In the

# Supreme Court of the United States

MOORMAN MANUFACTURING COMPANY,
Appellant,

V.

G.D. BAIR, DIRECTOR OF REVENUE,
STATE OF IOWA,
Appellee.

No. 77-454

Washington,D.C.
March 21, 1978

Pages 1 thru 44



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| v. | : | No. 77-454 |
| G. D. BAIR, Director of Revenue, State of Iowa, Appellee. | : | |

Washington, D. C.

Tuesday, March 21, 1978

The above-entitled matter came on for argument at 11:15 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

DONALD K. BARNES, ESQ., 26 Palm Club, Pompano Beach, Florida 33062, for the Appellant.

HARRY M. GRIGER, ESQ., Assistant Attorney General of Iowa, Lucas State Office Building, Des Moines, Iowa 50319, for the Appellee.

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Moorman Manufacturing Company against Bair.

Mr. Barnes, I think you may proceed when you are ready.

ORAL ARGUMENT OF DONALD K. BARNES ON BEHALF OF APPELLANT

MR. BARNES: Mr. Chief Justice, and may it please the Court: This is an appeal from a decision of the Supreme Court of Iowa upholding that State's taxing scheme which has the purpose and effect of imposing a tariff on imports while subsidizing exports.

The case differs from General Motors Corporation v. District of Columbia, which this Court decided in 1965, only in irrelevant factual details and that the issue here is purely constitutional whereas the Court was able to decide the District of Columbia case on a statutory interpretation.

The appellant is the Moorman Manufacturing Company, which is an Illinois-based corporation with the business of manufacturing animal feeds which it sells to farmers and others. It has warehouses and salesmen in Iowa, but no manufacturing in that State. Everything sold into Iowa is manufactured in Illinois.

The corporation paid the Iowa corporate income tax, computing its apportionable income in the manner prescribed in the Iowa statute, as to which there is no

dispute. And then it apportioned that income following the three-factor formula of the Uniform Division of Income for Tax Purposes Act. That is the formula of property, payroll, and sales equally weighted, with the sales assigned to the destination, in this case Iowa.

The assessments are for the difference between the tax as thus apportioned and the Iowa formula. The Iowa formula provides for a single sales factor by destination, not attributing anything to either property or payroll. The Iowa statute starts with Federal taxable income and makes certain adjustments in it. Then having done that, it applies a fraction, the numerator of which is Iowa sales and the denominator sales to customers all over, to that amount of total income. And this has the effect of attributing to Iowa all of the income which is derived from the manufacture in Illinois and the sale to customers in Iowa. There is no tax on income from an Iowa manufacturer selling into Illinois.

All the facts are stipulated -- the total taxable income, the apportionment fractions, any one of the three apportionment fractions, the amounts of tax which will be due if the statute is held constitutional, and also the amount of tax which will be due if it is held unconstitutional. So that the sole question in the case is the constitutionality of a single sales fraction.

The appellee agrees with that. That appears in his

motion to dismiss and also in his brief.

QUESTION: Mr. Barnes, just one question there. If the statute is unconstitutional, why do you owe any tax?

MR. BARNES: We don't owe any tax more than we already paid.

QUESTION: Why did you have to pay any at all?

MR. BARNES: Because we -- Oh, Mr. Justice Stevens, the statute imposing tax is not unconstitutional. The only thing that is unconstitutional is the apportionment formula, so-called apportionment formula.

QUESTION: You say that the constitution mandates the three partite formula that you used in filling out your returns?

MR. BARNES: No, Mr. Justice Stevens. We don't call on the Court to impose a formula or perform any other legislative function. We merely say that the single sales factor is unconstitutional, and that's all that the Court is asked to do.

QUESTION: And if that's correct, then, as my brother Stevens has indicated, you would owe no tax under the Iowa statute, and yet you voluntarily paid a tax, didn't you?

MR. BARNES: I wouldn't go that far, Mr. Justice SteWart. I think the statute is perfectly valid except for this apportionment formula. And the statute not only says -- I shouldn't say apportionment. There is no apportionment.

This single factor sales formula of attribution, I think, is unconstitutional, but the statute also says that in the case of interstate commerce, the taxpayer shall pay a reasonable portion. So I think that knocking out the formula does not knock out the statute nor the liability. It just leaves a question as to how it will be computed.

QUESTION: How can it be? Has the taxing agency any authority to set up a different formula?

MR. BARNES: Yes, they do.

QUESTION: They do.

MR. BARNES: Yes, they do. In this statute --

QUESTION: And you suggest they could then compute the tax on some three-factor or other formula?

MR. BARNES: That is what we have agreed on. But almost all these statutes in all States contain a provision that if there is something wrong with a statutory formula, the commission or the director can work out something that fits in a particular case. A prime example was the one in California in the McDonnell Douglas case. The California statute provided that the property factor is going to consider only owned property. McDonnell Douglas owned a big factory in California and they leased a big factory in another State. And they said it's not fair to attribute all of our property to California when we are using this property in another State. And the California Supreme Court agreed. This was a case in which the

statute was improper in its application in a particular case.

So the statutes permit that all along, including the Iowa statute.

QUESTION: You had to pay the tax based on a three-factor fomula.

MR. BARNES: That is right. We did not pay on the additional assessment. We filed an appeal bond instead.

All the other States, including Illinois -- not all, but all the ones that are important, including Illinois -- use the three-factor formula: the property, payroll, and sales.

