FEDERALISM AND INSURANCE REGULATION

BASIC SOURCE MATERIALS

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by

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3. Black, J., wrote no opinion. He merely stated his belief that the Court of Appeals for the Ninth Circuit had analyzed the issues correctly.
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Prefatory Note

State regulation of insurance is usually said to have been formally approved by the United States Supreme Court in the 1868 case of Paul v. Virginia; the 1945 adoption of the McCarran-Ferguson Act by the United States Congress is usually considered the starting point for discussing modern regulation of insurance in the United States. This collection of materials accepts those conventions, but it also looks at the roots of development of insurance regulation from the beginnings of the Republic and traces it to the present. It does so in part by using illustrative early statutes, presenting them chronologically, and in part by using cases that illustrate the interpretation of the crucial later statutes. The cases are arranged analytically, rather than chronologically.

The theme of the book is that increasingly American insurance regulation has been shaped by reactions to judicial decisions; those reactions have in some instances reflected misunderstanding or mistake.

Analysis of large quantities of interrelated materials must be selective. Nowhere has this been truer than with presentations about insurance regulation. Discussions of insurance regulation, particularly during the last half century, have often sought to justify staked-out positions of interested parties. A virtual avalanche of writing on the subject has descended on the public, on the Congress, and on the professions whose livelihoods are dependent on insurance regulation. Our aim is more modest. We seek to present a factual historical account of what has happened, using primary sources with a minimum of connective text. For the most part, we have eliminated parallel citations to decisions of the United States Supreme Court, and also the footnotes that appear in the opinions. Both are of no interest to non-lawyers and are unnecessary to lawyers, who can easily locate the additional material if they need it. Though our selection of materials inevitably reflects our own views, we have tried to make it clear where fact ends and our opinions begin. Our views are not necessarily those of the Journal Board, its editor, or the National Association of Insurance Commissioners.

1. *Infra*, at 12.
In preparing these materials, we have relied heavily on our own earlier work.\(^2\) We cite Wisconsin sources often for two reasons: [1] the Wisconsin Insurance Code, drafted in the decade after 1965, has been the most carefully considered revision of insurance law in recent times, and has in numerous instances informed other insurance law legislation, and [2] we were deeply involved in that revision and have much greater familiarity with it than with other sources. The principal author was staff director of the Wisconsin Legislative Council's Insurance Laws Revision Committee. The second author was a principal member of the staff for much of the time.

Since these materials have been assembled primarily for readers of the Journal of Insurance Regulation, we also provide annotations to discussions in the Journal that deal with the themes presented here, whether or not we agree with the positions they advance. They will provide the interested reader with access to other viewpoints expressed in the Journal. These additions include nothing beyond Volume 12 of the Journal.

This collection of materials seeks to provide an outline of the development of the framework for American insurance regulation. It deals only incidentally with the substance of regulation. Even in the sphere covered, the authors have focused on general themes rather than minutiae because the book is designed for a wide segment of the insurance community. The regulatory development chronicled here can not be considered the last word on the subject, for the law affecting state regulation of insurance is fluid; changes may be expected at any time.\(^3\)

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3. In Emasculation, supra note 2, we faced the same situation. Just as that article was ready for publication, the Supreme Court issued its decision in Metropolitan v. Ward, 471 U.S. 1120 (1985), requiring reconsideration of some points in the article. See Emasculation, supra note 2, at 60-61.
FEDERALISM AND
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I. Origins of Regulation

A. Special Charters

Corporate insurers in the United States were at first created by individual statutes [special charters]. Those enactments contained the rudiments of insurance regulation. The rules created by a charter applied only to the company created by that charter, but an examination of successive charters enacted by the legislature of each single state shows the development of a recognizable pattern. Both entrepreneurs and legislators lacked the ingenuity and the inclination to invent new wheels for each new carrier. Many newly authorized insurers died aborning; some, however, became working corporations and a few even survived to become participants in today's marketplace. For example, the Insurance Company of North America was chartered by the Pennsylvania legislature in 1794; the Northwestern Mutual Life Insurance Company was chartered by Wisconsin in 1857 as the Mutual Life Insurance Company of Wisconsin, and given its present name in 1865.

An illustrative special charter follows:

* * * * *

LAWS of the COMMONWEALTH OF MASSACHUSETTS passed at several sessions of the GENERAL COURT, 1806-1809

CHAP. LXXX.

An act to incorporate William King and others, into a company, by the name of the Bath Fire and Marine Insurance Company.

Sect. 1. BE it enacted by the Senate and House of Representatíves, in General Court assembled, and by the authority of the same, That [nine named persons] together with such persons as have already or hereafter may become stockholders in said

4. 1857 Wis. Private & Local Laws, c. 129.
company, being citizens of the United States, be, and hereby
are incorporated into a company by the name of the Bath
Fire and Marine Insurance Company, for and during the
term of twenty years from the date of this act; and by that
name may sue and be sued, plead or be impleaded; appear,
prosecute, and defend to final judgment and execution; and
have a common seal, which they may alter at pleasure, and
may purchase, hold, and convey any estate, real or personal,
for the use of said company, subject to the restrictions here-
after mentioned.

Sec. 2. Be it further enacted, That a share in the capital
stock of said company, shall be one hundred dollars, and the
number of shares shall be one thousand, and if the said num-
ber of shares are not already filled, subscriptions shall be kept
open under the inspection of the president and directors of
the said company, until the same shall be filled. . . .

Sec. 3. Be it further enacted, That the stock, property,
affairs and concerns of the said company, shall be managed
and conducted by nine directors, one of whom shall be the
president thereof, who shall hold their offices for one year
and until others shall be chosen, and no longer. . . .

Sec. 4. [Choice of presidents]
Sec. 5. [Powers of board]
Sec. 6. [Meetings of board]; . . . and the said board of
directors and the committee aforesaid, at and during the
pleasure of said board, shall have power and authority, in
behalf of the company, to make all kinds of marine insur-
ance; insurance against fire; insurance on lives, and on in-
land transportation of goods, wares and merchandize; and
generally to transact and perform all the business relating to
the objects aforesaid, and to fix the premium and terms of
payment, and all policies of insurance by them made, shall
be subscribed by the President; or in case of his death, sick-
ness, inability or absence, by any two directors of said com-
pany, and countersigned by the secretary, and shall be bind-
ing and obligatory on the said company, and the assured may
maintain an action upon the cause against the said company,
and all causes duly arising under any policy so subscribed, may
be adjusted and settled by the president and directors, and the same shall be binding on the company.

Sec. 7. Be it further enacted, That it shall be the duty of the directors on the first Tuesday of July and January, in every year, to make dividends of so much of the interest arising from the capital stock, and the profits of the said company, as to them shall appear advisable; but the monies received, and the notes taken for premiums on risks which shall be undetermined and outstanding at the time of making such dividend, shall not be considered as part of the profits of the company; and in case of any loss or losses, whereby the capital stock of the company shall be lessened, each proprietor or stockholder’s estate shall be held accountable for the deficiency that may be due on his share at the time of said loss or losses taking place, to be paid in to the said company by assessments, or such other modes, and at such time or times as the directors shall order; and no subsequent dividend shall be made until a sum equal to such diminution shall have been added to the capital, and that once in every year, and oftener if required by a majority of votes of the stockholders, the directors, shall lay before the stockholders at a general meeting, an exact and particular statement of the profits, if any there be after deducting losses and dividends.

Sec. 8. Be it further enacted, That the said company shall not, directly or indirectly, deal or trade, in buying or selling any goods, wares, merchandise, or commodities whatsoever; and the capital stock of said company, shall, within six months after being collected, at each installment be invested either in the funded debt of the United States, or of this Commonwealth, or in the stock of the United States bank, or of any incorporated bank of this commonwealth, at the discretion of the president and directors of said company, or of any committee which the proprietors shall appoint for that purpose.

Sec. 9. Be it further enacted, That fifty dollars on each share in said company shall be paid within four months after the first meeting of said company, and the remaining sum
due on each share within one year afterwards, at such equal instalments, and under such penalties as the said company shall direct; and no transfer of any share in said company shall be valid, until all the instalments on such share shall have been paid.

Sect. 10. Be it further enacted, That in case of any loss or losses taking place that shall be equal to the amount of the capital stock of said company, and the president or directors after knowing of such loss or losses taking place, shall subscribe to any policy of insurance, their estates, jointly and severally, shall be accountable for the amount of any and every loss that shall take place under policies thus subscribed.

Sect. 11. Be it further enacted, That the president and directors of said company, shall, previous to their subscribing to any policy, and once in every year after, publish, in two public newspapers the amount of their stock, and against what risks they mean to insure, and the largest sum they mean to take on any one risk; Provided nevertheless, that the said President and Directors shall not be allowed to take more on any one risk, than ten per centum of the amount of the capital stock of said corporation, actually paid in.

Sect. 12. Be it further enacted, That no person being a Director in any other company carrying on the business of Marine Insurance, shall be eligible as a Director of the company, by this act established.

Sect. 13. Be it further enacted, That the President and Directors of said company shall, when, and so often as required by the Legislature of this Commonwealth, lay before them a statement of the affairs of said company, and submit to an examination concerning the same under oath.

Sect. 14. [Initial Shareholders meeting]
[This act passed February 25, 1807.]

***

B. General Incorporation Statutes

In due course, legislatures enacted general provisions to govern corporations, making it simpler to enact the special charters, as shown
by the following example. Still later, pursuant to general incorporation statutes, it became possible to create a corporation through an administrative agency, without involving the legislature.

The provisions for incorporating insurance companies differed somewhat from those for general corporations, and were placed in insurance codes, as the latter began to develop, rather than being dealt with in general corporation statutes.

The Massachusetts legislature enacted the following special charter. It took advantage of general provisions that had been developed, as mentioned above, thus making the chartering process simpler.

***

ACTS AND RESOLVES passed by the GENERAL COURT OF MASSACHUSETTS in the year 1845, CHAP. 23

An Act to incorporate the Dighton Mutual Fire Insurance Company.

BE it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, as follows:

Seth Talbot, Anthony Reed, Anthony Shove, their associates and successors, are hereby made a corporation, by the name of the Dighton Mutual Fire Insurance Company, in the town of Dighton, in the county of Bristol, for the term of twenty-eight years, for the purpose of insuring dwelling houses, and other buildings and personal property throughout the Commonwealth, against loss by fire; with all the powers and privileges, and subject to all the duties, liabilities and restrictions, set forth in the thirty-seventh and forty-fourth chapters of the Revised Statutes.

[Approved by the Governor, Jan. 30, 1845.]

***

C. The Beginnings of Formal Insurance Regulation

Starting with New Hampshire in 1851, the states created formal agencies for the regulation of insurance. The Massachusetts statute relating to foreign corporations follows.

---

5. 1851 N.H. Laws, c. 1111.
ACTS AND RESOLVES passed by the GENERAL COURT OF MASSACHUSETTS in the year 1852, CHAP. 231

An Act relating to Insurance by Foreign Corporations.

Be it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, as follows:

SEC. 1. The provisions of the act entitled "An Act in addition to an act to provide against Loss from Insurance by Foreign Corporations," passed in the year one thousand eight hundred and fifty-one, are hereby extended, except as hereinafter provided, to companies not incorporated in this Commonwealth, making insurance on health.

SEC. 2. Every person acting for an insurance company not incorporated in this Commonwealth, shall annually, in the month of October, deposit with the treasurer of the Commonwealth, and shall also, in the months of October and November of each year, publish six times in each of three different newspapers in the county in which such person resides, or has his place of business, a statement similar in all respects to that required by the forty-first section of the thirty-seventh chapter of the Revised Statutes, and said statement shall be deposited with said treasurer before making any contract of insurance; and said publication shall be continued for six weeks successively in those counties in which there are less than three newspapers.

SEC. 3. Every such agent shall exhibit in conspicuous letters, on the sign designating his place of business, the name of the State under whose authority the company he represents has been incorporated. And said company and agent shall also have printed in large type the name of such State upon all policies issued to the citizens of this Commonwealth, on all cards, placards, and pamphlets, and in all advertisements published, issued, or circulated in this State, by them or him, relating to the business of such company.

SEC. 4. No person shall be allowed to act as agent of any insurance company not incorporated in this Commonwealth, until such company and such agent shall have complied with all the requirements of the laws of this Commonwealth relating to such
companies and their agents. And every person so acting without such compliance, after the first day of July next, shall forfeit for every such offense the sum of one thousand dollars.

Sec. 5. The secretary, treasurer, and auditor of this Commonwealth, are hereby constituted a board of insurance commissioners; and it shall be their duty, annually, in the month of November, to examine the statements and returns required to be made by the companies and agents aforesaid; and if, in their opinion, any statement or return shall be obscure, defective, or in any respect unsatisfactory, it shall be their duty immediately to require answers, under oath, from the agent by whom such obscure, defective, or unsatisfactory statement or return shall have been deposited or made, to such interrogatories as they may deem necessary and proper to be answered in order to explain such statement or return, and exhibit a full and accurate view of the business and resources of the company represented by such agent.

[Provisions follow for penalties for breach of the law, and for an annual commission report to the Legislature.]

Sec. 7. Any insurance company, other than those incorporated in this Commonwealth, having a capital of fifty thousand dollars, may make insurance on live stock, but on no other property: provided, said company, and its agent, previously to making such insurance, shall have complied with all the requirements of the laws of this Commonwealth relating to insurance by foreign corporations.

Sec. 8. All payments made for policies, whether in money or by note, or other security, shall be taken and deemed to be premiums for the purposes expressed in the seventh section of the act mentioned in the first section of this act.

Sec. 10. All penalties recovered for violations of the provisions of this act, and of all other acts relating to insurance by foreign corporations, shall go, one half to the person giving information of such violations, and one half to the treasury of the Commonwealth.

[Approved by the Governor, May 18, 1852.]

* * * * *

The 1851 statute mentioned in Section 1 of the preceding Act follows:
ACTS AND RESOLVES passed by the GENERAL COURT
OF
MASSACHUSETTS in the year 1851, CHAP. 331

An Act in addition to “An Act to provide against loss from Insurance by Foreign Corporations.”

BE it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same as follows:

SECT. 1. No insurance company, unless incorporated by the Legislature of this Commonwealth, shall make any insurance on property within this State, nor contract for insurance with any party resident within this State, until such insurance company shall have complied with the provisions of this act.

SECT. 2. Every insurance company shall, by a written power, appoint some citizen of this Commonwealth, resident therein, their attorney, with power and authority to accept service of all lawful processes against such company in this Commonwealth, and to cause an appearance to be entered in any action, in like manner as if such corporation had existed and been duly served with process within this State.

SECT. 4. If any such attorney shall die, or resign, or be removed, it shall be the duty of such corporation to make a new appointment as aforesaid, and file a copy with the said secretary as above prescribed, so that at all times, and while any liability remains outstanding on such insurance, there shall be within this State, an attorney authorized as aforesaid. And no such power of attorney shall be revoked until after a like power shall have been given to some competent person, and a copy thereof filed as aforesaid.

SECT. 5. Service of process upon such attorney shall be deemed to be sufficient service upon his principals.

SECT. 6. If any such insurance company shall make insurance without complying with the requisitions of this act, the contract shall be valid; but any agent of such company, acting within this State, respecting the effecting of any policy of insurance, shall forfeit to the Commonwealth a sum not exceeding one thousand dollars nor less than three hundred dollars; and all persons shall
be deemed agents of such company, and acting as such, respecting
the effecting of a policy of insurance, within the meaning of this
section, who are agents and do acts within the terms of the first
section of the act to which this act is in addition. And in case any
such company, when thereto notified by the treasurer of this
Commonwealth, shall neglect to appoint an attorney agreeably to
the provisions of this act, such company shall not be entitled to
recover any premium or assessment made by them, on any contract
of insurance with any citizen of this State, until such company
shall have complied with the provisions of this act.

Sect. 7. Every agent described in the first section of the act to
which this act is in addition, shall, on the first Monday of October,
in every year during the continuance of his agency, make a return,
on oath, to the treasurer of this State, of the amount insured, or
procured to be insured by him in this State, as such agent, during
the year preceding, and of the amount of premiums received and
assessments collected during the said period, and shall, at the same
time, pay to the treasurer a tax of one per cent. on the amount of
such premiums and assessments.

Sect. 8. If any such agent shall neglect to make such returns
and payments as are required in the preceding section, or if he
shall make the same falsely or fraudulently, he shall, for every such
offence, forfeit a sum not exceeding one thousand dollars.

Sect. 9. Every such agent shall, before making, or procuring
to be made, any contract of insurance as aforesaid, give bond to
the treasurer of the State, with two or more sureties, to be ap-
proved by him, in the sum of five thousand dollars at least, with
conditions to make the annual returns before required, and to pay
the said tax.

.

Sect. 11. This act shall not apply to companies incorporated
by any state in which corporations of like character, incorporated
by this Commonwealth, are not taxed.

[Approved by the Governor, May 24, 1851.]

* * * * *

D. The Development of a Regulatory System

During the middle decades of the 19th century, the system of insur-
ance regulation developed rapidly. New York collected the law that
was in effect in the 1867 "Statutes at Large" into a compilation that could hardly be called a code, but was a somewhat systematic collection of individual statutes in force. Part I of the Statutes at Large, entitled "Territory, Civil Polity, and Internal Administration" contained Chapter XX, entitled "Police." It covered a wide range of subjects, including the law relating to banking and insurance that was then in effect. Perhaps the title derived from the notion that the chapter dealt with the applications of the state's police power. The chapters dealing with insurance occupied 60 pages in the compilation.

1. Development of a State Regulatory System

It was important in the development of the regulatory system that the United States Supreme Court held in the famous Paul case that the state system did not violate either the commerce clause or the privileges and immunities clause of the United States Constitution.6

** * * * *

PAUL v. VIRGINIA
75 U.S. (8 Wall.) 168 (1868)

ERROR to the Supreme Court of Appeals of the State of Virginia. The case was thus:

An act of the legislature of Virginia, passed on the 3d of February, 1866, provided that no insurance company, not incorporated under the laws of the State, should carry on its business within the State without previously obtaining a license for that purpose; and that it should not receive such license until it had deposited with the treasurer of the State bonds of a specified character, to an amount varying from thirty to fifty thousand dollars, according to the extent of the capital employed. . . .

---

A subsequent act passed during the same month declared that no person should, "without a license authorized by law, act as agent for any foreign insurance company" under a penalty of not less than $50 nor exceeding $500 for each offense; and that every person offering to issue, or making any contract or policy of insurance for any company created or incorporated elsewhere than in the State, should be regarded as an agent of a foreign insurance company.

In May, 1866, Samuel Paul, a resident of the State of Virginia, was appointed the agent of several insurance companies, incorporated in the State of New York, to carry on the general business of insurance against fire; and in pursuance of the law of Virginia, he filed with the auditor of public accounts of the State his authority from the companies to act as their agent. He then applied to the proper officer of the district for a license to act as such agent within the State, offering at the time to comply with all the requirements of the statute respecting foreign insurance companies, including a tender of the license tax, excepting the provisions requiring a deposit of bonds with the treasurer of the State, and the production to the officer of the treasurer's receipt. With these provisions neither he nor the companies represented by him complied, and on that ground alone the license was refused. Notwithstanding this refusal he undertook to act in the State as agent for the New York companies without any license, and offered to issue policies of insurance in their behalf, and in one instance did issue a policy in their name to a citizen of Virginia. For this violation of the statute he was indicted, and convicted... and was sentenced to pay a fine of fifty dollars. On error to the Supreme Court of Appeals of the State, this judgment was affirmed, and the case was brought to this court..., the ground of the writ of error... being that the judgment below was against a right set up under that clause of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;"* and that clause giving to Congress power "to regulate commerce with foreign nations, and among the several States."†

* Art. IV, § 2.
† Art. I, § 8.
The corporators of the several insurance companies were at the time, and still are, citizens of New York, or of some one of the States of the Union other than Virginia. And the business of insurance was then, and still is, a lawful business in Virginia, and might then, and still may, be carried on by all resident citizens of the State, and by insurance companies incorporated by the State, without a deposit of bonds, or a deposit of any kind with any officer of the commonwealth.

.....

Mr. Justice Field, after stating the case, delivered the opinion of the court, as follows:

On the trial in the court below the validity of the discriminating provisions of the statute of Virginia between her own corporations and corporations of other States was assailed. It was contended that the statute in this particular was in conflict with [the above clauses] of the Constitution. ... The same grounds are urged in this court for the reversal of the judgment.

The answer which readily occurs to the objection founded upon the first clause consists in the fact that corporations are not citizens within its meaning. The term citizens as there used applies only to natural persons. ...

.....

We proceed to the second objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution. It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals.

.....

There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as
something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.

In *Nathan v. Louisiana,* this court held that a law of that State imposing a tax on money and exchange brokers, who dealt entirely in the purchase and sale of foreign bills of exchange, was not in conflict with the constitutional power of Congress to regulate commerce. The individual thus using his money and credit, said the court, “is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on.” And the opinion shows that, although instruments of commerce, they are the subjects of State regulation, and, inferentially, that they may be subjects of direct State taxation.

If foreign bills of exchange may thus be the subject of State regulation, much more so may contracts of insurance against loss by fire.

We perceive nothing in the statute of Virginia which conflicts with the Constitution of the United States; and the judgment of the Supreme Court of Appeals of that State must, therefore, be

**AFFIRMED.**

* * * *

2. Development of a *Private* Regulatory System

The insurance business, in the 19th century as now, was not uniformly profitable. The President of the Fire Underwriters’ Asso-

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* 49 U.S. (8 How.) 73 (1850).
ciation of the Northwest said in 1877 that about 4,000 insurance companies had come into existence, and that only 1,000 remained.\textsuperscript{7} An industry committee reporting in 1850 said that from the beginning to 1810 the fire insurance business was profitable, that from 1811 to 1830 profits averaged about three percent on capital, and that from 1831 to 1850 the entire business was carried on at a great loss. The committee said there was a loss for the entire period from 1791 to 1850.\textsuperscript{8}

Faced with those perceived business results, whether accurate or not, the fire insurers tried to organize the business to stem their losses. Early organizations were ineffective, but the losses suffered in the Chicago and Boston fires of 1871 and 1872 respectively stimulated more self-regulation of the business with more teeth. The organizations that developed would in the end be found to violate the antitrust laws of the United States, but they were originally perceived as a necessary protection for the companies against unprofitable business and eventual insolvency.

The following excerpts from the rules of one of the self-governing industry organs are taken from the opinion in \textit{United States v. New Orleans Insurance Exchange}.\textsuperscript{9}

\* \* \* \*

**SELECTED RULES OF THE NEW ORLEANS INSURANCE EXCHANGE**

Article X, Section 1:

"Active Members shall not accept or retain the agency of any company, including Underwriters of same, which has or whose General Agent or Manager has agents within the jurisdiction of this Exchange who are not Active Members of the Exchange."

\textsuperscript{7} EIGHTH ANNUAL PROCEEDINGS OF FIRE UNDERWRITERS' ASS'N OF N.W. 17 (1877).


\textsuperscript{9} 148 F.Supp. 915, 917-18, nn. 7-10 (1957).
Article X, Section 2:

"Active Members shall not accept or retain the agency of any insurance company, including its parent corporation, all underwriting agencies of such company, members of a group or fleet of companies, and all companies owned, either in whole or in part, managed, controlled, directly or indirectly, or reinsured by such company, unless all agents within the jurisdiction of this Exchange, of such insurance companies, are members of this Exchange."

Article X, Section 3:

"Active or Associate Members of this Exchange may not represent or place business with a company, not a member of this Exchange, whose State Agent, Special Agent, Manager or salaried representative solicits from or issues policies or bonds direct to the public within the jurisdiction of this Exchange or accepts such business from a non-member of this Exchange."

Article IX, Section 6:

"It shall not be permissible for Members to place business within the jurisdiction of the Exchange with non-member agents or with any type of non-stock carriers unless and until the facilities of all members of the Exchange have been exhausted and an affidavit to that effect has been filed with the Secretary of the Exchange within ten days of the binding of the risk."

Article IX, Section 7:

"It is permissible for Active Members to accept business from Non-Member Agents and Brokers domiciled in the territorial jurisdiction of the Exchange, provided no commission or other valuable consideration is paid directly or indirectly on such business; and, provided further, that the member immediately notify the Secretary of the Exchange in writing, giving the name of the Non-Member, character and location of the risk, amount of insurance and premiums, and further pays to the Exchange, promptly, an amount equal to 10% of the net premiums involved, which said amount so paid, shall go towards the cost of keeping a record of such transactions."
3. Re-entry of the Federal Government

For three quarters of a century after *Paul*, state regulation of insurance developed steadily, little disturbed by federal intervention. That does not mean that no questions were raised about regulation of insurance by the states. As the *South-Eastern Underwriters* case (which follows) recounts, various people raised questions during that period about the correctness of *Paul*, but the Supreme Court repeatedly affirmed it in subsequent cases.

Not surprisingly, much of the opposition to state-level regulation came from insurance companies. For example, it was an insurance company that was behind the nominal defendant in *Paul*. Around the turn of the century, there seems to have been an especially vigorous effort by insurers, and perhaps especially life insurers, to induce a shift to federal regulation of insurance. The Presidents of the Prudential Insurance Company and the Fidelity and Casualty Company of New York gave major addresses in 1904 and 1910 respectively, contending that the commerce clause gave the federal government power to regulate insurance. The Committee on Insurance Law of the American Bar Association reached the same conclusion in 1906.10 It is fair to observe that though regulation at the state level was becoming increasingly invasive and therefore was not always welcome, the only federal regulation likely to be applicable before the New Deal period would have been the Sherman and Clayton Acts. Although the antitrust laws may have constituted a threat of federal interference (and perhaps even a continuing burden) to fire and casualty companies, they were unlikely to trouble life insurers much, given the patterns of operation of the latter.

The challenge to state insurance regulation that resulted in *South-Eastern Underwriters* came, however, from the great difficulty that states had in preventing or controlling adequately the collusive setting of rates by fire insurers, despite statutes that sought to exercise such control. In the 1880s, if not before, the stock fire insurers developed techniques for enforcing rate-uniformity that extended beyond rates to many other aspects of insurance company practice. Missouri's difficulties in subjecting the powerful insurance

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10. See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 545 n. 23 (1944).
Part I

industry associations to public control led that state to seek the help of the United States Department of Justice which, in turn, led to the prosecution in *South-Eastern Underwriters*.

* * * *

**UNITED STATES v. SOUTH-EASTERN UNDERWRITERS ASS'N,**

322 U.S. 533 (1944)

Mr. Justice Black delivered the opinion of the Court.

For seventy-five years this Court has held, whenever the question has been presented, that the Commerce Clause of the Constitution does not deprive the individual states of power to regulate and tax specific activities of foreign insurance companies which sell policies within their territories. Each state has been held to have this power even though negotiation and execution of the companies' policy contracts involved communications of information and movements of persons, moneys, and papers across state lines. Not one of all these cases, however, has involved an Act of Congress which required the Court to decide the issue of whether the Commerce Clause grants to Congress the power to regulate insurance transactions stretching across state lines. Today for the first time in the history of the Court that issue is squarely presented and must be decided.

Appellees—the South-Eastern Underwriters Association (S.E.U.A.), and its membership of nearly 200 private stock fire insurance companies, and 27 individuals—were indicted in the District Court for alleged violations of the Sherman Anti-Trust Act. The indictment alleges two conspiracies. The first, in violation of § 1 of the Act, was to restrain interstate trade and commerce by fixing and maintaining arbitrary and non-competitive premium rates on fire and specified "allied lines" of insurance in Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia; the second, in violation of § 2, was to monopolize trade and commerce in the same lines of insurance in and among the same states.

The indictment makes the following charges: The member companies of S.E.U.A. controlled 90 per cent of the fire insurance and "allied lines" sold by stock fire insurance companies in the six
states where the conspiracies were consummated. Both conspiracies consisted of a continuing agreement and concert of action effectuated through S.E.U.A. The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms. Companies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-S.E.U.A. companies were punished by a withdrawal of the right to represent the members of S.E.U.A.; and persons needing insurance who purchased from non-S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage. The two conspiracies were effectively policed by inspection and rating bureaus in five of the six states, together with local boards of insurance agents in certain cities of all six states.

The kind of interference with the free play of competitive forces with which the appellees are charged is exactly the type of conduct which the Sherman Act has outlawed for American "trade or commerce" among the states. Appellees have not argued otherwise. Their defense, set forth in a demurrer, has been that they are not required to conform to the standards of business conduct established by the Sherman Act because "the business of fire insurance is not commerce." Sustaining the demurrer, the District Court held that "the business of insurance is not commerce, either intrastate or interstate;" it "is not interstate commerce or interstate trade, though it might be considered a trade subject to local laws, either State or Federal, where the commerce clause is not the authority relied upon." 51 F.Supp. 712-714.

... [T]he District Court held the indictment bad for the sole reason that the entire "business of insurance" (not merely the part of the business in which contracts are physically executed) can never under any possible circumstances be "commerce," and that therefore, even though an insurance company conducts a substantial part of its business transactions across state lines, it is not engaged in "commerce among the States" within the meaning of either the Commerce Clause or the Sherman Anti-Trust Act....
The record, then, presents two questions and no others: (1) Was the Sherman Act intended to prohibit conduct of fire insurance companies which restrains or monopolizes the interstate fire insurance trade? (2) If so, do fire insurance transactions which stretch across state lines constitute “Commerce among the several States” so as to make them subject to regulation by Congress under the Commerce Clause? Since it is our conclusion that the Sherman Act was intended to apply to the fire insurance business we shall, for convenience of discussion, first consider the latter question.

I.

Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written. To hold that the word “commerce” as used in the Commerce Clause does not include a business such as insurance would do just that. Whatever other meanings “commerce” may have included in 1787, the dictionaries, encyclopedias, and other books of the period show that it included trade: business in which persons bought and sold, bargained and contracted. And this meaning has persisted to modern times. Surely, therefore, a heavy burden is on him who asserts that the plenary power which the Commerce Clause grants to Congress to regulate “Commerce among the several States” does not include the power to regulate trading in insurance to the same extent that it includes power to regulate other trades or businesses conducted across state lines.

This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies’ methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and
indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. . . .

. . . .

Despite all of this, despite the fact that most persons, speaking from common knowledge, would instantly say that of course such a business is engaged in trade and commerce, the District Court felt compelled by decisions of this Court to conclude that the insurance business can never be trade or commerce within the meaning of the Commerce Clause. We must therefore consider these decisions.

In 1869 this Court held, in sustaining a statute of Virginia which regulated foreign insurance companies, that the statute did not offend the Commerce Clause because "issuing a policy of insurance is not a transaction of commerce." Paul v. Virginia, 8 Wall. 168, 183. Since then, in similar cases, this statement has been repeated, and has been broadened. In Hooper v. California, 155 U.S. 648, 654, 655, decided in 1895, the Paul statement was reaffirmed, and the Court added that, "The business of insurance is not commerce." In 1913 the New York Life Insurance Company, protesting against a Montana tax, challenged these broad statements, strongly urging that its business, at least, was so conducted as to be engaged in interstate commerce. But the Court again approved the Paul statement and held against the company, saying that "contracts of insurance are not commerce at all, neither state nor interstate." New York Life Ins. Co. v. Deer Lodge County, 231 U.S. 495, 503-504, 510.

In all cases in which the Court has relied upon the proposition that "the business of insurance is not commerce," its attention was focused on the validity of state statutes—the extent to which the Commerce Clause automatically deprived states of the power to regulate the insurance business. Since Congress had at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint. As early as 1866 the insurance trade, though still in its infancy, was subject to widespread abuses. To meet the imperative need for correction of these abuses
the various state legislatures, including that of Virginia, passed regulatory legislation. Paul v. Virginia upheld one of Virginia’s statutes. To uphold insurance laws of other states, including tax laws, Paul v. Virginia’s generalization and reasoning have been consistently adhered to.

Today, however, we are asked to apply this reasoning, not to uphold another state law, but to strike down an Act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; and, in so doing, to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines. . . .

One reason advanced for the rule in the Paul case has been that insurance policies “are not commodities to be shipped or forwarded from one State to another.” But both before and since Paul v. Virginia this Court has held that Congress can regulate traffic though it consist of intangibles. Another reason much stressed has been that insurance policies are mere personal contracts subject to the laws of the state where executed. But this reason rests upon a distinction between what has been called “local” and what “interstate,” a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. . . . In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce.

Another reason advanced to support the result of the cases which follow Paul v. Virginia has been that, if any aspects of the business of insurance be treated as interstate commerce, “then all control over it is taken from the States and the legislative regulations which this Court has heretofore sustained must be declared invalid.” Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. . . .
Our basic responsibility in interpreting the Commerce Clause is to make certain that the power to govern intercourse among the states remains where the Constitution placed it. That power, as held by this Court from the beginning, is vested in the Congress, available to be exercised for the national welfare as Congress shall deem necessary. No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.

