LEG. FINANCE - BILLS 1985 - 1986 2254

SB 377 cont. - SB 381

2254

Another problem area is the relationship of joint and several liability to "enterprise" or "market share" liability. See Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980). In theory, "market share" liability such as that established in the California Supreme Court's seminal opinion in Sindell attempts to allocate liability for a generic product (e.g., DES) among various producers on the basis of their share of the relevant market. Even assuming such an allocation is reasonable, 4/ some jurisdictions have devised variations of or alternative approaches to Sindell which apply joint and several liability among the producers of a generic product. 5/ See, e.g., Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, cert. denied, 105 S.Ct. 123 (1984); Collins v. Eli Lilly Co., 116 Wis.2d 166, 342 N.W.2d 37 (1984). 6/ The difficulties plaintiffs face in attempting to show which manufacturer of a generic product was responsible for plaintiff's injury in fact can be (but are not always) substantial. While the Working Group does not advocate one approach over another, it firmly believes that any allocation of liability on the basis of market share should limit a manufacturer's liability to its specific share, and that such liability should not, in the absence of actual concerted action, be joint and several in nature.

The Working Group thus recommends elimination of joint and several liability, except in the limited circumstances where the plaintiff can demonstrate that the defendants have actually acted in concert to cause plaintiff's injury. 7/

4/ Because of a number of problems and inequities associated with Sindell, only a few states have embraced the position of the California Supreme Court. See Schwartz & Mahshigian, "Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution," 73 Calif. L. Rev. 941 (1985).

5/ It is unclear whether even Sindell is a true "market share" allocation decision, since under Sindell plaintiff must only sue manufacturers representing a substantial share of the market, and may allocate all liability among those defendants in proportion to their respective market shares.

6/ Particularly disturbing are decisions such as Abel which appear to distort the principles of concerted action to impute concerted action to manufacturers of a generic product.

7/ Joint and several liability as discussed in this report should not be confused with the legislatively enacted schemes for allocating financial responsibility for the cost of cleanup of hazardous waste sites and spills under the Nation's environmental laws, and, in particular, under the Superfund Act

(CONTINUED)

Recommendation No. 4: Limit non-economic damages to a fair and reasonable amount.

Non-economic damages such as pain and suffering, mental anguish and punitive damages are inherently open-ended. 8/ They are entirely subjective, and often defy quantification. For example, in many instances it simply is not possible, no matter how much money is awarded, to compensate someone fully for the pain and anguish of the loss of a loved one or from a serious injury. Moreover, because such damages are essentially subjective, awards for similar injuries can vary immensely from case to case, leading to highly inequitable, lottery-like results. Accordingly, such damages are particularly suitable for a specific limitation.

The open-ended nature of such damages makes them a particular problem from the standpoint of achieving predictability. Unlike economic damages (medical expenses, lost earnings, etc.), which can be reviewed objectively and thus can be predicted within a given range, non-economic damages are entirely subjective and unpredictable.

Non-economic damages also can serve as a significant obstacle in the settlement process. Plaintiffs and defendants often can

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7/ (FOOTNOTE CONTINUED)

(the Comprehensive, Environmental Response, Compensation and Liability Act of 1980) and the Resource Conservation and Recovery Act (RCRA). Unlike the tort system, which is intended to compensate injured persons and to deter wrongful conduct (see Chapter 2), Superfund and RCRA represent a legislative choice to allocate the cost of these programs among those who contributed to the problems the programs are designed to remedy. Thus, Superfund and RCRA liability, like the liability established under other environmental laws, are founded upon congressional objectives which provide that those who contributed to the problem or profited from the manufacture which created the waste, ought to bear the cost of cleaning it up. Those whose specific contribution to the site can be identified and severed from the whole are not jointly liable under this scheme. Without some degree of joint and several liability under Superfund and RCRA, the effective enforcement of these programs could be seriously impeded as a result of protracted and costly litigation among responsible parties over the precise allocation of cleanup costs.

8/ There are two types of non-economic damages: compensatory (pain and suffering, mental anguish, etc.) and punitive (sometimes called exemplary damages). The latter are designed purely to punish the defendant.

agree quickly on the amount of economic damages, but disagree sharply on non-economic damages. Plaintiffs frequently have unrealistic expectations of non-economic damages in the hundreds of thousands or millions of dollars to which defendants simply are unwilling to agree. Plaintiffs thus often reject settlement offers that from the standpoint of compensation for economic damages are quite reasonable. Plaintiffs' attorneys also often see high non-economic damage awards as necessary to justify high contingency fees, which may lead them to press for a high non-economic damage award when it may be in their clients' interest to obtain a quick and fair settlement.

Nevertheless, plaintiffs should be entitled to reasonable compensation for their pain and suffering and mental anguish. The key in this regard is to provide such compensation, but to ensure that it will be kept within reasonable bounds.

The Working Group believes that $100,000 would be such a reasonable limitation. In this regard, it should be noted that only a handful of claims involve non-economic damages in excess of $100,000. For example, it is estimated that only 2.7% of all medical malpractice claims (5.6% of all paid medical malpractice claims) receive non-economic compensation in excess of $100,000. 9/ However, in those medical malpractice cases going to verdict where non-economic damages above $100,000 are awarded, the non-economic damages award averages between $428,000 and $738,000 (the latter figure being the "best estimate"). 10/ For such awards including non-economic damages in excess of $100,000, on the average 80% of the total award is for the non-economic damages component of the award. 11/ Since the non-economic damages in excess of $100,000 awarded in these cases (including verdicts and settlements) account for between 28% and 50% of all paid out medical malpractice damages, the non-

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9/ H. Manne, Medical Malpractice Policy Guidebook 132-48 (1985). In comparison, approximately half of all claims that end in a jury verdict in favor of plaintiff include a non-economic damages award in excess of $100,000. Id. This suggests that non-economic damages are a major factor in forcing claims to trial.

As discussed in Chapter 2, the Guidebook was prepared for the Florida Medical Association. Henry Manne served as the general editor, and the analysis on the effect of a $100,000 cap was prepared by Patricia Danzon -- "perhaps the most widely known and published economist in the country on the subject of medical malpractice." Id., at 10.

10/ Id.

11/ Id. In this regard, it is worth noting that non-economic damages as a percentage of overall damages increases substantially as the overall damages increase. Id., at 138-39. See discussion in Chapter 2.

economic damages payments in excess of $100,000 alone account for up to half of all medical malpractice damages. 12/ Thus, a $100,000 limitation on non-economic damage awards would affect only a relatively small percentage of all claims, but would introduce substantial predictability into the tort system. 13/

It also is necessary to deal with punitive damages. While some thought was given to an absolute ban on punitive damages, or perhaps a separate limitation, the Working Group concluded that the best approach would be to include punitive damages within the $100,000 limitation on all non-economic damages. Nevertheless, punitive damages should only be awarded for willful conduct bordering on a criminal violation. Specifically, the Working Group recommends that an award of punitive damages be predicated on a demonstration of actual malice.

Even if these recommendations are adopted, punitive damages at best have a tenuous basis in tort law. Increasingly, there has been growing skepticism among legal scholars about the role of punitive damages, 14/ and numerous instances of extraordinary

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12/ Id. The best estimate of the Guidebook is that pain and suffering awards above $100,000 account for nearly 39% of all medical malpractice damages.

13/ Some states have struck down such limitations on constitutional grounds, primarily on the basis of equal protection, on the theory that it is unfair to limit the recoveries of certain plaintiffs (e.g., medical malpractice claimants) while allowing other plaintiffs to receive unlimited recoveries. Recently, however, both the California Supreme Court and the Court of Appeals for the Ninth Circuit upheld such a limitation for medical malpractice verdicts awarded under California law. See Fein v. Permanente Medical Group, 38 Cal.3d 137, 695 P.2d 665 (1985); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985). The Supreme Court refused to hear either case, finding with regard to the former that no substantial federal question was presented. Constitutional concerns such as this, however, can only be sensibly considered in the context of specific legal proposals.

14/ See, e.g., Owen, "Problems in Assessing Punitive Damages Against Manufacturers of Defective Products," 49 U. Chi. L. Rev. 1 (1982); Seltzer, "Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control," 52 Fordham L. Rev. 37 (1983); Sugarman, "Doing Away With Tort Law," 73 Calif. L. Rev. 555 (1985); Schwartz, "Deterrence and Punishment in the Common Law of Punitive Damages: A Comment," 56 S. Cal. L. Rev. 133 (1982); Ellis, "Fairness and Efficiency in the Law of Punitive Damages," 56 S. Cal. L. Rev. 1 (1982).

abuses. 15/ Punitive damages add considerable uncertainty, and frequently have very little real deterrent effect because they are awarded years after the offending conduct. In any event, the punishment of misconduct is primarily a function of the public law enforcement system, and should not be a common purpose of private litigation.

Nevertheless, the Working Group does not recommend prohibiting punitive damages in tort cases provided they are included within the limitation on non-economic damages. If this is infeasible, the Working Group recommends that punitive damages be abolished. 16/

Recommendation No. 5: Provide for periodic payments of future economic damages.

Traditionally, a losing defendant is required to pay all of plaintiff's future damages in one lump-sum payment. When damages were within reasonable limits, this generally was not a major problem. But as average damages have skyrocketed into the hundreds of thousands of dollars this has become an increasing burden on the defendant (or defendants' insurers). The Working Group, therefore, recommends that future economic damages be paid periodically. 17/

Allowing defendants to pay for plaintiff's damages periodically has several advantages. First, it gives defendants the ability in some cases to digest major adverse judgments by spacing

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15/ One of the most flagrant examples is the $8 million dollar punitive damage award against the defendant in Johnson v. American Cyanamid Co., (District Court No. 81 C 2470), for its decision to produce the Sabin rather than the Salk polio vaccine. Despite the fact that the defendant had complied in this decision with the well established medical judgment of the United States government and virtually the entire medical community, the jury apparently decided to use punitive damages to overrule this judgment and to force the Sabin vaccine off the market. Ironically, the Sabin vaccine has proven far more effective than the Salk vaccine in combating polio. The case presently is on appeal to the Kansas Supreme Court, and the federal government has filed an amicus brief urging reversal.

16/ It frequently is noted that the deterrent effect of punitive damages could be achieved through a system of civil fines.

17/ Where there is legitimate concern that a particular defendant may not be able to make the periodic payments in future years the court should be empowered to require the defendant to ensure the periodic payment through the purchase of an annuity.

payments out over time, much in the same way that many consumers can afford major purchases by buying on installment. Second, society is benefited by the fact that plaintiffs have a guaranteed stream of income, and cannot deplete their awards within a few years. This sharply reduces the possibility that severely injured plaintiffs eventually will become wards of the state.

An important additional advantage of requiring courts to award damages in terms of periodic payments rather than lump-sum awards is that it uses the market's rather than a court's assessment of the applicable interest rate. Under the existing practice in most states, the trial court determines plaintiff's economic loss over plaintiff's lifetime, and then awards plaintiff the present value of those losses in a lump sum. The interest rate used to make that present value calculation is critical, and can significantly reduce or inflate the lump-sum payment. Frequently, courts in making that calculation use interest rates that bear no reasonable relationship to what in fact is available in the market.

