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# GIVING STATE TAX INCENTIVES TO CORPORATIONS: HOW MUCH IS TOO MUCH?

*Kathleen E. McDavid\**

## INTRODUCTION

The South has traditionally attracted multinational automakers for many reasons; the South boasts notoriously low labor costs, cheap land, skilled industrial workers, and auto parts manufacturers between Atlanta and Virginia along Interstate 85.<sup>1</sup> Today, however, multinational corporations have a new reason to look to the South as a prime location incentive packages. “Typically, jurisdictions offer incentive packages that include income and sales-tax reductions, employment-based tax credits, land preparation, worker-training subsidies, and relaxation of existing environmental and zoning laws.”<sup>2</sup>

South Carolina uses targeted tax incentives in an attempt to stimulate the economy and create jobs within the state.

Targeted tax incentives . . . are fiscal tools designed to attract a private firm to a new location, help support or expand an existing business, or to prevent a company from relocating to another city or state. . . . While these policies are common among state governments, the efficacy of these policies has been called into question over and over again by many scholars and policy makers.<sup>3</sup>

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<sup>1</sup> *OUTLOOK '96: THE ECONOMY; BMW Follows a Trend to the Southeast*, N.Y. TIMES, Jan. 2, 1996, at C12, available at 1996 WLNR 4357471; see also James Bennet, *Company News; Mercedes Selects Alabama Site*, N.Y. TIMES, Sept. 30, 1993, at D1, available at 1993 WLNR 3344209 (listing reasons auto makers build plants in the South).

<sup>2</sup> Gary Biglaiser & Claudio Mezzetti, *Incentive Auctions and Information Revelation*, 31 RAND J. ECON. 145, 145 (2000).

<sup>3</sup> PETER T. CALCAGNO & FRANK HEFNER, *UNLEASHING CAPITALISM: A PRESCRIPTION FOR ECONOMIC PROSPERITY IN SOUTH CAROLINA* 131 (S.C. Policy Council Educ. Found., 2009).

This article will begin by giving an overview of the recent history of the use of tax incentives in the South to lure corporations. More specifically, this article will examine BMW's and Boeing's choice to set up shop in South Carolina and Mercedes-Benz's choice to build in Alabama. Next, this article will scrutinize the economic impact that state tax incentives have on the states themselves by looking at typical arguments that economic proponents use. Using BMW as a case study, this article will analyze the employment and income opportunities BMW has offered the community. Furthermore, this article will investigate BMW's training programs, research skill tutorials, and advanced facility to determine how the company itself has worked to boost the state's economy. In examining the opponents' arguments against state tax incentives, this article offers economists' arguments, which assert that bringing corporations into a state that does not have the knowledge base, skills, or tools necessary to compete is essentially a state buying jobs for its citizens.

In addition, this article will examine the governmental impact that state tax incentives have on state government. Recently, Boeing has, in effect, collapsed South Carolina's state government and limited transparency by securing one of the biggest economic deals to ever come to the state by way of a top-secret transaction. This article also provides an opportunity-cost analysis, as well as a section balancing whether positive externalities can outweigh a state's expenditure of scarce tax dollars. Then, this article will examine a recently passed piece of legislation, the South Carolina Economic Development Competitiveness Act of 2010, and its possible positive and negative effects on the state. Finally, this article will conclude with an argument that opponents of state tax incentives lean on when their backs are against the wall: the Dormant Commerce Clause.

## I. RECENT HISTORY OF THE USE OF TAX INCENTIVES TO LURE MULTINATIONAL CORPORATIONS TO THE SOUTH

### A. *BMW IN SOUTH CAROLINA*

The BMW Manufacturing Company chose South Carolina as the site for its \$625 million automobile-assembly plant in 1992. South Carolina offered BMW an incentive package worth \$150 million in exchange for the 2,000 jobs BMW predicted it would create.<sup>4</sup> The

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<sup>4</sup> John J. Garman, *The New War Between the States: A Look at the Incentives to Recruit Foreign Automakers to the South, Daimlerchrysler Corp.*

incentives that South Carolina offered included an employment training program, “where South Carolina provided ‘all hand tools, manuals and classroom facilities’ and hired instructors required for training. Additionally, South Carolina agreed to manage the recruiting, screening, and testing of potential plant employees.”<sup>5</sup> Finally, South Carolina invested an additional \$40 million to modernize and extend the runway at a nearby airport.<sup>6</sup>

Spartanburg, South Carolina attracted BMW with “promises of an eager, technically trained work force, the proximity of both the port of Charleston and numerous automotive suppliers, tax incentives, and a favorable climate.”<sup>7</sup> The anti-trade-union climate in South Carolina also added to the state’s attractiveness because “BMW wish[ed] to avoid a bruising fight against organized labor.”<sup>8</sup>

BMW now employs 5,000 people at its Spartanburg, South Carolina plant and “estimates its investments through June [2008] at \$6.3 billion—including \$2.1 billion through suppliers.”<sup>9</sup>

#### B. MERCEDES-BENZ IN ALABAMA

Mercedes-Benz chose Tuscaloosa County, Alabama, as the site of its first automobile assembly plant in 1993. In April of that year, Mercedes-Benz announced that it intended to open the assembly plant, which would provide Alabama with 1,500 jobs. The prospect of the new plant had launched a five-month bidding war between almost

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v. *Cuno, and the European Union’s Prohibition Against State Aid*, 24 T.M. COOLEY L. REV. 313, 333 (2007) (citing Krystal Miller, *BMW to Build Factory in U.S., Employ 2,000: Firm’s First Plant Outside Germany to Make Cars in South Carolina in 1995*, WALL ST. J., June 23, 1992, at A2).

<sup>5</sup> Garman, *supra* note 4, at 333 (quoting Robert M. Ady, *Why BMW Cruised into Spartanburg*, WALL ST. J., July 6, 1992, at A).

<sup>6</sup> *Id.*

<sup>7</sup> Doron P. Levin, *What BMW Sees In South Carolina*, N.Y. TIMES, Apr. 11, 1993, at 3, available at 1993 WLNR 3417888.

<sup>8</sup> *Id.*; see also *Aviation and the South: Advantage Dixie*, ECONOMIST, Jan. 9, 2010, available at 2010 WLNR 428479 (citing “anti-trade-union climate” as a common attraction for corporations in southern states).