QUESTION: You said all the States that are pertinent. You mean the ones in which your client is subject to taxation.

MR. BARNES: I made that qualification because there are one or two States that, while using three-factor formula, apply some different weights. And there is one State which has adopted the only really sound formula, which is property and payroll but no sales in it. That's West Virginia.

QUESTION: Are you saying that because so many other States have adopted the three-factor formula, Iowa is under constitutional mandate to do the same thing?

MR. BARNES: No. What we say is that they are under a constitutional mandate not to adopt something different which imposes a double tax on interstate commerce.

QUESTION: But supposing every State in the Union

had adopted Iowa's formula. Could you make the same argument that you are making now, that Iowa's formula is unconstitutional?

MR. BARNES: Yes, because the taxes would be being paid all to the wrong States, which is a due process problem.

QUESTION: How can you know what the wrong States are?

MR. BARNES: There wouldn't be any double taxation in that case. But you would still have taxes going to places that are unrelated to where the income was earned and to where the governmental services were rendered.

QUESTION: But certainly there would be some nexus between the taxes collected and the earning of income.

MR. BARNES: No, there is no nexus question in this case. We agree with the nexus. It could have a very tiny nexus and the same problems would arise. The question is not whether a tax is owed, but how much. And the measure is entirely our problem.

QUESTION: You have got to show that Iowa's proposed measure is unconstitutional, not just that you don't like it or that you would have done something else if you were a legislator.

MR. BARNES: That's right. I think we have no difficulty with that.

The hypothetical which this Court used in its opinion in the General Motors v. District of Columbia case

is applicable here. Assume that a particular manufacturer does all its manufacturing in Illinois and it sells only to customers in Iowa.

QUESTION: Mr. Barnes, you argued the General Motors case, didn't you?

MR. BARNES: I did, sir.

QUESTION: Two of them? Or not?

MR. BARNES: You remember, Mr. Justice White.

QUESTION: I should, yes. Washington and District of Columbia.

MR. BARNES: Correct.

And I tried again but you wouldn't take it.

QUESTION: I think you won the Washington.

MR. BARNES: I lost Washington and won the D.C.

QUESTION: Oh, yes, that's right.

MR. BARNES: In that situation, all manufacture (sic) in Iowa and all customers in the District of Columbia --in Iowa, Illinois would tax two-thirds of the income by applying its property and payroll factors. It wouldn't apply the sales factor because the sales were all outside the State. And Iowa would tax 100 percent of the income because it attributes all income to a locus of the customer. That's a total of 166 percent. As I say, that hypothetical I have taken from GMC v. District of Columbia. This shows the fallacy of the argument. They are making the same error that the court of appeals made in the

GMC case, namely, that because the unrelated income is not taxed, income is apportioned. The fact is that 100 percent of related income is taxed.

Now, they say, for instance, Moorman has a factory in Texas that sells to Texas customers. By not taxing any of that, they say, well, Moorman's entire income is apportioned. But apportionment of the entire income is irrelevant. What counts is the income on the segment of the business that consists of manufacturing in Illinois and selling to customers in Iowa.

The sales fraction, of course, does not do any apportioning. It merely identifies the income from that segment of the business. Taken by itself, the tax is 100 percent of that income.

Now, the sales factor is economically illegitimate in any case, but it is tolerable if combined with property and payroll factors which do measure the income-producing activity and which also measures the burden on governmental services.

QUESTION: This again is a constitutional argument, I take it, not just an economic argument.

MR. BARNES: Yes, because, as we have attempted to point out, the constitutionality of things in this area have to take into consideration economic realities, among other considerations. The constitutional requirements rest to a considerable degree on economics.

QUESTION: Your basic constitutional claim, as I understand it, Mr. Barnes, is that what Iowa has done results in double taxation of interstate commerce.

MR. BARNES: That is the interstate commerce argument. There is also the due process point because they are reaching outside their geographical borders to grab something from another State.

QUESTION: Precisely how does this double taxation, as you refer to it, take place? How do you define double taxation?

MR. BARNES: That was the hypothetical I went through a minute ago.

QUESTION: Multiple taxation perhaps is better.

MR. BARNES: Illinois uses this three-factor formula which is universal except for Iowa. And if we manufacture in Illinois, Illinois will attribute to itself two-thirds of the income derived from that part of the business, because it will apply property factor and payroll factor.

Iowa, then, if the shipment is into Iowa, attributes 100 percent of the income to itself because it attributes all of it to the location of the customer.

QUESTION: So you say that if the same income is attributed to more than one State, it's double taxation.

MR. BARNES: Yes, and constitutionally impermissible.

QUESTION: What case supports that?

MR. BARNES: There are many cases that touch on this particular subject, most of them not in this precise context. Of course, the best description of the situation is General Motors v. District of Columbia. The only trouble with that is that the Court was able to decide it on a statutory ground, which cannot be done in this case.

Freeman v. Hewit is a case in which a different type of tax was struck down because of the mere danger of a double taxation by a second State.

QUESTION: You think Freeman v. Hewit is still good law after our recent decisions in the last two or three years?

MR. BARNES: Yes. I don't know of any decision that attacks the conclusion in that one. That was outshipments. Now, the recent decisions that have upheld the tax on somewhat that same type have been on inshipments. Freeman v. Hewit isn't the only case, of course. Adams v. Storen is another one. Gwin, White & Prince v. Henneford is still another. And there are a great many.

