Insurance As Interstate Commerce: An Analysis of the Underwriters Case

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The insurance business is now interstate commerce. It is subject as such to the application of the Sherman Anti-Trust Act of 1890. In a four to three decision, Justices Roberts and Reed taking no part in the case, this is the judgment of the Supreme Court in United States v. South-Eastern Underwriters Association. The doctrine, enunciated as far back as 1869 in Paul v. Virginia, that issuance of a policy of insurance is not an act in commerce, is upset by a judgment which may lack effectiveness both because of the narrow cleavage of opinion and pending legislation to amend the Sherman and Clayton Acts so as to remove specifically insurance companies from the scope of anti-trust laws.

In Paul v. Virginia the Supreme Court through Mr. Justice Field declared:

"Issuing a policy of insurance is not a transaction of commerce. The policies are simply 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 trans-

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1. 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1082 (1944).
2. 75 U.S. 168, 19 L.Ed. 357 (1869).
fer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. They are, then, local transactions, and are governed by the local law."

This point of view was reiterated strongly in *Hooper v. California* which flatly added that, "the business of insurance is not commerce." Until the present case the Court has consistently upheld this concept of insurance.

It is noteworthy that each of the previous rulings on this issue concerned the validity of state statutes regulating various aspects of the insurance business. Not until the *South-Eastern Underwriters* case was the Court asked to restrain the federal government from regulating insurance by striking down an act of Congress. *Paul v. Virginia*, as all other previous cases, stood for the doctrine that the right of a foreign corporation to do business in a state other than the one of its creation depended upon the will of the state. This rested on the assumption that, while a corporation was a person within the meaning of the due process clause of the Fourteenth Amendment, it was not yet a citizen entitled to full "privileges and immunities." The decision thus gave the state the right to burden a business not yet regarded as interstate commerce.

There were good reasons for upholding state regulations of insurance in the absence of detailed federal rules. In the first place any harm which such statutes might cause could be re-

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5. 155 U.S. 648, 655, 15 S.Ct. 207, 210, 39 L.Ed. 297, 301 (1895).
7. 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1082 (1944).
9. This was in line with the interpretation the post Civil War Court gave to the commerce clause, developing no doctrine which substantially altered the principles previously enunciated: Gilman v. Philadelphia, 70 U.S. 713, 18 L.Ed. 96 (1866); Waring v. Mobile, 75 U.S. 110, 19 L.Ed. 342 (1869); Woodruff v. Parham, 75 U.S. 123, 19 L.Ed. 382 (1869); Ex parte McNeil, 56 U.S. 236, 20 L.Ed. 624 (1872); Osborne v. Mobile, 83 U.S. 479, 21 L.Ed. 470 (1870); Chicago and Northwestern Ry. v. Fuller, 84 U.S. 560, 21 L.Ed. 710 (1873).
strained by other constitutional limits than the commerce power. Due process, equal protection of the laws, and federal jurisdiction over actions where the parties possess diverse citizenship afforded an ample judicial arsenal against possible abuses.

Moreover, as the Paul case pointed out, a contract is intangible. It offers little difficulty in the location of a definite situs even though the parties to it may be citizens of different states. Once the state whose law controls has been determined, the limitations already noted in state action would operate to give sufficient protection to insurance companies. In short the companies were protected by the federal government without invoking the commerce power, but they were not regulated by it.

At the same time Paul v. Virginia undoubtedly placed an obstacle in the way of that uniformity of legislation which students of American government have recognized as desirable. In insurance specifically there has existed a multiplicity of state rules and regulations with regard to each of the aspects of the business subject to regulation. An insurance company had to comply with as many different sets of rules and regulations as there were states in which it wished to do business. Some states were too lax and were havens for fraudulent insurance companies. The general effect of state regulation of insurance has been to cause the payment of higher rates. Financial statements and reports, the employment of lobbyists to influence passage of legislation, the procuring of high-paid legal staffs to interpret it, and the maintenance of numerous offices have all contributed to a higher cost than would probably be necessary under a national system of regulation. Additionally the companies themselves have felt burdened by local regulations and have raised the cry that theirs is a business subject to the regulation of interstate commerce. Indications from other sources have also appeared occasionally that the rule of Paul v. Virginia was not wholly satisfactory.

James M. Beck, hardly a disinterested observer, refers to the judgment as "easily one of the two most mischievous decisions

10. 75 U.S. 168, 19 L.Ed. 357 (1869).
11. Shenton, supra note 8, at 123.
the Supreme Court ever announced."  This conclusion is based on the argument that a foreign corporation seeking to do business in an alien state places itself at the mercy of the latter state as a concomitant of entering business there. States have, however, been limited in their dealings with non-resident corporations by the provisions of the Fourteenth Amendment. Thus a state must grant a corporation "equal protection of the laws" once it has entered the state in compliance with the laws of the locality.