II.

We come then to the contention, earnestly pressed upon us by appellees, that Congress did not intend in the Sherman Act to exercise its power over the interstate insurance trade.

Certainly the Act's language affords no basis for this contention. Declared illegal in § 1 is "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . .", and "every person" who shall make such a contract or engage in such a combination or conspiracy is deemed guilty of a misdemeanor. Section 2 is not less sweeping. "Every person" who monopolizes, or attempts to monopolize, or conspires with "any other person" to monopolize, "any part of the trade or commerce among the several States" is, likewise, deemed guilty of a misdemeanor. Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.

A general application of the Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth. "Trusts" and "monopolies" were the terror of the period . . .

Combinations of insurance companies were not exempt from public hostility against the trusts. Between 1885 and 1912 twenty-three states enacted laws forbidding insurance combinations. When, in 1911, one of these state statutes was un成功fully challenged in this Court, the Court had this to say: "We can well
understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the State is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly." *German Alliance Ins. Co. v. Hale*, 219 U.S. 307, 316.

Appellees argue that the Congress knew, as doubtless some of its members did, that this Court had prior to 1890 said that insurance was not commerce and was subject to state regulation, and that therefore we should read the Act as though it expressly exempted that business. But neither by reports nor by statements of the bill's sponsors or others was any purpose to exempt insurance companies revealed. . . .

Appellees further argue that, quite apart from what the Sherman Act meant in 1890, the succeeding Congresses have accepted and approved the decisions of this Court that the business of insurance is not commerce. They call attention to the fact that at various times since 1890 Congress has refused to enact legislation providing for federal regulation of the insurance business, and that several resolutions proposing to amend the Constitution specifically to authorize federal regulation of insurance have failed of passage. . . .

The most that can be said of all this evidence considered together is that it is inconclusive as to any point here relevant. By no means does it show that the Congress of 1890 specifically intended to exempt insurance companies from the all-inclusive scope of the Sherman Act. Nor can we attach significance to the omission of Congress to include in its amendments to the Act an express statement that the Act covered insurance. From the beginning Congress has used language broad enough to include all businesses, and never has amended the Act to define these businesses with particularity. And the fact that several Congresses since 1890 have failed to enact proposed legislation providing for more or less comprehensive federal regulation of insurance does not even remotely suggest that any Congress has held the view that insurance alone, of all businesses, should be permitted to enter
into combinations for the purpose of destroying competition by coercive and intimidatory practices.

Finally it is argued at great length that virtually all the states regulate the insurance business on the theory that competition in the field of insurance is detrimental both to the insurers and the assured, and that if the Sherman Act be held applicable to insurance much of this state regulation will be destroyed. The first part of this argument is buttressed by opinions expressed by various persons that unrestricted competition in insurance results in financial chaos and public injury. Whether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress, not this Court. . . .

. . . .

. . . The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. Cf. Parker v. Brown, 317 U.S. 341, 350-352. No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices.

Reversed.

Mr. Justice Roberts and Mr. Justice Reed took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE STONE, dissenting.

This Court has never doubted, and I do not doubt, that transactions across state lines which often attend and are incidental to the formation and performance of an insurance contract, such as the use of facilities for interstate communication and transportation, are acts of interstate commerce subject to regulation by the federal government under the commerce clause. Nor do I doubt that the business of insurance as presently conducted has in many
aspects such interstate manifestations and such effects on inter-
state commerce as may subject it to the appropriate exercise of
federal power. See Polish Nat. Alliance v. National Labor Relations
Board.

But such are not the questions now before us. We are not
concerned here with the power of Congress to do what it has not
attempted to do, but with the question whether Congress in en-
acting the Sherman Act has asserted its power over the business
of insurance.

It would be strange, indeed, if Congress, in adopting the Sher-
man Act in 1890, more than twenty years after this Court had
supposedly settled the question, had considered that the business
of insurance was interstate commerce or had contemplated that
the Sherman Act was to apply to it. Nothing in its legislative
history suggests that it was intended to apply to the business of
insurance. The legislative materials indicate that Congress was
primarily concerned with restraints of competition in the mar-
keting of goods sold in interstate commerce, which were clearly
within the federal commerce power. And while the Act is not
limited to restraints of commerce in physical goods, see e.g., At-
lantic Cleaners & Dyers v. United States, 286 U.S. 427, there is no
reason to suppose that Congress intended the Act to apply to
matters in which, under prevailing decisions of this Court, com-
merce was not involved. On the contrary the House committee,
in reporting the bill which was adopted without change, declared:
“No attempt is made to invade the legislative authority of the
several States or even to occupy doubtful grounds. No system of
laws can be devised by Congress alone which would effectually
protect the people of the United States against the evils and op-
pression of trusts and monopolies. Congress has no authority to
deal, generally, with the subject within the States, and the States
have no authority to legislate in respect of commerce between the
several States or with foreign nations.”

Numerous bills providing for federal regulation of various
aspects of the insurance business were introduced between 1902
and 1906 but the judiciary committees of both House and Senate
concluded that the regulation of the business of marine, fire and life insurance was beyond Congressional power. Sen. Rep. No. 4406, 59th Cong., 1st Sess.; H.R. Rep. No. 2491, 59th Cong., 1st Sess., 12-25. The House committee stated that “the question as to whether or not insurance is commerce has passed beyond the realm of argument, because the Supreme Court of the United States has said many times for a great number of years that insurance is not commerce.” (p. 13.)

And when in 1914, one year after the decision in New York Life Ins. Co. v. Deer Lodge County, supra, Congress by the Clayton Act, 38 Stat. 730, amended the Sherman Act and defined the term “commerce” as used in that Act, it gave no indication that it questioned or desired this Court to overrule the decision of the Deer Lodge case and those preceding it. On the contrary Mr. Webb, who was in charge of the bill in the House of Representatives, stated that “insurance companies are not reached as the Supreme Court has held that their contracts or policies are not interstate commerce.” 51 Cong. Rec. 9390.

This Court, throughout the seventy-five years since the decision of Paul v. Virginia, has adhered to the view that the business of insurance is not interstate commerce. Such has ever since been the practical construction by the other branches of the Government of the application to insurance of the commerce clause and the Sherman Act. . . .

. . . .

But the immediate and only practical effect of the decision now rendered is to withdraw from the states, in large measure, the regulation of insurance and to confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance. Congress having taken no action, the present decision substitutes, for the varied and detailed state regulation developed over a period of years, the limited aim and indefinite command of the Sherman Act for the suppression of restraints on competition in the marketing of goods and services in or affecting interstate commerce, to be applied by the courts to the insurance business as best they may.

In the years since this Court's pronouncement that insurance is not commerce came to be regarded as settled constitutional
doctrine, vast efforts have gone into the development of schemes of state regulation and into the organization of the insurance business in conformity to such regulatory requirements. Vast amounts of capital have been invested in the business in reliance on the permanence of the existing system of state regulation. How far that system is now supplanted is not, and in the nature of things could not well be, explained in the Court's opinion.

Certainly there cannot but be serious doubt as to the validity of state taxes which may now be thought to discriminate against the interstate commerce, cf. Philadelphia Fire Ass'n v. New York, 119 U.S. 110; or the extent to which conditions may be imposed on the right of insurance companies to do business within a state; or in general the extent to which the state may regulate whatever aspects of the business are now for the first time to be regarded as interstate commerce. While this Court no longer adheres to the inflexible rule that a state cannot in some measure regulate interstate commerce, the application of the test presently applied requires "a consideration of all the relevant facts and circumstances" in order to determine whether the matter is an appropriate one for local regulation and whether the regulation does not unduly burden interstate commerce, Parker v. Brown, 317 U.S. 341, 362—a determination which can only be made upon a case-to-case basis. Only time and costly experience can give the answers.

Congress made the choice against so drastic a change when in 1906 it rejected the proposals to assume national control over the insurance business.

Had Congress chosen to legislate for such parts of the insurance business as could be found to affect interstate commerce, whether by making the Sherman Act applicable to them or by regulation in some other form, it could have resolved many of these questions of conflict between federal and state regulation. But this Court can decide only the questions before it in particular cases. Its action in now overturning the precedents of seventy-five years governing a business of such volume and of such wide ramifications, cannot fail to be the occasion for loosing a flood of litigation and of legislation, state and national, in order to establish a new boundary between state and national power, raising questions which cannot be answered for years to come, during which a great business and the regulatory officers of every state must be harassed
by all the doubts and difficulties inseparable from a realignment of the distribution of power in our federal system. These considerations might well stay a reversal of long-established doctrine which promises so little of advantage and so much of harm. For me these considerations are controlling.

The judgment should be affirmed.

Mr. Justice FRANKFURTER.
I join in the opinion of the Chief Justice.

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Mr. Justice JACKSON, dissenting in part.

I.

The historical development of public regulation of insurance underwriting in this country has created a dilemma which confronts this Court today. It demonstrates that “The life of the law has not been logic: it has been experience.”

For one hundred fifty years Congress never has undertaken to regulate the business of insurance. Therefore to give the public any protection against abuses to which that business is peculiarly susceptible the states have had to regulate it. Since 1851 the several states, spurred by necessity and with acquiescence of every branch of the Federal Government, have been building up systems of regulation to discharge this duty toward their inhabitants.

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The doctrine that insurance business is not commerce always has been criticized as unrealistic, illogical, and inconsistent with other holdings of the Court. I am unable to make any satisfactory distinction between insurance business as now conducted and other transactions that are held to constitute interstate commerce. Were we considering the question for the first time and writing upon a clean slate, I would have no misgivings about holding that insurance business is commerce and where conducted across state lines is interstate commerce and therefore that congressional power to regulate prevails over that of the states. . . .

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II.

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The principles of decision that I would apply to this case are neither novel nor complicated and may be shortly put:

1. As a matter of fact, modern insurance business, as usually conducted, is commerce; and where it is conducted across state lines, it is in fact interstate commerce.

2. In contemplation of law, however, insurance has acquired an established doctrinal status not based on present-day facts. For constitutional purposes a fiction has been established, and long acted upon by the Court, the states, and the Congress, that insurance is not commerce.

3. So long as Congress acquiesces, this Court should adhere to this carefully considered and frequently reiterated rule which sustains the traditional regulation and taxation of insurance companies by the states.

4. Any enactment by Congress either of partial or of comprehensive regulations of the insurance business would come to us with the most forceful presumption of constitutional validity. The fiction that insurance is not commerce could not be sustained against such a presumption, for resort to the facts would support the presumption in favor of the congressional action. The fiction therefore must yield to congressional action and continues only at the sufferance of Congress.

5. Congress also may, without exerting its full regulatory powers over the subject, and without challenging the basis or supplanting the details of state regulation, enact prohibitions of any acts in pursuit of the insurance business which substantially affect or unduly burden or restrain interstate commerce.

6. The antitrust laws should be construed to reach the business of insurance and those who are engaged in it only under the latter congressional power. This does not require a change in the doctrine that insurance is not commerce. The statute as thus construed would authorize prosecution of all combinations in the course of insurance business to commit acts not required or authorized by state law, such as intimidation, disparagement, or coercion, if they unreasonably restrain interstate commerce in commodities or interstate transportation. It would leave state regulation intact.
III.

The majority of the sitting Justices insist that we follow the more drastic course. Abstract logic may support them, but the common sense and wisdom of the situation seem opposed. It may be said that practical consequences are no concern of a court, that it should confine itself to legal theory. Of course, in cases where a constitutional provision or a congressional statute is clear and mandatory, its wisdom is not for us. But the Court now is not following, it is overruling, an unequivocal line of authority reaching over many years. We are not sustaining an act of Congress against attack on its constitutionality, we are making unprecedented use of the Act to strike down the constitutional basis of state regulation. I think we not only are free, but are duty bound, to consider practical consequences of such a revision of constitutional theory.

The states began nearly a century ago to regulate insurance, and state regulation, while no doubt of uneven quality, today is a successful going concern. Several of the states, where the greatest volume of business is transacted, have rigorous and enlightened legislation, with enforcement and supervision in the hands of experienced and competent officials. Such state departments, through trial and error, have accumulated that body of institutional experience and wisdom so indispensable to good administration. The Court's decision at very least will require an extensive overhauling of state legislation relating to taxation and supervision. The whole legal basis will have to be reconsidered. What will be irretrievably lost and what may be salvaged no one now can say, and it will take a generation of litigation to determine. Certainly the states lose very important controls and very considerable revenues.

The recklessness of such a course is emphasized when we consider that Congress has not one line of legislation deliberately designed to take over federal responsibility for this important and complicated enterprise. There is no federal department or personnel with national experience in the subject on which Congress can call for counsel in framing regulatory legislation. A poorer time to thrust upon Congress the necessity for framing a plan for nationalization of insurance control would be hard to find.

Moreover, we have not a hint from Congress that it concurs in the plan to federalize responsibility for insurance supervision. Indeed, every indication is to the contrary.
The orderly way to nationalize insurance supervision, if it be desirable, is not by court decision but through legislation. Judicial decision operates on the states and the industry retroactively. We cannot anticipate, and more than likely we could not agree, what consequences upon tax liabilities, refunds, liabilities under state law to states or to individuals, and even criminal liabilities will follow this decision. Such practical considerations years ago deterred the Court from changing its doctrine as to insurance. Congress, on the other hand, if it thinks the time has come to take insurance regulation into the federal system, may formulate and announce the whole scope and effect of its action in advance, fix a future effective date, and avoid all the confusion, surprise, and injustice which will be caused by the action of the Court.

A judgment as to when the evil of a decisional error exceeds the evil of an innovation must be based on very practical and in part upon policy considerations. When, as in this problem, such practical and political judgments can be made by the political branches of the Government, it is the part of wisdom and self-restraint and good government for courts to leave the initiative to Congress.

Moreover, this is the method of responsible democratic government. To force the hand of Congress is no more the proper function of the judiciary than to tie the hands of Congress. To use my office, at a time like this, and with so little justification in necessity, to dislocate the functions and revenues of the states and to catapult Congress into immediate and undivided responsibility for supervision of the nation’s insurance businesses is more than I can reconcile with my view of the function of this Court in our society.

* * * * *
II. The McCarran-Ferguson Act and Its Meaning

A. Enactment

Even though it was a state—Missouri—that had induced the initiation of South-Eastern Underwriters, the sweeping result of the case was, on the whole, disturbing to state officials, for it threatened both state jobs and state revenues. It also left insurance companies unfettered by state oversight of insurer dealings with consumers. The result was the expeditious passage of the McCarran-Ferguson Act, intended to restore essentially the status quo ante.

It is possible to argue many positions based on selected portions of the legislative history of the McCarran-Ferguson Act, but the balance of the evidence seems to show that in passing the Act, the Congress intended essentially to nullify South-Eastern Underwriters, with the minor exception of the egregious anticompetitive acts listed in Section 3(b). This view seems to be that taken by the Supreme Court in at least the early opinions construing the Act.

After South-Eastern Underwriters, various bills were quickly introduced in Congress to restore the primacy of state regulation and taxation of insurance, in whole or in part. The result was a bill that differed only modestly from a draft bill submitted by the National Association of Insurance Commissioners. With the exception found in Section 3(b), McCarran restored the status quo ante South-Eastern Underwriters and left the regulation and taxation of insurance within the competence of the states.

It is impossible to believe that Congress intended to make the antitrust laws the sole manifestation of its purpose respecting the regulation of the complex field of insurance. Its only command is to refrain from restraints of trade. Intelligent insurance regulation goes much further. It requires careful supervision to ascertain and protect solvency, regulation which may be inconsistent with unbridled rate competition. It prescribes some provisions of policies of insurance and many other matters beyond the scope of the Sherman Act.
McCarran-Ferguson Act
Section 1

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 2

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 3

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.
Section 4

Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

* * *

There was also contained in Section 2(b) something unusual in federal statutes—an authorization to the states to preempt all federal legislation except such as specifically relates to insurance. This "reverse preemption" is the basis for continued state domination of the insurance field.

The McCarran Act remains substantively unchanged nearly half a century later, although there have been numerous suggestions during that time for either repeal or amendment. A number of Journal articles have dealt with this subject. For an extensive discussion of recent suggested legislative activity, see Manders, Proposed Congressional Amendments to the McCarran-Ferguson Act: Their Impact on State Regulation, 9 J. Ins. Reg. 107 (1990).

Manders examines and comments on the current batch of proposed amendments to the McCarran-Ferguson Act, which allocates power between the states and the federal government in the regulation and taxation of the insurance business. The article examines briefly the status of insurance regulation both before and after passage of the McCarran-Ferguson Act. The main focus is on the various amendments introduced in the 100th and 101st Congresses (1987-1990) that attempt to modify the existing regulatory structure established in the Act by removing the antitrust exception extended to the "business of insurance."


A number of judicial decisions have narrowed significantly the scope of the Act. They are discussed in the remaining portions of this section, infra.
B. Authority to Tax

Since the mid-1940s, insurance companies have attacked state authority to tax insurance companies on a variety of constitutional grounds. Until the 1980s, the usual line of attack was a challenge under the commerce clause with the major target the authority of states to levy a discriminatory (or differential) premium tax against out-of-state (foreign) insurers.

In *Prudential Insurance Co. v. Benjamin*,\(^{11}\) the insurer challenged on commerce clause grounds the validity of a three percent tax on non-South Carolina insurance companies, when no similar tax was imposed on domestic companies. Justice Rutledge, in his majority opinion, said that the affirmative grant of power to the Congress was sweeping, but that the "negative" cutting edge of the commerce clause did not deny the states power with the same comprehensive effect. He said that "[f]or in all the variations of commerce clause theory it has never been the law that what the states may do in the regulation of commerce, Congress being silent, is the full measure of its power\(^{12}\). . . . Here both Congress and South Carolina have acted, and in complete coordination, to sustain the tax. It is therefore reinforced by the exercise of all the power of government residing in our scheme."\(^{13}\) The discriminatory tax was upheld. Prudential did not raise nor did the court discuss the equal protection clause or the privileges and immunities clause. The court did discuss and reject any problem that might arise from the due process clause.

Insurers have also challenged the "retaliatory" tax against insurers. The retaliatory tax law is virtually universal throughout the United States. It seeks to protect domestic companies against the discriminatory taxation upheld in *Prudential*. But it does even more. It tends to protect domestic companies against higher taxes in other states even if those taxes are not discriminatory. The net result is a tendency for premium taxes to remain at modest levels everywhere.

A little thought will show that retaliatory tax laws are most effective against states with large nationally operating companies. The point was made clearly when in 1901 the Northwestern Mutual Life Insurance Company said it would rather pay Wisconsin directly

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12. At 422.
13. At 435-36.
what the state needed from life insurance taxation than have high
taxes equally applicable to both domestic and foreign companies, for
it was paying approximately two dollars in retaliatory taxes to other
states for every dollar Wisconsin received from out of state com-
panies.\textsuperscript{14}

The commerce clause was again the basis of a challenge to a
premium tax in \textit{Western & Southern Life Insurance Co. v. State
Board of Equalization}.\textsuperscript{15} In that case, California taxed domestic and
foreign insurers equally except that if another state imposed higher
taxes on California companies than California would otherwise
charge, the higher tax rate of the other state would be imposed on
business of its companies in California.

The commerce clause challenge to California's retaliatory tax
was rejected summarily in \textit{Western & Southern}. Though he upheld
the tax, Justice Brennan had more difficulty with the equal protec-
tion argument. He discussed it at length. Justices Stevens and Black-
mun dissented, thinking that the holding of insurance companies as
hostages to coerce another sovereign state to change its policies was
not permissible.

Several \textit{Journal} articles and case notes have discussed the eco-
nomic problems associated with the discriminatory premium tax
and the retaliatory tax. See Hoflander & Zollinger, \textit{California Tax-
avation of Life Insurance Companies, 1 J. Ins. Reg.} 23 [1982]; Gandhi,
\textit{Property and Casualty Tax Reform—United States General Ac-
counting Perspective}, 2 J. Ins. Reg. 422 [1984]; Hofflander, Nye &
Zollinger, \textit{An Economic Analysis of Discriminatory Premium Tax-
ation}, 3 J. Ins. Reg. 3 [1984]; Skipper, \textit{State Taxation of Insurance
Companies: Time for a Change}, 6 J. Ins. Reg. 121 [1987]; Overstreet,
\textit{Discriminatory Premium Taxation: A Review of Metropolitan Life
nor, \textit{Regulatory and Other Advantages of State Tax Incentives for
Insurance Company Domestication}, 8 J. Ins. Reg. 371 [1990]. Note,
\textit{Supreme Court Strikes Down Alabama Differential Premium Tax},

\textsuperscript{14} See KIMBALL, \textit{INSURANCE and PUBLIC POLICY} 259-70, especially at 265
[1960].

\textsuperscript{15} 451 U.S. 648 [1981].
Justice Powell delivered the opinion of the Court.

This case presents the question whether Alabama's domestic preference tax statute, Ala. Code §§ 27-4-4 and 27-4-5 (1975), that taxes out-of-state insurance companies at a higher rate than domestic insurance companies, violates the Equal Protection Clause.

I

Since 1955, the State of Alabama has granted a preference to its domestic insurance companies by imposing a substantially lower gross premiums tax rate on them than on out-of-state (foreign) companies. Under the current statutory provisions, foreign life insurance companies pay a tax on their gross premiums received from business conducted in Alabama at a rate of three percent, and foreign companies selling other types of insurance pay at a rate of four percent. Ala. Code § 27-4-4(a) (1975). All domestic insurance companies, in contrast, pay at a rate of only one percent on all types of insurance premiums. § 27-4-5(a). As a result, a foreign insurance company doing the same type and volume of business in Alabama as a domestic company generally will pay three to four times as much in gross premiums taxes as its domestic competitor.

Alabama's domestic preference tax statute does provide that foreign companies may reduce the differential in gross premiums taxes by investing prescribed percentages of their worldwide assets in specified Alabama assets and securities. § 27-4-4(b). By investing 10 percent or more of its total assets in Alabama investments, for example, a foreign life insurer may reduce its gross premiums tax rate from 3 to 2 percent. Similarly, a foreign property and casualty insurer may reduce its tax rate from four to three percent. Smaller tax reductions are available based on investment of smaller percentages of a company's assets. Ibid. Regardless of how much of its total assets a foreign company places in Alabama investments, it can never reduce its gross premiums tax rate to the same level paid by comparable domestic companies. These are
entitled to the one-percent tax rate even if they have no investments in the State. Thus, the investment provision permits foreign insurance companies to reduce, but never to eliminate, the discrimination inherent in the domestic preference tax statute.

II

Appellants, a group of insurance companies incorporated outside of the State of Alabama, filed claims with the Alabama Department of Insurance in 1981, contending that the domestic preference tax statute, as applied to them, violated the Equal Protection Clause. They sought refunds of taxes paid for the tax years 1977 through 1980. The Commissioner of Insurance denied all of their claims on July 8, 1981.

[Eventually the case came to the Supreme Court, the sole issue being whether the purposes of the Alabama tax statute were legitimate under the equal protection clause, under the doctrine of Western & Southern.]

III

[In Western & Southern, we held that "[w]e consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose."

A (1)

first of the purposes found by the trial court to be a legitimate reason for the statute's classification between foreign and domestic corporations is that it encourages the formation of new domestic insurance companies in Alabama. The State, agreeing with the Court of Civil Appeals, contends that this Court has long held that the promotion of domestic industry, in and of itself, is a
legitimate state purpose that will survive equal protection scrutiny. In so contending, it relies on a series of cases, including *Western & Southern*, that are said to have upheld discriminatory taxes.

The cases cited lend little or no support to the State’s contention. In *Western & Southern*, the case principally relied upon, we did not hold as a general rule that promotion of domestic industry is a legitimate state purpose under equal protection analysis. Rather, we held that California’s purpose in enacting the retaliatory tax—to promote the *interstate* business of domestic insurers by deterring *other States* from enacting discriminatory or excessive taxes—was a legitimate one. 451 U.S., at 668. In contrast, Alabama asks us to approve its purpose of promoting the business of its domestic insurers in Alabama by penalizing foreign insurers who also want to do business in the State. Alabama has made no attempt, as California did, to influence the policies of other States in order to enhance its domestic companies’ ability to operate interstate; rather, it has erected barriers to foreign companies who wish to do interstate business in order to improve its domestic insurers’ ability to compete at home.

The crucial distinction between the two cases lies in the fact that Alabama’s aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there.

The State argues nonetheless that it is impermissible to view a discriminatory tax such as the one at issue here as violative of the Equal Protection Clause. This approach, it contends, amounts to no more than “Commerce Clause rhetoric in equal protection clothing.” The State maintains that because Congress, in enacting the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, intended to authorize States to impose taxes that burden interstate commerce in the insurance field, the tax at issue here must stand. Our concerns are much more fundamental than as characterized by the State. Although the McCarran-Ferguson Act exempts the insurance industry from Commerce Clause restrictions, it does not purport to limit in any way the applicability of the Equal Protection
Clause. As noted above, our opinion in *Western & Southern* expressly reaffirmed the viability of equal protection restraints on discriminatory taxes in the insurance context.

Moreover, the State’s view ignores the differences between Commerce Clause and equal protection analysis and the consequent different purposes those two constitutional provisions serve. Under Commerce Clause analysis, the State’s interest, if legitimate, is weighed against the burden the state law would impose on interstate commerce. In the equal protection context, however, if the State’s purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish.

The two constitutional provisions perform different functions in the analysis of the permissible scope of a State’s power—one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States. See *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421, 423–424 (1921). The effect of the statute at issue here is to place a discriminatory tax burden on foreign insurers who desire to do business within the State, thereby also incidentally placing a burden on interstate commerce. Equal protection restraints are applicable even though the effect of the discrimination in this case is similar to the type of burden with which the Commerce Clause also would be concerned.

... We hold that under the circumstances of this case, promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose.

**B**

The second purpose found by the courts below to be legitimate was the encouragement of capital investment in the Alabama assets and governmental securities specified in the statute. We do not agree that this is a legitimate state purpose when furthered by discrimination. Domestic insurers remain entitled to the more favorable rate of tax regardless of whether they invest in Alabama assets.

**IV**

We conclude that neither of the two purposes furthered by the Alabama domestic preference tax statute and addressed by the
Basic Source Materials Case Book

Circuit Court for Montgomery County, see supra, at 873, is legitimate under the Equal Protection Clause to justify the imposition of the discriminatory tax at issue here. The judgment of the Alabama Supreme Court accordingly is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice O'CONNOR, with whom Justice BRENNAN, Justice MARSHALL, and Justice REHNQUIST join, dissenting.

This case presents a simple question: Is it legitimate for a State to use its taxing power to promote a domestic insurance industry and to encourage capital investment within its borders? In a holding that can only be characterized as astonishing, the Court determines that these purposes are illegitimate. This holding is unsupported by precedent and subtly distorts the constitutional balance, threatening the freedom of both state and federal legislative bodies to fashion appropriate classifications in economic legislation. Because I disagree with both the Court's method of analysis and its conclusion, I respectfully dissent.

I

Alabama's legislature has chosen to impose a higher tax on out-of-state insurance companies and insurance companies incorporated in Alabama that do not maintain their principal place of business or invest assets within the State. Ala. Code § 27-4-4 et seq. (1975). This tax seeks to promote both a domestic insurance industry and capital investment in Alabama. . . .

Our precedents impose a heavy burden on those who challenge local economic regulation solely on Equal Protection Clause grounds. In this context, our long-established jurisprudence requires us to defer to a legislature's judgment if the classification is rationally related to a legitimate state purpose. Yet the Court evades this careful framework for analysis, melding the proper two-step inquiry regarding the State's purpose and the classification's relationship to that purpose into a single unarticulated judgment. This tactic enables the Court to characterize state goals that have been legitimated by Congress itself as improper solely because it disagrees with the concededly rational means of differ-
ential taxation selected by the legislature. This unorthodox approach leads to further error. The Court gives only the most cursory attention to the factual and legal bases supporting the State’s purposes and ignores both precedent and significant evidence in the record establishing their legitimacy. Most troubling, the Court discovers in the Equal Protection Clause an implied prohibition against classifications whose purpose is to give the “home team” an advantage over interstate competitors even where Congress has authorized such advantages.

The Court overlooks the unequivocal language of our prior decisions. . . .

[Justice O’Connor discusses prior cases and then discusses the legitimacy of favoring local businesses.]

Ignoring these policy considerations, the Court insists that Alabama seeks only to benefit local business, a purpose the Court labels invidious. Yet if the classification chosen by the State can be shown actually to promote the public welfare, this is strong evidence of a legitimate state purpose. See Note, Taxing Out-of-State Corporations After Western & Southern: An Equal Protection Analysis, 34 Stan. L. Rev. 877, 896 (1982). In this regard, Justice Frankfurter wisely observed:

“[T]he great divide in the [equal protection] decisions lies in the difference between emphasizing the actualities or the abstractions of legislation.

“... To recognize marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic.” Morey v. Doud, 354 U.S. 457, 472 (1957) (dissenting).

A thoughtful look at the “actualities of [this] legislation” compels the conclusion that the State’s goals are legitimate by any test.

II

The policy of favoring local concerns in state regulation and taxation of insurance, which the majority condemns as illegitimate, is not merely a recent invention of the States. The States initiated regulation of the business of insurance as early as 1851. . . .
The majority opinion correctly notes that Congress did not intend the McCarran-Ferguson Act to give the States any power to tax or regulate the insurance industry other than they already possessed. But the legislative history cited by the majority relates not to differential taxation but to decisions of this Court that had invalidated state taxes on contracts of insurance entered into outside the State's jurisdiction. See H. R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945). The Court fails to mention that at the time the Act was under consideration the taxing schemes of Alabama, Arizona, Arkansas, Illinois, Kansas, Kentucky, Maine, Michigan, Mississippi, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, and Wisconsin all incorporated tax differentials favoring domestic insurers.

Any doubt that Congress' intent encompassed taxes that discriminate in favor of local insurers was dispelled in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). Cf. Note, Congressional Consent to Discriminatory State Legislation, 45 Colum. L. Rev. 927 (1945) (discussing the issues of constitutional power posed by the Act). There a foreign insurer challenged a tax on annual gross premiums imposed on foreign but not domestic insurers as a condition for renewal of its license to do business. Congress, the foreign insurer argued, was powerless to sanction the tax at issue because "the commerce clause 'by its own force' forbids discriminatory state taxation." 328 U.S., at 426. A unanimous Court rejected the argument that exacting a 3% gross premium tax from foreign insurers was invalid as "somehow technically of an inherently discriminatory character." *Id.*, at 432. The Court concluded that the McCarran-Ferguson Act's effect was "clearly to sustain the exaction and that this can be done without violating any constitutional provision." *Id.*, at 427 (emphasis added).

*Benjamin* expressly noted that nothing in the Equal Protection Clause forbade the State to enact a law such as the tax at issue. *Id.*, at 438, and n. 50. In this regard the Court relied in part on *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926), a decision that explicitly recognized that differential taxation of revenues of foreign corporations may not be arbitrary or without reasonable basis. See *Western & Southern Life Ins. Co. v. State Board of Equal-
ization of California, 451 U.S., at 664, n. 17. The Commerce Clause, Benjamin emphasized, is not a “one-way street” but encompasses congressional power “to discriminate against interstate commerce and in favor of local trade,” “subject only to the restrictions placed upon its authority by other constitutional provisions.” 328 U.S., at 434. Where the States and Congress have acted in concert to effect a policy favoring local concerns, their action must be upheld unless it unequivocally exceeds “some explicit and compelling limitation imposed by a constitutional provision or provisions designed and intended to outlaw the action taken entirely from our constitutional framework.” Id., at 435–436.

Our more recent decision in Western & Southern in no way undermines the force of the analysis in Benjamin. Western & Southern confirms that differential premium taxes are not immune from review as “privilege” taxes, but it also teaches that the Constitution requires only that discrimination between domestic and foreign corporations bear a rational relationship to a legitimate state purpose. Benjamin clearly recognized that differentially taxing foreign insurers to promote a local insurance industry was a legitimate state purpose completely consonant with Congress’ purpose in the McCarran-Ferguson Act.

The contemporary realities of insurance regulation and taxation continue to justify a uniquely local perspective. Insurance regulation and taxation must serve local social policies including assuring the solvency and reliability of companies doing business in the State and providing special protection for those who might be denied insurance in a free market, such as the urban poor, small businesses, and family farms. GAO Report 10–13; State Insurance Regulation, Hearing before the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary, 96th Cong., 1st Sess., 19–21 (1979) (hereinafter Insurance Regulation). Currently at least 28 of the 50 States employ a combination of investment incentives and differential premium taxes favoring domestic insurers to encourage local investment of policyholders’ premiums and to partially shelter smaller domestic insurers from competition with the large multistate companies.