QUESTION: Supposing you had a neighboring State next to Iowa that had a two-factor formula -- payroll and property -- and Iowa had the one-factor formula -- sales. Would both statutes be unconstitutional? And say all the goods are manufactured in the two-factor formula State and shipped into the one-factor formula State. Would both statutes be unconstitutional?

MR. BARNES: No. What you would get in that case --

QUESTION: You would have 200 percent tax.

MR. BARNES: One hundred percent duplication, 200 percent instead of 166 that we have here.

The rule has long been that what one State does doesn't make much difference to what another State does.

QUESTION: Then they would both be bad.

MR. BARNES: Well, the conclusion usually is they are both good. But you pose an extreme case and there is something in that case to uphold the neighboring State's two-factor formula. West Virginia, they don't neighbor on Iowa, but they ship things up there. The fiscal soundness, economic soundness, of the property and payroll factors would throw a terrific burden on the State of Iowa to justify its own sales factor, and it can't meet that burden. Furthermore, the two factors, while differing from the three factors used by the majority of States, is very close to what is done by a majority of States. It attributes income to the sources of capital and labor, which this Court has often said are the sources of income.

QUESTION: But, Mr. Barnes, what I am asking you, does your argument rest on the overlap, which it would seem to me makes all statutes unconstitutional, or are you arguing quite a different argument that the sales factor just isn't justifiable because there is not enough activity in the State?

If you are arguing overlap, I don't see what difference it makes which factor you use. Any one would be unconstitutional if it is not the same as the neighboring State's.

MR. BARNES: The difference is that -- I don't think both statutes would be unconstitutional in your case. I think the sales tax would be unconstitutional.

QUESTION: But doesn't your overlap argument apply equally to both States?

MR. BARNES: It does, and it puts a burden on both States to prove the validity of its method of doing it. I think the State that uses property and payroll can easily prove it and the State that uses sales can't come anywhere near proving it.

QUESTION: But are you then saying that if every State in the country used a purely sales method, every State statute would be unconstitutional? And then you don't have to rely on overlap at all.

MR. BARNES: That's right. That would eliminate the double taxation. I think Mr. Justice Rehnquist asked me a question similar to that. But what it would do would be to result in the taxes being paid to the wrong States, because there isn't any basis for attributing taxes on an income to the locus of the customers, which is what that would do.

QUESTION: See, you have got two quite different theories. I am trying to understand on which one you are

resting. One is an overlap double taxation theory. The other is that sales isn't any good no matter how it's done.

MR. BARNES: Right.

QUESTION: Which is your principal argument?

MR. BARNES: On the interstate commerce phase of the case, the overlap.

QUESTION: But you rely equally on your due process issue, I take it. That's the sales factor just taxes income earned in another State.

MR. BARNES: That's right.

We have said enough about the sales tax -- sales fraction, not apportioning. A tax is justified only by governmental services; in the case of corporations services to corporations. And the sales factor is unrelated to services. It doesn't in any way measure the burden which the corporation imposes upon the State. Income, as this Court has often said, is the product of capital or labor or both. And the sales factor is unrelated to that. Selling effort, of course, produces income, but that is measured by capital and labor. The Iowa formula has no relation to selling effort. It has no relation to the warehouses and inventories, nor to the salesmen employees that are in the State of Iowa. The tax would be the same if there were no property or payroll in Iowa. It would also be the same if Moorman were to pick up its entire Illinois factory and put it in Iowa. It would not

increase the tax in the slightest.

The effect of the formula is to tax capital and labor which is in Illinois, and again impose a tariff on imports and subsidize the exports, and in conjunction with Illinois to cause a double tax.

In a powerful brief of 15 distinguished economists, that economic fallacy in the sales factor is pointed out to tariff on imports, an inducement to trade war with resulting injury to common markets. Now, since our last brief was written, our attention has been drawn to an activity in the State of Minnesota which shows that the trade war which was theoretically envisioned by the economists is actually going on.

Minnesota had permitted manufacturers such as Moorman shipping into Minnesota to use the standard three-factor formula, equally weighted, property, payroll, and sales. Now they have a bill pending which would force Moorman and other similarly situated to use a three-factor formula but only 15 percent property, 15 percent payroll, and 70 percent sales. The report that I get is that this is done in retaliation for Wisconsin's recent changing the weights in its formula and increasing the weight on sales from one-third up to one-half.

QUESTION: How much latitude do you think the Constitution allows the various States in using one , two , or three formulas and in weighting the formulas?

MR. BARNES: I think that the decisions of this Court and of other courts have upheld minor overlap, particularly where the overlap is not directly intentional, it just happens to result from a different way of doing things. That can happen under the three-factor formula equally weighted because of different definitions of some parts of the formula. But it doesn't produce any very serious overlap.

In this case we have a serious overlap that is 141 percent in one of the years, and there is nothing just incidental about it. It's intention, it's the deliberate intention to impose a tariff on imports and subsidize exports.

Referring to that Minnesota thing again, a very peculiar provision in that statute, or bill since it's a pending bill, as it has been reported to us orally, we haven't seen it, is that it contains a provision that will not take effect if Moorman succeeds in this case.

QUESTION: Tell me specifically what impact does this sales factor have with respect to the competition between Iowans and people from Illinois?