A periodic payment requirement effectively avoids this problem by having the court determine the stream of future economic losses and require defendant to purchase an annuity providing a corresponding stream of compensation (where defendant is sufficiently large, an actual annuity probably would be unnecessary). Under such a procedure, the market determines the appropriate interest rate for calculating the present value of those payments (the present value would equal the cost of the annuity). Since the payments are guaranteed through the annuity, subsequent changes in the interest rate would have no effect on plaintiff's compensation. Defendant, on the other hand, would have the market rather than a judge or jury determine the correct interest rate for assessing the present value of future damages.

Periodic payments, as noted, are not unfair to plaintiffs because the payments would be scheduled to be made as the damages are in fact incurred (that is, as earnings are actually lost, or as certain expenses actually occur).

Because the benefits of such a provision would be relatively limited for smaller awards, the Working Group recommends that periodic payments only be required where the total economic damages award exceeds $100,000.

Recommendation No. 6: Reduce awards by collateral sources of compensation for the same injury.

The collateral source rule prohibits the finder of fact from taking collateral sources of income related to the same injury into account in making an award of damages to the plaintiff. This effectively permits the plaintiff to obtain double recovery of certain components of his damages award.

In an era when collateral sources of income were financed largely by plaintiff himself, the collateral source rule may have been sensible. Today, however, when many collateral sources are provided or subsidized by the government or by third parties (such as employers, who often are required by law to provide certain collateral benefits), the traditional justification is called into question. Increasingly, the collateral source rule simply permits a windfall recovery by the plaintiff.

As to publicly provided collateral sources of compensation, there is no justification for not taking such sources into account in determining plaintiff's ultimate damages. The collateral source rule in such circumstances has the effect of requiring citizens to pay compensation twice -- once as taxpayer, and once as the consumer of the product causing the injury. 18/

The situation is somewhat more complicated in dealing with private sources of collateral compensation, particularly where subrogation is involved. 19/ Where a third party (such as an insurer) is subrogated to plaintiff's claim, the collateral source rule may not in fact result in any double recovery. As a practical matter, however, subrogation often is not a significant consideration in many tort actions. In some areas, such as automobile accidents, subrogation is quite common. In other areas, however, such as medical malpractice, subrogation is far less common.

As to private sources, the best approach appears to be to require collateral sources of compensation related to the same injury to be taken into account as long as a third party is not subrogated to that portion of plaintiff's claim. Further analysis may suggest that elimination of subrogation (that is, simply offsetting all collateral sources against the award, and prohibiting subrogation arrangements) may have a limited effect and be justified on the basis of significant reductions in transaction costs.

While the correct approach to workers' compensation benefits must be considered very carefully, workers should be required to seek their workers' compensation benefits where appropriate. The Working Group takes no position on whether subrogation and indemnification actions between employers and manufacturers

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18/ Another reason to be concerned about such a windfall is that much of the windfall is in fact a windfall for attorneys in the form of attorneys' fees.

19/ In the context of insurance, subrogation allows the insurer to obtain from the tortfeasor-defendant all or part of its payments to the insured-plaintiff arising from the injury caused by the tortfeasor.

found liable as third party defendants should be eliminated, as has been proposed in some legislation. The Working Group will continue to review the merits of proposals dealing with such subrogation and indemnification actions.

Recommendation No. 7: Schedule contingency fees.

Currently, plaintiffs' attorneys receive a flat percentage of their clients' awards, usually between 30% and 40%, but sometimes as high as 50%. Where plaintiff's award is moderate, such a contingency fee may, in fact, be quite reasonable, since the attorney has significant costs and may face substantial risks that must be reimbursed. But as the average plaintiff's verdict has increased in recent years, such a high percentage becomes difficult to justify. Increasingly, there are indications of extraordinary abuses where attorneys receive fees in the hundreds of thousands of dollars for limited work. Particularly in mass liability cases where the groundwork for liability has been laid in previous cases by other attorneys, the fees often bear no relationship whatsoever to the work of or the risk to plaintiff's attorney. 20/

Nevertheless, the Working Group does not recommend, as some have suggested, the abolition of contingency fees. Often, such fees are the only means available to the poor to afford an attorney and obtain access to the legal system. The problem with contingency fees emerges when awards become very high, and a flat contingency rate becomes excessive. The Working Group, therefore, believes that contingency fees should be scheduled to decrease as awards increase.

Specifically, the Working Group recommends the following schedule: 25% for the first $100,000, 20% for the next $100,000, 15% for the next $100,000, and 10% for the remainder. Thus, for an award of $500,000, plaintiff's attorney would receive $80,000 rather than $166,666 (assuming a one-third contingency fee), and for an award of $1,000,000, would receive $130,000 rather than $333,333.

There are a number of justifications for scheduling contingency fees:

- Verdicts often are inflated by judges and juries to compensate plaintiff for what is well understood to be high attorneys' fees. Defendants thus pay for such fees through higher insurance premiums or awards,

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20/ As discussed in Chapter 2, the prevailing plaintiff is not only liable to his attorney for the agreed to contingency fee, but also for litigation expenses. Such expenses often can amount to an additional five to eight percent of the underlying award.

which, in turn, are passed on to consumers through higher prices. It is difficult to justify placing such a burden on American consumers for the purpose of paying what often amounts to exorbitant attorneys' fees.

- Similarly, in order to compensate plaintiffs for very high contingency fees, settlements often are higher than otherwise would be the case. As with high awards, these payments ultimately are passed through to the consumer. More problematic, however, is that attorneys' fees often can become a major impediment to settlements since defendants may balk at paying a higher than justified award in order to compensate plaintiffs for exorbitant attorneys' fees. In such situations, attorneys' fees create an additional burden by causing cases not to be settled that otherwise would be settled.

- Contingency fees also distort the incentives of attorneys. Such fees may lead plaintiffs' attorneys to hold out for high non-economic damages (and, potentially, windfall profits for the attorney requiring only minimal additional work on the attorney's part), while the clients may be best served with obtaining economic damages and more limited non-economic damages as promptly as possible.

- Scheduling contingency fees also should substantially reduce the excessive transaction costs presently plaguing the tort system. This is particularly important in such areas as the asbestos litigations where there are only limited resources available to compensate a large pool of plaintiffs.

In this regard, it is worth noting that the Federal Tort Claims Act contains a 25% cap on attorneys' fees for lawsuits filed under the Act, and a 20% cap on attorneys' fees for settlements obtained under the Act's administrative claims process. 28 U.S.C. § 2678. Violations of these limitations are punishable by fine or imprisonment, or both. A similar 25% attorneys' fee cap (with similar sanctions) is found in the Social Security Act. 42 U.S.C. § 406. None of these caps appears to have had any significant effect on the ability of persons suing the government to obtain adequate legal representation. In fact, the number of lawsuits filed under both the Federal Tort Claims Act and the Social Security Act has increased substantially in recent years.

The Working Group has considered and recommends against the adoption of the English Rule on attorneys' fees, which would transfer attorneys' fees to the losing party. While such a rule might deter some frivolous litigation, it also would inhibit many lawsuits that may be merited but where some preliminary discovery may be necessary to determine the strength of plaintiff's claims. Moreover, because many plaintiffs essentially are judgment proof, the widely held belief that such

a rule would significantly deter frivolous litigation may be largely illusory.

A preferable (but still problematic) alternative approach to the English Rule would be to use a transfer of attorneys' fees as a means of motivating parties to settle their claims at an earlier point in litigation. Thus, a rule modeled on Rule 68 of the Federal Rules of Civil Procedure, 21/ but including attorneys' fees, might be useful. Perhaps the most promising approach would be to combine alternative dispute resolution with a transfer of attorneys' fees.

Recommendation No. 8: Develop alternative dispute resolution mechanisms.

The Working Group believes that alternative dispute resolution holds much promise. Experimentation and experience, however, is the only reliable vehicle for determining which systems will work. Alternative dispute resolution proposals range from binding arbitration to mediation, and include such procedural innovations as mini-trials and expedited discovery techniques. Many of these proposals are worthy of serious consideration, and states represent excellent laboratories in which to develop and explore these various alternative dispute resolution proposals.

The Working Group strongly supports alternative dispute resolution, and believes that the organized bars, legislatures, and jurists should be more receptive to alternative dispute resolution proposals. Where necessary, particularly in areas such as medical malpractice, states should be encouraged to consider seriously the necessary constitutional changes to permit the use of alternative dispute resolution.

The Working Group believes that the most promising use of alternative dispute resolution will be to encourage the early settlement of lawsuits. For example, requiring non-binding arbitration where part or all of attorneys' fees shift to the party which rejects an arbitration award and obtains a less favorable result in litigation, much as costs of litigation are shifted for rejected offers of settlement under Federal Rule of Civil Procedure 68 (see supra), might be an effective means

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21/ Rule 68 ("Offer of Judgment") provides that costs of litigation will shift to a plaintiff who has rejected an Offer of Settlement made under the rule and not obtained a judgment more favorable than the rejected offer. There currently is a proposal under consideration to include attorneys' fees in Rule 68, as well as to make other changes to the Rule. Inclusion of attorneys' fees in Rule 68, however, has a number of serious problems that must be considered very carefully. These and other problems have led the Department of Justice to caution against the proposed changes to Rule 68.

for using alternative dispute resolution to facilitate and expedite early settlements.

The Working Group does not believe, however, that alternative dispute resolution needs to or should involve major changes to the standards of liability or causation in tort law. The merits of alternative dispute resolution are largely unrelated to which standard of liability is used in resolving disputes. The value of alternative dispute resolution lies in procedural rather than substantive changes in the law.

CHAPTER 5

GOVERNMENT INSURANCE: A NON-SOLUTION

The growing liability insurance availability/affordability crisis has spawned calls for government insurance or indemnification for persons or companies unable to obtain adequate insurance coverage through the private sector. For the reasons discussed below, such government insurance or indemnification would be highly undesirable and would do nothing to remedy the problems underlying the availability/affordability crisis.

The most serious deficiency with the various schemes for government insurance or indemnification is, as noted, the fact that such proposals do not address the problems that have led to the availability/affordability crisis. Instead, these schemes simply would pass the costs of the crisis directly to the taxpayer. While it is difficult to estimate the potential cost of such a program to the American taxpayer, it should be noted that the insurance industry suffered an estimated $25 billion underwriting loss in 1985 (see Chapter 2). This loss does not include self-insurance or captive insurer losses, which in all likelihood represent additional billions of dollars.

A government insurance or indemnification program would by definition certainly involve the riskiest activities; that is, those activities that even the insurance industry is unwilling to underwrite. To the extent that the government attempts to address affordability problems by offering coverage more cheaply than the industry, the government, of course, simply would be subsidizing certain purchasers of insurance. Again, the cost of such subsidization is difficult to estimate, but considering that the insurance industry paid out over $126 billion in 1985, with related expenses of $37 billion (see Chapter 2), such a subsidy easily could involve tens of billions of dollars annually. 1/ (Again, these figures do not include self-insurance or captive insurers).

