State Taxation of Corporate Income: Formulary Apportionment of Income Earned in Interstate Commerce

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STATE TAXATION OF CORPORATE INCOME: FORMULARY APPORTIONMENT OF INCOME EARNED IN INTERSTATE COMMERCE

I. INTRODUCTION .............................................. 719

II. BACKGROUND: APPORTIONMENT IN STATE TAXATION OF INTERSTATE CORPORATE INCOME ......................... 720
   A. Overview ............................................. 720
   B. Constitutional Questions ............................... 722
      1. State Authority to Tax Income ....................... 722
      2. Commerce Clause .................................. 723
      3. Due Process ...................................... 725
      4. Unitary Business Requirement ....................... 728
   C. Statutory Developments in State Taxation of Interstate Business Income ............................................. 734
      1. Public Law 86-272 .................................. 734
      2. Uniform Division of Income for Tax Purposes Act ... 737
      3. Multistate Tax Compact ............................. 739
   D. Status of Tax Apportionment ............................ 742

III. APPORTIONMENT OF BUSINESS INCOME FOR TAX PURPOSES IN MISSOURI ................................................ 743
   A. Statutory Background .................................. 743
   B. Single-Factor Apportionment ............................ 745
   C. Single-Factor Apportionment Prior to the Multistate Tax Compact: The Source of Income Test ......................... 747
   D. Cases Interpreting the Multistate Tax Compact .............. 751

IV. ALTERNATIVES .............................................. 758
   A. Uniform Federal Standards ............................. 758
   B. Alternatives for Missouri ............................. 761
      1. Apportionability .................................... 761
      2. Elective Apportionment Formulas ..................... 766

V. CONCLUSIONS: MISSOURI LAW OF TAX APPORTIONMENT AFTER GOLDBERG II .............................................. 768

I. INTRODUCTION

Missouri Revised Statutes section 143.451.2\(^1\) provides that for purposes of determining the Missouri taxable income of a corporation, net income

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\(^{1}\) (1978).

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shall represent any and all income "from sources within this state." Hence, where a corporation derives income from the transaction of business partly in Missouri and partly in another state or states, the portion of income subject to Missouri taxation is based on that part of the transaction occurring in Missouri.  

The policy and language contained in section 143.451 have been part of corporate taxation in Missouri since 1929. For almost as long, courts have struggled with the problem of the allocation of interstate corporate net income. Disputes have arisen because the operation of the elective statutory method of single-factor formulary apportionment in Missouri has not been clearly established. Complicating this problem was the enactment of the Multistate Tax Compact in 1967. The degree of uncertainty has become more pronounced in the last few years because the Missouri Supreme Court has rendered markedly different interpretations concerning the proper application of Missouri's apportionment statutes. Other states have faced similar problems.  

This Comment discusses the history of apportioning corporate net income, including federal constitutional concerns and judicially imposed prerequisites to apportionment, and the development of Missouri's law of apportionment. It also seeks to present some alternatives to apportioning income for tax purposes. Finally, the future of taxing interstate corporate income in Missouri will be examined.  

II. BACKGROUND: APPORTIONMENT IN STATE TAXATION OF INTERSTATE CORPORATE INCOME  

A. Overview  

When a corporation's income is produced only from activities and sources within a particular state, it is a relatively simple task to determine its state net taxable income because all of its income is generated intrastate and all is subject to taxation by that state. A company domiciled in one  

3. See id. § 10115.3 (1929).  
4. To avoid confusion, it should be noted that the terms "allocation" and "apportionment" are often used interchangeably in state statutes and decisions when referring to use of a formula for dividing income earned in interstate commerce. Some commentators indicate, however, that the phrase "specific allocation" is increasingly being used to refer to the process of attributing income to a particular state on a non-formula basis, whereas apportionment refers to dividing the tax base by formula. J. Hellerstein & W. Hellerstein, STATE AND LOCAL TAXATION, CASES AND MATERIALS 397 (4th ed. 1978).  
5. 1967 Mo. Laws 102 (codified at MO. REV. STAT. § 32.200 (1978)).  
7. See, e.g., MO. REV. STAT. § 143.451.1 (1978) ("taxable income of a corporation shall include all income derived from sources within this state").
STATE TAX APPORTIONMENT

state and doing business or owning property in other states, however, may be subject to taxation in all of the states involved.\(^8\) Determining what portion of the overall income of multistate corporations and their interconnected divisions and subsidiary companies may fairly be attributed to a particular state for income tax purposes raises complex questions. Case law has set the goal of allowing each state to tax only that income which is reasonably attributable to activities within the taxing state.\(^9\) Three general methods have evolved to accomplish this aim. Where the activities and sources producing income within a given state can be accurately and separately calculated apart from income-producing activities and sources outside the state, a corporation may use the method of separate accounting.\(^10\) When, however, the sources of income and income-producing activities within the state cannot accurately be isolated from extrastate activities and sources, as in the case of a unitary business, separate accounting is unacceptable and an apportionment formula will generally be used.\(^11\) An apportionment formula may produce only a rough estimate of the amount of income actually earned in the taxing state, but such formulas have been routinely upheld so long as they do not impose a tax that is out of proportion to the corporation’s activities in the state.\(^12\) A final method is specific allocation of particular items of income to certain states, a method that is generally available only for properties and income not associated with the corporation’s total business operations.\(^13\)

A corporation engaged in interstate commerce may find use for all three methods in calculating its net taxable income in any state where it is subject to an income tax. For example, an increment of income produced


13. Dexter, supra note 10, at 181. Once it has been determined that certain income may be separately allocated under the laws of the taxing state, there are four methods of deciding which state is the source of the allocable income. These are the location of (1) the income producing activity, (2) the entity which paid the income to the taxpayer, (3) the taxpayer, and (4) the income producing asset. Special Subcomm. on State Taxation of Interstate Commerce, House Comm. on the Judiciary, State Taxation of Interstate Commerce, H.R. REP. NO. 1480, 88th Cong., 2d Sess., pt. 1, at 216 (1964) [hereinafter cited as Willis Report].
by some discrete facet of the corporate enterprise (non-unitary income), could be assigned by separate accounting to the state where that income was produced. On the other hand, income generated from business activities that evidence an interconnection between operations in the taxing state and other states could not be accurately segregated, so the corporation would determine its share of taxable income by applying an apportionment formula to the multistate profits produced from these interstate operations. Finally, the same corporation might own property, such as real property used for rental income, in a state other than the taxing state. This income could be specifically allocated to the foreign state in which the property was located and the taxing state could not impose a tax on this income.

B. Constitutional Questions

1. State Authority to Tax Income

In *McCulloch v. Maryland*, the United States Supreme Court acknowledged the states' sovereign power of taxation. Recognition of this power, however, does not mean that it may be exercised indiscriminately. Taxation of multistate businesses by the states is subject to constitutional limitations based on the jurisdictional concept that a state may not tax income earned outside its borders. This concept is particularly relevant when corporate income is earned in interstate commerce because the taxing state, in attempting to tax a fair portion of such interstate income, may seek to include income actually earned outside that state. The difficulty in determining the fair share of income apportionable to each state prompted the states to apply formulas to interstate corporate income in order to apportion the income of businesses with interdependent activities in various states (unitary businesses). The theory behind formulary apportionment is that certain factors, such as property, payroll, and sales, accurately reflect that


15. Id. at 432. Chief Justice Marshall, writing for the Court, said:

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied.


portion of income apportionable to each state.\textsuperscript{18} In other words, although the formula applies to all of the corporation’s income, it does not tax income earned outside the state. It utilizes in-state and out-of-state factors to measure the income earned in the taxing state.\textsuperscript{19}

There are few clear constitutional limitations on state power to tax corporate income. Although the Supreme Court has rendered numerous decisions, the case-by-case approach has produced confusing and occasionally contradictory results.\textsuperscript{20}

2. Commerce Clause

The commerce clause\textsuperscript{21} grants exclusive power to Congress to regulate

\begin{tabular}{|c|c|c|}
\hline
Property owned & Payroll paid & Sales in \\
in Taxing State & in Taxing State & Taxing State \\
\hline
Total Property Owned & Total Payroll Paid & Total \times Total Net Income \\
\hline
\end{tabular}

One writer has offered a clear explanation of how the result achieved under the three-factor formula compares with the result under a single-factor sales formula such as that contained in MO. REV. STAT. § 143.451.2 (1978).

If a corporation’s net income were $100 and the total amounts of its property, payroll and sales were $100 each and the amounts of each of those factors located within the taxing state were 5, 15 and 20 respectively, the amount of income taxable under the Iowa system [single-factor sales formula] would be 20/100 × $100, or $20. Under the three factor system

\((5/100 + 15/100 + 20/100)/3 \times 100\), or only $13, would be taxable.


20. \textit{See} Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457-58 (1959) (“This Court alone has handed down some three hundred full-dress opinions . . . [regarding the constitutionality of state tax measures, not all of which have been] ‘consistent or reconcilable.’”); Roy Stone Transfer Corp. v. Messner, 377 Pa. 234, 243, 103 A.2d 700, 705 (1954) (noting difficulty in reconciling conflicting opinions regarding how states may constitutionally tax income earned in interstate commerce).

21. U.S. CONST. art. 1, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

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interstate commerce and requires that interstate commerce be free from any
direct restrictions or impositions by the states.\textsuperscript{22} Even in circumstances
where Congress has refused or failed to act, states may not take actions that
tend to restrict interstate commerce.\textsuperscript{23} The concern with state taxation of
interstate businesses as it affects the commerce clause is that apportionment
formulas necessarily include, as part of the net income, money derived from
activities outside the taxing state.\textsuperscript{24} Challengers contend that this situation
burdens interstate commerce by subjecting corporate income to the risk of
multiple taxation; i.e., the apportionment formula includes as net taxable
income in one state money which is also subject to income tax in another
state.\textsuperscript{25}

Early Supreme Court decisions held that the commerce clause prohibited
direct state taxation of wholly interstate commerce.\textsuperscript{26} This position
created a tax haven for corporations involved exclusively in interstate busi-
ness.\textsuperscript{27} The Court later abandoned this interpretation and held that the
commerce clause was not intended to relieve businesses operating interstate
from bearing their fair share of the state tax burden.\textsuperscript{28} In Northwestern States

\textsuperscript{22} Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

\textsuperscript{23} Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458
(1959); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 320-21 (1851). In
Cooley, the Court addressed the extent to which states may regulate commerce in
the absence of congressional action. The Court divided state action affecting inter-
state commerce into two broad areas—subjects national in scope and admitting of
only uniform federal regulation, and subjects local in character, permitting state
action until Congress acts to occupy the field. Id. at 318-19. The Supreme Court
has concluded that a state tax which does not unduly burden or discriminate
against interstate commerce is valid, in the absence of congressional action. See
International Harvester Co. v. Department of Treasury, 322 U.S. 340, 358 (1944);
exercise commerce clause power on states so as to impose its choices on integral
government functions).

\textsuperscript{24} Hellerstein, supra note 11, at 130-31.

\textsuperscript{25} See, e.g., Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 434
(1980).

\textsuperscript{26} See Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 320-21 (1851);
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 8 (1824).

\textsuperscript{27} Hellerstein, \textit{State Taxation Under the Commerce Clause: An Historical Perspective},

\textsuperscript{28} Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S.
734, 750 (1978) (state tax does not violate commerce clause unless it exacts from
interstate activity more than a fair share of cost of state government); International
Harvester Co. v. Department of Treasury, 322 U.S. 340, 348 (1944) (state may tax
gross receipts from interstate transactions consummated within its borders where it
treats wholly local transactions similarly); Western Live Stock v. Bureau of Reven-
ue, 303 U.S. 250, 254-58 (1938) (interstate commerce should bear its share of state
tax burden and such taxes should be sustained so long as they do not involve risk of
cumulative burdens not imposed on local commerce); William E. Peck & Co. v.
Portland Cement Co. v. Minnesota,29 the Court ruled that the commerce clause does not prevent a state from levying a fairly apportioned net income tax on a foreign corporation engaged in interstate business.30 In recent cases the Court has attempted to clarify the effect of the commerce clause on state taxation of interstate business income.31 As a result of these decisions, the Court has established four standards to test the constitutionality of a state corporate income tax under the commerce clause: (1) whether the tax is applied to an activity that has a substantial nexus with the taxing state; (2) whether the tax is fairly apportioned; (3) whether the tax discriminates against interstate commerce; and (4) whether the tax is fairly related to the services provided by the state.32

3. Due Process

Apportionment formulas are often attacked on the ground that they violate the due process clause33 as applied to the states through the fourteenth amendment.34 Due process challenges to the taxation of corporate income derived from interstate activity are based on the concept that a state may not tax income earned outside its borders.35 The due process clause does not, however, preclude a state from looking beyond its borders to get

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Lowe, 247 U.S. 165, 174-75 (1918) (tax that is general and discriminates against exports only indirectly does not violate commerce clause).


30. Id. at 461-62. The Court explained that there is an important distinction between a tax on net income from interstate commerce, which is permissible, and a tax on the privilege of engaging in interstate commerce, which conflicts with the commerce clause and is impermissible. Id. at 461.


32. See Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 228 (1980); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). When a state seeks to tax instrumentalities of international rather than interstate commerce, the inquiry must go beyond the four tests enunciated in Complete Auto. A court must also ask whether the tax creates a substantial risk of international multiple taxation and whether the tax prevents the federal government from speaking with uniformity in regulating commercial relations with foreign governments. See Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1979) (court struck down California property tax assessment on cargo containers located in Los Angeles, owned by Japanese shipping company, and subject to property tax in Japan); Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) (court upheld Georgia ad valorem property tax on inventory of imported tires located in wholesale distribution warehouse).

33. U.S. CONST. amend. IV.

34. U.S. CONST. amend. XIV, § 1. The fourteenth amendment provides that no state may “deprive any person of life, liberty, or property, without due process of law.”

the true value of taxed property or income within its borders when the out-
of-state property and income are an integral part of an interstate system
that enhances the value of the property or income that is taxed. This analy-
sis inevitably requires establishment of appropriate factors to bring a corpo-
ration's income under a particular state's taxing jurisdiction.