There have been judicial tokens, moreover, that contractual relations which are essential to interstate commerce should be brought within the definition of interstate commerce, this to include insurance. Such was the main import of *Thames and Mersey Marine Insurance Company v. United States.* There a corporation, engaging in the business of marine insurance, was taxed under the War Revenue Act of 1898. This tax was assailed by the company as being in substance a tax upon exportation and hence invalid. Accepting this charge, the Court went on to say:

"Let it be assumed, as this Court has said, that the insurance business, generically considered, is not commerce; that the contract of insurance is a personal contract, an indemnity against the happening of a contingent event. The inquiry still remains whether policies of insurance against marine risks during voyage to foreign ports are not so vitally connected with exporting that the tax on such policies is essentially a tax on the exportation itself. . . . It cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation; the business of the world is conducted upon this basis."

Two years earlier, however, the New York Life Insurance Company vainly sought a judgment that a state tax upon the excess of premiums over losses and ordinary expenses incurred

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    Accord: Power Mfg. Co. v. Saunders, 274 U.S. 490, 47 S.Ct. 678, 71 L.Ed. 1165 (1927). In *Terral v. Burke Constr. Co.*, 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352 (1922) the Court held that as a condition of doing business within the state a state may not compel waiver of resort on the corporation's part to federal courts or withdraw the privilege of doing business within the state should the corporation exercise such resort in protection of its rights against state action.
within the state was a burden upon interstate commerce.\textsuperscript{20} In an exhaustive review of the subject the Court again found in a six to two decision that insurance was not interstate commerce. The Court, speaking through Justice McKenna, held that that tribunal might decide differently had not the issue been "authoritatively" determined. He cited all precedents at hand and concluded:

"for over forty-five years they have been the legal justification for such [i.e., state] legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibitions upon the states, and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision.\textsuperscript{21}

The point of reference in this case, though, was still the validity of state enactments. As we turn to \textit{United States v. South-Eastern Underwriters Association}, the question of the power of the federal government to regulate insurance as a part of interstate commerce appears for the first time.

II

The South-Eastern Underwriters Association, its membership of two hundred private stock fire insurance companies, and twenty-seven individuals were indicted by the United States for conspiracy to restrain trade in violation of Section One of the Sherman Act by fixing and maintaining arbitrary and non-competitive premium rates on fire and specified allied lines of insurance in Alabama, Georgia, Florida, North Carolina, South Carolina, and Virginia. The second conspiracy charged in the indictment, in violation of Section Two of the Sherman Act, was to monopolize trade and commerce in the same lines of insurance in and among the states listed above.\textsuperscript{22} The indictment alleged that ninety per cent of the fire insurance and allied lines sold by stock companies


\textsuperscript{21} 231 U.S. 495, 502, 34 S.Ct. 168, 169, 58 L.Ed. 332, 335.

\textsuperscript{22} United States v. South-Eastern Underwriters Association, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1082 (1944). The relevant provisions of the Sherman Act are as follows: "Section One. 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, is hereby declared to be illegal. ... Every person who shall make any such contract or engage in any such combination or conspiracy declared by Sections One to Seven of this title to be illegal shall be deemed guilty of a misdemeanor. Section Two. Every
within the six states was controlled by member companies of the association. It was further alleged that through continuous agreement and joint action the Underwriters Association fixed premium rates and agents' commissions, boycotted non-members in order to compel such companies to join the conspiracy, used various means of coercion to compel people needing insurance to purchase only from the South-Eastern Underwriters Association on its own terms, punished independent sales agents by withdrawal of the right to represent member companies if they also represented non-member companies, and committed other acts alleged to be in violation of the statute. These activities constituted "a single continuous chain of events," which necessarily crossed state lines in the consummation of transactions.

From this statement the Court derived two main issues: First, do fire insurance transactions crossing state lines constitute interstate commerce within the scope of the constitutional provisions? And second, was the Sherman Act intended to prohibit conduct of insurance companies in monopolizing interstate insurance trade? Since the sole constitutional basis of the Sherman Act is the commerce power, we shall necessarily consider the Court's analysis of the first of these questions at this point.

On the basis of the facts of the case the district court had sustained a demurrer of the defendants that they were not subject to the Sherman Act because "the business of fire insurance is not interstate commerce." The lower court went further in its holding, ruling that insurance is not commerce—either intrastate or interstate. The majority opinion prepared by Mr. Justice Black reverses this judgment with a frontal assault on its judicial cornerstone, Paul v. Virginia. Chief Justice Stone and Justices Frankfurter and Jackson dissented. Roberts and Reed took no part in the case.

Seven years ago the then Chief Justice Hughes declared in National Labor Relations Board v. Jones & Laughlin Steel Company that:

person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor." Act of July 2, 1890, 26 Stat. 209 as amended (1890), 15 U.S.C.A. §§ 1, 2 (1941).

25. 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937).
"When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial warfare? . . . . And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!"

It seems evident that the Court is now asking the same questions with regard to insurance companies, also organized on a national basis, whose policies of investment and credit are interstate equally with the labor relations of a large industrial corporation. Can this test be fairly applied to insurance companies?

A glance at the principles of the Labor Board case is first necessary.\[27\] The judgment of this case sustained the so-called Wagner Labor Act,\[28\] which provided for federal regulation and protection of labor organizations in industries affecting interstate commerce. When it summarized the extent of operations of Jones & Laughlin, the Labor Board found that the central manufacturing plants "might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania . . . they transform the materials and then pump them out to all parts of the nation . . . ."\[29\] In fact, therefore, the steel company was engaged in interstate commerce and subject to federal regulations to prevent the burdening of such commerce.

