

Prudential Ins. Co. Vs. Benjamin

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Appellant : Prudential Ins. Co.

Respondent : Benjamin

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Prudential Ins. Co. v. Benjamin - 328 U.S. 408 (1946)

U.S. Supreme Court Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946)

Prudential Insurance Co. v. Benjamin

No. 707

Argued March 8, 11, 1946

Decided June 3, 1946

328 U.S. 408

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

SYLLABUS

1. A Statute of South Carolina imposed on foreign insurance companies as a condition on their doing business within the State an annual tax of three percent of premiums from business done within the State, without reference to the character of the transactions as interstate or local. No similar tax was imposed on South Carolina corporations.

Held, in view of the provisions of the Act of Congress of March 9, 1945, 59 Stat. 33, authorizing state regulation and taxation of the business of insurance, that the tax was not in violation of the Commerce Clause of the Federal Constitution, notwithstanding this Court's ruling in *United States v. South-Eastern Underwriters Assn.*, [322 U. S. 533](#) (1944). Pp. [328 U. S. 410](#) -411, [328 U. S. 422](#) .

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2. A state tax or regulation discriminating against interstate commerce, which would be invalid under the Commerce Clause in absence of action by Congress, may be validated by the affirmative action of Congress consenting thereto. Pp. [328 U. S. 421](#) -427.

3. The Commerce Clause is not a limitation upon the power of Congress over interstate and foreign commerce, but a grant to Congress of plenary and supreme authority over those subjects. P. [328 U. S. 423](#) .

4. The state tax here involved is clearly sustained by the Act of March 9, 1945, the purpose of which was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. Pp. [328 U. S. 427](#) -433.

5. The power of Congress over commerce is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. P. [328 U. S. 434](#) .

6. If authority over interstate commerce is exercised by Congress in conjunction with the States, their joint action is limited only by those provisions in the Constitution which forbid action altogether by any power or combination of powers

in our governmental system. P. [328 U. S. 434](#) .

7. In validating the state tax here involved, the Act of March 9, 1945, is not in violation of the due process clause of the Fifth Amendment, nor of the first clause of Art. I, 8, requiring that "all Duties, Imposts and Excises shall be uniform throughout the United States," nor of Art. I, 1, conferring the legislative power on Congress, nor of the Tenth Amendment. Pp. [328 U. S. 437](#) -439.

8. As here construed, the Act of March 9, 1945, does not involve an unconstitutional delegation by Congress of its power to the States. P. [328 U. S. 439](#) .

207 S.C. 324, 35 S.E.2d 586, affirmed.

By an original proceeding in the Supreme Court of South Carolina, appellant challenged the validity under the Federal Constitution of a state statute which imposed a tax upon foreign insurance companies. The state court upheld the tax, 207 S.C. 324, 35 S.E.2d 586, and an appeal was taken to this Court. *Affirmed*, p. [328 U. S. 440](#) .

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MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This case and *Robertson v. California*, *post*, p. [328 U. S. 440](#) , bring not unexpected sequels to *United States v. South-Eastern Underwriters Assn.*, [322 U. S. 533](#) . In cycle reminiscent conversely of views advanced there and in *Paul v. Virginia*, 8 Wall. 168, claims are put forward on the basis of the *South-eastern* decision to sustain immunity from state taxation and, in the *Robertson* case, from state regulation of the business of insurance.

The specific effect asserted in this case is that South Carolina no longer can collect taxes from Prudential, a New Jersey corporation, which, for years prior to 1945, the state had levied and the company had paid. The tax is laid on foreign insurance companies. and must be paid annually as a condition of receiving a

certificate of authority to carry on the business of insurance within the state. The exaction amounts to three percent of the aggregate of premiums received from business done in South Carolina, without reference to its interstate or local character. [[Footnote 1](#)]

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No similar tax is required of South Carolina corporations. [[Footnote 2](#)]

Prudential insists that the tax discriminates against interstate commerce and in favor of local business, since it is laid only on foreign corporations and is measured by their gross receipts from premiums derived from business done in the state, regardless of its interstate or local character. Accordingly, it says the tax cannot stand consistently with many decisions of this Court outlawing state taxes which discriminate against interstate commerce. [[Footnote 3](#)] South Carolina denies that the tax is discriminatory [[Footnote 4](#)] or

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has been affected by the *South-Eastern* decision. But, in any event, it maintains that the tax is valid, more particularly in view of the McCarran Act, [[Footnote 5](#)] by which it is claimed Congress has consented to continuance of this form of taxation, and thus has removed any possible constitutional objection which otherwise might exist. This Prudential asserts Congress has not done, and could not do.

The State Supreme Court has held the continued exaction of the tax not to be in violation of the commerce clause or affected by the ruling made in the *South-Eastern* case. 35 S.E.2d 586. That holding presents the principal basis for this appeal.

I

The versatility with which argument inverts state and national power, each in alternation to ward off the other's incidence, [[Footnote 6](#)] is not simply a product of protective self-interest. It is a recurring manifestation of the continuing necessity

in our federal system for accommodating the two great basic powers it comprehends. For this Court's

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part, from [Gibbons v. Ogden](#), 9 Wheat. 1, no phase of that process has been more continuous or at times perplexing than reconciling the paramount national authority over commerce, created by Article I, 8 of the Constitution, with appropriate exercise of the states' reserved powers touching the same or related subject matter. [[Footnote 7](#)]

The continuing adjustment has filled many of the great constitutional gaps of Marshall's time and later. [[Footnote 8](#)] But not all of the filling has been lasting. Great emphases of national policy swinging between nation and states in historic conflicts have been reflected, variously and from time to time, in premise and therefore in conclusion of particular dispositions. [[Footnote 9](#)] In turn, their sum has shifted and reshifted the general balance of authority, inevitably producing some anomaly of logic and of result in the decisions.

No phase has had a more atypical history than regulation of the business of insurance. This fact is important for the problems now presented. They have origin in that history. Their solution cannot escape its influence. Moreover, in law as in other phases of living, reconciliation

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of anomalous behavior, long continued, with more normal attitudes is not always easy when the time for that adjustment comes.

Essentially the problems these cases tender are of that character. It is not necessary to renew the controversy presented in *South-Eastern*. Whether or not that decision properly has been characterized as "precedent-smashing," [[Footnote 10](#)] there was a reorientation of attitudes toward federal power in its relation to the business of insurance conducted across state lines. Necessarily, this worked in two directions. As the opinion was at pains to note, [322 U. S. 322](#)

U.S. 533, [322 U. S. 545](#) ff., no decision previously had held invalid an Act of Congress on the ground that such business was beyond reach of its power, because previously no attempted exercise of that authority had been brought here in litigation. But, from *Paul v. Virginia* to *New York Life Ins. Co. v. Deer Lodge County*, [231 U. S. 495](#) , negative implication from the commerce clause was held not to place any limitation upon state power over the business, however conducted with reference to state lines. And, correlatively, this was taken widely, although not universally, to nullify federal authority until the question was squarely presented and answered otherwise in the *South-Eastern* case.