MR. BARNES: The effect on competition is nothing which we can measure. At this point all we can do is look at it --

QUESTION: You say it's a tax on imports. It's a tax on imports because you are saying both Illinois and Iowa are taxing the same income. So the tax bite on Moorman is

higher --

MR. BARNES: Even if Illinois were not taxing the same income; as a matter of fact, the first two years in this appeal they didn't. Their corporate income tax came in later. It still is a tax on imports because it is attributing to Iowa 100 percent of --

QUESTION: But does it help Iowans control the Iowa market?

MR. BARNES: That results if there is another tax, as there is in this case. Because Moorman has to pay tax on 166 percent of its income, and Iowa --

QUESTION: And makes it less able to compete in the Iowa market.

MR. BARNES: That's right. And an Iowa manufacturer wouldn't pay that.

The biggest boon is to the Iowa manufacturer who sells into Illinois or some other place, because he doesn't pay any tax to Iowa at all, and is taxed on only one-third of his income when it gets into Illinois because of the application of the sales factor in that case.

Now, when many States do it one way and Iowa does it another --

QUESTION: You think there is a discrimination then against interstate commerce or not?

MR. BARNES: Yes, there is.

QUESTION: Well, is that an independent basis for invalidating it?

MR. BARNES: No. It isn't independent of the overlap.

QUESTION: You think it's the same.

MR. BARNES: Yes. The overlap is what illustrates and this was the consequence of the discrimination against interstate commerce.

As I said, when Iowa does it one way and all the other States do it some other way, Iowa has to give way unless Iowa can clearly establish that it's right and the others are clearly wrong.

QUESTION: In other words, Iowa's constitutional right to tax, or limitations on Iowa's power to tax is affected by the means chosen by other States.

MR. BARNES: That is true. And Iowa, since it's so different from everybody else, has the burden of proof showing that it's right.

QUESTION: I thought that every State enactment was presumed constitutional.

MR. BARNES: So?

QUESTION: So why does Iowa have the burden of proof?

MR. BARNES: I merely cite the decisions of this Court, the most recent one very recently, the Raymond Transport

Company v. Wisconsin, in which the Wisconsin statute was held unconstitutional, or regulation, because it was different from the regulations of other States thereby imposing a burden on, in that case, the trucking industry. And before that there have been others like Bibb v. Navajo, another one of the same type of thing.

It's a perfectly valid statute if it stood by itself, but invalid only because it was incompatible with other States and imposed an unreasonable burden on the interstate commerce involved in those cases.

QUESTION: Do you think if neither party had introduced evidence in the recent Wisconsin case, the Wisconsin statute would have been struck down because Wisconsin had the burden of proof to show it was constitutional?

MR. BARNES: No. The case had to have evidence to show two things: One was what other States were doing, and the second one was that the interplay of Wisconsin and the other States imposed a burden on interstate commerce, and that evidence was in the case.

QUESTION: Mr. Barnes, does the record tell us what the tax rates were? How heavy a tax is it?

MR. BARNES: In early years it was 8 percent and in the latter years 10 percent.

QUESTION: Ten percent.

MR. BARNES: A pretty stiff rate for a State income

tax.

QUESTION: Do you think it would be unconstitutional to impose a 10 percent sales tax?

MR. BARNES: No. They could do that.

The appellee hasn't made any case of their own. They have argued that 100 percent income is not taxed. That's wrong. The statute defines the income. In their brief they say that the State taxed 100 percent income of the local businesses, which it did, but it also taxed 100 percent --

QUESTION: You would be making the same argument, I take it, if this tax rate were one-half of one percent, or one one-hundredths of one percent.

MR. BARNES: You asked me about that one once before. The answer here is that in this particular case the total tax if they were to tax on gross receipts, which would be a low rate of tax, would be substantially less than the tax that is involved in this case.

We applied the Washington statute to these facts and it came out way down.

QUESTION: Yes, but why shouldn't a reasonable question be whether or not a State is extracting from Moorman a reasonable return for what it does for Moorman?

MR. BARNES: There isn't any measure. The sales formula doesn't measure anything that the State does for Moorman, nor any place that Moorman earns the income.

QUESTION: Suppose it were one-thousandth of one percent rate. You wouldn't say that it was more than what Iowa was doing for Moorman?

MR. BARNES: Well, if the tax were very low, we wouldn't be quarreling about it, but the legal principle, the constitutional principle, would be just the same, assuming --

QUESTION: Unless you say the constitutional principle is that interstate commerce and Moorman have to pay their way, and unless somebody can show the State is extracting too much for what it's giving, the tax is constitutional.

MR. BARNES: You would have an interstate commerce objection if they taxed their own corporations on the same basis and then exempt them from the tax, as the sales factor does, and then applied it to Moorman.

Now, of course, if the amount is very small, nobody is going to complain. That's why gross receipts taxes were allowed for --

QUESTION: Of course, the Iowa people who are exporting, manufacturing and exporting, are paying property taxes and everything else in Iowa. The total tax burden imposed by Iowa may be greater than Moorman's, for all you know.

MR. BARNES: But Moorman is paying the same taxes in Illinois, so there isn't any --

QUESTION: What if Iowa's tax rate was 1 percent and it had a single factor formula and Illinois's tax rate

were 15 percent, but it had a three-factor formula? Would your answer as to constitutionality of Iowa's statute still be the same?