III

Despite abundant evidence of a legitimate state purpose, the majority condemns Alabama’s tax as “purely and completely dis-
“criminatory” and “the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent.” Ante, at 878. Apparently, the majority views any favoritism of domestic commercial entities as inherently suspect. The majority ignores a long line of our decisions. In the past this Court has not hesitated to apply the rational basis test to regulatory classifications that distinguish between domestic and out-of-state corporations or burden foreign interests to protect local concerns. . . .

A State may use its taxing power to entice useful foreign industry, see Allied Stores of Ohio, Inc. v. Bowers, 358 U.S., at 528, or to make residence within its boundaries more attractive, see Zobel v. Williams, 457 U.S. 55, 67-68 (1982) (BRENNAN, J., concurring). Though such measures might run afoul of the Commerce Clause, “[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry.”

. . . . .

IV

Because Alabama’s classification bears a rational relationship to a legitimate purpose, our precedents demand that it be sustained. The Court avoids this clear directive by a remarkable evasive tactic. It simply declares that the ends of promoting a domestic insurance industry and attracting investments to the State when accomplished through the means of discriminatory taxation are not legitimate state purposes. This bold assertion marks a drastic and unfortunate departure from established equal protection doctrine. By collapsing the two prongs of the rational basis test into one, the Court arrives at the ultimate issue—whether the means are constitutional—without ever engaging in the deferential inquiry we have adopted as a brake on judicial impeachment of legislative policy choices. In addition to unleashing an undisciplined form of Equal Protection Clause scrutiny, the Court’s approach today has serious implications for the authority of Congress under the Commerce Clause. Groping for some basis for this radical departure from equal protection analysis, the Court draws heavily on Justice BRENNAN’S concurring opinion in Allied Stores of Ohio, Inc. v. Bowers, supra, at 530, as support for its argument that “the Equal Protection Clause forbids a State to discriminate in favor of its
own residents solely by burdening 'the residents of other state members of our federation.'"

As noted in Western & Southern, Justice Brennan's interpretation has not been adopted by the Court, "which has subsequently required no more than a rational basis for discrimination by States against out-of-state interests in the context of equal protection litigation." 451 U.S., at 667, n. 21. More importantly, to the extent the Court today purports to find in the Equal Protection Clause an instrument of federalism, it entirely misses the point of Justice Brennan's analysis. Justice Brennan reasoned that "[the] Constitution furnishes the structure for the operation of the States with respect to the National Government and with respect to each other" and that "the Equal Protection Clause, among its other roles, operates to maintain this principle of federalism." 358 U.S., at 532. Favoring local business as an end in itself might be "rational" but would be antithetical to federalism. Accepting arguendo this interpretation, we have shown that the measure at issue here does not benefit local business as an end in itself but serves important ulterior goals. . . .

The doctrine adopted by the majority threatens the freedom not only of the States but also of the Federal Government to formulate economic policy. The dangers in discerning in the Equal Protection Clause a prohibition against barriers to interstate business irrespective of the Commerce Clause should be self-evident. The Commerce Clause is a flexible tool of economic policy that Congress may use as it sees fit, letting it lie dormant or invoking it to limit as well as promote the free flow of commerce. Doctrines of equal protection are constitutional limits that constrain the acts of federal and state legislatures alike. See, e.g., Califano v. Webster, 430 U.S. 313 (1977); Cohen, Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma, 35 Stan. L. Rev. 387, 400-413 (1983). The Court's analysis casts a shadow over numerous congressional enactments that adopted as federal policy "the type of parochial favoritism" the Court today finds unconstitutional. White v. Massachusetts Council of Construction Employers, Inc., supra, at 213. Contrary to the reasoning in Benjamin, the Court today indicates the Equal Protection Clause stands as an independent barrier if
courts should determine that either Congress or a State has ventured the “wrong” direction down what has become, by judicial fiat, the one-way street of the Commerce Clause. Nothing in the Constitution or our past decisions supports forcing such an economic straitjacket on the federal system.

V

Today’s opinion charts an ominous course. I can only hope this unfortunate adventure away from the safety of our precedents will be an isolated episode. I had thought the Court had finally accepted that

“the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.” New Orleans v. Dukes, 427 U.S., at 303-304. [Citations omitted in original.]

Because I believe that the Alabama law at issue here serves legitimate state purposes through concededly rational means, and thus is neither invidious nor arbitrary, I would affirm the court below. I respectfully dissent.

* * * * *

It is not only the commerce and equal protection clauses that can be the basis for a serious challenge to the state’s power to tax insurance companies or insurance transactions. Even Congress does not have the power to negate the protection of the due process clause, as the following case shows.

* * * * *

STATE BOARD OF INSURANCE v. TODD SHIPYARDS CORPORATION
370 U.S. 451 (1962)

Mr. Justice DOUGLAS delivered the opinion of the Court.

When we held in United States v. South-Eastern Underwriters Assn., 322 U.S.533, that the modern business of insurance was
“interstate commerce,” we put it in a category which Congress could regulate and which, if our prior decisions controlled, could not in some respects be regulated by the States, even in absence of federal regulation. See Frankfurter, The Commerce Clause (1937); Rutledge, A Declaration of Legal Faith (1947).

Congress promptly passed the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. § 1011, which provided that the regulation and taxation of insurance should be left to the States, without restriction by reason of the Commerce Clause. Subsequently, by force of the McCarran-Ferguson Act, we upheld the continued taxation and regulation by the States of interstate insurance transactions. Prudential Ins. Co. v. Benjamin, 328 U.S. 408.

Prior to the South-Eastern Underwriters decision, we had given broad scope to local regulation of the insurance business. Osborn v. Ozlin, 310 U.S. 53; Hoopeston Canning Co. v. Cullen, 318 U.S. 313. The Osborn case upheld a Virginia requirement that insurance companies authorized to do business in that State must write policies through resident agents. The Hoopeston case, while it involved the making of out-of-state insurance contracts, also involved servicing of policies in New York, the regulating State.

Here, unlike the Osborn and Hoopeston cases, the insurance companies carry on no activities within the State of Texas. Of course, the insured does business in Texas and the property insured is located there. It is earnestly argued that, unless the philosophy of the Osborn and Hoopeston decisions is to be restricted, the present Texas tax on premiums paid out-of-state on out-of-state contracts should be sustained. We are urged to follow the approach of the Osborn and Hoopeston decisions, look to the aspects of the insurance transactions taken as a whole, and decide that there are sufficient contacts with Texas to justify this tax under the requirements of due process.

Were the Osborn and Hoopeston cases and the bare bones of the McCarran-Ferguson Act our only criteria for decision, we would have presented the question whether three prior decisions—Allgeyer v. Louisiana, 165 U.S. 578; St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346; Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77—have continuing vitality. The first two were distinguished in the Osborn (310 U.S., at 66–67) and Hoopeston (318 U.S., at 318–319) cases. The Allgeyer case held that Louisiana by reason of the Due Process Clause of the Fourteenth Amend-
ment could not make it a misdemeanor to effect insurance on Louisiana risks with an insurance company not licensed to do business in Louisiana, where the insured through use of the mails contracted in New York for the policy. The *St. Louis Cotton Compress* case held invalid under the Due Process Clause an Arkansas tax on the premiums paid for a policy on Arkansas risks, made with an out-of-state company having no office or agents in Arkansas. The *Connecticut General Life Insurance* case held invalid under the Due Process Clause a California tax on premiums paid in Connecticut by one insurance company to another for reinsurance of life insurance policies written in California on California residents, even though both insurance companies were authorized to do business in California.

The insurance transactions involved in the present litigation take place entirely outside Texas. The insurance, which is principally insurance against loss or liability arising from damage to property, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do business in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas, and do not investigate risks or claims in Texas.

The insured is not a domiciliary of Texas but a New York corporation doing business in Texas. Losses under the policies are payable not to Texas residents but to the insured at its principal office in New York City. The only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas.

We need not decide *de novo* whether the results (and the reasons given) in the *Allgeyer, St. Louis Cotton Compress, and Connecticut General Life Insurance* decisions are sound and acceptable. For we have in the history of the McCarran-Ferguson Act an explicit, unequivocal statement that the Act was so designed as not to displace those three decisions.

[The Court quoted from the House Report.]

Senator McCarran, after reading the foregoing part of the House Report during the Senate debate, stated, “... we give to
the States no more powers than those they previously had, and we take none from them." 91 Cong. Rec. 1442.

So, while Congress provided in 15 U.S.C. § 1012 (a) that the insurance business "shall be subject to the laws of the several States which relate to the regulation or taxation of such business," it indicated without ambiguity that such state "regulation or taxation" should be kept within the limits set by the Allgeyer, St. Louis Cotton Compress, and Connecticut General Life Insurance decisions.

The power of Congress to grant protection to interstate commerce against state regulation or taxation (Bethlehem Steel Co. v. State Board, 330 U.S. 767, 775-776; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 235-236) or to withhold it (In re Rahrer, 140 U.S. 545, 560 et seq.; Prudential Ins. Co. v. Benjamin, supra) is so complete that its ideas of policy should prevail.

Congress, of course, does not have the final say as to what constitutes due process under the Fourteenth Amendment. And while Congress has authority by § 5 of that Amendment to enforce its provisions (Ex parte Virginia, 100 U.S. 339; Monroe v. Pape, 365 U.S. 167), the McCarran-Ferguson Act does not purport to do so. We have, of course, freedom to change our decisions on the constitutionality of laws. Smith v. Allwright, 321 U.S. 649, 665. But the policy announced by Congress in the McCarran-Ferguson Act was one on which the industry had reason to rely since 1897, when the Allgeyer decision was announced; and we are advised by an amicus brief how severe the impact would be on small insurance companies should the old rule be changed. When, therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions (see Federal Trade Comm'n v. Travelers Health Assn., 362 U.S. 293, 301-302), we should be loath to change them...

... Here Congress tailored the new regulations for the insurance business with specific reference to our prior decisions. Since these earlier decisions are part of the arch on which the new structure rests, we refrain from disturbing them lest we change the design that Congress fashioned.

Affirmed.
Mr. Justice BLACK, dissenting.

In holding that the McCarran-Ferguson Act withdrew from the States the power to tax the ownership and use of insurance policies on property located within their borders merely because those policies were made by representatives of the insurer and the insured in another State, I think the Court places an unwarranted construction upon that Act which may seriously impair the capacity of Texas and other States to provide and enforce effective regulation of the insurance business. The Texas statute held invalid was enacted by the State Legislature in 1957 in order to protect the State's comprehensive supervision of insurance companies and their policies from being undercut by the practice of insuring Texas property with insurance companies not authorized to do business in that State. . . . The Court's construction of the McCarran-Ferguson Act bars Texas from providing this sort of protection to regulated companies. This holding seems to me to threaten the whole foundation of the Texas regulatory program for it plainly encourages Texas residents to insure their property with unregulated companies and discourages out-of-state companies from qualifying to do business in and subjecting themselves to regulation and taxation by the State of Texas.

I cannot believe that an Act which was basically designed to leave the power to regulate and tax insurance companies to the States was intended to have any such effect. The McCarran-Ferguson Act "declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States"—a declaration which is not qualified by any other language of the Act. Nothing in the legislative history which the Court relies upon persuades me that we should read this Act in a way which so seriously impairs the power of the States to discharge their responsibilities under the Act to provide a comprehensive, effective, well-integrated program for regulating insurance on property within their borders. I think the McCarran-Ferguson Act left Texas with adequate power to place a tax on the ownership and use of insurance policies covering the vast properties owned and operated by this respondent in Texas, and I therefore dissent.

*****
Todd Shipyards does not sweep as broadly as some have thought. While due process is a limitation that overrides both legislative and judicial power, of both the states and the federal government, it is only a limited qualification on the power of the state to tax and regulate. The question is primarily whether the contacts a company or a transaction has with the state are sufficient to justify the taxation (or the regulation) the state seeks to impose.

After losing in the Wisconsin Supreme Court in the following case, Ministers appealed to the Supreme Court of the United States, which dismissed the appeal "for want of a substantial federal question." 385 U.S. 205 (1966).

* * * * *

MINISTERS LIFE and CASUALTY UNION v. HAASE
30 Wis. 2d 339, 141 N.W. 2d 287 (1966)

HALLOWS, Justice.

The challenged sec. 201.42, Stats., entitled "Unauthorized Insurance" was created by ch. 397, Laws of 1961, and purports by its terms to apply to the mail-order insurance business and to be a comprehensive regulating and taxing law of the doing of insurance business in this state by a company which is not licensed to do business herein. In the purpose clause, the legislature declared as public policy its concern with "the protection of residents of this state against acts of persons and insurers not authorized to do an insurance business in this state by the maintenance of fair and honest insurance markets, by protecting the premium tax revenues of this state, by protecting authorized persons and insurers, which are subject to strict regulation, from unfair competition by unauthorized persons and insurers and by protecting against the evasion of the insurance regulatory laws of this state." . . .

Ministers was organized under the laws of Minnesota sixty-four years ago and is representative of that class of insurance companies which had their origin in the early Traveling Men's Associations which served a selective class of members principally on a direct-mail basis. It is now a mutual legal-reserve life company...
selling accident and health and life insurance policies to ministers and professional religious workers in the United States and Canada principally by direct mail even in those states in which it is licensed. It is licensed to do business in 10 states and in all but two provinces of Canada. It has agents in seven states and one province of Canada.

Wisconsin is a state in which Ministers is not licensed to do business, has no agents therein, and operates on a direct-mail basis. ... It solicits business through advertisements in national publications and in church and other religious publications. Direct-mail solicitation and group leaders are also used extensively. General mailing is sent to between 60,000 and 140,000 eligible persons some six times a year and a special mailing to between 6,000 and 8,000 selected individuals approximately 12 times a year. In Wisconsin approximately 25,000 mail solicitations are made annually to approximately 3,600 residents. In the case of individual policies, upon receiving an inquiry at its home office in Minneapolis, Ministers mails an application to the prospect who fills it out and mails it back to Ministers. This application is usually accompanied by the first premium. The policy is prepared, signed, and mailed to the applicant from its home office. Under its articles of incorporation, a person becomes a member of Ministers upon delivery and acceptance of the policy and the applicant is given an opportunity to examine the policy upon its receipt; if unsatisfactory, he may reject it and mail it back and his premium will be refunded. All the mailing of notices of premium and other mailing is done at the home office of Ministers and all premiums are payable and received there.

If, in this process of mail-order selling, Ministers needs additional information for underwriting purposes, it obtains it through correspondence with the applicants or from local doctors or by employing national investigatory agencies. For medical information Ministers may use the family physician by mailing a medical-report form to him requesting that he fill it out and return it to the home office. The doctor is paid by Ministers for such services. Physical examinations when required are made by the family physician and occasionally by some other doctor selected by Ministers. All contacts between Ministers and the doctor are by mail and the cost of the medical examination is paid by Ministers. If other local investigation is required, Ministers uses national investigatory
agencies either on a basic-charge basis or upon agreed-hourly charge or some other specially-arranged charge. Claims for accidental death, for disability under accident and health policies and for death which occurs during the contestable period of a life policy are generally investigated. While these national agencies have no power to negotiate or settle claims, they do make the necessary investigation and report to Ministers.

Ministers pays claims from its home office on proof-of-claim forms furnished to the claimant or which are generally attached to the policy when issued. Further claim forms, if needed, are sent to the claimant who furnishes such other data and certification and reports as may be necessary.

.......

Ministers has no office, officer, bank account or real estate in Wisconsin. It does own some mortgages secured by Wisconsin real estate. Approximately one third of the policies held by residents of Wisconsin were issued while such persons were residents of other states.

The business done by Ministers is not insignificant; although compared with large stock companies, it would hardly be considered impressive....

This case does not involve sporadic sales of insurance but a continuous and systematic course of business conduct and the question is whether this conduct or activity is of such a quality and nature and so related to the purpose of the regulation and bears such relationship to Wisconsin in respect to the state's interest in such activity and the subject of the insurance that this state may regulate and tax it. Phrased in traditional conceptual language of "presence in the state," is Ministers "doing business" in the state of Wisconsin for the purpose of regulating that business?

Ministers contends the State of Wisconsin has no jurisdiction to tax or regulate its mail-order insurance business by sec. 201.42, Stats., because that section violates (1) the commerce and the supremacy clauses, (2) the due-process clause, (3) the contract clause, and (4) the postal clause of the United States constitution.

We do not agree and expressly hold the State of Wisconsin has jurisdiction to enact an insurance regulatory and taxing statute such as sec. 201.42, Stats. The insurance business from its very
inception has been so permeated with public interest and with the need for regulation that it has been considered the proper object of regulation by the state.

[The court disposed of the commerce clause argument and then proceeded to discuss due process.]

The precise nature and extent of a state's power to regulate insurance was again examined in *State Board of Ins. v. Todd Shipyards Corp.*, supra, which is relied upon by Ministers for its theory that the state's jurisdiction to regulate was in effect put in a deep freeze and confined to cases decided prior to *SEUA*. We think the outer limits of the vital and ever-growing standards of due process were defined in *Todd* to be the holdings in a trilogy of cases, but we do not read *Todd* as freezing state regulation to the type then extant and as forever barring within these outer limits the expansion of the regulation of the insurance industry by states to meet the ever-growing social needs and problems of modern civilization. The so-called contact concept of due process in relation to the state's jurisdiction to tax and regulate the "doing of insurance business" within its borders may be applicable to new facts within the outer limits decided factually by *Allgeyer v. Louisiana* (1897), 165 U.S. 578; *St. Louis Cotton Compress Co. v. Arkansas* (1922), 260 U.S. 346; and *Connecticut General Life Ins. Co. v. Johnson* (1938), 303 U.S. 77.

These three cases have the common element that the insurer involved carried on no activities within the taxing or regulating state either by mail, by agents, by independent contractors, or otherwise, in connection with the insurance transaction involved. All the activities to produce the policy and to service it took place wholly outside the state seeking to impose the tax. Significantly, the only contact was the location of the risk within the state which standing alone was not sufficient for jurisdiction.

Because the facts in *Todd* were so similar to the facts in the *Allgeyer, Cotton Compress* and *Connecticut General Cases*, the Supreme Court was asked to re-examine the validity of the trilogy and to adopt the approach of *Osborn v. Ozlin* (1940), 310 U.S. 53 and *Hoopeson Canning Co. v. Cullen* (1943), 318 U.S. 313.
The philosophy of these two cases within the framework of the
due-process limitation considers as a whole all aspects of the ins-
urance transaction having contacts with the state and the rela-
tionship of the regulation involved to the state's interest in those
aspects. In this posture the Supreme Court refused to re-examine
the validity of the three older cases, stating the policy announced
by Congress in the McCarran Act was one which the industry
had reason upon which to rely since the Allgeyer decision in 1897.
Then in picturesque language, the court stated, "Congress tailored
the new regulations for the insurance business with specific ref-
ence to our prior decisions. Since these earlier decisions are part
of the arch on which the new structure rests, we refrain from
disturbing them lest we change the design that Congress fash-
ioned."

If we read Todd correctly, it held Allgeyer, St. Louis Cotton Com-
press and Connecticut General were not to be re-examined and over-
rulled but constitute the outer limits within which the doctrine of
due process must be confined. Todd does not hold any static or
conceptualistic theory of "doing business" as the jurisdictional ba-
sis for state regulation, nor did it overrule the Osborn and Hoo-
peston decisions or approach. It might well have reached the same
result on the facts, applying the Osborn-Hoopeston philosophy.

These two cases are also a part of the pre-SEUA cases and
more so in respect to regulation than Minnesota Commercial Men's
Association v. Benn (1923), 261 U.S. 140, which is relied upon by
Ministers.

We think Osborn and Hoopeston are sufficient authority for
Wisconsin's jurisdiction to regulate the type of insurance business
presented by the instant facts and represent the prevailing view of
the jurisdiction to tax and regulate an insurance business within
the limits of due process. In Osborn the court justified a Virginia
statute which prohibited insurers licensed in Virginia from making
contracts of insurance on persons or property in the state except
through licensed resident-agents who were to countersign such
policies and receive at least one half of the customary commission.
As here, the claim was made the state's statute sought to intrude
upon business transactions beyond its borders. The court denied
such contention, stating Virginia's "interest in the risks which
these contracts are designed to prevent warrants the kind of control she has here imposed." The court thought Virginia had a definable interest in that which she sought to regulate and distinguished the Allgeyer and Cotton Compress Cases. The Osborn decision was not predicated upon the fact the insurance companies to which the law applied were licensed to do business in Virginia or upon the place of contracting but principally upon the power of the state to regulate a business affecting a matter of great public interest and concern to the state. . . . It is true, public interest alone is not sufficient to give a state jurisdiction, but great concern and public interest do add significance to contacts which compose the organic whole and are directly related to the regulation and which might not otherwise be sufficient to meet the standard of the due-process clause.

Hoopeson was decided a few years after Osborn. This case involved reciprocal-insurance associations whose attorney-in-fact was located in Illinois. The suit was brought by a reciprocal-insurance association to have declared unconstitutional a New York statute which prohibited reciprocal-insurance associations from doing business in New York unless licensed therein. In this case, a canner in New York signed an application, sent it to the attorney-in-fact in Chicago. If the canner was accepted for membership he would sign a power-of-attorney and forward it to the attorney-in-fact. Sometimes an insurance engineer investigated the risk and in some instances he might service the policy. Under the standard fire policy, the option to rebuild and repair the damaged property was reserved. Losses were paid by check from Illinois. In sustaining the statute, the court took the view that in determining the power of a state to regulate the doing of insurance business in the state the earlier conceptualistic theories of the place of contracting or of performance to determine the "presence" of the business which Ministers relies upon here, were no longer of importance. Hoopeson recognized a state may have substantial interests in the business of insuring its people and property which may be measured by the need for the protection of its citizens by the regulation of the industry.

Significantly, the court viewed the actual physical signing of the contracts as only one element in the broad range of the business activities, and while important, it was "an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business trans-
action." The court realistically stated that in the insurance business, a transaction neither begins nor ends with the execution of the contract. . . .

While the facts in the instant case may not be as strong as the facts in *Hoopeston*, the contacts with Wisconsin are measurably more than found in the *Todd* type of case. Here, we have a systematic solicitation of insurance by mail, not sporadic but continuous, and in addition, group leader's solicitations. We need not consider group leaders as agents but even Ministers should admit they are significant contacts which were encouraged to work for Ministers' benefit and which were relied upon as a method of doing business. Besides, Ministers utilizes the necessary services of investigatory agencies and doctors in the state for underwriting and claim-settlement purposes, carefully avoiding designating them agents but securing the same results. Ministers has "realistically entered the state looking for and obtaining business." It is not essential that the issuance of the policy be done in Wisconsin to "exploit the consumer market." . . .

. . .

The impact of this section on Ministers is not so serious as to violate the due-process standard. The inconvenience and the change in its mode of business are arguments properly made to the legislature but in this case hardly render the section unconstitutional. While it is conceded the premium tax is modest and not burdensome, it is claimed the regulatory parts prohibit assessment policies, require the issuance of policies by resident licensed agents, require financial reports different from other states, and regulate the form of policies. Obviously, any necessary regulation substantial enough to protect the citizens of a state will cause inconvenience and adjustments in the insurance business. Uniform policies, uniform forms of financial reports and issuance of policies by licensed agents are not unreasonable. Financial requirements to insure the solvency of the insurer are common and necessary in insurance regulation. True, Wisconsin regulation may have some repercussions beyond its borders and may run counter to Ministers' economic theories of doing business but these are of no judicial significance. We cannot find merit in its argument that although Wisconsin's regulations alone may not be a prohibitive
burden, such regulations will be burdensome if the pattern of its legislation is adopted by other states.

We need not dwell on the degree of interest and concern Wisconsin has in the regulation of insurance and particularly the regulation under inquiry. Its grasp has not exceeded its reach of legitimate interest in the regulation of mail-order insurance insuring the life and health of its residents in the manner in which Ministers conducts its business. No claim is made the methods adopted are not germane to the objects of the legislation; the claim is only, "You can't do this to me." We do not hold, however, that any one single act defined as doing business in the state in sec. 201.42, Stats., is alone sufficient for the application of the section to a given business. Each set of facts must be considered on its own merits when applying the statute.

[The court considers and rejects an argument based on the contract clause of the Constitution, as well as other minor arguments.]

The judgment declaring sec. 201.42, Stats., constitutional and applicable to the plaintiff in its insurance business with residents of Wisconsin and requiring the plaintiff to comply with its provisions is affirmed.

GORDON, Justice (dissenting).

[Justice Gordon's opinion is omitted.]

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C. The Meaning of 'Insurance'

Insurance regulation applies only to insurance. Numerous cases had to decide the question "what is insurance?" In its core area, everyone knows what insurance is and can determine that it exists. But at the periphery it is less clear whether a transaction is insurance or something else.

At the state level, the question arises whenever the Insurance Commissioner seeks to regulate some activity that is on the periphery.

The question most commonly arises where the line to be drawn is between insurance and a sales warranty. For example, State ex rel. Duffy v. Western Auto Supply Company16 held that a road hazard warranty under which a tire would be replaced if it failed for any reason was insurance. But the same court, in State ex rel. Herbert v.

16. 134 Ohio St. 163, 16 N.E.2d 256 (1939).
Standard Oil Company,\textsuperscript{17} held that a less expansive warranty that applied only to tires damaged because of defects was a sales warranty, not insurance. The same question has arisen with respect to guaranteed maintenance contracts for automobiles (often called Vehicle Service Agreements) to television repair contracts, and the like. The results are not all consistent with one another. Sometimes, as some states have done with Vehicle Service Agreements, statutes have settled the question.

Recently, the issue arose in connection with collision damage waivers in automobile rental contracts. \textit{Hertz Corporation v. Corcoran}\textsuperscript{18} held that the collision damage waiver was not insurance. We think the decision is unsound.

The question may also arise in another way. Some federal statutes \textit{exempt} insurance from their application. That is true of the federal bankruptcy law and the federal securities regulatory statutes.

At one time life insurers had few and relatively standardized products—all fixed-dollar products, subject to the qualification that participation in profits would allow insureds to benefit to some extent from the investment success of insurers.

Yet the conservatism of the institution, coupled with the constraints on investment imposed on insurers by the regulatory regime, made fixed-dollar products less than fully satisfactory in an economy plagued by recurrent bouts of inflation.

One of the results was the invention of the variable annuity (and later of variable life insurance). The variable annuity permitted the "policyholder" or "annuitant" to benefit from appreciation of equity investments (though also assuming the risks that these investments might also depreciate). The Securities and Exchange Commission not unnaturally thought the new insurance vehicle was a security, and sought to subject it to regulation under New Deal securities legislation. The following case (among others) resulted.

\* \* \* \* \*

\textbf{SECURITIES AND EXCHANGE COMMISSION v. VARIABLE ANNUITY LIFE INSURANCE CO. OF AMERICA} 359 U.S. 65 (1959)

Mr. Justice Douglas delivered the opinion of the Court.

\textsuperscript{17} 138 Ohio St. 376, 35 N.E.2d 437 (1941).
This is an action instituted by the Securities and Exchange Commission to enjoin respondents from offering their annuity contracts to the public without registering them under the Securities Act of 1933, 48 Stat. 74, 15 U.S.C. § 77a, and complying with the Investment Company Act of 1940, 54 Stat. 789, 15 U.S.C. § 80a. The District Court denied relief, 155 F.Supp. 521; and the Court of Appeals affirmed, 103 U. S. App. D. C. 197, 257 F.2d 201. The case is here on petitions for writs of certiorari which we granted, 358 U.S. 812, because of the importance of the question presented.

Respondents are regulated under the insurance laws of the District of Columbia and several other States. It is argued that that fact brings into play the provisions of the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. § 1011, § 2(b) of which provides that "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance..." It is said that the conditions under which that law is applicable are satisfied here. The District of Columbia and some of the States are "regulating" these annuity contracts and, if the Commission is right, the Federal Acts would at least to a degree "supersede" the state regulations since the Federal Acts prescribe their own peculiar requirements. Moreover, "insurance" or "annuity" contracts are exempt from the Securities Act when "subject to the supervision of the insurance commissioner... of any State..." Respondents are also exempt from the Investment Company Act if they are "organized as an insurance company, whose primary and predominant business activity is the writing of insurance... and which is subject to supervision by the insurance commissioner... of a State..." While the term "security" as defined in the Securities Act is broad enough to include any "annuity" contract, and the term "investment company" as defined in the Investment Company Act would embrace an "insurance company," the scheme of the exemptions lifts pro tanto the requirements of those two Federal Acts to the extent that respondents are actually regulated by the States as insurance companies, if indeed they are such. The question common to the exemption provisions of the Securities Act and the Investment Company Act and to § 2(b) of the McCarran-Ferguson Act is whether respondents are issuing contracts of insurance.
We start with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of “insurance,” they speak with the authority of a long tradition. For the regulation of “insurance,” though within the ambit of federal power (United States v. Underwriters Assn., 322 U.S. 533), has traditionally been under the control of the States.

We deal, however, with federal statutes where the words “insurance” and “annuity” are federal terms. Congress was legislating concerning a concept which had taken on its coloration and meaning largely from state law, from state practice, from state usage. Some States deny these “annuity” contracts any status as “insurance.” Others accept them under their “insurance” statutes. It is apparent that there is no uniformity in the rulings of the States on the nature of these “annuity” contracts. In any event how the States may have ruled is not decisive. For, as we have said, the meaning of “insurance” or “annuity” under these Federal Acts is a federal question.

While all the States regulate “annuities” under their “insurance” laws, traditionally and customarily they have been fixed annuities, offering the annuitant specified and definite amounts beginning with a certain year of his or her life. The standards for investment of funds underlying these annuities have been conservative. The variable annuity introduced two new features. First, premiums collected are invested to a greater degree in common stocks and other equities. Second, benefit payments vary with the success of the investment policy. The first variable annuity apparently appeared in this country about 1952 when New York created the College Retirement Equities Fund to provide annuities for teachers. It came into existence as a result of a search for a device that would avoid paying annuitants in depreciated dollars. The theory was that returns from investments in common stocks would over the long run tend to compensate for the mounting inflation. The holder of a variable annuity cannot look forward to a fixed monthly or yearly amount in his advancing years. It may be greater or less, depending on the wisdom of the investment policy. In some respects the variable annuity has the characteristics of the fixed and conventional annuity: payments are made periodically [sic]; they continue until the annuitant’s death or in case other options are
chosen until the end of a fixed term or until the death of the last of two persons; payments are made both from principal and income; and the amounts vary according to the age and sex of the annuitant. Moreover, actuarially both the fixed-dollar annuity and the variable annuity are calculated by identical principles. Each issuer assumes the risk of mortality from the moment the contract is issued. That risk is an actuarial prognostication that a certain number of annuitants will survive to specified ages. Even if a substantial number live beyond their predicted demise, the company issuing the annuity—whether it be fixed or variable—is obligated to make the annuity payments on the basis of the mortality prediction reflected in the contract. This is the mortality risk assumed both by respondents and by those who issue fixed annuities. It is this feature, common to both, that respondents stress when they urge that this is basically an insurance device.

The difficulty is that, absent some guarantee of fixed income, the variable annuity places all the investment risks on the annuitant, none on the company. The holder gets only a pro rata share of what the portfolio of equity interests reflects—which may be a lot, a little, or nothing. We realize that life insurance is an evolving institution. Common knowledge tells us that the forms have greatly changed even in a generation. And we would not undertake to freeze the concepts of “insurance” or “annuity” into the mold they fitted when these Federal Acts were passed. But we conclude that the concept of “insurance” involves some investment risk-taking on the part of the company. The risk of mortality, assumed here, gives these variable annuities an aspect of insurance. Yet it is apparent, not real; superficial, not substantial. In hard reality the issuer of a variable annuity that has no element of a fixed return assumes no true risk in the insurance sense. It is no answer to say that the risk of declining returns in times of depression is the reciprocal of the fixed-dollar annuitant’s risk of loss of purchasing power when prices are high and gain of purchasing power when they are low. We deal with a more conventional concept of risk-bearing when we speak of “insurance.” For in common understanding “insurance” involves a guarantee that at least some fraction of the benefits will be payable in fixed amounts. . . . The companies that issue these annuities take the risk of failure. But they guarantee nothing to the annuitant except an interest in a portfolio of common stocks or other equities—an interest that has
a ceiling but no floor. There is no true underwriting of risks, the one earmark of insurance as it has commonly been conceived of in popular understanding and usage.

Reversed.

Mr. Justice Brennan, with whom Mr. Justice Stewart joins, concurring.

[The concurring opinion expresses two basic reasons for agreeing that the variable annuity is subject to the federal acts.]

.......

First....