<sup>9</sup> Bruce Smith, *S.C. Governor Signs Incentive Package for Boeing*, USA TODAY (Oct. 30, 2009, 7:57 PM), [http://www.usatoday.com/money/industries/manufacturing/2009-10-30-boeing-sc\\_N.htm](http://www.usatoday.com/money/industries/manufacturing/2009-10-30-boeing-sc_N.htm).

thirty states.<sup>10</sup> Alabama eventually wooed the automaker, and Mercedes-Benz planned to “produce 60,000 vehicles at the [Alabama] plant—about a third as many as the average American assembly plant ma[de].”<sup>11</sup>

Mercedes-Benz chose Alabama not only for the attractiveness of the region in the vicinity of many auto manufacturers, but also for Tuscaloosa’s advanced transportation infrastructure.<sup>12</sup> Mercedes-Benz planned to import many auto parts and to export two-thirds of the plant’s production. An interstate highway and a railroad line run by the Tuscaloosa site, and the port of Mobile lies two-hundred miles away.<sup>13</sup>

### C. BOEING IN SOUTH CAROLINA

After automakers, the aircraft industry also became attracted to the South’s anti-union climate. Boeing had operated its first assembly line in Everett, Washington. “Machinists there went on a 57-day walkout in 2008 that cost the company more than \$2 billion and led some airlines to switch their orders to Europe’s Airbus.”<sup>14</sup> In 2009, Boeing, decided to break ties with the fractious labor union in Washington, announced that it would build a \$750 million factory in North Charleston, South Carolina.<sup>15</sup> To further its goals of “flexibility and . . . stability in their supply chain,” Boeing will replicate the manufacturing of all plane parts produced in Washington, allowing the South Carolina plant to operate independently from Washington.<sup>16</sup>

In addition to having “one of the lowest rates of unionization in the country,” South Carolina has much to offer in North Charleston—proximity to an international airport and port facilities. Despite Boeing’s doubts about South Carolina’s work force and history of political friction, Boeing chose South Carolina as the location for its new assembly line.<sup>17</sup>

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<sup>10</sup> Bennet, *supra* note 1; see also James Bennet, *Company News; Mercedes to Announce Site for U.S. Plant Next Week*, N.Y. TIMES, Sept. 24, 1993, at D3, available at 1993 WLNR 3434150.

<sup>11</sup> Bennet, *supra* note 1, at D1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Aviation*, *supra* note 8.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Andy Shain, *S.C. Traveled a Long Road to Land Boeing*, CHARLOTTE OBSERVER, Nov. 1, 2009, at B1.

The economic impact of Boeing's new plant in North Charleston is welcome in a state with an 11.6% unemployment rate, the sixth highest in the nation.<sup>18</sup> South Carolina offered Boeing an incentive package worth more than \$450 million. Boeing is estimated to employ 3,800 workers by 2015. Boeing initially invested \$750 million, and Boeing and its suppliers are expected to invest \$10 billion directly and indirectly over the next fifteen years.<sup>19</sup>

#### D. OTHER WAYS STATES USE TAX INCENTIVES

Some states have been creative in their use of state tax incentives. For example, thirty-eight "states have passed incentive packages to bolster economic development associated with the entertainment industries or quell 'runway productions'—projects intended to appear on screen as certain geographical areas but shot elsewhere."<sup>20</sup> So, states like Louisiana and New Mexico offer incentives to film companies wanting to produce a movie in Texas, and those film companies settle for scenery that looks like Texas because it comes with an enticing incentives package.<sup>21</sup> South Carolina also offers generous film incentives in the form of an employee wage rebate, South Carolina supplier rebate, sales tax exemption, no location fee for using State properties, and a Motion Picture Tax Credit. These incentives are subject to approval by the South Carolina Film Commission and only require a \$500 application fee.<sup>22</sup> Other states, especially in the past ten years, have been offering incentives to companies who help promote state objectives. For example, some states give incentives to companies that reduce their carbon dioxide emissions or create renewable energy.<sup>23</sup>

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<sup>18</sup> Levin, *supra* note 7.

<sup>19</sup> Shain, *supra* note 17, at B1.

<sup>20</sup> Deena Kalai, *Feature: Now Showing!: Entertainment & Sports Law: Does a Little Go a Long Way?: Texas Entertainment Industry Economic Incentives*, 71 TEX. B.J. 734, 735 (2008).

<sup>21</sup> *Id.*

<sup>22</sup> *Production Incentives*, S.C. FILM COMM'N, <http://www.filmsc.com/incentives/test123/default.aspx> (last visited May 28, 2011).

<sup>23</sup> *Renewable Energy Tax Incentives*, WASH. DEP'T OF REVENUE, Apr. 29, 2009, <http://www.commerce.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0&ItemID=7355&Mid=863&wversion=Staging> (giving options for companies in the state of Washington to receive tax incentives for using or manufacturing certain levels of renewable energy); *see*

## II. ECONOMIC IMPACT: PROS AND CONS OF STATE TAX INCENTIVES

Competition among states to lure companies through tax incentives provides no net gain to the United States economy. Each state may appear better off competing for particular businesses with its neighbor, but auctions for business leave the nation's economy "with less of both private and public goods than if such competition was prohibited."<sup>24</sup> Using BMW's eighteen years in Spartanburg, South Carolina as an example, this section will examine the economic impact a multinational corporation has had on a state that gave the corporation a tax incentives package as a condition of locating there.<sup>25</sup>

### A. PROS: CAPITAL, INCOME AND ECONOMIC DEVELOPMENT

#### 1. ARGUMENTS IN FAVOR OF STATE TAX INCENTIVES

Proponents of state tax incentive programs argue that they "reduce[] the inherently inefficient taxation of capital."<sup>26</sup> While a reduction of tax revenues does result when a state gives tax incentives, the loss of state tax revenue is not necessarily bad for the economy at large. When money remains in private hands, instead of being paid to the state, investment and incomes increase because "consumers and

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*also California Incentives and Laws for EVs*, U.S. DEP'T OF ENERGY, Feb. 19, 2010, [http://www.afdc.energy.gov/afdc/progs/ind\\_state\\_laws.php/CA/ELEC](http://www.afdc.energy.gov/afdc/progs/ind_state_laws.php/CA/ELEC).

<sup>24</sup> CALCAGNO & HEFNER, *supra* note 3, at 133 (quoting M.L. BURSTEIN & A.J. ROLNICK, CONGRESS SHOULD END THE ECONOMIC WAR AMONG THE STATES, Federal Reserve Bank of Minneapolis 1994 Annual Report 9(1): 3-19 (1995)).

<sup>25</sup> South Carolina's BMW plant is a part of the BMW Group, who's Production Network spans twenty-three plants and twelve countries. The Spartanburg plant, the only BMW plant in the United States, produces the BMW X5 and X6 models, and the plant began production of the X3 in 2010 for the global market. See Douglas P. Woodward & Paulo Guimarães, *BMW in South Carolina: An Update*, 55(2) BUS. & ECON. REV., Sept. 2008, at 1, 1-3, available at <http://www.moore.sc.edu/UserFiles/moore/Documents/Division%20of%20Research/BMWReportSept2008.pdf>.

