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THE "URBAN SEVERANCE TAX": SOME QUESTIONS AS TO APPORTIONMENT

Sheppard F. Miers, Jr.*

The dramatic rise in energy resource values in the last decade has been paralleled by the heightening importance of state and local taxes on the extraction and production of those resources. Lawmakers in both producing and consuming states are pragmatically seeking to apply a variety of tax measures to this expanded revenue base. Political pressure to direct the impact of those taxes to producers and away from consumers has helped shape the form of many of the taxes proposed and enacted.

The result of these energy tax laws and proposals has been euphemistically described as an economic or tax "civil war" between western and southern producing states, and midwestern and eastern consuming states.¹ Those engaged in oil and gas extraction, production, and sale have been caught in the middle of the levies of the protagonists and have become a convenient target of the taxing schemes involved. The recent evolution and refinement of constitutional standards governing state taxation has resulted, in large measure, from the effort of states to expand and focus their taxing authority to include more of the coun-

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1. BUS. WK., May 12, 1980, at 91; Coates, *A New Civil War Looms Over State Taxes on Natural Resources*, Wash. Post, Aug. 19, 1981, § I, at 7, col. 1.

try's energy revenue base and the activities of corporate taxpayers generating it.

The Supreme Court's judicial formulation of a broad and more uniform set of principles to govern application of constitutional limitations on state taxation of interstate commerce has coincided with oil price increases. At the same time, inflationary pressures have necessitated a marked increase in revenue raising measures by states.²

The effect of the recent development and application of those principles has been to clarify, make more consistent, and generally expand the taxing authority of the states with respect to interstate commerce. This restatement of the governing constitutional provisions has brought several express changes in the reach and propriety of taxes affecting mineral production and the income therefrom. Implicit in the new approach of the Court are other possible changes in constitutional application. They may be of great significance to oil and gas producers engaged in interstate transactions who are regarded as taxpayers with economic capacity to furnish a large amount of additional tax revenues to consuming, but nonproducing, states.

A catchy description of the State of New York's version of a tax³ intended to levy on the increased energy values is an "urban severance tax" payable by oil and gas producers.⁴ That label was probably not offered as a technical abstract of the law. It nevertheless elicits some meaningful interpretive questions for companies whose operating costs include new tax burdens from multistate efforts to derive added revenue from taxes directed at oil and gas production activities.

The resolution of taxpayer challenges to the New York tax pending at this writing, which are based on the asserted conflict of the tax's price control provisions with federal regulatory authority⁵ and the commerce clause,⁶ could render such questions moot as to that tax's application.⁷ Nevertheless, the tax seems worthy of analysis from the perspective of the questions considered in this Article, due to the experi-

2. N.Y. Times, Oct. 15, 1981, at B12, col. 1.

3. N.Y. TAX LAW § 182 (McKinney Supp. 1982-1983).

4. Wash. Post, Aug. 19, 1981, § I, at 7, col. 1.

5. Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760h (1976 & Supp. V 1981).

6. U.S. CONST. art. 1, § 8, cl. 3.

7. Mobil Oil Corp. v. Tully, 499 F. Supp. 888 (N.D.N.Y. 1980), *appeal dismissed and stay of enforcement continued*, 639 F.2d 912 (2d Cir.), *cert. denied*, 452 U.S. 967, *aff'd*, 653 F.2d 497 (Temp. Emer. Ct. App. 1981), *vacated and remanded per curiam*, 455 U.S. 245, *remanded for further proceedings*, 689 F.2d 186 (Temp. Emer. Ct. App. 1982); *see also* Shell Oil Co. v. New York State Tax Comm'n, 110 Misc. 2d 71, 441 N.Y.S.2d 595 (N.Y. Sup. Ct.), *modified*, 111 Misc. 2d 460, 444

ration of the federal authority underlying the taxpayer challenge⁸ and the particular relationship of the form of the tax to the interstate energy production and distribution pattern of operations subjected to it. The issue of natural resource wealth sharing through taxation by producing and consuming states is brought more sharply into focus by the form of the tax. As a practical matter, it may represent a form of extraterritorial severance or production tax, because it bears primarily upon taxpayers producing oil and gas in the other states and selling refined products in the taxing jurisdiction.

Among the interpretive questions suggested are: (1) If a nonproducing state's special oil company tax does effectively levy upon gross receipts associated with the activity of extraction, can apportionment in the form acceptable as an income tax operate to avoid multiple taxation, particularly where the producing state's production or severance tax is imposed on the same activity or privilege, and (2) whether the Supreme Court's conclusions on state income taxation of the unitary business of an integrated oil company still leaves potential for challenge of special gross receipts taxes, or new applications of existing laws, of nonproducing states seeking to tap the gross revenues of oil and gas producers beginning at the wellhead.

The discussion in this Article attempts to explore these questions in light of some recent decisions addressing state taxation of interstate operations involving extractive industries. Departure from the rationale of the historical application of constitutional standards to extractive operations is also considered with respect to the application of tax measures on natural resource activities and revenues by consuming states as exemplified by the New York form of oil company tax.

A brief restatement of the fundamental standards which must now be met by any state tax on revenues or activities which involve interstate commerce is appropriate. Those standards were spelled out by the Supreme Court in the 1977 decision of *Complete Auto Transit, Inc. v. Brady*.⁹ The Court's statement in that case signaled a purposeful and definitive break from the formalism of prior authority and a reconfirmation of judicial preference for a "practical" approach in application of constitutional limitations of state taxation. A state tax will

N.Y.S.2d 460 (N.Y. Sup. Ct. 1981), *modified*, Nos. 43145, 43362 (N.Y. App. Div. Jan. 6, 1983) (holding that anti-passthrough provisions of law discriminate against interstate commerce).

8. The Emergency Petroleum Allocation Act expired on September 30, 1981. 15 U.S.C. § 760g (1976); see *Mobil v. Tully*, 653 F.2d at 500.

9. 430 U.S. 274 (1977).

survive a challenge based upon the commerce clause under the test enunciated in *Complete Auto* if the tax (1) has substantial nexus with the state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state.¹⁰

I. COMMONWEALTH/EXXON—UNRESOLVED ISSUES IN THE STATE ENERGY TAX SPECTRUM?

Since being set out in 1977, the *Complete Auto* standards have been applied to state taxation affecting natural resource extraction in Supreme Court decisions addressing the constitutionality of taxes at both the production and consumption ends of the domestic energy spectrum. In *Exxon Corp. v. Department of Revenue*,¹¹ the Court examined the scope of a nonproducing state's apportioned income tax in relation to net income resulting from integrated operations, including extraction and production in other states.¹² At the production end, a severance tax which operated to increase costs to out-of-state consumers was upheld in *Commonwealth Edison Co. v. Montana*.¹³ The two cases confirm a broader scope of state taxation and constitutional involvement with it. They seem dispositive of much of what can be asserted in the way of constitutional limitations on forms of taxation enacted or proposed by the energy producing and consuming states. But analysis of the rationale and scope of the Court's determinations in these and other recent decisions suggests, in at least one aspect, that a nonproducing state's power to effectively levy on part of the increased oil and gas receipts base is limited or possibly precluded.

These two cases are obviously significant in the constitutional evaluation of state taxation within the federal system. A close consideration of certain elements of the decisions in the specific context of the growing array of taxes on businesses whose receipts include the increased value of extracted petroleum resources and petroleum products indicates possible further definition of constitutional limitations on consuming state legislation, particularly where gross receipts is the tax measure.

10. *See id.* at 279.

11. 447 U.S. 207 (1980).

12. *Id.* at 210.

13. 453 U.S. 609 (1981); *cf.* *Maryland v. Louisiana*, 451 U.S. 725 (1981). In *Maryland*, the Court held that a "first-use tax" on offshore natural gas was unconstitutional by reason of its discrimination against interstate commerce. *Id.* at 756.

For taxpayers engaged in interstate operations involving energy resource activity, the Court's decisions, though unfavorable in result to the taxpayers involved, may nevertheless portend limits on the tax reach of nonproducing states pursuing tax policy that seeks to levy on increased upstream energy values at the point of extraction. The cases contain statements which suggest that if New York's special tax on integrated oil companies operates as described by the media, then constitutional review based upon its actual effect could make its validity questionable. This is because (1) the tax has the explicit effect of multiple taxation of the taxpayer's gross revenue from the privilege of petroleum extraction; (2) it is imposed almost wholly from outside the state of production; and (3) because of the tax's passthrough prohibition, it may not be as readily justified, in terms of apportionment, as the consuming or market state gross receipts taxes which have won approval of the Court.

Proper consideration of these issues requires an elementary definition of the forms of taxation involved to aid in comparison of any non-producing state tax in the energy tax confrontation. The critical point of analysis is the operative incidence and measure of the tax considered. Thus, regardless of nominal incidence, the actual economic effect of a market state's extension of taxing authority should be considered to determine if a gross revenue levy is being imposed on productive activity involving mineral deposits located outside its borders.

In terms of general definitional classification, a "severance tax" can generally be defined as an excise upon the privilege of taking or extracting a resource.¹⁴ The tax may be imposed on a base determined by extracted quantity or its value. Where value of the extracted resource is the standard of liability, the severance tax can have incidence very similar to a tax on the gross receipts of a particular business. However, a critical distinction is that the severance tax is technically assessable even though the resource is not sold but is merely consumed for personal use or otherwise used or disposed of following extraction.¹⁵

A "franchise tax" is a tax on the franchise of a corporation, or the right and privilege of carrying on business in the character of a corporation, for the purposes for which it was created and in the conditions

14. *Gulf Ref. Co. v. McFarland*, 154 La. 251, —, 97 So. 433, 434 (1923).

