce clause.[107] Under the first tier, a law triggers strict scrutiny if it treats in-state interests more favorably than out-of-state interests.[108] If the law passes the first tier of scrutiny but incidentally burdens interstate commerce, it is invalid if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[109]

Even if a court were to determine that a state's geographical limitation on its use of tax incentives was discriminatory, the law would still likely withstand strict scrutiny and thus be considered valid. The Supreme Court has held that a law will pass this heightened standard if the discrimination is "demonstrably justified by a valid factor unrelated to economic protectionism."[110] The truce bill is not meant to protect local businesses from outside competition, but instead to ensure that taxpayers in Kansas and Missouri are not having their tax dollars spent on incentives for Kansas City businesses that add little economic benefit. This tax savings factor would also likely pass the second tier of the dormant commerce clause test because the burden on businesses that do not 'qualify for tax incentives is grossly outweighed by the benefit of preventing tax dollars from being invested in programs that fail to stimulate economic growth and net job creation.

103. Ray McCarty, *Missouri/Kansas Border War – "Truce" Bill May be Unconstitutional*, ASSOC. INDUS. OF MO. (Jan. 3, 2014), http://aimo.com/2014/01/03/missourikansas-border-war-truce-bill-may-be-unconstitutional/.

104. *Id.*; *See* Cuno v. DaimlerChrysler, Inc., 386 F.3d 738 (6th Cir. 2004).

105. *DaimlerChrysler*, 386 F.3d at 743.

106. McCarty, *supra* note 103.

107. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 596–97 (1997) (Scalia, J., dissenting).

108. Or. Waste Sys. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 99 (1994).

109. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

110. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 269 (1988).

B. State Tax Incentives

The dormant commerce clause has also been cited as a potential source for invalidating state tax incentives entirely.[111] As a basis for its opinion in *Cuno*, the 6th Circuit adopted the "anti-coercion standard" proposed by Professors Hallerstein and Coenen, which bases tax discrimination analysis on prior negative commerce clause jurisprudence.[112] This standard makes it unconstitutional for state and local governments to use their power to tax to coerce business decisions in a manner that favors in-state over out-of-state interests.[113]

Many others in academia have weighed in on the issue of constitutionality of state tax incentives in response to what has been characterized as "vague"[114] and "illusive"[115] jurisprudence by the Court. When courts are determining the constitutionality of a state tax provision, the key question is whether the tax meets the anti-discrimination requirement of the four-prong test laid out in *Complete Auto Transit, Inc. v. Brady*.[116] Professor Enrich, attorney for the plaintiffs in the *Cuno* case,[117] argues that states have taken competition for business too far and that the commerce clause ought to be used to invalidate most tax incentives.[118] He opines that state tax incentives do not meet the anti-discrimination requirement whenever in-state investments are favored over those from out-of-state.[119] By this logic, both the Kansas and Missouri state economic development incentive programs would be deemed a violation of the dormant commerce clause.[120]

On the opposite end of the spectrum, Professor Coleman argues that business location incentives do not meet the threshold "commerce" requirement to induce the commerce clause because they are "local" in nature.[121] Professor Coleman also contends that from a policy perspective courts should allow state and local governments to experiment with tax policy and leave states in charge of policies relating to economic growth and development.[122] Similarly,

---

111. Shane L. Parker, *The Debate Over Kentucky's Tax Incentives: Do They have a Future in the Commonwealth if State Courts Follow the Coercive Pre-Existing Tax Liability Test?*, 45 BRANDEIS L.J. 809, 814–15 (2007).

112. *See* Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 747 (6th Cir. 2004).

113. Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 792 (1996).

114. Parker, *supra* note 111, at 815.

115. Coleman Jr., *supra* note 7, at 591.

116. Phillip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 883–84 (1986).

117. Parker, supra note 111, at 812.

118. Enrich, *supra* note 8, at 377.

119. *Id.* at 427.

120. *Id.* at 429.

121. Coleman Jr., *supra* note 7, at 597–98 (comparing state location incentives to subsidies, which do not burden interstate commerce).

122. *Id.* at 598–99.

Professors Tatarowicz and Mims-Velarde created a six-question test to determine whether a state or local tax is discriminatory:[123]

> (1) Is the state tax subject to commerce clause scrutiny?
>
> (2) Is there disparate tax treatment?
>
> (3) Is the inequality being challenged caused by the state tax statute?
>
> (4) Does the unequal treatment weigh against a protected class of commerce?
>
> (5) Does the unequal treatment weigh in favor of local commerce?
>
> (6) Can any other law alter the commerce clause result?

Under the application of this test, a state tax provision will not be found unconstitutional if it focuses solely on a taxpayer's in-state activities because the provision doesn't have a negative impact on commerce.[124] State tax incentives that act as tariffs by taxing out-of-state activities would trigger a dormant commerce clause violation under the proposed test.[125] Lastly, Professor Zelinsky argues that courts should no longer recognize the dormant commerce clause jurisprudence that prohibits discriminatory state taxes.[126]

With such limited research on the influence of tax policies on state economic growth, it is hard to discern whether a truce bill or current state tax incentive laws would implicate the dormant commerce clause.[127] Since the *Cuno* decision, neither Kansas nor Missouri state courts have heard a case in which state tax incentives were alleged to have violated the dormant commerce clause.[128]

VII. CONCLUSION

As millions of Kansas and Missouri taxpayer dollars are spent on economic development incentives to attract and keep businesses on one side of the state line or the other in the Greater Kansas City area, it is clear that the two states are locked in an economic development border war.[129] The result of this contentious and expensive engagement is a pair of state tax incentive policies that generate questionable net job creation and economic growth. Kansas now has the

123. Tatarowicz & Mims-Velarde, *supra* note 116, at 886.

124. *Id.* at 928–29.

125. *Id.* at 929; Parker, *supra* note 111, at 816.

126. Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29, 88 (2002).

127. Kirk J. Stark & Daniel J. Wilson, *What Do We Know About the Interstate Economic Effects of State Tax Incentives?*, 4 GEO. J.L. & PUB. POL'Y 133, 163 (2006); Parker, supra note 111, at 823.

128. *See* CDR Sys. Corp. v. State Tax Comm'n, 339 P.3d 848 (Okla. 2014)(recent Oklahoma Supreme Court case determining the constitutionality of capital gains deductions that were based on whether the business headquarters was located in-state or not).

129. Tracy King, *Hall Family Foundation Study Shows Missouri has Lost $217 million in Taxes in Border War*, MO. CHAMBER OF COM. (FEB. 7, 2014), http://mochamber.wordpress.com/2014/02/07/hall-family-foundation-study-shows-missouri-has-lost-217-million-in-taxes-in-border-war/.

opportunity to reciprocate the action of Missouri or propose an alternative agreement to prevent the further use of state funds to fight an economic development border war in Kansas City.