The decision in the case of the National Labor Relations Board v. Friedman-Harry Marks Clothing Company\[30\] perhaps gives the best illustration of the expansion of the commerce power under the Wagner Act. The clothing company was not a large interstate corporation whose business had any great effect upon

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26. 301 U.S. 1, 41-42, 57 S.Ct. 615, 626-627, 81 L.Ed. 893, 914-915.
29. 301 U.S. 1, 27, 57 S.Ct. 615, 619, 81 L.Ed. 893, 906 (1937).
commerce. Out of 150,000 men engaged in the industry, it employed somewhat less than 800. The Court sustained the application of the statute, Hughes apparently relying on his statement in an earlier case that:

“Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”

Although Hughes cited the *Schechter Poultry Corporation* case in support of this proposition, the general import of the Labor Board cases appears to be that the doctrine of “direct and indirect” affectation of commerce as a test of the validity of congressional action is abandoned and that any practice substantially affecting interstate commerce either in a primary or secondary sense is brought within the scope of power of the federal government.

Similarly this seems to be the gist of the Court’s opinion in the case of *Polish National Alliance of the United States of North America v. National Labor Relations Board*. On the same day the *Underwriters Association* case was decided, the Court held that the National Labor Relations Act, which prohibits unfair labor practices on the part of employers, applied to an insurance company active in twenty-six states. Stated Frankfurter for the Court:

“This summary of the activities of the Alliance and of the methods and facilities for their pursuit amply shows the web of money-making transactions woven across many State lines. An effective strike against such a business enterprise, centered in Chicago but radiating from it all over the country, would as a practical matter certainly burden and obstruct the means of transmission and communication across these state lines. . . . To hold that Congress could not deem the activities here in question to affect what men of practical affairs call commerce, and to deem them related to such commerce mere-

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31. 301 U.S. 1, 37-38, 57 S.Ct. 615, 624, 81 L.Ed. 893, 901.
34. 64 S.Ct. 1196, 88 L.Ed. 1117 (U.S. 1944).
ly by gossamer threads and not by solid ties, would be to dis-
respect the judgment that is open to men who have the con-
stitutional power and responsibility to legislate for the Na-
tion."

In concurrence Black simply declared that "I agree that the busi-
ness of insurance is commerce subject to federal regulation as
such when conducted across state lines . . . ."

The activities of the members of the South-Eastern Under-
writers Association, considered in this broad sense not merely as
the entering into of a series of insurance contracts but rather as
the conduct of an industry, presented to the Court a picture of
an integrated enterprise which constituted a "continuous stream
of intercourse" among the states. Every insurance policy concerns
at least the transmission of money to the company, and the re-
turn of a policy to the customer, either of which may involve the
crossing of state lines. More significant than this, the risks which
an insurance company assumes, the investments it makes in
bonds and securities, and the premiums which it charges for its
services are interstate in character.

This was especially so with the Underwriters Association. Only
eighteen of the two hundred companies comprising the
membership maintained home offices in the six states covered by
the association. Agents of the company collected $488,000,000 in
the six states during the years 1931-41 and disbursed $215,000,000
in losses. All this involved countless transmissions over and
across state borders. Clearly enough, the mere protection of the
facility of transportation would prove insufficient if interstate
commerce were burdened with respect to credit and investment
facilities.

Here, perhaps, appears a limitation inherent in the reasoning
of Paul v. Virginia. Concerned with the validity of a state statute
in 1868, the Court in that case examined only contracts of insur-
ance and ignored the insurance business which is the totality of
all policy contracts and companies. Once established as a doc-

35. 64 S.Ct. 1196, 1198, 1200, 88 L.Ed. 1117, 1119, 1121.
36. 64 S.Ct. 1196, 1201, 88 L.Ed. 1117, 1123.
37. United States v. South-Eastern Underwriters Association, 322 U.S. 533,
542, 64 S.Ct. 1162, 1168, 88 L.Ed. 1082, 1087 (1944).
38. Ibid.
39. Timberg, Insurance and Interstate Commerce (1941) 50 Yale L. J.
959, 964.
trine, the resultant emphasis on the contractual element alone displayed remarkable tenacity despite the fact that insurance companies and their activities are closely related to the national economy as a functioning part thereof. This stress is reflected in Chief Justice Stone’s dissenting opinion which would permit congressional regulation to extend to the formation and performance of insurance contracts only insofar as such contracts affected communication and transportation in interstate commerce.

Yet it must be emphasized again that in the Paul case Justice Field stated a rule for judging state, not federal, action and that at no time has the Court offered any elaborate explanation of its exclusion of the insurance business from interstate commerce. Justice Frankfurter offers the accommodating rule for this situation:

"Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the Constitution or different exertions of power under it. Thus, federal regulation does not preclude state taxation and state taxation does not preclude federal regulation."