Whether *Paul v. Virginia* represented, in its day, an accommodation with or a departure from the preexisting evolution of commerce clause law, and whether its ruling, together with later ones adhering to it, remained consonant with the subsequent general development of that law, may still be debated. But all may concede that the *Paul* case created for the business of insurance a special, if not a wholly unique, way of thinking and acting in the regulation of business done across state lines. See Ribble, *State and National Power over Commerce* (1937) 89, 186-187.

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The aegis of federal commerce power continued to spread over and enfold other business so conducted, in both general and specific legislative exertions. Usually this was with judicial approval, and, despite notable instances of initial hostility, the history of judicial limitation of congressional power over commerce, when exercised affirmatively, has been more largely one of retreat than of ultimate victory. [[Footnote 11](#)] The plain words of the grant have made courts cautious, except possibly in some of the instances noted, about nullifying positive exertions of Congress' power over this broad and hard-to-define field. At the same time, physical and economic change in the way commerce is carried on has called forth a constantly increasing volume of legislation exercising that power. [[Footnote 12](#)]

Concurrently with this general expansion, however, from *Paul* to *South-Eastern*, the states took over exclusively the function of regulating the insurance business in its specific legislative manifestations. Congress legislated only in terms applicable to commerce generally, without particularized reference to insurance. At the same time, on the rationalization that insurance was not commerce, yet was business affected with a vast public

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interest, [[Footnote 13](#)] the states developed comprehensive regulatory and taxing systems. And litigation of their validity came to be freed of commerce clause objections -- at any rate, from *Deer Lodge* on to *South-Eastern*. Due process, in its jurisdictional aspects, remained to confine the reach of state power in relation to business affecting other states. [[Footnote 14](#)] But the negative implications of the commerce clause became irrelevant, as such, for the valid exercise of state regulatory and taxing authority.

Meanwhile, the business of insurance experienced a nationwide expansion graphically depicted not only in the facts of the situation presented in the *South-Eastern* case, but also in the operations of Prudential as described by its advocates in this cause. [[Footnote 15](#)] These divergent facts,

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legal and economic, necessarily were reflected in state legislation. States grappling with nationwide, but nationally unregulated, business inevitably exerted their powers to limits and in ways not sought generally to be applied to other business held to be within the reach of the commerce clause's implied prohibition. Obvious and widespread examples are furnished in broad and detailed licensing provisions for the doing of business within the states, and in connected or distinct taxing measures drawn in apparent reliance upon freedom from commerce clause limitations. [[Footnote 16](#)]

Now we are told many of these statutes no longer can stand. The process of readjustment began affirmatively with *South-Eastern*. Since the commerce clause

is a two-edged instrument, the indicated next step, indeed the constitutionally required one, as the argument runs, is to apply its negatively cutting edge. Conceptions so developed with reference to other commerce must now be extended to the commerce of insurance in completion of the readjustment. This, it is confidently asserted, will require striking down much of the state legislation enacted

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and effective prior to the *South-Eastern* decision. Particularly will this be true of all discriminatory state taxes, of which it is said South Carolina's is one. Moreover, those results must follow regardless of the McCarran Act's provisions. For, by that Act, in Prudential's assessment, Congress neither intended to nor could validate such taxes.

It is not surprising that the attack is thus broad. When a decision is conceived as precedent-smashing, rightly or wrongly, the conception's invitation may be to greater backtracking than is justified, in spite of warning to proceed with care. [322 U. S. 322](#) U.S. 533, [322 U. S. 547](#) ff.

Prudential's misconception relates not to the necessity for applying, but to the nature and scope of the negative function of the commerce clause. It is not the simple, clean-cutting tool supposed. Nor is its swath always correlative with that cut by the affirmative edge, as seems to be assumed. For, cleanly as the commerce clause has worked affirmatively on the whole, its implied negative operation on state power has been uneven -- at times highly variable. More often than not, in matters more governable by logic and less by experience, the business of negative implication is slippery. Into what is thus left open for inference to fill divergent ideas of meaning may be read much more readily than into what has been made explicit by affirmation. That possibility is broadened immeasurably when not logic alone, but large choices of policy, affected in this instance by evolving experience of federalism, control in giving content to the implied negation. In all our constitutional history, this has become no more apparent than in commerce clause dispositions.

That the clause imposes some restraint upon state power has never been doubted. For otherwise the grant of power to Congress would be wholly ineffective. But the limitation not only is implied. It is open to different implications of meaning. And this accounts largely for

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variations in this field continuing almost from the beginning until now. [[Footnote 17](#)] They started with Marshall and Taney,

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went forward from Waite to Fuller, and have been projected in later differences perhaps less broad, but hardly less controversial. [[Footnote 18](#)] Consequently, in its prohibitive, as in its affirmative or enabling, effects, the history of the commerce clause has been one of very considerable judicial oscillation.

Moreover, the parallel encompasses the latest turn in the long-run trend. For, concurrently with the broadening of the scope for permissible application of federal authority, [[Footnote 19](#)] the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce, [[Footnote 20](#)] and to doing so by a new or renewed emphasis on facts and practical considerations, rather than dogmatic logic. [[Footnote 21](#)] These facts are of great importance for disposing

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of such controversies. For, in effect, they have transferred the general problem of adjustment to a level more tolerant of both state and federal legislative action.

II

We are not required, however, to consider whether, on that level, the authorities on which Prudential chiefly relies would require invalidation of South Carolina's tax. For they are not in point.

As has been stated, they are the cases which from *Welton v. Missouri*, [91 U. S. 275](#) , until now, have outlawed state taxes found to discriminate against interstate commerce. [[Footnote 22](#)] No one of them involved a situation like that now here. In each, the question of validity of the state taxing statute arose when Congress' power lay dormant. In none had Congress acted or purported to act, either by way of consenting to the state's tax or otherwise. Those cases therefore presented no question of the validity of such a tax where Congress had taken affirmative action consenting to it or purporting to give it validity. Nor, consequently, could they stand as controlling precedents for such a case.

This would seem so obvious as hardly to require further comment, except for the fact that Prudential has argued

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so earnestly to the contrary. Its position puts the McCarran Act to one side, either as not intended to have effect toward validating this sort of tax or, if construed otherwise, as constitutionally ineffective to do so. Those questions present the controlling issues in this case. But, before we turn to them, it will be helpful to note the exact effects of Prudential's argument.