15. *Phillips Petroleum Co. v. Heath*, 254 Ark. 847, —, 497 S.W.2d 30, 32 (1973).

which surround it.¹⁶

A "gross receipts" tax is essentially any excise tax measured by the gross receipts of the taxpayer. It may be limited to those receipts arising from the exercise of the privilege of engaging in an occupation or activity.¹⁷ It is theoretically not operative on the act of engaging in an activity or exercising a privilege in the absence of gross receipts, as in the case of extraction of minerals without sale. However, a constructive sale provision governing particular uses or transfers involving taxable activity could effectively give a nominal gross receipts tax the same effect as a severance tax in those circumstances. Further, in the context of this Article regarding the imposition of a tax in part conditioned upon existence of extractive activity, a more generalized definition must be qualified.

Finally, an "income tax" is generally defined as a tax levied upon the net income or profits of the taxpayer after return of capital and deduction of expenses and costs of generating taxable earnings.¹⁸

The Supreme Court expressly and implicitly noted the distinctions between the nominal and the practical effects of producing and consuming state taxes measured by the revenue or earnings of energy companies in its application of apportionment standards to a nonproducing state's income tax in *Exxon*, and to a producing state's severance tax in *Commonwealth*. It is submitted that these cases suggest that if a non-producing state's tax is of such narrow scope as to attach exclusively to gross receipts flowing from purely extraterritorial production activity, the tax may not meet the first two standards of the four-part test of *Complete Auto* unless it has a more precise apportionment giving greater recognition to the situs state's relation to that activity.

In *Commonwealth*, the Court was asked to decide the constitutionality of a Montana severance tax imposed upon the production of coal within that state.¹⁹ The tax, which ranged in rates up to thirty percent of the value or contract sales price of the coal, was imposed on production which was in large part committed to interstate commerce and consumption in other states.²⁰ In examining that part of the challenge to the tax based upon the commerce clause, the Court applied the tests

16. *Scott-Rice Co. v. Oklahoma Tax Comm'n*, 503 P.2d 208, 210 (Okla. 1972).

17. R. HAIG & C. SHOUP, *THE SALES TAX IN THE AMERICAN STATES* 3-4 (1934).

18. J. HELLERSTEIN & W. HELLERSTEIN, *STATE AND LOCAL TAXATION; CASES AND MATERIALS* 29 (4th ed. 1978).

19. 453 U.S. 609, 612 (1981).

20. *See id.* at 613, 617-18.

enunciated in *Complete Auto*.²¹ The Court concluded that earlier decisions which treated severance tax as purely local and not subject to commerce clause limitations are no longer correct.²² The Court overruled the thesis of those early decisions which held that severance taxes upon extraction were imposed prior to entry into a narrower notion of interstate commerce, and thus not subject to commerce clause standards.²³ The application of the standards of *Complete Auto* was made in response to the assertion that Montana was seeking to export its severance tax to consuming states and that this unduly burdened interstate commerce. The Court found that the essential criteria of constitutionality were present. First, it concluded that there was an obvious nexus.²⁴ As discussed in greater detail below, the Court also found a clear rationale for exclusive allocation of the tax to the state of the taxable severance. The latter finding, unequivocally stated, obviated consideration of whether there was fair apportionment.²⁵ The Court held further that the facially neutral tax on all producers within the state was not unconstitutionally burdensome and did not discriminate against interstate commerce despite being shifted primarily to consumers in other states.²⁶ In a somewhat strained abstention,²⁷ the Court ruled that the tax bore a fair relation to the business activity of the taxpayers within the taxing state.²⁸ It found that the tax on a percentage of gross earnings within the state of those actually taxed meant a fair relationship to the taxed activity existed.²⁹ The level or rate of taxation was passed off as a matter for legislative rather than judicial determination.³⁰

The *Commonwealth* case broke from the Court's existing precedent and brought state severance taxes within the scope of constitutional inquiry under the commerce clause. As a result, previous judicial treatment of such a tax as local and separate from commerce clause standards of nexus, fair apportionment, nondiscrimination, and fair relation to services of the taxing state, was overruled. This elimination of

21. *See id.* at 627-29.

22. *Id.* at 614-15.

23. *Id.* at 617.

24. *See id.*

25. *See id.*

26. *See id.* at 617-20; *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 93, 103 (1981).

27. *See* 453 U.S. at 644-46 (Blackmun, J., dissenting); *The Supreme Court, 1980 Term*, *supra* note 26, at 103.

28. 453 U.S. at 626-27; *The Supreme Court, 1980 Term*, *supra* note 26, at 106.

29. *See* 453 U.S. at 626-29; *The Supreme Court, 1980 Term*, *supra* note 26, at 105-06.

30. 453 U.S. at 628; *The Supreme Court, 1980 Term*, *supra* note 26, at 106.

the prior immunity of severance taxes from consideration under the commerce clause, and movement to the current practical analysis as to such taxes, would seemingly require more frequent multiple taxation inquiry. This would involve interaction of such taxes with taxes of nonproducing states which are directed at receipts generated by the extractive operations also subject to producing state severance taxes.

As indicated, the Supreme Court responded in *Commonwealth* to the taxpayers' challenge of the tax by summarily disposing of the initial two standards of the *Complete Auto* test. As to the requirement of a taxable nexus, the Court concurred in the determination of the Montana Supreme Court that there could be no argument that a substantial, in fact the *only*, nexus of the severance tax in question was in the producing state of Montana.³¹ With equal force and certainty, as to the requirement of fair apportionment, the Court determined: "Nor is there any question here regarding apportionment or potential multiple taxation, for as the state court observed, 'the severance can occur in no other state' and 'no other state can tax the severance.'"³² The literal terms of this conclusion provide potential for the assertion that discriminatory multiple taxation arises from a special nonproducing state tax which seeks to capture revenue, in whole or in part, in a manner having the same practical effect as a severance tax, as suggested by the label given such provisions by the media.

Before the recent formation and restatement of standards marked by the *Complete Auto* decision, the constraints upon state taxation grounded in the commerce clause had historically shown, despite an irregular case by case development, a very broad pattern or trend of interpretation. The same fundamental requirement of a taxable nexus or minimal relationship as now forms a part of the restated controlling standards was present in that pattern of precedents. Beyond that, it was generally held that an apportioned net income tax could be levied on interstate commerce.³³ As to the right of states to impose a tax measured by gross receipts on the privilege of manufacture or production, it was generally held that the point of incidence of the tax was controlling.³⁴ Significantly, taxes could generally be imposed upon local man-

31. 453 U.S. at 617.

32. *Id.*

33. *E.g.*, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 452 (1959); *see, e.g.*, *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920); *United States Glue Co. v. Oak Creek*, 247 U.S. 321, 329 (1918).

34. *See* SUBCOMM. ON STATE TAXATION OF INTERSTATE COMMERCE OF THE HOUSE COMM.

ufacture or production before actual shipment,³⁵ while the Court looked with disfavor on gross receipts taxes imposed on interstate sales by the state of shipment.³⁶ Finally, gross receipts and use taxes by the state of delivery had judicial approval,³⁷ although the rationale for such results was sometimes less clearly reasoned and set forth by the Court than was expected.³⁸

Because of the fiscal stakes involved, the special energy taxes are likely to be a source of growing litigation and further development of the fundamental principles set out in *Complete Auto*. The large revenue potential has already stimulated an expansion of the range of constitutional impact on taxation of energy production destined for interstate commerce. But at the same time, this new focus on the constitutional principles, at the level of extraction and production, arguably has the effect of being more restrictive of the nonproducing states' ability to tap the revenue base in this line of commerce.

The Court's statements in *Commonwealth*,³⁹ overruling the rationale of *Heisler v. Thomas Colliery Co.* that severance or production taxes are purely local and beyond the scope of the commerce clause,⁴⁰ were coupled with the admonition that the four-pronged standards of *Complete Auto* and *Mobil Oil Corp. v. Commissioner*⁴¹ should apply equally to severance or production taxes as they do to other state privilege or income taxes affecting interstate commerce.⁴² With these tests determining the constitutionality of such taxes on operations involving interstate transactions, such taxes would presumably be more susceptible to some new requirement of comity with both actual or potential taxing schemes of nonproducing states which have a nexus of downstream activities involving the mineral.

However, the Supreme Court's determinations in *Commonwealth*,

ON THE JUDICIARY, STATE TAXATION OF INTERSTATE COMMERCE, H.R. REP. NO. 565, 89th Cong., 1st Sess. 1037-38 (1965).

35. *E.g.*, *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 177-79 (1923) (mining of iron ore); *American Mfg. Co. v. St. Louis*, 250 U.S. 459, 463-64 (1919) (manufacturing).

36. *E.g.*, *J.D. Adams Mfg. Co. v. Stoen*, 304 U.S. 307, 311-14 (1938).

37. *E.g.*, *General Motors Corp. v. Washington*, 377 U.S. 436, 437-39 (1964); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 57-58 (1940).