MR. BARNES: Yes, sir. No difference. The rate and the base are unaffected in an argument of apportionment, which is all we are arguing about here.

The present situation, then, is we have a double tax which is a violation of the Commerce Clause; we have a tax on manufacturing that is out of the State, which violates Due Process. It also violates fundamental principle of federalism, which confines States to their own geographical jurisdiction. And it favors local industry,which is a violation of Equal Protection.

MR. CHIEF JUSTICE BURGER: Mr. Griger.

ORAL ARGUMENT OF HARRY M. GRIGER ON

BEHALF OF APPELLEE

MR. GRIGER: Mr. Chief Justice, and may it please the Court: The issues today, as far as the constitutionality of the Iowa corporate income tax scheme, revolve around the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause.

The subissues are facial constitutionality of the Iowa tax scheme on its face, and then, if it is constitutional on its face, whether or not it has been constitutionally applied to Moorman Manufacturing Company.

QUESTION: What do you mean by "facial constitutionality"?

MR. GRIGER: I believe that facial constitutionality means that it must be constitutional under all -- rather, it must be unconstitutional under all conceivable circumstances. If it simply has a possibility of being unconstitutional some of the time or under some conceivable circumstances, I believe that should be an as-applied issue.

QUESTION: That's really overbreadth you are talking about, isn't it?

MR. GRIGER: Yes, I believe the whole case is overbreadth.

QUESTION: That's only been applied in the First Amendment area, hasn't it? Why do you need to wrestle with facial constitutionality at all when you are talking about a tax statute that has nothing to do with free speech?

MR. GRIGER: Maybe I am being misunderstood.

When this case began Moorman basically put into issue that the Iowa sales tax is invalid, period, under any conceivable circumstances.

QUESTION: You didn't have to buy that, did you?

MR. GRIGER: No. We don't. And our trial judge in Iowa held that it was unconstitutional under all conceivable circumstances. The Iowa Supreme Court, which we believe correctly met the issue, said, no, there is no showing it

can be facially unconstitutional because it's not facially unconstitutional under all circumstances. And, secondly, as to this particular tax there has been no proof of unconstitutionality.

But what I am saying is as far as the facial due process issue, this would mean that no matter what the circumstances, the Iowa single sales factor formula would automatically cause extraterritorial taxation, Mr. Justice Rehnquist, regardless of the circumstances. I believe that is what Moorman is saying. That is not our position. We don't think they have proved that in any event.

The Iowa single sales factor formula, exploring this one step further, applies not simply to corporations such as Moorman, which manufacture outside the State of Iowa and sell within, it applies to retail merchants, wholesale merchants, in-State manufacturers, out-of-State manufacturers, manufacturers manufacturing in State and out of State.

Moorman's evidence, of course, was only directed towards its own facts, which it agrees on page 4 of its brief that that is all the issues really are. This, as I say, suggests that this case really involves the constitutionality of the Iowa formula as applied to Moorman's facts, and it is too broad to say that it involves an attack upon the statute as invalid under any conceivable circumstances which are not even before the Court today.

Due Process principles derived from constitutional apportionment cases decided by this Court are as follows:

First, the statutory formula and the results reached in its application are presumed constitutional. An attack here must show unconstitutionality beyond a reasonable doubt, rebut all reasonable basis to support the formula.

Second, the States have great leeway in their choice and application of formula.

Third, the Court has never stricken an apportionment formula on its face. In the hundred and some odd years of constitutional history of formulas in this country, one has never been stricken on its face. They have adopted a case-by-case approach, carefully reviewing the record in the courts below to see if the taxpayer showed constitutional transgression. A taxpayer has in this area not merely the burden of proof, but extremely heavy burden of proof in challenging a formula's constitutionality. This generally requires a powerful evidentiary showing against the formula and not merely, as in this case, arguments of counsel. And, of course, precise apportionment is impossible, rough approximation being sufficient, the Court having long recognized that it is generally impossible to specifically allocate the profits of a unitary business to activities carried on in a taxing State.

Now, an application of these Due Process principles to this case for the years in question, the Iowa apportionment

formula,as applied to the Iowa computed net income tax base, showed that Moorman earned from about 21.9 or 22 percent of its income in Iowa to about 18.7 percent for the five years in question. This is stipulated, and there is really no dispute as to the fact the formula shows that.

We believe that Moorman was required to show, to satisfy its burden of proof that the Iowa law was unconstitutional, that they didn't earn that amount, that they earned a substantially lesser amount.

Now, the only evidence in this case in the stipulated data, there were no witnesses, we have stipulated data in this case, consisted of a mere comparison of the results reached by Moorman's three-factor formula, which is about 12.2 to 14.5 percent of its income in Iowa, and, of course, the Iowa formula listing the percentages that I mentioned. In other words, we have a comparison of one estimate with another estimate, with no evidence in the case which estimate may be right or which estimate may be wrong. From all that appears in this case, we have actually undertaxed Moorman.

QUESTION: It is true, isn't it, General, that your single formula does benefit your Iowa manufacturers? And this, I take it, is why we have an amicus brief from Deere & Co. and Maytag and others who ship out of the State.

MR. GRIGER: I might point out Deere & Co.--Maytag is quite local, they manufacture washing machines; Monsanto

is located in St. Louis. Most of the --

QUESTION: Their headquarters are, but you have an Iowa establishment, don't you, of Monsanto?