Fundamentally it maintains that the commerce clause, "of its own force" and without reference to any action by Congress, whether through its silence [[Footnote 23](#)] or otherwise, forbids discriminatory state taxation of interstate commerce. This is to say, in effect, that neither Congress acting affirmatively nor Congress and the states thus acting coordinately can validly impose any regulation which the Court has found or would find to be forbidden by the commerce clause, if laid only by state action taken while Congress' power lies dormant. In this view, the limits of state power to regulate commerce in the absence of affirmative action by Congress are also the limits of Congress' permissible action in this respect, whether taken alone or in coordination with state legislation.

Merely to state the position in this way compels its rejection. So conceived, Congress' power over commerce would be nullified to a very large extent. [[Footnote 24](#)] For, 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. Much less has this boundary been thought to

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confine what Congress and the states, acting together, may accomplish. So to regard the matter would invert the constitutional grant into a limitation upon the very power it confers.

The commerce clause is in no sense a limitation upon the power of Congress over interstate and foreign commerce. On the contrary, it is, as Marshall declared in *Gibbons v. Ogden*, a grant to Congress of plenary and supreme authority over those subjects. The only limitation it places upon Congress' power is in respect to what constitutes commerce, including whatever rightly may be found to affect it sufficiently to make Congressional regulation necessary or appropriate. [[Footnote 25](#)] This limitation, of course, is entirely distinct from the implied prohibition of the commerce clause. The one is concerned with defining commerce, with fixing the outer boundary of the field over which the authority granted shall govern. The other relates only to matters within the field of commerce, once this is defined, including whatever may fall within the "affectation" doctrine. The one limitation bounds the power of Congress. The other confines only the powers of the states. And the two areas are not coextensive. The distinction is not always clearly observed, for both questions may, and indeed at times do, arise in the same case, and in close relationship. [[Footnote 26](#)] But to blur them, and thereby equate the implied prohibition with the affirmative endowment, is altogether fallacious. There is no such equivalence.

This appears most obviously, perhaps, in the cases most important for the decision in this cause. They are the ones involving situations where the silence of Congress or the dormancy of its power has been taken judicially,

on one view or another of its constitutional effects, [[Footnote 27](#)] as forbidding state action, only to have Congress later disclaim the prohibition or undertake to nullify it. [[Footnote 28](#)] Not yet has this Court held such a disclaimer invalid, or that state action supported by it could not stand. On the contrary, in each instance, it has given effect to the Congressional judgment contradicting its own previous one. [[Footnote 29](#)]

It is true that rationalizations have differed concerning those decisions, [[Footnote 30](#)] indeed, also that the judges participating in them differed in this respect. [[Footnote 31](#)] But the results have been lasting, and are at least as important, for the direction given to the process of accommodating federal and state authority, as the reasons stated for reaching them. None

of the decisions conceded, because none involved any question of, the power of Congress to make conclusive its own mandate concerning what is commerce. But, apart from that function of defining the outer boundary of its power, whenever Congress' judgment has been uttered affirmatively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' expressed approval.

Some part of this readjustment may be explained in ways acceptable on any theory of the commerce clause and the relations of Congress and the Courts toward its functioning. [[Footnote 32](#)] Such explanations, however, hardly go to the root of the matter. For the fact remains that, in these instances, the sustaining of Congress' overriding action has involved something beyond correction of erroneous factual judgment in deference to Congress' presumably better-informed view of the facts, [[Footnote 33](#)] and also beyond giving due

deference to its conception of the scope of its powers, when it repudiates, just as when its silence is thought to support, the inference that it has forbidden state action. [[Footnote 34](#)]

Prudential has not squarely met this fact. Fixed with the sense of applicability of the *Welton or Shelby County* line of cases, it rather has posed an enigma for the bearing of the bridge and liquor cases upon the decision to be made. It is, if the commerce clause, "by its own force," forbids discriminatory state taxation or other measures, how is it that Congress, by expressly consenting, can give that action validity?

The answer need no be labored. Prudential in this case makes no contention that commerce is not involved. Its argument is exactly the opposite. Its contention

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founded on the commerce clause is one wholly of implied prohibition within the filed of commerce.

This it regards as operative not only in Congress' silence, but in the face of its positive expression by the McCarran Act that the continued regulation and taxation by the states of the business of insurance is in accord with Congress' policy. That expression raises questions concerning its own validity, and also concerning whether the policy stated extends to the kind of state legislation which is immediately in issue. But those questions are not answered, as Prudential seeks to have them answered, by any conception that Congress' declaration of policy adds nothing to the validity of what the states have done within the area covered by the declaration or, in other words, that it is mere *brutum fulmen*. For to do this not only would produce intolerable consequences for restricting Congress' power. It would ignore the very basis on which the second *Wheeling Bridge* case, and indeed the *Clark Distilling* case, have set the pattern of the law for governing situations like that now presented. [[Footnote 35](#)] Accordingly, we turn to the issues which are more alive and significant for the future.

III

In considering the issues raised by the McCarran Act and the question of its applicability, ground may be cleared by putting aside some matters strenuously argued in the state supreme court and here. First, it follows from what has been said that we are not required to determine whether South Carolina's tax would be valid in the dormancy of Congress' power. For Congress has expressly stated its intent and policy in the Act. And, for reasons to be stated, we think that the declaration's effect is clearly to sustain the exaction, and that this can be done without violating any constitutional provision.

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By the same token, we need not consider whether the tax, if operative in Congress' unilluminated silence, would be discriminatory in the sense of an exaction forbidden by the commerce clause, as Prudential categorically asserts, or not so, as South Carolina maintains with equal certitude. Much attention has been given both here and in the state court to these questions. But, in the view we take of the case, the controlling issues undercut them. Nor do we determine, as Prudential's argument seems to subsume, whether all of its business done in South Carolina and affected by the tax should be regarded as constituting interstate commerce so as to fall within the "in commerce" classification or, on the other hand, some of it may properly be considered as being only local or intrastate business. [[Footnote 36](#)] These questions we put to one side.

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And, for present purposes, we assume that the tax would be discriminatory in the sense of Prudential's contention, and that all of its business done in South Carolina and affected by the tax is done "in" or as a part of interstate commerce.

It is not necessary to spend much time with interpreting the McCarran Act. Pertinently, it is as follows:

". . . 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."

"SEC. 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. . . ."

59 Stat. 34, 15 U.S.C. 1011-1015. [[Footnote 37](#)]

Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided

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in the Act itself or in future legislation. [[Footnote 38](#)] The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest, and that the business and all who engage in it "shall be subject to" the laws of the several states in these respects.

Moreover, in taking this action, Congress must have had full knowledge of the nationwide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted, and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts, and its purpose was evidently to throw the whole weight of its power behind the state systems notwithstanding these variations.

It would serve no useful purpose now to inquire whether or how far this effort was necessary in view of the explicit reservations made in the majority opinion in the *South-Eastern* case. Nor is it necessary to conclude that Congress, by enacting the McCarran Act, sought to validate every existing state regulation or tax. For in all that mass of legislation must have lain some provisions which may have been subject to serious question on the score of other constitutional limitations in addition to commerce clause objections arising in the dormancy of Congress' power. And we agree with Prudential that there can be no inference that Congress intended to circumvent constitutional limitations upon its own power.