In the 1920 case of Underwood Typewriter Co. v. Chamberlain,36 the
Supreme Court held that an apportionment formula designed to reach only
those profits earned within the state was constitutional.37 The Court stated
that unless the formula reaches an unreasonable result or is inherently arbi-
trary as applied to a particular taxpayer, it does not violate due process.38
Subsequent cases emphasized that the taxpayer had the burden of showing
that application of the state's apportionment formula was unreasonable.39
Recently, the Supreme Court refined the criteria announced in Underwood
Typewriter by stating that taxation by apportionment is consistent with due
process if (1) there is "a rational relationship between the income attributed
to the State and the interstate values of the enterprise," and (2) there is "a
'minimal connection' between the interstate activities and the taxing
State."40 Thus, the amount of income taxed cannot be arbitrary and there
must be a nexus of activity before a state tax on corporate income earned in
interstate commerce will be consistent with due process requirements. It is
no mere coincidence that the standards to satisfy the due process clause are
similar to those required by the commerce clause. The Supreme Court has
commented that these two clauses are closely connected and that, for the
most part, activities that satisfy due process requirements will also meet re-
quirements of the commerce clause.41

37. Id. at 120.
38. Id. See also A. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934). One
writer explains that the test for the unreasonableness of an apportionment formula
under the due process clause is whether the state is taxing the "extraterritorial
value" of a foreign corporation which is outside the taxing state and is therefore
beyond the state's taxing jurisdiction. Britton, State Taxation of Extraterritorial Values:
Allocation of Sales to Destination, 46 VA. L. REV. 1160, 1162 (1960).
North Carolina ex rel. Maxwell, 283 U.S. 123, 130 (1931); Maxwell v. Kent-Coffey
41. Ott v. Mississippi Valley Barge Line, 336 U.S. 169, 174 (1949); Pacific Tel.
& Tel. Co. v. Tax Comm'n, 297 U.S. 403, 420 (1936); American Mfg. Co. v. City of
A Survey and an Appraisal, 46 VA. L. REV. 1051, 1061-65 (1960) (requirements for due
process and commerce clauses are different in many contexts). Justice O'Connor,
having, dissenting in ASARCO, Inc. v. Idaho State Tax Comm'n, 102 S. Ct. 3103
To prove that a state has failed the rational relationship requirement, a taxpayer must show "'by clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State.'"42 The presumptive validity of the taxing method poses a substantial impediment to successfully challenging the tax on due process grounds. Moreover, the Court does not demand mathematical precision in apportionment schemes,43 so states are allowed considerable latitude in selecting their apportionment formulas.44

The nature of the connection between the taxing state and the taxpayer's activities required to satisfy the second prong of the due process test is not entirely clear. The Supreme Court has said the nexus is present "if the corporation avails itself of the 'substantial privilege of carrying on business' within the State."45 Nevertheless, two recent decisions suggest that the unitary business principle, which requires a showing that a business's interstate operations are interdependent, supplies the requisite nexus between the state and the corporation's interstate income even when the corporation conducts some facet of its business entirely outside the taxing state.46

Using the two prerequisites of minimal connection and rational relationship, the Supreme Court has upheld a variety of different state apportionment formulas.47 The decisions indicate that an apportionment

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(1982), stated what she perceived to be an important distinction between the commerce clause and the due process clause. She expressed concern with overturning a state's taxing determination on due process grounds, which places the matter beyond Congress's power to correct, rather than on a commerce clause basis, which is susceptible to congressional repair. Id. at 3126-27 (O'Connor, J., dissenting). The Justice's reasoning has been criticized. 102 S. Ct. at 3116 n.23; Hellerstein, State Income Taxation of Multijurisdictional Corporations, Part II: Reflections on ASARCO and Woolworth, 81 Mich. L. REV. 157, 174 (1982).


45. Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 220 (1980). See Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444-45 (1940). The Court has explained that the "privilege of doing business" test helps to ensure that the taxing state has given something to the taxpayer so that it can reasonably ask for something in return. See ASARCO, Inc. v. Idaho State Tax Comm'n, 102 S. Ct. 3103, 3109 (1982); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 465 (1959); J.C. Penney Co., 311 U.S. at 444. There is a similarity between this application of the "privilege of doing business" concept and the requirement of minimum contacts when allowing a state to exert personal jurisdiction over a civil defendant. See, e.g., Kulko v. Superior Court, 436 U.S. 84, 94 (1978).


47. By 1983, twenty-seven states had adopted the Uniform Division of Income
scheme, even though imprecise, will withstand a due process challenge so long as these two tests are satisfied.48

4. Unitary Business Requirement

The unitary business principle, a judicially created requirement,49 has

for Tax Purposes Act, the Multistate Tax Compact, or both. 1 ST. TAX GUIDE (CCH) ¶ 10,000, at 1043 (1983). Since states use different allocation formulas, it is possible for the same income to be taxed twice because identical income can be attributed to different states using different formulas. See Studenski, supra note 18, at 1133. The United States Supreme Court has not, however, been persuaded by the double taxation argument. In Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), the Court termed the argument "speculative," id. at 276, and concluded that imposition of any uniform apportionment formula was a task for Congress, id. at 278-79.

Justice Frankfurter expressed concern with excessive deference to the various states' apportionment schemes. In his dissent in Braniff Airways, Inc. v. Nebraska, 347 U.S. 590 (1954), he said that the states' apportionment methods "cannot be regarded as abstract mathematical formulas, and hence they must be closely scrutinized to insure their fairness as applied to a given situation." Id. at 605 n.2 (Frankfurter, J., dissenting). Nevertheless, the Court has rarely overturned a state court decision against a taxpayer who challenged the state's apportionment formula. P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 530 (1981) (referring to Hans Rees' Sons v. North Carolina ex rel. Maxwell, 283 U.S. 123 (1931)). In Hans Rees' Sons, North Carolina had applied a formula based on a single factor—property. The Court determined that the state court had erroneously excluded evidence showing a significant disparity between the percentage of Hans Rees' operations within North Carolina (17% of total operations) and the percentage of the corporation's income attributed to the state under the apportionment formula (80% of total income). 283 U.S. at 134. The Court added that such evidence may always be received if it tends to establish that an apparently fair taxing mode operates to reach profits not attributable to activities in the taxing state. Id.

48. One writer, however, urges that the Supreme Court's 1982 decisions in ASARCO and Woolworth indicate that the Court has embraced a less deferential approach to evaluating state taxing decisions. Hellerstein, supra note 41, at 189-91.

49. Dexter, supra note 10, at 183. The unitary business concept was originally developed to apportion earnings and assets of interstate enterprises such as communication and transportation companies. P. HARTMAN, supra note 47, at 25.

The "unit rule" of valuation was thus predicated upon the theory that capital employed as an integral part of the multistate communications or transportation business tends to make every other part of the business more valuable, and the advantage flowing from large scale capital resources can, consistent with the due process and commerce clauses, be equitably distributed for tax purposes among the States under whose protection the corporations conduct business. Id. (footnote omitted). See, e.g., Norfolk & W. Ry. v. Missouri State Tax Comm'n, 390 U.S. 317, 323-25 (1968) (state permitted to tax rolling stock moving between states); Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412, 425 (1937) (tax graduated by the number of chain stores held by taxpayer in various states).
frequently been referred to as the linchpin of apportionability. The principle mandates that a multistate corporation’s income may not be taxed by means of an apportionment formula unless it has first been determined that the corporation is a unitary business. A unitary business can be defined generally as one whose activities outside the taxing state bear such an interdependent relationship to those within the taxing state that is impossible to measure their separate contribution to the overall profit of the multistate enterprise. The unitary business concept reflects consideration of the functional integration in a business, centralized management, and economies of scale—factors that contribute to corporate income but which are not easily isolated to a particular state.

To be classified as income from a non-unitary business, a company must show that the income derives from an unrelated activity which constitutes an independent business capable of producing a profit by itself. For example, a corporation that operates a farm in Missouri and a resort hotel in Florida would probably not be treated as a unitary business. The corporation could separate the income produced from each property, and the corporation would be taxed in Missouri only on that income produced from the Missouri farm. Non-unitary enterprises may use a separate accounting method, allocating certain income to a particular state, rather than being forced to rely on an apportionment formula. With a unitary business, however, a state must allocate the business’s total taxable income so that it taxes only an amount proportionate to the income-producing contributions of the in-state business operations.

Although the United States Supreme Court has not clearly stated the

55. Certain businesses, such as mining, banking, farming, and hotel operations, can generally be operated without being classified as unitary even where a single corporation conducts the same business in several states. See Hellerstein, Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business, 21 NAT’L TAX J. 487, 496-97 (1968).
constitutional underpinnings of the unitary business requirement,\textsuperscript{58} the requirement of interdependent interstate activities seems to be directly related to due process concerns.\textsuperscript{59} Before a state may constitutionally tax income earned by a multistate business, there must be a minimal connection between the taxing state and the company's income-producing activities.\textsuperscript{60} Unitary business status supplies the minimum connection, because if the business is unitary, the state necessarily has some connection with the out-of-state activities.\textsuperscript{61} Due process requirements are met, notwithstanding the fact that specific income may be attributable to an out-of-state source through the use of separate geographic accounting, so long as the intrastate and extrastate activities are part of a unitary business.\textsuperscript{62} While an exact accounting system may be useful, such a system may not accurately reflect the income earned in the taxing state because factors beyond mere receipt of payment for services or goods must be considered.\textsuperscript{63}

The importance of the unitary business requirement was emphasized recently by two Supreme Court cases: \textit{ASARCO, Inc. v. Idaho State Tax Commission}\textsuperscript{64} and \textit{P.W. Woolworth Co. v. Taxation & Revenue Department}.\textsuperscript{65} In both cases, the Court reversed state court decisions finding corporate income subject to taxation and reaffirmed that the crux of apportionability for state income tax purposes is the unitary business requirement. In \textit{ASARCO}, the

\textsuperscript{58} While those cases resolving a due process challenge to apportionment formulas generally argue a connection between due process and the unitary business requirement, the writer has not found any clear statement that the due process clause requires a finding of unitary business before a state may tax interstate income. \textit{See}, e.g., Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 223 (1980).


\textsuperscript{61} \textit{See} Hellerstein, \textit{supra} note 41, at 168. Hellerstein believes that the \textit{ASARCO} majority suggested that without a unitary business there can be no rational relationship between income attributed to the state and the enterprise's intrastate value. \textit{See} ASARCO, Inc. v. Idaho State Tax Comm'n, 102 S. Ct. 3103, 3115 (1982). He nevertheless argues that the Court's observation is irrelevant because if no unitary business is found, the minimal connection test is not met and it becomes unnecessary to ask if there is a rational relationship. Hellerstein, \textit{supra} note 41, at 168 n.63. Conversely, if a unitary business is found, a court must still determine whether the second due process requirement of a rational relationship is met. \textit{Id}. Thus, Hellerstein's analysis suggests that, for all practical purposes, the unitary business requirement and the due process minimal connection test are identical.

\textsuperscript{62} Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 223 (1980).

\textsuperscript{63} Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271, 282 (1924).

\textsuperscript{64} 102 S. Ct. 3103 (1982).

\textsuperscript{65} 102 S. Ct. 3128 (1982).
Court held that Idaho could not constitutionally include within the taxable income of a non-domiciliary corporation doing business in the state a portion of intangible income that it received from subsidiaries having no other connection with the state. The Court found that ASARCO and its subsidiaries comprised discrete business enterprises rather than a unitary business. In *F.W. Woolworth*, New Mexico sought to tax “gross up” and other dividend income from four of the taxpayer’s foreign subsidiaries. The Court held that the tax violated the due process clause because the dividend income from the subsidiaries, each of which operated a separate business enterprise, was derived from business activities unconnected with New Mexico. *ASARCO* and *F.W. Woolworth* made it clear that a state

66. The intangible income at issue consisted of dividends, interest payments, and capital gains from the sale of stock. 102 S. Ct. at 3105-06.

67. *Id.* at 3115. A detailed factual analysis led to the determination that the disputed intangible income was not derived from a unitary business. The Court pointed to findings that ASARCO’s stock investments were not a necessary part of the overall business operation, that ASARCO had never been required to use the stock as security for borrowing capital, acquiring stock or securities in other companies, or to support bond issues, and that ASARCO had sufficient cash flow from its mining operations to provide operating capital without relying on the income generated from the intangible property. *Id.* at 3113 n.21. In addition, the Court was influenced by the limited functional and managerial relationships between ASARCO and its subsidiaries. *Id.* at 3112.

The Idaho Tax Commission argued that the intangible income was the product of a unitary business because the shares of stock were “‘acquired, managed or disposed of for purposes relating or contributing to the taxpayer’s business.’” *Id.* at 3114 (quoting Brief for Appellee at 4). The Court rejected such a standard for unitary business income, reasoning that if the unitary business test was whether something relates or contributes to the business, there would be no limits on the unitary business concept because the business of every corporation is to make money; thus, any activity, including mere investments, that generates income could be said to relate to or contribute to the business. *Id.*

Justice O’Connor disagreed strongly with the Court’s finding that the contested income was not the product of a unitary business, and she argued that the Court’s decision altered the unitary business principle as applied in *Mobil* and *Exxon “beyond all recognition.” *Id.* at 3123 (O’Connor, J., dissenting). The dissent would have found that ASARCO had operational control of the subsidiaries based on some managerial control and limited interchange of products. *Id.* at 3121 (O’Connor, J., dissenting).

68. Gross up refers to money not actually received from foreign subsidiaries but which the federal government deems to be received for tax credit purposes. *F.W. Woolworth Co. v. Taxation & Revenue Dept.*, 102 S. Ct. 3128, 3132 (1982). *See also I.R.C. §§ 78, 901(a), 902(a) (1976); Hellerstein, supra note 41, at 177.

69. 102 S. Ct. at 3132.

70. *Id.* at 3138-39. The Court found that income from the subsidiaries was not money generated by a unitary business because there was no functional integration, centralized management, or economies of scale between Woolworth and its subsidiaries. *Id.* at 3135-38. The New Mexico taxing authority argued that the disputed
may not apportion to a non-domiciled parent corporation the income produced from a subsidiary that has no connection with the taxing state. In other words, unitary business status must exist before a corporation can be compelled to apportion certain interstate income to the taxing state.