MR. GRIGER: I believe they do have an Iowa establishment. Most of their manufacturing is outside the State.

QUESTION: You certainly do Deere & Co. at the quad cities on the Iowa side.

MR. GRIGER: Deere has manufactured both in Iowa and in Illinois, sir.

QUESTION: And this is why they are in favor of the single sales formula.

In other words, how do you answer Mr. Barnes' argument that you are not favoring the exporters at the cost of the importers, if there is an answer?

MR. GRIGER: First of all, the only answer I can think of giving a particular question like that is that you are talking about a theory.

QUESTION: It is a legitimate question.

MR. GRIGER: I'm not saying it isn't. I'm not saying it isn't. We are talking about a theory. The same questions cropped up in prior -- I believe anyway they cropped up -- in prior apportionment cases decided by this Court involving single property factor cases. There, of course, the formula would tax the total segment income if you accept the theory

of a company manufacturing in a State, whereas theoretically in the formula -- it doesn't take into account what is going on in the State of sales.

Now, Mr. Barnes is saying the same thing insofar as this case. I believe, however, that the Iowa tax is triggered and is applicable against corporations who sell in the Iowa market place. And if they do that, they become subject to the Iowa corporate income tax.

QUESTION: Of course, I'm not suggesting Mr. Barnes necessarily will prevail here. But I'm just wondering if the so-called Iowa formula on the single factor isn't the result of the legislative response to Iowa manufacturers.

MR. GRIGER: Your Honor, the formula was adopted in 1934. Why it was adopted, I honestly don't know. Back at that period of time there were certainly -- I think as Mr. Barnes brought out in his brief, back around 1929 the basic formulae in effect at that time were the single properties and the single sales.

QUESTION: Yes. Well, having practiced it on a neighboring State, they were adopting these kinds of tax laws at that time, and they were fairly simple and they went to single factors. Iowa has never progressed beyond that point, I suppose, because it's helpful to them.

I'm not saying that's unconstitutional.

MR. GRIGER: No. In trying to answer your question,

it's a little bit difficult for me to point out why we would want to do it. Our Iowa-based companies, an Iowa manufacturer who sells totally in Iowa or sells very little out of Iowa certainly gives no legislative benefit --

QUESTION: Under any theory.

MR. GRIGER: Yes, sir.

QUESTION: Let's put it another way. Wouldn't Moorman be better off if they moved their factory to Iowa?

MR. GRIGER: I don't think we know that. This assumes that they are --

QUESTION: Really?

MR. GRIGER: No, I don't think we do. That would assume, for example, that they are earning substantial income out of their manufacturing activity. There is no evidence of that, in this particular record anyway. For all that the record shows here, they could be earning a great deal of money out of their Iowa sales activity more than we are taxing, and moving their factory to Iowa might not have any effect insofar as their overall tax liability is concerned, but it doesn't mean that what we are doing right now is wrong.

QUESTION: It would not increase their Iowa taxes and it would, presumably, reduce their Illinois taxes. So why isn't my Brother Marshall correct?

MR. GRIGER: Well, I don't think there is any question it would reduce their Illinois taxes based --

QUESTION: And it would not increase their Iowa taxes.

MR. GRIGER: No, unless they increased their Iowa sales. Assuming everything remained constant --

QUESTION: If they moved their factory to Iowa, they would come out ahead, wouldn't they? Isn't my Brother Marshall exactly right?

MR. GRIGER: I don't know if they would come out ahead. That assumes that --

QUESTION: They would not pay any Illinois tax at all, and they wouldn't pay any increase in Iowa.

MR. GRIGER: From an economics standpoint, yes.

QUESTION: Do you have a property tax in Iowa?

MR. GRIGER: Oh, yes, sir, one of the highest in the country.

QUESTION: They would pay then an Iowa property tax.

MR. GRIGER: Oh, certainly.

QUESTION: This assumption also would rest on Illinois keeping the same tax that it has now. It isn't likely, but it might abolish its taxes.

MR. GRIGER: They might.

QUESTION: And rescind what they have got now.

MR. GRIGER: They could very well.

QUESTION: Do I gather from your reluctance to

answer my question, that if you did answer they would be better off, you would lose your case?

MR. GRIGER: Would Iowa be better off if we lose our case?

QUESTION: No, sir. I said do I assume that if you answer my question yes, you would lose your case. And that's why you didn't say yes?

You don't have to answer it.

MR. GRIGER: No, I want to answer your question, your Honor. Let me put it like this, if I may rely on a prior case, the Hans Rees case, in which a taxpayer came in and actually was able to break down the components of his profit and show the formula, a single property formula in that case, just wasn't any good. It overreached.

Now, if Moorman can make the same showing, fine. We would like this case to simply be treated as the Court has been treating apportionment cases for a number of years, on a case-by-case basis. In other words, there is a case, for example, Kent-Coffey, where 99 percent of the income was taxed by the manufacturing State. Now, would that taxpayer be better off if it moved out of -- in that case it was North Carolina -- North Carolina? Maybe so. But that didn't make the statute unconstitutional, in the absence of proof.

QUESTION: General, do you think then Moorman would be better off, or have a better chance of winning this case if

it had put some accountants on the stand and proved by cost accounting that part of its net profit is attributable to its manufacturing operations in Illinois? That was Hans Rees, wasn't it?