But, though Congress had no purpose to validate unconstitutional provisions of state laws except insofar as the Constitution itself gives Congress the power to do this by removing obstacles to state action arising from its own

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action or by consenting to such laws, H.Rep. No.143, 79th Cong., 1st Sess., p. 3, it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for.

Two conclusions, corollary in character and important for this case, must be drawn from Congress' action and the circumstances in which it was taken. One is that Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, [[Footnote 39](#)] are not required in reference to the business of insurance by the national public interest, except in the specific respects otherwise expressly provided for. This necessarily was a determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear or should not bear in the competition with local business. Such taxes were not uncommon, among the states, [[Footnote 40](#)] and the statute clearly included South Carolina's tax now in issue.

That judgment was one of policy, and reflected long and clear experience. For, notwithstanding the long incidence of the tax and its payment by Prudential without question prior to the *South-Eastern* decision, the record of Prudential's continuous success in South Carolina over decades [[Footnote 41](#)] refutes any idea that payment of the tax handicapped it in any way tending to exclude it from competition with local business or with domestic insurance companies. Indeed, Prudential makes no contrary contention on any factual basis, nor could it well do so. For the *South-Eastern* decision did not, and could not, wipe out all this experience or its weight for bearing, as a matter of the practical consequences resulting from operation of the tax, upon that question. *Robertson v. California*, [328 U. S. 440](#) .

Consequently Prudential's case for discrimination must rest upon the idea either that the commerce clause forbids the state to exact more from it in taxes than from purely local business; or that the tax is somehow technically of an inherently discriminatory character, or possibly of a type which would exclude or seriously handicap new entrants

seeking to establish themselves in South Carolina. As to each of these grounds, moreover, the argument subsumes that Congress' contrary judgment, as a matter of policy relating to the regulation of interstate commerce, cannot be effective either "of its own force" alone or as operative in conjunction with and to sustain the state's policy.

IV

In view of all these considerations, we would be going very far to rule that South Carolina no longer may collect her tax. To do so would flout the expressly declared policies of both Congress and the state. Moreover, it would establish a ruling never heretofore made, and, in doing this, would depart from the whole trend of decision

in a great variety of situations most analogous to the one now presented. For, as we have already emphasized, the authorities most closely in point upon the problem are not, as appellant insists, those relating to discriminatory state taxes laid in the dormancy of Congress' power. They are, rather, the decisions which, in every instance thus far not later overturned, [[Footnote 42](#)] have sustained coordinated action taken by Congress and the states in the regulation of commerce. [[Footnote 43](#)]

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The power of Congress over commerce, exercised entirely without reference to coordinated action of the states, is not restricted, except as the Constitution expressly provides, [[Footnote 44](#)] by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote, but also to prohibit, interstate commerce, as it has done frequently and for a great variety of reasons. [[Footnote 45](#)] That power does not run down a one-way street, or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states.

This broad authority Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the states, [[Footnote 46](#)] in which case limitations imposed for the preservation of their powers become inoperative, and only those designed to forbid action altogether by any power or combination of powers in our governmental

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system remain effective. [[Footnote 47](#)] 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. [[Footnote 48](#)] Clear and gross must be the evil which would nullify such an exertion, one which could arise only by exceeding beyond cavil 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.

In this light, the argument that the degree of discrimination which South Carolina's tax has involved, if any, puts it beyond the power of government to continue must fall of its own weight. No conceivable violation of the commerce clause, in letter or spirit, is presented. Nor is contravention of any other limitation.

A word should be added in the latter respect. Prudential has not urged grounds founded upon other constitutional provisions than the commerce clause, except in relation to the McCarran Act, and then only in the event it should be construed as having effect to validate continued exaction of the tax. As has been said, it regards the statute as neither intended nor effective to "validate, authorize, or sanction state statutes which discriminate against interstate commerce." But, against the event that the Act should be taken as intended to have such an effect, it puts forward the somewhat novel contentions that the statute would be in violation of the due process clause of the Fifth Amendment; of the first clause of Article I, 8, requiring that "all Duties, Imposts and Excises shall be uniform throughout the United States;" of Article I, 1, "which requires legislation to be enacted by Congress;" and, apparently of the Tenth Amendment, "as a violation of the states' power to tax for purposes of raising revenue for their own use, which power is vested exclusively in the states." [[Footnote 49](#)]

These arguments may be summarily disposed of. As for the due process contention, it was settled by a long line of authorities prior to the *South-Eastern* decision that the similar provision of the Fourteenth Amendment,

as well as that requiring equal protection of the laws, does not forbid the states to lay and collect such a tax as South Carolina's. [[Footnote 50](#)] Certainly the Fifth Amendment does not more narrowly confine the power of Congress; nor do it and the Fourteenth, taken together, accomplish such a restriction upon the coordinated exercise of power by the Congress and the states.

The argument grounded upon the first clause of Article I, 8, requiring that excises shall be uniform throughout the United States, identifies the state exaction with the laying of an excise by Congress, to which alone the limitation applies. This is done on the theory that no more has occurred than that Congress has "adopted" the tax as its own, a conception which obviously ignores the state's exertion of its own power and, furthermore, seeks to restrict the coordinated exercise of federal and state authority by a limitation applicable only to the federal taxing power when it is exerted without reference to any state action. [[Footnote 51](#)] The same observation applies also to the contention based on Article I, 1.

The final contention that to sustain the Act, and thus the tax, would be an invasion of the state's own power of

taxation is so clearly lacking in merit as to call for no comment other than to point out that, by juxtaposition with the contentions discussed in the preceding paragraph, the effect would be at one stroke to bring the Act into collision with limitations operative only upon the federal power, and at the same time to nullify state authority.

No such anomalous consequence follows from the division of legislative power into the respective spheres of federal and state authority. There are limitations applicable to each of these separately, and some to their coordinated exercise. But neither the former nor the latter are to be found merely in the fact that the authority is thus divided. Such a conception would reduce the joint exercise of power by Congress and the states to achieve common ends in the regulation of

our society below the effective range of either power separately exerted, without basis in specific constitutional limitation or otherwise than in the division itself. [[Footnote 52](#)] We know of no grounding, in either constitutional experience or spirit, for such a restriction. For great reasons of policy and history not now necessary to restate, these great powers were separated. They were not forbidden to cooperate or, by doing so, to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion. [[Footnote 53](#)]

We have considered appellant's other contentions, including the suggestion that the McCarran Act, construed as we have interpreted it and thus given effect, would involve an unconstitutional delegation by Congress of its

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power to the states. For reasons already set forth and others, including the fact that no instance of delegation is involved on the facts, we find them without merit.