<sup>26</sup> 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) (citing James R. Rogers, *The Law and Policy of State Tax Competition: Much Ado About Nothing?*, 4 GEO. J. L. & PUB. POL'Y, 101, 110 (2006)).

resource owners [may] use the tax savings more efficiently than state governments.”<sup>27</sup>

However, another proponent of tax competition argues in favor of discriminatory tax regimes. Michael Keen, a professor of Economics at the University of Essex, UK, reasons that these “tax regimes are socially desirable because they protect tax revenues.”<sup>28</sup> Keen bases his argument on a model where tax competition is confined to a mobile sector, while an immobile sector maintains or increases high levels of taxation. A country using a discriminatory tax regime “can protect its ability to collect a great deal of tax revenue from an immobile base while at the same time competing with foreign countries, through preferential taxation, for the other’s mobile base and the marginal revenue increase it represents.”<sup>29</sup>

In addition, tax competition promotes efficient allocation of resources.<sup>30</sup> Incentives create ideal matches between businesses and localities whenever a locality understands its needs better than a company. This understanding allows bidding to solve the “problem of asymmetric distribution [of information] because the same firm assumes different values in different jurisdictions and that additional value is reflected in the bid.”<sup>31</sup>

If competition between states was restricted or restrained, economic welfare may suffer<sup>32</sup> because in the absence of competition, companies have “less incentive to be responsive to the desires of consumers and less pressure to minimize costs.”<sup>33</sup> Tax revenue reductions that result when states give away tax incentives force state governments to act more efficiently.<sup>34</sup>

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<sup>27</sup> Kaye, *supra* note 26, at 113 (citing James R. Rogers, *State Tax Competition and Congressional Commerce Power: The Original Purchase of Concurrent Taxing Authority*, 7 REGENT U. L. REV. 103, 120 (1996)).

<sup>28</sup> Kaye, *supra* note 26, at 113-14 (citing Michael Keen, *Preferential Regimes Can Make Tax Competition Less Harmful*, 54 NAT’L TAX J. 757, 758 (2001)).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; see also Rogers, *supra* note 26, at 108, 120.

<sup>31</sup> Kaye, *supra* note 26, at 114 (citing Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 453-58 (1997-1998)).

<sup>32</sup> Charles E. McLure, *Tax Competition: Is What’s Good for the Private Goose Also Good for the Public Gander?*, 39 NAT’L TAX J. 341, 344 (1986).

<sup>33</sup> *Id.*

<sup>34</sup> Kaye, *supra* note 26, at 114; see also Rogers, *supra* note 26, at 109.



## 2. BMW'S PROVISION OF EMPLOYMENT AND INCOME FOR SOUTH CAROLINA RESIDENTS, BOTH DIRECTLY AND INDIRECTLY

Raising income and creating jobs in South Carolina is an important goal for policymakers and economic development advocates. The State has a very low per capita income, and this trend is not new; South Carolina has lagged behind the national average for decades. Thus, attracting new investment, raising income, and creating jobs remain the fundamental missions as policymakers attempt to increase the standard of living in South Carolina.<sup>35</sup> After the state's investment in BMW, the Upstate of South Carolina went through a drastic economic shift from a textile-manufacturing region into an automotive-production region, which "has created a stronger automotive cluster and a more diversified economy."<sup>36</sup>

BMW has contributed to South Carolina's economy through large-scale investment. Unique from other investments, "automotive plants have outsized employment and income effects. This is because they are final product producers (rather than intermediate producers in a value chain) linked to a long sequence of economic activity."<sup>37</sup> BMW's cumulative investment reached more than \$5 billion by the end of 2007.<sup>38</sup> The continual flow of capital into the BMW plant allows South Carolina to remain a leader in "attracting inward foreign direct investment." This investment capital raises living standards for the community by providing more employment opportunities.<sup>39</sup>

The 2008 Moore School of Business study explains how BMW's business in Spartanburg County has spread economic benefits through the multiplier effect, "an accepted and widely practiced technique used to assess the total impact of investment and payroll."<sup>40</sup> Using an inter-industry model as a basis for calculating economic impacts, the study calculated the "extent to which direct activities at the BMW plant stimulate further economic effects, spreading employment and income . . ."<sup>41</sup> First, economists assessed the initial effects of local payroll and purchases at the automobile plant. They then examined indirect and

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<sup>35</sup> Woodward & Guimarães, *supra* note 25, at 6.

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.* at 5.

<sup>38</sup> *Id.* at 1.

<sup>39</sup> *Id.* at 6.

<sup>40</sup> *Id.* at 7.

<sup>41</sup> *Id.*

induced effects that stem from the immediate effects of the local payroll and purchases.

The study found that BMW has an especially large multiplier effect for two main reasons: (1) BMW's "extensive regional supplier network and (2) its relatively large direct payroll, which is largely spent at local businesses."<sup>42</sup> The regional supplier network is made up of companies throughout North America from which BMW purchases supplies, materials, and services; as a result, this network indirectly creates more jobs and income. The suppliers with income from BMW then re-spend that income, creating "additional indirect employment and earnings as their purchases spread into the wider economy."<sup>43</sup> Indirect effects are measured by employment; "[i]n this case, 1.87 jobs are supported indirectly for every direct job at the BMW plant: 10,124 compared with 5,400."<sup>44</sup>

The second main reason for BMW's large multiplier effect is called "the induced effect," which stems from spending related to the direct payroll. BMW's \$437 million of direct personal income paid to their employees is subsequently spent at local businesses and on various services, which leads to "further rounds of spending and income."<sup>45</sup> The study found that the induced effect of BMW's payroll amounts to an employment of 7,526 workers, which is "significant for a single plant."<sup>46</sup> The study found that BMW's South Carolina investment, through the multiplier effect, supports 23,050 jobs in the state. While a typical employment multiplier for industries and services in South Carolina is around two, "this total job impact yields a multiplier of 4.3."<sup>47</sup>

An input-output analysis generated by the same study indicated the total output of BMW's annual economic activities in 2007 to be more than \$8.8 billion. The plant accounts for \$6.3 billion in annual output, while the remainder consisted of output "through indirect and induced linkages with the economy at large."<sup>48</sup>

While the present study concentrated mainly on BMW's economic impacts, the fiscal effects of employees paying property, income, and sales taxes also benefit the community. A 2002 Moore

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<sup>42</sup> *Id.* at 8.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 9.

<sup>48</sup> *Id.* at 11.

School of Business study found that the four South Carolina counties most affected by BMW's presence—Anderson, Greenville, Laurens, and Spartanburg—received \$2.4 million each year in additional net revenue.<sup>49</sup>

### 3. BMW'S INFLUENCE ON THE COMMUNITY

South Carolina, along with many regions worldwide, faces economic and social development challenges. BMW has invested in the state via its long-run sustainability goal; not only is a healthy economy important, but the state must also maintain the natural environment and social needs of the corporation through health and education goals. BMW serves as an example of how other businesses can and should sacrifice some of their solely profit-driven motive and work for the prosperity of the state and its citizens.<sup>50</sup>

The BMW plant was first awarded ISO 14001<sup>51</sup> in 1998.<sup>52</sup> This environmental certification is only given to facilities that meet or exceed international environmental standards.<sup>53</sup> To qualify for an ISO 14001, the organization must meet standards of an Environmental Management System (EMS) by way of “a policy statement which includes commitments to prevention of pollution, continual improvement of the EMS leading to improvements in overall environmental performance, and compliance with all applicable statutory and regulatory requirements.”<sup>54</sup> The international environmental field attempts to establish systematic environmental sustainability through this standard.<sup>55</sup> In addition, BMW recommends that its regional suppliers follow its example and institute forward-

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<sup>49</sup> *Id.* at 15.

<sup>50</sup> Woodward & Guimarães, *supra* note 25, at 10.