....[T]he situation changes where the coin of the company's obligation is not money but is rather the present condition of its investment portfolio. To this extent, the historic functions of state insurance regulation become meaningless. Prescribed limitations on investment and examination of solvency and reserves become perfectly circular to the extent that there is no obligation to pay except in terms measured by one's portfolio. But beyond controlling corporate solvency and the adequacy of reserves, and maintaining observance of the legal list of investments, the state plans of regulation do not go in regulating investment policy. Where the nature of the obligation assumed is such, the federally protected interests in disclosure to the investor of the nature of the corporation to whom he is asked to entrust his money and the purposes for which it is to be used become obvious and real. The contract between the investor and the organization no longer squares with the sort of contract in regard to which Congress in 1933 thought its "disclosure" statute was unnecessary.

The provisions of the Investment Company Act of 1940, which passes beyond a simple "disclosure" philosophy, also are informed by policies that are very relevant to the contracts involved in this case. While the Act does cover face-amount certificate companies whose obligations are specified in fixed-dollar amounts, the majority of its provisions are of greatest regulatory relevance in the case of the much more common sort of investment company, where the investors (or at least certain categories of them) participate on an "equity" basis in the investment experience of the enterprise....
Second. Much bewilderment could be engendered by this case if the issue were whether the contracts in question were “really” insurance or “really” securities—one or the other. It is rather meaningless to view the problem as one of pigeonholing these contracts in one category or the other. Obviously they have elements of conventional insurance, even apart from the fixed-dollar term life insurance and the disability waiver of premium insurance sold with some of these contracts (both of which are quite incidental to the main undertaking). They patently contain a significant annuity feature (unless one defines an annuity as a contract necessarily providing fixed-sum payments), and the granting of annuities has been considered part of the business of life insurance. Of course, some urge that even the traditional annuity has few “insurance” features and is basically a form of investment. . . . But the point is that, even though these contracts contain, for what they are worth, features of traditional annuity contracts, administering them also involves a very substantial and in fact predominant element of the business of an investment company, and that in a way totally foreign to the business of a traditional life insurance and annuity company, as traditionally regulated by state law. This is what leads to the conclusion that it is not within the intent of the 1933 and 1940 statutes to exempt them.

Mr. Justice Harlan, whom Mr. Justice Frankfurter, Mr. Justice Clark and Mr. Justice Whittaker join, dissenting.

The issue in these cases is whether Variable Annuity Life Insurance Company of America (VALIC) and The Equity Annuity Life Insurance Company (EALIC) are subject to regulation by the Securities and Exchange Commission under the Securities Act of 1933 and the Investment Company Act of 1940 with respect to their variable annuity business.

Variable annuity policies are a recent development in the insurance business designed to meet inflationary trends in the economy by substituting for annuity payments in fixed-dollar amounts payments in fluctuating amounts, measured ultimately by the
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company's success in investing the premium payments received from annuitants.

The characteristics of a typical variable annuity contract have been adumbrated by the majority. It is sufficient to note here that, as the majority concludes, as the two lower courts found, and as the SEC itself recognizes, it may fairly be said that variable annuity contracts contain both "insurance" and "securities" features. It is certainly beyond question that the "mortality" aspect of these annuities—that is the assumption by the company of the entire risk of longevity—involves nothing other than classic insurance concepts and procedures, and I do not understand how that feature can be said to be "not substantial," determining as it does, apart from options, the commencement and duration of annuity payments to the policyholder. On the other hand it cannot be denied that the investment policies underlying these annuities, and the stake of the annuitants in their success or failure, place the insurance company in a position closely resembling that of a company issuing certificates in a periodic payment investment plan. Even so, analysis by fragmentation is at best a hazardous business, and in this instance has, in my opinion, led the Court to unsound legal conclusions. It is important to keep in mind that these are not cases where the label "annuity" has simply been attached to a securities scheme, or where the offering companies are traveling under false colors, in an effort to avoid federal regulation. The bonâ fides of this new development in the field of insurance is beyond dispute.

The Court's holding that these two companies are subject to SEC regulation stems from its preoccupation with a constricted "color matching" approach to the construction of the relevant federal statutes which fails to take adequate account of the historic congressional policy of leaving regulation of the business of insurance entirely to the States.

I can find nothing in the history of the Securities Act of 1933 which savors in the slightest degree of a purpose to depart from or dilute this traditional federal "hands off" policy respecting insurance regulation. On the contrary, the exemption of insurance from that Act, which is couched in the broadest terms, reflected not merely adherence to tradition but also compliance with a supposed command of the Constitution.
In 1944, this Court removed the supposed constitutional basis for exemption of insurance by holding, in United States v. South-Eastern Underwriters Assn., supra, that the business of insurance was subject to federal regulation under the commerce power. Congress was quick to respond. It forthwith enacted the McCarran Act, 59 Stat. 33, 15 U.S.C. §§ 1011-1015, which on its face demonstrates the purpose "broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," Prudential Ins. Co. v. Benjamin, supra, at 429, and "to assure that existing state power to regulate insurance would continue." Wilburn Boat Co. v. Fireman's Fund Ins. Co., supra, at 319. Thus, rather than encouraging Congress to enter the field of insurance, the South-Eastern decision spurred reiteration of its undeviating policy of abstention.

In this framework of history the course for us in these cases seems to me plain. We should decline to admit the SEC into this traditionally state regulatory domain.

It is asserted that state regulation, as it existed when the Securities and Investment Company Acts were passed, was inadequate to protect annuitants against the risks inherent in the variable annuity and that therefore such contracts should be considered within the orbit of SEC regulation. The Court is agreed that we should not "freeze" the concept of insurance as it then existed. By the same token we should not proceed on the assumption that the thrust of state regulation is frozen. As the insurance business develops new concepts the States adjust and develop their controls. This is in the tradition of state regulation and federal abstention. If the innovation of federal control is nevertheless to be desired, it is for the Congress, not this Court, to effect.

I would affirm.

* * * * *

In life insurance and annuities, the primary risk assumed by the insurance company is the mortality risk, of premature death in the
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case of life insurance and of unexpectedly prolonged life in the case of annuities. That is true for both traditional life insurance and annuities and variable life insurance and annuities. In the traditional life insurance contract and the traditional fixed annuity the insurance contract and the traditional fixed annuity the insurance company also nominally assumes the investment risk, though it should be understood that the conservative interest assumptions made by the insurance company make the assumption of investment risk by the company almost illusory. If the contract should be fully participating, that risk (and the corresponding benefits if earnings are in excess of expectation) would in reality be borne (or enjoyed) completely by the insured rather than the insurer.

Thus, variable and fixed life insurance and annuities are much less different than the judicial rhetoric in SEC v. VALIC and NationsBank v. VALIC, which follows, has suggested. The crucial risk assumed by the insurer, the mortality risk, has been equally assumed in both cases and the investment risk, while not assumed at all by the insurer in the one case is scarcely more than nominally assumed by the insurer in the other.

With the variable annuity (and later with variable life insurance), insurance companies abandoned any pretense of assuming the investment risk, but explicitly left that to be borne by the insured or annuitant. Nevertheless, the insurance company continued to assume the mortality risk, which the dissenting justices correctly thought was the essence of insurance.

It is appropriate to ask whether Mr. Justice Douglas and the concurring justices really understood the nature of insurance, or whether the dissenting justices dealt with the issue more sensibly. Of course insurance and securities jostle each other or even intersect at this point. This makes it an open question whether a completely rational system of regulation would opt to regulate annuities as a part of securities regulation or as a part of insurance regulation. Yet that was not the question before the court. That question was whether annuities (in NationsBank fixed annuities) are insurance or not within the meaning of the relevant statutes.

We would have left SEC v. VALIC without any comment outside the opinions in the case were it not for the following very recent case, which raises the question once again, but in realm no one had doubted was insurance until the NationsBank of North Carolina challenged the traditional view.
NATIONS BANK v. VARIABLE ANNUITY LIFE INS. CO.

Justice GINSBURG delivered the opinion of the Court.

These consolidated cases present the question whether national banks may serve as agents in the sale of annuities. The Comptroller of the Currency, charged by Congress with superintendence of national banks, determined that federal law permits such annuity sales as a service to bank customers. Specifically, the Comptroller considered the sales at issue "incidental" to "the business of banking" under the National Bank Act, Rev. Stat. § 5136, as amended, 12 U.S.C. § 24 Seventh (1988 ed. and Supp. V). The Comptroller further concluded that annuities are not "insurance" within the meaning of § 92; that provision, by expressly authorizing banks in towns of no more than 5,000 people to sell insurance, arguably implies that banks in larger towns may not sell insurance. The United States District Court for the Southern District of Texas upheld the Comptroller's conclusions as a permissible reading of the National Bank Act, but the United States Court of Appeals for the Fifth Circuit reversed. We are satisfied that the Comptroller's construction of the Act is reasonable and therefore warrants judicial deference. Accordingly, we reverse the judgment of the Court of Appeals.

I

Petitioner NationsBank of North Carolina, N.A., a national bank based in Charlotte, and its brokerage subsidiary sought permission from the Comptroller of the Currency, pursuant to 12 CFR § 5.84 (1994), for the brokerage subsidiary to act as an agent in the sale of annuities. Annuities are contracts under which the purchaser makes one or more premium payments to the issuer in exchange for a series of payments, which continue either for a fixed period or for the life of the purchaser or a designated beneficiary. When a purchaser invests in a "variable" annuity, the purchaser's money is invested in a designated way and payments to the purchaser vary with investment performance. In a classic "fixed" annuity, in contrast, payments do not vary. Under the con-
tracts NationsBank proposed to sell, purchasers could direct their payments to a variable, fixed, or hybrid account, and would be allowed periodically to modify their choice. The issuers would be various insurance companies.

The Comptroller granted NationsBank’s application. He concluded that national banks have authority to broker annuities within “the business of banking” under 12 U.S.C. § 24 Seventh. He further concluded that § 92, addressing insurance sales by banks in towns with no more than 5,000 people, did not impede his approval; for purposes of that provision, the Comptroller explained, annuities do not rank as “insurance.”


Four judges dissented from the failure of the court grant rehearing en banc. The dissenters maintained that the panel had not accorded due deference to the Comptroller’s reasonable statutory interpretations. Variable Annuity Life Ins. Co. v. Clarke(e), 13 F.3d 833, 837–838 (CA5 1994). We granted certiorari, 511 U.S. _____, 114 S.Ct. 2161, 128 L.Ed.2d 885 (1994).

II

A

Authorizing national banks to “carry on the business of banking,” the National Bank Act provides that such banks shall have power—
“To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes. . . . The business of dealing in securities and stock by the [bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the [bank] shall not underwrite any issue of securities or stock. . . .” 12 U.S.C. § 24 Seventh (1988 ed. and Supp. V).

As the administrator charged with supervision of the National Bank Act, see §§ 1, 26-27, 481, the Comptroller bears primary responsibility for surveillance of “the business of banking” authorized by § 24 Seventh. We have reiterated:

“It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.”

Under the formulation now familiar, when we confront an expert administrator’s statutory exposition, we inquire first whether “the intent of Congress is clear” as to “the precise question at issue.” If so, “that is the end of the matter.” But “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute. If the administrator’s reading fills a gap or defines a term in a way that is reasonable in light of the legislature’s revealed design, we give the administrator’s judgment “controlling weight.”

. . . . .

VALIC argues that the Comptroller’s interpretation is contrary to the clear intent of Congress because the banking power on which the Comptroller relies—“broker[ing] financial investment instruments”—is not specified in § 24 Seventh. According to VALIC, the five specific activities listed in § 24 Seventh after the words “business of banking” are exclusive—banks are confined to these five activities and to endeavors incidental thereto. VALIC
thus attributes no independent significance to the words “business of banking.” We think the Comptroller better comprehends the Act’s terms.

.....

B

As we have just explained, the Comptroller determined, in accord with the legislature’s intent, that “the business of banking” described in § 24 Seventh covers brokerage of financial investment instruments, and is not confined to the examples specifically enumerated. He then reasonably concluded that the authority to sell annuities qualifies as part of, or incidental to, the business of banking. National banks, the Comptroller observed, are authorized to serve as agents for their customers in the purchase and sale of various financial investment instruments, and annuities are widely recognized as just such investment products.

By making an initial payment in exchange for a future income stream, the customer is deferring consumption, setting aside money for retirement, future expenses, or a rainy day. For her, an annuity is like putting money in a bank account, a debt instrument, or a mutual fund. Offering bank accounts and acting as agent in the sale of debt instruments and mutual funds are familiar parts of the business of banking.

In sum, modern annuities, though more sophisticated than the standard savings bank deposits of old, answer essentially the same need. By providing customers with the opportunity to invest in one or more annuity options, banks are essentially offering financial investment instruments of the kind congressional authorization permits them to broker. Hence, the Comptroller reasonably typed the permission NationsBank sought as an “incidental powe[r] . . . necessary to carry on the business of banking.”

III

A

"In addition to the powers now vested by law in [national banks]... any such [bank] located and doing business in any place the population of which does not exceed five thousand inhabitants... may... act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company. . . ."

The parties disagree about whether § 92, by negative implication, precludes national banks located in places more populous than 5,000 from selling insurance. We do not reach this question because we accept the Comptroller's view that, for the purpose at hand, annuities are properly classified as investments, not "insurance."

Again, VALIC contends that the Comptroller's determination is contrary to the plain intent of Congress, or else is unreasonable. In support of its position that annuities are insurance, VALIC notes first that annuities traditionally have been sold by insurance companies. But the sale of a product by an insurance company does not inevitably render the product insurance. For example, insurance companies have long offered loans on the security of life insurance, but a loan does not thereby become insurance.

VALIC further asserts that most States have regulated annuities as insurance and that Congress intended to define insurance under § 92 by reference to state law. Treatment of annuities under state law, however, is contextual. States generally classify annuities as insurance when defining the powers of insurance companies and state insurance regulators. But in diverse settings, States have resisted lump classification of annuities as insurance.

[The Court notes that states often treat life insurance and annuities differently for tax purposes.]

As our decisions underscore, a characterization fitting in certain contexts may be unsuitable in others. Moreover, the federal banking law does not plainly require automatic reference to state law here. The Comptroller has concluded that the federal regime is best served by classifying annuities according to their functional characteristics. Congress has not ruled out that course, see Chevron, 467 U.S., at 842, 104 S.Ct., at 2781; courts, therefore, have no cause to dictate to the Comptroller the state law constraint VALIC espouses.

VALIC further argues that annuities functionally resemble life insurance because some annuities place mortality risk on the par-
ties. Under a classic fixed annuity, the purchaser pays a sum certain and, in exchange, the issuer makes periodic payments throughout, but not beyond, the life of the purchaser. In pricing such annuities, issuers rely on actuarial assumptions about how long purchasers will live.

While cognizant of this similarity between annuities and insurance, the Comptroller points out that mortality risk is a less salient characteristic of contemporary products. Many annuities currently available, both fixed and variable, do not feature a life term. Instead they provide for payments over a term of years; if the purchaser dies before the term ends, the balance is paid to the purchaser’s estate. Moreover, the presence of mortality risk does not necessarily qualify an investment as “insurance” under § 92. For example, VALIC recognizes that a life interest in real property is not insurance, although it imposes a mortality risk on the purchaser. Some conventional debt instruments similarly impose mortality risk.

**B**

The Comptroller’s classification of annuities, based on the tax deferral and investment features that distinguish them from insurance, in short, is at least reasonable. See Comptroller’s Letter 44a. A key feature of insurance is that it indemnifies loss. See Black’s Law Dictionary 802 (6th ed. 1990) (first definition of insurance is “contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils”).

[Justice Ginsburg errs here. Life insurance and annuities do not indemnify. They pay fixed sums.]

As the Comptroller observes, annuities serve an important investment purpose and are functionally similar to other investments that banks typically sell. See *supra*, at 814–815. And though fixed annuities more closely resemble insurance than do variable annuities, fixed annuities too have significant investment features and are functionally similar to debt instruments. See *ibid.* Moreover, mindful that fixed annuities are often packaged with variable annuities, the Comptroller reasonably chose to classify the two together.
We respect as reasonable the Comptroller's conclusion that brokerage of annuities is an "incidental powe[r] . . . necessary to carry on the business of banking." We further defer to the Comptroller's reasonable determination that 12 U.S.C. § 92 is not implicated because annuities are not insurance within the meaning of that section. Accordingly, the judgment of the Court of Appeals for the Fifth Circuit is

*Reversed.*

*****

**D. The Meaning of ‘Regulation’**

The proviso in Subsection 2(b) of the McCarran-Ferguson Act said that the federal antitrust laws would apply "to the business of insurance to the extent that such business is not regulated by State law." That provision at once raises the question what is meant by "regulated." Must the regulatory scheme be intelligently conceived and effectively administered? Or is it sufficient that there be a statute that, if it were well administered, would effectively supervise the business? Is it necessary for such a statute to be closely analogous to the federal statutes it displaces, or is it sufficient that there be a regulatory statute, even if it approaches the subject differently? Must it be comprehensive or is it sufficient if it deals partially with a subject the federal statutes deal with more comprehensively?

The initial thinking at the state level in most states was that a little Sherman Act, a little Federal Trade Commission Act, and a little Clayton Act were all needed to preempt the federal legislation referred to in the proviso to Subsection 2(b). The Sherman Act problem was first on the agenda. In collaboration with the industry, the states developed the Commissioners'-All Industry bill to regulate rates and thus, it was hoped, to preempt the Sherman Act. The statute enacted in Wisconsin, part of which follows, was in essence the same as the Commissioners'-All Industry bill.
203.32 (1) PURPOSE OF SECTION. The purpose of this section is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and regulate cooperative action among insurers in rate making and in other matters within the scope of this section. . . .

(3) MAKING OF RATES (a) Rates shall be made in accordance with the following provisions:

3. Due consideration shall be given to past and prospective loss experience within and outside this state, to the conflagration and catastrophe hazards, to a reasonable margin for underwriting profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurer to their policyholders, members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state, and to all other relevant factors within and outside this state; and in the case of fire insurance rates consideration shall be given to the experience of the fire insurance business during a period of not less than the most recent 5-year period for which such experience is available. In the case of classes of risks which do not develop an adequate amount of experience in this state, the experience in states with similar conditions prevailing on such risks may be taken into consideration if available.

(4) RATE FILINGS (a) Every insurer shall file with the commissioner, except as to inland marine risks which by general custom of the business are not written according to manual rates or rating plans, every manual, schedule, minimum, class rate, rating schedule or rating plan and every underwriting rule, and every modification of any of the foregoing which it proposes to use.
Every such filing shall state the proposed effective date thereof, and shall indicate the character and extent of the coverage contemplated.

(c) An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings, and by authorizing the commissioner to accept such filings on its behalf; provided, that nothing contained in this section shall be construed as requiring any insurer to become a member of or a subscriber to any rating organization.

(d) The commissioner shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of this section.

(e) Subject to the exception specified in paragraph (f), each filing shall be on file for a waiting period of 15 days before it becomes effective, which period may be extended by the commissioner for an additional period not to exceed 15 days if he gives written notice within such waiting period to the insurer or rating organization which made the filing that he needs such additional time for the consideration of such filing. Upon written application by such insurer or rating organization, the commissioner may authorize a filing which he has reviewed to become effective before the expiration of the waiting period or any extension thereof. A filing shall be deemed to meet the requirements of this section unless disapproved by the commissioner within the waiting period or any extension thereof.

(5) DISAPPROVAL OF FILINGS. (a) If within the waiting period or any extension thereof as provided in subsection (4)(e), the commissioner finds that a filing does not meet the requirements of this section, he shall, except as provided in subsection (7) hereof, send to the insurer or rating organization which made such filing, written notice of disapproval of such filing specifying therein in what respects he finds such filing fails to meet the requirements of this section and stating that such filing shall not become effective.
(c) If at any time subsequent to the applicable review period provided for in paragraph (a) or (b), the commissioner finds that a filing does not meet the requirements of this section, he shall, after a hearing held upon not less than 10 days' written notice, specifying the matters to be considered at such hearing, to every insurer and rating organization which made such filing, issue an order specifying in what respects he finds that such filing fails to meet the requirements of this section, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Copies of said order shall be sent to every such insurer and rating organization. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

(d) Any person or organization aggrieved with respect to any filing which is in effect may make written application to the commissioner for a hearing thereon, provided, however, that the insurer or rating organization that made the filing shall not be authorized to proceed under this subsection. Such application shall specify the grounds to be relied upon by the applicant. If the commissioner shall find that the application is made in good faith, that the applicant would be so aggrieved if his grounds are established, and that such grounds otherwise justify holding such a hearing, he shall, within 30 days after receipt of such application, hold a hearing upon not less than 10 days' written notice to the applicant and to every insurer and rating organization which made such filing.

(e) If, after such hearing, the commissioner finds that the filing does not meet the requirements of this section, he shall issue an order specifying in what respects he finds that such filing fails to meet the requirements of this section, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Copies of said order shall be sent to the applicant and to every such insurer and rating organization. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

(6) RATING ORGANIZATIONS. (a) A corporation, an unincorporated association, a partnership or an individual, whether
located within or outside this state, may make application to the commissioner for license as a rating organization.

(c) Subject to rules and regulations which have been approved by the commissioner as reasonable, each rating organization shall permit any insurer, not a member, to be a subscriber to its rating services for any kind of insurance, subdivision, or class of risk or a part or combination thereof for which it is authorized to act as a rating organization.

(e) Co-operation among rating organizations or among rating organizations and insurers in rate making or in other matters within the scope of this section is hereby authorized, provided the filings resulting from such co-operation are subject to all the provisions of this section which are applicable to filings generally. The commissioner may review such co-operative activities and practices and if, after a hearing, he finds that any such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this section, he may issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this section, and requiring the discontinuance of such activity or practice.

(g) Any rating organization may subscribe for or purchase actuarial, technical or other services, and such services shall be available to all members and subscribers without discrimination.

7 DEVIATIONS. (a) Every member of or subscriber to a rating organization shall adhere to the filings made on its behalf by such organization except that any insurer may file with the commissioner and with the rating organization of which it is a member or to which it is a subscriber, a deviation upon any class of risk from the rates or any underwriting rule filed by such rating organization. Any such deviation of a rate shall be by a percentage increase or decrease, shall be uniform in its application to all risks in the same class and in the same regional classification, if any, and shall not be such as to result in a rate which is excessive, inadequate or unfairly discriminatory.
(10) ADVISORY ORGANIZATIONS. (a) Every group, association or other organization of insurers, whether located within or outside this state, which assists insurers which make their own filings or rating organizations in rate making, by the collection and furnishing of loss or expense statistics, or by the submission of recommendations, but which does not make filings under this section, shall be known as an advisory organization.

(d) No insurer which makes its own filings, nor any rating organization shall support its filings by statistics or adopt rate making recommendations, furnished to it by an advisory organization which has not complied with this subsection or with an order of the commissioner involving such statistics or recommendations issued under paragraph (c). If the commissioner finds such insurer or rating organization to be in violation of this subsection he may issue an order requiring the discontinuance of such violation.

(12) EXAMINATIONS. The commissioner shall, at least once in 5 years, make or cause to be made an examination of each rating organization licensed in this state as provided in subsection (6), and he may, as often as he may deem it expedient, make or cause to be made an examination of each advisory organization referred to in subsection (10) and of each group, association or other organization referred to in subsection (11).

(13) RATE ADMINISTRATION. (a) Recording and reporting of Loss and Expense Experience. The commissioner shall promulgate reasonable rules and statistical plans, reasonably adapted to each of the rating systems on file with him, which may be modified from time to time and which shall be used thereafter by each insurer in the recording and reporting of its loss and countrywide expense experience, in order that the experience of all insurers may be made available at least annually in such form and detail as may be necessary to aid him in determining whether rating systems comply with the standards set forth in subsection (3).
Although the All-Industry laws had an approach different from the Sherman Act, they were universally thought to be sufficient to preempt the federal statute. More than that, some thought them to be necessary. Some form of rate regulation statute was virtually universal among the states in response to the demands of the proviso in Subsection 2(b).¹⁹ The response was also prompt.

The Commissioners'-All Industry laws stated a standard for rates, and established for rate regulation a requirement of prior approval by the state insurance commissioners before rates might be used. Not all states followed that pattern, however. Some states thought, probably correctly, that much less than a strict prior approval approach would suffice to preempt the Sherman Act.

The states were slower to respond to the need for unfair trade legislation to preempt the Federal Trade Commission Act, but eventually all the states enacted such legislation.²⁰ The state efforts to preempt the Clayton Act were much less common, perhaps because the Clayton Act was not perceived as a serious threat to the state systems of regulation.

One of the questions that arose quite early was whether the quality of the regulation actually carried out by the state was relevant in determining whether the state had "regulated" within the meaning of the provision in Subsection 2(b). That question, addressed in the following case, has not yet been laid to rest.

¹⁹. See National Association of Insurance Commissioners, Model Laws, Regulations and Guidelines 775-12 to 775-17.
²⁰. See id. 880-11 to 880-14.
FEDERAL TRADE COMMISSION v. NATIONAL CASUALTY CO.
357 U.S. 560 (1957)

Per Curiam

The Courts of Appeals for the Fifth and Sixth Circuits have set aside cease-and-desist orders of the Federal Trade Commission prohibiting respondent insurance companies from carrying on certain advertising practices found by the Commission to be false, misleading, and deceptive, in violation of the Federal Trade Commission Act, 15 U.S.C. § 45. These orders seek to proscribe activities within the boundaries of States that have their own statutes prohibiting unfair and deceptive insurance practices as well as within States that do not. The courts below concluded that in view of the existence of these statutes, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, prohibits the Federal Trade Commission from regulating such practices within the States having these statutes. We granted certiorari to review this interpretation of an important federal statute. 355 U.S. 867.

Respondents, the National Casualty Company in No. 435 and the American Hospital and Life Insurance Company in No. 436, engage in the sale of health and accident insurance. National is licensed to sell policies in all States, as well as the District of Columbia and Hawaii, while American is licensed in fourteen States. Solicitation of business for National is carried on by independent agents who operate on commission. The company's advertising material is prepared by it and shipped in bulk to these agents, who distribute the material locally and assume the expense of such dissemination. Only an insubstantial amount of any advertising goes directly by mail from the company to the public, and there is no use of radio, television, or other means of mass communication by the company. American does not materially differ from National in method of operation.

The pertinent portions of the McCarran-Ferguson Act are set forth in the margin. An examination of that statute and its legislative history establishes that the Act withdrew from the Federal Trade Commission the authority to regulate respondents' adver-
Petitioner asserts that for constitutional reasons the McCarran-Ferguson Act should be construed to authorize federal regulation in these cases. It is urged that because Congress understood that in accordance with due process there are territorial limitations on the power of the States to regulate an interstate business, it did not intend to foreclose federal regulation of interstate insurance as a supplement to state action. However, petitioner concedes that this constitutional infirmity on the power of the States does not operate to hinder state regulation of the advertising practices of the respondents in the instant cases. Whatever may have been the intent of Congress with regard to interstate insurance practices which the States cannot for constitutional reasons regulate effectively, that intent is irrelevant in the cases before us. Respondents' advertising programs require distribution by their local agents, and there is no question but that the States possess ample means to regulate this advertising within their respective boundaries. Cf., e.g., *Robertson v. California*, 328 U.S. 440, 445, n. 6, 461.

Petitioner also argues in a different vein that even if the McCarran-Ferguson Act bars federal regulation where state regulation has been effectively applied, the exercise of Commission authority in these cases should be upheld because the States have not “regulated” within the meaning of the Section 2(b) proviso. This argument is not persuasive in the instant cases. Each State in question has enacted prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision. Petitioner does not argue that the statutory provisions here under review were mere pretense. Rather, it urges that a general prohibition designed to guarantee certain standards of conduct is too “inchoate” to be “regulation” until that prohibition has been crystallized into “administrative elaboration of these standards and application in individual cases.” However, assuming there is some difference in the McCarran-Ferguson Act between “legislation” and “regulation,” nothing in the language of that Act or its legislative history supports the distinctions drawn by petitioner. So far as we can determine from the records and arguments in these cases, the proviso in Section 2(b) has been satisfied.
The judgments of the Courts of Appeals are

*Affirmed.*

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A result different from the one reached in *National Casualty* would be difficult to justify, however, because of the unlimited quantity of litigation it would invite. Yet even interpreted most broadly, that case leaves open questions of great difficulty, such as "when is a statute that purports to regulate mere pretense?"

A recent Supreme Court case, *Federal Trade Commission v. Ticor Title Insurance Co.*, has been thought, on a superficial reading, to reverse or at least to qualify the holding of *National Casualty*. The original Federal Trade Commission ruling was *In Re Ticor Title Ins. Co.*, FTC Docket No. 9190, Dec. 22 1986, noted 5 J. Ins. Reg. 373 (1987). The Supreme Court decision, which follows, was noted in 11 J. Ins. Reg. 117 (1992).

While a few sentences in the majority opinion appear to suggest such a result, that would be a simplistic reading of the case, which follows. It should be noted carefully, in reading the case, that the portion of the insurance company's activities challenged as a violation of the federal antitrust laws is not the doing of "the business of insurance," under the doctrines developed by the Supreme Court in the cases found in the next section. Further, although the McCarran-Ferguson Act was mentioned briefly, the case was not decided under McCarran, but under the state-action doctrine of *Parker v. Brown*, as was necessary because the activity was outside the protective shield of McCarran.

Moreover, the operations peculiar to the title insurance business may have influenced the Court's decision. Koch, *Title Insurance: A Regulatory Perspective*, 12 J. Ins. Reg. 3 (1993) provides an extensive discussion of the regulatory problems of the title insurance industry.

If facts fall within the purview of McCarran, as did those involved in *National Casualty*, under the holding of that case the mere enactment of a regulatory statute (unless it is mere pretense) will suffice to preempt federal legislation not specifically relating to the business of insurance. The facts fall within McCarran only if they constitute the "business of insurance." The meaning of that term is considered in the next section. If they do not constitute the business
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of insurance, preemption of a federal statute may still be sought under the well-known “state action” doctrine of *Parker v. Brown*. But the state action doctrine does not apply unless there is “active supervision.” This requirement has been established in a whole series of cases, among which is *Patrick v. Burget*, 486 U.S. 94 (1988) noted 7 J. Ins. Reg. 151 (1988). A less restrictive doctrine applies under certain circumstances. See *Lancaster Community Hospital v. Antelope Valley Hospital Medical Center*, U.S. Dist. Ct. (C.D. Calif.), 1988-1 Trade Cas. (CCH) P. 67,933 noted 6 J. Ins. Reg. 544 (1988) (state action doctrine exempts from antitrust laws hospital district which qualified as a municipality).

Though it is impossible to predict that *Ticor* will not ultimately result in the qualification or even the reversal of the holding in *National Casualty*, because of the court’s changing attitude toward the McCarran-Ferguson Act, it is premature to reach that conclusion.

* * * * *

**FEDERAL TRADE COMMISSION v. TICOR TITLE INSURANCE CO.**

504 U.S. ___, 119 L.Ed. 2d 410, 112 S.Ct. 2169 (1992)

Justice KENNEDY delivered the opinion of the Court.

The Federal Trade Commission filed an administrative complaint against six of the nation’s largest title insurance companies, alleging horizontal price fixing in their fees for title searches and title examinations. One company settled by consent decree, while five other firms continue to contest the matter. The Commission charged the title companies with violating § 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. § 45(a)(1), which prohibits “unfair methods of competition in or affecting commerce.” One of the principal defenses the companies assert is state-action immunity from antitrust prosecution, as contemplated in the line of cases beginning with *Parker v. Brown*, 317 U.S. 341 (1943). The Commission rejected this defense, *In re Ticor Title Ins. Co.*, 112 F.T.C. 344 (1989), and the firms sought review in the United States Court of Appeals for the Third Circuit. Ruling that state-action immunity was available under the state regulatory schemes in question, the Court of Appeals re-
Title insurance is the business of insuring the record title of real property for persons with some interest in the estate, including owners, occupiers, and lenders. A title insurance policy insures against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it refers. Before issuing a title insurance policy, the insurance company or one of its agents performs a title search and examination. The search produces a chronological list of the public documents in the chain of title to the real property. The examination is a critical analysis or interpretation of the condition of title revealed by the documents disclosed through this search.

The title search and examination are major components of the insurance company's services. There are certain variances from State to State and from policy to policy, but a brief summary of the functions performed by the title companies can be given. The insurance companies exclude from coverage defects uncovered during the search; that is, the insurers conduct searches in order to inform the insured and to reduce their own liability by identifying and excluding known risks. The insured is protected from some losses resulting from title defects not discoverable from a search of the public records, such as forgery, missing heirs, previous marriages, impersonation, or confusion in names. They are protected also against errors or mistakes in the search and examination. Negligence need not be proved in order to recover. Title insurance also includes the obligation to defend in the event that an insured is sued by reason of some defect within the scope of the policy's guarantee.