A persistence of Field’s rule has been partly at least a reflection of the Court’s inability to shift gears intellectually. Such a shift is accomplished successfully, however, when Mr. Justice Black denies that the Court

"is powerless to examine the entire transaction, of which that [i.e., the insurance] contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce. . . . 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

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40. On December 31, 1937, twenty-six of the larger insurance companies held 11.6% of the federal debt, 6% of the state debt, 17.4% of all railway bonds, 18.2% of the public utility debt, and 28.5% of all mortgages rural and urban. Hearings before the Temporary National Economic Committee (1940) 14718. From 1929-1938 some twenty-five companies received an income of approximately $42,000,000,000 and invested $26,000,000,000, obviously not all within one state. Hearings before the Temporary National Economic Committee (1940) 15493. The insurance industry represents no less than 64,000,000 policyholders as of 1940.


42. Timberg, supra note 39, at 966.

rule otherwise, few businesses could be said to engage in interstate commerce."\textsuperscript{44}

The test thus has changed from a mechanical one to the review of each case in an effort to accommodate competing state and national demands.

Two points remain to be noted. First, the Underwriters stressed the rule that insurance policies "are not commodities to be shipped or forwarded from one state to another.\textsuperscript{45} A contract of insurance is not, however, solely a contract of indemnification and dependent upon an uncertain contingency as to profit or loss. The policyholder regards generally the contract as an investment on his part for cash surrender purposes and in turn is contributing to any investment program the insurance company may have.\textsuperscript{46} The parties to such a contract become, in a sense, joint enterprisers in a network of commercial activities which are certainly nationwide in scope and effect. Moreover, the relationship of insurer and insured is not the same as occurs as the result of the usual contractual process. A person buys insurance much as he purchases a hat, an automobile, or a piano.\textsuperscript{47} This has gone largely unnoticed.

In the face of these developments, the Court consistently asserted insurance was not commerce and let it go at that. Why? Perhaps, first, because all the previous cases involved state regulatory actions rather than specific types of federal regulation. The result was, as Mr. Justice Jackson states in dissent in the case at hand, that, although the modern insurance business usually is in fact interstate commerce, "In contemplation of the law ... insur-

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\textsuperscript{44} United States v. South-Eastern Underwriters Association, 322 U.S. 533, 547, 64 S.Ct. 1162, 1170, 88 L.Ed. 1082, 1090 (1944).
\textsuperscript{45} Paul v. Virginia, 75 U.S. 183, 19 L.Ed. 357 (1868).
\textsuperscript{47} One writer has put it this way: "The insurer deals in a standardized type of contract, the terms of which it has fixed in advance. The main objectives in view are to attract policy holders and at the same time afford a maximum of protection for the insurer. The bargaining powers of the respective parties are seldom equal. Furthermore, insurance is issued through standardized methods involving the intervention of an authorized agent who has no contracting power himself but who nevertheless contacts the prospective policy holder and represents to him what the terms of the contract will be. Thus, although insurance policies are still governed largely by the law of contracts, they more nearly represent interests normally covered by the law of sales of personal property. The public regards the 'buying' of insurance much as it does the buying of an ordinary commodity." (Italics
ance has acquired an established doctrinal status not based on present day facts.”

Second, the defendants to the present action contended that control over insurance companies previously exercised by valid state statutes would be placed in the federal government with state rules becoming invalid. Jackson’s dissenting opinion especially deals with this subject, though Stone’s also touches upon it. The majority opinion treats this argument lightly as one susceptible of exaggeration. The case of Cooley v. Board of Wardens of the Port of Philadelphia upheld a state statute imposing a pilotage fee on vessels entering the port. The opinion of the Court, divided seven to two, found that, in matters not requiring uniform treatment, state rules might stand until they conflicted with a federal regulation. It is a familiar observation, furthermore, that constitutional questions of apparent similarity have different contextual backgrounds which may call for varying exertions of power. Again, the restraint urged frequently upon the Court would indicate that no wholesale reversal of state laws is imminent. In his dissenting opinion in an earlier case, Mr. Justice Black argued that the Court should look for a congressional declaration that a state law conflicts with federal power before declaring it invalid. There three dissenting justices insisted that the judicial rule of presumption of validity of state legislative enactments should be applied to commerce clause cases. Finally, no state laws authorize insurance companies to use coercion, intimidation, and other dubious methods in the pursuit of business, and most states require state supervision over agreements.

49. 322 U.S. 533, 548, 64 S.Ct. 1162, 1171, 88 L.Ed. 1082, 1091.
50. 322 U.S. 533, 575, 583, 586, 591, 64 S.Ct. 1162, 1185, 1189, 1190, 1193, 88 L.Ed. 1082, 1106, 1110, 1112, 1115.
52. Thus state regulation of food and drugs was sustained despite the passage of the Pure Food and Drugs Act. See McDermott v. Wisconsin, 228 U.S. 115, 33 S.Ct. 431, 57 L.Ed. 754 (1913).
55. “... it cannot be that any companies have acquired a vested right to engage in such destructive business practices.” Mr. Justice Black in United States v. South-Eastern Underwriters Association, 322 U.S. 533, 562, 64 S.Ct. 1162, 1178, 88 L.Ed. 1082, 1099 (1944).
as to uniform rates. Moreover, general provision is usually made by state constitutions or statutes in line with the Sherman Act, prohibiting monopolies and restraints of trade.