Problems arise in determining exactly what constitutes a unitary business because there is no commonly accepted method or set of criteria for ascertaining whether a business is unitary. The unitary concept involves complex factual inquiries concerning the various activities of large multi-

income was income from a unitary business because it contributed to the wealth of the entire business enterprise. *Id.* at 3135. The Court rejected such a standard for finding a unitary business stating, "The state court's reasoning would trivialize this due process limitation by holding it satisfied if the income in question 'adds to the riches of the corporation' . . . . Income, from whatever source, always is a 'business advantage' to a corporation. Our cases demand more." *Id.* (citation omitted). The Court was also careful to point out that potential, as opposed to actual, control of an out-of-state facet of the business is insufficient to show a unitary business relationship. *Id.* at 3135-38.


72. Keesling & Warren, *California's Uniform Division of Income for Tax Purposes Act*, 15 UCLA L. REV. 156, 172 (1967). Keesling and Warren emphasize the difference in various states' application of the unitary business rule. A typical situation raising the opportunity for disparate approaches would occur in determining whether a corporation "which manufactures insecticides in California, fertilizers in West Virginia and chemicals for use in textile manufacturing in Georgia engaged in three separate businesses, or . . . in the single business of manufacturing chemicals." *Id.* Cf. Superior Oil Co. v. Franchise Tax Bd., 60 Cal. 2d 406, 412, 386 P.2d 33, 37, 34 Cal. Rptr. 545, 548 (1963) (not necessary that every phase of a vertically integrated oil enterprise be interstate in nature to find unitary business); Webb Resources, Inc. v. McCoy, 194 Kan. 758, 770, 401 P.2d 879, 890 (1965) (vertically integrated oil operation in six states not unitary business because certain activities connected with business were not carried on interstate).

For cases in which courts have found a unitary business, see Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 224 (1980) (unitary business found where Exxon operated three divisions, only one of which had activities in taxing state, based on: (1) centralized management that provided company-wide services such as coordinating refining functions, long-range planning, and legal services, and (2) controlled interaction between divisions on matters of bulk sales, credit, packaging, and promotion); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 438 (1980) (unitary business existed where nondomiciliary parent corporation held subsidiaries organized and operated in foreign states and nations, based on three "factors of profitability": "functional integration, centralization of management, and economies of scale"); Fleming v. Oklahoma Tax Comm'n, 157 F.2d 888, 889-90 (10th Cir. 1946) (railroad operating lines in 14 states found to be unitary because all elements of business were essential to ultimate realization of profit); United States Tobacco Co. v. Mack, 229 Or. 627, 636-37, 368 P.2d 337, 341-42 (1962) (unitary business found were component parts of business were interdependent and com-
state or multinational businesses and their affiliates.73 Nevertheless, two tests for identifying unitary businesses have received wide usage. The first, called the "three unities test," was expressed in Butler Brothers v. McColgan.74 Butler Brothers, an Illinois corporation doing business in California, purchased general merchandise as a middleman and resold to retailers. It had branch offices in seven states, including California, where goods were stored, a sales force was operated, and solicitation, sales, credit, and collections were carried on.75 The Supreme Court found a unitary enterprise.76 Using the three unities test, the Court upheld the state court's determination that the corporation had (1) unity of ownership; (2) unity of operation as evidenced by central purchasing, advertising, accounting, and management divisions; and (3) unity of use in its centralized executive force and general system of operation.77

A second test for identifying a unitary business was used by the California Supreme Court in Edison California Stores, Inc. v. McColgan.78 In that case the taxpayer was a California subsidiary of a Delaware parent corporation whose central management division, charged with purchasing and distributing merchandise for itself and its subsidiaries, was located in Missouri.79 In finding a unitary business, the court said, "If the operation of the portion of the business done within the state is dependent upon or contributes to the operation of the business without the state, the operations are unitary ... »80

The significance of the unitary business concept extends beyond its ap-


75. Id. at 504-05.

76. Id. at 505.

77. Butler Bros. v. McColgan, 17 Cal. 2d 664, 678, 111 P.2d 334, 341 (1941), aff'd, 315 U.S. 501 (1942). When it listed unity of ownership as one of the factors used to find a unitary business, the California Supreme Court was referring to the central corporation's ownership of several divisions spread throughout a number of states. In Butler Brothers, an Illinois corporation owned and operated wholesale distributing houses in seven states.


79. 176 P.2d at 698. The California Supreme Court in Edison did not reject the three unities test expressed in Butler Brothers. Id. at 701. Rather, the court focused on the factual differences in the two cases; Butler Brothers had as its taxpayer a foreign corporation doing business in California while Edison involved a California corporation that was a subsidiary of a foreign parent. Id. at 702.

80. Id. at 702; G. ALTMAN & F. KEESSLING, supra note 52, at 101.
plication to activities conducted between various states. Increasingly, large corporations have multinational operations, and a state seeking to tax income attributable to unitary business operations may have to look to activities that connect intrastate operations with activities carried on in a foreign nation. For the most part, the United States Supreme Court has applied to international business income the same unitary business analysis used for interstate enterprises. 81

The Court recently upheld California's franchise tax on a percentage of worldwide profits earned by corporations doing business in the state. In Container Corporation of America v. Franchise Tax Board, 82 the corporation argued that profits earned in and taxed by foreign countries could not be subject to the California tax. 83 The Court disagreed, finding that the corporation was a unitary business because of the interaction between the foreign and domestic subsidiaries. 84

C. Statutory Developments in State Taxation of Interstate Business Income

1. Public Law 86-272

In 1959, the United States Supreme Court decided two cases that troubled multistate businesses. In Northwestern States Portland Cement Co. v. Minnesota 85 and Williams v. Stockham Valves & Fittings, Inc., 86 the Court upheld state and local taxation of an interstate business based on sales activity within the jurisdiction. 87 The breadth of the Northwestern States-Stockham


82. 51 U.S.L.W. 4987 (U.S. June 27, 1983).
83. Id. at 4989.
84. Id. at 4992. The Court deferred to the findings of the California Court of Appeals on whether the activities constituted a unitary business. Id. at 4991. See also Container Corp. of Am. v. Franchise Tax Bd., 117 Cal. App. 3d 988, 173 Cal. Rptr. 121 (1981), aff'd, 51 U.S.L.W. 4987 (U.S. June 27, 1983). Two weeks later, the Court dismissed an appeal raising a similar issue. See Caterpillar Tractor Co. v. Lenckos, 84 Ill. 2d 102, 417 N.E.2d 1343 (1981), appeal dismissed sub. nom., Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., 51 U.S.L.W. 3937 (U.S. July 6, 1983).
86. Id. Stockham Valves was decided concurrently with Northwestern States Portland Cement Co.
87. Id. at 452-65. In Northwestern States and Stockham Valves, a state imposed an
Values decisions generated concern among businesses, who feared that even minimal activities in a state could subject the corporation to tax liability in that state. Following these two decisions, a number of businesses engaged in interstate commerce pressured Congress for legislation limiting the scope of Northwestern States and Stockham Values. In response, Congress enacted Public Law 86-272, establishing minimum jurisdictional requirements for income tax on a foreign corporation based on that portion of the net income from the corporation's interstate business which was reasonably attributable to its business activities within the state. Northwestern States involved Minnesota's attempt to tax income of an Iowa corporation whose only physical nexus with the taxing state was the presence of two salesmen and a secretary operating in a rented office. Id. at 453-57. In Stockham Values, Georgia imposed income tax on a Delaware corporation which operated a single rented sales office with one salesman in the taxing state. Id. In both cases, however, the corporation had solicited within the taxing state orders for the purchase of the corporation's products. These orders were accepted at and filled from the corporation's central office in another state. Id. at 454.

88. WILLIS REPORT, supra note 13, at 145. From the standpoint of the business community, there were several justifications for legislation designed to limit the states' ability to tax multijurisdictional income. Roland, Public Law 86-272: Regulation or Raid?, 46 VA. L. REV. 1172, 1176-78 (1960). One justification was the cost of complying with a variety of tax laws in a number of states. Id. at 1176. A second concern was the threat of income being subject to multiple taxation. Id. at 1177. A further consideration was the possible burden on commerce because firms might withdraw from markets in some states if their participation therein would subject them to taxation under the Northwestern States nexus test. Id. at 1178. Two additional decisions, involving issues similar to those in Northwestern States, were also of concern to the business community: International Shoe Co. v. Fontenot, 236 La. 279, 107 So. 2d 640 (1958), cert. denied, 359 U.S. 984 (1959); Brown-Forman Distillers Corp. v. Collector of Revenue, 234 La. 651, 101 So. 2d 70 (1958), cert. denied, 359 U.S. 28 (1959). See Hartman, "Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course, 29 VAND. L. REV. 353, 355, 358-59 (1976).

89. Multistate Tax Commission, Suggested State Legislation and Enabling Act, Preamble C-3, reprinted in 23 COMMITTEE OF STATE OFFICIALS ON SUGGESTED STATE LEGISLATION, COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION C-3 (1968). See Celler, The Development of a Congressional Program Dealing with State Taxation of Interstate Commerce, 36 FORDHAM L. REV. 385, 387 (1968); Studenski, supra note 18, at 1128; see also Hirshberg & Nedry, A Federal Concept of Doing Business, 46 VA. L. REV. 1241, 1243-44 (1960). Hirshberg and Nedry quote the Chairman of the Senate Select Committee on Small Business as saying: "'If the volume of mail committee members receive is a true index, small businessmen are as concerned over the recent opinions of the Supreme Court on State taxation of interstate business income as almost any other problem they have faced since the committee was established in 1950.'" Id. (quoting Hearing on State Taxation on Interstate Commerce Before the Senate Select Comm. on Small Business, 86th Cong., 1st Sess., pt. 1, at 1 (1959) (statement of Sen. Sparkman)).

90. Act of Sept. 14, 1959, 73 Stat. 555 (codified at 15 U.S.C. §§ 381-384 (1976)). Public Law 86-272 was enacted on September 14, 1959, and was applicable to taxable years ending after this date. 15 U.S.C. §§ 381(a), 382(a) (Supp. I
a state to impose a net income tax on nondomiciliary corporations' income derived from interstate commerce.\footnote{91} In essence, the law prohibits states from taxing income of out-of-state sellers of tangible personal property if their sole instate activity consists of soliciting orders to be approved outside the state and filled by delivery from a location outside the state.\footnote{92}

1959). This represented notable expediency on the part of Congress because the law was enacted just seven months after the decision in \textit{Northwestern States and Stockham Valves}. See Hartman, supra note 41, at 1052. The Supreme Court explained in Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275 (1972), that the motivation for enacting Public Law 86-272 was to allay apprehension of businessmen that "mere solicitation would subject them to state tax." \textit{Id.} at 280. Heublein recognized that Public Law 86-272 only set jurisdictional limits and did not provide any method for determining state income tax. \textit{Id.} at 281.

91. The pertinent language of the statute provides:

(a) No state, or political subdivision thereof, shall have power to impose . . . a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State . . . during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).


Public Law 86-272 also directed congressional committees to study and propose legislation pertaining to the taxation of interstate commerce by the states.93 Congress, however, never formulated any proposals.94

2. Uniform Division of Income for Tax Purposes Act

At about the same time Congress was responding to business concerns by promulgating Public Law 86-272, the states were themselves taking steps to modify their existing tax apportionment schemes. In the late 1950's, representatives from the states met to discuss a uniform system and, in 1957, the Uniform Division of Income for Tax Purposes Act (UDITPA)95 was adopted by the Commissioners on Uniform State Laws and the American Bar Association. It was designed as a model act to aid states in enforcing taxpayer compliance and eliminating the possibility of double taxation of interstate businesses.96 UDITPA divides corporate income into nonbusiness income, for which specific allocation is permitted,97 and business income, for which an apportionment formula is used.98 For business income,
UDITPA offers an apportionment formula based on three factors: payroll, sales, and property. An additional feature of UDITPA is its provision for management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." Professor Hellerstein has observed a practical connection between the state law questions raised under UDITPA's business and nonbusiness income distinction and the constitutional questions inherent in deciding whether income arose out of a unitary business carried on in the taxing state. In particular, he claims that the Supreme Court's recent decisions in *ASARCO* and *Woolworth*, see notes 64-71 and accompanying text *supra*, will have an effect on state court interpretations of UDITPA. Hellerstein, *supra* note 41, at 161.

In particular, he points to the fact that the state taxing authorities in both *ASARCO* and *Woolworth* had applied the Multistate Tax Compact's broad interpretation of dividends as apportionable business income (Multistate Tax Comm'n Reg. IV.1.25(4), reprinted in 1 ST. TAX GUIDE (CCH) ¶ 352, at 370 (1980)), yet the Supreme Court rejected this approach. Hellerstein, *supra* note 41, at 186.

In addition, there seems to be a trend away from distinguishing between business and nonbusiness income; nine of forty-six states with corporate income tax refuse to permit separate accounting for nonbusiness income, with the result that all corporate income not earned wholly intrastate may be apportioned. Harris, *State Taxation of Income Earned Beyond Its Borders: Allocation and Apportionment of Unitary Business Income in Florida*, 8 FLA. ST. U.L. REV. 21, 39 (1980). This trend may be explained, at least in part, by the threat of double taxation created by the states' nonuniform approaches to deciding what types of income may be separately allocated and the state to which such income will be attributed. For example, it is possible that one state might separately allocate "nonbusiness" income to itself, while some other state may either allocate that same income to itself or consider it to be "business" income and apportion a fraction of the income to itself. Comment, *supra* note 18, at 486-87. See also Corrigan, *Interstate Corporate Income Tax—Recent Revolutions and a Modern Response*, 29 VAND. L. REV. 423, 433-35 (1976); Keesling & Warren, *supra* note 72, at 164; Peters, *An Analysis of Important Recent Developments in the State and Local Tax Area*, 39 J. TAX'N 172, 176 (1973). The threat of multiple taxation posed by the differences in how states apply the business and nonbusiness income categories is ironic considering UDITPA's stated goal of eliminating any such threat.

99. UDITPA § 9 (1957). In evaluating income under the sales factor, UDITPA applies a state-of-destination test wherein sales of goods are attributed to the taxing state if the property is delivered or shipped to a purchaser within the state regardless of other aspects of the sale. *Id.* § 16. Compare this approach to Missouri's treatment of the sales factor under the source of income test. *See* notes 152-58 and accompanying text *infra*.