38. *See Hellerstein, State Taxation of Interstate Business and the Supreme Court, 1974 Term: Standard Pressed Steel and Colonial Pipeline*, 62 VA. L. REV. 149, 149-55 (1976); Comment, *More Ado About Gross Receipts Taxes*, 60 HARV. L. REV. 501, 510 & n.48 (1947).

39. 453 U.S. 609, 617 (1981).

40. 260 U.S. 245, 259-61 (1922).

41. 445 U.S. 425, 443 (1980).

42. 453 U.S. at 615-17; *see also Exxon Corp. v. Department of Revenue*, 447 U.S. 207, 226-27 (1980) (Court will apply *Mobil* and *Complete Auto* standards to an income tax).

with respect to the first two standards of nexus and fair apportionment, resulted in the Montana severance tax in question being in, perhaps, a more constitutionally stable position than under the exclusionary rule *Heisler* provided. The Court administered the commerce clause tests of nexus and apportionment and found that a state severance tax involving extraction of minerals committed to interstate commerce passed without reservation.⁴³ This result was reached when considering a tax which was wholly unapportioned by the producing state.

Thus, in the absence of either discrimination or lack of fair relation to the taxed activity, the severance or production type tax has been found to be absolved of any potential constitutional infirmity by reason of a lack of apportionment. The Court's conclusion on that point leaves an interpretive impression that although it set aside the shelter of severance and production taxes which *Heisler* and other decisions furnished, a new, equally inflexible, and obviously more tempered resistance of such taxes to constitutional challenge has been put in place by the *Commonwealth* treatment of the apportionment standard.

This rule would seem to increase potential constitutional conflict in the interaction of a nonproducing state's special gross receipts privilege tax on oil companies with a producing state's severance or production tax. Once the factor of nexus is met, the element of fair apportionment is the next essential to any nonproducing state tax measured by oil and gas company revenues, and when seeking to tap the energy value base at or near the point of extraction in other states, an acceptable apportionment may be difficult or perhaps impossible to achieve.

The Court's conclusion in *Commonwealth* that there is no requirement for apportionment of a severance tax other than to the situs state places an importance on tax classification and incidence which probably cannot be overstated for those taxpayers affected in an interstate energy tax confrontation. Where a nonproducing state tax is only a general provision imposed upon the local exercise of the privilege of doing business measured by sales, apportionment relative to that activity would seem to meet the requirements now in effect under the commerce clause, even if measured in the same manner as a tax imposed on some more particularized element of the corporate operation by another state. But a narrowing of the object of taxable activity may result in a much more vulnerable extension of a nonproducing state's powers.

43. See 453 U.S. at 617; *supra* text accompanying notes 31-32.

In the *Exxon* case, the Supreme Court found that a unitary business, made up of distribution and marketing of petroleum products within the taxing state of Wisconsin and also exploration, production, and refining of crude oil exclusively outside that state, was being conducted.⁴⁴ The Court rejected the contentions of the taxpayer that its income from its exploration and production activity should not be apportioned to Wisconsin. The taxpayer had reasoned that it engaged in such activity only at a situs outside the state, and that the company's internal functional accounting demonstrated an absence of the minimal connection of those sources of income with the taxing state necessary to support apportionment.⁴⁵

The Court found that while such separate accounting might serve other purposes, it did not necessarily reflect the integration of all operations of a unitary business for the purpose of an apportioned taxation of all its income by a state in which some part of those unitary business activities was conducted.⁴⁶ The Court made the determination that the standards of constitutional law applicable under the due process⁴⁷ and commerce clauses do not in any way mandate that income which can be separately accounted for as flowing from exploration and production wholly outside the taxing state be allocated to the producing states.⁴⁸ If a sufficient nexus exists between a unitary business and the states seeking to tax its income on an apportioned basis, then the particular geographic location of the extraction of the unitary operation will not preclude such taxes.⁴⁹

The Court concluded that a unitary business existed in Exxon's vertical integration.⁵⁰ The taxpayer's production activity was found to be a part of that unitary business.⁵¹ As a result, income from that production was not separately allocable to the situs state of the production, but rather was subject to apportionment in the taxing, and nonproducing, state.⁵²

The Court reasoned that as a part of the unitary flow of income to

44. *Exxon Corp. v. Department of Revenue*, 447 U.S. 207, 212-13 (1980).

45. *Id.* at 220-21.

46. *Id.* at 221-22.

47. U.S. CONST. amend. XIV, § 1.

48. 447 U.S. at 225-26 (due process); *id.* at 229-30 (commerce clause).

49. *Id.* at 230.

50. *Id.* at 224 (Court agreed with Wisconsin Supreme Court's conclusion that Exxon was a unitary business).

51. *See id.* at 226 (Court found that Exxon had not proved its functional departments, i.e., exploration and production, refining, and marketing, were separate enterprises).

52. *See id.* at 223-24, 229-30.

which the taxing state had a sufficient relationship or nexus, the income from production was taxable on a formula apportionment basis even though it all actually arose from business activities conducted outside the taxing state. The incidence of the tax was net income of the unitary business, regardless of the nature of activity generating it. The Court expressed the same thoughts stated earlier in the same term in *Mobil*: that a fairly apportioned tax of net income from interstate activities may be made by any state where there was a minimal contact or nexus with the taxing state without situs of particular earning activities or assets necessitating special allocation of income to the state of their situs.⁵³

In refuting Exxon's contentions that its exploration and production activities were not sufficiently connected with the taxing state, the Court stated that, absent a special showing of a separate and discrete business enterprise, the particular situs of the activity which is the source of the income in a unitary business is essentially irrelevant.⁵⁴ The Court emphasized that a stream of income was the object of the taxation in question and that it flowed from a unitary business in interstate commerce that had sufficient contact with the taxing state.⁵⁵

The Court's review was limited to apportionment of production income generated through Exxon's vertically integrated operations.⁵⁶ The state taxing authority had determined that the Wisconsin statute required that income derived from the sale of crude oil and gas to third parties at the wellhead be allocated to the situs state and be excluded from apportionment.⁵⁷ Accordingly, the apportionment of income from that activity was expressly omitted from due process and commerce clause review.⁵⁸

In analyzing the tax in terms of its practical effect to determine whether the four-pronged *Complete Auto* test was satisfied, the Court pointed out that the tax in question was on income, not property own-

53. *See id.* at 219-20.

54. *Id.* at 223-24 (citing *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 439 (1980)); *id.* at 229-30.

55. 447 U.S. at 226.

56. *See id.* at 226 n.10 ("[W]e need not address the issue of whether the Due Process Clause would require such allocation rather than apportionment."); *id.* at 227 n.11 ("[W]e do not here address the issue of whether the Commerce Clause requires allocation of income derived from the sale of crude oil and gas at the wellhead to third parties to the situs State rather than apportionment.").

57. *Id.* at 226 n.10.

58. *Id.* at 226 n.10, 227 n.11; *see supra* note 56.

ership.⁵⁹ The income derived from production had a sufficient relationship through the unitary business presence in both the producing and consuming state to be apportioned to the latter. The Court added that the taxing of such income on an apportioned basis was not dependent upon the existence or form of a similar tax in the producing state.⁶⁰

The concluding footnote to Justice Marshall's opinion in *Exxon* related to the issue of multiple taxation. That footnote suggests that the commerce clause standards now being followed may not necessarily dictate the same result for other forms of extraterritorial state taxation of oil and gas production as were applied with respect to net income resulting from Exxon's unitary business. In particular, Justice Marshall stated that the existence of severance taxes in the producing state did not result in a forbidden multiple taxation when the consuming state imposed an apportioned income tax on the income from the function subject to such severance taxes.⁶¹ In expressing this conclusion, Justice Marshall stated that severance taxes are directed at the gross value of the mineral extracted or the quantity of production rather than the net income from the production activities.⁶² Accordingly, he approved the Wisconsin Supreme Court's conclusion that the fact that producing states may impose severance taxes which have been held to be occupation taxes or property taxes does not preclude another state's effort to reach a proportionate share of the taxpayer's net income.⁶³ There was no further elaboration on the suggested distinction between the types of taxes, or room for possible differences in constitutional results if a non-producing state tax on gross value of the mineral extracted were involved.

Footnote twelve to the *Exxon* opinion is particularly significant because of its possible implication. It could easily be a signal of the Court's general view that excises imposed on interstate transactions cannot enjoy the same scope which apportionment formulas afford income taxes. It may also suggest that the Court reserved the latitude to apply the prevailing constitutional standards to state gross receipts taxes imposed upon the exercise of specified privileges by taxpayers op-

59. 447 U.S. at 228.

60. *Id.* at 228-29.

61. "The Wisconsin Supreme Court therefore properly concluded that '[t]he fact that the producing states may impose . . . severance taxes which have been held to be occupation taxes or property taxes does not render unfair or unconstitutional Wisconsin's efforts to reach a proportionate share of the taxpayer's income.'" *Id.* at 229 n.12 (citation omitted).

62. *Id.* at 228 n.12.

63. *Id.* at 229 n.12; *see supra* note 61.

erating in interstate commerce, as opposed to taxes levied on their unitary net income. The implication presented is that a type of gross revenue tax of extraterritorial mineral production by a consuming state involves a significantly higher risk of multiple taxation than an apportioned income tax on net income from the unitary enterprise with a taxable nexus in the taxing state. The measure of such risk presumably should be determined under the same "practical effect" standard said to be followed by the Court in *Complete Auto* and its progeny. That standard should dictate that the nominal incidence of gross receipts taxes may be of less significance in terms of actual economic consequence; and that taxes measured by gross energy production values being adopted in the reputed revenue struggle by consuming states could be found to lack the requisite constitutional characteristics where they effectively bear upon the same activity as a local severance tax in the state of production.