Nevertheless it is against possible invalidation of state statutes that Jackson's dissent is directed. And this at a time when the federal government has no insurance regulations upon the books. Granting that the insurance business as a matter of fact is usually interstate commerce, he argues that it has attained the fictional status of an intrastate business. This it should be permitted to retain until Congress alone changes the rule. He declared:

"When, as in this problem, such practical judgments can be made by the political branch of government, it is the part of wisdom and self-restraint and good government for courts to leave the initiative to Congress."

His, then, is a plea for judicial restraint and acceptance of a status quo pending legislative action. It is not an elaboration of the old position that all insurance is not interstate commerce.

III

We come, now, to the second main issue of United States v. South-Eastern Underwriters Association: Was the Sherman Act intended to prohibit monopolistic practices of insurance companies in interstate trade?

Many familiar axioms of statutory interpretation may be applied to the reading of statutory intent, and were in this case. Thus silence in an act, indicating awareness of a settled rule on a given subject, may lead to the presumption that the subject was not intended to be included within the scope of the legislation. Conversely, "equity of the statute" sometimes may be used to bring the subject within statutory bounds. The result, then, of efforts in many cases to discover statutory intent is inconclusive. The performance of judicial law-making founded upon judicial policy-making remains necessary. This was the case in the present controversy.

56. 322 U.S. 533, 594, 64 S.Ct. 1162, 1195, 88 L.Ed. 1082, 1117.

57. This is of capital importance, for by marking out the area within which government, both state and federal, may act, the Court at least temporarily aways the cause of political action. Compare Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895) with Brushaber v. Union Pacific Ry., 240 U.S. 1, 18, 36 S.Ct. 236, 243, 60 L.Ed. 493, 510 (1916); Hammer v. Dagenhart, 247 U.S. 251, 32 S.Ct. 229, 62 L.Ed. 1101 (1918) with
In interpreting legislative intent as to applicability of the Sherman Act, the Court deals not with a purely legal issue, but with one which also involves a question of power and hence of policy. No criteria of judgment are to be found in the Constitution on the policy of applying an anti-trust statute to interstate businesses. The issue is one of what the Constitution should become, and for resolution demands an appeal to conceptions of statesmanship. These appeals in turn involve a choice between competing interests. The end result is that formulation of judicial theories of constitutional law contains a personal element. The decision of the individual judge will follow from the synthesis of his predilections and their effect upon his concept of desirable public policy.

This becomes apparent in the Underwriters case. Neither Black's opinion of the Court nor Stone's dissent is a simple expression of legal logistics, a mere amassing of the lawyer's "transport and supply." Each starts from a major premise, based ultimately upon the writer's own conception of policy, and each follows his reasoning through to its logical end. The arguments of the two justices may be stated briefly to illustrate the point.

Thus Stone argues, in effect, that, when Congress passed the Sherman Anti-Trust Act, it was aware of the long settled rule that insurance is not interstate commerce. Congress has refused many times to declare affirmatively that insurance is interstate commerce. The reasonable assumption is that Congress did not

61. Haines, General Observation on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges (1922) 17 Ill. L. Rev. 96, 104.
64. The following bills have been introduced in the Congress at various times to "federalize" the insurance business: H.R. 738, 38th Cong., 1st Sess. (1866); Senate Bill 299, 40th Cong., 2d Sess. (1868); H.R. 4699, 52d Cong., 1st Sess. (1892); Senate Bill 2736, 55th Cong., 2d Sess. (1898); Senate Bill 7277, 58th Cong., 3d Sess. (1904); S.J. Res. 103, 63d Cong., 2d Sess. (1914); H.J. Res. 194, 63d Cong., 2d Sess. (1914); S.J. Res. 58, 64th Cong., 1st Sess. (1915).
intend the scope of the act to transcend constitutional limitations. Furthermore, congressional refusal to enter the field of insurance regulation, together with the long line of judicial decisions, combined to encourage, perhaps hasten, the systematic development of state regulations. This is a cogent argument and, if determinative of the issue, it would be highly persuasive.

Countervailing is the argument that the scope of the Sherman Act was intended to be coextensive with the interstate commerce power, and if the shifting concepts were later to be enlarged by the court, Congress wished the scope of the act to follow the enlargements; in other words, Congress wanted the scope of the anti-trust legislation to be as broad as was constitutionally possible, then or thereafter. As Black puts it, "The question was not whether they [trusts and monopolies] should be abolished, but how this purpose could best be accomplished."

Each of these general theses is in the best vein of judicial balderdash. Choice between them is a matter of personal preference. Justices Stone and Black each postulate an impressive number of arguments to establish intent. Argument is neatly balanced as the following chart indicates:

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<th>BLACK</th>
<th>STONE</th>
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<td>1. The language of the Sherman Act is clear, comprehensive, and shows a studied attempt to include all interstate businesses.</td>
<td>1. The Sherman Act does not apply to interstate insurance because there has been no restraint of marketing of goods and services in interstate commerce.</td>
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<tr>
<td>2. A general application of the act is in harmony with the spirit of the times which gave rise to congressional action.</td>
<td>2. Nothing in the legislative history of the act suggests it was intended to apply to the interstate insurance business.</td>
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65. 322 U.S. 533, 555, 64 S.Ct. 1162, 1175, 88 L.Ed. 1082, 1095.
3. There is no unequivocal expression of congressional desire to exclude the insurance business from application of the act.