The judgment accordingly is

Affirmed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE JACKSON, took no part in the consideration or decision of this case.

[[Footnote 1](#)]

The statute imposing the tax are 7948 and 7949, South Carolina Code of 1942. Each section in fact imposes a separate tax, the former of two percent, the latter of one percent, on gross premium returns "from the State," with provisions under 7948 for reduction in the amount of the tax scaled to specified investments in South Carolina securities or property. Both taxes are laid "in addition to the annual license fees now provided by law," and are stated in terms to be required "an an additional and graded license fee" (7948) or as "a graduated license fee." 7949.

The two taxes have been treated in combination, for purposes of this litigation, as being in effect a single tax of three percent.

[[Footnote 2](#)]

Section 7948 and 7949 expressly exempt South Carolina corporations from payment of the tax. They, however, are subject to other taxes, which Prudential maintains have no bearing upon the issues, other than possibly to demonstrate the discriminatory character and effects of the exaction in issue. See [328 U. S.](#) These are chiefly taxes on real and personal property, incidence of which Prudential largely escapes by the location of its property in other states.

[[Footnote 3](#)]

Extending from *Welton v. Missouri*, [91 U. S. 275](#) , to *Nippert v. Richmond*, [327 U. S. 416](#) . See the collection of authorities in *McGoldrick v. Berwind-White Co.*, [309 U. S. 33](#) , [309 U. S. 56](#) , note 11.

[[Footnote 4](#)]

In apparent reliance not only upon decisions rendered prior to the *South-Eastern* decision or made without reference to its ruling, e.g., *Lincoln National Ins. Co. v. Read*, [325 U. S. 673](#) ; *Bethlehem Motors Corp. v. Flynt*, [256 U. S. 421](#) , but indeed also *Paul v. Virginia*, 8 Wall. 168; *Hooper v. California*, [155 U. S. 648](#) , and like authorities.

The state also maintains that Prudential's South Carolina business is not altogether interstate commerce, but consists, in substantial part, of local transactions, the aggregate of which measures the tax, for which view it relies upon such diverse decisions as *McGoldrick v. Berwind-White Co.*, [309 U. S. 33](#) ; *International Shoe Co. v. Shartel*, [279 U. S. 429](#) ; *Western Live Stock v. Bureau of Revenue*, [303 U. S. 250](#) , and *Polish National Alliance v. Labor Board*, [322 U. S. 643](#) . See [note 36 and text](#)

[[Footnote 5](#)]

The pertinent portion of the Act are set forth in the text, Part III at [note 37](#)

[[Footnote 6](#)]

Cf. United States v. South-Eastern Underwriters, [322 U. S. 533](#) , at notes 9 and 23; *but see also* [note 33 for an early and highly authoritative but less mutually exclusive view of the possible alternatives](#)

[[Footnote 7](#)]

Among the volumes which have been written, special reference may be made to Frankfurter, *The Commerce Clause* (1937); Ribble, *State and National Power over Commerce* (1937); Gavit, *The Commerce Clause* (1932), *and see* Dowling, *Interstate Commerce and State Power* (1940) 27 Va.L.Rev. 1. For thoughtful comment since the *South-Eastern* decision, see Patterson, *The Future of State Supervision of Insurance* (1944) 23 Tex.L.Rev. 18; Note, *Congressional Consent to Discriminatory State Legislation* (1945), 45 Col.L.Rev. 927.

[[Footnote 8](#)]

"Judges legislate interstitially and the interstices were great in Marshall's time."
Ribble, *State and National Power over Commerce* (1937) 47.

[[Footnote 9](#)]

"Lines of demarcation are drawn largely according to the pull of the Court at one period towards the interests of local self-government, and at another in the direction of a nationwide rule."

Frankfurter, *The Commerce Clause* (1937) 97.

[[Footnote 10](#)]

S.Rep. No.1112, 78th Cong., 2d Sess. 2.

[[Footnote 11](#)]

E.g., *Hammer v. Dagenhart*, [247 U. S. 251](#) , overruled by *United States v. Darby Co.*, [312 U. S. 100](#) , compare *United States v. E. C. Knight Co.*, [156 U. S. 1](#) , with *United States v. American Tobacco Co.*, [221 U. S. 106](#) ; *Schechter Corp. v. United States*, [295 U. S. 495](#) ; with *Labor Board v. Jones & Laughlin Steel Corp.*, [301 U. S. 1](#) . See also discussion in *Wickard v. Filburn*, [317 U. S. 111](#) , [317 U. S. 118](#) ff.

See Ribble, *State and National Power over Commerce* (1937) 63, n. 39, for listing of the decisions invalidating Acts of Congress prior to 1879, noting that Mr. Justice Miller was "but slightly in error" in the statement, in *Trade-Mark Cases*, [100 U. S. 82](#) , [100 U. S. 96](#) , that one then might count "on his fingers" those decisions.

[[Footnote 12](#)]

Beginning in modern phase with enactment of Interstate Commerce Commission and antitrust legislation near the beginning of the present century. The catalogue is now too long to repeat here.

[[Footnote 13](#)]

See *German Alliance Ins. Co. v. Lewis*, [233 U. S. 389](#) , [233 U. S. 414](#) -415; *La Tourette v. McMaster*, [248 U. S. 465](#) , [248 U. S. 467](#) ; *National Union Fire Ins. Co. v. Wanberg*, [260 U. S. 71](#) , [260 U. S. 74](#) ; cf. *Osborn v. Ozlin*, [310 U. S. 53](#) , [310 U. S. 65](#) : "Government has always had a special relation to insurance." See also *United States v. South-Eastern Underwriters Assn.*, [322 U. S. 533](#) , dissenting opinion at [322 U. S. 585](#) .

[[Footnote 14](#)]

See *Allgeyer v. Louisiana*, [165 U. S. 578](#) ; *New York Life Ins. Co. v. Head*, [234 U. S. 149](#) ; *Fidelity & Deposit Co. of Maryland v. Tafoya*, [270 U. S. 426](#) ; *St. Louis Cotton Compress Co. v. Arkansas*, [260 U. S. 346](#) ; *Hoopeston Co. v. Cullen*, [318 U. S. 313](#) ; Powell, *The Supreme Court and State Public Power, 1922-1930* (1932) 140 *et seq.*; also *St. Louis Southwestern R. Co. of Texas v. Alexander*, [227 U. S. 218](#) , with which compare Henderson, *The Position of*

Foreign Corporations in American Constitutional Law (1918) c. V. *Cf. International Harvester Co. v. Dept. of Treasury*, [322 U. S. 340](#) , concurring opinion, [322 U. S. 349](#) at 322 U. S. 353 ff.; *and see International Shoe Co. v. Washington*, [326 U. S. 310](#) .