MR. GRIGER: Yes, Hans Rees did involve, I believe, cost accounting where the evidence was not rebutted by the State. As a lawyer and not being an accountant or an economist, I would have to talk to my own witnesses, and we may very well generate some type of, well, a jury question, for lack of a better description of it, although it would be decided in our case by a judge, as to whether or not they have proved the case.

But, yes, if we were dealing with a Hans Rees situation here, we would be dealing with a far different situation than what we are dealing with now.

QUESTION: General, Iowa has not joined the Multi-State Tax Commission yet?

MR. GRIGER: No, they have not joined it. We are neither a regular member nor an associate member. I think they have 19 regular, 13 associate members.

QUESTION: Nor have you been in and out of it as some States have.

MR. GRIGER: No, we have not. No, sir.

We believe that the cornerstone of Moorman's argument and whole case, whether they talk about Due Process,

Equal Protection, Interstate Commerce, rests upon the abstract argument of counsel that Iowa necessarily taxed 100 percent of Moorman's income from Iowa sales of goods manufactured in Illinois.

We disagree that Moorman showed that Iowa so taxed 100 percent of such income and implicated the facial validity of the Iowa formula.

MR. CHIEF JUSTICE BURGER: We will resume there at 1 o'clock.

(Whereupon, at 12 noon, the oral argument was recessed until 1 p.m. the same day.)

AFTERNOON SESSION

(1:02 p.m.)

MR. CHIEF JUSTICE BURGER: You may continue, counsel.

ORAL ARGUMENT OF HARRY M. GRIGER ON BEHALF OF APPELLEE (RESUMED)

MR. GRIGER: Mr. Chief Justice, and may it please the Court: Before the recess I was getting into Moorman's contention that 100 percent of their income was necessarily taxed by Iowa, that is, income that they derive from selling goods in Iowa, which goods were manufactured in Illinois.

One of the points I would like to make in this regard is there is a total lack of evidence in this record as to whether or not there is any manufacturing profit in Illinois. Such lack of evidence was held to be a fatal defect by this Court in the Bass case, the Underwood case, Kent-Coffey cases, all involving single property factor formulas.

QUESTION: Could I just pursue that again. We had an exchange about this before. If there had been cost accounting evidence that part of the profit was assignable to Illinois manufacturing, and assume it was uncontradicted, what would you say then? Could you still use the sales tax formula?

MR. GRIGER: One of the things I would want to know is how much, because in this sense the States are allowed

a rough approximation. If they had manufacturing profit, for example, that we were trying to tax out of all reasonable proportion to business done --

QUESTION: Suppose it's a third, third, and third. That's what the accountants testified to. And on any reasonable accounting basis, a third of the income is assignable to Illinois manufacturing. And then Iowa said, well, we are still going to use the single sales formula. What would you say then?

MR. GRIGER: Of course, if they could prove it, I think we are getting into a Hans Rees type situation; that is, breaking down the component parts of the business to show --

QUESTION: Are you suggesting that you agree that constitutionally Iowa may not tax income that could be shown to be traceable to Illinois manufacturing?

MR. GRIGER: I think this is what extraterritorial taxation is all about, is trying to overreach beyond the State. The States have been granted some leeway in this area.

QUESTION: General Griger, what do you understand Justice White's phrase "traceable to Illinois manufacturing" to mean when you answer his question?

MR. GRIGER: As I understand, there may not be able to be a precise apportionment to Illinois, but it may be a situation like Hans Rees where the evidence differed, and I

think it was between 17 and 21 percent earned in the State of North Carolina in that case, whereas the formula attributed 80-some percent to North Carolina.

QUESTION: You wouldn't say evidence like that would be irrelevant or inadmissible, would you?

MR. GRIGER: No, I believe this Court --

QUESTION: And if the judge concluded, made findings that based on the evidence before me, one-third of the income is due to manufacturing in Illinois. If there is a finding like that, would you say that -- you wouldn't conclude -- would you argue that Iowa could nevertheless tax that part of the income?

MR. GRIGER: If a finding could be made. I'm not an accountant or an economist, and I might want to consult my own expert witnesses.

QUESTION: I understand that.

MR. GRIGER: I think what you are saying is basically the Hans Rees situation. Yes, the Court has already held that would be --

QUESTION: What would you understand such a finding by a trial judge that one-third of the income is, quote, due to, close quote, manufacturing in Illinois to mean economically?

MR. GRIGER: Well, if we can break the business down into its components that he would actually be making a finding in that instance that the income can be directly traceable to

that activity. Now, generally this cannot be done in the unitary business. From CPA's I've talked to in our Department of Revenue in Iowa, they say it can't be done.

QUESTION: Take, for instance, when you are talking about the production of copper wire, you have copper that may have been mined in Arizona and Utah, smelted in El Paso, refined somewhere else and made into wire still somewhere else, it would be kind of hard to ascribe a, quote, due to, close quote, finding to any one of those activities, wouldn't it?

MR. GRIGER: As I understand it, it would be. I think we were assuming hypothetically it could be done. I don't know that it can be done. But if it could be, then I think we have a burden of going forward with our own evidence. Maybe we can attack that finding, show that it is based on faulty premises.

As I understood his question, if it could be shown, then would we be overreaching by taxing all that income? I suppose the answer would be yes, because the answer was yes in the Hans Rees case. That's at least what I meant my answer to be.