Some commentators have argued that business income results from the combination of labor and property to produce a salable good or service, elements which are represented by the property and payroll factors; therefore, a two-factor formula is all that is needed. Studenski, *supra* note 18, at 1146-48. Nevertheless, UDITPA adds the sales factor in an attempt to meet the taxation needs of both producer and consumer states. A producer state will also be a consumer state for some purposes; thus an apportionment formula which factors in the element of sales tends to balance competing claims of consumer states and producer states. *See* Lynn, *supra* note 96, at 98; Lynn, *The Uniform Division of Income for Tax Purposes Act Re-examined*, 46 VA. L. REV. 1257, 1262 (1960); Comment, *supra* note 18, at 493-96, 502-03; cf. Barnes,
variation from the standard apportionment formula if the taxpayer can establish that its application would result in a tax that failed to represent fairly the degree of the corporation's business activity in the taxing state.\(^{100}\) Initially, only a limited number of states adopted UDITPA.\(^{101}\) After the Act's incorporation into the 1967 Multistate Tax Compact,\(^{102}\) however, many more states employed it in their tax apportionment schemes.\(^{103}\)

3. Multistate Tax Compact

In 1964, a congressional subcommittee published what is known as the Willis Report, a study on state taxation of interstate business.\(^{104}\) The Report criticized the diversity in state apportionment formulas\(^{105}\) and recommended a federal allocation plan using a two-factor (property and payroll) formula.\(^{106}\) The Report suggested that differences among the state systems created the possibility of haphazard taxation, required additional paperwork, increased business costs, and generated taxpayer disrespect for the laws.\(^{107}\) Coupled with threats of federal intervention in the state taxing methods, the Report prodded the states to police themselves.\(^{108}\)

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Prerequisites of a Federal Statute Regulating State Taxation of Interstate Commerce, 46 VA. L. REV. 1269, 1277-78 (1960) ("sharing the wealth . . . cannot be accomplished by application of the 'market state' concept"). It is also significant that UDITPA adopted the "destination" test for sales; that is, a sale will be deemed to occur at the point of destination. This was matter of compromise because other approaches, such as reliance on three sales factors (negotiation, origin, and destination), had been proposed. See Lynn, supra note 96, at 94, 99; Comment, supra note 18, at 500.

100. UDITPA § 18 (1957).


104. WILLIS REPORT, pts. 1 & 2, supra note 13. For a discussion of the pertinent provisions of the WILLIS REPORT, see Celler, supra note 90, at 388-90.

105. WILLIS REPORT, supra note 13, at 128.


107. WILLIS REPORT, supra note 13, at 522, 583-88. The Willis Committee advocated eliminating the sales factor because of the difficulties and expense of administration and compliance. J. HELLERSTEIN & W. HELLERSTEIN, supra note 4, at 401. Businesses' reaction to the Willis Committee's proposed two-factor formula for apportionment was, however, negative. See Kust, State Taxation of Interstate Business—An Obdurate Issue, 25 TAX EXEC. 143, 146 (1973).

The product of the states' initiative was the Multistate Tax Compact, which was drafted in 1966 by a special committee of the Council of State Governments.\textsuperscript{109} The draft of the Tax Compact was submitted to the states in January 1967, and soon thereafter a number of states, including Missouri,\textsuperscript{110} enacted it.\textsuperscript{111} The Multistate Tax Commission, composed of representatives from states that have enacted the Compact, constitutes the governing board and administrative agency for the Compact.\textsuperscript{112} Associate member states, those that have not enacted the Compact in full, are permitted to participate in Commission meetings but are not allowed to vote.\textsuperscript{113}

Drafters of the Multistate Tax Compact had several goals in mind.\textsuperscript{114} They did, however, express one overriding motivation for formulating the Compact:

The basic justification for the Multistate Tax Compact is that the States themselves are the most appropriate instruments for the determination of their own tax laws and policies. The Compact is a means by which the States can cooperatively work out any problems which may exist, or which may arise in the future, because businesses function in more than one State. Further, the

\textsuperscript{109} The complete text of the Multistate Tax Compact appears in 1 ST. TAX GUIDE (CCH) ¶ 351 (1982); 1 ST. & LOC. TAX SERV. (P-H) ¶ 6310 (1977); Note, The Constitutionality of the Multistate Tax Compact, 29 VAND. L. REV. 453, app. 470-85 (1976).

\textsuperscript{110} Missouri codified the Multistate Tax Compact at MO. REV. STAT. § 32.200 (1978). References to the Compact in this Comment will be cited to the Missouri statute.

\textsuperscript{111} 1 ST. TAX GUIDE (CCH) ¶ 351, at 356 (1982). As of 1982, the following states had enacted the Compact: Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Washington, and West Virginia. States that are associate members of the Compact include the following: Alabama, Arizona, Delaware, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania, and Tennessee. \textit{Id.}

\textsuperscript{112} MO. REV. STAT. § 32.200, art. VI (1978). The Tax Commission is authorized to perform interstate audits on behalf of member states. \textit{Id.} art. VIII, ¶ 2. The constitutionality of this audit provision was upheld in United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

\textsuperscript{113} MO. REV. STAT. § 32.200, art. VI, ¶ 1(a) (1978).

\textsuperscript{114} The Compact states four objectives:

1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
2. Promote uniformity or compatibility in significant components of tax systems.
3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
4. Avoid duplicative taxation.

\textit{Id.} art. I.
The record of activity in Congress over the past few years appears to make it likely that if the States do not take cooperative action to deal with the problems alleged to exist, Federal legislation restricting the jurisdiction of the States and their local governments to tax will ensue.115

The Compact represented an effort of the states to foreclose federally imposed methods of taxing corporate income by devising their own format for resolving tax disputes between states and erecting a framework for uniformity in taxing methods. At the same time, it allowed the states to continue their own systems for taxing income earned by businesses in interstate commerce or to make use of the suggested apportionment methods contained in the Compact.

The Multistate Tax Compact incorporated as its article IV the Uniform Division of Income for Tax Purposes Act, which contains two provisions that have particular application to tax apportionment. Article IV, paragraph 3, provides that a taxpayer is taxable in another state if "that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not [actually tax the income of the taxpayer]."116 Thus, a business may apportion income in the taxing state so long as it can demonstrate that another state could tax a portion of its income. Article IV, paragraph 9, sets out a suggested apportionment formula based on three factors: payroll, property and sales.117 States which have adopted the Multistate Tax Compact are free to retain their existing provisions for division of interstate income,118 as Missouri has done.119 These states are, however, required to make the Compact's apportionment formula available to any taxpayer wishing to use it.120 The purpose of permitting a taxpayer to choose between apportionment formulas is to pro-

115. Goldberg v. State Tax Comm'n, 639 S.W.2d 796, 799 (Mo. en banc 1982) (quoting Multistate Tax Commission, Suggested State Legislation and Enabling Act C-3 to C-4, reprinted in 23 COMMITTEE OF STATE OFFICIALS ON SUGGESTED STATE LEGISLATION, COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION C-3 to C-4 (1968)).

116. Id. ¶ 9. The Compact requires that a taxpayer seeking to apportion his income must first establish that he has income which is taxable both within and without the taxing state. Art. IV, ¶ 3(2) simply states one circumstance in which income is taxable in another state. The second situation occurs when, as to another state, a taxpayer "is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax." Id. ¶ 3(1).

117. Id. ¶ 9. The Tax Compact has incorporated the unitary business concept into its allocation and apportionment regulations. See Multistate Tax Comm'n Reg. IV,1(b), reprinted in 1 ST. TAX GUIDE (CCH) ¶ 352 (1981).


119. See id. ¶ 143.451; see also Goldberg v. State Tax Comm'n, 639 S.W.2d 796, 803 (Mo. en banc 1982).

120. MO. REV. STAT. § 32.200, art. IV, ¶ 2 (1978).
vide a taxpayer the option of obtaining the benefits of uniform taxation.\footnote{121} The constitutionality of the Tax Compact was upheld in United States Steel Corp. v. Multistate Tax Commission.\footnote{122} The taxpayer contended that the Compact, which had never been endorsed by Congress, was unconstitutional because it violated the compact clause.\footnote{123} The Supreme Court disagreed and concluded that creation of the Tax Compact did not violate the compact clause because it did not further the political power of states belonging to the Multistate Tax Commission in a way that encroached on the supremacy of the United States.\footnote{124}

Nineteen states, plus the District of Columbia, have adopted the Tax Compact.\footnote{125} Despite the Compact's goal of achieving some degree of national uniformity, however, diverse state apportionment methods abound even after the promulgation of this uniform act.

D. Status of Tax Apportionment

The states continue to take various approaches toward taxing business income earned in interstate commerce. A number of states have incorporated the Multistate Tax Compact's three-factor formula as their sole apportionment method, while others offer the option of using the Compact

\footnote{121} Goldberg v. State Tax Comm’n, 639 S.W.2d 796, 799 (Mo. en banc 1982) (quoting Multistate Tax Commission, Suggested State Legislation and Enabling Act C-4, reprinted in 23 COMMITTEE OF STATE OFFICIALS ON SUGGESTED STATE LEGISLATION, COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION C-4 (1968)). As of 1977, 41 of the 46 jurisdictions which impose a corporate net income tax either prescribed a three-factor formula by statute or permitted it as an option. 1 ST. & LOC. TAX SERV. (P-H) ¶¶ 10,203-10,943 (1977). Nevertheless, some writers have pointed out that this apparent uniformity is deceptive. First, states differ on when a particular sale may be attributed to the taxing state, with some states looking to the destination of the product to be sold (market state) and other states relying on the location of the property at the time of sale (origins test), or the state where the sale was solicited or executed. See Hartman, supra note 41, at 1104; Comment, supra note 18, at 488-89. Second, a few states have revised the three-factor formula by giving double weight to the sales factor, thereby making it worth one-half of the equation. See, e.g., FLA. STAT. ANN. § 220.15(4) (1981); MASS. GEN. LAWS ANN. ch. 514, § 38(2) (West 1978). Third, the “safety valve” provision that originated in UDITPA permits deviation from the prescribed apportionment method where the result would be unfair. See text accompanying note 100 supra. Fourth, regulations proposed by the Multistate Tax Commission to guide interpretation of the Compact are not binding on the states. MO. REV. STAT. § 32.200, art. VII, ¶ 3 (1978).}


\footnote{123} 434 U.S. at 458. U.S. CONST. art. I, § 10, cl. 3 provides in part, “No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . .”

\footnote{124} 434 U.S. at 472-78.

\footnote{125} 1 ST. TAX GUIDE (CCH) ¶ 351, at 356 (1982).
formula or some alternative formula. Aside from Public Law 86-272, which provides some guidelines for the states' exercise of taxing jurisdiction, there has been no federal legislation controlling state taxation of business income. The states are still left largely to their own taxation methods with little outside interference.

The United States Supreme Court has provided some help in defining the constitutional limits of state taxation of income earned from interstate operations, but even with the large body of federal case law, few definite guideposts emerge. Income must be wholly intrastate or attributable to unitary business operations before a state may tax it. There is, however, no absolute criteria for finding a unitary business; at this juncture courts are left to analyze the particulars of a given taxpayer's business activities and measure their findings against the determinative facts in prior cases.126 The application of the due process and commerce clauses is equally cloudy. Although it may be said that a state tax that meets the four standards expressed in Complete Auto Transit, Inc. v. Brady127 will pass muster for both due process and commerce clause purposes, each of those four standards requires a detailed look at the facts of each case. This process is not significantly different from other situations a court must face, but the task is made more difficult by the vagueness of such criteria as "substantial nexus," "fairly apportioned," and "discriminatory taxation."128

III. APPORTIONMENT OF BUSINESS INCOME FOR TAX PURPOSES IN MISSOURI

A. Statutory Background

The first Missouri corporate income tax laws were enacted in 1917.129 They imposed a tax on the total net income of Missouri corporations but taxed foreign corporations doing business in Missouri only on net income generated in Missouri.130 Consequently Missouri corporations were exposed to possible tax discrimination, because a Missouri corporation doing business in another state could be subject to income taxes in that state on the income generated there while remaining taxable in Missouri on its total

126. See, e.g., Kennecott Copper Corp. v. State Tax Comm'n, 27 Utah 2d 119, 493 P.2d 632 (corporation expressed concern that unitary business concept not applied uniformly by states and thus creates risk of double taxation), cert. denied, 409 U.S. 973 (1972). Professor Hellerstein has predicted that the indecisive reasoning of ASARCO, Inc. v. Idaho State Tax Comm'n, 102 S. Ct. 3103 (1982), will invite increased litigation over the facts that will support a finding of unitary business. Hellerstein, supra note 41, at 173.


128. See id.

129. 1917 Mo. Laws 524.

130. See Artophone Corp. v. Coale, 345 Mo. 344, 352, 133 S.W.2d 343, 346 (1939).
net income. A corporation chartered in a state imposing no, or limited, income taxes could conduct essentially identical operations within and without Missouri as a domestic corporation, yet Missouri would tax the total net income of the Missouri corporation and only a small portion of that of the foreign corporation. To solve this problem, the Missouri income tax laws were revised in 1927, imposing a tax on the net income of all corporations, both foreign and domestic, from all sources within this state, including a reasonable proportion of net income derived from business partially within and partially without the state which could not be specifically allocated. The laws were amended again in 1929, and the apportionment formula that now appears in Missouri Revised Statutes section 143.451 was added.

A second statute governing apportionment of income for corporate taxpayers was enacted in 1967 as part of the Multistate Tax Compact. It provides that apportionment shall be used by a taxpayer whose income is derived from business activity which is taxable both in Missouri and in some other state. A company subject to income tax in Missouri may also use separate allocation of income and thereby avoid apportioning income earned outside Missouri if it has kept its books and records to clearly show what income is derived in Missouri and what income is derived in some other state or states.