[[Footnote 15](#)]

According to Prudential's brief, it transacts business in all forty-eight states, and, on December 31, 1944,

"had in force 33,933,077 policies, insuring approximately 22,900,000 persons, for a total amount of \$22,741,134,075, and 36,733 annuity contracts operative during the lives of approximately 300,000 persons and providing for an annual income of approximately \$63,200,000 on such lives. During the year 1944, the Appellant issued 2,412,150 policies, insuring the lives of approximately 2,170,000 persons, in the total amount of \$2,668,714,022, and entered into 451 annuity contracts operative during the lives of approximately 600 persons and providing for an annual income of approximately \$150,000 on such lives. During the year 1944, the Appellant collected as premiums on insurance policies \$681,052,095.07, and paid out as claims on policies \$246,776,197.45, and it paid out \$13,690,781.93 on annuity contracts."

For South Carolina, the company

"had in force 26,373 policies insuring the lives of approximately 20,000 persons resident in said State for a total amount of \$30,827,184.00. During the year ending December 31, 1944, 1,439 policies insuring the lives of approximately 1,000 persons resident in said State for a total amount of \$1,475,062.00 were issued, and \$457,602.28 in claims were paid on policies covering the lives of residents."

The South Carolina premium tax for 1943 amounted to \$18,496.87; for 1944, \$19,676.94. All other state or local taxes paid in 1944 amounted to \$3,103.92, making a total for the year for all taxes of \$22,780.86.

[[Footnote 16](#)]

[322 U. S. 322](#) U.S. 533, dissenting opinion at [322 U. S. 590](#) ; see [note 40](#) *infra*; *cf. Robertson v. California, post*, p. [328 U. S. 440](#) .

[[Footnote 17](#)]

That the question was discussed, but not settled, in the Constitutional Convention itself appears from debate on September 15, 1787, two days before submission of the proposed Constitution to Congress, a portion of which bears quotation:

"Mr. McHenry & Mr. Carrol moved that 'no State shall be restrained from laying duties of tonnage for the purpose of clearing harbours and erecting lighthouses.'"

"Col. Mason, in support of this, explained and urged the situation of the Chesapeake, which peculiarly required expenses of this sort."

"Mr. Govr. Morris. The States are not restrained from laying tonnage as the Constitution now Stands. The exception proposed will imply the Contrary, and will put the States in a worse condition than the gentleman (Col. Mason) wishes."

"Mr. Madison. Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague, but seem to exclude this power of the States. They may certainly be restrained by Treaty. He observed that there were other projects for tonnage duties as the support of Seamen &c.; He was more & more convinced that the regulation of Commerce was in its nature indivisible, and ought to be wholly under one authority."

"Mr. Sherman. The power of the U. States to regulate trade, being supreme, can controul interferences of the State regulation [when] such interferences happen, so that there is no danger to be apprehended from a concurrent jurisdiction."

"Mr. Langdon insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it. On motion 'that no State shall lay any duty on tonnage without the Consent of Congress.'"

"N.H., ay; Mas. ay.; Ct., divd.; N.J., ay.; Pa. no.; Del., ay.; Md., ay; Va., no; N.C., no; S.C. ay; Geo., no. [Ayes -- 6; noes -- 4; divided -- 1.]"

Farrand, Records of the Federal Constitutional Convention of 1787 (1937), Vol. II, 625-626.

See Note, Congressional Consent to Discriminatory State Legislation (1945) 45 Col.L.Rev. 927, 946 ff., for a short summary of views expressed in the debates and later by members of the Convention. See *also* Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment (1941) 25 Minn.L.Rev. 432; Hamilton and Adair, The Power to Govern (1937).

[[Footnote 18](#)]

"The categories of 'burdens' on interstate commerce, of state laws 'directly affecting' commerce, etc., are natural concomitants of Marshall's doctrine. The theories as to the silence of Congress are the outgrowth of Taney's. When diverse theories cohabit, the miscegenation may produce strange progeny."

[[Footnote 19](#)]

See [note 11 and text](#)

[[Footnote 20](#)]

Cf., e.g., South Carolina State Highway Dept. v. Barnwell Bros., [303 U. S. 177](#) ; Western Live Stock v. Bureau of Revenue, [303 U. S. 250](#) ; McGoldrick v. Berwind-White Co., [309 U. S. 33](#) ; Nelson v. Sears, Roebuck & Co., [312 U. S. 359](#) ; California v. Thompson, [313 U. S. 109](#) ; Duckworth v. Arkansas, [314 U. S. 390](#) ; Union Brokerage Co. v. Jensen, [322 U. S. 202](#) , [322 U. S. 209](#) ff.

[[Footnote 21](#)]

Cf. Nippert v. Richmond, [327 U. S. 416](#) , notes 9 and 23, and authorities cited.

[[Footnote 22](#)]

See [328 U. S.](#) and compare:

". . . State laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress."

Gwin, White & Prince v. Henneford, [305 U. S. 434](#) , dissenting opinion at [305 U. S. 446](#) .

". . . except for State acts designed to impose discriminatory burdens on interstate commerce because it is interstate -- Congress alone must 'determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts and how far it shall be prohibited.'"

Id. at [305 U. S. 455](#) .

See also, for essentially the same position, *Adams Mfg. Co. v. Storen*, [304 U. S. 307](#) , dissenting opinion; *Southern Pacific Co. v. Arizona*, [325 U. S. 761](#) , dissenting opinion at [325 U. S. 795](#) t.

[[Footnote 23](#)]

See [note 18](#)

[[Footnote 24](#)]

Thus, for instance, the limitations upon the length of trains imposed by the Arizona Train Limit Law, and held to be in violation of the commerce clause in *Southern Pacific Co. v. Arizona*, [325 U. S. 761](#) , would be beyond the power of Congress, perhaps also of Congress and the states acting together, to impose, and, on commerce clause grounds, thus nullifying the very power conferred in order to regulate such matters. The argument is reminiscent of that of Mr. Justice McLean in the second *Wheeling Bridge* case, cf. [note 34](#)

[[Footnote 25](#)]

Cf. [note 11 and text](#)

[[Footnote 26](#)]

See the argument for the plaintiff in error in *Paul v. Virginia*, 8 Wall. 168, 172-173 [argument of counsel omitted in USSC+], as a classic instance.

[[Footnote 27](#)]

Cf. [note 18](#). See also the discussions cited in [note 7](#)

[[Footnote 28](#)]

Legislation which, typically, has presented the problem is found in a variety of measures, of which the Wilson Act, 26 Stat. 313, is the prototype. Earlier legislation presenting the difficulty was that involved in the second of the *Wheeling Bridge* cases, [Pennsylvania v. Wheeling & Belmont Bridge Co.](#), 18 How. 421. See [note 43 for further citations](#)

[[Footnote 29](#)]

[Pennsylvania v. Wheeling & Belmont Bridge Co.](#), 13 How. 518, with which compare [59 U. S.](#) *Wheeling & Belmont Bridge Co.*, 18 How. 421, and [77 U. S.](#) 10 Wall. 454; *Leisy & Co. v. Hardin*, [135 U. S. 100](#), with which compare *In re Rahrer*, [140 U. S. 545](#); *Bowman v. Chicago & Northwestern R. Co.*, [125 U. S. 465](#), with which compare *Clark Distilling Co. v. Western Maryland R. Co.*, [242 U. S. 311](#).