4. If exceptions are to be made in the application of the act, Congress must make them. The argument that many state laws are necessarily invalidated by application of federal anti-trust legislation is exaggerated.

It is evident that Black started from the premise that application of the Sherman Act to insurance businesses in interstate commerce was desirable as a matter of policy; Stone started from the converse premise. Both marshaled facts to support their positions, reasoned deductively from alternate choice of precedent, and occasionally resorted to simple verbalism. More members of the Court, three in fact, supported Black than Stone, who had the concurrence of two justices. Black's proposition, therefore, became the opinion of the Court.

IV

The effect of the decision in the Underwriters case upon the actual conduct of interstate insurance remains problematical. Any prediction is subjected necessarily to qualifications. Some definite conclusions emerge clearly, however, in relation to the everyday practices of the business.

Stock fire and casualty company executives view the results of the judgment as twofold: First, a series of federal acts is made applicable to interstate insurance which will be in conflict, it is claimed, with the provisions of state laws. Second, state regulatory acts and the business are subjected to the line of decisions interpreting the federal commerce power and regulatory statutes enacted under it. To meet these alleged difficulties the Execu-

67. The writer acknowledges indebtedness for much of the material used in this section to representatives of the business. Especially helpful has been Mr. Ray Murphy, General Counsel to the Association of Casualty and Surety Executives.
68. Report of Sub-Committee on Federal Legislation to Executive Com-
tive Committee of the National Association of Insurance Commissioners on August 29, 1944, recommended a declaration by Congress that the regulation and taxation of insurance be continued in the states; that the insurance business be completely eliminated from the Federal Trade Commission and Robinson-Patman Acts; and that the industry be partially exempted from application of the Sherman Act, the specific exemptions being described as "all cooperative procedures necessary and incidental to the establishment of a statistical rate base, rates, coverage, and related matters." These recommendations touch at the very center of the matter—trade practices and especially statistical reporting.

Although unregulated competition prevailed in the early days of the business, the states today have widely regulated insurance in order that rates be fair and reasonable. Therein the Underwriters case has posed the dilemma confronting the business. If unfair discrimination is to be avoided, rate uniformity must prevail. Such uniformity results only by cooperation in ferreting out statistical data and basing rates on conclusions drawn therefrom. A concerted action on the part of the companies is thus required. At the same time, there is a marked tendency on the part of the courts to hold that statistical reporting leading to agreements to fix prices is illegal.

A cardinal principle of the fire and casualty fields of insurance has been that cooperative activity of all companies writing policies is necessary in order to determine the loss experienced as a basis for arriving at a fair and reasonable rate of premium.


70. Memorandum prepared by Mr. John M. McFall, Vice President and Chief Attorney of the United States Fidelity and Guaranty Company (1944) 1. (Hereinafter cited as McFall, Memorandum.)

71. Memorandum of Association of Casualty and Surety Executives to Sub-Committee on Federal Legislation, National Association of Insurance Commissioners (1944) 3. (Hereinafter cited as Memorandum of Association of Casualty and Surety Executives.)

charges. Conditions in these fields differ from those prevailing in life insurance. In the latter, gross rates may be based upon a large number of readily available factors, such as mortality tables. In fire and casualty insurance there is no assurance that the insured contingency will occur. These types of policies are largely, though not exclusively, of an indemnifying nature. The obligation of the insurer becomes absolute only whenever a fire or accident takes place. Necessarily, therefore, the wider the statistical base of information the more accurate can be rate determination. Combination of experience of the companies in the field leaves such companies in a position to discharge fairly incurred obligations.

Consequently, bureaus have been privately established by the companies to pool their individual experiences and arrive at a premium rate. In the casualty field many states have enacted regulations permitting and occasionally requiring companies to collect common statistical data. An example is afforded by workman’s compensation insurance. Here, though casualty companies may combine to pool experience, the rates issued on the basis of such experience are subject to approval of state supervisory officials. In the fire insurance field this practice has been almost entirely private, and state regulatory power has been little exercised. In either event, the underlying purposes of statistical reporting in insurance are on the fringe of conflict with the concept of unrestricted competition in the Sherman Act. This does not mean, however, that all statistical reporting is illegal.

The practical effect of the Court’s decision in the Underwriters case is to give rise to the danger that all associations of insurance companies for rate-making or other purposes may fall be-

74. Ibid.
75. With qualifications, valid principles of statistical reporting have been listed as follows:

1. Secrecy in reporting data and limitation of information to members of the trade association is illegal.
2. Statistics must be compiled "fairly" and record "actual transactions."
3. Reports must not be more detailed or specific than is necessary for intelligent comprehension of fundamental industrial conditions.
4. Representatives of the trade association may not make comments "influencing" production or price policies of individual members.
5. There must be no penal provision to force members to conform to group action with respect to prices, etc.
6. There must be no supervisory system which amounts to control of members by the association.
7. Except for "special circumstances," reports must be of "past transactions," not "future prices."