Once a business determines that its income qualifies for apportionment, it may elect to use one of two available apportionment formulas. The first of these is a single-factor sales formula. The second formula, derived from the Multistate Tax Compact, relies on the three factors of

131. Id. at 352-53, 133 S.W.2d at 346.
132. 1927 Mo. Laws 475.
133. MO. REV. STAT. § 13108 (1929).
134. 1929 Mo. Laws 423.
136. 1967 Mo. Laws 102, 104 (codified at MO. REV. STAT. § 32.200, art. IV, ¶ 2 (1978)).
137. Id. § 143.461.2.
138. Id. § 143.451. The pertinent portion of this statute reads:
1. Missouri taxable income of a corporation shall include all income derived from sources within this state.
2. A corporation . . . shall include in its Missouri taxable income all income from sources within this state, including that from the transaction of business in this state and that from the transaction of business
property, payroll, and sales. 140

B. Single Factor Apportionment

The language of Missouri Revised Statutes section 143.451141 provides that net taxable income for a corporation shall include all income "from sources within this state."142 Part of this net figure must represent any income derived from the transaction of business partially in this state and partially in another state.143

In addition, section 143.451.2(1) provides that if the portion of income generated in the various states cannot be segregated, then an amount partly done in this state and partly done in another state or states.

However:

1. Where income results from a transaction partially in this state and partially in another state or states, and income and deductions of the portion in the state cannot be segregated, then such portions of income and deductions shall be allocated in this state and other state or states as will distribute to this state a portion based upon the portion of the transaction in this state and the portion in such other state or states.

2. The taxpayer may elect to compute the portion of income from all sources in this state in the following manner:

(a) The income from all sources shall be determined as provided, excluding therefrom the figures for the operation of any bridge connecting this state with another state.

(b) The amount of sales which are transactions wholly in this state shall be added to one-half of the amount of sales which are transactions partly within this state and partly without this state, and the amount thus obtained shall be divided by the total sales or in cases where sales do not express the volume of business, the amount of business transacted wholly in this state shall be added to one-half of the amount of business transacted partly in this state and partly outside this state and the amount thus obtained shall be divided by the total amount of business transacted, and the net income shall be multiplied by the fraction thus obtained, to determine the proportion of income to be used to arrive at the amount of Missouri taxable income.

140. Id. § 32.200, art. IV, ¶ 9. The formula provides, "All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three." Id. The property factor is explained in ¶ 8, the payroll factor in ¶ 13, and the sales factor in ¶ 15.


143. Id. § 143.451.2.
should be allocated to Missouri which will distribute to the state "a portion based upon the portion of the transaction in this state and the portion in such other state or states." 144 Once it has been determined that the business's interstate income cannot be segregated, it may elect to apportion its income following the single-factor formula. 145

Clearly, the determination of what constitutes a sale which is a transaction "wholly" in the state, in contrast to a sale which is a "transaction done partly within and partly without the state," is crucial to the proper operation of the single-factor apportionment formula. Although no state regulations exist to aid in determining where a sales transaction occurs, 146 the Missouri legislature in 1981 enacted a statute that defines the situations in which a transaction occurs partially within and partially without the state. 147 In addition, the cases that have construed the apportionment formula have been instrumental in defining when a corporation may elect apportionment and what qualifies as a transaction subject to elective apportionment under the statute.

144. Id. § 143.451.2(1).
145. Id. § 143.451.2(2)(b). The relevant language is set forth in note 140 supra.

In simplified form, Missouri's single-factor sales formula operates as follows:

\[
\text{Net Income} \times \frac{100\% \text{ of Sales which are transactions wholly in Missouri}}{\text{Total Sales}} + \frac{50\% \text{ of Sales which are transactions partly within Missouri}}{100}
\]

The fraction obtained is multiplied by total net income to compute Missouri taxable income.

146. Note, supra note 141, at 618 n.19. The authors observe that there are presently no state regulations to guide interpretations of Missouri's single-factor apportionment formula. There was a regulation promulgated under Mo. Rev. Stat. §§ 143.040, .100 (1969), which set percentage limits on what constitutes a sale sufficient to equal a transaction, thereby qualifying such income for apportionment. Even this regulation is no longer in operation because it was not redrafted to conform to Mo. Rev. Stat. § 536.023.4 (1978), which sets requirements for the adoption of regulations.


For the purposes of taxation under chapter 143, RSMo, a transaction involving the sale of tangible property is:

(a) "Wholly in this state" and not "in commerce" if both the seller's shipping point and the purchaser's destination point are in this state;

(b) "Partly within this state and partly without this state" and "in commerce" if: (i) the seller's shipping point is in this state and the purchaser's destination point is outside this state, or (ii) the seller's shipping point is outside this state and the purchaser's destination point is in this state. The purchaser's destination point shall be determined without regard to the F.O.B. point or other conditions of the sale.
C. Single-Factor Apportionment Prior to the Multistate Tax Compact: The Source of Income Test

Early Missouri case law focused on what was meant by income earned from transactions partly within and partly without the state, the so-called “source of income” test. The Missouri Supreme Court was faced with deciding two issues: (1) what is a transaction, and (2) when is income attributable to both intrastate and extrastate sources. The first question was resolved through a broad reading of the term “transaction” as including more than is contemplated in a simple contract setting. The second question was answered by examining facts to determine whether the income in question has a clearly defined situs or whether it is a nonseverable product of connected interstate activities.

The first case interpreting single-factor apportionment in Missouri was *Artophone Corp. v. Coale.* Artophone was a Missouri corporation with its principal place of business in St. Louis and a branch office in Kansas City. The corporation distributed electric appliances in Missouri, Illinois, Kentucky, and Kansas. All management activities were performed by corporate executives in St. Louis. Artophone did, however, have a sales force which traveled the four-state area soliciting orders that were subject to approval by the home office. All payments were made directly to the St. Louis office and all goods were shipped from the Missouri warehouse.

Artophone sued for abatement of income taxes assessed against it for the 1936 tax year. The corporation had computed its Missouri net income tax using the single-factor apportionment formula. The state auditor held that a domestic corporation which had no branch office outside of the state was taxable in Missouri on its entire net income. The Supreme Court of Missouri resolved the dispute in Artophone’s favor. First, the court held that a corporation with no office or permanent place of business outside Missouri was not necessarily precluded from using the apportionment formula. Second, and more important, the court gave a broad interpretation of the phrase “sales which are transactions.” The court noted:

> [T]he term “transaction” is broader than is the term “contract,” construing the latter in its strict legal sense. And so we believe was its intended meaning in the statute we are construing. If by “sale” the Legislature meant the ultimate act by which the contract or agreement between seller and buyer was consummated and that the situs of such act should make the corporation subject to taxation for the entire net income resulting from such sale, why the provision for allocation in case of “sales” which are transactions partly within this state and partly without this state?

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148. 345 Mo. 344, 133 S.W.2d 343 (1939).
149. Id. at 349-50, 133 S.W.2d at 344-45.
150. Id. at 350, 133 S.W.2d at 345.
151. Id. at 356-57, 133 S.W.2d at 348.
152. Id.
Under *Artophone*, the issue became one of sufficient ties with the states among which the transactions were to be divided. *Artophone* made it clear that the contacts need not be a physical plant or permanent presence in another state. Rather, the term “sales which are transactions” encompassed more than would be meant in a purely contractual context.\(^\text{153}\)

Shortly after *Artophone*, another dispute calling for construction of the apportionment formula arose in *F. Burkhart Manufacturing Co. v. Coale*.\(^\text{154}\) The Burkhart Company maintained general offices and factories in Arkansas, Pennsylvania, and Michigan. The principal office was in Missouri. Each factory separately accepted and paid its own bills.\(^\text{155}\) The court found that the company’s central management, was not a sufficient tie to justify apportioning some of the company’s net income to Missouri.\(^\text{156}\) Unfortunately, the *Burkhart* court did not clarify how many contacts or how much of the transaction must be done in the state in order to qualify for apportionment.

The court handed down a more helpful decision in *In re Kansas City Star Co.*\(^\text{157}\) The Star was a Missouri corporation engaged in gathering news and distributing newspapers in various states. For the years in question, the Star had allocated a portion of its income to Missouri and a portion to the other states in which it sold papers, based on the percentage of newspaper circulation in Missouri and the percentage of circulation outside the state. The state claimed that all of the Star’s income resulted from activities in Missouri and that its total net income was subject to taxation in Missouri.\(^\text{158}\) The supreme court disagreed and offered two important conclusions. First, even though the Star sought to use separate allocation of income rather than apportionment, the court stated that use of the apportionment formula is triggered when the source of income could not be said to be wholly within or without Missouri.\(^\text{159}\) Second, the court explained

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\(^{153}\) *Id.*

\(^{154}\) *Id.* at 1131, 139 S.W.2d 502 (1940).

\(^{155}\) *Id.*. at 1134, 139 S.W.2d at 503.

\(^{156}\) *Id.* at 1135, 139 S.W.2d at 503-04. There have been a series of Missouri cases holding, consistent with *Burkhart*, that the right to allocate and apportion income is to be determined by the source of a taxpayer’s income. See A.P. Green Fire Brick Co. v. Missouri State Tax Comm’n, 277 S.W.2d 544, 547 (Mo. 1955); *In re Union Elec. Co.,* 349 Mo. 73, 77, 161 S.W.2d 968, 970 (en banc 1942); Union Elec. Co. v. Coale, 347 Mo. 175, 179, 146 S.W.2d 631, 635 (1940). These cases have often been cited as authority for interpreting the source of income test as it applies to the question of eligibility to apportion interstate income. They were decided, however, on a different issue involving the source of certain income for purposes of separately allocating it entirely to one state or country. See Note, *supra* note 141, at 626-27.

\(^{157}\) *Id.* at 658, 142 S.W.2d 1029 (en banc 1940).

\(^{158}\) *Id.* at 663, 142 S.W.2d at 1031-32.

\(^{159}\) *Id.* at 672-73, 142 S.W.2d at 1037. *Kansas City Star* is one of the few opinions where the Missouri Supreme Court has recognized that income earned from a unitary business must be apportioned rather than separately allocated.
that source of income is defined by the nature and location of its “producing cause.” In language clearer than that in Burkhart, the court in Kansas City Star noted that the source of income is not where the sale is accepted but rather depends on whether the activities occurring in the taxing state are such that they “efficiently entered into the process by which the income was earned.” In other words, the source of income is determined by locating the place where the income was produced or earned. If income was earned by labor, the source of income is where that labor was performed; if income was generated by capital, the income’s source is the place where the capital was employed.

State ex rel. River Corp. v. State Tax Commission was the next significant decision applying section 143.451. The issue was whether a Missouri-based corporation was liable for Missouri income tax on sales of cement manufactured in Missouri, delivered to out-of-state sales offices, and sold by an out-of-state sales force. The State Tax Commission argued that the sales were fully taxable in Missouri because the cement was manufactured in and delivered in Missouri. While the court noted that these outside sales established a constitutionally sufficient nexus with Missouri to permit taxation, it concurred with the taxpayer’s argument that by the language of the elective formula the tax was on “sales” or the “amount of sales” which are transactions. Because the sales here were consummated in another state, they were wholly outside Missouri and none of the resulting income was subject to Missouri taxation.

The Missouri Supreme Court overruled River Corp. in the 1978 case of

160. Id. at 671, 142 S.W.2d at 1039.
161. Id.
162. See A.P. Green Fire Brick Co. v. Missouri State Tax Comm’n, 277 S.W.2d 544, 548 (Mo. 1955) (royalties paid to Missouri corporation by foreign corporations for use of trademarks, trade-names, and manufacturing processes in connection with business done entirely outside the United States were not income from sources within Missouri and could be separately allocated); In re Union Elec. Co., 349 Mo. 73, 76, 161 S.W.2d 968, 970-71 (en banc 1942) (source of income for dividends on Missouri corporation’s shares of stock in foreign corporations is outside Missouri when dividends are generated from expenditure of labor and use of capital outside the state); Union Elec. Co. v. Coale, 347 Mo. 175, 183, 146 S.W.2d 631, 635 (1940) (dividends paid on stock in foreign corporations did not have “source” in Missouri because activities producing income from stock were conducted wholly outside Missouri).
163. 492 S.W.2d 821 (Mo. 1973) (overruled in International Travel Advisors, Inc. v. State Tax Comm’n, 567 S.W.2d 650 (Mo. en banc 1978)).
164. Id. at 822-23.
165. Id. at 824.
166. Id. at 828-29. An important element of the court’s decision was the operation of Department of Revenue Reg. M.R. 210, which was designed to guide interpretations of single-factor apportionment.
International Travel Advisors, Inc. v. State Tax Commission.\(^{167}\) The court rejected the River Corp. view that the apportionment formula was based on sales; instead, it found that the tax should be based entirely on transactions, not sales.\(^{168}\) International Travel was a Missouri corporation with its only offices in St. Louis. It engaged in organizing, selling, and conducting group tours. Part of its sales staff traveled throughout the country, soliciting organizations to sponsor tour packages. A member of a sponsoring organization made an individual tour reservation by mailing a deposit to the organization, which transferred the money to International Travel’s St. Louis office. Before the tour’s departure, International Travel billed each person and payment was made to the home office. In its 1970 Missouri tax return, the company elected to use the single-factor apportionment formula, excluding from its calculation all proceeds from tours sold to individuals in foreign states and including only one-half of the income from tours for Missouri organizations. The court found against the taxpayer and stated, “We have concluded that our decision in River Corporation that the tax is on sales rather than transactions where the elective formula of subsection 2 is utilized is incorrect.”\(^{169}\) The court held that the single-factor apportionment formula continued to be based on transactions rather than sales and that the formula only provided an alternate method of determining the company’s tax where there were transactions which occurred partly in Missouri and partly in some other state.

Several conclusions can be drawn from Missouri Supreme Court decisions regarding the Missouri law of apportionment in the absence of the Multistate Tax Compact. Initially, a corporation was entitled to use the apportionment formula so long as it met the source of income test, i.e., the income in question was derived from transactions partly within and partly without the state. As cases such as Artophone and F. Burkhardt Manufacturing suggest, a sufficient connection with both the taxing state and a foreign state had to be established in order to show that the source of income was truly an interstate transaction. In addition, cases interpreting source of income as it applies both to apportionment under section 143.451.2 and to separate allocation under section 143.451 have concluded that the source of income is to be identified by looking to that place where income is produced or earned. Unfortunately, for purposes of divining the source of income earned through the interstate activities of a unitary business, this test offers little guidance. A final conclusion permitted from the cases is that the term

\(^{167}\) 567 S.W.2d 650 (Mo. en banc 1978). Although International Travel was decided in 1978, eleven years after Missouri had enacted the Multistate Tax Compact, the opinion does not address the conflicts between the Compact rules and the extant Missouri statutes used for determining eligibility to apportion income. International Travel only alludes to the Multistate Tax Compact’s effect by terming single-factor apportionment an elective formula. Id. at 653.