Government insurance or indemnification would not only pass these costs to the taxpayer, but could exacerbate the current problems of the tort system. One of the few constraints left in tort law is the recognition that "deep pockets" are not after

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1/ For example, over recent years the National Flood Insurance Fund has been subsidizing flood insurance by roughly $150 million annually. The cumulative loss for the program to date is approximately $1.4 billion. The President, in his latest budget submission, reiterated his intention to continue to phase out this costly subsidy. The riot insurance program, which existed from 1968 to 1984, was able to sustain itself through collected premiums. The relative success of the program, however, was largely due to the decline in urban riots after the program was instituted.

all bottomless -- that there is a finite amount of resources that can be reallocated through tort liability. Government indemnification or insurance would remove that last restraint, since the resources of the Federal Government are all too often viewed as without limit. Thus, courts and juries might be even more willing to skew liability and causation standards to ensure compensation, and to award the most generous compensation conceivable.

There are, however, a number of compelling reasons for rejecting the concept of government insurance or indemnification other than because of its potential cost and the failure to address the real problems underlying the crisis. Perhaps foremost among those reasons is that such a program would most likely jeopardize among the most effective and important mechanisms currently existing in the private sector to protect public health and safety. The insurance industry plays a vital role in promoting public health and safety by policing insureds to ensure that risks of injury are minimized. Insureds who fail to minimize such risks, or who experience higher than normal claim rates, may find the desired level of insurance coverage more difficult to obtain and more expensive. The insurance industry thus plays an important role in creating incentives that protect public health and safety, both in policing insureds, and in passing the benefits of safety back to the insureds through lower premiums.

While the role of insurance in promoting public health and safety is by no means perfect, and the above description admittedly is somewhat idealized, insurance creates important health and safety incentives which cannot be dismissed lightly. This critical function of insurance is undermined to the extent that the government supplants the private sector in providing insurance or indemnification, particularly for high risk activities. The government, even if and when it demonstrates the best of intentions, simply does not have the resources, experience, flexibility or incentives to replicate the activities of the private sector in policing insureds' practices and setting premiums to reflect claims experience. In addition, were the government to undertake such activities, the existing health and safety bureaucracies almost certainly would prove inadequate. Substantial additional funds, personnel and resources would need to be devoted to these activities, and in many areas new bureaucratic structures would need to be established. 2/ If, as seems likely, such additional investments of government resources are not made, government insurance or indemnification would operate as a clear disincentive to greater safety since insureds would receive

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2/ The necessary collection and analysis of relevant information would of itself be a major undertaking requiring substantial investment of additional government resources.

the benefit of a risk transfer to the government (and, accordingly, would have less incentive to protect public health and safety) without any corresponding checks upon their conduct or activities. Both the consumer and the taxpayer would be the ultimate losers.

To the extent that the government institutes an insurance or indemnification program, such a program also would increase significantly in two ways the involvement of the government in the private sector. First, while the government, as noted, cannot replicate the efforts of the insurance industry, it would have to become involved in the activities it has insured or indemnified to ensure that such insurance or indemnification does not lead to completely open-ended liability on the part of the government. This necessarily would involve new additional forms of government supervision and regulation of private sector activities.

A second undesirable but inevitable effect of such a program would be that the government frequently would be forced to manage, or at least actively oversee, the litigation of cases involving the liability of its insureds, since the insureds often would have only a limited incentive to contest aggressively claims, however meritless, against which they are fully insured or indemnified. Even putting aside the consideration of the massive investment of litigation resources that would be needed by both the insuring agencies and the Department of Justice, this could involve the government directly and actively in some of the most controversial and visible tort litigation in our society, much of which would involve litigation in state court under substantive, procedural and evidentiary rules of state law.

An additional consideration is that such a program necessarily would involve the federal government in state regulation of the insurance industry since such regulation could have a significant impact on the kind of insurance or indemnification the federal government would have to provide. For example, state regulators who might wish to avoid approving politically unpopular rate increases or policy provisions might be far more inclined to withhold such approvals if they perceived the federal government as ready and willing to provide an alternative source of insurance. The federal government, in turn, in order to avoid such wholesale transfers of the insurance burden, could very easily find itself compelled to regulate the insurance industry directly, or to regulate the state regulators. Either way, it would represent a substantial intrusion by the federal government into the regulation of the insurance industry.

Finally, a federal program of insurance or indemnification would interfere with and perhaps severely inhibit the ability of the market to devise new policies, insurance mechanisms, and specific contractual provisions to meet changing economic and

social conditions. Where the current services of the insurance industry prove inadequate or unacceptable, insurers and insureds have strong incentives to restructure those services so that the needs of the marketplace can be met (witness, for example, the current discussions over the introduction of claims-made policies and the inclusion of defense costs). Where government insurance or indemnification is available, however, insureds may be far more inclined to seek such insurance (particularly where it is subsidized, either intentionally or unintentionally) than to negotiate with insurers or invest considerable effort and resources shopping for better conditions. Insurers, in turn, who may feel themselves compelled to offer otherwise unattractive services to customers they wish to retain, may find a government insurance or indemnification program a convenient dumping grounds for the risks they would rather spin-off. 3/ The end result could very well be that the ability of the marketplace to respond to new conditions with innovative solutions could be severely chilled if the "safe harbor" of government insurance or indemnification were available to both the insureds and the insurers. 4/

In sum, government insurance or indemnification would be a highly undesirable and counterproductive response to the current availability/affordability crisis. It effectively would amount to the nationalization of a potentially large portion of one of the Nation's leading financial industries. And, given the history of past government involvement in the private sector, it is all too apparent that removing the federal government from the insurance industry once the purported justification for its presence had passed would be an arduous if not ultimately futile endeavor.

3/ Such risks most likely would include the type of long-latency, catastrophic risks endemic to toxic torts. As is apparent from the asbestos litigations, such insurance would expose the taxpayer to potentially massive liability. The problem of insurers spinning off certain types of business very likely would generate pressure for some form of federal regulation of such practices.

4/ It should be noted in this regard that the contractor indemnification provision which the Administration supports in the context of Superfund reauthorization is purely discretionary in nature, is limited to cleanups under the control of the Environmental Protection Agency, is linked to a critical limitation on liability (liability would be predicated only on negligence), and would be provided only because it will be extremely difficult, if not impossible, to keep this vital program in operation without such limited and closely regulated contractor indemnification (which presumably will include both limits and deductibles).

CONCLUSION

This report contains within it a number of observations, conclusions and recommendations. The most important of these, however, for the purposes of the Tort Policy Working Group, are what this report implies as to the appropriate response of the federal government to the current crisis in insurance availability and affordability. In this regard, the pertinent conclusions are straightforward and relatively apparent.

First, tort law appears to be a major cause of the insurance availability/affordability crisis.

Second, there are a number of beneficial reforms of tort law that the federal government can support and promote in sensible and appropriate ways.

Third, to the extent that other factors -- such as the recent large underwriting losses of the insurance industry -- underlie this crisis, there is little the federal government can or should do to remedy these problems. While the contribution of these economic factors seems clear, it is likely that these problems will work themselves out in the short-term as the insurance industry restores its desired level of profitability, and as other insurance industry developments (see Chapter 3) are implemented. It seems highly unlikely, however, that these changes will substantially alleviate the crisis, particularly the affordability aspect of the crisis, without substantial reforms of tort law.

Fourth, the Working Group found nothing to support the suggestion that this crisis could be remedied through federal regulation of the insurance industry or of state insurance regulators.

Fifth, while a federal insurance or indemnification program obviously could provide subsidized insurance where insurance is unavailable or unaffordable, for many reasons (see Chapter 5) such a program would be highly undesirable and ultimately counterproductive.

In sum, tort law appears to be a major cause of the insurance availability/affordability crisis which the federal government can and should address in a variety of sensible and appropriate ways. But significant, long-term reform cannot and should not come solely from the federal government. Ultimately, state governments and courts must address the current excesses of tort law. Their active participation is essential to finding workable solutions to the increasingly debilitating problems of tort law.

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COMMITTEE REPORT

SENATE

FURTHER:

3/12/86

Date 5/2/86

Mr. President

The Committee on FINANCE considered SB 379

relating to premium tax for domestic insurers.

and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass

[ ] do pass with attached amendment(s)

[✓] replace with/or adopt CS for SB 379 (Fin)
[ ] new title
[✓] same title and recommends

[ ] and attached a "LETTER OF INTENT"

[✓] NEW FISCAL NOTE

SB CS (Fin) is revenue neutral

[ ] reports it back without recommendation

[ ] recommends referral to Committee

MEMBERS SIGNING
DO PASS

Gleason

Jergeson

MEMBERS HAVING
OTHER RECOMMENDATIONS

Kolstad No Rec

Paul Fritz No Rec

Jan Fritz
Chairman

No Rec.
Chairman recommendation

Offered: 3/13/86
Referred: Finance

Original sponsor: Rules/Governor

BY ~~THE LABOR AND COMMERCE COMMITTEE~~ Senate Finance

IN THE SENATE

CS FOR SENATE BILL NO. 379 ~~(L&C)~~ Finance

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the premium tax for domestic insurers; and identifying the tax years to which the Act applies."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 21.09.210(b) is amended to read:

(b) Each insurer, and each formerly authorized insurer with respect to premiums received while an authorized insurer in this state, shall pay a tax on the total direct premium income received during the year ending on the preceding December 31 and paid for the insurance of property or risks resident or located in the state other than wet marine and transportation insurance, after deducting from the total direct premium income the applicable cancellations, returned premiums, the unabsorbed portion of any deposit premium, all policy dividends, unabsorbed premiums refunded to policyholders, refunds, savings, savings coupons and other similar returns paid or credited to policyholders with respect to their policies. No deductions may be made of cash surrender value of policies. Considerations received on annuity contracts are [SHALL] not [BE] included in the direct premium income and are [SHALL] not [BE] subject to tax. The tax shall be paid to the director annually before April 1, and, except as provided in AS 21.69.390(c), is computed at the rate of

(1) for domestic and foreign insurers, except hospital and medical service corporations, three [COMPANIES, 1 1/2] 2.7 percent;

(2) for hospital and medical service corporations, six [6]

percent of their gross premiums less claims paid [;

(3) FOR COMPANIES OTHER THAN DOMESTIC AND HOSPITAL AND MEDICAL SERVICE CORPORATIONS, 3 PERCENT].

* Sec. 2. This Act applies to the tax due by April 1, 1987 for the tax year beginning January 1, 1986 and to the tax due for subsequent tax years.

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : CSSB 379 (Finance)
Title : Premium tax for domestic insurers

Sponsor : Senate Finance
Requestor : _____
Date of Request : _____

FISCAL DETAIL

Agency Affected : Commerce & Economic
BRU : Development - Div. of Ins.

Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS :

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

CSSB 379 (Finance) is revenue neutral.

Prepared by : _____ Phone : 465-4523
Division : Senator Jan Faiks, Co-chairman Date : May 2, 1986
Senate Finance Committee

Approved by Commissioner : _____ Date : _____
Agency : _____

Distribution (by Agency preparing fiscal note) :
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

10/25/85

5/12/86
Returned to Fin
7:00 pm

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH V, STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

COPY

MEMORANDUM May 12, 1986

SUBJECT: CSSB 379(Fin) Title

TO: Rosemary Kimlinger
Enrolling Secretary

FROM: David R. Dierdorff
Revisor of Statutes

I have reviewed CSSB 379 (Finance) under Uniform Rule 43(a). It is my opinion that the title of the bill is deficient. When the committee substitute was passed out of Finance Committee May 2, 1986, the title should have been changed to "An Act relating to the premium tax for domestic and foreign insurers; and identifying the tax years to which the Act applies" to reflect the change in sec. 1 of the bill. The present title refers only to domestic insurers, while sec. 1 changes the tax rate for both domestic and foreign insurers.