II. THE ROLE OF APPORTIONMENT IN THE ENERGY TAX CONFRONTATION

Long before the more definitive *Complete Auto* rules were set out, it was well established that the respective states are not literally bound to imposing income taxes which have absolutely no reach beyond their borders; that interstate commerce could be taxed in each state it affects; and that income generated in part from activities outside a taxing state could be taxed by it.⁶⁴ These taxes can occur provided that fair apportionment operates to bring home only that part of the taxable revenue which is fairly related to the local activity for which the taxing jurisdiction can ask a return. Where exact lines should be drawn in a constitutional tax panoply with as many as fifty variant apportioning and allocation methods has, of course, not been easily determined in a case-by-case drafting.

Certain basic guidelines and trends have emerged. The most pronounced guideline is that apportionment is supposed to reflect the extent and nature of a unitary business activity within the taxing state.⁶⁵ Apportionment is fundamentally a sharing mechanism, intended to divide, in a workable approximation, a multistate tax base among the

64. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1959).

65. Hartman, *State Taxation of Corporate Income from a Multistate Business*, 13 VAND. L. REV. 21, 31 (1959).

several taxing jurisdictions. The essential goals of apportionment are the avoidance of undue burden on interstate commerce, which can come from a multiplication of taxation which will not be borne by purely local commerce, and the restriction of the scope of state taxing authority consistent with standards of due process.

In the states' efforts to secure increased portions of the energy revenue base generated in large part by activity outside their borders, the method of apportionment under the basic constitutional standards is made increasingly significant, since it is both the means and the justification for expanded tax recoveries by the states involved.

A gross receipts tax on interstate sales has been judicially approved even though it falls in part upon sales generated or flowing from an activity also subjected to a production tax by the state in which that activity occurs.⁶⁶ Policy considerations may, however, dictate a different rule with respect to a gross receipts tax reaching revenues which also serve as the base for a natural resource severance tax. Those policy considerations may have been the rationale for the Court's unequivocal conclusion regarding apportionment as to the severance tax in *Commonwealth*. A result may be that separate and distinct application of the second rule of the four-prong test of *Complete Auto* is warranted in the case where such a severance or production tax is followed by a narrowly framed gross receipts tax which is also effectively measured by the gross revenue of the same extractive activity. Such special application could be readily premised upon the actual practical effect of a state imposing a gross receipts tax exclusively aimed at integrated oil companies which engage in oil and gas production only in other states, and have local distribution and sales of refined products in the taxing state.

This suggested result is not proposed without recognizing the precedent that a taxpayer who asserts that a particular application or method fails to provide a constitutionally acceptable apportionment has an extremely difficult burden of proof to meet.⁶⁷ The apportion-

66. *General Motors Corp. v. Washington*, 377 U.S. 436, 448-49 (1964). See *infra* text accompanying notes 100 & 106-08 for a further discussion of *General Motors*.

67. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978) ("[A] formula-produced assessment will only be disturbed when the taxpayer has proved 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' . . . or has 'led to a grossly distorted result.'" (citations omitted)); see *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n*, 266 U.S. 271, 282-84 (1924) (company failed to show statutory method of apportionment was arbitrary or unreasonable); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120-21 (1920).

ment required by the Court in the case of state income taxes has consistently required much less than an exact matching of the net income base with the taxpayer's presence in the taxing state.⁶⁸ But the tolerable degree of imprecision may be much smaller when a scheme seeks to place a gross receipts tax on an activity or group of activities with a situs which is largely or completely outside the taxing state. Disregard of exactness in the application of an apportionment method seems less justifiable in such a case.

Where the object of the tax is very limited in scope, and the burden of the tax is more severe,⁶⁹ there should arguably be a greater responsibility for apportionment incongruity. The taxing authority then has less basis to assert that it cannot expediently provide offsets for foreign state taxes or for out-of-state taxpayer activity in its apportionment scheme. If the taxable privilege is a single form of business entity, engaging in a specially limited set of activities, the probabilities of inconsistency with known or potential forms of taxes of other states with respect to the same privilege are easier to foresee and measure. A prohibited degree of multiple taxation, which fair apportionment is intended to remedy, should perhaps be addressed by more than a rough approximation in such circumstances.

Notwithstanding the *Exxon* and *Mobil* decisions as to net income taxes, if a tax measured by gross revenue is only imposed when the privilege of operating in corporate form includes an activity which is known to occur virtually totally beyond the borders of the taxing state, a higher degree of exactness in the apportionment may be appropriate. Gross receipts taxation of activity which can only occur at sites located exclusively outside the taxing state is in itself suggestive of unfair apportionment and due process shortcomings.

The multiple taxation concept of commerce clause application, as a definitive precursor of today's standards, was set out in 1938 in *Western Live Stock v. Bureau of Revenue*.⁷⁰ There the Supreme Court laid down what appears to be the foundation for much of the reasoning now followed by the Court to resolve contests of state tax raising questions of commerce clause limitation. The importance of the multiple taxation concept is obviously magnified today by the Court's unqualified reconfirmation of the corollary proposition stated in *Western Live*

68. See, e.g., *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273-74 (1978); *Underwood Type-writer Co. v. Chamberlain*, 254 U.S. 113, 120-21 (1920).

69. See *United States Glue Co. v. Oak Creek*, 247 U.S. 321, 328-29 (1918).

70. 303 U.S. 250, 259 (1938).

Stock, that interstate commerce is in and of itself the proper object of state taxation.⁷¹ Further, the Court concluded that the commerce clause is to be applied only in a practical sense.⁷² These theories expand the scope of state taxing powers in an economy where multistate fusion of taxable activity is now more the rule than the exception. The result may be a more likely occurrence of multiple taxation in the case of gross receipts taxes seeking either to levy upon values flowing from activities outside the taxing state, or to direct the impact of tax on a local activity to other states.

Justice Stone, in his opinion in *Western Live Stock*, concluded that there is a risk of multiple taxation when one state is allowed to indiscriminately levy on gross revenues of interstate commerce, but that this could be obviated by a fair apportionment method.⁷³ His landmark analysis noted that local taxes, even if fairly apportioned, will without question operate to increase the cost of doing business in more than a single state, and there is really no constitutional basis, under the commerce clause, to limit or preclude such taxes for that reason.⁷⁴

The constitutional difficulty was seen to arise only when a tax, particularly one on gross receipts, is imposed to an extent that transcends local involvement in interstate transactions and comes to rest on interstate commerce in and of itself in a degree not fairly related to the taxing state's role in the activities. Justice Stone theorized that if one state is allowed to tax to such an extent, then nothing would stand in the way of all states enjoying the same power. This would result in a potential multiplication of tax burdens which would create barriers to thwart the freedom of commerce intended to be secured by the commerce clause. To preclude this result, apportionment of gross receipts taxes was recognized as a practical way to permit states touched by interstate commerce to fairly tax the activities involved.⁷⁵ In the case of a tax with a narrow classification, Justice Stone's theory is particularly provocative in its suggestion that where a gross receipts tax is aimed at a privilege which can occur only in one taxing jurisdiction, there should be no real threat of cumulative burdens which breach the constitutional standard.

That theorem was later criticized as an oversimplification or a play

71. *Id.* at 254.

72. *Id.* at 259.

73. *Id.* at 256-57.

74. *Id.* at 254-55.

75. *Id.* at 255-57.

on words which itself fails to recognize practical considerations of taxation.⁷⁶ A corollary of the concept may be that a tax measured by gross revenue generated by mineral production in a particular state is improperly multiplied if a substantive duplication occurs in another state, because all the taxable events occurred in the first state and are beyond the "control and taxing power" of any other state.

Under these standards, the value of the minerals to the producer at the time and point of severance, even if enhanced by the prospect of distribution and marketing in another state, would be taxable by the situs state without apportionment, because no other state could levy upon that activity. Thus, if the contours of the apportionment standard as they appear to have been shaped in the *Western Live Stock* opinion remain intact today as announced in *Commonwealth*, a state other than the one where the extractive production occurs may be without the capacity to constitutionally apportion gross values associated with it as a measure of tax on the activity of a taxpayer operating within its borders.

Commonwealth's specification of an activity which is taxable exclusively in one state might on its face seem out of step with the approval of wide-ranging apportionment found in the Court's recent decisions in *Exxon* and *Mobil*. However, those cases, read together with *Commonwealth*, imply that apportionment relative to each state's involvement with oil and gas extraction may have different bounds in the case of a gross revenue tax base containing both production and distribution functions of an integrated energy company, as opposed to a tax on the net income from the unitary operation of the whole. The possibility of such a distinction in energy tax confrontation certainly remains open to assertion under the Court's decisions in the three cases.

III. THE NEW YORK "URBAN SEVERANCE TAX"—ANALYSIS OF APPORTIONMENT

The leading prototype, and to date most controversial, of the special taxes on petroleum revenues is the one enacted by the State of New York in 1980.⁷⁷ It is likely that this statute is the most extreme example of those types of taxes which might be chosen for testing by the stan-

76. Comment, *supra* note 38, at 516-21; see *Freeman v. Hewitt*, 329 U.S. 249, 254 (1946); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 442-55 (1939) (Black, J., dissenting).