<sup>51</sup> The International Organization for Standardization 14001 requires an organization to “put in place and implement a series of practices and procedures that, when taken together, result in an environmental management system.” This is a voluntary, international standard for companies to strive toward. *Environmental Management System/ISO 14001 – Frequently Asked Questions*, U.S. ENVTL. PROT. AGENCY [hereinafter *EPA ISO 14001 FAQs*] <http://water.epa.gov/polwaste/wastewater/Environmental-Management-System-ISO-14001-Frequently-Asked-Questions.cfm> (last updated Apr. 23, 2010).

<sup>52</sup> Woodward & Guimarães, *supra* note 25, at 13.

<sup>53</sup> *Id.*

<sup>54</sup> *EPA ISO 14001 FAQs*, *supra* note 52.

<sup>55</sup> Woodward & Guimarães, *supra* note 25, at 13.

thinking environmental practices.<sup>56</sup> Many of the suppliers have followed suit.<sup>57</sup>

Moreover, due to a progressive recycling program, the Landfill Gas-to-Energy Project, and a heavy reliance on methane gas, BMW has become a leader in the use of alternative energy.<sup>58</sup> In using methane, BMW decreases the need for use of fossil fuels and greatly reduces the total amount of carbon dioxide emissions.<sup>59</sup> BMW's paint shop is also environmentally cautious; energy generated by methane gas powers the shop, and water-based paint is used instead of higher-solvent paints with toxins.<sup>60</sup> Companies like BMW, who are invested in and informed about environmental sustainability, are pioneers in the field and bring the best environmental practices to a state where a widespread positive environmental attitude is lacking.

In addition to its environmental impact, large companies like BMW support and fiscally impact the community via revenue contributions "through employee property, income, and sales taxes."<sup>61</sup> In addition to providing revenue, generating community development is important for a company.<sup>62</sup> Furthermore, national chains of restaurants and motels, as well as retail stores and banks, bought land in the surrounding counties to accommodate BMW's new employees. This new interest in Spartanburg-area land sent property values soaring; experts estimated that land values increased by 25% in the year after BMW announced its plans to build a plant in the Upstate.<sup>63</sup>

South Carolina is currently host to the Information Technology Research Center located on Clemson University's campus in the International Center for Automotive Research.<sup>64</sup> The center focuses on maintenance-system automation, telematics, and onboard computing; consequently, BMW's investment is helping South Carolina's effort "to build a knowledge-based economy."<sup>65</sup> BMW also donates to local

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 15.

<sup>62</sup> *Id.*

<sup>63</sup> Lyn Riddle, *Real Estate; The BMW Plant Under Construction in South Carolina is Pushing up Property Values Nearby*, N.Y. TIMES, Dec. 8, 1993, at D20, available at 1993 WLNR 3401201.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

vocational schools and K-12 education to improve the state's school system.<sup>66</sup>

### B. CONS: BUYING JOBS CAN BE EXPENSIVE

#### 1. ARGUMENTS AGAINST STATE TAX INCENTIVES

Legal scholars have analyzed the harmful effects of incentive packages given by state and local governments. Opponents of state-tax competition argue that tax incentives do not actually influence location decisions of businesses.<sup>67</sup> Incentives are only one factor among many that businesses consider when deciding where to locate.<sup>68</sup> Peter D. Enrich, professor of State and Local Taxation and State and Local Government at Northeastern University School of Law, asserts that "tax incentives . . . [,] even when they create significant differentials in tax levels, simply are not large enough to exert substantial influence on business location decisions."<sup>69</sup> The state and local taxes that businesses must pay generally account for less than 2% of their total cost of operating in the United States; therefore, a reduction of such costs do not provide great leverage over their decisions to choose locations.<sup>70</sup>

Since incentives have little weight in corporate decision-making, and business investment would have happened anyway, it follows that state tax incentives cause the "winning" state to lose substantial revenue.<sup>71</sup> "The majority of the creators of job and productivity gains throughout a state's economy are hurt as their taxes go up to pay for infrastructure improvements, job-training subsidies, and other enticements."<sup>72</sup>

Tax incentive competition merely transports economic activity from state to state, achieving zero-sum net gain on both the national and local levels.<sup>73</sup> Any increase of jobs and investment in one state is

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<sup>66</sup> *Id.* at 16.

<sup>67</sup> Kaye, *supra* note 26, at 114.

<sup>68</sup> *Id.*

<sup>69</sup> Kaye, *supra* note 26, at 115 (quoting Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 337, 397 (1996)).

<sup>70</sup> Kaye, *supra* note 26, at 115.

<sup>71</sup> See Enrich, *supra* note 70, at 405.

<sup>72</sup> Kaye, *supra* note 26, at 115 (quoting John Hood, *Ante Freeze: Stop the State Bidding Wars for Big Business*, 68 POL'Y REV. 62, 62 (1994)).

<sup>73</sup> Kaye, *supra* note 26, at 115.

offset by an equal loss through incentive wars by another state.<sup>74</sup> In fact, competitive efforts of states are likely to cancel out any benefits that states that offer tax incentives may reap, which “can be a negative-sum game that produces a net loss.”<sup>75</sup>

The models that proponents of tax incentive packages use to demonstrate benefits of preferential tax regimes are based on extreme assumptions that a government’s main goal would be revenue maximization.<sup>76</sup> These assumptions “make the oversimplified model’s practical relevance and applicability tenuous at best.”<sup>77</sup> Such a model fails to account for governmental interests other than revenue maximization.<sup>78</sup> Additionally, the models may be flawed.

[When designing models to explain the benefits of tax incentives,] it cannot be assumed that immobile bases are perfectly inelastic; at some point the shifting tax burden will become too onerous causing the immobile base to become mobile. A model should not assume that high tax rates do not exacerbate diminishing marginal returns to labor. By reducing the return an individual receives for his or her labor, the opportunity cost of engaging in income-producing activities increases. This, in turn, would cause productivity to stagnate, if not decline, leading to a reduction in the tax revenue collected from the immobile base. Absent the existence of circumstances in practice that mirror the model’s assumptions, the strong conclusion that discriminatory taxation is desirable and beneficial

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<sup>74</sup> Kaye, *supra* note 26, at 115-16 (citing *The National Economic Policy Implications of State Tax Incentive Competition: Hearing on “Cuno and Competitiveness: Where to Draw the Line” Before the Subcomm. on Int’l Trade of the S. Comm. on Finance*, 109th Cong. 5 (2006) (statement of Peter Fisher) [hereinafter Statement of Fisher]).

<sup>75</sup> Enrich, *supra* note 70, at 397; Amicus Curiae Brief of Economics and Public Policy Professors et al. in Support of Respondents at 21, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006) (Nos. 04-1704, 04-1724).

<sup>76</sup> Kaye, *supra* note 26, at 116.

<sup>77</sup> *Id.*; see also Joseph Bankman & David Weisbach, *Reply: Consumption Taxation Is Still Superior to Income Taxation*, 60 STAN. L. REV. 789, 790 (2007) (noting that the strong conclusions of simplified models are likely to be weakened by more complex models).