Under Uniform Rule 43(a) it is your duty to report this deficiency to the chief clerk so that she may advise the presiding officers before the bill is transmitted to the governor.

DRD:mkr
m5/113

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

M E M O R A N D U M May 12, 1986

SUBJECT: CSSB 379 (Finance)

TO: Peggy Mulligan
Secretary of the Senate

FROM: Rosemary Kimlinger
Enrolling Secretary Pinky

In accordance with Rule 43(a) of the Uniform Rules, I am reporting that the revisor of statutes has advised me that the title of CSSB 379 (Finance) is deficient.

When the committee substitute was passed out of committee May 2, 1986, the title should have been changed to "An Act relating to the premium tax for domestic and foreign insurers; and identifying the tax years to which the Act applies" to reflect the change in sec. 1 of the bill. The present title refers only to domestic insurers, while sec. 1 changes the tax rate for both domestic and foreign insurers.

Peggy:
This is an official notification
so your body can do something
about it if you so choose.
Pinky

P.S. Let me know.

SECTIONAL ANALYSIS

SB379

Section 1.b,1. Provides for equalization of taxation for domestic and non domestic insurers at a 1 1/2% increase for a total of three percent.

Section 1.b,2. Provides for a three percent increase on the taxation of hospital and medical services corporations, for a total of six percent.

This legislation was introduced in response to Metropolitan Life Insurance Co. v. Ward 470 US---, 84 L Ed 2nd 751, 106 S Ct (Summary Attached)

Fiscal Impact: Generates increased revenues.

BILL SHEFFIELD, GOVERNOR

REPLY TO:

☐ 1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

☐ 1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

☒ POUCH K · STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 7, 1986

The Honorable Fred Zharoff
Chair, Senate Labor and Commerce
Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Re: SB 379 (Premium tax for domestic insurers)

Dear Chairman Zharoff:

As indicated in the governor's transmittal letter dated January 31, 1986, this bill is necessary due to a recent United States Supreme Court case, Metropolitan Life Insurance Co., v. Ward, 105 S.Ct. 1676 (1985), which calls into serious doubt the constitutionally of the present Alaska premium tax law.

Enclosed is a chart prepared from data compiled by the division of insurance, Department of Commerce and Economic Development, showing the amount of premium taxes collected by the state from foreign insurance companies between 1974 and 1984. As you can see, the state collected approximately $14.5 million in 1985, for the 1984 tax year.

We can assume this figure is a good indication of the premium amount the state will collect in future years. Foreign insurance companies, claiming the entire tax is unconstitutional, are now making their entire tax payments under protest. Thus, the state is currently exposed to possible liability in excess of $14.5 million per year until the statute is corrected. 1/

1/ A good argument can be made that if a refund is required, it should be only one-half of all taxes paid, or approximately $7.25 million annually. This represents the difference between the amount paid by the companies (three percent) and the amount they would have paid, were they domestic companies (one and one-half percent).

03-C5LH

Given the state's declining revenues, it is very important that this bill be passed this year, to prevent possible future state losses of $7 - 14 million per year.

Sincerely,

HAROLD M. BROWN
ATTORNEY GENERAL

By: Jeffrey W. Bush
Assistant Attorney General

HMB:JWB:cck

Enclosure

cc w/ enc.:

Jim Ayres, Director
Legislative Relations
Office of the Governor

Art Peterson
Legislation/Regulations Attorney
Department of Law

John George, Director
Division of Insurance
Department of Commerce
and Economic Development

ALASKA FOREIGN INSURANCE COMPANY TAX PAYMENTS

1974 - 1984

TAX YEAR	FOREIGN LIFE (3%)	PROP & CAS (3%)	TOTAL TAX PAID	AMT. WOULD HAVE PAID AT DOM. RATE
1984	4,861,829	9,644,148	14,505,977	7,252,989
1983	4,438,315	8,818,990	13,257,305	6,628,653
1982	3,707,727	7,729,096	11,436,823	5,718,412
1981	3,360,555	6,018,707	9,379,262	4,689,631
1980	3,178,322	4,843,581	8,021,903	4,010,952
1979	2,921,795	4,999,852	7,921,647	3,960,824
1978	2,912,980	5,050,350	7,963,330	3,981,665
1977	2,897,452	4,736,774	7,634,226	3,817,113
1976	2,329,917	3,910,087	6,240,004	3,120,002
1975	2,049,788	2,818,755	4,868,543	2,434,272
1974	1,586,349	2,235,308	3,821,657	1,910,829
	34,245,029	60,805,548	95,050,577	47,525,288

TAX CASE 13V-81 CIV
13V-83 616 CIV

	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	COMPANY TOTAL
Equitable Life Assurance	53,757	69,930	77,232	111,053	126,220	162,987	180,440	140,897	151,959	175,413	145,314	1,133,656
John Hancock Mutual Life	19,741	21,945	26,172	30,303	30,609	47,025	45,757	55,155	60,806	58,426	51,144	446,252
Metropolitan Life	91,777	119,376	139,195	206,468	215,247	207,039	228,356	152,843	73,429	54,020	52,191	1,539,940
Mutual Life Insurance Co. of NY	75,274	88,935	93,935	102,149	117,873	115,665	116,697	126,447	131,829	154,141	59,340	1,293,285
New York Life Insurance Company	170,823	177,683	218,659	241,917	272,951	290,766	310,683	362,120	418,880	533,434	619,917	3,617,848
Prudential Insurance Company	83,940	59,303	64,797	75,964	136,627	139,440	124,976	174,767	190,139	188,765	185,030	1,423,745
Travelers Insurance Co. - Life Accident Department	60,575	79,180	126,850	169,402	190,928	164,736	167,953	190,193	178,529	209,038	261,946	1,799,530
Travelers Indemnity	14,954	37,110	28,450	60,601	62,617	32,973	17,430	98,462	38,506	140,359	105,352	636,823
Aetna Life & Annuity Corp.	14,904	29,460	26,958	16,872	46,896	21,622	57,619	25,328	55,335	127,366	129,339	536,780
Aetna Casualty & Surety	-	-	281	153	32	32	24	559	1,885	4,685	22,503	30,169
Aetna Life Insurance Company	10,253	25,930	46,798	90,325	79,928	29,821	43,816	79,666	92,797	102,665	76,769	678,897
Standard Fire Insurance Co.	188,875	231,309	259,502	354,978	343,960	391,051	460,919	523,185	564,299	904,663	773,609	4,999,531
Automobile Ins. Co. of Hartford	7,209	5,565	5,260	15,628	20,743	5,373	6,583	6,040	21,876	108,512	76,162	281,701
Accidential Life Ins. Co. (Transamerica)	-	-	29	17	-	-	-	-	-	11	868	1,025
Massachusetts Mutual Life Insurance Company	55,590	51,432	53,948	60,968	66,284	82,365	98,332	97,674	104,026	124,586	90,071	885,776
Connecticut Mutual Life Insurance Company	9,399	13,108	15,421	16,345	18,887	22,489	23,004	24,720	25,063	19,948	22,322	210,756
	5,291	6,528	7,860	9,631	11,567	13,426	16,220	19,063	17,753	17,791	16,656	141,246
3% TAX PAID	846,958	987,548	1,166,469	1,545,922	1,694,600	1,707,160	1,841,339	2,051,012	2,071,906	2,795,926	2,674,633	19,384,281
GRAND TOTAL	861,952	1,017,008	1,193,427	1,562,794	1,736,496	1,728,790	1,893,958	2,077,140	2,127,241	2,918,292	2,803,977	19,921,020
REFUND @ 1 1/2% (domestic rate)	439,796	508,504	596,713	781,397	868,248	864,395	946,979	1,038,570	1,063,620	1,459,146	1,401,986	9,960,534

3Refund6.08%-7/25/86a

REQUEST FOR REFUNDS RECEIVED TO DATE
FEBRUARY 1986

	YEAR(S)	TOTAL REQUEST
Horace Mann Insurance Company	1981	20,611
Horace Mann Life Insurance Company	1981	2,913
Union Mutual Stock Life	1984	8,500
	1983	5,006
States West Life Insurance Company	1982, 1983, 1984	13,380
Northern Life Insurance Company	1980 - 1985	27,198
Dairyland Insurance Company	1982 - 1984	8,294
Mutual Protective Insurance Company	1980 - 1984	1,138
Physicians Mutual Insurance Company	1980 - 1984	45,857
Medico Life Insurance Company	1979 - 1984	347
Motors Insurance Company	1979 - 1984	80,395
MIC Life Insurance Company	1983 - 1984	1,684
CIM Insurance Corporation	1979 - 1984	3,774
Philadelphia Life	1983 - 1984	809
Philadelphia American Life	1983 - 1984	386
American Bankers Insurance Company	1982	1,383
American Bankers Life Insurance Company	1982	13,201
Cudis Insurance	1982, 1983, 1984	28,692
CUNA Mutual Insurance Society	1982, 1983, 1984	40,463
Union Mutual Life Insurance Company	1983, 1984	1,118
Mutual Life Insurance Company of New York*	1984	84,170
Combined Insurance Company of America	1974 - 1984	112,380
Ranger Insurance	1982 and 1984	9,201
Industrial Indemnity	1981	70,472
Atlantic International Insurance Company	1984	3,249
Provident Mutual Life Insurance Company	1981 - 1984	2,547
Phoenix Mutual Life	1981	1,153
26 Companies - TOTAL		588,321

* Also Party to Suit

Total 3%

Foreign Premium Tax Paid for 1984	14,505,977
Premium Tax	
1 - 1/2% Refund	7,252,988

2RefundLGJOBS2/25/86a

ALASKA FOREIGN INSURANCE COMPANY TAX PAYMENTS
ESTIMATED REFUNDS
1974 - 1984

	FOREIGN LIFE 3%	REFUND 1 - 1/2	P & C 3% Paid	REFUND 1 - 1/2	COMBINED TOTAL REFUND
1984					
1983	4,438,315	2,219,158	8,818,990	4,409,495	6,628,653
1982	3,707,727	1,853,864	7,729,096	3,864,548	5,718,412
1981	3,360,555	1,680,278	6,018,707	3,009,353	4,689,631
1980	3,178,322	1,589,161	4,843,581	2,421,790	4,010,951
1979	2,921,795	1,460,898	4,999,852	2,499,926	3,960,824
1978	2,912,980	1,456,490	5,050,350	2,525,175	3,981,665
1977	2,897,452	1,448,726	4,736,774	2,368,387	3,817,113
1976	2,329,917	1,164,958	3,910,087	1,955,043	3,120,001
1975	2,049,788	1,024,879	2,818,755	1,409,378	2,434,257
1974	1,586,349	793,175	2,235,308	1,117,604	1,910,779
	29,383,200	14,691,585	51,161,400	25,580,699	40,272,284
PLUS					
1984 Revised 2/24/86	4,851,829	2,430,914	9,644,148	4,822,074	7,252,988
	GRAND TOTAL				47,525,272

1RefundLGJOBS2/25/86a

Leg fis note -061

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : 377-069-86 SB 379
Title : Premium tax for domestic insurers.