77. N.Y. TAX LAW § 182 (McKinney Supp. 1982-1983).

dards specified in *Complete Auto* and the Court's decisions after *Complete Auto* in the multistate energy area.

The New York tax is narrowly directed only at vertically integrated oil companies' exercise of the privilege of doing business in the State of New York.⁷⁸ For purposes of the tax, an oil company is defined as a vertically integrated petroleum corporation engaged in extraction of crude oil and downstream refining, distribution, and marketing, with extraction or production exceeding one hundred thousand average barrels of crude oil per day and refining capacity in excess of one hundred seventy-five thousand average barrels per day.⁷⁹ The conduct of such activities by a fifty percent affiliate is attributed to the taxpayer for purposes of fixing and measuring liability.⁸⁰ The measure of the tax is the worldwide gross receipts of such a taxpayer, apportioned to the state generally on the basis of the proportion of gross receipts within the state to worldwide gross receipts.⁸¹ In the most controversial provision of the law, the taxpayer is precluded from passing the burden of the tax through to any customer in the State of New York.⁸²

The drafters of the law appear to have drawn heavily from the theoretical underpinning of the *Exxon* case in defining entities subject to the tax. The statute looks only to tax vertically integrated oil companies which possess the requisite characteristics of a unitary business whose extraterritorial extraction is functionally related to the downstream distribution activity in New York. As indicated, that integration was found in *Exxon* to justify an apportioned tax on the net income of the whole enterprise.⁸³

The New York statute, however, levies a gross receipts tax. While the existence of a unitary flow of "income" supports an apportioned net income tax which is derived in part from activity wholly outside the

78. *Id.* § 182(1).

79. *Id.* § 182(2)(a). The statute, as originally enacted, defined "oil company" as "every corporation formed for or engaged in the business of importing or causing to be imported into [the] state for sale in [the] state, extracting, producing, refining, manufacturing, compounding or selling petroleum." Ch. 271, § 3, 1980 N.Y. Laws 424, 426. This definition of "oil company" was retroactively amended on November 11, 1981, to apply to vertically integrated oil companies. Ch. 1043, § 65, 1982 N.Y. Laws 1981-114, 1981-142 to -143 (1981); *see also* Merit Oil of New York, Inc. v. New York State Tax Comm'n, 111 Misc. 2d 118, —, 443 N.Y.S.2d 604, 606-07 (N.Y. Sup. Ct. 1981) (court held that original definition of oil company in § 182 was unconstitutional).

80. N.Y. TAX LAW § 182(2)(a) (McKinney Supp. 1982-1983).

81. *Id.* § 182(2)(b), (3).

82. *Id.* § 182(11).

83. *Exxon Corp. v. Department of Revenue*, 447 U.S. 207, 224 (1980); *see supra* notes 44-52 and accompanying text.

taxing state, functional integration of out-of-state production with in-state distribution has not been explicitly utilized to support an apportioned tax on gross receipts under the Court's new and more pronounced application of practical standards. To establish a difference in result between such a tax and a net income tax, the taxpayer would doubtless need to convincingly develop practical and economic distinctions to overcome the Court's view of unitary effect as to taxation of net income. But, as suggested, the door may be still open to such proof.

In the case of a gross receipts or gross revenue tax, the unitary/integrated operations pattern so carefully followed in the special New York tax on oil companies may conceivably increase, rather than minimize, constitutional difficulties in the multistate setting. A gross receipts privilege tax, when oil and gas production is the initial point of generation of taxable values, lends itself to a more geographically based division of the constituent taxable activities of the taxpayer. This may be particularly true where that function occurs almost exclusively outside of the taxing state.

While the facial incidence of the special New York tax is upon the doing of business in the state, by definition only an oil company which extracts, produces, refines, and markets petroleum products is subject to the tax. An oil company engaged in less than all of those functions would not be liable.⁸⁴ With this classification of taxpayers who must bear the tax for exercising a corporate franchise, extractive operations are made a *sine qua non* of liability, notwithstanding the fact that virtually no petroleum extraction presently occurs in New York.

By reason of the statute's narrow classification of corporations subject to liability and its expansive revenue base, the tax arguably does equate, in large measure, to a tax imposed on the extraterritorial privilege of extraction and production of petroleum; subject, of course, to the definitional shortcoming that it is not imposed by reason of removal of oil and gas from land. There is no oil and gas severance or production tax imposed by the State of New York on production occurring within the state.

In this regard, strong authoritative caveats exist providing that the measure of a tax is not to be confused with its incidence in any determi-

84. See N.Y. TAX LAW § 182(2)(a) (McKinney Supp. 1982-1983); *Shell Oil Co. v. New York State Tax Comm'n*, Nos. 43145, 43362, slip op. at 4 (N.Y. App. Div. Jan. 6, 1983); Appellant's Brief at 43-46, *Shell Oil Co. v. New York State Tax Comm'n*, Nos. 43145, 43362 (N.Y. App. Div. Jan. 6, 1983).

nation of its validity under the commerce clause,⁸⁵ even though the Court has sometimes reportedly failed to observe the distinction.⁸⁶ This discussion is not intended to suggest that because values arising from severance of oil and gas are the basis for measurement of a tax, like the New York special franchise tax, its incidence automatically then falls on such activity. Rather, the form of the New York statute, taken as a whole, makes it operative only upon corporations which extract and produce oil and gas as a part of an integrated petroleum business.

A corporation which never engages in extraction of oil or gas would escape payment of the tax, as corporate taxpayers exercising a franchise in New York which do not engage in oil and gas extraction somewhere in the world are not subject to liability.⁸⁷ The tax is tailored and selective, as distinguished from a uniformly applied corporate franchise tax measured by gross receipts from every corporation's general business operations. It insists upon a channelization of a special tax base into the state and simultaneously imposes an absolute requirement that the economic burden of the tax be absorbed outside the state. Only an integrated oil company which is involved in petroleum production from the wellhead through product distribution is subjected to the tax.

Without question, a substantive objective of the statute is to secure a share of actual out-of-state values for taxation in New York by reason of contact with any taxpayer having such operations. The tax is not in the nature of a consumer tax, and cannot effectively be converted to one, because of the express incidence parameters in the law's anti-pass-through provision.⁸⁸

As mentioned above, the possible unresolved apportionment issues in the context of gross receipts or ad valorem taxation, as suggested by the footnote in *Exxon*, may be presented for resolution in a challenge to New York's form of statute. The potential collision of the severance tax apportionment standard set forth by the Court in *Commonwealth*

85. Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051, 1074-77, 1110 (1960); Hellerstein, *supra* note 38, at 178 n.150.

86. *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 960-61 (1962); see Hartman, *supra* note 85, at 1099. See Justice Rutledge's concurring opinion in *Freeman v. Hewit*, 329 U.S. 249, 259-83 (1946), for an insightful analysis calling for practical treatment of questions of measurement, incidence, and multiple taxation under the commerce clause.

87. See *supra* notes 78-79 & 84 and accompanying text.

88. See N.Y. TAX LAW § 182(11) (McKinney Supp. 1982-1983).

with an effective targeting of extraterritorial extractive operations found in the New York law would seem to provide an excellent issue for determination by the new and supposedly more realistic approach to judicial resolution of state taxation questions.

If the privilege of extraction can be subjected to an excise only in the location where it occurs, as *Commonwealth* indicates, then a foreign state's gross receipts tax so specifically conditioned upon conduct of that activity may cause inequitable multiple taxation, even if cast in the form of a franchise tax. Certainly, an arguable result is that apportionment of any part of that segment of the tax base to a nonproducing state should not be permissible if gross receipts from such activity rather than the net income of the unitary business of a taxpayer is the measure of the tax. Here, the Court's distinction between an apportionment of a tax on the income of an interstate enterprise, as contrasted with a gross value tax on a privilege exercised by it, as implied in *Exxon*, appears to be very meaningful. While the Supreme Court's footnoted caveats focused upon a potential multiplication involving consuming state taxes with producing situs state property taxes, the mineral production normally subject to severance taxes is intrinsically related to the producing real property in the producing state.⁸⁹

With regard to the effect of *Commonwealth's* standard of apportionment on a special oil company tax like New York's, some significance can also be found in an observation offered in the Supreme Court's discussion of apportionment standards in *Mobil*. In *Mobil*, the Court considered the issue of apportioned taxation of dividend receipts of an integrated oil company and its producing subsidiaries. In rejecting the taxpayer's contentions regarding apportionment of income being duplicative and unconstitutionally burdensome, the Court refused to accept the contention that allocation of all dividend income to the taxpayer's domicile was appropriate. Nevertheless, the Court expressly acknowledged that a fatal inconsistency and a prohibited degree of multiple taxation would exist in any particular circumstance where exclusive allocation to one state is accepted or required, stating, "Taxation by apportionment and taxation by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former cannot be sustained."⁹⁰

89. See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624 (1981) (noting the analogous nature of severance taxes and property taxes in the constitutional context).

90. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 444-45 (1980); see also *Standard Oil Co. v. Peck*, 342 U.S. 382, 384 (1952) ("The rule which permits taxation by two or more

The reasoning of this observation, and the Court's offering it as a caveat to a decision marking a departure from separate allocation, may take on more importance if the growing state energy tax conflicts are presented for judicial resolution. The Court's acknowledgment of the logical inconsistency in such a situation would arguably necessitate that a nonproducing state tax on extraterritorial extractive values be precluded by the type of total apportionment or allocation of that tax base to the producing state which was approved in *Commonwealth*.⁹¹ If the nonproducing state, for example, New York, is attempting to impose a gross receipts tax upon extractive activity which is also subjected to an unapportioned severance tax in a producing state, such as Oklahoma or Texas, the Court's theoretical conclusions may even support denial of such a tax.

It is assumed that most or perhaps all state severance taxes are unapportioned⁹² to the extent they levy upon gross value at the point of extraction without apportionment relative to any subsequent interstate delivery. The sanction of that characteristic by the apportionment rule of *Commonwealth* may well be a constitutional preference for an allocation such as that hypothesized in the above quoted analysis contained in *Mobil*. With those assumptions as a predicate, the range of acceptable apportionment available to any nonproducing state's special tax, such as the New York law, may be circumscribed. Any such result, of course, also requires specific consideration of the form and effect of the apportionment offered by the consuming state's law.

The New York oil company tax statute's apportionment formula, based on the proportion of gross receipts from all operations of a vertically integrated oil company in the State of New York to gross receipts from all of its worldwide operations, is an apportionment formula essentially equivalent to a single factor income, receipts, or sales method.⁹³ While having the virtue of simplicity, such a basis of appor-

states on an apportionment basis precludes taxation of all of the property by the state of the domicile.").

91. See 453 U.S. at 617.

92. See *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927), for judicially imposed apportionment. For examples of state severance taxes, see LA. REV. STAT. ANN. § 47:633(7) (West Supp. 1982); OKLA. STAT. tit. 68, §§ 1001-1024 (1981 & Supp. 1982); TEX. TAX CODE ANN. §§ 202.001-.353 (Vernon 1982).

93. The New York statute's formula simply attributes taxable receipts to the state on the basis of the taxpayer's gross receipts in the state in proportion to worldwide gross receipts. Its effect is to place the total measure of sales revenue from interstate sales completed in New York within the tax base, not unlike the "apportionment" under the Washington, D.C. tax at issue in *General Motors Corp. v. District of Columbia*, 380 U.S. 553 (1965). See N.Y. TAX LAW § 182(3)

tionment has not gone without strong opposition.⁹⁴ It can, however, serve a nonproducing market state to more favorably weight a tax base for imposition of a gross receipts tax.

The activities which are the object of taxation under the New York law, by definition, virtually always include extraterritorial extractive petroleum operations by a corporation which is also engaged in the marketing of petroleum products in New York.⁹⁵ The former activity occurs on a relatively small scale in New York,⁹⁶ in comparison to the latter.⁹⁷ The statute links the two activities as a precondition to tax liability. The sales activity which touches the state is not a taxable event unless the corporate taxpayer also engages in the other activities which are part of a vertically integrated petroleum operation.

It would seem that the single factor formula apportionment utilizing gross receipts is particularly suspect in this context. The formula applied is really only a horizontal apportionment of total corporate revenue among an integrated oil company's market states. Beyond that division, the formula gives no meaningful recognition to the relation of the taxing state to the extractive activity occurring outside its borders. Thus, the tax is essentially *unapportioned* insofar as the values in that portion of worldwide receipts attributable to the state are concerned. The value contained in the company's New York gross revenues which is attributable to extraction is, by operation of the vertical integration classification, carried entirely to New York for imposition of the two percent tax. Thus, whenever local taxation of such extractive activity also occurs in another state where the taxpayer produces the products sold in the market state of New York, multiple taxation is arguably present.

The application of a single factor method of apportionment based upon a receipts or sales factor has been approved in both the income⁹⁸

(McKinney Supp. 1982-1983); *cf.* *General Motors Corp. v. District of Columbia*, 380 U.S. at 554 (describing the D.C. tax).

94. See *General Motors Corp. v. District of Columbia*, 380 U.S. at 557-62; Hellerstein, *State Tax Discrimination Against Out-of-Staters*, 30 NAT'L TAX J. 113, 121-23 (1977).

95. See N.Y. TAX LAW § 182(2)(a) (McKinney Supp. 1982-1983); *supra* notes 78-79 & 84 and accompanying text.

96. Department of Energy statistics indicate crude oil production in the State of New York of 841,000 barrels in 1981, with total U.S. production of 3,128,624,000 in the same year. ENERGY INFORMATION ADMIN., U.S. DEP'T OF ENERGY, PETROLEUM SUPPLY ANN. 1981, Table 9 (1982).

97. In 1981, consumption in the state of New York exceeded 120 million barrels of gasoline and 164 million barrels of other refined products. ENERGY INFORMATION ADMIN., *supra* note 96, at 160-64; FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., HIGHWAY STATISTICS 1981, at 9.

98. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 269-71 (1978).

and the gross receipts tax contexts.⁹⁹ The absence of other factors in measuring the relationship of the taxing states to the tax bases in those instances has been accepted in decisions made with a less than thorough analysis. The results most often have been attributed to a litigant's failure to prove the effect of such apportionment, or lack thereof. The precedents nevertheless exist and their summary conclusions on the adequacy of such apportionment loom as a large hurdle for any challenge to the methods of apportionment. The so-called urban severance tax may, however, contain elements which make more insightful review of its apportionment unavoidable. The same factors may also serve as a basis for disapproval of the apportionment scheme of such a law.

The Supreme Court decisions which have examined the application of the commerce clause to gross receipts taxes on inshipments of other states' production have generally allowed unapportioned imposition. These results have been reached by, in essence, considering the taxed activity as more or less local, with the tax being imposed on transactions which have occurred after the completion of interstate commerce.

In one explanation of this approach, which considered it all but indefensible, the treatment of such taxes as sales or use taxes was described as being the means of pragmatic avoidance of determining a proper and workable apportionment between the state of origination and the state of delivery.¹⁰⁰ While the sales or use tax analogy and treatment may have served to lessen burdensome judicial inquiry into the sharing of gross receipts tax recoveries by the several states involved in taxable transactions, that approach may no longer be as easy to follow under the more realistic guidelines employed by the Court in its recent decisions.

The Court's mandate, requiring the determination of the practical effect of a tax on the gross receipts from interstate transactions by a state of destination, should preclude a separation of the transaction from the scope of the commerce clause in the same manner as *Commonwealth* ended such exclusion of severance and production taxes. Any tax on interstate transactions by the state of destination should arguably now always include a reasonable attempt at apportionment,

99. *General Motors Corp. v. Washington*, 377 U.S. 436, 439 (1964); see Hellerstein, *supra* note 94, at 122-23.

100. Hellerstein, *supra* note 94, at 122-23; Hellerstein, *supra* note 38, at 168.

with due consideration being given to the range and effect of actual tax burdens similarly measured on the same transactions.

To permit an unapportioned gross receipts tax by the consuming state, on the premise that the incidence of the tax is purely local, would likely avoid recognition of the Court's focal point of inquiry—the actual effect on the economics of interstate transactions. A congressional subcommittee report alluded to these practicalities by noting the difficulty in asserting that the taxation of the same person on the same transaction by the same measure is accomplished by anything but the same form of tax.¹⁰¹ It further suggested that the existing pattern of gross receipts taxes on production provide some systematic allowance of credit for sales taxes on the same transaction, indicating that economic result in a given transaction should control more than notions of distinct forms of taxation.¹⁰²

The landmark inshipments decision of *McGoldrick v. Berwind-White Coal Mining Co.*¹⁰³ coincidentally involved application of a New York gross receipts tax upon natural resources delivered from out-of-state producing sources. In *Berwind-White*, the Court determined that the tax was in the nature of a use tax upon local activity, applicable after the completion of interstate commerce.¹⁰⁴

The approach taken by the Court in *McGoldrick*, sustaining a gross receipts tax at the destination of an interstate transaction, was premised upon the assumption that the goods lost their character as interstate commerce when they arrived in the state and thus the tax was levied on an intrastate activity. This approach is similar to the Court's reasoning in *Heisler*—that goods taxed in the producing state are not protected by the commerce clause because they are separate from interstate commerce until they are committed to interstate commerce—which has now been rejected.¹⁰⁵

The Court's five to four decision in *General Motors Corp. v. Washington*¹⁰⁶ probably stands as the most significant authority for the destination state's gross receipts taxation of interstate commerce. That

101. SUBCOMM. ON STATE TAXATION OF INTERSTATE COMMERCE OF THE HOUSE COMM. ON THE JUDICIARY, STATE TAXATION OF INTERSTATE COMMERCE, H.R. REP. NO. 565, 89th Cong., 1st Sess. 1059 (1965).

102. *Id.* at 1057.

103. 309 U.S. 33 (1940).

104. *Id.* at 57-58.