<sup>78</sup> Kaye, *supra* note 26, at 116 (citing Michael Keen, *Preferential Regimes Can Make Tax Competition Less Harmful*, 54 NAT’L TAX J. 757, 759 (2001)).

must be discounted and found to be unpersuasive in practice.<sup>79</sup>

Further, “once a state lures a targeted business, it must pay for public service support for the business in the form of infrastructure and transportation costs, while leaving the previous state with redundant public service support infrastructure.”<sup>80</sup> Enrich describes the states as being caught in the classic prisoners’ dilemma: If every state refrains from offering location incentives to target businesses, all states could keep bigger tax bases to support other substantial governmental functions. However, if some states choose to offer tax incentives, then no state can afford the political cost of abstaining, resulting in incentives proliferating and leaving all the states in a worse position.<sup>81</sup>

## 2. BMW IN SOUTH CAROLINA: DID WE ESSENTIALLY BUY JOBS FOR THE UNEMPLOYED?

While BMW’s positive economic impact on South Carolina is apparent, some opponents of incentives packages argue that buying jobs can be expensive.<sup>82</sup> Southern states may be in danger by expecting too much from the automobile industry.<sup>83</sup> South Carolina’s corporate giveaways have been described as “promiscuous” and the state’s business tax a mere footnote to the state budget.<sup>84</sup> Will South Carolina really give anything to a company to avoid losing a business to Georgia or Alabama?<sup>85</sup>

BMW’s South Carolina plant has escaped millions of dollars in taxes and costs that industrial companies expect to pay in developed nations.

....

... The company pays \$1 a year to lease its \$36 million piece of land. It pays no land tax to

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<sup>79</sup> Kaye, *supra* note 26, at 116.

<sup>80</sup> Kaye, *supra* note 26, at 116-117.

<sup>81</sup> Enrich, *supra* note 70, at 396.

<sup>82</sup> *Imported car factories: Buying jobs can be expensive*, ECONOMIST, Nov. 29, 2003, 2003 WLNR 6358487.

<sup>83</sup> *Id.*

<sup>84</sup> Jay Hancock, *S.C. Pays Dearly for Added Jobs*, BALT. SUN, Oct. 12, 1999, available at [http://www.strom.clemson.edu/teams/ced/tax\\_news/sc-tax-news.html](http://www.strom.clemson.edu/teams/ced/tax_news/sc-tax-news.html).

<sup>85</sup> *Id.* (quoting Darla Moore, founder and chair of the Palmetto Institute, a nonprofit organization striving to improve per capita wealth in South Carolina).

Spartanburg County. Building and equipment tax on the first phase of BMW's plant is 43 percent lower than what established businesses have to pay. Tax discounts on BMW's second phase are even bigger -- 62 percent -- even though the expansion couldn't have been built anywhere but Greer.

. . . .

BMW uses as many services as other companies. Its 2,500 employees have just as many school-age children as workers at other businesses. Its trucks wear down South Carolina's roads just as much as other companies' trucks. Thanks to the incentives war between the states, however, BMW has been able to carve its own special deal, a deal shielding it from obligations for other services that most South Carolina companies accept as the cost of doing business.<sup>86</sup>

Other state “[s]ubsidy winners include amusement parks, cable makers, data-storage firms, . . . food warehouses, furniture-foam makers, printers, metal fabricators, health-product distributors, textile companies, telephone-call centers and magazine sellers.”<sup>87</sup> Many of these businesses, as was the case with BMW’s parts suppliers, planned on locating in South Carolina regardless of whether BMW chose South Carolina, but managed to extract “millions in incentives that were there for the taking.”<sup>88</sup>

The revenue lost when states give away incentive packages makes it more difficult for those states to finance important functions like state education, police and fire departments, transportation systems, and utilities programs. States must continue to increase tax-incentive offers in order to keep up with each other and to lure businesses; but this competition undermines the ability of states to finance the investments in education and infrastructure that actually provide the foundations for future economic growth.<sup>89</sup>

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<sup>86</sup> Hancock, *supra* note 85.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Kaye, *supra* note 26, at 117; *see also* Statement of Fisher, *supra* note



III. GOVERNMENTAL IMPACT: HOW INCENTIVE PACKAGES AFFECT  
STATE GOVERNMENTA. COLLAPSING STATE GOVERNMENT: TREATING THE BOEING  
DEAL AS TOP-SECRET

“South Carolina lawmakers seemed euphoric when they unanimously passed legislation in a special session on [October 28, 2009] to clear the way for the Chicago-based company[, Boeing,] to land a final assembly plant in North Charleston, passing out special aerospace coins and lapel pins to commemorate the occasion.”<sup>90</sup> “Lawmakers and lobbyists around the State House said they had never seen leaders of the House and Senate work so cooperatively before.”<sup>91</sup> The reason for the Bill’s unanimous approval in the state legislature could be due to the legislature’s failure to exercise due diligence and object to voting on a bill name without details. However, the reason also could lie with the failure of the leadership in adequately informing the House and the Senate of Boeing’s price tag. Either way, a failed legislative process resulted in the Boeing Bill’s passage.<sup>92</sup>

This failed legislative process is due to what Edward Zelinsky calls “an inherent and irremediable information asymmetry in negotiations between state and local officials and the corporations and developers with which such officials bargain over tax incentives.”<sup>93</sup> Corporations know their exact situs preferences, and they “have no reason to disclose these to the officials with whom they are bargaining for tax benefits.”<sup>94</sup> In fact, corporations have great incentive to hide their preferences and deliver a message through negotiations that if local governments do not offer tax incentives, their community will not reap the benefits of the corporation building there.<sup>95</sup> “If community X refuses to grant tax incentives to attract or retain a particular firm,

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<sup>90</sup> Rick Brundrett & Eric K. Ward, *Part I: Inside the Boeing Deal*, THE NERVE, (Jan. 11, 2010), <http://scthenerve.wordpress.com/2010/01/11/part-1-inside-the-boeing-deal/> (last visited Feb. 22, 2011).

<sup>91</sup> Shain, *supra* note 17, at 1B.

<sup>92</sup> Eric K. Ward, *Part 3: The Truth on Senate Claims About Boeing*, THE NERVE (Jan. 12, 2010), <http://scthenerve.wordpress.com/2010/01/10/part-3-the-truth-on-senate-claims-about-boeing/> (last visited Feb. 22, 2011).

<sup>93</sup> Edward A. Zelinsky, *Tax Incentives for Economic Development: Personal (and Pessimistic) Reflections*, 58 CASE W. RES. L. REV. 1145, 1148 (2008).

<sup>94</sup> *Id.* at 1148-49.