The title insurance industry earned $1.35 billion gross revenues in 1982, and respondents accounted for 57 percent of that amount. Four of respondents are the nation's largest title insurance companies: Ticor Title Insurance Co., with 16.5 percent of the market; Chicago Title Insurance Co., with 12.8 percent; Lawyers Title Insurance Co., with 12 percent; and SAFECO Title Insurance Co. (now operating under the name Security Union Title Insurance Co.), with 10.3 percent. Stewart Title Guarantee
Co., with 5.4 percent of the market, is the country's eighth largest title insurer, with a strong position in the West and Southwest. The Commission issued an administrative complaint in 1985. Horizontal price-fixing was alleged in these terms:

"Respondents have agreed on the price to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the Respondents have fixed prices with other Respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming." 112 F.T.C., at 346.

The Commission did not challenge the insurers' practice of setting uniform rates for insurance against the risk of loss from defective titles, but only the practice of setting uniform rates for the title search, examination, and settlement, aspects of the business which, the Commission alleges, do not involve insurance.

Before the Administrative Law Judge (ALJ), the respondents defended against liability on three related grounds. First, they maintained that the challenged conduct is exempt from antitrust scrutiny under the McCarran-Ferguson Act, 59 Stat. 34, 15 U.S.C. § 1012(b), which confers antitrust immunity over the "business of insurance" to the extent regulated by state law. Second, they argued that their collective ratemaking activities are exempt under the Noerr-Pennington doctrine, which places certain "joint efforts to influence public officials" beyond the reach of the antitrust laws. Third, respondents contended their activities are entitled to state-action immunity, which permits anticompetitive conduct if authorized and supervised by state officials. As to one State, Ohio, the respondents contended that the rates for title search, examination, and settlement had not been set by a rating bureau.

Title insurance company rates and practices in thirteen States were the subject of the initial complaint. Before the matter was decided by the ALJ, the Commission declined to pursue its complaint with regard to fees in five of these States, Louisiana, New Mexico, New York, Oregon, and Wyoming. Upon the recommendation of the ALJ, the Commission did not pursue its complaint with regard to fees in two additional States, Idaho and Ohio. This left six States in which the Commission found anti-
trust violations, but in two of these States, New Jersey and Pennsylvania, the Commission conceded the issue on which certiorari was sought here, so the regulatory regimes in these two States are not before us. Four States remain in which violations were alleged: Connecticut, Wisconsin, Arizona, and Montana.

The ALJ held that the rates for search and examination services had been fixed in these four States. For reasons we need not pause to examine, the ALJ rejected the McCarran-Ferguson and Noerr-Pennington defenses. The ALJ then turned his attention to the question of state-action immunity. A summary of the ALJ's extensive findings on this point is necessary for a full understanding of the decisions reached at each level of the proceedings in the case.

Rating bureaus are private entities organized by title insurance companies to establish uniform rates for their members. The ALJ found no evidence that the collective setting of title insurance rates through rating bureaus is a way of pooling risk information. Indeed, he found no evidence that any title insurer sets rates according to actuarial loss experience. Instead, the ALJ found that the usual practice is for rating bureaus to set rates according to profitability studies that focus on the costs of conducting searches and examinations. Uniform rates are set notwithstanding differences in efficiencies and costs among individual members.

The ALJ described the regulatory regimes for title insurance rates in the four States still at issue. In each one, the title insurance rating bureau was licensed by the State and authorized to establish joint rates for its members. Each of the four States used what has come to be called a “negative option” system to approve rate filings by the bureaus. Under a negative option system, the rating bureau filed rates for title searches and title examinations with the state insurance office. The rates became effective unless the State rejected them within a specified period, such as 30 days. Although the negative option system provided a theoretical mechanism for substantive review, the ALJ determined, after making detailed findings regarding the operation of each regulatory regime, that the rate filings were subject to minimal scrutiny by state regulators.

In Connecticut the State Insurance Department has the authority to audit the rating bureau and hold hearings regarding rates, but it has not done so. The Connecticut rating bureau filed only two major rate increases, in 1966 and in 1981. The circum-
stances behind the 1966 rate increase are somewhat obscure. The ALJ found that the Insurance Department asked the rating bureau to submit additional information justifying the increase, and later approved the rate increase although there is no evidence the additional information was provided. In 1981 the Connecticut rating bureau filed for a 20 percent rate increase. The factual background for this rate increase is better developed though the testimony was somewhat inconsistent. A state insurance official testified that he reviewed the rate increase with care and discussed various components of the increase with the rating bureau. The same official testified, however, that he lacked the authority to question certain expense data he considered quite high.

In Wisconsin the State Insurance Commissioner is required to examine the rating bureau at regular intervals and authorized to reject rates through a process of hearings. Neither has been done. The Wisconsin rating bureau made major rate filings in 1971, 1981, and 1982. The 1971 rate filing was approved in 1971 although supporting justification, which had been requested by the State Insurance Commissioner, was not provided until 1978. The 1981 rate filing requested an 11 percent rate increase. The increase was approved after the office of the Insurance Commissioner checked the supporting data for accuracy. No one in the agency inquired into insurer expenses, though an official testified that substantive scrutiny would not be possible without that inquiry. The 1982 rate increase received but a cursory reading at the office of the Insurance Commissioner. The supporting materials were not checked for accuracy, though in the absence of an objection by the agency, the rate increase went into effect.

In Arizona the Insurance Director was required to examine the rating bureau at least once every five years. It was not done. In 1980 the State Insurance Department announced a comprehensive investigation of the rating bureau. It was not conducted. The rating bureau spent most of its time justifying its escrow rates. Following settlement in 1981 of a federal civil suit challenging the joint fixing of escrow rates, the rating bureau went out of business without having made any major rate filings, though it had proposed minor rate adjustments.

In Montana the rating bureau made its only major rate filing in 1983. In connection with it, a representative of the rating bureau met with officials of the State Insurance Department. He was
told that the filed rates could go into immediate effect though
further profit data would have to be provided. The ALJ found no
evidence that the additional data were furnished.

To complete the background, the ALJ observed that none of
the rating bureaus are now active. The respondents abandoned
them between 1981 and 1985 in response to numerous private
treble damage suits, so by the time the Commission filed its formal
complaint in 1985, the rating bureaus had been dismantled. The
ALJ held that the case is not moot, though, because nothing
would preclude respondents from resuming the conduct chal-
lenged by the Commission.

These factual determinations established, the ALJ addressed
the two-part test that must be satisfied for state-action immunity
under the antitrust laws, the test we set out in California Retail
A state law or regulatory scheme cannot be the basis for antitrust
immunity unless, first, the State has articulated a clear and affir-
mative policy to allow the anticompetitive conduct, and second,
the State provides active supervision of anticompetitive conduct
undertaken by private actors. The Commission having conceded
that the first part of the test was satisfied in the four States still
at issue, the immunity question, beginning with the hearings be-
fore the ALJ and in all later proceedings, has turned upon the
proper interpretation and application of Midcal's active supervi-
sion requirement. The ALJ found the active supervision test was
met in Arizona and Montana but not in Connecticut or Wiscon-
sin.

On review of the ALJ's decision, the Commission held that
none of the four states had conducted sufficient supervision, so
that the title companies were not entitled to immunity in any of
those jurisdictions. The Court of Appeals for the Third Circuit
disagreed with the Commission, adopting the approach of the
First Circuit in New England Motor Rate Bureau, Inc., v. FTC,
908 F. 2d 1064 (1990), which had held that the existence of a
state regulatory program, if staffed, funded, and empowered by
law, satisfied the requirement of active supervision. Under this
standard, the Court of Appeals for the Third Circuit ruled that
the active state supervision requirement was met in all four states
and held that the respondents' conduct was entitled to state action
immunity in each of them.
We granted certiorari to consider two questions: First, whether the Third Circuit was correct in its statement of the law and in its application of law to fact, and second, whether the Third Circuit exceeded its authority by departing from the factual findings entered by the ALJ and adopted by the Commission. Before this Court, the parties have confined their briefing on the first of these questions to the regulatory regimes of Wisconsin and Montana, and focused on the regulatory regimes of Connecticut and Arizona in briefing on the second question. We now reverse the Court of Appeals under the first question and remand for further proceedings under the second.

II

The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people. Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls. Against this background, in *Parker v. Brown*, 317 U.S. 341 (1943), we upheld a state-supervised market sharing scheme against a Sherman Act challenge. We announced the doctrine that federal antitrust laws are subject to supersession by state regulatory programs. Our decision was grounded in principles of federalism.

The principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine in our decisions in *Midcal*, supra, and *Patrick v. Burget*, 486 U.S. 94 (1988). In *Midcal* we invalidated a California statute forbidding licensees in the wine trade from selling below prices set by the producer. There we announced the two-part test applicable to instances where private parties participate in a price fixing regime. “First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself.” *Midcal* confirms that while a State may not confer antitrust immunity on private persons by fiat, it may
displace competition with active state supervision if the displace-
ment is both intended by the State and implemented in its specific
details. Actual state involvement, not deference to private price
fixing arrangements under the general auspices of state law, is the
precondition for immunity from federal law. Immunity is con-
ferred out of respect for ongoing regulation by the State, not out
of respect for the economics of price restraint. In *Midcal* we found
that the intent to restrain prices was expressed with sufficient pre-
cision so that the first part of the test was met, but that the absence
of state participation in the mechanics of the price posting was so
apparent that the requirement of active supervision had not been
met.

.......

Our decisions make clear that the purpose of the active super-
vision inquiry is not to determine whether the State has met some
normative standard, such as efficiency, in its regulatory practices.
Its purpose is to determine whether the State has exercised suf-
cient independent judgment and control so that the details of
the rates or prices have been established as a product of deliberate
state intervention, not simply by agreement among private parties.
Much as in causation inquiries, the analysis asks whether the State
has played a substantial role in determining the specifics of the
economic policy. The question is not how well state regulation
works but whether the anticompetitive scheme is the State's own.

.......

The respondents contend that principles of federalism justify a
broad interpretation of state-action immunity, but there is a pow-
erful refutation of their viewpoint in the briefs that were filed in
this case. The State of Wisconsin, joined by Montana and 34
other States, has filed a brief as *amici curiae* on the precise point.
These States deny that respondents' broad immunity rule would
serve the States' best interests. We are in agreement with the *amici*
submission.

If the States must act in the shadow of state-action immunity
whenever they enter the realm of economic regulation, then our
doctrine will impede their freedom of action, not advance it. The
fact of the matter is that the States regulate their economies in
many ways not inconsistent with the antitrust laws. For example,
Oregon may provide for peer review by its physicians without approving anticompetitive conduct by them. Or Michigan may regulate its public utilities without authorizing monopolization in the market for electric light bulbs. So we have held that state-action immunity is disfavored, much as are repeals by implication. By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility.

States must accept political responsibility for actions they intend to undertake. It is quite a different matter, however, for federal law to compel a result that the States do not intend but for which they are held to account. Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

The respondents contend that these concerns are better addressed by the requirement that the States articulate a clear policy to displace the antitrust laws with their own forms of economic regulation. This contention misapprehends the close relation between *Midcal*'s two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. In the usual case, *Midcal*'s requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence; it cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State. It seems plain, moreover, in light of the *amici curiae* brief to which we have referred, that sole reliance on the requirement of clear articulation will not allow the regulatory flexibility that these States deem necessary. For States whose object it is to benefit their citizens through regulation, a broad doctrine of state-action immunity may serve as nothing more than an attractive nuisance in the economic sphere. To oppose these pressures, sole reliance on the requirement of clear articulation could become a rather meaningless formal constraint.
In the case before us, the Court of Appeals relied upon a formulation of the active supervision requirement articulated by the First Circuit:

"Where ... the state’s program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state’s courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state’s policy and not simply their own policy, more need not be established." 922 F. 2d, at 1136, quoting New England Motor Rate Bureau, Inc. v. FTC, 908 F. 2d 1064, 1071 (CA1 1990).

Based on this standard, the Third Circuit ruled that the active supervision requirement was met in all four states, and held that the respondents’ conduct was entitled to state-action immunity from antitrust liability. 992 F. 2d, at 1140.

While in theory the standard articulated by the First Circuit might be applied in a manner consistent with our precedents, it seems to us insufficient to establish the requisite level of active supervision. The criteria set forth by the First Circuit may have some relevance as the beginning point of the active state supervision inquiry, but the analysis cannot end there. Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate-setting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State. Under these standards, we must conclude that there was no active supervision in either Wisconsin or Montana.

The respondents point out that in Wisconsin and Montana the rating bureaus filed rates with state agencies and that in both States the so-called negative option rule prevailed. The rates became effective unless they were rejected within a set time. It is said that as a matter of law in those States inaction signified substantive approval. This proposition cannot be reconciled, however, with the detailed findings, entered by the ALJ and adopted by the Commission, which demonstrate that the potential for state supervision was not realized in fact. The ALJ found, and the Com-
mission agreed, that at most the rate filings were checked for mathematical accuracy. Some were unchecked altogether. In Montana, a rate filing became effective despite the failure of the rating bureau to provide additional requested information. In Wisconsin, additional information was provided after a lapse of seven years, during which time the rate filing remained in effect. These findings are fatal to respondents' attempts to portray the state regulatory regimes as providing the necessary component of active supervision. The findings demonstrate that, whatever the potential for state regulatory review in Wisconsin and Montana, active state supervision did not occur. In the absence of active supervision in fact, there can be no state-action immunity for what were otherwise private price fixing arrangements. And as in Patrick, the availability of state judicial review could not fill the void. Because of the state agencies' limited role and participation, state judicial review was likewise limited.

Our decision in Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985), though it too involved a negative option regime, is not to the contrary. The question there was whether the first part of the Midcal test was met, the Government's contention being that a pricing policy is not an articulated one unless the practice is compelled. We rejected that assertion and undertook no real examination of the active supervision aspect of the case, for the Government conceded that the second part of the test had been met. The concession was against the background of a district court determination that, although submitted rates could go into effect without further state activity, the State had ordered and held rate-making hearings on a consistent basis, using the industry submissions as the beginning point. In the case before us, of course, the Government concedes the first part of the Midcal requirement and litigates the second; and there is no finding of substantial state participation in the rate setting scheme.

This case involves horizontal price fixing under a vague imprimatur in form and agency inaction in fact. No antitrust offense is more pernicious than price fixing. In this context, we decline to formulate a rule that would lead to a finding of active state supervision where in fact there was none. Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state super-
vision. We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices. We do not have before us a case in which governmental actors made unilateral decisions without participation by private actors. And we do not here call into question a regulatory regime in which sampling techniques or a specified rate of return allow state regulators to provide comprehensive supervision without complete control, or in which there was an infrequent lapse of state supervision. In the circumstances of this case, however, we conclude that the acts of the respondents in the States of Montana and Wisconsin are not immune from antitrust liability.

IV

In granting certiorari we undertook to review the further contention by the Commission that the Court of Appeals was incorrect in disregarding the Commission's findings as to the extent of state supervision. The parties have focused their briefing on this question on the regulatory schemes of Connecticut and Arizona. We think the Court of Appeals should have the opportunity to reexamine its determinations with respect to these latter two States in light of the views we have expressed.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion. It is so ordered.

Justice SCALIA, concurring.

The Court's standard is in my view faithful to what our cases have said about "active supervision." On the other hand, I think The Chief Justice and Justice O'CONNOR are correct that this standard will be a fertile source of uncertainty and (hence) litigation, and will produce total abandonment of some state programs because private individuals will not take the chance of participating in them. That is true, moreover, not just in the "negative-option" context, but even in a context such as that involved in Patrick v. Burget, 486 U.S. 94 (1988): Private physicians invited to participate in a state-supervised hospital peer review system may not know until after their participation has occurred (and indeed until after their trial has been completed) whether the State's supervision will be "active" enough.
I am willing to accept these consequences because I see no alternative within the constraints of our "active supervision" doctrine, which has not been challenged here; and because I am skeptical about the Parker v. Brown exemption for state-programmed private collusion in the first place.

Chief Justice REHNQUIST, with whom Justice O'CONNOR and Justice THOMAS join, dissenting.

The Court holds today that to satisfy the "active supervision" requirement of state action immunity from antitrust liability, private parties acting pursuant to a regulatory scheme enacted by a state legislature must prove that "the State has played a substantial role in determining the specifics of the economic policy." Because this standard is neither supported by our prior precedent, nor sound as a matter of policy, I dissent.

Immunity from antitrust liability under the state action doctrine was first established in Parker v. Brown, 317 U.S. 341 (1943). As noted by the majority, in Parker we relied on principles of federalism in concluding that the Sherman Act did not apply to state officials administering a regulatory program enacted by the state legislature. We concluded that state action is exempt from antitrust liability, because in the Sherman Act Congress evidences no intent to "restrain state action or official action directed by a state." "The Parker decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56 (1985).

We developed our present analysis for state action immunity for private actors in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). We held in Midcal that our prior precedent had granted state-action immunity from antitrust liability to conduct by private actors where a program was "clearly articulated and affirmatively expressed as state policy [and] the policy [was] actively supervised by the State itself." In Midcal, we found the active supervision requirement was not met because under the California statute at issue, which required liquor retailers to charge a certain percentage above a price "posted" by area wholesalers, "[t]he State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers." We noted that the state action defense does not allow
the States to authorize what is nothing more than private price fixing.

In each instance since *Midcal* in which we have concluded that the active supervision requirement for state action immunity was not met, the state regulators lacked authority, under state law, to review or reject the rates or action taken by the private actors facing antitrust liability. Our most recent formulation of the “active supervision” requirement was announced in *Patrick v. Burget*, 486 U.S. 94 (1988), where we concluded that to satisfy the “active supervision” requirement, “state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” Until today, therefore, we have never had occasion to determine whether a state regulatory program which gave state officials authority—“power”—to review and regulate prices or conduct, might still fail to meet the requirement for active state supervision because the state’s regulation was not sufficiently detailed or rigorous.

Addressing this question, the Court of Appeals in this case used the following analysis:

> "Where, as here, the state’s program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state’s courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state’s policy and not simply their own policy, more need not be established."

The Court likens this test to doing away all together [sic] with the active supervision requirement for immunity based on state action. But the test used by the Court of Appeals is much more closely attuned to our “have and exercise power” formulation in *Patrick v. Burget* than is the rule adopted by the Court today. The Court simply doesn’t say just how active a State’s regulators must be before the “active supervision” requirement will be satisfied. The only guidance it gives is that the inquiry should be one akin to causation in a negligence case; does the State play “a substantial role in determining the specifics of the economic policy.” Any other formulation, we are told, will remove the active supervision requirement all together [sic] as a practical matter.

I do not believe this to be the case. In the States at issue here, the particular conduct was approved by a state agency. The agency
manifested this approval by raising no objection to a required rate filing by the entity subject to regulation. This is quite consistent with our statement that the active supervision requirement serves mainly an “evidentiary function” as “one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy . . . .”

The Court insists that its newly required “active supervision” will “increase the States’ regulatory flexibility.” But if private actors who participate, through a joint rate filing, in a State’s “negative option” regulatory scheme may be liable for treble damages if they cannot prove that the State approved the specifics of a filing, the Court makes it highly unlikely that private actors will choose to participate in such a joint filing. This in turn lessens the States’ regulatory flexibility, because as we have noted before, joint rate filings can improve the regulatory process by ensuring that the state agency has fewer filings to consider, allowing more resources to be expended on each filing. *Southern Motor Carriers Rate Conference, Inc. v. United States*, *supra*, at 51. The view advanced by the Court of Appeals does not sanction price fixing in areas regulated by a State “not inconsistent with the antitrust laws.” A State must establish, staff, and fund a program to approve jointly set rates or prices in order for any activity undertaken by private individuals under that program to be immune under the antitrust laws.

The Court rejects the test adopted by the Court of Appeals, stating that it cannot be the end of the inquiry. Instead, the party seeking immunity must “show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme.” Such an inquiry necessarily puts the federal court in the position of determining the efficacy of a particular State’s regulatory scheme, in order to determine whether the State has met the “requisite level of active supervision.” The Court maintains that the proper state action inquiry does not determine whether a State has met some “normative standard” in its regulatory practices. But the Court’s focus on the actions taken by state regulators, *i.e.*, the way the State regulates, necessarily requires a judgment as to whether the State is sufficiently active—surely a normative judgment.

The Court of Appeals found—properly, in my view—that while the States at issue here did not regulate respondents’ rates
with the vigor the petitioner would like, the States’ supervision of respondents’ conduct was active enough so as to provide for immunity from antitrust liability. The Court of Appeals, having concluded that the Commission applied an incorrect legal standard, reviewed the facts found by the Commission in light of the correct standard and reached a different conclusion. This does not constitute a rejection of the Commission’s factual findings.

I would therefore affirm the judgment below.

Justice O’CONNOR, with whom Justice THOMAS joins, dissenting.

Notwithstanding its assertions to the contrary, the Court has diminished the States’ regulatory flexibility by creating an impossible situation for those subject to state regulation. Even when a State has a “clearly articulated policy” authorizing anticompetitive behavior—which the Federal Trade Commission concedes was the case here—and even when the State establishes a system to supervise the implementation of that policy, the majority holds that a federal court may later find that the State’s supervision was not sufficiently “substantial” in its “specifics” to insulate the anticompetitive behavior from antitrust liability. Given the threat of treble damages, regulated entities that have the option of heeding the State’s anticompetitive policy would be foolhardy to do so; those that are compelled to comply are less fortunate. The practical effect of today’s decision will likely be to eliminate so-called “negative option” regulation from the universe of schemes available to a State that seeks to regulate without exposing certain conduct to federal antitrust liability.

The Court does not dispute that each of the States at issue in this case could have supervised respondents’ joint ratemaking; rather, it argues that “the potential for state supervision was not realized in fact.” Such an after-the-fact evaluation of a State’s exercise of its supervisory powers is extremely unfair to regulated parties. Liability under the antitrust laws should not turn on how enthusiastically a state official carried out his or her statutory duties. The regulated entity has no control over the regulator, and very likely will have no idea as to the degree of scrutiny that its filings may receive. Thus, a party could engage in exactly the same conduct in two States, each of which had exactly the same policy of allowing anticompetitive behavior and exactly the same regulatory structure, and discover afterward that its actions in one State
were immune from antitrust prosecution, but that its actions in the other resulted in treble-damage liability.

Moreover, even if a regulated entity could assure itself that the State will undertake to actively supervise its rate filings, the majority does not offer any guidance as to what level of supervision will suffice. It declares only that the State must “pla[y] a substantial role in determining the specifics of the economic policy.” That standard is not only ambiguous, but it also runs the risk of being counterproductive. The more reasonable a filed rate, the less likely that a State will have to play any role other than simply reviewing the rate for compliance with statutory criteria. Such a vague and retrospective standard, combined with the threat of treble damages if that standard is not satisfied, makes “negative option” regulation an unattractive option for both States and the parties they regulate.

Finally, it is important to remember that antitrust actions can be brought by private parties as well as by government prosecutors. The resources of state regulators are strained enough without adding the extra burden of asking them to serve as witnesses in civil litigation and respond to allegations that they did not do their job.

For these reasons, as well as those given by THE CHIEF JUSTICE, I dissent.

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E. The Meaning of the ‘Business of Insurance’

The McCarran-Ferguson Act does not deal with “insurance” so much as with the “business of insurance.” Knowing the meaning of “insurance” does not end the inquiry about the scope of application of the Act. The initial understanding seems to have been that the phrase meant the same as the “business of insurance companies.” In dissent in Todd Shipyards, Justice Black spoke of the McCarran-Ferguson Act leaving to the states “the power to regulate and tax insurance companies,” as if the “business of insurance” were whatever insurance companies do. The common sense view is that the terms have the same meaning, at least if the insurance companies are engaged in a normal insurance business. Further, Section 4 of the Act21 would be surplusage unless the “business of insurance” is

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given a broad significance that includes even the labor relations of the insurance company.

Nevertheless, the common sense view has not prevailed. The meaning of the phrase first came to the Supreme Court in the following case.

* * * * *

SECURITIES AND EXCHANGE COMMISSION v. NATIONAL SECURITIES
393 U.S. 453 (1969)

Mr. Justice MARSHALL delivered the opinion of the Court.

This case raises some complex questions about the Securities and Exchange Commission's power to regulate the activities of insurance companies and of persons engaged in the insurance business. . . . According to the amended complaint, National Securities and various persons associated with it had contrived a fraudulent scheme centering on a contemplated merger. . . .

The Commission was denied temporary relief, and shortly thereafter Producers' shareholders and the Arizona Director of Insurance approved the merger. The two companies were formally consolidated into National Producers Life Insurance Co. on July 9, 1965. Thereafter, the Commission amended its complaint to seek additional relief. . . . The court ruled that the relief requested was either barred by §2(b) of the McCarran-Ferguson Act, 59 Stat. 34 (1945), as amended, 15 U.S.C. §1012(b), or was beyond the scope of §21(e) of the Securities Exchange Act. 252 F. Supp. 623 (1966). The Ninth Circuit affirmed, relying on the McCarran-Ferguson Act. 387 F. 2d 25 (1967). Upon application by the Commission, we granted certiorari because of the importance of the questions raised to the administration of the securities laws. 390 U.S. 1023 (1968).

I.

Insofar as it is relevant to this case, §2(b) of the McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . ."
unless such Act specifically relates to the business of insurance. . . ."

. . . The first question posed by this case is whether the relevant Arizona statute is a "law enacted . . . for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act. Even accepting respondents' view of Arizona law, we do not believe that a state statute aimed at protecting the interests of those who own stock in insurance companies comes within the sweep of the McCarran-Ferguson Act. Such a statute is not a state attempt to regulate "the business of insurance," as that phrase was used in the Act.

. . . .

The question here is whether state laws aimed at protecting the interests of those who own securities in insurance companies are the type of laws referred to in the 1945 enactment. The legislative history of the McCarran-Ferguson Act offers no real assistance. Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the powers of the States to tax insurance companies. The debate centered on these issues, and the Committee reports shed little light on the meaning of the words "business of insurance." In context, however, it is relatively clear what problems Congress was dealing with. Under the regime of Paul v. Virginia, supra, States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The South-Eastern Underwriters Association decision threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. As the House Report makes clear, "[i]t [was] not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern Underwriters Association case." H. R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945).

Given this history, the language of the statute takes on a different coloration. The statute did not purport to make the States
supreme in regulating all the activities of insurance companies, its language refers not to the persons or companies who are subject to state regulation, but to laws “regulating the business of insurance.” Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the “business of insurance” does the statute apply. Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies, *FTC v. National Casualty Co.*, 357 U.S. 560 (1958), and the licensing of companies and their agents, cf. *Robertson v. California*, 328 U.S. 440 (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* held was not “commerce.” The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the “business of insurance.” Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the “business of insurance.”

In this case, Arizona is concerning itself with a markedly different set of problems. It is attempting to regulate not the “insurance” relationship, but the relationship between a stockholder and the company in which he owns stock. This is not insurance regulation, but securities regulation. It is true that the state statute applies only to insurance companies. But mere matters of form need not detain us. The crucial point is that here the State has focused its attention on stockholder protection; it is not attempting to secure the interests of those purchasing insurance policies. Such regulation is not within the scope of the McCarran-Ferguson Act.

II.

The fact remains, however, that the State of Arizona has approved a merger between two insurance companies which, as a
matter of remedies, the Securities and Exchange Commission seeks to unwind. Moreover, Arizona has approved the merger not only under its laws relating to insurance securities but also in its capacity as licensor of insurers within the State. The applicable statute requires the State Director of Insurance to find that the proposed merger would not “substantially reduce the security of and service to be rendered to policyholders” before he gives his approval. Ariz. Rev. Stat. Ann. § 20-731B 3 (Supp. 1969). This section of the statute clearly relates to the “business of insurance.” The question is, then, whether the McCarran-Ferguson Act bars a federal remedy which affects a matter subject to state insurance regulation. In the circumstances of this particular case, we do not think it does; without intimating any opinion about what remedies would be appropriate should a violation be found after a trial on the merits, we hold that the McCarran-Ferguson Act furnishes no reason for refusing the remedies the Commission is seeking.

It is clear that any “impairment” in this case is a most indirect one. The Federal Government is attempting to protect security holders from fraudulent misrepresentations: Arizona, insofar as its activities are protected by the McCarran-Ferguson Act from the normal operations of the Supremacy Clause, is attempting to protect the interests of the policyholders. Arizona has not commanded something which the Federal Government seeks to prohibit. It has permitted respondents to consumate the merger; it did not order them to do so. In this context, all the Securities and Exchange Commission is asking is that insurance companies speak the truth when talking to shareholders. The paramount federal interest in protecting shareholders is in this situation perfectly compatible with the paramount state interest in protecting policyholders. And the remedy the Commission seeks does not affect a matter predominatntly of concern to policyholders alone; the merger is at least as important to those owning the companies' stock as it is to those holding their policies. In these circumstances, we simply cannot see the conflict...

III.

[In this section of the opinion Justice Marshall discusses the substance of the federal securities laws.]
Since the McCarran-Ferguson Act does not prohibit the relief sought, and since neither of the alternative grounds for dismissal which have been raised here is meritorious, we reverse the judgment of the Court of Appeals and remand the case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Black, believing that the United States Court of Appeals for the Ninth Circuit correctly analyzed the issues in this case and that its judgment is right, dissents from this Court's reversal of the judgment.

* * * *

National Securities can be interpreted narrowly or broadly, narrowly as limiting the "business of insurance" to the relationship of policyholders and insurers in a very strict sense, or more broadly as including matters collateral to that narrow relationship but essential to the successful operation of the business. The most important case on the subject follows. It gives a relatively narrow reading, though not the narrowest possible reading, to National Securities. In the process it narrows substantially the preemptive authority of the state legislatures.

* * * *

GROUP LIFE & HEALTH INSURANCE CO. v.
ROYAL DRUG COMPANY
440 U.S. 205 (1979)

Mr. Justice Stewart delivered the opinion of the Court.

The respondents, 18 owners of independent pharmacies in San Antonio, Tex., brought an antitrust action in a Federal District Court against the petitioners, Group Life and Health Insurance Co., known as Blue Shield of Texas (Blue Shield), and three pharmacies also doing business in San Antonio. The complaint alleged that the petitioners had violated § 1 of the Sherman Act, 15 U.S.C. § 1, by entering agreements to fix the retail prices of drugs and pharmaceuticals, and that the activities of the petitioners had caused Blue Shield's policyholders not to deal with certain of the respondents, thereby constituting an unlawful group boycott. The trial court granted summary judgment to the petitioners on the
Basic Source Materials Case Book

I

Blue Shield offers insurance policies which entitle the policyholders to obtain prescription drugs. If the pharmacy selected by the insured has entered into a “Pharmacy Agreement” with Blue Shield, and is therefore a participating pharmacy, the insured is required to pay only $2 for every prescription drug. The remainder of the cost is paid directly by Blue Shield to the participating pharmacy. If, on the other hand, the insured selects a pharmacy which has not entered into a Pharmacy Agreement, and is therefore a nonparticipating pharmacy, he is required to pay the full price charged by the pharmacy. The insured may then obtain reimbursement from Blue Shield for 75% of the difference between that price and $2.

Blue Shield offered to enter into a Pharmacy Agreement with each licensed pharmacy in Texas. Under the Agreement, a participating pharmacy agrees to furnish prescription drugs to Blue Shield’s policyholders at $2 for each prescription, and Blue Shield agrees to reimburse the pharmacy for the pharmacy’s cost of acquiring the amount of the drug prescribed. Thus, only pharmacies that can afford to distribute prescription drugs for less than this $2 markup can profitably participate in the plan.

The only issue before us is whether the Court of Appeals was correct in concluding that these Pharmacy Agreements are not the “business of insurance” within the meaning of § 2(b) of the McCarran-Ferguson Act. If that conclusion is correct, then the
Agreements are not exempt from examination under the antitrust laws. Whether the Agreements are illegal under the antitrust laws is an entirely separate question, not now before us.

II

A

As the Court stated last Term in *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541, the starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself. It is important, therefore, to observe at the outset that the statutory language in question here does not exempt the business of insurance companies from the scope of the antitrust laws. The exemption is for the “business of insurance,” not the “business of insurers:"

The statute did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws ‘regulating the business of insurance.’ Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the ‘business of insurance’ does the statute apply. *SEC v. National Securities, Inc.*, 393 U.S. 453, 459-460. (Emphasis in original.)

Since the law does not define the “business of insurance,” the question for decision is whether the Pharmacy Agreements fall within the ordinary understanding of that phrase, illumined by any light to be found in the structure of the Act and its legislative history.

B

The primary elements of an insurance contract are the spreading and underwriting of a policyholder’s risk. . . .

. . . .

The petitioners do not really dispute that the underwriting or spreading of risk is a critical determinant in identifying insurance. Rather they argue that the Pharmacy Agreements do involve the underwriting of risks. As they state in their brief:

In *Securities and Exchange Commission v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, 73 (1959), the ‘earmark’ of insurance was de-
scribed as the 'underwriting of risks' in exchange for a premium. Here the risk insured against is the possibility that, during the term of the policy, the insured may suffer a financial loss arising from the purchase of prescription drugs, or that he may be financially unable to purchase such drugs. In consideration of the premium, Blue Shield assumes this risk by agreeing with its insureds to contract with Participating Pharmacies to furnish the needed drugs and to reimburse the Pharmacies for each prescription filled for the insured. In short, each of the fundamental elements of insurance is present here—the payment of a premium in exchange for a promise to indemnify the insured against losses upon the happening of a specified contingency.