105. See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981); *supra* text accompanying notes 39-40.

106. 377 U.S. 436 (1964).

decision has been criticized for its disregard of real economic effect in that it obscured the form of taxation involved and summarily separated the tax from protections of the commerce clause.¹⁰⁷ The Court ruled in *General Motors* that apportionment was more or less automatic because only receipts from sales destined for the taxing jurisdiction were subject to the tax.¹⁰⁸ As indicated, the decision has been analyzed as sustaining the gross receipts tax by likening it to a consumer sales tax, when in fact it was an unapportioned excise tax, not on separate transactions, but on the privilege of operations by the taxpayer. Thus, in disposing of the aura of multiple taxation presented by an unapportioned gross receipts tax in the destination state, the Court made a perfunctory analysis of the question, stating that all sales activities which were the subject of the tax occurred within the taxing jurisdiction. Similar reasoning has been suggested concerning the apportionment formula of the New York tax.¹⁰⁹

Therefore, the judicial approach to avoiding the difficult task of determining whether a fair apportionment exists in a gross receipts tax has involved a rather superficial analysis and a narrowing of the inquiry to only the consideration of whether there is at least some supportable relationship between the levy and the local activity in the taxing state. The majority approval of gross receipts taxes on interstate transactions at the point of ultimate sale has not involved significant probing of economic substance at all levels of the taxable activity involved as would be expected in challenges premised on constitutional limits of critical powers of the states. The points to be studied seem obvious. With prevention of undue burdening of interstate commerce as the end to be achieved, the interplay of taxes at all levels of the same taxable activity, and in at least all similar forms, should be more thoroughly examined.

Commonwealth pushed back the boundaries of local versus interstate activity set by *Heisler* concerning production. It is hard to conceive of the Court now avoiding the practical examination it has resolved to employ by treating a consuming state tax on gross revenues flowing from interstate activity as a local sales tax. Presumably, in the testing of such a gross receipts tax levied by the market state today, both a different standard of review and result from earlier precedents

107. See Hellerstein, *supra* note 38, at 171-74.

108. 377 U.S. at 448.

109. Golden, *The Constitutionality of State Taxation of Energy Resources*, 46 ALB. L. REV. 804, 856 n.296 (1982).

should occur. This result would be in contrast to *Commonwealth*, which rejected the theory of the earlier restrictive approach in *Heisler*, but still reached the same result in sustaining the challenged tax.

If a tax measured by the gross value at the point of destination in an interstate transaction does actually have the practical effect of being a levy coexistent with an unapportioned severance or production tax on part of the same taxable activities, some recognition of multiple taxation seems to be compelled. Such a situation appears to include exactly those dangers suggested by the dissent in *General Motors*, particularly where a gross receipts tax is pointed at a very specific integration of activities making up the taxable privilege.¹¹⁰

Most importantly, if the Supreme Court is to disregard labels and fictions in favor of the realistic approach which it says it wishes to take in these cases, the Court's treatment of a tax exacted upon a specific group of activities and privileges as being analogous to a sales or local use tax may no longer be tenable.

In the specific context of New York's special two percent franchise tax on integrated oil companies, the treatment of the tax as a sales tax to expediently avoid more meaningful consideration of multiple taxation in resolving the commerce clause issues presented in *Berwind-White* and *General Motors* would seem much less correct, or perhaps impossible. This is because the New York law expressly prohibits inclusion of the tax in the sales price of affected products.¹¹¹ Where out-of-state oil production is an essential incidence of taxability, and collection or recovery of a tax from the local market is forbidden, it cannot be passed off as wholly reflective of purely local activity or transactions.

IV. RATIONALE OF UNAPPORTIONED SEVERANCE TAXES

It has been suggested in this Article that the special market state tax on oil company gross revenue may violate the commerce clause because of an unqualified statement of preference for allocation to a single situs in the case of severance taxes. The Supreme Court affirmed the Montana Supreme Court's holding that no apportionment of the severance tax was necessary without apparent need for discussion of

110. Both Justices Brennan and Goldberg in their dissenting opinions filed in *General Motors* disagreed with the majority's apportionment rationale. They asserted that the Washington gross receipts tax was a form of multiple taxation and violated the standards required by the commerce clause. 377 U.S. at 449-62; see also Hartman, *supra* note 85, at 1076-78 (discussing "multiple burdens" test approach to gross receipts tax).

111. See N.Y. TAX LAW § 182(11) (McKinney Supp. 1982-1983) (anti-passthrough provision).

any policy rationale in *Commonwealth*.¹¹² It is appropriate, however, to consider the existence of a rationale supporting a preference for the producing state's tax, to the possible exclusion of a nonproducing state's gross receipts tax on an integrated oil company's extraterritorial extractive activity.

Analysts have noted that the practical, or less formal, approach to commerce clause review should result in an apportionment prerequisite for production taxes to the same extent as those imposed on other privileges.¹¹³ Similarly, it may be asserted that, notwithstanding *Commonwealth*, consistency and fairness dictate a requirement of some apportionment at the producing state severance tax level, in like manner as other taxes affecting interstate commerce. It is possible, however, that even taking the fundamentals of consistency and fairness as generally controlling, apportionment in the case of severance taxes simply may not necessitate or justify reliance upon approximation permitted in the case of income taxes where the three factor formula is designed merely to furnish a fair estimate. As mentioned, the concluding footnotes in *Exxon* demonstrate the present Court's recognition of the distinction between severance taxes and income taxes and their respective effects.¹¹⁴ Therefore, even if the exclusive apportionment conclusion of *Commonwealth* does not mean what it appears to, it must still be recognized that for purposes of gross valuation taxation upon mineral extraction, that activity is literally and exclusively connected with the situs state, even though interstate commerce may now be considered to begin with the extraction activity.

In this regard, there may be significance to the Court's statement in *Commonwealth* that it was not suggesting that the *Heisler* decision was incorrectly decided.¹¹⁵ Without further elaboration, the basis for that conclusion cannot be known. But the statement is indicative of the view that there remains a justification for an apportionment method which more directly sets apart value at the point of the exclusively local tax incidence, in the narrow frame of mineral production, as opposed to any generalized apportionment appropriate in the case of a general excise, broad-based privilege, or net income tax. A tax upon the privi-

112. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981).

113. See Hellerstein, *supra* note 38, at 174; Williams, *Severance Taxes and Federalism: The Role of the Supreme Court in Preserving a National Common Market for Energy Supplies*, 53 U. COLO. L. REV. 281, 307-08 (1981).

114. See *supra* notes 57-63 and accompanying text.

115. 453 U.S. at 617 n.7.

lege of extraction of minerals may not constitute a property tax; but its incidence is the changing of the land from which the taxable production is taken. This similarity was expressly recognized by the Court in *Commonwealth*.¹¹⁶ The application of another state's gross receipts tax to that activity, premised upon the existence of a unitary business, may therefore not fall within the pattern established by *Exxon* with respect to taxes on corporate net income.¹¹⁷

The Court has noted that attempts to achieve complete uniformity in application of the apportionment rules may, in certain instances, result in greater difficulty than is remedied and that this difficulty may be even greater where a long standing tax policy exists in one state.¹¹⁸ This would be the case if severance taxes in producing states were subjected to a constitutional challenge based upon interaction with a recently adopted measure like the New York tax which seeks to levy upon the same incident or privilege.

Perhaps the economic sectionalism, of which the form and scope of the New York law appear to be a manifestation, itself provides the appropriate rationale. A nonproducing state's oil privilege tax, which includes almost exclusively extraterritorial production activity, is one which necessarily goes largely without the political check which likely serves best to proportion tax burdens. With a prohibition of any collection of the tax cost in prices charged in the consuming state, this important relationship is even less existent and the melding of due process standards with the need for fair apportionment becomes more obvious. Absent the important balancing mechanism of constituent exposure to the economic burden of a tax, closer scrutiny of its effect has been recognized as appropriate and necessary.¹¹⁹ Where the local impact of such a tax is exported, or at least purposely deflected to other states and constituencies, the long standing suggestion of increased unfairness or discriminatory application becomes more likely.

In the constitutional sense, such a restriction on the transferability

116. "In many respects, a severance tax is like a real property tax, which has never been doubted as a legitimate means of raising revenue by the situs State (quite apart from the right of that or any other State to tax income derived from the use of the property)." *Id.* at 624.

117. See *supra* text accompanying note 54.

118. See *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 277-80 (1978).

119. Barrett, "Substance" vs. "Form" in the Application of the Commerce Clause to State Taxation, 101 U. PA. L. REV. 740, 749-50 (1953); Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication*, 75 MICH. L. REV. 1426, 1448-50 (1975); *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 957 (1962).

of the burdens of a gross receipts tax of a very particularized out-of-state activity is a patent barrier which may be harmful to the non-producing state as well as those states where the production takes place. Economies of scale and accessibility to markets through established modes of transport and distribution may be desirable in the capital intensive production of energy. Big may not be all bad for the consumer. The denial of the right of the market to absorb part or all of an integrated producer's tax costs could reduce sources of supply if other states allow the recovery of such costs. That aspect of an anti-passthrough provision is a possible rationale for more specific apportionment. That is, if the market state forbids cost recovery to the extent of a significant charge against gross receipts, the relative importance of its contribution to the corporate profit and viability is diminished.

It has been suggested that the post extraction mineral value be apportioned in a manner paralleling value added tax provisions.¹²⁰ While this approach may not be the most appropriate in a federal system, the *Commonwealth* and *Exxon* decisions, taken together, suggest some more specific separation is a permissible and, perhaps, a required form of apportionment for the type of narrowly framed taxation of the gross revenue of the oil and gas producing activity which consuming states may wish to impose. The states in which the production does occur may have been perceived as able to impose a gross valuation tax on it with greater appreciation of economic effect and with less potential for multiple taxation and discriminatory application than a distant state whose economic structure does not contribute directly to attracting and supporting the front-end investment, risks, and productive activity resulting in the taxable events.