Sponsor : _____
Requestor : _____
Date of Request : _____

FISCAL DETAIL

Agency Affected : Commerce & Economic Dev.
BRU : Insurance

Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE	-0-	1,142.3	1,200.4	1,260.0	1,323.4	1,389.6

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS :

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : John L. George
Division : Insurance
Phone : 465-2515
Date : 11/27/85

Approved by Commissioner : _____
Date : _____
Agency : Commerce and Economic Development

Distribution (by Agency preparing fiscal note) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

10/25/85

Department of Commerce & Economic Development / POSITION PAPER

SB 379: "An Act relating to premium tax for domestic insurers."

This legislation eliminates the the tax preference currently granted to domestic insurance companies by standardizing the rate for domestic and nondomestic insurance companies.

AS 21.09.210(b) provides that domestic insurance companies pay premium tax at the rate of one and one-half percent of gross premiums, while nondomestic companies pay three percent of gross premiums. A recent U.S. Supreme Court case, Metropolitan Life Insurance Co. v. Ward, U.S., 53 U.S.L.W. 4699 (June 10, 1985), raises serious questions concerning constitutionality of the differential rate structure. This bill is proposed to correct the problem and not jeopardize our premium tax law. The bill has the further benefit of raising the total amount of premium tax collected. We are in favor of the legislation.

Loren H. Lounsbury, Commissioner
Department of Commerce & Economic Development

Date: 2/21/86

John L. George, Director of Insurance

Date: 2/20/86

0229K

Alaska State Legislature

Senate

Committee on Labor & Commerce

Pouch V
State Capitol
Juneau, Alaska 99811

Official Business

SB 379: Summary

Current law provides that domestic insurers pay a 1.5% premium tax on gross premiums, while nondomestic companies are required to pay 3%. A recent US Supreme Court case raised constitutional questions concerning the differential rate of these tax structures, and the Department of Law estimates that the state is exposed to a potential liability of approximately $14.5 million if this statute is not corrected.

SENATE FINANCE

DOMESTIC INSURER PREMIUMS FOR CALENDAR 1985

Alaska National Insurance Company	34,446.0
Alaska Pacific Assurance Company	22,782.6
Alaska Rural Electric Coop Association	1,774.3
Pacific Marine of Alaska	17,990.1
Providence Washington Insurance Co. of AK	20,255.8
Medical Indemnity Corporation of AK	3,331.4
Alaska Insurance Company	12,137.2
Alaska Timber Insurance Exchange	4,542.1
Industrial Indemnity of Alaska	38,835.9
Umialik	1,894.5
Life Insurance of Alaska	712.3
Alaska Industrial Insurance Company	0.0
TOTAL	158,702.2

158 million

SEC-86
4/30/86

REVENUES FROM PREMIUM TAXES (utilizing 1984 figures)

Under Current Law

Domestic @ 1.5 %	$ 1,451,162
Foreign @ 3%	$ 9,644,148
Life @ 3%	$ 4,861,829
TOTAL	$15,957,139

Using a Uniform 3% Rate

Domestic	$ 2,902,235
Foreign	$ 9,644,148
Life	$ 4,861,829
TOTAL	$17,408,212

Would result in a revenue increase of $1,451,073

Using a Uniform 2.35% Rate

Domestic	$ 2,273,487
Foreign	$ 7,554,582
Life	$ 3,808,432
TOTAL	$13,636,501

Would result in a revenue loss of $2,320,638

Using a Uniform 1.5% Rate

Domestic	$ 1,451,162
Foreign	$ 4,822,074
Life	$ 2,430,915
TOTAL	$ 8,704,151

Would result in a revenue loss of $7,252,988

SB 379
4/30/86

1984 PREMIUM TAXES

	Premium	Tax 1½%	Tax 2.35%	Tax 3%
		foreign		
Domestic Property & Casualty	$96,744,158	$1,451,162	$2,273,487	$2,902,235
Foreign Property & Casualty	$321,471,600	N/A	$7,554,582	$9,644,148
Life	$162,060,967	N/A	$3,808,432	$4,861,829
Total Generated @ 2.35% and 3%			$13,636,501	$17,408,212

Actual 1984 Tax		$15,957,139
Difference between uniform 2.35% and 3% rates	-	$3,771,710
Difference between amount actually taxed and amount would have received at uniform 2.35% rate	-	$2,320,638

SB 379 (Stafford)

METROPOLITAN LIFE INSURANCE COMPANY, et al., Appellants

v

W. G. WARD, Jr., et al.

470 US —, 84 L Ed 2d 751, 106 S Ct —

[No. 83-1274]

Argued October 31, 1984. Decided March 26, 1985.

Decision: State statute taxing out-of-state insurance companies at a higher rate than domestic insurance companies held not to have legitimate state purpose for purposes of equal protection clause.

SUMMARY

A group of foreign insurance companies filed claims with Alabama state insurance authorities contending that an Alabama statute imposing a substantially higher gross premiums tax on out-of-state insurance companies than on domestic companies, and allowing the out-of-state companies to reduce their tax rate by investing certain percentages of their total assets in specified state assets and securities, violated the equal protection clause as applied to them. The Circuit Court for Montgomery County, Alabama, upheld the denial of these claims, ruling that the statute was rationally related to the legitimate state purposes of encouraging the formation of new domestic insurance companies and encouraging capital investment in the state by foreign insurance companies. The Court of Civil Appeals of Alabama affirmed as to the legitimacy of these purposes but remanded for an evidentiary hearing on the issue of rational relationship. The insurance companies waived their right to such a hearing and appealed as to the legitimacy of the stated legislative purposes. The Supreme Court of Alabama denied certiorari, and judgment was subsequently entered in favor of the state and the intervenor domestic companies.

On appeal, the United States Supreme Court reversed and remanded. In an opinion by POWELL, J., joined by BURGER, Ch. J., and WHITE, BLACKMUN, and STEVENS, JJ., the court held that the Alabama statute could not be sustained under the equal protection clause ruling that the promotion of domestic business within a state by discriminating against foreign corpora-

tions that wish to compete by doing business there is not a legitimate state purpose, and that the encouragement of capital investment in state assets and securities also is not a legitimate state purpose when furthered by discrimination.

O'CONNOR, J., joined by BRENNAN, MARSHALL, and REHNQUIST, JJ., dissented, expressing the view that the majority opinion was unsupported by precedent and distorted the constitutional balance, threatening the freedom of both state and federal legislative bodies to fashion appropriate classifications in economic legislation.

METROPOLITAN LIFE INSURANCE COMPANY, et al., Appellants

v

W. G. WARD, Jr., et al.

470 US —, 84 L Ed 2d 751, 106 S Ct —

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SUMMARY

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On appeal, the United States Supreme Court reversed and remanded in an opinion by POWELL, J., joined by BURGER, Ch. J., and WHITE, BLACKMUN, and STEVENS, JJ., the court held that the Alabama statute could not be sustained under the equal protection clause ruling that the promotion of domestic business within a state by discriminating against foreign corporations that wish to compete by doing business there is not a legitimate state purpose, and that the encouragement of capital investment in state assets and securities also is not a legitimate state purpose when furthered by discrimination.

O'CONNOR, J., joined by BRENNAN, MARSHALL, and REHNQUIST, JJ., dissented, expressing the view that the majority opinion was unsupported by precedent and distorted the constitutional balance, threatening the freedom of both state and federal legislative bodies to fashion appropriate classifications in economic legislation.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 369; Insurance § 6 — equal protection — foreign corporations — insurance companies — illegitimacy of purposes of discriminatory tax law

1a–1f. A state law imposing a higher premiums tax on foreign insurance companies than on domestic insurance companies, and allowing foreign companies to reduce but not eliminate the disparity in tax rates by investing certain proportions of their assets in state assets and securities, cannot be justified under the equal protection clause by its asserted purpose of promoting domestic business within the state, which is not a legitimate state purpose for purposes of the equal protection clause where it is accomplished by discriminating against foreign corporations that wish to compete by doing business in the state, or by its asserted purpose of encouraging investment in state assets, which is also not a legitimate state purpose when furthered by discrimination. (O'Connor, J., and Brennan, Marshall, and Rehnquist, JJ., dissented from this holding.)

Constitutional Law § 349 — equal protection — state discrimination against nonresidents

2. The equal protection clause forbids a state to discriminate in favor of its own residents solely by burdening the residents of other state members of the federation.

Constitutional Law § 369; Insurance § 6 — equal protection — insurance companies — McCarran-Ferguson Act

3. Although the McCarran-Ferguson Act, 15 USCS §§ 1011–1015, exempts the insurance industry from commerce clause restrictions, it does not purport to limit in any way the applicability of the equal protection clause.

Commerce § 144; Constitutional Law § 313 — commerce clause and equal protection clause — comparison of tests governing validity of state laws

4. Under commerce clause analysis, the state's interest served by a state law, if legitimate, is weighed against the burden the state law would impose on interstate commerce; in the equal protection context, however, if the state's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose.

SYLLABUS BY REPORTER OF DECISIONS

An Alabama statute imposes a substantially lower gross premiums tax rate on domestic insurance companies than on out-of-state (foreign) insurance companies. The statute permits foreign companies to reduce but not to eliminate the differential by investing in Alabama assets and securities. Appellant foreign insurance companies filed claims for refunds of taxes paid, contending that the statute, as applied to them, violated the Equal Protection Clause. The State Commissioner of Insurance denied the claims. On consolidated appeals to a county Circuit Court, in which several domestic

companies intervened. The statute was upheld on summary judgment. The court ruled that the statute did not violate the Equal Protection Clause because, in addition to raising revenue, it served the legitimate state purposes of encouraging the formation of new insurance companies in Alabama and capital investment by foreign insurance companies in Alabama assets and securities, and that the distinction between foreign and domestic companies was rationally related to those purposes. The Alabama Court of Civil Appeals affirmed the finding as to legitimate state purposes, but remanded for an evidentiary hearing on the issue of rational relationship. On certiorari to the Alabama Supreme Court, appellants waived their rights to such an evidentiary hearing, and the court entered judgment for the State and the intervenors on appellants' equal protection challenge to the statute.

Held: The Alabama domestic preference tax statute violates the Equal Protection Clause as applied to appellants.

(a) Under the circumstances of this case, promotion of domestic business by discriminating against nonresidents is not a legitimate state purpose. Western & Southern Life Ins. Co. v State Board of Equalization of California, 451 US 648, 68 L Ed 2d 514, 101 S Ct 2070, distinguished. Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there. Alabama's purpose constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent. A State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence. Although the McCarran-Ferguson Act exempts the insurance industry from Commerce Clause restrictions, it does not purport to limit the applicability of the Equal Protection Clause. Equal protection restraints are applicable even though the *effect* of the discrimination is similar to the type of burden with which the Commerce Clause also would be concerned. Pp 6–12.

(b) Nor is the encouragement of the investment in Alabama assets and securities a legitimate state purpose. Domestic insurers remain entitled to the more favorable tax rate regardless of whether they invest in Alabama assets. Moreover, since the investment incentive provision does not enable foreign insurers to eliminate the statute's discriminatory effect, it does not cure but reaffirms the impermissible classification based solely on residence.