<sup>95</sup> *Id.* at 1149.

community Y will.”<sup>96</sup> Therefore, community X’s refusal to offer incentives would prove very risky for local officials, who are often elected for short periods of time, but “[t]he costs of tax incentives often extend far into the future.”<sup>97</sup> Most elected officials and voters are concentrated on the present and do not look very far into the future. Consequently, elected officials may gain political advantage by voting in favor of granting tax incentives that have immediate and apparent benefits. However, the negative consequences of those benefits, “costs in the form of reduced tax revenues[,] do not appear until many years later, when others will be in office.”<sup>98</sup>

### B. OPPORTUNITY COST ANALYSIS

Incentives given to multinational corporations drain the general income of the pursuing state. The logical question follows: could a state that gives a corporation such a generous incentive package have spent those funds in a more opportunistic way to produce a stronger and more sustainable economy? “The concept of opportunity cost examines what is the highest valued alternative that is foregone when one activity is chosen over another.”<sup>99</sup> Although opportunity costs are rarely considered when dealing with state competition through incentives,<sup>100</sup> government actions are not a costless activity.<sup>101</sup>

Revenue lost through incentive packages is revenue that could have helped finance the state’s education, transportation, police, fire, and utilities programs. States that continually increase tax incentives above those of other states in order to lure businesses undermine “the ability of state and local government to finance the investments in public education and infrastructure that provide the foundation for future economic growth.”<sup>102</sup>

When faced with a “wrecked budget that threatens [public] schools, colleges and law enforcement,” should the legislature have

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> CALCAGNO & HEFNER, *supra* note 3, at 143.

<sup>100</sup> Ann Markusen, *Reining in the Competition for Capital*, 4 J. APPLIED RES. ECON. DEV., No. 2: 78 (2007).

<sup>101</sup> Anne Kruger, *Government Failures in Development*, 4 J. ECON. PERSPECTIVES, No. 3: 9-23 (Summer 1990).

<sup>102</sup> Kaye, *supra* note 26, at 117.

borrowed \$270 million to build an assembly line?<sup>103</sup> Keep in mind that the total amount borrowed by South Carolina over the next fifteen years amounts to about \$83,000 for each of the Boeing plant's 3,800 employees.<sup>104</sup> Further, small South Carolina businesses may suffer lost goodwill as a result of incentives packages being given to larger out-of-state corporations.

However, the 3,800 jobs that Boeing is projected to create will not solely employ current South Carolina residents. Those jobs are expected to employ a mix of currently unemployed South Carolina residents and residents seeking higher salary jobs. In addition, highly-qualified executives and highly-skilled engineers will be brought in from out of state for select higher-level positions. Assuming that at least 1,000 of the 3,800 Boeing jobs will be these higher-level jobs, South Carolina will automatically attract those people of higher educational backgrounds. South Carolina will collect income taxes from those people. Assuming most of these non-resident employees are married and have families, they will bring their spouses with them, who will also work in South Carolina, educate their children in South Carolina, buy homes and pay property taxes in South Carolina, and become consumers in a state whose economy is in desperate need of all of the above. Houses that were empty will be filled, new business will be created, and hard-working, driven people will rear and educate their families in South Carolina.

Additionally, South Carolinian companies will be hired to build many of the buildings. By proving to other industries and companies the state's willingness and eagerness to successfully integrate new businesses into South Carolina, the state will attract more new businesses in the future. While there are staunch negatives in this opportunity-cost analysis, the overall future opportunity benefits probably outweigh any costs.

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<sup>103</sup> Jim Davenport, *S.C. Lawmakers Approve Boeing Bonds*, MANUFACTURING.NET (Jan. 12, 2010), <http://www.manufacturing.net/News-SC-Lawmakers-Approve-Boeing-Bonds-011210.aspx?menuid=246> (last visited Feb. 22, 2011).

<sup>104</sup> Tim Smith, *Boeing Loan to Cost State \$83,000 Per Job*, GREENVILLE NEWS, Jan. 14, 2010, available at <http://pqasb.pqarchiver.com/greenvilleonline/access/1940281321.html?FMT=A BS&date=Jan+14%2C+2010>.

IV. THE SOUTH CAROLINA ECONOMIC DEVELOPMENT  
COMPETITIVENESS ACT OF 2010:  
WHY ITS CHALLENGERS WERE WRONG

“A presumption and hallmark of federalism mandates that states have general police powers over their internal affairs. The creation and structuring of economic incentives . . . are, and have historically been, within this purview of states’ rights.”<sup>105</sup> Offering state incentives is an exercise of a state’s broad police power.<sup>106</sup> “States enjoy comparative informational advantages over the federal government and are more competent at enacting effective economic measures.”<sup>107</sup> Because states across the country have different needs, each state should be capable of assessing their own economic needs and structuring a system that works best for their citizens.

The South Carolina Economic Development Competitiveness Act of 2010 (“Act”) was proposed with the purposes of promoting business expansion using state incentives, phasing out South Carolina’s corporate income tax, and improving the reward for employers who create new jobs.<sup>108</sup> An economic development committee, composed of six business leaders and assembled by S.C. House Speaker Bobby Harrell, drafted the Act.<sup>109</sup> Their goal was “to pick through the state’s existing laws, looking for ways to sweeten the deal for companies as they look to emerge from weathering the economic recession.”<sup>110</sup>

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<sup>105</sup> Jennifer M. Lee, Comment, *A Match Made in Heaven or a Pair of Star-Crossed Lovers? Assessing Dormant-Foreign-Commerce-Clause Limitations on the Wisconsin-China Relationship*, 2009 WIS. L. REV. 733, 747 (2009) (citation omitted).

<sup>106</sup> *See id.*

<sup>107</sup> *Id.* at 748.

<sup>108</sup> Katy Stech, *State Forming Own Stimulus Package*, POST & COURIER (Charleston, S.C.), Feb. 22, 2010, available at <http://www.postandcourier.com/news/2010/feb/22/state-forming-own-stimulus-package/>; see also South Carolina Economic Development Competitiveness Act of 2010, S.C. Act No. 290, available at [http://www.scstatehouse.gov/sess118\\_2009-2010/bills/4478.htm](http://www.scstatehouse.gov/sess118_2009-2010/bills/4478.htm).

<sup>109</sup> The other committee members included April Allen, O’Neal, Inc.; Lewis Gossett, S.C. Manufacturers Alliance; Nick Kremydas, S.C. Association of Realtors; Burnie Maybank, Nexsen Pruet; former director of S.C. Dept. of Revenue, Otis Rawl, S.C. Chamber of Commerce; and George Wolfe, Nelson Mullins—Chairman, Economic Development Practice Group.

<sup>110</sup> Stech, *supra* note 108.

After passing through both the House and the Senate, Governor Sanford signed the Act into law on June 23, 2010.<sup>111</sup> Before passage, a few major concerns with the proposed Act existed. Some were worried that the Act could spur business owners to hire employees more quickly because they may be eligible for generous tax breaks for each new worker. Also, many feared the Act would come at the expense of some state and property tax revenues.

The main concern with the Act involved the proposed gradual elimination of South Carolina's corporate income tax. This is "a move that would strip hundreds of millions of dollars from already depleted state coffers and fail to provide any relief to more than 95 percent of the state's businesses."<sup>112</sup> Four other states, Wyoming, South Dakota, Washington and Nevada, have already eliminated corporate income tax.<sup>113</sup> Doing so will hopefully catch the attention of companies looking to expand operations, but it is open to debate as to whether eliminating the tax will greatly affect the state's revenue.<sup>114</sup> Most small businesses in South Carolina pay no corporate income tax anyhow because most are registered as "entities" other than "corporations."<sup>115</sup> In addition, the two main sources of tax revenue for the state are sales tax and individual income taxes.<sup>116</sup> While corporate income tax, a tax on a business's profit, adds to the state's revenue, it amounts to the "smallest component of the state's three-pronged income tax collection strategy."<sup>117</sup>

Proponents of the Act, however, claimed that the Act was just a "tweaking" of existing incentives programs, which South Carolina needed to better utilize. Section 11-18-60 of the bill allowed South Carolina counties to pool their bond capacities.<sup>118</sup>

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<sup>111</sup> South Carolina Statehouse Blog, Press Release: Gov. Sanford Signs Economic Development Competitiveness Act, *available at* <http://sc.statehouseblogs.com/2010/06/23/press-release-gov-sanford-signs-economic-development-competitiveness-act/>.