The Court may also simply be of the view that valuation taxation of the production of oil and gas or other natural resources is so intrinsically tied to situs that apportionment of value at the point of removal from the ground should not be required. With that treatment granted, there is much less room to realistically avoid the multiplicity which is presented by another state's taxation of the same activity, particularly when the initial production is now recognized as a part of interstate commerce.

Notwithstanding all these considerations involved in the question of apportionment of severance taxes and the decision in *Commonwealth*, additional inquiry into that subject is warranted. Recognition

120. Williams, *supra* note 113, at 308.

of the level of extractive activity involvement with out-of-state operations and markets is a likely subject for further judicial and even congressional action.¹²¹ Producers engaged in integrated multistate petroleum operations may ultimately find that some form of apportionment of severance taxes, similar to other taxes levied upon a unitary business, must be afforded in their situation to preclude discriminatory multiple taxation. The so-called urban severance tax in New York is a manifestation of sectionalism and protectionist tax policy.

It is submitted in this Article that the existing apportionment standard for producing situs severance taxes under *Commonwealth* may make the New York type oil tax constitutionally deficient. But to the extent that proposition is not sustainable, the practical consequences of the energy tax conflict may make it economically imperative that the integrated taxpayers subjected to gross receipts taxes at both production and market sites reassert the theory¹²² that the fundamental concept of the commerce clause mandates that producing state production, or severance, taxes be apportioned, particularly where the "local" incidence of such taxation is no longer supportable.

In *Commonwealth*, the Court stated that severance taxes are not distinguishable in economic effect from other taxes subjected to commerce clause scrutiny.¹²³ If effective gross receipts taxation on mineral severance is imposed on a unitary business by more than the situs state, this lack of economic distinction may be of obvious significance to challenges based upon the multiple taxation concept.

V. CONCLUSION

The critical point for consideration in the structure of a tax such as the New York oil company tax is that gross receipts apportioned to New York, as only a sales and distribution point, will reflect values directly attributable to extractive rights and operations which have no fair relationship to the state. This result occurs due to the predilected imposition of the tax only upon an integrated taxpayer in a single industry where the initial productive activity is made a prerequisite to

121. See generally Browde & DuMars, *State Taxation of Natural Resource Extraction and the Commerce Clause: Federalism's Modern Frontier*, 60 OR. L. REV. 7, 45-56 (1981) (prediction of future judicial and congressional direction); Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 NAT'L TAX J. 245 (1979) (discussing future resolutions of controversies over constitutional limitations on state taxation of energy resources).

122. See Hellerstein, *supra* note 38, at 175.

123. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 616 (1981).

taxability. The taxable activity of extraction occurs virtually entirely outside the taxing state. Any gross value taxation effectively imposed on that activity should be similarly limited in scope. The measure of a tax as narrowly aimed as the New York tax is therefore inherently duplicative of a similar privilege tax imposed by a state offering governmental support to the production. This bias in the formation of the tax base suggests that otherwise reasonable income tax apportionment methods may be ineffective in preventing multiple taxation and that a method causing an integral flow of values to the taxing state is particularly questionable.

Mineral production has an inherent relationship and impact on the producing state by reason of the depletion of resources. A market state which is served by the product can likely mount convincing arguments that the consumption of those products is an economic exploitation which justifies equal return through taxation of those engaged in the activity. A balancing is obviously necessary. The Supreme Court's recent treatment of the productive state's powers in this context indicates a direction which dictates some adjustment of any special gross receipts tax at the market level to avoid unfair multiplication.

Integrated oil companies subject to the federal crude oil windfall profit tax which also engage in significant downstream operations in nonproducing market states furnish an alternate method for bringing a crude oil production tax base to consuming states. This is accomplished by a denial of a deduction for the federal windfall profit tax in the computation of a corporate income or franchise tax imposed by the consuming state.¹²⁴ This approach to revenue raising by a nonproducing state is equivalent to a severance tax. Arguably, it involves much more subtle questions of apportionment than the New York form of levy on integrated oil companies discussed in this Article. However, the denial of deductibility involving a special levy of the magnitude of the windfall profit tax, a tax which impacts on an activity carried on primarily in one section of the country, should probably also be questioned in terms of its real and practical effect on the adequacy of usual apportionment methods.¹²⁵ A fundamental practicality involved in

124. This has been accomplished by express statutory denial in the states of Iowa, Minnesota and Wisconsin. IOWA CODE ANN. § 422.35 (West 1971); MINN. STAT. ANN. § 290.09(4)(f) (West Supp. 1982); WIS. STAT. ANN. § 71.04(3) (West Supp. 1982-1983). The states of Georgia, New Jersey, New York, and South Carolina have taken the position in audit adjustments that their existing corporate income tax statutes preclude the deductibility of the Crude Oil Windfall Profit Tax for the reason that it constitutes a federal *income* tax.

125. Denial of a deduction for the windfall profit tax, particularly in the case of a statutory

such treatment of the windfall profit tax is the enhancement of the tax revenue position of a nonproducing state in an amount measured in terms of crude oil production revenue.

If the sectional tax confrontation on domestic energy does exist, the considerations outlined in this Article point to the conclusion that any so-called urban severance tax, to the extent it is structured to be effectively imposed extraterritorially by a nonproducing state, may well involve conflict with implicit but fundamental meanings of the apportionment standards enunciated by the Supreme Court in *Exxon, Mobil*, and *Commonwealth*. This confrontation, and the obvious involvement of the new standards with a specially designed oil company tax like New York's, would seem to provide a source for their further refinement. The limitation of special gross receipts, rather than net income, taxes aimed at reaching the value associated with extractive activity in another state should be a subject as appropriate for the Court's consideration as the question of tax exportation raised in *Commonwealth*. The result of such a question is difficult to predict, in view of the experience of taxpayers challenging similar, if less aggressive, taxes imposed upon the gross revenues from interstate transactions.

If any controversy involving the question is adjudicated, it is sug-

rule, will ostensibly be less susceptible to constitutional inquiry than the more direct levy in the form of the New York tax. However, the magnitude of an adjustment to taxable income resulting from such provisions or interpretations may conceivably raise apportionment questions which, even if not of constitutional dimension, could provide the basis for a challenge. The situation would arguably arise where a taxpayer's receipts within and outside the taxing state would not be fairly reflected in real economic terms through application of the statutory formula of apportionment. The windfall profit tax on many integrated companies, which concentrate in crude oil production and refining, could have a particularly great impact on relative recoveries measured by the sales factor in formula apportionment. To the extent deductibility is denied, the apportionment of that income base is arguably distorted by the failure of the existing formulary treatment to reflect the burden of the tax related to productive activity outside a nonproducing market state. The propriety, or even necessity, of adjustment to such apportionment would seem to be called into question in such circumstances.

There has been a judicial reluctance to provide apportionment factor relief in circumstances where particular costs are geographically skewed. *See* *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978); *Commonwealth v. Lucky Stores, Inc.*, 217 Va. 121, —, 225 S.E.2d 870, 875-77 (1976). Nevertheless, where a before profit excise of the magnitude of the federal windfall profit tax is involved, recognition of special conditions warranting such relief is more supportable. If the measure of the gross income of a corporate taxpayer is subjected to such an exaction at the production level, capital recovery is extraordinarily affected in relative terms. Denial of recognition of such a tax in computing taxable income raises the need to explore the adequacy of the income apportionment to a state not providing the resource base generating the excise tax imposition. The application of a normal three-factor formula in that situation may result in a distorted tax base. The nonproducing state sales or receipts which become a part of the numerator in the usual formula apportionment would arguably be overstated in relation to the producing state sales in the denominator when the relative return to a taxpayer's operations subject to the windfall tax burden is considered in real economic terms.

gested that the purposes and policy of taxes upon the severance and extraction of mineral resources should be explored in the same depth as the constitutional requirements of the due process and commerce clauses. The ends sought to be achieved by both state severance taxation and the relevant constitutional provisions should lead to a conclusion that has perhaps already been perceived and implicitly recognized by the Court in the decisions discussed in this Article. A determination that a sharing of the added wealth relative to increased resource values is not best accomplished by random gross revenue taxation of mineral production by states not directly involved in that activity.

The better solution seems that the local market for the product ultimately delivered from the activity is a more appropriate point for any economic regulation or taxation of those increased values by a nonproducing jurisdiction. Further, market state apportionment, which provides more direct adjustment or credit for prior gross value or revenue taxes of the state of extraction, would be more consistent with economic consequence and the rationale of the commerce clause. To take any other approach risks the very disruptive conflicts which that provision of the Constitution is intended to prevent in the federal system.*

* On March 29, 1983, while this Article was in the publication process, the Governor of New York signed Ch. 18, 1983 N.Y. Laws —, which was passed by the legislature on the same day. The new law retroactively repeals the anti-passthrough provision of the gross receipts tax on oil companies. N.Y. TAX LAW § 182(11) (McKinney Supp. 1982-1983); *see supra* text accompanying notes 5, 82, 88 & 111. It also repeals the provision requiring that the entire law shall be invalid if any portion thereof is so found. Ch. 272, § 5, 1980 N.Y. Laws 433, 435-36. The tax is extended through 1985, still as an imposition only upon vertically integrated oil companies. Under the new law, the New York Tax Commission *may* decide to prescribe a method of allocation other than the statutory formula in order to more fairly and equitably reflect the gross receipts of an oil company from within the state.