The fallacy of the petitioners' position is that they confuse the obligations of Blue Shield under its insurance policies, which insure against the risk that policyholders will be unable to pay for prescription drugs during the period of coverage, and the agreements between Blue Shield and the participating pharmacies, which serve only to minimize the costs Blue Shield incurs in fulfilling its underwriting obligations. The benefit promised to Blue Shield policyholders is that their premiums will cover the cost of prescription drugs except for a $2 charge for each prescription. So long as that promise is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies.

Another commonly understood aspect of the business of insurance relates to the contract between the insurer and the insured. In enacting the McCarran-Ferguson Act Congress was concerned with:

"The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder." \textit{SEC v. National Securities, Inc., supra}, at 460.
The Pharmacy Agreements are not "between insurer and insured." They are separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services other than insurance.

III

C

References to the meaning of the “business of insurance” in the legislative history of the McCarran-Ferguson Act strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk. Thus, one of the early House Reports stated: “The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors.”

Because of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation, the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws. . . .

IV

If agreements between an insurer and retail pharmacists are the “business of insurance” because they reduce the insurer’s costs, then so are all other agreements insurers may make to keep their costs under control—whether with automobile body repair shops or landlords. Such agreements would be exempt from the antitrust laws if Congress had extended the coverage of the McCarran-
Ferguson Act to the "business of insurance companies." But that is precisely what Congress did not do.

For all these reasons, the judgment of the Court of Appeals is *Affirmed*.

Mr. Justice Brennan, with whom The Chief Justice, Mr. Justice Marshall, and Mr. Justice Powell join, dissenting.

The McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. §§ 1011-1015, renders the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law and is not subject to the "boycott" exception stated in § 1013(b). The single question presented by this case is whether the "business of insurance" includes direct contractual arrangements ("provider agreements") between petitioner Blue Shield and third parties to provide benefits owed to the insurer's policyholders. The Court today holds that it does not.

I disagree: Since (a) there is no challenge to the status of Blue Shield's drug-benefits policy as the "business of insurance," I conclude (b) that some provider agreements negotiated to carry out the policy obligations of the insurer to the insured should be considered part of such business, and (c) that the specific Pharmacy Agreements at issue in this case should be included in such part. Before considering this analysis, however, it is necessary to set forth the background of the enactment of the McCarran-Ferguson Act.

I

SEC v. National Securities, Inc., 393 U.S. 453, 459 (1969), recognized that the legislative history of the McCarran-Ferguson Act sheds little light on the meaning of the words "business of insurance." See S. Rep. No. 20, 79th Cong., 1st Sess. (1945); H. R. Rep. No. 143, 79th Cong., 1st Sess. (1945). But while the legislative history is largely silent on the matter, it does indicate that Congress deliberately chose to phrase the exemption broadly. Congress had draft bills before it which would have limited the "business of insurance" to a narrow range of specified insurance company practices, but chose instead the more general language which ultimately became law.

Since continuation of state regulation as it existed before South-Eastern was Congress' goal, evidence of what States might rea-
sonably have considered to be and regulated as insurance at the
time the McCarran-Ferguson Act was passed in 1945 is clearly
relevant to our decision. This does not mean that a transaction
not viewed as insurance in 1945 cannot be so viewed today.

“We realize that . . . insurance is an evolving institution. Common
knowledge tells us that the forms have greatly changed even in a gen-
eration. And we would not undertake to freeze the concep[t] of ‘in-
surance’ . . . into the mold [it] fitted when these Federal Acts were

It is thus logical to suppose that if elements common to the or-
dinary understanding of “insurance” are present, new forms of the
business should constitute the “business of insurance” for purposes
of the McCarran-Ferguson Act. The determination of the scope
of the Act, therefore, involves both an analysis of the proximity
between the challenged transactions and those well recognized as
elements of “insurance,” and an examination of the historical set-
ting of the Act. On both counts, Blue Shield’s Pharmacy Agree-
ments constitute the “business of insurance.”

II

I start with common ground. Neither the Court, ante, at 230
n.37, nor the parties challenge the fact that the drug-benefits pol-
icy offered by Blue Shield to its policyholders—as distinguished
from the contract between Blue Shield and the pharmacies—is
the “business of insurance.” Whatever the merits of scholastic ar-
'gument over the technical definition of “insurance,” the policy
both transfers and distributes risk. The policyholder pays a sum
certain—the premium—against the risk of the uncertain contin-
gency of illness, and if the company has calculated correctly, the
premiums of those who do not fall ill pay the costs of benefits
above the premiums of those who do. See R. Mehr & E. Cam-
difference between Blue Shield’s policy and other forms of health
insurance is that Blue Shield “pays” the policyholder in goods and
services (drugs and their dispensation), rather than in cash. Since
we will not “freeze the concep[t] of ‘insurance’ . . . into the mold
it fitted” when McCarran-Ferguson was passed, this difference
cannot be a reason for holding that the drug-benefits policy falls
outside the “business of insurance” even if our inquiry into the
understandings of what constituted "insurance" in the 1930's and 1940's were to suggest that a contrary view prevailed at that time.

Fortunately, logic and history yield the same result. It is true that the first health insurance policies provided only cash indemnities. However, although policies that specifically provided drug benefits were not available during the 1930's and 1940's, analogous policies providing hospital and medical services—rather than cash—were available.

[Justice Brennan then discussed the history of Blue Cross and Blue Shield.]

III

The next question is whether at least some contracts with third parties to procure delivery of benefits to Blue Shield's insureds would also constitute the "business of insurance." Such contracts, like those between Blue Shield and the druggists in this case, are known as "provider agreements." The Court, adopting the view of the Solicitor General, today holds that no provider agreements can be considered part of the "business of insurance." It contends that the "underwriting or spreading of risk [is] an indispensable characteristic of insurance," ante, at 212, and that "[a]nother commonly understood aspect of the business of insurance relates to the contract between the insurer and the insured." Because provider agreements neither themselves spread risk, nor involve transactions between insurers and insureds, the Court excludes them from the "business of insurance."

The argument fails in light of this Court's prior decisions and the legislative history of the Act. The Court has held, for example, *FTC v. National Casualty Co.*, 357 U.S. 560 (1958), that the advertising of insurance, a unilateral act which does not involve underwriting, is within the scope of the McCarran-Ferguson Act. And the legislative history makes it abundantly clear that numerous horizontal agreements between insurance companies which do not technically involve the underwriting of risk were regarded by Congress as within the scope of the Act's exemption for the "business of insurance." For example, rate agreements among insurers, a conspicuous congressional illustration, see, e.g., 91 Cong. Rec. 1481, 1484 (1945) (remarks of Sens. Pepper and Ferguson), and the subject of the South-Eastern Underwriters case, see SEC
v. National Securities, Inc., 393 U.S., at 460, do not themselves spread risk. Indeed, the Court apparently concedes that arrangements among insurance companies respecting premiums and benefits would constitute the "business of insurance," despite their failure to fit within its formula.

... Some kind of provider agreement becomes a necessity if a service-benefits insurer is to meet its obligations to the insureds. The policy before us in this case, for example, promises payment of benefits in drugs. Thus, some arrangement must be made to provide those drugs for subscribers. Such an arrangement obtains the very benefits promised in the policy; it does not simply relate to the general operation of the company. A provider contract in a service-benefit plan, therefore, is critical to "the type of policy which could be issued" as well as to its "reliability" and "enforcement." It thus comes within the terms of SEC v. National Securities, Inc., 393 U.S., at 460. That case explained that the "business of insurance" involves not only the "relationship between insurer and insured," but also "other activities of insurance companies [that] relate so closely to their status as reliable insurers that they too must be placed in the same class." Thus, "[s]tatutes aimed at protecting or regulating . . . [the insurer/insured] relationship, directly or indirectly, are laws regulating the 'business of insurance.'" Ibid.

... V

The process of deciding what is and is not the "business of insurance" is inherently a case-by-case problem. It is true that the conclusion advocated here carries with it line-drawing problems. That is necessarily so once the provider-agreement line is crossed by holding some to be within the "business." But that is a line which history and logic compel me to cross. I would hold that the concept of a provider agreement for benefits promised in the policy is within the "business of insurance" because some form of provider agreement is necessary to fulfill the obligations of a service-benefit policy. I would hold that these provider agreements, Blue...
Shield's Pharmacy Agreements, are protected because they (1) directly obtain the very benefits promised in the policy and therefore directly affect rates, cost, and insurer reliability, and (2) themselves constitute a critical element of risk “prediction.” The conclusion that these kinds of agreements are the “business of insurance” is that reached by every Court of Appeals except the Court of Appeals in this case.

.......

Finally, the conclusion that Blue Shield's Pharmacy Agreements should be held within the “business of insurance” does not alone establish whether the agreements enjoy an exemption from the antitrust laws. To be entitled to an exemption, petitioners still would have to demonstrate that the transactions are in fact truly regulated by the State, 15 U.S.C. § 1012(b), and that they do not fall within the “boycott” exception of 15 U.S.C. § 1013(b). The District Court held for petitioners on both issues. Neither issue was reached by the Court of Appeals, however, in light of its holding that the contracts were not the “business of insurance.” Accordingly, I would reverse the judgment of the Court of Appeals and remand the case for further proceedings.

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The question what is the business of insurance arises in many contexts, some of them new. The significance of the narrow reading of Group Life & Health has yet to be played out fully. Few cases have reached the Supreme Court for definitive resolution; more will need to do so before the full implications of National Securities and Group Life & Health are clear.

One of the newer situations in which the meaning of “the business of insurance” arises is in the liquidation of insurance companies. The need to decide the issue was forced by the way in which the Wisconsin Insurance Code was drafted. The first chapter of the complex Wisconsin revision was the chapter on “Delinquency Proceedings,” dealing with the rehabilitation and liquidation of insurance companies. The Wisconsin statute, with some minor changes, became the Model Act of the National Association of Insurance Commissioners and, unlike many such Model Acts, was adopted by many of the states, again with minor variations. The drafting notes, which were
enacted by the Legislature with the bill, were carefully framed to make it clear that liquidation of an insurance company was regarded by the Wisconsin Legislature as the ultimate act of regulation. In particular, the notes to the section on the Order of Distribution of the remaining assets said that “The insurance enterprise should be made to do its proper job in the social organism, so far as that is possible with the limited assets that remain in a liquidation.”

Section 645.68(5) of the Wisconsin code provides for the residual classification, in which general creditors fall. It begins “All other claims including claims of the federal or any state or local government, not falling within other classes under this section.” This conflicts directly with the federal “superpriority statute,” which reads “A claim of the United States Government shall be paid first when—(A) a person indebted to the Government is insolvent. . . .” The superpriority statute does not relate to insurance, and thus should be preempted by state statutes regulating insurance. The Wisconsin statute would put government claims based on insurance policies in the same class as other similar claims, while relegating other government claims, such as tax claims, to the general creditor class. The Wisconsin revision comments sketched out the argument for giving effect to the Wisconsin statute in preference to the superpriority statute.


The issue whether the state legislation overrides the federal superpriority statute has come up directly in several cases, at least three of which went to the federal Circuit Court level. The final one went to the United States Supreme Court. One of the cases was Idaho ex rel. Soward v. Internal Revenue Service, in which the district court held that a state regulatory scheme for liquidation of in-

22. Introductory comment to Wisconsin Statutes, §645.68, last sentence. These comments may be found in either Wis. Laws of 1967, Ch. 89 (the session laws), or in West's Annotated version of the Wisconsin statutes. The comments were included in the bill as enacted.

surers constitutes the "business of insurance." The district court was reversed, and the United States Supreme Court denied certiorari. A second was Gordon v. United States, giving effect to the federal superpriority statute on the ground that the liquidation of an insurance company was not the business of insurance. Both those circuits agreed in denying preemptive effect to the state statute. The issue arose again in the following case, in which the 6th Circuit held the state priority scheme in the insurance liquidation statute to be within the "business of insurance." The United States Supreme Court granted certiorari to resolve the conflict among the circuits.

** *** **

UNITED STATES v. FABE
113 S. Ct. 2202 (1993)

Justice BLACKMUN delivered the opinion of the Court.

The federal priority statute, 31 U.S.C. § 3713, accords first priority to the United States with respect to a bankrupt debtor's obligations. An Ohio statute confers only fifth priority upon claims of the United States in proceedings to liquidate an insolvent insurance company. Ohio Rev. Code Ann. § 3903.42 (1989). The federal priority statute pre-empts the inconsistent Ohio law unless the latter is exempt from pre-emption under the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. § 1011 et seq. In order to resolve this case, we must decide whether a state statute establishing the priority of creditors' claims in a proceeding to liquidate an insolvent insurance company is a law enacted "for the purpose of regulating the business of insurance," within the mean-

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24. 858 F.2d 445 (9th Cir. 1988).
27. The U.S. District Court for the Southern District of Iowa correctly followed the Sixth Circuit position even before the United States Supreme Court settled the question. Lyons v. United States, No. 4-91-10209, 1992 U.S. Dist. LEXIS 11714, noted 11 J. INS. REG. 227 (1992).
ing of § 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

We hold that the Ohio priority statute escapes pre-emption to the extent that it protects policyholders. Accordingly, Ohio may effectively afford priority, over claims of the United States, to the insurance claims of policyholders and to the costs and expenses of administering the liquidation. But when Ohio attempts to rank other categories of claims above those pressed by the United States, it is not free from federal pre-emption under the McCarran-Ferguson Act.

I

The Ohio priority statute was enacted as part of a complex and specialized administrative structure for the regulation of insurance companies from inception to dissolution. The statute proclaims, as its purpose, "the protection of the interests of insureds, claimants, creditors, and the public generally." § 3903.02(D). Chapter 3903 broadly empowers the State's Superintendent of Insurance to place a financially impaired insurance company under his supervision, or into rehabilitation, or into liquidation.

Pursuant to this statutory framework, the Court of Common Pleas for Franklin County, Ohio, on April 30, 1986, declared American Druggists' Insurance Company insolvent. The court directed that the company be liquidated, and it appointed respondent, Ohio's Superintendent of Insurance, to serve as liquidator. The United States, as obligee on various immigration, appearance, performance, and payment bonds issued by the company as surety, filed claims in excess of $10.7 million in the state liquidation proceedings. The United States asserted that its claims were entitled to first priority under the federal statute, 31 U.S.C. § 3713(a)(1)(A)(iii), which provides: "A claim of the United States Government shall be paid first when ... a person indebted to the Government is insolvent and ... an act of bankruptcy is committed."

Respondent Superintendent brought a declaratory judgment action in the United States District Court for the Southern District of Ohio seeking to establish that the federal priority statute does not pre-empt the Ohio law designating the priority of creditors' claims in insurance-liquidation proceedings. Under the Ohio
statute, as noted above, claims of federal, state, and local governments are entitled only to fifth priority, ranking behind (1) administrative expenses, (2) specified wage claims, (3) policyholders' claims, and (4) claims of general creditors. § 3903.42. Respondent argued that the Ohio priority scheme, rather than the federal priority statute, governs the priority of claims of the United States because it falls within the anti-pre-emption provisions of the McCarran-Ferguson Act, 15 U.S.C. § 1012.

The District Court granted summary judgment for the United States. . . .

A divided Court of Appeals reversed. 939 F.2d 341 (CA6 1991). The court held that the Ohio priority scheme regulates the "business of insurance" because it protects the interests of the insured. . . .

. . . .

We granted certiorari, to resolve the conflict among the Courts of Appeals on the question whether a state statute governing the priority of claims against an insolvent insurer is a "law enacted . . . for the purpose of regulating the business of insurance," within the meaning of § 2(b) of the McCarran-Ferguson Act.

. . . .

III

"[T]he starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 210 (1979). Section 2(b) of the McCarran-Ferguson Act provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The parties agree that application of the federal priority statute would "invalidate, impair, or supersede" the Ohio priority scheme and that the federal priority statute does not "specifically relate to the business of insurance." All that is left for us to determine, therefore, is whether the Ohio priority statute is a law enacted "for the purpose of regulating the business of insurance."
This Court has had occasion to construe this phrase only once. On that occasion, it observed: "Statutes aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly, are laws regulating the 'business of insurance,'" within the meaning of the phrase. SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969). The opinion emphasized that the focus of McCarran-Ferguson is upon the relationship between the insurance company and its policyholders:

"The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder." Ibid.

In the present case, on the other hand, there is a direct conflict between the federal priority statute and Ohio law. Under the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the Ohio statute furthers the interests of policyholders.

Minimizing the analysis of National Securities, petitioner invokes Royal Drug and Pireno in support of its argument that the liquidation of an insolvent insurance company is not part of the "business of insurance" exempt from pre-emption under the McCarran-Ferguson Act. . . .

To be sure, the Ohio statute does not directly regulate the "business of insurance" by prescribing the terms of the insurance contract or by setting the rate charged by the insurance company. But we do not read Pireno to suggest that the business of insurance is confined entirely to the writing of insurance contracts, as opposed to their performance. Pireno and Royal Drug held only that "ancillary activities" that do not affect performance of the insurance contract or enforcement of contractual obligations do not enjoy the antitrust exemption for laws regulating the "business of insurance." . . .

There can be no doubt that the actual performance of an insurance contract falls within the "business of insurance," as we
understood that phrase in *Pireno* and *Royal Drug*. To hold otherwise would be mere formalism. The Court’s statement in *Pireno* that the “transfer of risk from insured to insurer is effected by means of the contract between the parties . . . and . . . is complete at the time that the contract is entered,” 458 U.S., at 130, presumes that the insurance contract in fact will be enforced. Without performance of the terms of the insurance policy, there is no risk transfer at all. Moreover, performance of an insurance contract also satisfies the remaining prongs of the *Pireno* test: it is central to the policy relationship between insurer and insured and is confined entirely to entities within the insurance industry. The Ohio priority statute is designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders’ claims despite the insurance company’s intervening bankruptcy. Because it is integrally related to the performance of insurance contracts after bankruptcy, Ohio’s law is one “enacted by the State for the purpose of regulating the business of insurance.” 15 U.S.C. § 1012(b).

Both *Royal Drug* and *Pireno*, moreover, involved the scope of the antitrust immunity located in the second clause of § 2(b). We deal here with the first clause, which is not so narrowly circumscribed. The language of § 2(b) is unambiguous: the first clause commits laws “enacted . . . for the purpose of regulating the business of insurance” to the States, while the second clause exempts only “the business of insurance” itself from the antitrust laws. To equate laws “enacted . . . for the purpose of regulating the business of insurance” with the “business of insurance” itself, as petitioner urges us to do, would be to read words out of the statute. This we refuse to do.

The broad category of laws enacted “for the purpose of regulating the business of insurance” consists of laws that possess the “end, intention, or aim” of adjusting, managing, or controlling the business of insurance. Black’s Law Dictionary 1236, 1286 (6th ed. 1990). This category necessarily encompasses more than just the “business of insurance.” For the reasons expressed above, we believe that the actual performance of an insurance contract is an essential part of the “business of insurance.” Because the Ohio statute is “aimed at protecting or regulating” the performance of an insurance contract, *National Securities*, 393 U.S., at 460, it follows that it is a law “enacted for the purpose of regulating the
business of insurance,” within the meaning of the first clause of § 2(b).

Petitioner, however, also contends that the Ohio statute is not an insurance law but a bankruptcy law because it comes into play only when the insurance company has become insolvent and is in liquidation, at which point the insurance company no longer exists. We disagree. The primary purpose of a statute that distributes the insolvent insurer’s assets to policyholders in preference to other creditors is identical to the primary purpose of the insurance company itself: the payment of claims made against policies. And “mere matters of form need not detain us.” National Securities, 393 U.S., at 460. The Ohio statute is enacted “for the purpose of regulating the business of insurance” to the extent that it serves to ensure that, if possible, policyholders ultimately will receive payment on their claims. That the policyholder has become a creditor and the insurer a debtor is not relevant.

V

We hold that the Ohio priority statute, to the extent that it regulates policyholders, is a law enacted for the purpose of regulating the business of insurance. To the extent that it is designed to further the interests of other creditors, however, it is not a law enacted for the purpose of regulating the business of insurance. Of course, every preference accorded to the creditors of an insolvent insurer ultimately may redound to the benefit of policyholders by enhancing the reliability of the insurance company. This argument, however, goes too far: “But in that sense, every business decision made by an insurance company has some impact on its reliability . . . and its status as a reliable insurer.” Royal Drug, 440 U.S., at 216–217. Royal Drug rejected the notion that such indirect effects are sufficient for a state law to avoid pre-emption under the McCarran-Ferguson Act. Id., at 217.

We also hold that the preference accorded by Ohio to the expenses of administering the insolvency proceeding is reasonably necessary to further the goal of protecting policyholders. Without
payment of administrative costs, liquidation could not even commence. The preferences conferred upon employees and other general creditors, however, do not escape pre-emption because their connection to the ultimate aim of insurance is too tenuous. . . .

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Justice Kennedy, with whom Justice Scalia, Justice Souter and Justice Thomas join, dissenting.

With respect, and full recognition that the statutory question the majority considers with care is difficult, I dissent from the opinion and judgment of the Court.

The function of the Ohio statute before us is to regulate the priority of competing creditor claims in proceedings to liquidate an insolvent insurance company. On its face, the statute’s exclusive concentration is not policyholder protection, but creditor priority. The Ohio statute states that its comprehensive purpose is “the protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers.” Ohio Rev. Code Ann. § 3903.02(D) (1989). It can be said that Ohio’s insolvency scheme furthers the interests of policyholders to the extent the statute gives policyholder claims priority over the claims of the defunct insurer’s other creditors. But until today that result alone would not have qualified Ohio’s liquidation statute as a law enacted for the purpose of regulating the business of insurance. The Ohio law does not regulate or implicate the “true underwriting of risks, the one earmark of insurance.” S.E.C. v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65, 73 (1959). To be sure, the Ohio priority statute increases the probability that an insured’s claim will be paid in the event of insurer insolvency. But such laws, while they may “further the interests of policyholders,” have little to do with the relationship between an insurer and its insured, National Securities, 393 U.S., at 460, and as such are not laws regulating the business of insurance under the McCarran-Ferguson Act. The State’s priority statute does not speak to the transfer of risk embodied in the contract of insurance between the
parties. Granting policyholders priority of payment over other creditors does not involve the transfer of risk from insured to insurer, the type of risk spreading that is the essence of the contract of insurance.

Further, insurer insolvency is not an activity of insurance companies that "relates so closely to their status as reliable insurers," ibid., as to qualify liquidation as an activity constituting the "core of the 'business of insurance.'" Ibid. Respondent maintains, and the majority apparently agrees, that nothing is more central to the reliability of an insurer than facilitating the payment of policyholder claims in the event of insurer insolvency. This assertion has a certain intuitive appeal, because certainly the payment of claims is of primary concern to policyholders, and policyholders have a vital interest in the financial strength and solvency of their insurers. But state insolvency laws requiring policyholder claims to be paid ahead of the claims of the rest of the insurer's creditors do not increase the reliability or the solvency of the insurer; they operate, by definition, too late in the day for that. Instead they operate as a state-imposed safety net for the benefit of those insured. In my view, the majority too easily dismisses the fact that the policyholder has become a creditor and the insurer a debtor by reason of the insurance company's demise. Whereas we said in National Securities that the focus of the McCarran-Ferguson Act is the relationship between insurer and insured, 393 U.S., at 460, the Ohio statute before us regulates a different relationship: the relationship between the policyholder and the other competing creditors. This is not the regulation of the business of insurance, but the regulation of creditors' rights in an insolvency proceeding.

Even though Ohio's insurance liquidation statute is not a law enacted for the purpose of regulating the business of insurance, I underscore that no provision of federal law precludes Ohio from establishing procedures to address the liquidation of insolvent insurance companies. The State's prerogative to do so, however, does not emanate from its recognized power to enact laws regulating the business of insurance under the McCarran-Ferguson Act, but from the long-standing decision of Congress to exempt insurance companies from the federal bankruptcy code. 11 U.S.C. §§ 109 (b)(2), (d). The States are not free to enact legislation
inconsistent with the federal priority statute, and in my view the majority errs in applying the McCarran-Ferguson Act to displace the traditional principles of pre-emption that should apply. I would reverse the judgment of the Court of Appeals.

* * * * *

In *Fabe*, the court dealt with a statute varying from the Wisconsin statute in that it postponed government claims to the claims of general creditors, instead of putting government claims in the general creditor class. In doing so it went beyond the regulation of the insurance business; in *Fabe* the Court ruled that the federal government could not be subordinated to general creditors; only creditors deserving the protection of the insurance regulatory laws could be preferred to the federal government. The priority provision was overridden, *pro tanto*, by the superpriority statute.

Whether insurers in liquidation might seek relief under the federal Bankruptcy Code was easily disposed of in *In re Oil & Gas Company*. The court said that an insurer placed in liquidation remained an insurer within the meaning of the bankruptcy code, precluding Chapter 11 protection.

Whether health maintenance organizations ("HMOs") should be treated as insurance companies for purposes of liquidation is a little more complicated. Though HMOs are generally supervised by state insurance departments (and in Wisconsin and perhaps some other states are regulated as insurance companies), they form a peculiar breed of insurance companies. Two recent *Journal* articles arising from the Maxicare bankruptcy have discussed this situation extensively. HMOs filed for protection under Chapter 11 of the Federal Bankruptcy Code. The bankruptcy court granted the protection, concluding that all the companies in the group should be reorganized within a single jurisdiction, that of the bankruptcy court. In separate decisions that court denied state motions to dismiss the bankruptcy

petitions. The bankruptcy court’s rulings were reversed for those states, such as Wisconsin, in which HMOs are classified as insurance companies,32 but not in those, such as Michigan, in which they are not.33

In state courts, too, a variety of problems relating to receiverships appeared. *State ex rel. Melahn v. Circuit Court*34 held that all actions affecting receiverships must take place in the receivership court. Shareholders had sought relief in another state court. In an Illinois case, investors sought to establish a kind of “superpriority” by case law. Claiming they had been defrauded, they asked for priority over claimants under the state insurance liquidation statute. No problem of preemption, such as existed in the prior cases, was present; the Supreme Court of Illinois had no difficulty in rejecting the suggestion.35

*Gordon* and *Soward* did not always intimidate the state courts. The Superior Court for Los Angeles denied superpriority status to Freddie Mac (Federal Home Loan Mortgage Corporation). It held that even assuming federal superpriority existed, Freddie Mac was not entitled to it because it was not part of the government. Moreover, the Superior Court thought the federal circuit courts had erred.36 The California intermediate appellate court affirmed.37

The most recent Supreme Court case discussing the meaning of “the business of insurance” was decided in 1993. An edited version follows. The case also explores what constitutes a boycott within the meaning of McCarran, jurisdictional difficulties for courts, and questions of international comity created when some of the defendants are alien companies (i.e., non-United States companies, which are incorrectly referred to in the following case as “foreign companies.”)38

38. The comity issue may prove to be increasingly important in the future and is therefore retained in the version presented here. The case is noted in 12 J. INS. REG. 270 (1993).
Understanding the opinion is complicated by the divisions within the court, with Justice Souter’s opinion representing the prevailing view on the meaning of the “business of insurance” but the dissenting opinion on what constitutes a boycott in the McCarran sense. On other parts of the opinion, the prevailing and dissenting justices concur. The opinion is reproduced here in parts with some explanatory text inserted at appropriate places. The “boycott” discussion is transferred to the next section.

The case came up on motions to dismiss, so the facts alleged in the complaints were taken as true for purposes of the opinion. Justice Souter’s statement of facts, although lengthy, is reproduced here in full to facilitate understanding the complex issues that troubled the Court.

* * * *

HARTFORD FIRE INSURANCE CO. v. CALIFORNIA
113 S. Ct. 2891 (1993)

Justice SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II(A), III, and IV, and an opinion with respect to Part II(B) in which Justice WHITE, Justice BLACKMUN and Justice STEVENS join.

The Sherman Act makes every contract, combination, or conspiracy in unreasonable restraint of interstate or foreign commerce illegal. 26 Stat. 209, as amended, 15 U.S.C. § 1. These consolidated cases present questions about the application of that Act to the insurance industry, both here and abroad. The plaintiffs (respondents here) allege that both domestic and foreign defendants (petitioners here) violated the Sherman Act by engaging in various conspiracies to affect the American insurance market. A group of domestic defendants argues that the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. § 1011 et seq., precludes application of the Sherman Act to the conduct alleged; a group of foreign defendants argues that the principle of international comity requires the District Court to refrain from exercising jurisdiction over certain claims against it. We hold that most of the domestic defendants’ alleged conduct is not immunized from antitrust liability by the McCarran-Ferguson Act, and that, even assuming it applies, the principle of international comity does not
preclude District Court jurisdiction over the foreign conduct alleged.

I

The two petitions before us stem from consolidated litigation comprising the complaints of 19 States and many private plaintiffs alleging that the defendants, members of the insurance industry, conspired in violation of § 1 of the Sherman Act to restrict the terms of coverage of commercial general liability (CGL) insurance available in the United States. Because the cases come to us on motions to dismiss, we take the allegations of the complaints as true.

A

According to the complaints, the object of the conspiracies was to force certain primary insurers (insurers who sell insurance directly to consumers) to change the terms of their standard CGL insurance policies to conform with the policies the defendant insurers wanted to sell. The defendants wanted four changes.

First, CGL insurance has traditionally been sold in the United States on an “occurrence” basis, through a policy obligating the insurer “to pay or defend claims, whenever made, resulting from an accident or injurious exposure to conditions” that occurred during the [specific time] period the policy was in effect.” In place of this traditional “occurrence” trigger of coverage, the defendants wanted a “claims-made” trigger, obligating the insurer to pay or defend only those claims made during the policy period. Such a policy has the distinct advantage for the insurer that when the policy period ends without a claim having been made, the insurer can be certain that the policy will not expose it to any further liability. Second, the defendants wanted the “claims-made” policy to have a “retroactive date” provision, which would further restrict coverage to claims based on incidents that occurred after a certain date. Such a provision eliminates the risk that an insurer, by issuing a claims-made policy, would assume liability arising from incidents that occurred before the policy’s effective date, but remained undiscovered or caused no immediate harm. Third, CGL insurance has traditionally covered “sudden and accidental” pollution; the defendants wanted to eliminate that coverage. Finally,
CGL insurance has traditionally provided that the insurer would bear the legal costs of defending covered claims against the insured without regard to the policy's stated limits of coverage; the defendants wanted legal defense costs to be counted against the stated limits (providing a "legal defense cost cap").

To understand how the defendants are alleged to have pressured the targeted primary insurers to make these changes, one must be aware of two important features of the insurance industry. First, most primary insurers rely on certain outside support services for the type of insurance coverage they wish to sell. Defendant Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers (including the primary insurer defendants, Hartford Fire Insurance Company, Allstate Insurance Company, CIGNA Corporation, and Aetna Casualty and Surety Company), is the almost exclusive source of support services in this country for CGL insurance. ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms. All of the "traditional" features of CGL insurance relevant to this case were embodied in the ISO standard CGL insurance form that had been in use since 1973. For each of its standard policy forms, ISO also supplies actuarial and rating information: it collects, aggregates, interprets, and distributes data on the premiums charged, claims filed and paid, and defense costs expended with respect to each form, and on the basis of this data it predicts future loss trends and calculates advisory premium rates. Most ISO members cannot afford to continue to use a form if ISO withdraws these support services.

Second, primary insurers themselves usually purchase insurance to cover a portion of the risk they assume from the consumer. This so-called "reinsurance" may serve at least two purposes, protecting the primary insurer from catastrophic loss, and allowing the primary insurer to sell more insurance than its own financial capacity might otherwise permit. Thus, "the availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers." Insurers who sell reinsurance themselves often purchase insurance to cover part of the risk they assume from the primary insurer; such "retrocessional reinsurance" does for reinsurers what reinsurance does for primary insurers. Many of the defendants here are reinsurers or reinsurance
brokers, or play some other specialized role in the reinsurance business; defendant Reinsurance Association of America (RAA) is a trade association of domestic reinsurers.

B

The prehistory of events claimed to give rise to liability starts in 1977, when ISO began the process of revising its 1973 CGL form. For the first time, it proposed two CGL forms (1984 ISO CGL forms), one the traditional “occurrence” type, the other “with a new ‘claims-made’ trigger.” The “claims-made” form did not have a retroactive date provision, however, and both 1984 forms covered “sudden and accidental’ pollution” damage and provided for unlimited coverage of legal defense costs by the insurer. Within the ISO, defendant Hartford Fire Insurance Company objected to the proposed 1984 forms; it desired elimination of the “occurrence” form, a retroactive date provision on the “claims-made” form, elimination of sudden and accidental pollution coverage, and a legal defense cost cap. Defendant Allstate Insurance Company also expressed its desire for a retroactive date provision on the “claims-made” form. Majorities in the relevant ISO committees, however, supported the proposed 1984 CGL forms and rejected the changes proposed by Hartford and Allstate. In December 1983, the ISO Board of Directors approved the proposed 1984 forms, and ISO filed or lodged the forms with state regulators in March 1984.