—— So 2d ——, reversed and remanded.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and White, Blackmun, and Stevens, JJ., joined. O'Connor, J., filed a dissenting opinion, in which Brennan, Marshall, and Rehnquist, JJ., joined.

APPEARANCES OF COUNSEL

Matthew J. Zinn argued the cause for appellants.

Warren B. Lightfoot argued the cause for appellees.

Justice **Powell** delivered the opinion of the Court.

[1a] This case presents the question whether Alabama's domestic preference tax statute, Ala Code §§ 27-4-4 and 27-4-5 (1975), that taxes out-of-state insurance companies at a higher rate than domestic insurance companies, violates the Equal Protection Clause.

I

Since 1955,[1] the State of Alabama has granted a preference to its domestic insurance companies by imposing a substantially lower gross premiums tax rate on them than on out-of-state (foreign) companies.[2] Under the current statutory provisions, foreign life insurance companies pay a tax on their gross premiums received from business conducted in Alabama at a rate of 3 percent, and foreign companies selling other types of insurance pay at a rate of 4 percent. Ala Code § 27-1-4(a) (1975). All domestic insurance companies, in contrast, pay at a rate of only 1 percent on all types of insurance premiums. § 27-4-5(a).[3] As a result, a foreign insurance company doing the same type and volume of business in Alabama as a domestic company generally will pay three to four times as much in gross premiums taxes as its domestic competitor.

Alabama's domestic preference tax statute does provide that foreign companies may reduce the differential in gross premiums taxes by investing prescribed percentages of their worldwide assets in specified Alabama assets and securities. § 27-4-4(b). By investing 10 percent or more of its total assets in Alabama investments, for example, a foreign life insurer may reduce its gross premiums tax rate from 3 to 2 percent. Similarly, a foreign property and casualty insurer may reduce its tax rate from 4 to 3 percent. Smaller tax reductions are available based on investment of smaller percentages of a company's assets. Ibid. Regardless of how much of its total assets a foreign company places in Alabama investments, it can never reduce its gross premiums tax rate to the same level paid by comparable domestic companies. These are entitled to the 1 percent tax rate even if they have no investments in the State. Thus, the investment pre

1. The origins of Alabama's domestic preference tax statute date back to 1849, when the first tax on premiums earned by insurance companies doing business in the State was limited to companies not chartered by the State. Act No. 1, 1849 Ala Acts 5. A domestic preference tax was imposed on and off throughout the years until 1945, when the State restored equality in taxation of insurance companies in response to this Court's decision in United States v South-Eastern Underwriters Assn. 322 US 533, 88 L Ed 1440, 64 S Ct 1162 (1944). Act No. 156, 1945 Ala Acts 196–197. In 1955, the tax was reinstated, Act No. 77, 1955 Ala Acts 193 (2d Sp Sess), and with minor amendments, has remained in effect until the present.

2. For domestic preference tax purposes Alabama defines a domestic insurer as a company that both is incorporated in Alabama and has its principal office and chief place of business within the State. Ala Code § 27-4-1(c) (1975). A corporation that does not meet both of these criteria is characterized as a foreign insurer. § 27-4-1(2).

3. There are two exceptions to these general rules concerning the rates of taxation of insurance companies. For annuities, the tax rate is one percent for both foreign and domestic insurers, Ala Code § 27-4-6(a) (1975), and for wet marine and transportation insurance, the rate is three-quarters of one percent for both foreign and domestic insurance companies, § 27-4-6(a).

OPINION OF THE COURT

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vision permits foreign insurance companies to reduce, but never to eliminate, the discrimination inherent in the domestic preference tax statute.

II

Appellants, a group of insurance companies incorporated outside of the State of Alabama, filed claims with the Alabama Department of Insurance in 1961, contending that the domestic preference tax statute, as applied to them, violated the Equal Protection Clause. They sought refunds of taxes paid for the tax years 1977 through 1980. The Commissioner of Insurance denied all of their claims on July 8, 1981.

Appellants appealed to the Circuit Court for Montgomery County, seeking a judgment declaring the statute to be unconstitutional and requiring the Commissioner to make the appropriate refunds. Several domestic companies intervened, and the court consolidated all of the appeals, selecting two claims as lead cases[4] to be tried and binding on all claimants. On cross-motions for summary judgment, the court ruled on May 17, 1982, that the statute was constitutional. Relying on this Court's opinion in Western & Southern Life Ins. Co. v State Board of Equalization of California, 451 US 648, 68 L Ed 2d 514, 101 S Ct 2070 (1981), the court ruled that the Alabama statute did not violate the Equal Protection Clause because it served "at least two purposes, in addition to raising revenue: (1) encouraging the formation of new insurance companies in Alabama, and (2) encouraging capital investment by foreign insurance companies in the Alabama assets and governmental securities set forth in the statute." App to Juris Statement 20a-21a. The court also found that the distinction the statute created between foreign and domestic companies was rationally related to those two purposes and that the Alabama Legislature reasonably could have believed that the classification would have promoted those purposes. Id., at 21a.

After their motion for a new trial was denied, appellants appealed to the Court of Civil Appeals. It affirmed the Circuit Court's rulings as to the existence of the two legitimate state purposes, but remanded for an evidentiary hearing on the issue of rational relationship, concluding that summary judgment was inappropriate on that question because the evidence was in conflict. 437 So 2d 535 (1983). Appellants petitioned the Supreme Court of Alabama for certiorari on the affirmance of the legitimate state purpose issue, and the State and the intervenors petitioned for review of the remand order. Appellants then waived their right to an evidentiary hearing on the issue whether the statute's classification bore a rational relationship to the two purposes found by the Circuit Court to be legitimate, and they requested a final determination of the legal issues with respect to their equal protection challenge to the statute. The Supreme Court denied certiorari on all claims. Appellants again waived their rights to an evidentiary hearing on the rational relationship issue and filed a joint motion with the other parties seeking rehearing and entry of a final judgment. The motion was granted, and judgment was entered for the State and the intervenors. This appeal followed, and we noted probable jurisdiction. 466 US ——, 80 L Ed 2d 455, 104 S Ct 1905 (1984). We now reverse.

III

Prior to our decision in Western & Southern Life Ins. Co. v State Board of Equalization of California, supra, the jurisprudence of the applicability of the Equal Protection Clause to discriminatory tax statutes had a somewhat checkered history. Lincoln National Life Ins. Co. v Read, 325 US 673, 89 L Ed 1861, 65 S Ct 1220 (1945), held that so-called "privilege" taxes, required to be paid by a foreign corporation before it would be permitted to do business within a State, were immune from equal protection challenge. That case stood in stark contrast, however, to the Court's prior decisions in Southern R. Co. v Greene, 216 US 400, 54 L Ed 536, 30 S Ct 287 (1910), and Hanover Fire Ins. Co. v Harding, 272 US 494, 71 L Ed 372, 47 S Ct 179, 49 ALR 713 (1926), as well as to later decisions, in which the Court had recognized that the Equal Protection Clause placed limits on other forms of discriminatory taxation imposed on out-of-state corporations solely because of their residence. See, e.g., WHYY, Inc. v Glassboro, 393 US 117, 21 L Ed 2d 242, 89 S Ct 286 (1968); Allied Stores of Ohio, Inc. v Bowers, 358 US 522, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312 (1959); Wheeling Steel Corp. v Glander, 337 US 562, 93 L Ed 1544, 69 S Ct 1291, 40 Ohio Ops 101, 55 Ohio L Abs 305 (1949).

In Western & Southern, supra, we reviewed all of these cases for the purpose of deciding whether to permit an equal protection challenge to a California statute imposing a retaliatory tax on foreign insurance companies doing business within the State, when the home States of those companies imposed a similar tax on California insurers entering their borders. We concluded that Lincoln was no more than "a surprising throwback" to the days before enactment of the Fourteenth Amendment and in which incorporation of a domestic corporation or entry of a foreign one had been granted only as a matter of privilege by the State in its unfettered discretion. 451 US, at 665, 68 L Ed 2d 514, 101 S Ct 2070. We therefore rejected the longstanding but "anachronis[tic]" rule of Lincoln and explicitly held that the Equal Protection Clause imposes limits upon a State's power to condition the right of a foreign corporation to do business within its borders. Id., at 667, 68 L Ed 2d 514, 101 S Ct 2070. We held that "[w]e consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to legitimate state purpose." Id., at 667-668, 68 L Ed 2d 514, 101 S Ct 2070.

[1b] Because appellants waived their right to an evidentiary hearing on the issue whether the classification in the Alabama domestic preference tax statute bears a rational relation to the two purposes upheld

4. Metropolitan Life Insurance Co., a New York corporation, was chosen to represent the life insurance claimants, and Prudential Property and Casualty Co., a New Jersey corporation, was chosen as representative of the non-life claimants. See App 314-315.

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[1b] Because appellants waived their right to an evidentiary hearing on the issue whether the classification in the Alabama domestic preference tax statute bears a rational relation to the two purposes upheld

by the Circuit Court, the only question before us is whether those purposes are legitimate.[5]

A

(1)

The first of the purposes found by the trial court to be a legitimate reason for the statute's classification between foreign and domestic corporations is that it encourages the formation of new domestic insurance companies in Alabama. The State, agreeing with the Court of Civil Appeals, contends that this Court has long held that the promotion of domestic industry, in and of itself, is a legitimate state purpose that will survive equal protection scrutiny. In so contending, it relies on a series of cases, including Western & Southern, that are said to have upheld discriminatory taxes. See Bacchus Imports, Ltd. v Dias, 468 US ——, 82 L Ed 2d 200, 104 S Ct 3049 (1984); Pike v Bruce Church, Inc., 397 US 137, 25 L Ed 2d 174, 90 S Ct 844 (1970); Allied Stores of Ohio, Inc. v Bowers, supra; Parker v Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307 (1943); Carmichael v Southern Coal & Coke Co. 301 US 495, 81 L Ed 1245, 57 S Ct 868, 109 ALR 1327 (1937); Board of Education v Illinois, 203 US 553, 51 L Ed 314, 27 S Ct 171 (1906).

The cases cited lend little or no support to the State's contention. In Western & Southern, the case principally relied upon, we did not hold as a general rule that promotion of domestic industry is a legitimate state purpose under equal protection analysis.[6] Rather, we held that California's purpose in enacting the retaliatory tax—to promote the *interstate* business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes—was a legitimate one. 451 US, at 668, 68 L Ed 2d 514, 101 S Ct 2070. In contrast, Alabama asks us to approve its purpose of promoting the business of its domestic insurers in Alabama by penalizing foreign insurers who also want to do business in the State. Alabama has made no attempt, as California did, to influence the policies of other States in order to enhance its domestic companies' ability to operate interstate; rather, it has erected barriers to foreign companies who wish to do interstate business in order to improve its domestic insurers' ability to compete at home.