[[Footnote 30](#)]

See, e.g., Ribble at 62, 106, and other materials cited above in [note 7](#)

[[Footnote 31](#)]

For the modern record, it is interesting to note that, in the first *Bridge* case, Justice McLean spoke for the Court, Chief Justice Taney and Justice Daniel dissenting in separate opinions, and the same division prevailed in the further opinions filed upon consideration of the master's report and entry of the decree. In the second *Bridge* case, Justice Nelson spoke for the Court, with Justices

McLean, Grier, Wayne, and Daniel each filing separate opinions dissenting on one or more of the issues presented.

[[Footnote 32](#)]

[[Footnote 33](#)]

In the first *Wheeling Bridge* case, the Court itself made the finding, upon evidence taken by a master, that the bridge in fact obstructed navigation, to which it added the legal conclusion that it was a public nuisance, and went on to specify the height to which it must be raised to avoid this effect. Not only this finding of fact, therefore, but also the legal conclusion drawn from it, was, in effect, overturned by the Act of Congress. See [note 34](#) The finding of obstruction in fact depended in no sense upon previous determination by Congress. But the Court found in Congress' prior legislation a policy of freedom for navigation which it applied to outlaw the bridge.

[[Footnote 34](#)]

See [note 33](#)

"So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation, and, although it still may be an obstruction in fact, is not so in the contemplation of law. . . . The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation."

Mr. Justice Nelson, speaking for the Court, in the second [Wheeling Bridge](#) case, 18 How. 421, [59 U. S. 430](#) -431.

Compare the dissenting opinion of Mr. Justice McLean, who wrote for the majority in the first *Wheeling Bridge* case, going not only on the ground, among others, that the Act of Congress invaded the judicial function, but also that the Act, apart from this effect, was unconstitutional:

"It [Congress] may, under this power, declare that no bridge shall be built which shall be an obstruction to the use of a navigable water. And this, it would seem, is as far as the commercial power of congress can be exercised."

18 How. at [59 U. S. 442](#) . Thus was the grant of authority to Congress upon which he relied in the first decision, in part to outlaw the bridge, converted into a limitation. Cf. text, Part II, at [note 24 ff](#)

[[Footnote 35](#)]

Cf. [note 29 and text](#) And see [328 U. S.](#)

[[Footnote 36](#)]

Whether within or without the "affectation" doctrine. Cf. *United States v. South-Eastern Underwriters Assn.*, [322 U. S. 533](#) , [322 U. S. 548](#) , and authorities cited.

In making these assumptions, however, it is not improper to note that the record, as made in the state court, does not purport to deal factually with the latter question as a matter of proof. It simply alleged that all of Prudential's South Carolina business is done interstate, an allegation which is denied, and there are supporting allegations concerning the extent of the business and manner of conducting it.

Nor is the case in much better shape factually on the question of discrimination. While the briefs include tables of figures designed to show that Prudential pays more proportionately under the tax than South Carolina corporations pay under other taxes levied against them, cf. [note 2](#) these figures were not made part of the record in the state court until the petition for rehearing was filed, and Prudential has insisted both there and here that they have no proper place in consideration of the questions presented. Its position is that the tax is discriminatory on the face of the statute, and without reference to other taxes South Carolina corporations may pay. Cf. [note 4](#)

We express no opinion concerning whether such a showing, in either respect, would be sufficient to require determination of the issues to which it is directed, tendered in the absence of action by Congress.

[[Footnote 37](#)]

The remainder of the statute, including a proviso to 2(b), relates to applicability of the Sherman Act and other related federal statutes to the business of insurance before and after January 1, 1948; provides that the McCarran Act shall not affect in any manner the application to that business of the National Labor Relations Act, the Fair Labor Standards Act, or the Merchant Marine Act of 1920, extends the term "State" as used in the Act to include specified territories and the District of Columbia, and provides for severability.

[[Footnote 38](#)]

See [note 37](#)

[[Footnote 39](#)]

There is, of course, no constitutional requirement that state taxes must be uniform, in the sense of that requirement as laid upon the federal taxing power by the first clause of Article I, 8. Nor has it ever been held that such a requirement is made by the commerce clause or any other constitutional provision. This is a different thing entirely from the strictures against discrimination within or by a state laid under the equal protection and commerce clauses.

The McCarran Act is, in effect, a determination by Congress that the business of insurance, though done in interstate commerce, is not of such a character as to require uniformity of treatment within the distinction taken in the doctrine of [Cooley v. Board of Wardens](#), 12 How. 299, except as otherwise expressly declared.

[[Footnote 40](#)]

As of the effective date of the McCarran Act, sixteen states had imposed on "foreign" life insurance companies taxes substantially similar to the South Carolina tax in issue. Ala.Code (1940) tit. 51, 816, 819; Fla.Stat. (1941) 205.43(1), (6); Ill.Rev.Stat. (1943) c. 73, 1021; Ind.Stat. Ann. (Burns, 1940) 39-4802; Kan.Gen.Stat. Ann. (Corrick, 1935) 40-252; Ky.Rev.Stat. (1944) 136.330; La.Gen.Stat. (Dart.1939) 8369, Act No. 66 of 1906; Mich.Comp.Laws (1929) 12387; Mo.Rev.Stat. (1939) 6094; Neb.Rev.Stat. (1943) 77-902; N.M.Stat. Ann. (1941) 60-401; N.D.Comp.Laws (1913) 4924; Ohio Code Ann. (Throckmorton, 1940) 5433; Pa.Stat. Ann. (Purdon) tit. 72, 2261; S.C.Code Laws (1942) 7948, 7949; Tex.Civ.Stat. (Vernon) Art. 4769.

We express no opinion concerning the validity of any feature of these statutes not substantially identical with those of the South Carolina tax dealt with herein.

[[Footnote 41](#)]

Prudential was first authorized to do business in South Carolina in 1897, and, since that time, it has received annual renewals of its license. As to the present scope of its business in South Carolina and in all the states, see [note 15](#)

[[Footnote 42](#)]

Cf. Ashton v. Cameron County District, [298 U. S. 513](#) , which may be said in effect to have been overruled by *United States v. Bekins*, [304 U. S. 27](#) . See Jackson, *The Struggle for Judicial Supremacy* (1941) 240-241.