Kirsch, op. cit. supra note 72, at 52-66.
fore the anti-trust legislation. This would include associations for standardized policy forms and uniform coverage, as well as other kinds of agreements which may bear substantial relation to rate structures. Yet the very conditions of the interstate insurance business make it necessary for the fire and casualty companies to cooperate for these purposes. It is in the public interest that the rates paid for insurance be based upon accurate information rather than guesswork. Accordingly, the question arises: Is there any way, following United States v. South-Eastern Underwriters Association, by which such companies may provide a common fund of factual data for the legitimate purposes of the business? The separate dissent of Mr. Justice Brandeis in the Hardwood case is suggestive on this point. The Court is perfectly capable of recognizing that a purely competitive market condition in the insurance business, as in others, can result only in ignorance, fraud, coercion, and unintelligent conduct, harmful to the public in the long run. At the very least, the South-Eastern Underwriters case leaves open the probability of judicial recognition of the requirements of the business. At most, it stands as a shot-gun pulled from the closet to compel congressional action.

In addition, several legislative reforms might be effected. First, it has been suggested that cooperative associations which have been organized for experience purposes may be continued if such procedure be required by the law of each state. In this case the combinations, being involuntary, would not violate anti-trust laws. However, it cannot be assumed with any assurance

76. Compare, however, with Kirsch, op. cit. supra note 72, at 135-163.
77. He stated: "The cooperation which is incident to this plan does not suppress competition. On the contrary it tends to promote all in competition which is desirable. By substituting knowledge for ignorance, rumor, guess, and suspicion, it tends also to substitute research and reasoning for gambling and piracy, without closing the door to adventure or lessening the value of prophetic wisdom. . . . If, as is alleged, the Plan tends to substitute stability in prices for violent fluctuations, its influence in this respect, is not against the public interest." American Column & Lumber Co. v. United States, 257 U.S. 377, 418, 42 S.Ct. 114, 123, 66 L.Ed. 284, 298 (1921). Compare with Holmes' dissent, 257 U.S. 377, 412, 42 S.Ct. 114, 121, 66 L.Ed. 284, 296. See also Appalachian Coals, Inc. v. United States, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1932). In this case 137 producers of bituminous coal created the Appalachian Coals Commission which, as a common selling agency, agreed to establish standard classifications, obtain best prices, apportion orders, and fix the selling price. Defendants alleged their motive was to increase sales through better ways of advertising, research, marketing, and constructive trade practices. Held: Appalachian Coals was not a restraint of interstate commerce in violation of the Sherman Act. Apparently the Court will test "reasonableness" on the basis of motives and effects of the plan, economic conditions peculiar to the industry, reasons for adoption, and probable results on market prices. In short, the question is one of intent and effect. See Rohlfing, Carter, West, and Harvey, Business and Government (1938) 140.
that a state statute which is in contravention of federal anti-trust legislation would be valid.

A second alternative is the action proposed by the National Association of Insurance Commissioners, namely, an amendment to the Sherman and Clayton Acts "excluding from the prohibitions thereof all reasonable cooperative procedures necessary and incidental to the establishment of statistical rate bases, rates, coverages, and related matters."\(^7\) This suggests a procedure previously employed by Congress in the Miller-Tydings Amendment\(^7\) to the Sherman Act whereby the practice of vertical price fixing was excluded from the operation of the anti-trust law.

The model of the Miller-Tydings Amendment might be further emulated by providing that cooperative practices will be sanctioned under the federal act only to the extent that such practices have been expressly authorized by state statutes. This device will avoid federal intervention in opposition to state policy and will call for the preparation of a model state statute, repeating the process which gave rise to the Fair Sales laws which now appear on the statute books of most states.\(^8\) The constitutional status of such an amendment is now beyond question.\(^9\) In event that a legislative amendment of this nature were adopted, the South-Eastern Underwriters case might well serve as a medium of housecleaning with those states which may enact legislation approving associations of companies. The proposal involves, in effect, affirmative action by Congress buttressing state regulation.

Prior to the decision in the South-Eastern Underwriters case legislation had been introduced in Congress to exclude completely the business of insurance from the scope of the Sherman Anti-Trust Act and the Clayton Act.\(^8\) Shortly after the Supreme Court's action was announced, this bill was enacted by the House.\(^8\) It is now resting on the table of the Senate Committee on the Judiciary. The result of final passage of this act would be, of course, to lay the problem at rest insofar as present federal anti-trust legislation is concerned. It is clear, however, that the

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80. The state fair trade acts are collected in Comment (1941) 3 Louisiana Law Review 814, 817 et seq.
power of Congress to make later excursions into the field of insurance under the commerce clause remains established, and the cloud which is cast upon the validity of state action is not dissipated. The broadside attack of the proposed legislation represents a more complete abnegation of federal control than was requested by the Sub-Committee on Federal Legislation of the National Association of Insurance Commissioners,\(^8\) and there are some murmurs of dissatisfaction among the brethren who would be most affected thereby.