[2] The crucial distinction between the two cases lies in the fact that Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there. Alabama's purpose, contrary to California's, constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent. As Justice Brennan, joined by Justice Harlan, observed in his concurrence in Allied Stores of Ohio, Inc. v Bowers, 358 US 522, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312 (1959), this Court always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening "the residents of other state members of our federation." Id., at 533, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312. Unlike the retaliatory tax involved in Western & Southern, which only burdens residents of a State that imposes its own discriminatory tax on outsiders, the domestic preference tax gives the "home team" an advantage by burdening *all* foreign corporations seeking to do business within the State no matter what they or their States do.

The validity of the view that a State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence is confirmed by a long line of this Court's cases so holding. WHYY, Inc. v Glassboro, 393 US, at 119-120, 21 L Ed 2d 242, 89 S Ct 286; Wheeling Steel Corp. v Glander, 337 US, at 571, 93 L Ed 1544, 69 S Ct 1291,

5. The State and the intervenors advanced some 15 additional purposes in support of the Alabama statute. As neither the Circuit Court nor the Court of Civil Appeals ruled on the legitimacy of those purposes, that question is not before us, and we express no view as to it. On remand, the State will be free to advance again its arguments relating to the legitimacy of those purposes.

As the dissent finds our failure to resolve whether Alabama may continue to collect its tax "baffling," post, at 4, we reemphasize the procedural posture of the case: it arose on a motion for summary judgment. The Court of Civil Appeals upheld the Circuit Court's ruling that the two purposes identified by it were legitimate, but the appellate court remanded on the issue of rational relationship as to those purposes because it found the evidence in conflict. In order to obtain an expedited ruling, appellants waived their right to an evidentiary hearing only as to the purposes "which the lower courts have determined to be legitimate." App to Juris St, at 2a. Thus, for this Court to resolve whether Alabama may continue to collect the tax, it would have to decide de novo whether any of the other purposes was legitimate, and also whether the statute's classification bore a rational relationship to any of these purposes—all this, on a record that the Court of Civil Appeals deemed inadequate.

6. We find the other cases on which the State relies also to be inapposite to this inquiry. Bacchus Imports, Pike, and Parker discussed whether promotion of local industry is a valid state purpose under the Commerce Clause. The Commerce Clause, unlike the Equal Protection Clause, is integrally concerned with whether a state purpose implicates local or national interests. The Equal Protection Clause, in contrast, is concerned with whether a state purpose is impermissibly discriminatory; whether the discrimination involves local or other interests is not central to the inquiry to be made. Thus, the fact that promotion of local industry is a legitimate state interest in the Commerce Clause context says nothing about its validity under equal protection analysis. See infra, at ——-——, 84 L Ed 2d 760-761.

Moreover, neither Bacchus nor Pike ruled that a State's ability to promote domestic industry was unlimited, even under the Commerce Clause. Thus, in Bacchus, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry," 468 US ——, ——, 82 L Ed 2d 200, 104 S Ct 3049 (1984), we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business, id., at ——, 82 L Ed 2d 200, 104 S Ct 3049. Accord Armco Inc. v Hardesty, 467 US —— ——, 81 L Ed 2d 540, 104 S Ct 2620 (1984). Likewise, in Pike, the Court held that the state statute promoting a legitimate local interest must "regulat[e] evenhandedly." 397 US, at 142, 25 L Ed 2d 174, 90 S Ct 844.

Other cases cited by the State are simply irrelevant to the legitimacy of promoting local business at all. Carmichael relates primarily to the validity of a state unemployment compensation scheme, and Board of Education deals with the State's ability to regulate matters relating to probate. Bowers is the one of the State's cases that involves the validity under the Equal Protection Clause of a tax that discriminates on the basis of residence of domestic versus foreign corporations. That case does little, however, to support the State's contention that promotion of domestic business is a legitimate state purpose. It is concerned with encouraging nonresidents who are not competitors of residents to open warehouses within the State. See infra, at ——-——, 84 L Ed 2d 760.

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[2] The crucial distinction between the two cases lies in the fact that Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there. Alabama's purpose, contrary to California's, constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent. As Justice Brennan, joined by Justice Harlan, observed in his concurrence in Allied Stores of Ohio, Inc. v Bowers, 358 US 522, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312 (1959), this Court always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening "the residents of other state members of our federation." Id., at 533, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312. Unlike the retaliatory tax involved in Western & Southern, which only burdens residents of a State that imposes its own discriminatory tax on outsiders, the domestic preference tax gives the "home team" an advantage by burdening *all* foreign corporations seeking to do business within the State, no matter what they or their States do.

The validity of the view that a State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence is confirmed by a long line of this Court's cases so holding. WHYY, Inc v Glassboro, 393 US, at 119-120, 21 L Ed 2d 242, 89 S Ct 286; Wheeling Steel Corp. v Glander, 337 US, at 571, 93 L Ed 1544, 69 S Ct 1291, 40

Ohio Ops 101, 55 Ohio L Abs 305; Hanover Fire Ins. Co. v Harding, 272 US, at 511, 71 L Ed 372, 47 S Ct 179, 49 ALR 713; Southern R. Co. v Greene, 216 US, at 417, 54 L Ed 536, 30 S Ct 287. See Reserve Life Ins. Co. v Bowers, 380 US 258, 13 L Ed 2d 959, 85 S Ct 951 (1965) (per curiam). As the Court stated in Hanover Fire Ins. Co., with respect to general tax burdens on business, "the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind." 272 US, at 511, 71 L Ed 372, 47 S Ct 179, 49 ALR 713. In all of these cases, the discriminatory tax was imposed by the State on foreign corporations doing business within the State solely because of their residence, presumably to promote domestic industry within the State.[7] In relying on these cases and rejecting Lincoln in Western & Southern, we reaffirmed the continuing viability of the Equal Protection Clause as a means of challenging a statute that seeks to benefit domestic industry within the State only by grossly discriminating against foreign competitors.

The State contends that Allied Stores of Ohio, Inc. v Bowers, supra, shows that this principle has not always held true. In that case, a domestic merchandiser challenged on equal protection grounds an Ohio statute that exempted foreign corporations from a tax on the value of merchandise held for storage within the State. The Court upheld the tax, finding that the purpose of encouraging foreign companies to build warehouses within Ohio was a legitimate state purpose. The State contends that this case shows that promotion of domestic business is a legitimate state purpose under equal protection analysis.

[1c] We disagree with the State's interpretation of Allied Stores and find that the case is not inconsistent with the other cases on which we rely. We agree with the holding of Allied Stores that a State's goal of bringing in new business is legitimate and often admirable. Allied Stores does not, however, hold that promotion of domestic business by *discriminating* against foreign corporations is legitimate. The case involves instead a statute that *encourages nonresidents*—who are not competitors of residents—to build warehouses within the State. The discriminatory tax involved did not favor residents by burdening outsiders; rather, it granted the nonresident businesses an exemption that residents did not share. Since the foreign and domestic companies involved were not competing to provide warehousing services, granting the former an exemption did not even directly affect adversely the domestic companies subject to the tax. On its facts, then, Allied Stores is not inconsistent with our holding here that promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose. See 358 US, at 532-533, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312 (Brennan, J., concurring).

(2)

[3] The State argues nonetheless

7. Although the promotion of domestic business was not a purpose advanced by the [illegible] in support of their taxes in these cases, such promotion is logically the primary reason for enacting discriminatory taxes such as those at issue here.

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that it is impermissible to view a discriminatory tax such as the one at issue here as violative of the Equal Protection Clause. This approach, it contends, amounts to no more than "Commerce Clause rhetoric in equal protection clothing." Brief for Appellee Ward 22. The State maintains that because Congress, in enacting the McCarran-Ferguson Act, 15 USC §§ 1011–1015 [15 USCS §§ 1011–1015], intended to authorize States to impose taxes that burden interstate commerce in the insurance field, the tax at issue here must stand. Our concerns are much more fundamental than as characterized by the State. Although the McCarran-Ferguson Act exempts the insurance industry from Commerce Clause restrictions, it does not purport to limit in any way the applicability of the Equal Protection Clause. As noted above, our opinion in Western & Southern expressly reaffirmed the viability of equal protection restraints on discriminatory taxes in the insurance context.[8]

[4] Moreover, the State's view ignores the differences between Commerce Clause and equal protection analysis and the consequent different purposes those two constitutional provisions serve. Under Commerce Clause analysis, the State's interest, if legitimate, is weighed against the burden the state law would impose on interstate commerce. In the equal protection context, however, if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish. See Western & Southern, 451 US, at 674, 68 L Ed 2d 514, 101 S Ct 2070 (if purpose is legitimate, equal protection challenge may not prevail so long as the question of rational relationship is "'at least debatable'" (quoting United States v Carolene Products Co. 304 US 144, 154, 82 L Ed 1234, 58 S Ct 778 (1938)).

The two constitutional provisions perform different functions in the analysis of the permissible scope of a State's power—one protects interstate commerce, and the other protects persons[9] from unconstitutional discrimination by the States. See Bethlehem Motors Corp. v Flynt, 256 US 421, 423–424, 65 L Ed 1029, 41 S Ct 571 (1921). The effect of the statute at issue here is to place a discriminatory tax burden on foreign insurers who desire to do business within the State, thereby also incidentally placing a burden on interstate commerce. Equal protection restraints are applicable even though the *effect* of the discrimination in this case is similar to the type of burden with which the Commerce Clause also would be concerned. We reaffirmed the importance of the Equal Protection Clause in the in-

8. In fact, as we noted in Western & Southern, the legislative history of the McCarran-Ferguson Act reveals that the Act was Congress's response only to United States v South-Eastern Underwriters Assn. 322 US 533, 88 L Ed 1440, 64 S Ct 1162 (1944), and that Congress did not intend thereby to give the States any power to tax or regulate the insurance industry other than what they had previously possessed. Thus Congress expressly left undisturbed this Court's decisions holding that the Equal Protection Clause places limits on a State's ability to tax out-of-state corporations. See 451 US, at 655, n 6, 68 L Ed 2d 514, 101 S Ct 2070.

9. It is well established that a corporation is a "person" within the meaning of the Fourteenth Amendment. E.g., Western & Southern, supra, at 660, n 12, 68 L Ed 2d 514, 101 S Ct 2070.

surance context in Western & Southern and see no reason now for reassessing that view.

[1d] In whatever light the State's position is cast, acceptance of its contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context. A State's natural inclination frequently would be to prefer domestic business over foreign. If we accept the State's view here, then any discriminatory tax would be valid if the State could show it reasonably was intended to benefit domestic business.[10] A discriminatory tax would stand or fall depending primarily on how a State framed its purpose—as benefiting one group or as harming another. This is a distinction without a difference, and one that we rejected last term in an analogous context arising under the Commerce Clause. Bacchus Imports, Ltd. v Dias, 468 US, at ——, 82 L Ed 2d 200, 104 S Ct 3049. See n 6, supra We hold that under the circumstances of this case, promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose.

B

[1e] The second purpose found by the courts below to be legitimate was the encouragement of capital investment in the Alabama assets and governmental securities specified in the statute. We do not agree that this is a legitimate state purpose when furthered by discrimination. Domestic insurers remain entitled to the more favorable rate of tax regardless of whether they invest in Alabama assets. Moreover, the investment incentive provision of the Alabama statute does not enable foreign insurance companies to eliminate the discriminatory effect of the statute. No matter how much of their assets they invest in Alabama, foreign insurance companies are still required to pay a higher gross premiums tax than domestic companies. The State's investment incentive provision therefore does not cure, but reaffirms, the statute's impermissible classification based solely on residence. We hold that encouraging investment in Alabama assets and securities in this plainly discriminatory manner serves no legitimate state purpose.