[[Footnote 43](#)]

See *Carmichael v. Southern Coal Co.*, [301 U. S. 495](#) ; *Steward Machine Co. v. Davis*, [301 U. S. 548](#) ; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, [299 U. S. 334](#) ; *Clark Distilling Co. v. Western Maryland Ry. Co.*, [242 U. S. 311](#) ; *Whitfield v. Ohio*, [297 U. S. 431](#) ; *In re Rahrer*, [140 U. S. 545](#) ; *Perkins v. Pennsylvania*, 314 U.S. 586; *Standard Dredging Co. v. Murphy*, [319 U. S. 306](#) , [319 U. S. 308](#) ; *International Shoe Co. v. Washington*, [326 U. S. 310](#) ; *cf. Parker v. Richard*, [250 U. S. 235](#) , [250 U. S. 238](#) -239. See generally Keenig,

Federal and State Cooperation under the Constitution (1938) 36 Mich.L.Rev. 752.

[[Footnote 44](#)]

North American Co. v. Securities and Exchange Commission, [327 U. S. 686](#) ; *United States v. Darby Lumber Co.*, [312 U. S. 100](#) , [312 U. S. 114](#) -115; *Gibbons v. Ogden*, 9 Wheat. 1, [22 U. S. 196](#) . For example, the provisions of Article I, 9, forbidding the giving of preferences "by any Regulation of Commerce or Revenue to the Ports of one State over those of another," and commanding that "No Tax or Duty shall be laid on Articles exported from any State," held applicable only to foreign commerce in *Dooly v. United States*, [183 U. S. 151](#) .

But compare the further provision of Article I, 10, empowering Congress to consent to laying of duties or imposts on exports by the states. See also [note 47](#)

[[Footnote 45](#)]

E.g., *Reid v. Colorado*, [187 U. S. 137](#) ; *Champion v. Ames*, [188 U. S. 321](#) ; *Hipolite Egg Co. v. United States*, [220 U. S. 45](#) ; *Hoke v. United States*, [227 U. S. 308](#) ; *United States v. Darby Lumber Co.*, [312 U. S. 100](#) , *overruling* *Hammer v. Dagenhart*, [247 U. S. 251](#) .

[[Footnote 46](#)]

See cases cited in notes [29 and](#) | [29 and](#) S. 408fn43|>43.

[[Footnote 47](#)]

It is perhaps impossible to point with certainty to any such explicit limitation among the various commerce clauses of the Constitution, for decision in the application of such provisions to such a combined exercise of powers is sparse. See, *however*, the discussion in [Pennsylvania v. Wheeling and Belmont Bridge Co.](#), 18 How. 421, [59 U. S. 433](#) , relating to the clause of Article I, 9, providing:

"No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another, nor shall Vessels bound to, or from, one

State, be obliged to enter, clear, or pay Duties in another."

It was thus expressly contemplated, in some instances, that the combined exercise of the powers of Congress and the states should be free from restrictions expressly applicable to each when exerted in isolation. It is true that some of these provisions have been held applicable only to foreign commerce, e.g., the prohibition of Article I, 10, against levy of duties on imports or exports without Congress' consent. [Woodruff v. Parham](#), 8 Wall. 123; *American Steel & Wire Co. v. Speed*, [192 U. S. 500](#) , [192 U. S. 519](#) , *et seq.*; *but see* [25 U. S.](#) *Maryland*, 12 Wheat. 419. But others apply to coastwise trade -- indeed to trade between towns in the same state -- in other words, to intrastate commerce. [In re State Tonnage Tax Cases](#), 12 Wall. 24 , [79 U. S. 219](#) , *and see* *Pennsylvania v. Wheeling and Belmont Bridge Co.*, *supra*; *Louisiana Public Service Comm'n v. Texas & N.O. R. Co.*, [284 U. S. 125](#) ; *cf.* *Williams v. United States*, [255 U. S. 336](#) , *and see also* *United States v. The William*, 28 Fed.Cas. No. 16,700.

All these provisions are intimately and expressly related to the commerce power. Notwithstanding their diversities, in application to interstate and foreign commerce or both, and also to federal and state power or their combined operation, no conclusion can be drawn from them that our constitutional policy was, or is, to give Congress and the states, acting together, broad powers, in some instances denied to each acting alone, in relation to foreign commerce, but to deny such authority altogether in reference to interstate commerce. Indeed, the opposite conclusion is clearly indicated both by virtue of express provision where applicable and by strong inference where not expressly forbidden.

[[Footnote 48](#)]

The ruling is not new or only recent.

"We have already said, and the principle is undoubted, that the Act of the Legislature of Virginia conferred full authority to erect and maintain a bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having, in the exercise of this power, regulated the navigation

consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, state and federal, which, if not sufficient, certainly none can be found in our system of government."

[*Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421, 59 U. S. 430](#) . Compare this with Mr. Justice McLean's dissenting view, [note 34 above](#)

[[Footnote 49](#)]

The contentions are stated in appellant's brief as follows:

"If it be assumed that the McCarran-Ferguson Act is an adoption by Congress of legislation of the states, then the Act is unconstitutional (1) as a violation of the due process clause of Fifth Amendment to the Constitution, (2) as a violation of Article I, Section 8, Clause 1 of the Constitution which requires that excises shall be uniform throughout the United States in the exercise by Congress of its taxing power, (3) as a violation of Article I, Section 1 of the Constitution which requires legislation to be enacted by Congress, and (4) as a violation of the states' power to tax for purposes of raising revenue for their own use, which power is vested exclusively in the states."

[[Footnote 50](#)]

". . . It has never been held that a State may not exact from a foreign [insurance] corporation as a condition to admission to do business the payment of a tax measured by the business done within its borders."

Lincoln National Life Ins. Co. v. Read, [325 U. S. 673](#) , [325 U. S. 677](#) . See [*Ducat v. Chicago*, 10 Wall. 410](#); [*Fire Assn. of Philadelphia v. New York*, 119 U. S. 110](#) ; [*Hanover Fire Ins. Co. v. Harding*, 272 U. S. 494](#) ; [*Continental Assurance Co. v. Tennessee*, 311 U. S. 5](#) . See discussion in Henderson, the Position of Foreign Corporations in American Constitutional Law (1918) 101 ff.

[[Footnote 51](#)]

The related contention that Congress' "adoption" of South Carolina's statute amounts to an unconstitutional delegation of Congress' legislative power to the states obviously confuses Congress' power to legislate with its power to consent to state legislation. They are not identical, though exercised in the same formal manner. See *Clark Distilling Co. v. Western Maryland Ry. Co.*, [242 U. S. 311](#) , [242 U. S. 327](#) .

[[Footnote 52](#)]

"It would be a shocking thing if state and federal governments, acting together, were prevented from achieving the end desired by both simply because of the division of power between them."

Ribble, 211. *And see* [note 48](#)

[[Footnote 53](#)]

Cf. [note 47](#)