\(^{168}\) Id. at 654.

\(^{169}\) Id.
“transaction” is broad enough to permit much more than mere sales to dictate what is an appropriate subject for apportionment of income.

D. **Cases Interpreting the Multistate Tax Compact**

When it adopted the Multistate Tax Compact, the Missouri legislature subjected corporate taxpayers and state tax agencies to apparently conflicting rules for determining when corporate income is apportionable. Three decisions by the Missouri Supreme Court have grappled with the question of whether apportionability should be decided by Missouri’s traditional source of income test or by the test set forth in the Tax Compact, which permits a corporation to apportion income if it can show that it is also subject to taxation in another state. The first two decisions confronting this dichotomy concluded that the Multistate Tax Compact test was controlling. The Missouri Supreme Court in 1982, however, reconsidered its position, concluding that the legislature intended that the source of income test should continue to control the threshold question of apportionability.

Although Missouri adopted the Multistate Tax Compact in 1967, it was not until 1980, in *M. V. Marine Co. v. State Tax Commission*,\(^\text{170}\) that certain conflicts between the Compact and Missouri’s traditional apportionment scheme were addressed. The taxpayers in *M. V. Marine* were each wholly-owned subsidiaries of Marine Petroleum Company. These subsidiaries and the parent company were Missouri corporations which maintained a joint office in St. Louis. The disputed income was generated from the rental of barges, a towboat, and steel-tank trucks owned by the subsidiaries for use in the interstate transportation and sale of petroleum products. The taxpayers claimed that for purposes of their Missouri income taxes for the past four years, the rental income had been earned partly within and partly without the state, pursuant to Missouri Revised Statutes sections 143.040 and 143.451. The Department of Revenue disagreed and notified the taxpayers that their rental income constituted income from sources wholly within Missouri and that they were to be taxed on one hundred percent of such income.\(^\text{171}\)

The Missouri Supreme Court relied heavily on the Multistate Tax Compact to resolve the dispute. The court examined case law before the enactment of the Compact and noted that if these decisions were still controlling the *M. V. Marine* taxpayers might well conclude that the rental income originated in part from sources entirely outside of Missouri and was subject to elective apportionment.\(^\text{172}\) But enactment of the Multistate Tax Compact rendered the old case law no longer determinative. Although the court recognized that a taxpayer still had discretion in the method of apportionment he might choose, it held that all other questions pertaining to

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170. 606 S.W.2d 644 (Mo. en banc 1980).
171. *Id.* at 646-47.
172. *Id.* at 648.
apportionment of income must be resolved by reference to the Tax Compact.\textsuperscript{173} Specifically, the court looked to the Compact for the test used to determine a corporation's eligibility to apportion. Before the Compact, the clear pre-condition was a finding that income was earned partly within and partly without the state—the source of income test.\textsuperscript{174} The Compact, however, conditions a taxpayer's right to apportion interstate income on a showing that it has "income from business activity which is taxable both within and without this state."\textsuperscript{175} The court remanded the case to determine whether some other state had taxing jurisdiction over the rental income in question.\textsuperscript{176}

\textit{M.V. Marine} was an important decision, partly because it changed the threshold requirement for eligibility to elect apportionment of interstate income, but also because of its broad statement that, aside from the actual apportionment method chosen, all other apportionment issues were to be determined by reference to the Multistate Tax Compact. This decision certainly laid the groundwork for the controversial decisions in \textit{Goldberg v. State Tax Commission (Goldberg I}\textsuperscript{177} and \textit{Goldberg II}).\textsuperscript{178}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 648-49. The \textit{M.V. Marine} court did not indicate what factors prompted its determination that the corporate income statutes should be reinterpreted. Neither party to the appeal had argued for a new interpretation of the law, \textit{Goldberg v. State Tax Comm'n}, No. 62821, slip op. at 1 (Mo. en banc Jan. 12, 1982) (Welliver, J., dissenting) (\textit{Goldberg I}), and the Multistate Tax Compact had been in effect for thirteen years before \textit{M.V. Marine} was decided.
\item 606 S.W.2d at 648. \textit{See also} A.P. Green Fire Brick Co. v. Missouri State Tax Comm'n, 277 S.W.2d 544, 547 (Mo. 1955).
\item MO. REV. STAT. § 32.200, art. IV, ¶ 2 (1978).
\item 606 S.W.2d at 653.
\item No. 62821 (Mo. en banc Jan. 12, 1982) (principal opinion reprinted in [2 Missouri] ST. TAX REP. (CCH) ¶ 200-772 (1982)). The opinion in \textit{Goldberg I} was never officially reported because rehearing was granted in the case in early February 1982. Between \textit{M.V. Marine} and \textit{Goldberg I}, the Missouri Court of Appeals for the Western District handed down a decision on whether a corporate taxpayer must include as apportionable income royalties paid to it by foreign corporations for the use of trademarks, trade names, and manufacturing processes. A.P. Green Refractories Co. v. State Tax Comm'n, 621 S.W.2d 340 (Mo. App., W.D. 1981). A.P. Green Refractories is a Delaware corporation with its principal office in Mexico, Missouri. On its Missouri income tax returns for the years in question, it included all income derived from sources wholly within Missouri and used the single-factor sales formula to apportion income earned partially in Missouri and partially in other states. The return excluded from the tax base income earned from royalty payments under contracts with several foreign corporations conducting business wholly outside the United States on the theory that this was income from sources wholly outside Missouri. \textit{Id.} at 341-42. The Tax Commission acknowledged that a taxpayer can use separate accounting methods to specifically allocate portions of income from interstate transactions to specific source states. The Commission, however, contended that the taxpayer's use of an apportionment formula for some of its income showed that the transactions were too mixed to separately allocate the in-
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The taxpayer in Goldberg was Paul Mueller Company, a manufacturer of stainless steel products which were sold throughout the United States. The company employed sales representatives outside of Missouri, but all orders and payments went through the principal office in Springfield, Missouri. The taxpayer used section 143.451 to apportion its net income attributable to sales made outside Missouri. It included one-half of the income derived from sales to purchasers outside Missouri in the numerator of the single-factor formula, arguing that these sales resulted from transactions that occurred partially within and partially without the state. The Missouri Director of Revenue assessed additional taxes, contending that the disputed sales had taken place entirely within Missouri. The State Tax Commission reversed the Director's decision, but the circuit court reinstated it and upheld the additional taxes assessed. 179 At the first hearing before the Missouri Supreme Court, the Commission argued that the taxpayer was entitled to apportion its income, basing its argument on legislative intent, the clear language of section 143.451, and prior case law interpreting the statute. 180 The Commission also contended that article III, paragraph 1 of the Compact provided the language necessary to avoid irreconcilable conflict between the Compact and section 143.451. It claimed that clause allowed the taxpayer to select not only the formula by which he would apportion but also the test by which the right to apportion would be determined. 181 Four justices in Goldberg I, however, believed that M.V. Marine
was controlling. The majority found that article III, paragraph 1 of the Compact was designed only to offer the taxpayer a choice of apportionment formulas—the taxpayer could choose how, but not when, to apportion.182 Since Mueller had not shown tax liability in another state, the court affirmed the Director's determination that apportionment was unavailable.

Following the opinion in Goldberg I, rehearing was granted on the issue whether the taxpayer could, for purposes of determining its Missouri income tax liability, apportion the income received from the sale of goods to out-of-state customers.183 The Missouri Supreme Court reversed its decision in Goldberg I and held in Goldberg II, that the taxpayer was entitled to use the source of income test as the method for determining its eligibility to apportion income earned in interstate commerce.184

In Goldberg II, the supreme court reexamined M.V. Marine's position that the Multistate Tax Compact had shifted the focus of eligibility to elect apportionment from a search for the source of income to a showing of jurisdictional tax liability in another state.185 The court unequivocally held that M.V. Marine's statement of the law of apportionment was incorrect.186 The Goldberg II court agreed with the result in M.V. Marine because the transactions there were fully consummated within Missouri, making the resulting income wholly taxable by the state. It found, however, that because the question of apportionment was not truly at issue, the M.V. Marine language regarding taxing jurisdiction in another state was dicta. Furthermore, the Goldberg II court found this dicta flawed.187

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Id. at 3-4 (Bardgett, J., concurring in result) (footnotes omitted).

182. Id. at 7 (Chief Justice Donnelly and Judges Rendlen, Higgins and Morgan), reprinted in [2 Missouri] ST. TAX REP. (CCH) ¶ 200-772, at 11,140 (1982). The Goldberg I majority discussed art. III, ¶ 1 of the Compact only by reference to the decision in M.V. Marine. The majority opinion quoted the language in M.V. Marine which set forth the new apportionability rule and then stated, "Only after such a showing, may a taxpayer elect to apportion his income pursuant to § 143.451 or § 32.200, art. III, RSMo 1978." Id. at 3, reprinted in [2 Missouri] ST. TAX REP. (CCH) ¶ 200-772, at 11,138 (1982).

183. Goldberg v. State Tax Comm'n, 639 S.W.2d 796 (Mo. en banc 1982) (Goldberg II).

184. Id. at 797.

185. Re-examination of M.V. Marine was strongly urged by amicus curiae. Amicus curiae briefs were filed in the case by Associated Industries of Missouri, Checker Food Products Co., Swing-A-Way Manufacturing Co., Continental Disc Corp., Mid-Western Machinery Co., Russell Stover Candies, Inc., Rival Manufacturing Co., and the Multistate Tax Commission. In addition, the Missouri Chamber of Commerce appeared as amicus curiae. Id. at 798 n.2.

186. Id. at 798. The principal opinion in Goldberg II was written by Judge Weliver and joined by Chief Justice Donnelly and Judges Seiler and Bardgett. Judge Higgins filed a separate dissenting opinion with which Judges Rendlen and Morgan concurred. Id. at 803 (Higgins, J., dissenting).

187. 639 S.W.2d at 798-99.
In Goldberg II the court stated that M.V. Marine showed a "fundamental misinterpretation of the purpose underlying the adoption of the Compact,"188 to the extent that the Marine court said the Compact should control future apportionment questions. Goldberg II found that the Multistate Tax Compact was enacted principally because of the states' fear that Congress would take away their power to tax business income generated from interstate transactions. The supreme court supported its federal preemption argument with an examination of the case law leading up to the Compact and by reference to the drafters' statements on the Compact's intended purpose. The court concluded that the Compact was the result of the states' cooperative effort to forestall threatened congressional action and that "the drafters of the Compact and those states that adopted it never intended for it to have a substantive effect on taxation."189

A second basis for the Goldberg II holding was the court's perception of the legislative intent behind the Missouri statute that provides for elective single-factor apportionment. Initially, the court pointed out that even the Multistate Tax Commission's regulations do not limit eligibility for apportionment to a showing of jurisdictional tax liability in another state. Regulation III.1.(A) permits a taxpayer to apply Compact guidelines or to proceed under the "income tax laws of a party state" that exist independently of the Compact.190 In Missouri, whether a taxpayer is entitled to apportion interstate income had traditionally been decided by the source of income test of section 143.451. Moreover, the Compact provides in article III, paragraph 1, that:

any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in two or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with article IV.191

Thus, the court concluded that M.V. Marine incorrectly held that the Compact's test for eligibility to apportion income abrogated Missouri's pre-Compact test for apportionability because the Compact clearly provides that a taxpayer is eligible to apportion so long as he qualifies under the taxing state's law.192

188. Id. at 799.
189. Id. at 799-800.
190. Id. at 800. See Multistate Tax Comm'n Reg. III.1(A), reprinted in 1 ST. TAX GUIDE (CCH) ¶ 352 (1980). The Missouri Supreme Court suggests in Goldberg II that part of the confusion surrounding the issue whether the Tax Compact or traditional Missouri law controls eligibility to apportion income may be attributable to the fact that Missouri has never enacted Regulation III. 639 S.W.2d at 800 n.4.
192. 639 S.W.2d at 801.
The next inquiry, however, was how the taxpayer was to make the initial determination whether his income was subject to apportionment. The Compact requires a taxpayer to look "to the laws of a party state or . . . to the law of subdivisions in two or more party states,"\(^\text{193}\) rather than limiting him to the jurisdictional test of article IV, paragraph 2. The court believed that an examination of Missouri law indicated a clear legislative intent that the pre-Compact source of income test be followed in Missouri, the "party state." First, \textit{Goldberg II} noted the Missouri legislature's failure to adopt section 21 of the Uniform Division of Income for Tax Purposes Act, which provided for the repeal of "acts and parts of acts."\(^\text{194}\) The court noted that this omission indicated that the legislature "did not intend by the adoption of the Compact to vitiate the 'source of income' test of § 143.451."\(^\text{195}\) \textit{Goldberg II} found further evidence of intent in the legislature's specific refusal to enact three bills that would have abolished the source of income test in favor of the Compact's jurisdictional test.\(^\text{196}\) In addition, after adopting the Compact in 1967, the legislature reenacted section 143.451 and accompanying statutes in the statutory revisions of 1969 and 1978 and in the income tax revision of 1972.\(^\text{197}\) A final indicator of legislative intent was the fact that the general assembly had twice in the Missouri Revised Statutes the phrases "'wholly within this state' and not 'in commerce'" and "'partly within this state and partly without this state' and 'in commerce.'"\(^\text{198}\) These definitions are significant because of their connection to the traditional source of income test.