Significantly, even partial exemption by Congress of insurance from the application of anti-trust statutes would leave insurance companies subject to the Federal Trade Commission. Authority is placed in that tribunal by the Clayton Act to enforce certain sections of the statute. The Court's future determination whether insurance contracts are, for example, "commodities," "wares," or "merchandise" will decide if the Robinson-Patman Act extends to insurance companies.\(^8\) The present decision does not resolve this issue but rather leaves it open for resolution at a later time.\(^8\) Moreover, the ruling as it stands now makes applicable the Federal Trade Commission Act.\(^8\) Methods and practices of insurance companies may well fall within the scope of complaints brought to the commission for redress of unfair or deceptive acts and practices.\(^8\)

Questions other than rate-making, statistical reporting, and trade practices have been raised by the reversal of *Paul v. Virginia*. Thus, may a state now require a foreign insurance company engaged in interstate commerce to take out a license for the

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84. See note 71, supra.

85. Thus Section 14 (Robinson-Patman Act) makes it illegal for any person engaged in interstate commerce to effect a sale of goods, wares, or other commodities on condition that the purchaser shall not deal in the goods of a competitor when the effect of such a condition is to lessen competition substantially. 49 Stat. 1526 (1936), 15 U.S.C.A. §§ 13, 21 (1941).

86. In one state case, Beechley v. Melville, 70 N.W. 107 (Iowa 1897), the court held that "insurance" was a "commodity" within the meaning of an Iowa statute. Reliance is placed largely on a dictionary definition of the term. No other authorities are cited for conclusions.


privilege of carrying on its interstate business within the state? These are, of course, but two of many preliminary problems raised by the present case. Not so significant as the problem of rate determination, they yet demand an answer.

One point remains to be indicated briefly. Insofar as insurance now comes within the scope of interstate commerce, state regulatory acts are subject to judicial interpretation under the commerce power in its oft shifting concepts. This may, or may not, lead to what one insurance executive has termed "a sort of statutory erosion" which will eventually demand positive federal action. Certainly the history of the expansion of federal regulatory activity under the commerce power indicates strongly that when a business becomes huge in size and interstate in character, federal regulation is the ultimate result. Continued attacks on the validity of state acts regulating insurance may well leave the interstate insurance business in the same position railroads not uncomfortably occupied in the period immediately following the Wilbash case. The passage of the Interstate Commerce Act and the resultant creation of the Interstate Commerce Commission ensued to clarify the practices of a business truly interstate in its scope and ramifications.

It has been suggested that Paul v. Virginia deprived the insurance industry of the distinction of being the first business sub-

89. On this point the Court declared in Crutcher v. Kentucky, 141 U.S. 47, 53, 11 S. Ct. 851, 854, 35 L.Ed. 649, 652 (1891) that "a state law is unconstitutional and void which requires a party to take out a license for interstate commerce, no matter how specious the pretext for imposing it."


91. McFall, Memorandum, supra note 70, at 11.

92. A list of federally regulated industries with dates of passage of regulatory acts follows:

<table>
<thead>
<tr>
<th>Industry</th>
<th>Date of Passage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Railroads</td>
<td>February 4, 1887</td>
</tr>
<tr>
<td>Oil Pipe Lines</td>
<td>June 29, 1893</td>
</tr>
<tr>
<td>Express Companies</td>
<td>June 29, 1906</td>
</tr>
<tr>
<td>Telegraph Companies</td>
<td>June 18, 1910</td>
</tr>
<tr>
<td>Telephone Companies</td>
<td>June 18, 1910</td>
</tr>
<tr>
<td>Water Carriers (foreign commerce)</td>
<td>February 28, 1920</td>
</tr>
<tr>
<td>Air Commerce</td>
<td>May 20, 1926</td>
</tr>
<tr>
<td>Securities</td>
<td>May 27, 1933</td>
</tr>
<tr>
<td>Motor Carriers</td>
<td>August 9, 1935</td>
</tr>
<tr>
<td>Electric Power</td>
<td>August 26, 1935</td>
</tr>
<tr>
<td>Natural Gas</td>
<td>June 21, 1938</td>
</tr>
<tr>
<td>Civil Aeronautics</td>
<td>June 23, 1938</td>
</tr>
<tr>
<td>Water Carriers</td>
<td>September 18, 1940</td>
</tr>
</tbody>
</table>

jected to an independent federal regulatory body. If, under the 
South-Eastern Underwriters decision, states are no longer able
to regulate the conditions apparently required for the conduct of
the business with or without federal assistance, the time has come
for their departure from the field. Nor need it be mourned un-
duly. Granting fully that initial dislocations of practices may be
severe, that a federal supervisory system cannot be devised in a
day, the ultimate effect of the Court's judgment in United States
v. South-Eastern Underwriters Association will be to force Con-
gress's hand to the end that one more phase of political and legal
existence be integrated with the realities of economic life.

94. Cushman, The Problem of Independent Regulatory Commissions
(1937) Report of the President's Committee on Administrative Manage-
ment 27.