I believe that this Court has also held and correctly so, in Ford Motor Company v. Beauchamp, that constitutionality of State taxation ought not to turn upon so narrow an issue as to whether local assets rather than local gross receipts are used in an apportionment formula. The

presumption of constitutionality must in this type of a case, an apportionment case, must be overcome by evidence and not by the argument of counsel to satisfy the heavy burden of proof.

I would like to get on now into the argument in this case involving interstate commerce. Now, again, as far as the Iowa statute is concerned, the basic argument of Moorman, which is that the Iowa formula is bad per se, means that it must necessarily, regardless of the facts, cause multiple taxation to be visited upon Moorman or anybody else for that matter. We believe that the sum and substance of Moorman's argument in this regard is that anybody that deviates from the three factor formula automatically creates multiple taxation or risk of multiple taxation.

We think Moorman's argument is somewhat inconsistent, that in its brief, page 25, it says it accepts the single property factor formula which, of course, is such a deviation.

The argument also we think assumes that you have an easily definable tax base, such as what you would have in the gross receipts area where everybody can see the gross receipts. And that is what you are apportioning.

That isn't true. What is being apportioned here is net income. States like Iowa offer what might be called somewhat of a low tax base . We do allow large deductions, including a Federal income tax deduction. I don't believe that's allowed by the State of Illinois, for example. It's

only allowed by about six States.

If we accept Moorman's counsel's argument in this case, we believe that any formula other than a uniform three-factor formula, and also a uniform tax base, would impale -- I should rephrase that. If Moorman's argument were accepted, any formula that would deviate somehow from a uniform formula or tax base that would be different would somehow create the risk of multiple taxation, destroying the leeway States have in this area, a leeway, I might add, it seems to me this Court has recognized, at least in the area of nonbusiness income and disparate use of combination corporate tax reporting recently in the U.S. Steel Corporation v. Multi-State Tax Commission case decided on February 21. While that case did involve the Compact Clause of the Constitution, I believe there were arguments made as to interstate commerce, and the Court recognized that States did do things differently, but held that that wasn't necessarily bad.

Of course, only Congress would have the power in any event to act affirmatively under the Commerce Clause and to, if they wanted to, impose upon all the States a uniform apportionment formula or even a uniform tax base. But that has not been done yet, and the States have and ought to have some leeway in this area in support of their fundamental power of taxation. It's the must fundamental power a State can have, in fact.

I would also like to make a few comments about General Motors v. District of Columbia. I think the parties here agree that that case did not reach the constitutional issues that are being raised here. In addition, there was no exclusive formula in that case approved by the Court. The Court read the District statute which, of course, prescribed no formula, as requiring one which automatically would give effect to the geographical spread of all components of a manufacturing business. There was no overruling of prior constitutional case precedents, particularly the single factor cases and the Ford Motor case involving the very formula that we have here today.

The case does not implicate a taxpayer's heavy burden of proof that a statutory formula is unconstitutional. And we believe that based upon this Court's reading of the District statute in that case that a single property factor probably would have been inconsistent with the statute insofar as applying it to an integrated manufacturing-selling business, manufacturing in one State and selling goods in the District of Columbia.

We believe that the Court's standards on multiple taxation should be derived from the cases of Northwest Portland Cement case and also its recent case, 1975, the Standard Press Steel case, in which the Court seems to be going to an actual burden. And it certainly isn't a mere risk on the basis of

argument of counsel. That is an abstract notion of a risk of multiple taxation.

For these reasons we do not feel that the Iowa formula contravenes the Commerce Clause in the United States Constitution.

As to facial equal protection, again this involves that there is necessarily a discrimination against out-of-State manufacturers. No evidence on this issue was introduced, only extreme hypotheticals were presented by Moorman. It should also be remembered that even if there were some companies along the extreme hypotheticals Moorman presented -- that is, a company manufacturing totally out of Iowa and then selling in Iowa, and an Iowa manufacturer manufacturing in Iowa and selling totally out of Iowa, that an iron rule of taxation is neither attainable nor required. As this Court has held, under the Equal Protection Clause too rigorous a scrutiny ought not to be made. Otherwise all taxing schemes would fall since it's impossible to define any taxing scheme or to make one up which has no discriminatory impact whatsoever.

We fail to see that Moorman's argument with reference to that portion of its brief regarding constitutionality as applied is any different from that portion of its brief with reference to facial constitutionality. The Iowa Supreme Court agreed with this in that regard, because they held that the Iowa formula was not proven bad on its face. They also

held that Moorman did not satisfy its burden of proof to overturn the formula.

In conclusion, we believe that the decision of the Iowa Supreme Court is correct and that it ought to be affirmed by this Court.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Barnes, you have one minute remaining.

REBUTTAL ARGUMENT OF DONALD K. BARNES

ON BEHALF OF APPELLANT

MR. BARNES: Mr. Chief Justice, and may it please the Court: That one minute is quite sufficient.

The arguments that have been made are all adequately answered in our brief and reply brief. But I want to emphasize to the Court one thing: that the Director here is challenging the assumption which is inherent in the statute. We didn't make any assumption. The statute makes it. That assumption is that the income derived with respect to any dollar of sales is the same as income derived from any other dollar of sales. And that is the basis for the attribution of income to the income-producing activities in Illinois. They keep arguing for separate accounting. Of course, this Court has held that separate accounting is impermissible in the case of a unitary business. Hans Rees was not a unitary business.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:16 p.m., the oral argument in the above-entitled matter was concluded.)