After setting out what the court saw as a positive legislative intent and an interpretation of the Compact that is consistent with traditional Missouri law, \textit{Goldberg II} indicated that, on the question of eligibility to apportion, state courts should revert to the Missouri law of apportionment as it existed prior to adoption of the Multistate Tax Compact:

\footnotesize
\begin{itemize}
\item 194. \textit{UDITPA} § 21 (1957).
\item 195. 639 S.W.2d at 801.
\item 198. \textit{Mo. Rev. Stat.} § 144.010.1(7)(a), (b) (Supp. 1982).
\end{itemize}
We hold that the determination whether a taxpayer may elect to apportion income derived from the transaction of business in interstate commerce should be based upon the "source of income" test of § 143.451 and its predecessors and the longstanding judicial interpretation thereof. Language in *M.V. Marine* to the contrary should not be followed. 199

The language used by the *Goldberg II* majority strongly suggests that the only test for eligibility to apportion interstate income that will be recognized in Missouri is the source of income test found in section 143.451.

Although the Missouri Supreme Court seems to have stated unequivocally its preference for the source of income test, three recent Missouri cases offer the court the opportunity to further define when income qualifies for apportionment under the test based on transactions partially within and partially without the state. In *Montgomery Ward & Co. v. State Tax Commission*, 200 the principal issue was whether certain interest income received by a nondomiciliary corporation must be included in a taxpayer's net income when an election has been made to apportion income under the single-factor sales formula. 201 The Missouri Supreme Court vacated the State Tax Commission's determination that Montgomery Ward had improperly excluded this interest income and remanded the case for findings and further consideration in light of recent United States Supreme Court decisions. In *Langley v. Administrative Hearing Commission*, 202 the most recent case decided by the court, the Director of Revenue appealed from the Commission's

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199. 639 S.W.2d at 803.


201. In *Montgomery Ward* the taxpayer appealed the circuit court's decision that it had improperly excluded from the single-factor formula's net income base interest income earned from loans made to subsidiary and affiliate corporations and investments in commercial paper and certificates of deposit. The taxpayer explained that this income was unconnected to Missouri because none of the sources of the interest income was a Missouri corporation, conducted business in Missouri, or was present in Missouri. In addition, none of the interest was paid to Montgomery Ward in Missouri. Counsel for Montgomery Ward also referred the Missouri Supreme Court to the recent decision in *ASARCO, Inc. v. Idaho State Tax Comm'n*, 102 S. Ct. 3103 (1982), arguing that under *ASARCO* Missouri may not include in net taxable income interest that is derived from sources unconnected with the state and that is not the product of a unitary business. Letter from David J. Kornelis, counsel for appellant, to Chief Justice Robert T. Donnelly (Aug. 12, 1982) (available in Missouri Supreme Court Clerk's Office). A responsive letter on behalf of the State Tax Commission argued that *ASARCO* and the companion case of *F.W. Woolworth Co. v. Taxation & Revenue Dept.*, 102 S. Ct. 3128 (1982), merely followed the line of cases reflected in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), and focused on UDITPA's "business" and "nonbusiness" income distinction, something not pertinent to apportionment under Mo. REV. STAT. § 143.451 (1978). Letter from Richard L. Weiler, Assistant Atty. General, to Thomas F. Simon (Oct. 14, 1982) (available in Missouri Supreme Court Clerk's Office).

202. No. 62541 (Mo. en banc April 26, 1983).
finding that the taxpayer's income from the sale of bottles to Anheuser-Busch's St. Louis brewery was not income earned entirely in Missouri and that the taxpayer was thus entitled to apportion.\textsuperscript{203} The Director argued that the income was not apportionable because it was not generated from transactions occurring partly in Missouri and partly in Illinois. The court decided that a sale of goods by the taxpayer which were shipped from an out-of-state manufacturer to the taxpayer's customer in Missouri was not a transaction occurring partly within and partly without Missouri.\textsuperscript{204} The most recent case to be filed in Missouri on the subject of apportionment is \textit{Brown Group, Inc. v. Administrative Hearing Commission}.\textsuperscript{205} In \textit{Brown Group}, the taxpayer elected to apportion income to Missouri using the single-factor sales formula but sought to allocate royalties earned in Japan separately to that country and to exclude these royalties from the net income figure used in Missouri's apportionment formula. The Administrative Hearing Commission determined that all income from the foreign royalties must be included as Missouri net taxable income, and Brown Group appealed. Although each of these cases involves slightly different issues, they all offer the opportunity to refine interpretation of Missouri's apportionment scheme.

IV. ALTERNATIVES

A. Uniform Federal Standards

A number of judges and tax scholars have argued that much of the confusion surrounding state taxation of multistate business income could be resolved by having a uniform procedure formulated by Congress and imposed on all of the states.\textsuperscript{206} Although members of the United States Supreme Court have expressed the belief that federal action is needed with

\textsuperscript{203} Id., slip op. at 1. Both the Commission and the Director of Revenue agreed that sales of bottles that were shipped from out of state manufacturers to out of state breweries were transactions partially within and partially without Missouri. \textit{Id.} at 2. The disputed income was that derived from sales of bottles that were shipped from out of state manufacturers to a brewery in Missouri.

\textsuperscript{204} Id. at 1. Judge Higgins, writing for the court, analyzed the issues under the source of income test:

Such arrangements and purchases (for resale) are not a part of the transaction by which the taxpayer sells or resells to its customers. . . . Unless the taxpayer uses labor or capital outside this state in its transaction, the income from the transaction must be regarded as produced from a source wholly within this state.

\textsuperscript{205} Id. at 3.

\textsuperscript{206} No. 640130 (Mo. en banc filed June 16, 1982).
regard to uniform methods of apportionment,\textsuperscript{207} the Court has been unwilling to impose judicial requirements except when constitutional concerns such as due process or the commerce clause are involved.\textsuperscript{208} Rather, the Court has observed that any reform to be imposed on state taxation methods must come from the Congress.\textsuperscript{209} Congressional authority to compel the states to use uniform methods in apportioning multistate income could be found in the commerce clause.\textsuperscript{210} Nevertheless, some commentators have argued that the commerce clause does not grant Congress authority to interfere with the sovereign power of the states to tax.\textsuperscript{211}

If Congress has the authority, the form that federal action might take is unclear. Public Law 86-272,\textsuperscript{212} a federal statute restricting state taxation of income earned from interstate sales solicitation, was formulated to ensure that state assessments of income earned in interstate transactions would comply with due process and the commerce clause; it represents one type of restraint that might be pursued. In fact, legislation has been proposed to place more stringent requirements on the states’ exercise of taxing jurisdiction over multistate enterprises.\textsuperscript{213} It has been suggested that the federal government abolish the states’ diverse apportionment formulas and collect an additional tax on corporate income earned in interstate commerce. The funds subsequently would be returned to the states on some proportionate basis, such as revenue sharing, so that a given corporation would not face the prospect of being taxed on the same income twice in two different states.\textsuperscript{214} The most favored proposal for uniform action on a national level, however, is the creation of one formula to be used by all states for purposes


\textsuperscript{209} See Morrman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978). As recently as 1982, the Supreme Court in \textit{ASARCO} stated, “The question of federal authority to legislate in this area—whether to lay taxes or to delegate such power—is not presented in this case, and we imply no view as to it.” 102 S. Ct. at 3115 n.23. Moreover, Chief Justice Burger concurred in the \textit{ASARCO} and \textit{F.W. Woolworth} decisions only after stating that he was acting in reliance on the Court’s statement that its holdings “do not preclude future Congressional action in this area.” 102 S. Ct. at 3140 (Burger, C.J., concurring).


\textsuperscript{211} See Roland, \textit{supra} note 88, at 1186.


\textsuperscript{214} Barnes, \textit{supra} note 99, at 1272-73.
of apportioning income earned partly within and partly without their borders.215

Proponents have advanced several arguments for creating a federally imposed system. Federal guidance in the area of state taxation of interstate business income may prevent the risk of double taxation that results when states use apportionment formulas that have different factors.216 For example, State $X$ may have a single-factor apportionment formula that allocates income on the basis of sales, while State $Y$ may have a three-factor formula that apportions income based on sales, property owned in the state, and the in-state payroll figures. A corporation that manufactures widgets in State $Y$ (where it owns property, incurs payroll costs, and initiates the sales transaction) and sells the widgets in State $X$ may be taxed on the same income twice. Arguably, a uniform apportionment formula imposed by federal law would avoid the possibility of taxing the same income twice because each state would be applying the same factors and giving each factor equal weight. A further justification offered for a federal apportionment scheme is the likelihood that it would create more predictable tax consequences for businesses earning income in interstate transactions because these businesses would not have to speculate about state rules of income apportionment.217

One of the most persuasive arguments made by critics of federal intervention is that any apportionment scheme formulated by Congress would inevitably infringe on the states’ sovereignty and authority to tax.218 States have a strong interest in preserving their authority to fashion taxes on income earned within their borders, largely because of the important role corporate income taxes play in state revenue. A further criticism focuses on choosing an apportionment method. This would not seem to be unduly controversial, at least as to the choice of an apportionment formula, because a majority of the states already use a three-factor formula based on property, payroll, and sales.219 The Supreme Court, however, in Moorman Manufacturing Co. v. Bair220 expressed the belief that any uniform system should be undertaken only after due consideration is given to the interests of all affected states.221 Certainly states such as Missouri, which has a long his-

216. Hartman, supra note 41, at 1103-04; Hellerstein, supra note 27, at 347; Studenski, supra note 18, at 1133-34.
217. Corrigan, supra note 99, at 437-38. Corrigan observes that this concern is pronounced among small businesses since they are less likely to be able to finance a large staff of tax personnel or protracted litigation on state tax issues. Id. at 438 n.33.
218. Roland, supra note 88, at 1186.
219. See note 47 supra. Some authorities favor the three-factor formula because it is the only method that can be applied nationwide without seriously disrupting state revenues. See, e.g., Nemeth & Agee, State Taxation of Multistate Business: Resolution or Stalemate?, 48 TAXES 237, 250 (1970); Comment, supra note 18, at 506.
221. Id. at 280.
tory of using the single-factor sales formula, or Florida, whose legislature switched from the Multistate Tax Compact’s three-factor formula to a formula giving double weight to the sales factor,\textsuperscript{222} might contend that a uniform apportionment method imposed by Congress would prevent use of a taxing scheme which its state legislature had deemed preferable to the standard three-factor method.

The probability of federal imposition of a uniform apportionment scheme does not seem great at this time. There was a strong campaign for a uniform system beginning in the 1950’s;\textsuperscript{223} yet, with the exception of Public Law 86-272, no federal action materialized.\textsuperscript{224} In fact, the federal legislation that has been proposed has been defeated. With the advent of the Uniform Division of Income for Tax Purposes Act in 1959 and the Multistate Tax Compact in 1967, the need for any sweeping federal revisions diminished. Significantly, among the states enacting the Multistate Tax Compact, the concern for double taxation retains little force. Those states generally use the Compact’s three-factor apportionment formula as their sole apportionment method or offer a multistate corporation the option of using the three-factor formula or some other method prescribed by state statute. Thus, the taxpayer corporation theoretically can create for itself the advantages of a uniform system so long as it operates in Compact states.

B. Alternatives for Missouri

1. Apportionability

Missouri statutes provide two tests for determining whether corporate income is eligible for apportionment. A corporation may apportion its income under section 143.451 if that income was earned in transactions partly within and partly without the state (source of income test) or under section 32.200, article IV, paragraph 3(2), if the taxpayer’s income is subject to the taxing jurisdiction of another state (Multistate Tax Compact test).\textsuperscript{225} All-

\textsuperscript{223} See notes 88-89 and accompanying text supra.
\textsuperscript{224} Professor Hellerstein has noted that strong protest by the states has been important in defeating congressional attempts to pass uniform laws. Hellerstein, supra note 27, at 340. In addition, the Multistate Tax Commission has continued to promote the goal of “guard[ing] against restrictive federal legislation and other federal action which impinges upon the ability of state tax administrators to carry out the laws of their states effectively.” MULTISTATE TAX COMMISSION, 9 ANNUAL REPORT 1 (1976), quoted in United States Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 487 (1977) (White, J., dissenting).
\textsuperscript{225} Missouri is not alone in permitting alternative tests on the question of apportionability. Three other Compact states—Colorado, Hawaii, and Montana—plus the District of Columbia, permit the taxpayer to use the Compact’s taxing jurisdiction test or some other test provided by separate statute. The only case law interpreting the apparent conflict between the Compact test and the state alternatives is found in the Missouri Supreme Court’s decisions in M.V. Marine Co. v.
though both apportionability tests continue to exist in the statutes, the Missouri Supreme Court’s opinion in Goldberg II may be read as suggesting that the Compact test is no longer operative Missouri law. The court states that the Compact was never intended to be substantive law and that questions of apportionability “should be based upon the ‘source of income’ test of section 143.451.” As a practical matter, the court’s apparent rejection of the Compact test probably would make little difference because a corporation with income generated from transactions partially within another state will probably be subject to taxation in that state. Where the other state, however, is one that imposes no state income tax or exercises taxing jurisdiction based on something other than income, the differences between the source of income test and the Compact’s taxing jurisdiction test are significant. Under the latter test the taxpayer may qualify to apportion income without ever paying income tax on one hundred percent of its income. Nevertheless, reading Goldberg II as nullifying the Compact’s test for apportionability is probably too sweeping an interpretation. The Compact test is still in the Missouri Revised Statutes, and although the Compact gives the taxpayer the option of electing to use Missouri’s alternate apportionment scheme, it also provides its own apportionment system which the taxpayer may elect. It seems reasonable, regardless of the court’s language, for taxpayers to be able to rely on the statutory language and the options offered them by Missouri’s taxation statutes. Furthermore, it is conceivable that when the Missouri Supreme Court is in the future faced squarely with the question of whether the Compact’s apportionability test retains force, the court may attempt to limit Goldberg II’s sweeping statements to the facts of that case or to explain Goldberg II as criticising, but not nullifying, the

State Tax Comm’n, 606 S.W.2d 644 (Mo. en banc 1980), and Goldberg v. State Tax Comm’n, 639 S.W.2d 796 (Mo. en banc 1982).