<sup>112</sup> Katy Stech & Yvonne Wenger, *Tax Proposal Supported, Opposed*, POST & COURIER (Charleston, S.C.), Feb. 22, 2010, *available at* <http://www.thestate.com/2010/02/22/1168958/tax-proposal-supported-opposed.html>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> S.C. Act 290, *supra* note 109.

Each county received small increments from the federal stimulus bill in 2009, but these amounts are so small that few government agencies have been able to spend it. By pooling the bonds, counties working together will raise enough money for public infrastructure projects and economic development projects that each county would not have been able to accomplish on its own. In addition, the Act gave the State Ports Authority an \$8 million pool of tax breaks, which they can offer to port users that are boosting their business and encourage port development. “The value of [the] state’s existing job development tax credits, which company executives can use to cut down on paying employee withholding income taxes, would be doubled, but the length of time employers have to claim them would [be] shortened over time, balancing out the expense.”<sup>119</sup>

While the proposed bill passed with flying colors in the House, South Carolina state senators found it more difficult to agree that the benefits of the bill outweighed the negatives.<sup>120</sup> The senators were concerned with losing the “5 percent” of revenue that the state usually counts on from corporations; roughly \$167 million usually enters the state general fund each year.<sup>121</sup> These funds are then “used to run state agencies and programs that serve S[outh] C[arolina] residents.”<sup>122</sup> Senator Billy O’Dell, chair of the Senate Finance Subcommittee on Sales and Income Tax, said his committee ran critical tests.<sup>123</sup> After the measure passed O’Dell’s subcommittee, the bill went “immediately to the full Senate Finance Committee for consideration.”<sup>124</sup> The Senate Finance Committee passed the bill with an overwhelming vote of 18-0.

Many of the Senate’s fears should have been eliminated after the Senate Finance Committee’s unanimous vote in favor of the bill and because several of the bill’s most worrisome components were

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<sup>119</sup> See Stech, *supra* note 108.

<sup>120</sup> See Roddie Burris, *End Corporate Income Tax? Senators Weigh Bill*, STATE (Columbia, SC), Mar. 30, 2010, available at <http://www.thestate.com/2010/03/30/1222044/end-corporate-income-tax-senators.html>; see also Burnie Maybank & George Wolfe, *South Carolina Economic Development Competitiveness Act of 2010*, S.C. BUS. (Sept. 2010), available at <http://www.nexsenpruet.com/assets/attachments/SOUTH%20CAROLINA%20ECONOMIC%20DEVELOPMENT%20COMPETITIVENESS%20ACT%200F%202010.pdf>.

<sup>121</sup> See Burris, *supra* note 120.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

amended before the House passed the bill.<sup>125</sup> As it stood before the Senate, the corporate tax phase-out would not have begun until two years from the enactment of the legislation, as many hoped that the economy would rebound by then.<sup>126</sup> Also, the bill contained a tax credit for small businesses with five employees or fewer, if they add workers. The bill, which was sponsored by Harrell, had more than one hundred House members as co-signers.<sup>127</sup>

The four states that have already eliminated their corporate income tax provided great insight for what may come in South Carolina. Despite that insight, experts warn that these states “have found the incentives to be severe under-performers,”<sup>128</sup> instead of the “game-changer in luring industry and creating jobs.”<sup>129</sup> Michael Mazerov, an analyst for the Center on Budget and Policy Priorities in Washington, said that eliminating the tax has “been anything but a game-changer.”<sup>130</sup> Mazerov believes “too much emphasis and hype” has been placed on cutting business taxes as a way to increase state income.<sup>131</sup> While a handful of other states have eliminated the corporate income tax, they all replaced the tax with some other revenue stream or broad-based substitute.<sup>132</sup> “Nevada relies on its gambling appeal to fill [the revenue] void . . . and Wyoming relies on its rich oil and gas reserves.”<sup>133</sup>

#### V. THE OPPONENTS’ REFUGE IN THE DORMANT COMMERCE CLAUSE

Under the Interstate Commerce Clause, Congress alone has the power to regulate interstate commerce.<sup>134</sup> When Congress does not exercise this power, legal scholars call it a dormant power. In *Daimlerchrysler Corp. v. Cuno*, the Supreme Court held that the “state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers.”<sup>135</sup> Thus, a federal court is not an appropriate forum for a taxpayer to

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (alteration in original) (citation omitted).

<sup>134</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>135</sup> *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 332 (2006).

challenge a state incentive. The *Cuno* decision clarified that having the status of a state taxpayer is not enough for standing under the United States Constitution.<sup>136</sup> In order for a citizen to bring a Commerce Clause challenge to a state tax incentive program in federal court, the taxpayer “must establish that he has sustained a direct injury as a result of the challenged tax scheme.”<sup>137</sup> The injury must not be hypothetical or generally common to people.<sup>138</sup> However, the requirements for a taxpayer to sue in state court may not be as stringent.<sup>139</sup>

States that compete for the tax-incentive-recipient corporations may be in a good position to raise a federal court claim.<sup>140</sup> Enrich asserts that these states are in the position to challenge state tax incentives as the “most direct losers in the ongoing incentive competition.”<sup>141</sup> Secondly, Enrich argues that “‘states are particularly appropriate parties to bring Commerce Clause issues before the courts’ because the Commerce Clause’s ‘primary focus concerns the structural dangers posed to the federal system by excessive state interference with the dynamics of the national economy.’”<sup>142</sup> Each state has a “peculiarly direct and compelling interest in the enforcement of this structural safeguard of federalism.”<sup>143</sup> The states, however, seem to have no interest in protecting their citizens and challenging tax incentive programs because “more than half the states and several U.S. Territories filed an amicus brief together in support of petitioners’ argument that Ohio’s [investment tax credit] did not violate the dormant Commerce Clause.”<sup>144</sup>

The alternative venue for pursuing challenges is in state court. In *ASARCO Inc. v. Kadish*, the United States Supreme Court distinguished a state taxpayer’s standing in state court versus federal court.<sup>145</sup> The Court stated that in federal court, “[the Court] ha[s already] likened state taxpayers to federal taxpayers, and thus [it has] refused to confer standing upon a state taxpayer absent a showing of ‘direct injury,’

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<sup>136</sup> Kaye, *supra* note 26, at 131.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Enrich, *supra* note 70, at 418-19.

<sup>142</sup> Kaye, *supra* note 26, at 132 (quoting Enrich, *supra* note 70, at 419).

<sup>143</sup> Enrich, *supra* note 70, at 419.