Dissatisfied with this state of affairs, the defendants began to take other steps to force a change in the terms of coverage of CGL insurance generally available, steps that, the plaintiffs allege, implemented a series of conspiracies in violation of § 1 of the Sherman Act. The plaintiffs recount these steps as a number of separate episodes corresponding to different Claims for Relief in their complaints; because it will become important to distinguish among these counts and the acts and defendants associated with them, we will note these correspondences.

The first four Claims for Relief of the California Complaint, and the Second Claim for Relief of the Connecticut Complaint charge the four domestic primary insurer defendants and varying groups of domestic and foreign reinsurers, brokers, and associations with conspiracies to manipulate the ISO CGL forms. In
March 1984, primary insurer Hartford persuaded General Reinsurance Corporation (General Re), the largest American reinsurer, to take steps either to procure desired changes in the ISO CGL forms, or “failing that, [to] ‘derail’ the entire ISO CGL forms program.” General Re took up the matter with its trade association, RAA, which created a special committee that met and agreed to “boycott” the 1984 ISO CGL forms unless a retroactive-date provision was added to the claims-made form, and a pollution exclusion and defense cost cap were added to both forms. RAA then sent a letter to ISO “announcing that its members would not provide reinsurance for coverages written on the 1984 CGL forms,” and Hartford and General Re enlisted a domestic reinsurance broker to give a speech to the ISO Board of Directors, in which he stated that no reinsurers would “break ranks” to reinsure the 1984 ISO CGL forms.

The four primary insurer defendants (Hartford, Aetna, CIGNA, and Allstate) also encouraged key actors in the London reinsurance market, an important provider of reinsurance for North American risks, to withhold reinsurance for coverages written on the 1984 ISO CGL forms. As a consequence, many London-based underwriters, syndicates, brokers, and reinsurance companies informed ISO of their intention to withhold reinsurance on the 1984 forms, and at least some of them told ISO that they would withhold reinsurance until ISO incorporated all four desired changes into the ISO CGL forms.

For the first time ever, ISO invited representatives of the domestic and foreign reinsurance markets to speak at an ISO Executive Committee meeting. At that meeting, the reinsurers “presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance.” The ISO Executive Committee then voted to include a retroactive-date provision in the claims-made form, and to exclude all pollution coverage from both new forms. (But it neither eliminated the occurrence form, nor added a legal defense cost cap.) The 1984 ISO CGL forms were then withdrawn from the marketplace, and replaced with forms (1986 ISO CGL forms) containing the new provisions. After ISO got regulatory approval of the 1986 forms in most States where approval was needed, it eliminated its support services for the 1973 CGL form, thus rendering it impossible for most ISO members to continue to use the form.
The Fifth Claim for Relief of the California Complaint, and the virtually identical Third Claim for Relief of the Connecticut Complaint charge a conspiracy among a group of London reinsurers and brokers to coerce primary insurers in the United States to offer CGL coverage only on a claims-made basis. The reinsurers collectively refused to write new reinsurance contracts for, or to renew long-standing contracts with, “primary . . . insurers unless they were prepared to switch from the occurrence to the claims-made form;” they also amended their reinsurance contracts to cover only claims made before a “‘sunset date,’” thus eliminating reinsurance for claims made on occurrence policies after that date.

The Sixth Claim for Relief of the California Complaint, and the nearly identical Fourth Claim for Relief of the Connecticut Complaint charge another conspiracy among a somewhat different group of London reinsurers to withhold reinsurance for pollution coverage. The London reinsurers met and agreed that all reinsurance contracts covering North American casualty risks, including CGL risks, would be written with a complete exclusion for pollution liability coverage. In accordance with this agreement, the parties have in fact excluded pollution liability coverage from CGL reinsurance contracts since at least late 1985.

The Seventh Claim for Relief in the California Complaint, and the closely similar Sixth Claim for Relief in the Connecticut Complaint charge a group of domestic primary insurers, foreign reinsurers, and the ISO with conspiring to restrain trade in the markets for “excess” and “umbrella” insurance by drafting model forms and policy language for these types of insurance, which are not normally offered on a regulated basis. The ISO Executive Committee eventually released standard language for both “occurrence” and “claims-made” umbrella and excess policies; that language included a retroactive date in the claims-made version, and an absolute pollution exclusion and a legal defense cost cap in both versions.

Finally, the Eighth Claim for Relief of the California Complaint, and its counterpart in the Fifth Claim for Relief of the Connecticut complaint charge a group of London and domestic retrocessional reinsurers with conspiring to withhold retrocessional reinsurance for North American seepage, pollution, and property contamination risks. Those retrocessional reinsurers
signed, and have implemented, an agreement to use their “‘best endeavors’” to ensure that they would provide such reinsurance for North American risks “‘only . . . where the original business includes a seepage and pollution exclusion wherever legal and applicable.’”

C

Nineteen States and a number of private plaintiffs filed 36 complaints against the insurers involved in this course of events, charging that the conspiracies described above violated § 1 of the Sherman Act, 15 U.S.C. § 1. After the actions had been consolidated for litigation in the Northern District of California, the defendants moved to dismiss for failure to state a cause of action, or, in the alternative, for summary judgment. The District Court granted the motions to dismiss. It held that the conduct alleged fell within the grant of antitrust immunity contained in § 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), because it amounted to “the business of insurance” and was “regulated by State law” within the meaning of that section; none of the conduct, in the District Court’s view, amounted to a “boycott” within the meaning of the § 3(b) exception to that grant of immunity. The District Court also dismissed the three claims that named only certain London-based defendants, invoking international comity and applying the Ninth Circuit’s decision in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (CA9 1976).

The Court of Appeals reversed. Although it held the conduct involved to be “the business of insurance” within the meaning of § 2(b), it concluded that the defendants could not claim McCarran-Ferguson Act antitrust immunity for two independent reasons. First, it held, the foreign reinsurers were beyond the regulatory jurisdiction of the States; because their activities could not be “regulated by State law” within the meaning of § 2(b), they did not fall within that section’s grant of immunity. Although the domestic insurers were “regulated by State law,” the court held, they forfeited their § 2(b) exemption when they conspired with the nonexempt foreign reinsurers. Second, the Court of Appeals held that, even if the conduct alleged fell within the scope of § 2(b), it also fell within the § 3(b) exception for “acts of boycott,
Finally, as to the three claims brought solely against foreign defendants, the court applied its *Timberlane* analysis, but concluded that the principle of international comity was no bar to exercising Sherman Act jurisdiction.

We granted *certiorari*. . . . We now affirm in part, reverse in part, and remand.

II

The petition in No. 91-1111 touches on the interaction of two important pieces of economic legislation. The Sherman Act declares “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, . . . to be illegal.” The McCarran-Ferguson Act provides that regulation of the insurance industry is generally a matter for the States, 15 U.S.C. § 1012(a), and (again, generally) that “no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.” § 1012(b).

Section 2(b) of the McCarran-Ferguson Act makes it clear nonetheless that the Sherman Act applies “to the business of insurance to the extent that such business is not regulated by State law,” § 1012(b), and § 3(b) provides that nothing in the McCarran-Ferguson Act “shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.” § 1013(b).

Petitioners in No. 91-1111 are all of the domestic defendants in the consolidated cases: the four domestic primary insurers, the domestic reinsurers, the trade associations ISO and RAA, and the domestic reinsurance broker Thomas A. Greene & Company, Inc. They argue that the Court of Appeals erred in holding, first, that their conduct, otherwise immune from antitrust liability under § 2(b) of the McCarran-Ferguson Act, lost its immunity when they conspired with the foreign defendants, and, second, that their conduct amounted to “acts of boycott” falling within the exception to antitrust immunity set out in § 3(b). We conclude that the Court of Appeals did err about the effect of conspiring with foreign defendants, but correctly decided that all but one of the complaints’ relevant Claims for Relief are fairly read to allege conduct falling within the “boycott” exception to McCarran-Ferguson Act
antitrust immunity. We therefore affirm the Court of Appeals's judgment that it was error for the District Court to dismiss the complaints on grounds of McCarran-Ferguson Act immunity, except as to the one Claim for Relief that the Court of Appeals correctly found to allege no boycott.

A

By its terms, the antitrust exemption of § 2(b) of the McCarran-Ferguson Act applies to “the business of insurance” to the extent that such business is regulated by state law. . . .

The cases confirm that “the business of insurance” should be read to single out one activity from others, not to distinguish one entity from another. In Group Life & Health Ins. Co. v. Royal Drug Co. we held that § 2(b) did not exempt an insurance company from antitrust liability for making an agreement fixing the price of prescription drugs to be sold to Blue Shield policyholders. Such activity, we said, “would be exempt from the antitrust laws if Congress had extended the coverage of the McCarran-Ferguson Act to the ‘business of insurance companies.’ But that is precisely what Congress did not do.” And in Union Labor Life Ins. Co v. Pireno, we explicitly framed the question as whether “a particular practice is part of the ‘business of insurance’ exempted from the antitrust laws by § 2(b),” and each of the three criteria we identified concerned a quality of the practice in question: “first, whether the practice has the effect of transferring or spreading a policyholder’s risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.” Ibid. (emphasis in original).

The Court of Appeals did not hold that, under these criteria, the domestic defendants’ conduct fell outside “the business of insurance”; to the contrary, it held that that condition was met. Nor did it hold the domestic defendants’ conduct to be “unregulated by State law.” Rather, it constructed an altogether different chain of reasoning, the middle link of which comes from a sentence in our opinion in Royal Drug Co. “Regulation . . . of foreign reinsurers,” the Court of Appeals explained, “is beyond the jurisdiction of the states,” 938 F.2d, at 928, and hence § 2(b) does not exempt foreign reinsurers from antitrust liability, because their activities
Part II

are not "regulated by State law." Under *Royal Drug Co.*, "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." 440 U.S., at 231. Therefore, the domestic insurers, by acting in concert with the nonexempt foreign insurers, lost their McCarran-Ferguson Act antitrust immunity. See 938 F.2d, at 928. This reasoning fails, however, because even if we were to agree that foreign reinsurers were not subject to state regulation (a point on which we express no opinion), the quoted language from *Royal Drug Co.*, read in context, does not state a proposition applicable to this case.

The full sentence from *Royal Drug Co.* places the quoted fragment in a different light. "In analogous contexts," we stated, "the Court has held that an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." 440 U.S., at 231. We then cited two cases dealing with the Capper-Volstead Act, which immunizes from liability under § 1 of the Sherman Act particular activities of certain persons "engaged in the production of agricultural products." Because these cases relied on statutory language referring to certain "persons," whereas we specifically acknowledged in *Royal Drug Co.* that the McCarran-Ferguson Act immunizes activities rather than entities, see 440 U.S., at 232-233, the analogy we were drawing was of course a loose one. The agreements that insurance companies made with "parties wholly outside the insurance industry," *id.*, at 231, we noted, such as the retail pharmacists involved in *Royal Drug Co.* itself, or "automobile body repair shops or landlords," *id.*, at 232, are unlikely to be about anything that could be called "the business of insurance," as distinct from the broader " 'business of insurance companies.' " *Id.*, at 233. The alleged agreements at issue in the instant case, of course, are entirely different; the foreign reinsurers are hardly "wholly outside the insurance industry," and respondents do not contest the Court of Appeals's holding that the agreements concern "the business of insurance." These facts neither support even the rough analogy we drew in *Royal Drug Co.*, nor fall within the rule about acting in concert with nonexempt parties, which derived from a statute inapplicable here. Thus, we think it was error for the Court of Appeals to hold the domestic insurers bereft of their McCarran-Ferguson Act exemption simply because they agreed or acted with foreign reinsurers that, we assume for the sake of argument, were "not regulated by State law."
Finally, we take up the question presented by No. 91-1128, whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman Act to foreign conduct. The Fifth Claim for Relief of the California Complaint alleges a violation of § 1 of the Sherman Act by certain London reinsurers who conspired to coerce primary insurers in the United States to offer CGL coverage on a claims-made basis, thereby making "occurrence CGL coverage . . . unavailable in the State of California for many risks." The Sixth Claim for Relief of the California Complaint alleges that the London reinsurers violated § 1 by a conspiracy to limit coverage of pollution risks in North America, thereby rendering "pollution liability coverage . . . almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of California." The Eighth Claim for Relief of the California Complaint alleges a further § 1 violation by the London reinsurers who, along with domestic retrocessional reinsurers, conspired to limit coverage of seepage, pollution, and property contamination risks in North America, thereby eliminating such coverage in the State of California.

At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede. See Tr. of Oral Arg. 37 . . . ("Our position is not that the Sherman Act does not apply in the sense that a minimal basis for the exercise of jurisdiction doesn't exist here. Our position is that there are certain circumstances, and that this is one of them, in which the interests of another State are sufficient that the exercise of that jurisdiction should be restrained"). Although the proposition was perhaps not always free from doubt, see American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. Such is the conduct
alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect.

According to the London reinsurers, the District Court should have declined to exercise such jurisdiction under the principle of international comity. The Court of Appeals agreed that courts should look to that principle in deciding whether to exercise jurisdiction under the Sherman Act. This availed the London reinsurers nothing, however. To be sure, the Court of Appeals believed that “application of [American] antitrust laws to the London reinsurance market would lead to significant conflict with English law and policy,” and that “such a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction.” But other factors, in the court’s view, including the London reinsurers’ express purpose to affect United States commerce and the substantial nature of the effect produced, outweighed the supposed conflict and required the exercise of jurisdiction in this case.

When it enacted the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 96 Stat. 1246, 15 U.S.C. § 6a, Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity. See H. R. Rep. No. 97-686, p. 13 (1982) (“If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court’s ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction”) (citing Timberlane). We need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct (or, as Justice SCALIA would put it, may conclude by the employment of comity analysis in the first instance that there is no jurisdiction), international comity would not counsel against exercising jurisdiction in the circumstances alleged here.

The only substantial question in this case is whether “there is in fact a true conflict between domestic and foreign law.” The London reinsurers contend that applying the Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as amicus curiae, concurs. See Brief for Petitioners in No. 91-1128, pp. 22–27; Brief for Government
of United Kingdom of Great Britain and Northern Ireland as Amicus Curiae 10–14. They assert that Parliament has established a comprehensive regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict. "[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct. Restatement (Third) Foreign Relations Law § 415, Comment j; see Continental Ore Co., supra, 370 U.S. at 706–707. No conflict exists, for these purposes, "where a person subject to regulation by two states can comply with the laws of both." Restatement (Third) Foreign Relations Law § 403, Comment e. Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, see Reply Brief for Petitioners in No. 91-1128, pp. 7–8, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law. See Restatement (Third) Foreign Relations Law § 403, Comment e, § 415, Comment j. We have no need in this case to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.

IV

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

........

[Justice Scalia's view of the application of the Sherman Act to foreign conduct follows.]

II

The petitioners in No. 91-1128, various British corporations and other British subjects, argue that certain of the claims against them constitute an inappropriate extraterritorial application of the Sherman Act. It is important to distinguish two distinct questions
raised by this petition: whether the District Court had jurisdiction, and whether the Sherman Act reaches the extraterritorial conduct alleged here. On the first question, I believe that the District Court had subject-matter jurisdiction over the Sherman Act claims against all the defendants (personal jurisdiction is not contested). The respondents asserted nonfrivolous claims under the Sherman Act, and 28 U.S.C. § 1331 vests district courts with subject-matter jurisdiction over cases “arising under” federal statutes.

The second question—the extraterritorial reach of the Sherman Act—has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct. If a plaintiff fails to prevail on this issue, the court does not dismiss the claim for want of subject-matter jurisdiction—want of power to adjudicate; rather, it decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute.

There is, however, a type of “jurisdiction” relevant to determining the extraterritorial reach of a statute; it is known as “legislative jurisdiction.” This refers to “the authority of a state to make its law applicable to persons or activities,” and is quite a separate matter from “jurisdiction to adjudicate.” There is no doubt, of course, that Congress possesses legislative jurisdiction over the acts alleged in this complaint: Congress has broad power under Article I, § 8, cl. 3 “[t]o regulate Commerce with foreign Nations,” and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected. But the question in this case is whether, and to what extent, Congress has exercised that undoubted legislative jurisdiction in enacting the Sherman Act.

Two canons of statutory construction are relevant in this inquiry. The first is the “long-standing principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” . . . We have, however, found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially.
But if the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second canon of statutory construction becomes relevant: "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." This canon is "wholly independent" of the presumption against extraterritoriality. It is relevant to determining the substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. See Restatement (Third) §§ 401-416. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.

Consistent with that presumption, this and other courts have frequently recognized that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law....

*Lauritzen, Romero,* and *McCulloch* were maritime cases, but we have recognized the principle that the scope of generally worded statutes must be construed in light of international law in other areas as well. More specifically, the principle was expressed in *United States v. Aluminum Co. of America*, 148 F.2d 416 (CA2 1945), the decision that established the extraterritorial reach of the Sherman Act. . . . Judge Learned Hand cautioned "we are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'"

More recent lower court precedent has also tempered the extraterritorial application of the Sherman Act with considerations of "international comity." The "comity" they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed "prescriptive comity": the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory. . . . Considering comity in
this way is just part of determining whether the Sherman Act prohibits the conduct at issue.

In sum, the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence. In proceeding to apply that practice to the present case, I shall rely on the Restatement (Third) of Foreign Relations Law for the relevant principles of international law. . . .

Under the Restatement, a nation having some "basis" for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." Restatement (Third) § 403(1). The "reasonableness" inquiry turns on a number of factors including, but not limited to: "the extent to which the activity takes place within the territory [of the regulating state]," id., § 403(2)(a); "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated," id., § 403(2)(b); "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," id., § 403(2)(c); "the extent to which another state may have an interest in regulating the activity," id., § 403(2)(g); and "the likelihood of conflict with regulation by another state," id., § 403(2)(h). Rarely would these factors point more clearly against application of United States law. The activity relevant to the counts at issue here took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business or residence outside the United States. Great Britain has established a comprehensive regulatory scheme governing the London reinsurance markets, and clearly has a heavy "interest in regulating the activity." Finally, § 2(b) of the McCarran-Ferguson Act allows state regulatory statutes to override the Sherman Act in the insurance field, subject only to the narrow "boycott" exception set forth in § 3(b)—suggesting that "the importance of regulation to the [United States]," id., § 403(2)(c), is slight. Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the ab-
sence of statutory indication to the contrary, that Congress has made such an assertion.

It is evident from what I have said that the Court's comity analysis, which proceeds as though the issue is whether the courts should "decline to exercise . . . jurisdiction," rather than whether the Sherman Act covers this conduct, is simply misdirected. . . .

I would reverse the judgment of the Court of Appeals on this issue, and remand to the District Court with instructions to dismiss for failure to state a claim on the three counts at issue in No. 91-1128.

*****

F. The Meaning of 'Boycott, Coercion and Intimidation'

The primary thrust of the McCarran-Ferguson Act is to give the states power to determine the extent to which insurers would be permitted to engage in conduct that would otherwise violate the antitrust laws. Yet Section 3(b) is an important qualification; it completely precludes the states from shielding from the antitrust laws the more egregious kinds of conduct: boycott, coercion and intimidation. This limitation is plausible on its face, for such blatant anticompetitive conduct seems so seriously subversive of the American policy toward the proper operation of a free market that no degree of state approval should suffice to permit it.

Yet no thought was given, apparently, to the possible practical consequences of the rule. Alleging such egregious conduct in a complaint is not difficult. Even making it plausible to a court not so sophisticated about the complicated insurance business is not difficult. Proving it is quite another matter. Yet if it is alleged and is not implausible, the case cannot be disposed of readily on summary motions, but unless settled must go on to trial to determine the facts. That is especially evident in the following case, in which the alleged conduct was held to fall clearly within the meaning of "boycott," yet to someone familiar with the insurance business seems implau-
sible as a purported description of reality in the insurance marketplace. Even on the basis of economic theory it perhaps ought to be seen to be implausible, yet the case could not be disposed of on summary motions.

* * * * *

ST. PAUL FIRE & MARINE INSURANCE CO. v. BARRY 438 U.S. 531 (1978)

Mr. Justice Powell delivered the opinion of the Court.

Respondents, licensed physicians practicing in the State of Rhode Island and their patients, brought a class action, in part under the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 et seq. (1976 ed.), against petitioners, the four insurance companies writing medical malpractice insurance in the State. The complaint alleged a private conspiracy of the four companies in which three refused to sell respondents insurance of any type as a means of compelling their submission to new ground rules of coverage set by the fourth. Petitioner insurers successfully moved in District Court to dismiss the antitrust claim on the ground that it was barred by the McCarran-Ferguson Act (Act), 59 Stat. 33, as amended, 15 U.S.C. §§ 1011-1015 (1976 ed.). The Court of Appeals reversed, holding that respondents' complaint stated a claim within the “boycott” exception in § 3(b) of the Act, which provides that the Sherman Act shall remain applicable “to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation,” 15 U.S.C. § 1013 (b) (1976 ed.). 555 F.2d 3 (CA1 1977). We are required to decide whether the “boycott” exception applies to disputes between policyholders and insurers.

I

As this case comes to us from the reversal of a successful motion to dismiss, we treat the factual allegations of respondents' amended complaint as true. During the period in question, petitioners St. Paul Fire & Marine Insurance Co. (St. Paul), Aetna Casualty & Surety Co., Travelers Indemnity of Rhode Island (and two affiliated companies), and Hartford Casualty Co. (and an affiliated company) were the only sellers of medical malpractice in-
urance in Rhode Island. In April 1975, St. Paul, the largest of the insurers, announced that it would not renew medical malpractice coverage on an “occurrence” basis, but would write insurance only on a “claims made” basis. Following St. Paul's announcement, and in furtherance of the alleged conspiracy, the other petitioners refused to accept applications for any type of insurance from physicians, hospitals, or other medical personnel whom St. Paul then insured. The object of the conspiracy was to restrict St. Paul’s policyholders to “claims made” coverage by compelling them to “purchase medical malpractice insurance from one insurer only, to wit defendant, St. Paul, and that [such] purchase must be made on terms dictated by the defendant, St. Paul.” App. 25. It is alleged that this scheme was effectuated by a collective refusal to deal, by unfair rate discrimination, by agreements not to compete, and by horizontal price fixing, and that petitioners engaged in “a purposeful course of coercion, intimidation, boycott and unfair competition with respect to the sale of medical malpractice insurance in the State of Rhode Island.”

III

The Court of Appeals in this case determined that the word “boycott” in § 3(b) should be given its ordinary Sherman Act meaning as “a concerted refusal to deal.” The “boycott” exception, so read, covered the alleged conspiracy of petitioners, conducted “outside any state-permitted structure or procedure, [to] agree among themselves that customers dissatisfied with the coverage offered by one company shall not be sold any policies by any of the other companies.” 555 F.2d, at 9.

Petitioners take strong exception to this reading, arguing that the “boycott” exception “should be limited to cases where concerted refusals to deal are used to exclude or penalize insurance companies or other traders which refuse to conform their competitive practices to terms dictated by the conspiracy.” . . . Respondents . . . urge that this case involves a “traditional boycott,” defined as a concerted refusal to deal on any terms, as opposed to a refusal to deal except on specified terms.
We consider first petitioners' definition of "boycott" in view of the language, legislative history, and structure of the Act.

IV

A

The starting point in any case involving construction of a statute is the language itself. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). With economy of expression, Congress provided in § 3(b) for the continued applicability of the Sherman Act to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." Congress thus employed terminology that evokes a tradition of meaning, as elaborated in the body of decisions interpreting the Sherman Act. It may be assumed, in the absence of indications to the contrary, that Congress intended this language to be read in light of that tradition.

The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target. The word gained currency in this country largely as a term of opprobrium to describe certain tactics employed by parties to labor disputes. . . .

Petitioners define "boycott" as embracing only those combinations which target competitors of the boycotter as the ultimate objects of a concerted refusal to deal. They cite commentary that attempts to develop a test for distinguishing the types of restraints that warrant *per se* invalidation from other concerted refusals to deal that are not inherently destructive of competition. But the issue before us is whether the conduct in question involves a boycott, not whether it is *per se* unreasonable. In this regard, we have not been referred to any decision of this Court holding that petitioners' test states the necessary elements of a boycott within the purview of the Sherman Act. Indeed, the decisions reflect a marked lack of uniformity in defining the term.

Petitioners refer to cases stating that "group boycotts" are "concerted refusals by traders to deal with other traders," *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959), or are combinations of businessmen "to deprive others of access to merchandise which the latter wish to sell to the public," *United States v. General...*
Motors Corp., 384 U.S. 127, 146 (1966). We note that neither standard in terms excludes respondents . . . from the class of cognizable victims. But other verbal formulas also have been used. In FMC v. Svenska Amerika Linien, 390 U.S. 238, 250 (1968), for example, the court noted that “[u]nder the Sherman Act, any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal per se.” The Court also has stated broadly that “group boycotts, or concerted refusals to deal, clearly run afoul of § 1 [of the Sherman Act].” Times-Picayune v. United States, 345 U.S. 594, 625 (1953). Hence, “boycotts are not a unitary phenomenon.” P. Areeda, Antitrust Analysis 381 (2d ed. 1974).

As the labor-boycott cases illustrate, the boycotters and the ultimate target need not be in a competitive relationship with each other. This Court also has held unlawful, concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the sellers.

Whatever other characterizations are possible, petitioners’ conduct fairly may be viewed as “an organized boycott,” Fashion Guild v. FTC, 312 U.S. 457, 465 (1941), of St. Paul’s policyholders. Solely for the purpose of forcing physicians and hospitals to accede to a substantial curtailment of the coverage previously available, St. Paul induced its competitors to refuse to deal on any terms with its customers. This agreement did not simply fix rates or terms of coverage; it effectively barred St. Paul’s policyholders from all access to alternative sources of coverage and even from negotiating for more favorable terms elsewhere in the market. The pact served as a tactical weapon invoked by St. Paul in support of a dispute with its policyholders. The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott . . .

Thus if the statutory language is read in light of the customary understanding of “boycott” at the time of enactment, respondents’ complaint states a claim under § 3(b). But, as Mr. Justice Cardozo observed, words or phrases in a statute come “freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion. In such conditions history is a
teacher that is not to be ignored." ... We therefore must consider whether Congress intended to attach a special meaning to the word "boycott" in § 3(b).

\[\text{B}\]

In the Court of Appeals, petitioners argued that only insurance companies and agents could be victims of practices within the reach of the "boycott" exception. That position enjoys some support in the legislative history because the principal targets of the practices termed "boycotts" and "other types of coercion and intimidation" in *South-Eastern Underwriters* were insurance companies that did not belong to the industry association charged with the conspiracy, as well as agents and customers who dealt with those nonmembers.

See 322 U.S., at 535-536. Moreover, there are references in the debates to the need for preventing insurance companies and agents from "blacklisting" and imposing other sanctions against uncooperative competitors or agents.

\[\ldots\]

The language of § 3(b) is broad and unqualified; it covers "any" act or agreement amounting to a "boycott, coercion, or intimidation." If Congress had intended to limit its scope to boycotts of competing insurance companies or agents, and to preclude all Sherman Act protection for policyholders, it is not unreasonable to assume that it would have made this explicit. While the legislative history does not point unambiguously to the answer, it provides no substantial support for limiting language that Congress itself chose not to limit.

\[\text{C}\]

Petitioners also contend that the structure of the Act supports their reading of § 3(b). They note that this Court has interpreted the term "business of insurance" in § 2(b) broadly to encompass "[the] relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement," *SEC v. National Securities, Inc.*, 393 U.S., at 460, and has held that the mere enactment of "prohibitory legislation" and provision for "a scheme of administrative supervision" constitute ad-
equate regulation to satisfy the proviso to § 2(b), *FTC v. National Casualty Co.*, 357 U.S., at 564-565. Thus, petitioners conclude, § 3(b) cannot be interpreted in a fashion that would undermine the congressional judgment expressed in § 2(b) that the protection of policyholders is the primary responsibility of the States and that the state regulation which precludes application of federal law is not limited to regulation specifically authorizing the conduct challenged.

Petitioners rely on a syllogism that is faulty in its premise, for it ignores the fact that § 3(b) is an exception to § 2(b), and that Congress intended in the "boycott" clause to carve out of the overall framework of plenary state regulation an area that would remain subject to Sherman Act scrutiny. The structure of the Act embraces this exception. Unless § 3(b) is read to limit somewhat the sweep of § 2(b), it serves no purpose whatever. Petitioners do not press their argument that far, but they suggest no persuasive reason for engrafting a particular limitation on § 3(b) that is justified neither by its language nor by the legislative history.

V

We hold that the term "boycott" is not limited to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group. It remains to consider whether the type of private conduct alleged to have taken place in this case, directed against policyholders, constitutes a "boycott" within the meaning of § 3(b).

A

The conduct in question accords with the common understanding of a boycott. The four insurance companies that control the market in medical malpractice insurance are alleged to have agreed that three of the four would not deal on any terms with the policyholders of the fourth. As a means of ensuring policyholder submission to new, restrictive ground rules of coverage, St. Paul obtained the agreement of the other petitioners, strangers to the immediate dispute, to refuse to sell any insurance to its policyholders. . . .
Our ruling does not alter § 2(b)'s protection of state regulatory and tax laws, its recognition of the primacy of state regulation, or the limited applicability of the federal antitrust laws generally "to the extent that" the "business of insurance" is not regulated by state law. Moreover, conduct by individual actors falling short of concerted activity is simply not a "boycott" within § 3(b). Cf. *Times-Picayune v. United States*, 345 U.S., at 625. Finally, while we give force to the congressional intent to preserve Sherman Act review for certain types of private collaborative activity by insurance companies, we do not hold that all concerted activity violative of the Sherman Act comes within § 3(b). Nor does our decision address insurance practices that are compelled or specifically authorized by state regulatory policy.

The judgment of the Court of Appeals therefore is

*Affirmed.*

Mr. Justice Stewart, with whom Mr. Justice Rehnquist joins, dissenting.

Section 2(b) of the McCarran-Ferguson Act provides that the Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State Law." Section 3(b) limits the antitrust immunity which the States may confer by providing that the Sherman Act shall remain applicable to agreements or acts of "boycott, coercion, or intimidation." Today the Court holds that the term "boycott" found in § 3(b) should be given the same broad meaning that it has been given in Sherman Act case law. It seems clear to me, however, that the "boycott, coercion, or intimidation" language of § 3(b) was intended to refer, not to the practices defined and condemned by the Sherman Act, but to the narrower range of practices involved in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, the case that prompted Congress to enact the McCarran-Ferguson Act.
I

The Court accurately reads the Act as not conferring broadscale antitrust immunity on the insurance industry, at least not for practices that “occurred outside of any regulatory or cooperative arrangement established by the laws of Rhode Island.” Ante, at 553. Although Congress plainly intended to give the States priority in regulating the insurance industry, it just as plainly intended not to immunize that industry from federal antitrust liability “to the extent that such business is not regulated by State Law.” In thus construing the Act’s general purpose, the Court is true to the legislative history. But I cannot understand why the Court then tries to achieve that statutory purpose by giving an unduly expansive reading to § 3(b), when the provision that obviously was meant to accomplish that purpose was § 2(b). Properly read, § 2(b) suspends the federal antitrust laws only to the extent that an area or practice is regulated by state law. Although the Court correctly notes that § 2(b) “is not in issue in this case,” ante, at 540, neither section can be construed entirely independently of the other.

The broad reading the Court gives to § 3(b) seems to me not only to misconceive the larger design of the Act, but also to distort its basic purpose. Section 3(b) is an absolute exception to § 2(b). It brings back under the Sherman Act a range of practices, whether authorized by state law or not. By construing § 3(b) very expansively, the Court narrows the field of regulation open to the States. Yet it was clearly Congress’ intent to give the States generous license to govern the business of insurance free of interference from the antitrust laws.

Because I believe that the Court’s construction of § 3(b) overlooks the role of § 2(b) and misperceives congressional intent, I respectfully dissent.

II

It is true, as the Court says, that the McCarran-Ferguson Act fails to tell us in so many words that the phrase “boycott, coercion, or intimidation” should be read in some light other than that “tradition of meaning, as elaborated in the body of decisions interpreting the Sherman Act.” Ante, at 541. Yet, the very selection of precisely those three words from the entire antitrust lexicon
indicates that they were intended to have some special meaning apart from traditional usage. Indeed, if “boycott” is to be given the same scope it has in Sherman Act case law, then so should “coercion” and “intimidation.” But that reading of § 3(b) would plainly devour the broad antitrust immunity bestowed by § 2(b). Congress could not logically have intended that result. To understand the special sense in which it used the words “boycott, coercion, or intimidation,” therefore, we must turn to the legislative history of the McCarran-Ferguson Act.