227. Id. at 800.

228. Id. at 803. Judge Welliver, writing for the majority in Goldberg II, seems to state that the source of income test is the sole measure of apportionability in Missouri. Some ambiguity remains, however, regarding whether the judge intended to reject totally the Compact’s apportionability test, as set out at MO. REV. STAT. § 32.200, art. IV, ¶ 3(2) (1978). Goldberg II cites with approval Multistate Tax Comm’n Reg. III.1(A), which provides that the right to apportion may be determined under either Article IV of the Compact or under the taxing state’s laws. 639 S.W.2d at 800. Missouri, however, has not adopted the regulation. In addition, Goldberg II states that the Compact itself permits a taxpayer to decide eligibility to apportion income using the guidelines of existing state law and cites as authority art. III, ¶ 1, which also offers a taxpayer the option of using the Compact’s apportionability test. Id. at 801. Certainly, Goldberg II would have simplified the task of deciding whether art. IV, ¶ 3(2) retains any usefulness if the court had made specific reference to this Compact provision rather than inviting speculation based on its statement that apportionment determinations are to based on “the ‘source of income’ test of § 143.451.” Id. at 803.
Compact's apportionability provisions. Certainly it seems that, if forced to reexamine the language of Goldberg II, the court might conclude that any decision declaring a statute inoperative is something best left to the state legislature.

The Missouri legislature, faced with the uncertain language of Goldberg II, may choose a number of responses. One possibility is simply to eliminate the source of income test for apportionability and rely solely on the Compact's requirement that a taxpayer's income be subject to taxation in another state. The source of income test has faced criticism. In M.V. Marine, Judge Higgins, dissenting in Goldberg II, argues that the justification for the source of income test as expressed in Artophone Corp. v. Coale is illusory. Additionally, Judge Higgins, dissenting in Goldberg II, argues that the justification for the source of income test as expressed in Artophone Corp. v. Coale is illusory. The Artophone court reasoned that the test was codified in order to avoid discriminatory taxation of Missouri corporations. According to Judge Higgins, because Artophone only considered discrimination arising from domestic corporations paying more tax to Missouri than foreign corporations when both did the same amount of business here, that court incorrectly concluded that the source of income rule alleviated discrimination by treating all corporations equally. Judge Higgins found Artophone's reasoning unpersuasive because it failed to consider the tax consequences that Missouri's rule may have on a corporation's tax liability in another state. The judge presents a further criticism of Missouri's apportionability test based on a corporation's ability to avoid taxation. He argues that the source of income test permits a taxpayer to apportion and be taxed in Missouri on fifty percent of income earned partly within and partly without the state, even if the remaining fifty percent of its income is not actually taxed in some other state. Thus, if a company earned $100 of income from a transaction carried on partly in Missouri and partly in a state that assessed no corporate income tax, the company would be taxed on $50 in Missouri but would escape taxation on the remaining $50. Judge Higgins contends that such a result is unsatisfactory, especially after Missouri's adoption of the Uniform Division of Income for Tax Purposes Act, which has the goal of ensuring that one hundred percent of a multistate firm's income is taxable by the states.

230. Id. at 649. See also Goldberg, 639 S.W.2d at 813 (Higgins, J., dissenting).
231. 345 Mo. 344, 133 S.W.2d 343 (1929).
232. 639 S.W.2d at 811 (Higgins, J., dissenting).
233. 345 Mo. at 353-54, 133 S.W.2d at 346-47.
234. 639 S.W.2d at 811 (Higgins, J., dissenting).
235. Id. (Higgins, J., dissenting).
236. Id. at 812 (Higgins, J., dissenting). Judge Higgins cites as authority for his observation Hellerstein, supra note 103, at 769-70, and United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978). Eugene Corrigan, a director of the
In addition to problems raised by the source of income test, any policymaker must consider Missouri's primary alternative, the Multistate Tax Compact's test requiring that a corporation also be subject to the taxing jurisdiction of another state.237 The apparent conflict between the apportionability test stated in section 143.451 and that provided by the Compact could, arguably, be resolved by careful statutory construction. One interpretation that has been advanced is to read the two statutes as permitting election of one or two complete apportionment schemes; i.e., each statute would offer the taxpayer a choice of both the test for apportionability and the apportionment formula to be used.238 A second construction suggests that the jurisdictional standard found in the Compact actually does not exist. Because the Compact is a uniform act, adopted by various states to provide a uniform formula for use by multistate businesses, it assumes a taxpayer is already subject to taxation in several jurisdictions.239 Some commentators have argued that the phrase, "any taxpayer having income ... which is taxable both within and without this state," merely describes the intended beneficiary of the Compact rather than defining him. In fact, the Compact has been criticized for not providing a jurisdictional stan-

Multistate Tax Commission, has tendered a similar argument with regard to a corporation's ability to dodge taxation on 100% of its income by strategic use of the various states' apportionment methods. Corrigan, supra note 98, at 429. Corrigan contends that a corporate taxpayer can change taxable income into "nowhere income"—that is, income that avoids taxation by any state—by employing any of four methods:

1. attributing income to a state that does not have jurisdiction to tax that income;
2. inconsistently attributing sales, property, and payroll in the numerators of the respective factors of the apportionment formula;
3. inconsistently differentiating between "business" and "nonbusiness" income; and
4. utilizing a multiple corporate structure to shield unitary business income from taxation.

Id. at 429-30. The Goldberg II majority rejected the contention that taxing authorities should categorically seek 100% taxation of income earned in interstate commerce. Rather, Goldberg II stated that the fundamental rule of construction for taxation statutes is that the right to levy a tax must be clearly authorized by statute and that such statutes are to be strictly construed in favor of the taxpayer and against the taxing authority. 639 S.W.2d at 802. Thus, the desire for 100% taxation must give way to the goal of giving a taxpayer the benefit of the doubt on issues of statutory construction.

237. See notes 181-83 and accompanying text supra.

239. Terms used throughout the Compact are defined in Article II. "Taxpayer" is defined as "any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than one state." Missouri Rev. Stat. § 32.200, art. II, ¶ 3 (1978).
If the Compact contains no jurisdictional standard, there is no irreconcilable conflict between the Compact and prior Missouri apportionment law.

As with the source of income test, the Compact's guidelines provide no guarantee that a corporation will be taxed on one hundred percent of its income; the statutory language merely says that a firm must be "subject to taxation" in another state, not that it actually be taxed. Additionally, the Compact test deems a corporation subject to taxation in another state if it pays franchise tax or a tax on corporate stock because this is the equivalent of being subject to the taxing jurisdiction of another state.

Kentucky faced such a problem after it adopted the Uniform Division of Income for Tax Purposes Act. One section of the Act provided that a company could apportion if it had income from business activity which was taxable both within and without the state, while another law stated that a corporation was taxable in another state if it was subject to a franchise tax there. The Kentucky legislature resolved the conflict by deleting both of the sections and incorporating a new definition of taxable net income into a prior statute. Nevertheless, the concern that a corporation may qualify to apportion income in Missouri merely by paying a franchise fee or a tax on corporate stock is probably groundless. Merely qualifying for the right to apportion gains a taxpayer nothing under the provisions of either the Compact or section 143.451. The Compact's apportionment formula effectively assigns interstate income to a state where it will be taxed. For example, sales of tangible personal property are assigned to the state of delivery if taxable there; if not, they are assigned to the shipping state. The result under section 143.451 is not as certain, but based on the discussion offered by the concurring opinion in Goldberg I, it can be argued that income from activities not sufficient to subject a corporation to taxation by the state of delivery would be treated as if earned entirely in Missouri and

240. See Peters, supra note 98, at 181; State Taxation, supra note 8, at 258-59.
241. MO. REV. STAT. § 32.200, art. IV, ¶ 3(1) (1978). This paragraph provides:
   "For purposes of allocation and apportionment of income under this article, a taxpayer is taxable in another state if (1) in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax."
242. KY. REV. STAT. ANN. § 141.120(2) (Bobbs-Merrill 1962). See also Clinton Shirt Corp. v. Kentucky Bd. of Tax Appeals, 583 S.W.2d 84, 86-87 (Ky., 1978).
243. KY. REV. STAT. ANN. § 141.120(3) (Bobbs-Merrill 1962).
244. See Clinton Shirt Corp. v. Kentucky Bd. of Tax Appeals, 583 S.W.2d 84, 87 (1978).
246. Id. ¶ 16.
thus would be fully taxable by Missouri.\footnote{248} An additional protection against abusing the right to apportion is found in article IV, paragraph 18 of the Compact which permits either the taxpayer or the taxing authority to seek an alternative method of apportioning whenever the method provided does not "fairly represent the extent of the taxpayer's business activity in this state."\footnote{249}

Although both the source of income test and the Compact's subject to taxation test have flaws, the Missouri Supreme Court determined in \textit{Goldberg II} that the legislature, when faced with proposals to abolish the source of income test, decided to retain it.\footnote{250} More importantly, the court stated that source of income continues to be the operative test for apportionability of income in Missouri notwithstanding the statutory presence of the Compact's taxing jurisdiction test.\footnote{251}

2. Elective Apportionment Formulas

Once a corporate taxpayer determines that certain of its income qualifies for apportionment, it may elect to use one of two available methods. The corporation may use a single-factor formula which will allocate to Missouri fifty percent of income earned through transactions partly within and partly without Missouri.\footnote{252} Alternatively, the taxpayer may elect to apply the Multistate Tax Compact's three-factor formula which will calculate Missouri net taxable income based on a fraction derived from the firm's Missouri sales, payroll, and property as compared to its overall sales, payroll, and property.\footnote{253} Although no strong critics of the single-factor formula have emerged from the Missouri judiciary, it has been criticized from other quarters.

The United States Supreme Court, in \textit{Hans Rees' Sons v. North Carolina ex...
rel. Maxwell,\textsuperscript{254} overturned an assessment under a single-factor apportionment formula based on payroll because the taxpayer was able to demonstrate that the tax was so unfair in its application as to offend the due process clause.\textsuperscript{255} The Court spoke more forcefully in \textit{General Motors Corp. v. District of Columbia}\textsuperscript{256} where it stated that applying an apportionment formula based solely on the sales factor, in the face of widespread use of a three-factor formula, "will ordinarily result in multiple taxation of corporate net income."\textsuperscript{257} Notwithstanding its criticism of the sales formula, the Court upheld Iowa's single-factor sales formula in \textit{Moorman Manufacturing Co. v. Bair.}\textsuperscript{258} The Court acknowledged that some risk of double taxation was inevitable as long as there was diversity among the states' taxing methods but found that diversity alone was not a sufficient reason to invalidate the state's taxing formula.\textsuperscript{259}

It seems safe to predict that Missouri will retain its present system of offering elective apportionment formulas. Even after adopting the Multistate Tax Compact, the Missouri General Assembly has kept intact the single-factor sales formula first enacted in 1929. Missouri's elective system offers an advantage to multistate companies doing business and earning taxable income in Missouri; a corporate taxpayer may choose the single-factor formula in situations where its use would be advantageous, or the taxpayer may choose the three-factor formula where its application would produce a tax advantage.\textsuperscript{260} Certainly Missouri businesses have little to

\textsuperscript{254} 283 U.S. 123 (1931).
\textsuperscript{255} Id. at 135-36.
\textsuperscript{256} 380 U.S. 553 (1965).
\textsuperscript{257} Id. at 559-60.
\textsuperscript{258} 437 U.S. 267, 273 (1978). Iowa's apportionment formula is the only one that apportions income solely on the basis of sales. Comment, \textit{supra} note 18, at 481. The Iowa formula is found at IOWA CODE ANN. \S 422.33(1)(b) (West 1977). It differs from Missouri's apportionment scheme only in that Missouri permits the taxpayer to elect use of the sales factor formula or the Compact's three-factor formula, while Iowa offers only the sales factor formula.
\textsuperscript{259} 437 U.S. at 272. A part of this diversity has to do with the different approaches used in applying the sales factor itself.
\textsuperscript{260} The Multistate Tax Commission provided an option for the taxpayer in art. III, \S 1 because it wanted to preserve for a taxpayer the possible advantages inherent in the lack of uniformity between the states. The Commission has explained these advantages:

Thus a corporation which is selling into a state in which [it] has little property or payroll will want to insist upon the use of the three-factor formula (sales, property, and payroll) which is included in the UDITPA because that will substantially reduce [its] tax liability to that state below what [it] would be if a single sales factor formula were applied to [it]; on the other hand, [it] will look with favor upon the application of the single sales factor formula to [it] by a state from which [it] is selling into other states, since that will reduce [its] tax liability to that state.\textit{State Taxation, supra} note 8, at 262-63 n.155 (quoting \textit{Multistate Tax Commis-
gain by seeking to eliminate either of their present choices. Indeed, none of the debate surrounding the subject of apportionment has focused on the possibility of eliminating the two formulas, and Missouri courts do not appear inclined to eliminate the elective formula system.

V. CONCLUSIONS: MISSOURI LAW OF TAX APPORTIONMENT AFTER GOLDBERG II

Perhaps the most important conclusion to be drawn from the Goldberg decisions is that eligibility to apportion business income earned from interstate commerce continues to be controlled by the traditional source of income test enunciated in section 143.451 rather than solely by the Multistate Tax Compact’s test of jurisdictional tax liability. Although this Compact provision remains part of the Missouri statutes, the Missouri Supreme Court has suggested that the legislature never intended to make it operational. It remains to be seen whether the Missouri Supreme Court will adhere to this position or whether the court will explain its decision as a necessary step to “reinstating” the source of income test after M.V. Marine’s apparent rejection of that test. Although M.V. Marine was decided by a unanimous court, the inapposite decisions in Goldberg I and II were delivered with votes of four to three. The composition of the court has changed since the time of Goldberg II, and recent cases before the court present issues of apportionability. These cases may help define the scope of Goldberg II and provide businesses subject to Missouri income tax some guidance regarding when interstate income qualifies for apportionment. Presently, Missouri has two tests for apportionability set out in the statutes: the source of income test, which uses the same interpretation of transactions which are partly within and partly without the state, and the Multistate Tax Compact test, which looks to whether the corporation is subject to the taxing jurisdiction of some state other than Missouri. The availability of the Compact test is uncertain after Goldberg II. It is, however, well settled that once a business has established that it is entitled to apportion, it may apply either of Missouri’s elective apportionment formulas: the single-factor sales formula or the three-factor formula based on property, payroll, and sales.

KETRINA G. BAKEWELL

RATION, 3 ANNUAL REPORT 3 (1970)). The Commission’s express intent to preserve the advantages that flow from the states’ different apportionment formulas seems inconsistent with the Compact’s goal of promoting uniformity. See note 114 supra.