<sup>144</sup> *Id.*

<sup>145</sup> *ASARCO Inc., v. Kadish*, 490 U.S. 605 (1989).



pecuniary or otherwise.”<sup>146</sup> The Court, however, differentiated state taxpayers’ standing in state court:

“[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution . . . .” Given the *Kadish* decision, it is clear that states are not bound to adhere to the “case-or-controversy” doctrine. Thus, it appears that state court, as opposed to federal court, will more likely address the merits of a state taxpayer’s challenge to a state tax incentive.<sup>147</sup>

While the standing rules change from state to state, litigation against various state incentive programs is underway. For example, the North Carolina Institute for Constitutional Law (NCICL) represented several North Carolina taxpayer groups in challenging incentives offered to companies that invested in the state.<sup>148</sup> One case arose when North Carolina’s state and local governments planned to provide Dell Inc. “with \$279 million in various tax incentives and subsidies to build a computer manufacturing and distribution facility in the state.”<sup>149</sup> Relying on the Commerce Clause and a number of state constitutional arguments, the taxpayers sought to challenge the state’s tax incentive package. “The North Carolina Superior Court dismissed the complaint due to lack of standing. The Court of Appeals of North Carolina affirmed the trial court’s conclusion that the taxpayers lacked standing.”<sup>150</sup>

Another North Carolina case, which is ongoing, involves a group of taxpayers who are also represented by NCICL. This group is challenging “an economic development incentive granted to a wholly owned subsidiary of Google, Inc.”<sup>151</sup> Included in the \$165 million package is total relief of “business personal property taxes and an 80%

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<sup>146</sup> *Kadish*, 490 U.S. at 613-14.

<sup>147</sup> Kaye, *supra* note 26, at 132-33 (quoting *Kadish*, 490 U.S. at 617).

<sup>148</sup> Kaye, *supra* note 26, at 134.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*; see also *Blinson v. North Carolina*, 651 S.E.2d 268 (N.C. Ct. App. 2007).

<sup>151</sup> Kaye, *supra* note 26, at 135.

refund of real property taxes for the next 30 years.”<sup>152</sup> This group also raised numerous violations of provisions found in the North Carolina constitution.<sup>153</sup>

Recently, the NCICL has filed two more lawsuits on behalf of concerned taxpayers. They filed the first case in Wake County Superior Court after the county gave Goodyear Tire & Rubber Company and Bridgestone Americas Holding, Inc. a sixty million dollar incentive package.<sup>154</sup> A second case was filed in Durham County Superior Court and challenged the county’s plan to give the Nitronex Corporation \$100,000 in subsidies if the corporation would move to Durham County from another North Carolina county.<sup>155</sup> Instead of relying on the Commerce Clause, both of these complaints allege violations of the North Carolina constitution.<sup>156</sup>

Similar to the North Carolina cases, Minnesota taxpayers brought suit against the state because of the state’s Job Opportunity Building Zone (JOBZ) program.<sup>157</sup> This program allows local governments in the state to grant “a variety of incentives and credits to businesses that relocate to, or expand employment or capital investment in designated zones.”<sup>158</sup> The taxpayers’ main argument was that the JOBZ program violated the Commerce Clause. They claimed that this program used “unfair inducement to expand in the designated zones in Minnesota rather than in some other state.”<sup>159</sup> Even though taxpayer standing in state court is easier to achieve than in federal court, “the Court of Appeals of Minnesota dismissed the suit because the lack of an injury-in-fact deprived the challengers of standing.”<sup>160</sup> However, a different group of Minnesota taxpayers is raising a new challenge to the JOBZ program. This time the challenge may “withstand a motion to dismiss[,

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<sup>152</sup> *Id.* (citing NC Institute for Constitutional Law, *The Incentive Game: North Carolina Local Economic Development Incentives* 8 (2007)).

<sup>153</sup> Kaye, *supra* note 26, at 135.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*; see also Olson v. Minnesota, 742 N.W.2d 681 (Minn. Ct. App. 2007).

<sup>158</sup> Chris Atkins & Joseph D. Henchman, *The Ohio Incentives Decision and the Quest for a 21st Century Tax System*, 40 ST. TAX NOTES 945, Doc. No. 2006-11356 (2006) (LEXIS).

<sup>159</sup> Kaye, *supra* note 26, at 136.

<sup>160</sup> *Id.*; see also Olson, 742 N.W.2d at 684-85.

b]because it ‘directly compete[s] with businesses receiving benefits under JOBZ’”,<sup>161</sup> so it claims to have an injury-in-fact.

Lawsuits against incentives in states other than North Carolina and Minnesota will most likely face “a fate similar to the dismissed cases in North Carolina and Minnesota[,] . . . where the state trial judges ruled that plaintiffs lacked standing to challenge the tax incentives under the Commerce Clause.”<sup>162</sup>

#### VI. CONCLUSION: BENEFITS OF RECRUITING MULTINATIONAL CORPORATIONS IN THE SOUTH

In conclusion, by examining how states in the recent past have used incentive packages to entice companies to their respective states, the distinct advantages of companies choosing to accept lucrative incentive packages become evident. Building a plant in a relatively unknowledgeable and ill-equipped region may have major pay-offs for companies in the form of tax incentives. South Carolina may soon be able to offer even greater incentives to build in the state due to the aforementioned Act, which eliminates or greatly reduces corporate income tax.

A large company may boost state morale by being a shining example of environmental sustainability; may provide the technology standards and train employees to form a knowledge-based community; and may directly and indirectly create jobs for those in the community and the greater region. However, opposition to state incentive packages remains. Opponents argue that the money that states are spending competing with each other to “win” the companies and have them build in their respective states could be better spent elsewhere. Instead of “buying” these companies, states should put money into their public education systems and use that money efficiently to educate their citizens and form knowledge-based communities.

However, it is increasingly important for America to stay competitive in attracting and retaining businesses that are competing in a global market. As demonstrated, the states have an important role within our federal system in providing attractive business opportunities to lure and retain these businesses. In this age of globalization,

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<sup>161</sup> Kaye, *supra* note 26, at 136 (quoting Dale Busacker, *Appeals Court Dismisses Challenge to Economic Development Program*, 47 ST. TAX NOTES 17, Doc. No. 2008-34 (2008) (LEXIS)).

<sup>162</sup> Kaye, *supra* note 26, at 136.

“perhaps the most pragmatic advantage to state participation in foreign commerce is the flexibility it allows.”<sup>163</sup> International trade between countries and states has been dramatically increased through economic globalization in the past twenty years. “Interstate competition is a fact in our federalist system, and we must not overlook the growth and acceptance of state action in trade and investment. In general, ‘subnational governments within federal systems worldwide have taken an increased interest in the conduct of foreign affairs.’”<sup>164</sup> The use of state tax incentives is steadily growing, and as long as states continue to use more credits for job training, employment opportunities, education of the community, development of businesses, and other positive uses, potential for economic tax incentives is endless. For states that utilize these incentives, “[i]t is a matter of survival.”<sup>165</sup>

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<sup>163</sup> Lee, *supra* note 106, at 753.

<sup>164</sup> *Id.* at 752 (quoting Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1027 (2001)).

<sup>165</sup> Lee, *supra* note 106, at 753.