III

From this review of the legislative history, it should be clear that the scope given both §§ 2(b) and 3(b) is crucial to the effectuation of the compromise struck by the 79th Congress. If § 2(b) is construed broadly to pre-empt federal law without the need for specific state legislation and if § 3(b) is given no effect as a limitation on that pre-emption, the original House position prevails. On the other hand, if § 3(b) is construed as broadly as the Sherman Act itself, then the original Senate version largely prevails, no matter how § 2(b) is interpreted. Congress clearly intended a middle position between these extremes. That position cannot be given effect unless § 2(b) is read to pre-empt federal law only to the extent the States have actually regulated a particular area, and § 3(b) is viewed as referring to a range of evils considerably narrower than those prohibited by the Sherman Act.

From the legislative debates on S. 340, the Committee Reports, and the design of the statute itself, it is evident that the “boycott, coercion, or intimidation” provision is most fairly read as referring to the kinds of antitrust violations alleged in South-Eastern Underwriters—that is, attempts by members of the insurance business to force other members to follow the industry’s private rules and practices. Repeatedly, Congressmen involved in the drafting of the statute drew a distinction between state regulation and private regulation. Congress plainly wanted to allow the States to authorize anticompetitive practices which they determined to be in the public interest, as indicated by formal state approval. Section 2(b) does just that. Congress just as plainly wanted to make sure that
private organizations set up to govern the industry, such as the South-Eastern Underwriters Association, would not escape the reach of the federal antitrust laws. Section 2(b) also meets this concern to the extent that States do not authorize or sanction anticompetitive practices promoted by such organizations. But § 2(b) leaves open the possibility that States might, at the prompting of these powerful organizations, enact merely permissive regulations sufficiently specific to confer antitrust immunity, thus leaving those organizations free to coerce compliance from uncooperative competitors. Properly construed, § 3(b) fills this gap by keeping the Sherman Act fully applicable to private enforcement—by the means described in the South-Eastern Underwriters case—of industry rules and practices, even if those rules and practices are permitted by state law. Similarly, where a State enacts its own antitrust laws conferring § 2(b) immunity, § 3(b) retains Sherman Act coverage for those especially “destructive . . . practices,” 322 U.S., at 562, involved in South-Eastern Underwriters.

The key feature of § 3(b), then, is that the agreement or act of “boycott, coercion, or intimidation” must be aimed ultimately at a member of the insurance industry. As in South-Eastern Underwriters, the immediate targets may be policyholders or others outside the industry, but unless they are boycotted, coerced, or intimidated for the purpose of forcing other insurance companies or agents to comply with industry rules, § 3(b) does not apply.

It follows, then, that § 3(b) does not reach the boycott alleged in this case. The respondents’ complaint does not contend that petitioner insurance companies refused to sell them insurance with the ultimate aim of disciplining or coercing other insurance companies. Rather, if there was an agreement among the petitioners, the complaint would indicate that it was entirely voluntary.

I would reverse the judgment of the Court of Appeals.

* * * *

No actual boycott was proved in Barry. By the nature of the insurance business, this result is hardly surprising. It was the slim likelihood of profitability of the business that led former players to exit

the marketplace and new competitors to fail to enter. As market factors have changed, new entrants—at times mutuals created by groups unable to find coverage in the commercial market—have begun to offer insurance coverage at rates attractive to their members.\(^{40}\) Conversely, at other stages of the market cycles some commercial companies that had left the market have re-entered and competed with the new mutuals.\(^{41}\)

The most recent discussion of the meaning of "boycott" is to be found in *Hartford Fire Insurance Co. v. California*, 113 S. Ct. 2891 (1993). A portion of that opinion is found *supra* in the section on the "business of insurance." The portions of the opinion dealing with "boycott" follow. Justice Scalia’s opinion was the opinion of the court on the "boycott" issue, that of Justice Souter dissented on that question. They follow in that order.

* * * *

**HARTFORD FIRE INSURANCE CO. v. CALIFORNIA** 113 S. Ct. 2891 (1993)

[Portions of the opinion dealing with boycott follow.]

Justice SCALIA delivered the opinion of the Court with respect to Part I, and delivered a dissenting opinion with respect to Part II, in which Justice O’CONNOR, Justice KENNEDY, and Justice THOMAS have joined.

With respect to the petition in No. 91-1111, I join the Court’s judgment and Part I and II-A of its opinion. I write separately


because I do not agree with Justice Souter's analysis, set forth in Part II-B of his opinion, of what constitutes a "boycott" for purposes of § 3(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1013(b). With respect to the petition in No. 92-1128, I dissent from the Court's ruling concerning the extraterritorial application of the Sherman Act. Part I below discusses the boycott issue; Part II extraterritoriality.

I

Determining proper application of § 3(b) of the McCarran-Ferguson Act to the present case requires precise definition of the word "boycott."

[Justice SCALIA discusses the origin of the word "boycott." ]

To "boycott" means "[t]o combine in refusing to hold relations of any kind, social or commercial, public or private, with (a neighbour), on account of political or other differences, so as to punish him for the position he has taken up, or coerce him into abandoning it." 2 The Oxford English Dictionary 468 (2d ed. 1989).

Petitioners have suggested that a boycott ordinarily requires "an absolute refusal to deal on any terms," which was conceded not the case here. We think not. As the definition just recited provides, the refusal may be imposed "to punish [the target] for the position he has taken up, or coerce him into abandoning it." The refusal to deal may, in other words, be conditional, offering its target the incentive of renewed dealing if and when he mends his ways. . . .

It is, however, important—and crucial in the present case—to distinguish between a conditional boycott and a concerted agreement to seek particular terms in particular transactions. A concerted agreement to terms (a "cartelization") is "a way of obtaining and exercising market power by concertedly exacting terms like those which a monopolist might exact." L. Sullivan, Law of Antitrust 257 (1977). The parties to such an agreement (the members of a cartel) are not engaging in a boycott, because:

"They are not coercing anyone, at least in the usual sense of that word; they are merely (though concertedly) saying 'we will deal with you only on the following trade terms.'"

"... Indeed, if a concerted agreement, say, to include a security deposit in all contracts is a 'boycott' because it excludes all buyers who won't agree to it, then by parity of reasoning every price fixing agree-
ment would be a boycott also. The use of the single concept, boycott, to cover agreements so varied in nature can only add to confusion.” Ibid. (emphasis added).

Thus, if Captain Boycott’s tenants had agreed among themselves that they would refuse to renew their leases unless he reduced his rents, that would have been a concerted agreement on the terms of the leases, but not a boycott. The tenants, of course, did more than that; they refused to engage in other, unrelated transactions with Boycott—e.g., selling him food—unless he agreed to their terms on rents. It is this expansion of the refusal to deal beyond the targeted transaction that gives great coercive force to a commercial boycott: unrelated transactions are used as leverage to achieve the terms desired.

Of course as far as the Sherman Act (outside the exempted insurance field) is concerned, concerted agreements on contract terms are as unlawful as boycotts. . . . In fact, in the 65 years between the coining of the word and enactment of the McCarran-Ferguson Act in 1945, “boycott” appears in only seven opinions of this Court involving commercial (nonlabor) antitrust matters, and not once is it used as Justice SOUTER uses it—to describe a concerted refusal to engage in particular transactions until the terms of those transactions are agreeable.

[Justice SCALIA provided specific examples of concerted refusals to deal that are not boycotts.]

In addition to its use in the antitrust field, the concept of “boycott” frequently appears in labor law, and in this context as well there is a clear distinction between boycotts and concerted agreements seeking terms. The ordinary strike seeking better contract terms is a “refusal to deal”—i.e., union members refuse to sell their labor until the employer capitulates to their contract demands. But no one would call this a boycott, because the conditions of the “refusal to deal” relate directly to the terms of the refused transaction (the employment contract). A refusal to work changes from strike to boycott only when it seeks to obtain action from the employer unrelated to the employment contract. This distinction is well illustrated by the famous boycott of Pullman cars by Eugene Debs’ American Railway Union in 1894. The incident began when workers at the Pullman Palace Car Company called a strike,
but the "boycott" occurred only when other members of the American Railway Union, not Pullman employees, supported the strikers by refusing to work on any train drawing a Pullman car. See *In re Debs*, 158 U.S. 564, 566-567 (1895) (statement of the case); H. Laidler, Boycotts and the Labor Struggle 100-108 (1968). The refusal to handle Pullman cars had nothing to do with Pullman cars themselves (working on Pullman cars was no more difficult or dangerous than working on other cars); rather, it was in furtherance of the collateral objective of obtaining better employment terms for the Pullman workers. In other labor cases as well, the term "boycott" invariably holds the meaning that we ascribe to it: its goal is to alter, not the terms of the refused transaction, but the terms of workers' employment.

The one case in which we have found an activity to constitute a "boycott" within the meaning of the McCarran-Ferguson Act is *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978). There the plaintiffs were licensed physicians and their patients, and the defendant (St. Paul) was a malpractice insurer that had refused to renew the physicians' policies on an "occurrence" basis, but insisted upon a "claims made" basis. The allegation was that, at the instance of St. Paul, the three other malpractice insurers in the State had collectively refused to write insurance for St. Paul customers, thus forcing them to accept St. Paul's renewal terms. Unsurprisingly, we held the allegation sufficient to state a cause of action. The insisted-upon condition of the boycott (not being a former St. Paul policyholder) was "artificial": it bore no relationship (or an "artificial" relationship) to the proposed contracts of insurance that the physicians wished to conclude with St. Paul's competitors.

Under the standard described, it is obviously not a "boycott" for the reinsurers to "refuse to reinsure coverages written on the ISO CGL forms until the desired changes were made," because the terms of the primary coverages are central elements of the reinsurance contract—they are what is reinsured. The "primary policies are ... the basis of the losses that are shared in the reinsurance agreements." 1 B. Webb, H. Anderson, J. Cookman, & P. Kensicki, *Principles of Reinsurance* 87 (1990); see also *id.*, at 55; Gurley, *Regulation of Reinsurance in the United States*, 19 Forum 72, 73 (1983). Indeed, reinsurance is so closely tied to the terms of the primary insurance contract that one of the two categories
of reinsurance (assumption reinsurance) substitutes the reinsurer for the primary or "ceding" insurer and places the reinsurer into contractual privity with the primary insurer's policyholders. And in the other category of reinsurance (indemnity reinsurance), either the terms of the underlying insurance policy are incorporated by reference (if the reinsurance is written under a facultative agreement), Reinsurance (1979), or (if the reinsurance is conducted on a treaty basis) the reinsurer will require full disclosure of the terms of the underlying insurance policies and usually require that the primary insurer not vary those terms without prior approval.

Justice SOUTER simply disregards this integral relationship between the terms of the primary insurance form and the contract of reinsurance. He describes the reinsurers as "individuals and entities who were not members of ISO, and who would not ordinarily be parties to an agreement setting the terms of primary insurance, not being in the business of selling it." While this factual assumption is crucial to Justice SOUTER's reasoning (because otherwise he would not be able to distinguish permissible agreements among primary insurers), he offers no support for the statement. But even if it happens to be true, he does not explain why it must be true—that is, why the law must exclude reinsurers from full membership and participation. The realities of the industry may make explanation difficult:

"Reinsurers also benefit from the services by ISO and other rating or service organizations. The underlying rates and policy forms are the basis for many reinsurance contracts. Reinsurers may also subscribe to various services. For example, a facultative reinsurer may subscribe to the rating service, so that they have the rating manuals available, or purchase optional services, such as a sprinkler report for a specific property location." 2 R. Reinarz, J. Schloss, G. Patrik, & P. Kensicki, Reinsurance Practices 18 (1990).

Justice SOUTER also describes reinsurers as being "outside the primary insurance industry." That is technically true (to the extent the two symbiotic industries can be separated) but quite irrelevant. What matters is that the scope and predictability of the risks assumed in a reinsurance contract depend entirely upon the terms of the primary policies that are reinsured. The terms of the primary policies are the "subject-matter insured" by reinsurance, so that to insist upon certain primary-insurance terms as a condition of writing reinsurance is in no way "artificial"; and hence for a
number of reinsurers to insist upon such terms jointly is in no way a "boycott."

Justice SOUTER seems to believe that a non-boycott is converted into a boycott by the fact that it occurs "at the behest of," or is "solicited" by, competitors of the target. He purports to find support for this implausible proposition in United States v. South-Eastern Underwriters Assn., which involved a classic boycott, by primary insurers, of competitors who refused to join their price-fixing conspiracy, the South-Eastern Underwriters Association (S.E.U.A.). The conspirators would not deal with independent agents who wrote for such companies, and would not write policies for customers who insured with them. Moreover, Justice BLACK's opinion for the Court noted cryptically, "[c]ompanies not members of S.E.U.A. were cut off from the opportunity to reinsurance their risks." Justice SOUTER speculates that "the [S.E.U.A.] defendants could have [managed to cut the targets off from reinsurance] by prompting reinsurance companies to refuse to deal with nonmembers." Even assuming that is what happened, all that can be derived from S.E.U.A. is the proposition that one who prompts a boycott is a co-conspirator with the boycotters. For with or without the defendants' prompting, the reinsurers' refusal to deal in S.E.U.A. was a boycott, membership in the association having no discernible bearing upon the terms of the refused reinsurance contracts.

Justice SOUTER suggests that we have somehow mistakenly "posit[ed]... autonomy on the part of the reinsurers." We do not understand this. Nothing in the complaints alleges that the reinsurers were deprived of their "autonomy," which we take to mean that they were coerced by the primary insurers. (Given the sheer size of the Lloyd's market, such an allegation would be laughable.) That is not to say that we disagree with Justice SOUTER's contention that, according to the allegations, the reinsurers would not "have taken exactly the same course of action without the intense efforts of the four primary insurers." But the same could be said of the participants in virtually all conspiracies: If they had not been enlisted by the "intense efforts" of the leaders, their actions would not have been the same. If this factor renders otherwise lawful conspiracies (under McCarran-Ferguson) illegal, then the Act would have a narrow scope indeed.
Perhaps Justice Souter feels that it is undesirable, as a policy matter, to allow insurers to “prompt” reinsurers not to deal with the insurers’ competitors—whether or not that refusal to deal is a boycott. That feeling is certainly understandable, since under the normal application of the Sherman Act the reinsurers’ concerted refusal to deal would be an unlawful conspiracy, and the insurers’ “prompting” could make them part of that conspiracy. The McCarran-Ferguson Act, however, makes that conspiracy lawful (assuming reinsurance is state-regulated), unless the refusal to deal is a “boycott.”

Under the test set forth above, there are sufficient allegations of a “boycott” to sustain the relevant counts of complaint against a motion to dismiss. For example, the complaints allege that some of the defendant reinsurers threatened to “withdraw[ing] entirely from the business of reinsuring primary U.S. insurers who wrote on the occurrence form.” Construed most favorably to the respondents, that allegation claims that primary insurers who wrote insurance on disfavored forms would be refused all reinsurance, even as to risks written on other forms. If that were the case, the reinsurers might have been engaging in a boycott—they would, that is, unless the primary insurers’ other business were relevant to the proposed reinsurance contract (for example, if the reinsurer bears greater risk where the primary insurer engages in riskier businesses). Other allegations in the complaints could be similarly construed. For example, the complaints also allege that the reinsurers “threatened a boycott of North American CGL risks,” not just CGL risks containing dissatisfactory terms, that “the foreign and domestic reinsurer representatives presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance,” that some of the defendant insurers and reinsurers told “groups of insurance brokers and agents . . . that a reinsurance boycott, and thus loss of income to the agents and brokers who would be unable to find available markets for their customers, would ensue if the [revised] ISO forms were not approved.”

Many other allegations in the complaints describe conduct that may amount to a boycott if the plaintiffs can prove certain additional facts. For example, General Re, the largest American reinsurer, is alleged to have “agreed to either coerce ISO to adopt [the defendants’] demands or, failing that, ‘derail’ the entire CGL forms program.” If this means that General Re intended to with-
hold all reinsurance on all CGL forms—even forms having no objectionable terms—that might amount to a "boycott." Also, General Re and several other domestic reinsurers are alleged to have "agreed to boycott the 1984 ISO forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and a defense cost cap were added to both [the occurrence and claims made] forms." Liberally construed, this allegation may mean that the defendants had linked their demands so that they would continue to refuse to do business on either form until both were changed to their liking. Again, that might amount to a boycott. "[A] complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Under that standard, these allegations are sufficient to sustain the First, Second, Third, and Fourth Claims for Relief in the California Complaint and the First and Second Claims for Relief in the Connecticut Complaint.

[The following is Part II, B of Justice SOUTER's opinion dealing with "boycott."]

B

That the domestic defendants did not lose their § 2(b) exemption by acting together with foreign reinsurers, however, is not enough reason to reinstate the District Court's dismissal order, for the Court of Appeals reversed that order on two independent grounds. Even if the participation of foreign reinsurers did not affect the § 2(b) exemption, the Court of Appeals held, the agreements and acts alleged by the plaintiffs constitute "agreement[s] to boycott" and "act[s] of boycott [and] coercion" within the meaning of § 3(b) of the McCarran-Ferguson Act, which makes it clear that the Sherman Act applies to such agreement[s] and act[s] regardless of the § 2(b) exemption. See 938 F.2d, at 928. I agree with the Court that, construed in favor of the plaintiffs, the First, Second, Third, and Fourth Claims for Relief of the California Complaint, and the First and Second Claims for Relief of the Connecticut Complaint, allege one or more § 3(b) "acts of boycott," and are thus sufficient to survive a motion to dismiss.

In reviewing the motions to dismiss, however, the Court has decided to use what I believe to be an overly narrow definition of
the term "boycott" as used in § 3(b), confining it to those refusals to deal that are "unrelated" or "collateral" to the objective sought by those refusing to deal. I do not believe that the McCarran-Ferguson Act or our precedents warrant such a cramped reading of the term.

The majority and I find common ground in four propositions concerning § 3(b) boycotts, as established in our decisions in *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978), and *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). First, as we noted in *St. Paul*, our only prior decision construing "boycott" as it appears in § 3(b), only those refusals to deal involving the coordinated action of multiple actors constitute § 3(b) boycotts: "conduct by individual actors falling short of concerted activity is simply not a 'boycott' within [the meaning of] § 3(b)."

Second, a § 3(b) boycott need not involve an absolute refusal to deal. A primary goal of the alleged conspirators in *South-Eastern Underwriters*, as we described it, was "to force nonmember insurance companies into the conspiracies." 322 U.S., at 535; cf. Joint Hearing on S. 1362, H. R. 3269, and H. R. 3270 before the Subcommittees of the Senate Committee on the Judiciary, 78th Cong., 1st Sess., pt. 2, p. 335 (1943) (statement of Edward L. Williams, President, Insurance Executives Assn.) ("[T]he companies that want to come into the Interstate Underwriters Board can come in there. I do not know of any company that is turned down"). Thus, presumably, the refusals to deal orchestrated by the defendants would cease if the targets agreed to join the Association and abide by its terms. ("The refusal to deal may . . . be conditional").

Third, contrary to petitioners' contentions, boycott need not entail unequal treatment of the targets of the boycott and its instigators. Some refusals to deal (those, perhaps, which are alleged to violate only § 2 of the Sherman Act) may have as their object the complete destruction of the business of competitors; these may well involve unconditional discrimination against the targets. Other refusals to deal, however, may seek simply to prevent competition as to the price or features of the product sold; and these need not depend on unequal treatment of the targets. Assuming, as the *South-Eastern Underwriters* Court appears to have done, that membership in the defendant Association was open to all
insurers, the Association is most readily seen as having intended to treat all insurers equally: they all had the choice either to join the Association and abide by its rules, or to be subjected to the "boycotts," and acts of coercion and intimidation, alleged in that case.

Fourth, although a necessary element, "concerted activity" is not, by itself, sufficient for a finding of "boycott" under § 3(b). Were this the case, we recognized in Barry, § 3(b) might well "devour the broad antitrust immunity bestowed by § 2(b)," 438 U.S., at 545, n. 18, since every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," 15 U.S.C. § 1, involves "concerted activity." Thus, we suggested, simple price fixing has been treated neither as a boycott nor as coercion "in the absence of any additional enforcement activity." 438 U.S., at 545, n. 18; (contending that simple concerted agreements on contract terms are not properly characterized as boycotts).

Contrary to the majority's view, however, our decisions have suggested that "enforcement activity" is a multifarious concept. The South-Eastern Underwriters Court, which coined the phrase "boycotts[,]... coercion and intimidation," 322 U.S., at 535, provides us with a list of actions that, it finds, are encompassed by these terms. "Companies not members of [the Association]," it states, "were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-[Association] companies were punished by a withdrawal of the right to represent the members of [the Association]; and persons needing insurance who purchased from non-[Association] companies were threatened with boycotts and withdrawal of all patronage." 322 U.S., at 535-536. Faced with such a list, and with all of the other instances in which we have used the term "boycott," we rightly came to the conclusion in Barry that, as used in our cases, the term does not refer to a "unitary phenomenon." 438 U.S., at 543 (quoting P. Areeda, Antitrust Analysis 381 (2d ed. 1974)).

The question in this case is whether the alleged activities of the domestic defendants, acting together with the foreign defendants who are not petitioners here, include "enforcement activities" that would raise the claimed attempts to fix terms to the level of § 3(b) boycotts. I believe they do. The core of the plaintiffs' allegations
against the domestic defendants concern those activities that form
the basis of the First, Second, Third, and Fourth Claims for Relief
of the California Complaint, and the Second Claim for Relief of
the Connecticut Complaint: the conspiracies involving both the
primary insurers and domestic and foreign brokers and reinsurers
to force changes in the ISO CGL forms. According to the com-
plaints, primary insurer defendants Hartford and Allstate first
tried to convince other members of the ISO that the ISO CGL
forms should be changed to limit coverage in the manner we have
detailed above . . . but they failed to persuade a majority of mem-
bers of the relevant ISO committees, and the changes were not
made. Unable to persuade other primary insurers to agree volun-
tarily to their terms, Hartford and Allstate, joined by Aetna and
CIGNA, sought the aid of other individuals and entities who were
not members of ISO, and who would not ordinarily be parties to
an agreement setting the terms of primary insurance, not being in
the business of selling it. The four primary insurers convinced
these individuals and entities, the reinsurers, to put pressure on
ISO and its members by refusing to reinsure coverages written on
the ISO CGL forms until the desired changes were made. Both
domestic and foreign reinsurers, acting at the behest of the four
primary insurers, announced that they would not reinsure under
the ISO CGL forms until changes were made. As an immediate
result of this pressure, ISO decided to include a retroactive-date
provision in its claims-made form, and to exclude all pollution
coverage from both its claims-made and occurrence forms. In sum,
the four primary insurers solicited refusals to deal from outside
the primary insurance industry as a means of forcing their fellow
primary insurers to agree to their terms; the outsiders, acting at
the behest of the four, in fact refused to deal with primary insurers
until they capitulated, which, in part at least, they did.

This pattern of activity bears a striking resemblance to the first
act of boycott listed by the *South-Eastern Underwriters* Court; al-
though neither the *South-Eastern Underwriters* opinion, nor the
underlying indictment, details exactly how the defendants man-
ged to “cut off [nonmembers] from the opportunity to reinsure
their risks,” 322 U.S., at 535, the defendants could have done so
by prompting reinsurance companies to refuse to deal with non-
members, just as is alleged here. Moreover, the activity falls
squarely within even the narrow theory of the § 3(b) exception
Justice Stewart advanced in dissent in *Barry*. Under that theory, the § 3(b) exception should be limited to “attempts by members of the insurance business to force other members to follow the industry’s private rules and practices.” 438 U.S., at 565 (Stewart, J., dissenting). I can think of no better description of the four primary insurers’ activities in this case. For these reasons, I agree with the Court’s ultimate conclusion that the Court of Appeals was correct in reversing the District Court’s dismissal of the First, Second, Third, and Fourth Claims for Relief of the California Complaint, and the Second Claim for Relief of the Connecticut Complaint.

The majority concludes that, so long as the reinsurers’ role in this course of action was limited to “a concerted agreement to seek particular terms in particular transactions,”... the course of action could never constitute a § 3(b) boycott. The majority’s emphasis on this conclusion assumes an artificial segmentation of the course of action, and a false perception of the unimportance of the elements of that course of action other than the reinsurers’ agreement. The majority concedes that the complaints allege, not just implementation of a horizontal agreement, but refusals to deal that occurred “at the behest of,” or were “solicited by,” the four primary insurers, who were “competitors of the targets.” But it fails to acknowledge several crucial features of these events that bind them into a single course of action recognizable as a § 3(b) boycott.

First, the allegation that the reinsurers acted at the behest of the four primary insurers excludes the possibility that the reinsurers acted entirely in their own independent self-interest, and would have taken exactly the same course of action without the intense efforts of the four primary insurers. Although the majority never explicitly posits such autonomy on the part of the reinsurers, this would seem to be the only point of its repeated emphasis on the fact that “the scope and predictability of the risks assumed in a reinsurance contract depend entirely upon the terms of the primary policies that are reinsured.” If the encouragement of the four primary insurers played no role in the reinsurers’ decision to act as they did, then it is difficult to see how one could describe the reinsurers as acting at the behest of the primary insurers, an element I find crucial to the § 3(b) boycott alleged here. From the vantage point of a ruling on motions to dismiss, however, I discern
sufficient allegations in the complaints that this is not the case. In addition, according to the complaints, the four primary insurers were not acting out of concern for the reinsurers' financial health when they prompted the reinsurers to refuse reinsurance for certain risks; rather, they simply wanted to ensure that no other primary insurer would be able to sell insurance policies that they did not want to sell. Finally, as the complaints portray the business of insurance, reinsurance is a separate, specialized product, “[t]he availability [of which] affects the ability and willingness of primary insurers to provide insurance to their customers.” Thus, contrary to the majority’s assertion, the boundary between the primary insurance industry and the reinsurance industry is not merely “technica[l].”

The majority insists that I “disregar[d] th[e] integral relationship between the terms of the primary insurance form and the contract of reinsurance,” a fact which it seems to believe makes it impossible to draw any distinction whatsoever between primary insurers and reinsurers. Yet it is the majority that fails to see that, in spite of such an “integral relationship,” the interests of primary insurer and reinsurer will almost certainly differ in some cases. For example, the complaints allege that reinsurance contracts often “layer” risks, “in the sense that [a] reinsurer may have to respond only to claims above a certain amount. . . .” Thus, a primary insurer might be much more concerned than its reinsurer about a risk that resulted in a high number of relatively small claims. Or the primary insurer might simply perceive a particular risk differently from the reinsurer. The reinsurer might be indifferent as to whether a particular risk was covered, so long as the reinsurance premiums were adjusted to its satisfaction, whereas the primary insurer might decide that the risk was “too hot to handle,” on a standardized basis, at any cost. The majority’s suggestion that “to insist upon certain primary-insurance terms as a condition of writing reinsurance is in no way ‘artificial,’ ” simply ignores these possibilities; the conditions could quite easily be “artificial,” in the sense that they are not motivated by the interests of the reinsurers themselves. Because the parties have had no chance to flesh out the facts of this case, because I have no a priori knowledge of those facts, and because I do not believe I can locate them in the pages of insurance treatises, I would not rule out these possibilities on a motion to dismiss.
Believing that there is no other principled way to narrow the § 3(b) exception, the majority decides that "boycott" encompasses just those refusals to deal that are "unrelated" or "collateral" to the objective sought by those refusing to deal. This designation of a single "'unitary phenomenon,'" Barry, 438 U.S., at 543, to which the term "boycott" will henceforth be confined, is of course at odds with our own description of our Sherman Act cases in Barry. Moreover, the limitation to "collateral" refusals to deal threatens to shrink the § 3(b) exception far more than the majority is willing to admit. Even if the reinsurers refused all reinsurance to primary insurers "who wrote insurance on disfavored forms," including insurance "as to risks written on other forms," the majority states, the reinsurers would not be engaging in a § 3(b) boycott if "the primary insurers’ other business were relevant to the proposed insurance contract (for example, if the reinsurer bears greater risk where the primary insurer engages in riskier businesses)." Under this standard, and under facts comparable to those in this case, I assume that reinsurers who refuse to deal at all with a primary insurer unless it ceases insuring a particular risk would not be engaging in a § 3(b) boycott if they could show that (1) insuring the risk in question increases the probability that the primary insurer will become insolvent, and that (2) it costs more to administer the reinsurance contracts of a bankrupt primary insurer (including those unrelated to the risk that caused the primary insurer to declare bankruptcy). One can only imagine the variety of similar arguments that may slowly plug what remains of the § 3(b) exception. For these reasons, I cannot agree with the majority’s narrow theory of § 3(b) boycotts.

* * * *

G. Miscellaneous Problems

The interface between federal incursions into insurance and traditional state insurance regulation under McCarran-Ferguson becomes increasingly complicated; the long-run tendency seems to be in the direction of increasing federal involvement in insurance regulation.

One of the areas in which federal and state regulation intersect is in the control of the insurance activities of banks. The Journal of Insurance Regulation has contained comprehensive discussion of
the principal problems of this volatile area. Much of the prior discussion and litigation was made moot by the decision in *NationsBank v. Variable Annuity Life Ins. Co.*, reproduced supra in II. C. The Meaning of Insurance.42

Another area presenting difficult problems is the regulation of holding companies.43

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The federal Liability Risk and Retention Act permits purchasing
groups to form their own insurance mechanism. This raises the dif-
ficult question about how far such mechanisms may be regulated by
the states, for they are in reality insurance companies, though
McCarran reverse preemption would not apply with respect to any
problems addressed by the federal legislation.44

Ever since it was adopted, ERISA has been the source of conflict
between state insurance regulators and those who sought to insulate
themselves from that regulation by claiming ERISA preemption.45 In
addition to these major areas of litigation and discussion, courts have held that the federal Fair Housing Act applies to "redlining" by property and casualty companies,\(^46\) that the federal Medicare Law does not preempt consistent state regulation of related insurance marketing practices,\(^47\) that the Medicare Secondary Payer Program pre-


\(^{47}\) Solorzano v. Superior Court of Los Angeles County, 10 Cal. App. 4th 1135,
empts the McCarran-Ferguson Act,48 and RICO.49

The foregoing miscellaneous problems have been classified in terms of the general subject matter being treated. Some problems, however, can be classified better in terms of the doctrines that have been applied. For example, the doctrine of abstention (under which a court having jurisdiction defers to another court) comes up in numerous subject matter areas. It was treated in Ford Motor Co. v. Insurance Commissioner60 and discussed in a Note, Ford and USAA: State Regulation of Insurance Confirmed by Federal Circuit Court.51

Jurisdictional issues have been troublesome during the entire history of insurance litigation from at least the passage of McCarran. In a sense, virtually every case appearing in this book involved a jurisdictional question.52 More directly, jurisdictional issues have arisen in connection with solvency problems and rehabilitation or liquidation, because of the multiple jurisdictions that are involved.53

The problems of rehabilitation and liquidation of insurers operating in a multiplicity of jurisdictions has produced a considerable amount of discussion and writing, and some new proposals. Some of

50. Two cases were decided together by the Circuit Court; the other was USAA v. Foster. They came up from separate federal district courts. 874 F.2d 926 [3rd Cir. 1989].
52. See Kimball & Heaney, Emasculation of the McCarran-Ferguson Act: A Study in Judicial Activism, 1985 Utah L. Rev. 1 for a discussion of the main cases, including many of those reproduced in this book.
the writing focuses on problems arising out of the involvement of reinsurers with the insolvent insurer.54 Some new approaches have been suggested recently.55 In addition to expanding a program of accreditation of insurance departments (a program relying largely on cooperation among regulators), they included developing a uniform system of insolvency management and a model interstate compact.56

Recently, largely through the efforts of a former state regulator, James Jackson, considerable interest has been attracted to the possibility of using interstate compacts to facilitate state regulatory control over interstate and possibly even international insurance problem areas. In Jackson's view, transforming the NAIC Support Services Office into an interstate agency to implement agreements reached by compact among states would be a logical evolutionary step beyond ordinary state participation in insurance regulation.57


55. They were described and evaluated briefly in Payne, Call for Reform, 12 J. Ins. Reg. 140 [1993].

56. The first proposal is explained in a detailed article by Hall & Hall, Insurance Company Insolvencies: Order Out of Chaos, 12 J. Ins. Reg. 145 [1993]; the second is explained by Schacht & Gallanis, Interstate Compactas an Effective Mechanism for Insurance Receivership Reform, 12 J. Ins. Reg. 188 [1993]. The two proposals are inconsistent in important ways.

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