IV

[1f] We conclude that neither of the two purposes furthered by the Alabama domestic preference tax statute and addressed by the Circuit Court for Montgomery County, see supra, at 3, is legitimate under the Equal Protection Clause to justify the imposition of the discriminatory tax at issue here. The judgment of the Alabama Supreme Court accordingly is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

10. Indeed, under the State's analysis, *any* discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another. This case does not involve or question, as the dissent suggests, post, at ——, 84 L Ed 2d 774, the broad authority of a State to promote and regulate its own economy. We hold only that such regulation may not be accomplished by imposing discriminatorily higher taxes on nonresident corporations solely because they are nonresidents.

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Justice **O'Connor,** with whom Justice Brennan, Justice **Marshall** and Justice **Rehnquist** join, dissent- ing.

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

I

Alabama's legislature has chosen to impose a higher tax on out-of- state insurance companies and in- surance companies incorporated in Alabama that do not maintain their principal place of business or invest assets within the State. Ala Code § 27-4-4 et seq. (1975). This tax seeks to promote both a domestic insur- ance industry and capital invest- ment in Alabama. App to Juris Statement 20a-21a. Metropolitan Life Insurance Company, joined by many other out-of-state insurers, al- leges that this discrimination vio- lates its rights under the Equal Pro- tection Clause of the Fourteenth Amendment, which provides that a State shall not "deny to any person within its jurisdiction the equal pro- tection of the laws." Appellants rely [illegible] Equal Protection Clause be- cause, as corporations, they are not "citizens" protected by the privileges and immunities clauses of the Con- stitution. Hemphill v Orloff, 277 US 537, 548–550, 72 L Ed 978, 48 S Ct 577 (1928). Similarly, they cannot claim Commerce Clause protection because Congress in the McCarran- Ferguson Act, 59 Stat 33, 15 USC § 1011 et seq. [15 USCS §§ 1011 et seq.], explicitly suspended Commerce Clause restraints on state taxation of insurance and placed insurance regulation firmly within the purview of the several States. Western & Southern Life Ins. Co. v State Board of Equalization, 451 US 648, 655, 68 L Ed 2d 514, 101 S Ct 2070 (1981).

Our precedents impose a heavy burden on those who challenge local economic regulation solely on Equal Protection Clause grounds. In this context, our long-established juris- prudence requires us to defer to a legislature's judgment if the classifi- cation is rationally related to a legit- imate state purpose. Yet the Court evades this careful framework for analysis, melding the proper two- step inquiry regarding the State's purpose and the classification's rela- tionship to that purpose into a single unarticulated judgment. This tactic enables the Court to characterize State goals that have been legiti- mated by Congress itself as improper solely because it disagrees with the concededly rational means of differ- ential taxation selected by the legis- lature. This unorthodox approach leads to further error. The Court gives only the most cursory atten- tion to the factual and legal bases supporting the State's purposes and ignores both precedent and signifi- cant evidence in the record estab- lishing their legitimacy. Most trou-

bling, the Court discovers in the Equal Protection Clause an implied prohibition against classifications whose purpose is to give the "home team" an advantage over interstate competitors even where Congress has authorized such advantages. Ante, at ——, 84 L Ed 2d 759.

The Court overlooks the unequivocal language of our prior decisions. "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." New Orleans v Dukes, 427 US 297, 303, 49 L Ed 2d 511, 96 S Ct 2513 (1976). See, e.g., Lehnhausen v Lake Shore Auto Parts Co. 410 US 356, 35 L Ed 2d 351, 93 S Ct 1001 (1973). Judicial deference is strongest where a tax classification is alleged to infringe the right to equal protection. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." Madden v Kentucky, 309 US 83, 88, 84 L Ed 590, 60 S Ct 406, 125 ALR 1383 (1940). "Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one or to restrict or suppress the other." Carmichael v Southern Coal & Coke Co. 301 US 495, 512, 81 L Ed 1245, 57 S Ct 868, 109 ALR 1327 (1937) (citations omitted). As the Court emphatically noted in Allied Stores of Ohio, Inc. v Bowers:

"[It] has repeatedly been held and appears to be entirely settled that [a] statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment. Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary or violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." 358 US 522, 528, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312 (1959) (citations omitted).

See also Western & Southern Life Ins. Co. v State Board of Equalization, supra, at 674, 68 L Ed 2d 514, 101 S Ct 2070; Minnesota v Clover Leaf Creamery Co. 449 US 456, 464, 66 L Ed 2d 659, 101 S Ct 715 (1981).

Appellants waived their right to an evidentiary hearing and conceded that Alabama's classification was rationally related to its purposes of encouraging the formation of domestic insurance companies and bringing needed services and capital to the State. Thus the only issue in dispute is the legitimacy of these purposes. Yet it is obviously legitimate for a State to seek to promote local business and attract capital investment, and surely those purposes animate a wide range of legislation in all 50 States.

The majority evades the obvious by refusing to acknowledge the factual background bearing on the legitimacy of the State's purpose or to address the many collateral public benefits advanced by Alabama. Instead, the Court dismisses the

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State's arguments by merely stating that they were not ruled on by the courts below. Ante, at ——, n 5, 84 L Ed 2d 758. In point of fact, the full range of purposes documented before this Court was also argued and documented before the Alabama Circuit Court. See Record, Vols VI, VII, VIII. That court found "*at least* two purposes, in addition to raising revenue: (1) encouraging the formation of new insurance companies in Alabama, and (2) encouraging capital investment by foreign insurance companies in the Alabama assets and governmental securities set forth in the statute." App to Juris Statement 20a-21a (emphasis added). As appellants concede, these purposes are simply a step in achieving the "larger set of purposes [whose] premise . . . is that domestic insurance companies, on the whole, benefit the state in ways which foreign companies do not." Brief for Appellants 31.

In any event, it is settled law that the appellee may assert any argument in support of the judgment in his favor, regardless of whether it was relied upon by the court below. Dandridge v Williams, 397 US 471, 475, n 6, 25 L Ed 2d 491, 90 S Ct 1153 (1970). The Court's failure actually to resolve whether Alabama may continue to collect its tax, see ante, at ——, n 10, 84 L Ed 2d 762, is all the more baffling, since appellants took the exceptional step of conceding the factual issues to assure a speedy resolution of numerous pending lawsuits disruptive of industry stability. See Brief for State of Alaska et al. as Amici Curiae 1-2. Our precedents do not condone such a myopic approach to review of statutes imposing economic burdens. See, e.g. Allied Stores of Ohio, Inc. v Bowers, supra, at 528-529, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312; McGowan v Maryland, 366 US 420, 425, 6 L Ed 2d 393, 81 S Ct 1101, 17 Ohio Ops 2d 151 (1961); United States v Carolene Products Co. 304 US 144, 152-153, 82 L Ed 1234, 58 S Ct 778 (1938); Borden's Farm Products Co. v Baldwin, 293 US 194, 209, 79 L Ed 281, 55 S Ct 187 (1934). The Court had consistently reviewed the validity of such statutes based on whatever "may reasonably have been the purpose and policy of the State Legislature, in adopting the proviso." Allied Stores of Ohio, Inc. v Bowers, supra, at 528-529, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312. It is to that inquiry that I now turn.

Alabama claims that its insurance tax, in addition to raising revenue and promoting investment, promotes the formation of new domestic insurance companies and enables them to compete with the many large multistate insurers that currently occupy some 75% to 85% of the Alabama insurance market. App 80. Economic studies submitted by the State document differences between the two classes of insurers that are directly relevant to the well-being of Alabama's citizens. See id., at 46-129. Foreign insurers typically concentrate on affluent, high volume, urban markets and offer standardized national policies. In contrast, domestic insurers such as intervenors American Educators Life Insurance Company and Booker T. Washington Life Insurance Company are more likely to serve Alabama's rural areas, and to write low-cost industrial and burial policies not offered by the larger

national companies.[1] Additionally, Alabama argues persuasively that it can more readily regulate domestic insurers and more effectively safeguard their solvency than that of insurers domiciled and having their principal places of business in other states.

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

> "[T]he great divide in the [equal protection] decisions lies in the difference between emphasizing the actualities or the abstractions of legislation.
>
> "'To recognize marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic.'" Morey v Doud, 354 US 457, 472, 1 L Ed 2d 1485, 77 S Ct 1344 (1957) (Frankfurter, J., dissenting).

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

II

The policy of favoring local concerns in State regulation and taxation of insurance, which the majority condemns as illegitimate, is not merely a recent invention of the States. The States initiated regulation of the business of insurance as early as 1851. See Report of the Comptroller General, Issues and Needed Improvements in State Regulation of the Insurance Business, GAO Report B-192813, p 5 (Oct. 9, 1979) (GAO Report). In 1944, however, this Court overruled a long line of cases holding that the business of insurance was an intrastate activity beyond the scope of the Commerce Clause. United States v South-Eastern Underwriters Assn. 322 US 533, 88 L Ed 1440, 64 S Ct 1162. "The decision provoked widespread concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry. Congress moved quickly, enacting the McCarran-Ferguson Act within a year of the decision in South-Eastern Underwriters." St. Paul Fire & Marine Insurance Co. v Barry, 438 US 531, 539, 57 L Ed 2d 932, 98 S Ct 2923 (1978). See H R Rep No 143, 79th Cong, 1st Sess, 2 (1945); 91 Cong Rec 479–480 (1945) (remarks of Sen. Ferguson); id., at 487 (remarks of Sen. Ellender).

The drafters of the Act were sensitive to the same concerns Alabama now vainly seeks to bring to this Court's attention: the greater responsiveness of local insurance com-

1. "Industrial insurance" is the trade term for a low face-value policy typically sold door-to-door and maintained through home collection of monthly or weekly premiums. Alabama currently has more industrial insurance in force than any other State. Burial insurance is another form of insurance popular in rural Alabama that is offered exclusively by local insurers. By contrast, Metropolitan Life, like many multistate insurers, has discontinued writing even whole life policies with face values below $15,000. App 173–176.

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II

The policy of favoring local concerns in State regulation and taxation of insurance, which the majority condemns as illegitimate, is not merely a recent invention of the States. The States initiated regulation of the business of insurance as early as 1851. See Report of the Comptroller General, Issues and Needed Improvements in State Regulation of the Insurance Business, GAO Report B-192813, p 5 (Oct. 9, 1979) (GAO Report). In 1944, however, this Court overruled a long line of cases holding that the business of insurance was an intrastate activity beyond the scope of the Commerce Clause. United States v South-Eastern Underwriters Assn. 322 US 533, 88 L Ed 1440, 64 S Ct 1162. "The decision provoked widespread concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry. Congress moved quickly, enacting the McCarran-Ferguson Act within a year of the decision in South-Eastern Underwriters." St. Paul Fire & Marine Insurance Co. v Barry, 438 US 531, 539, 57 L Ed 2d 932, 98 S Ct 2923 (1978). See H R Rep No 143, 79th Cong, 1st Sess, 2 (1945); 91 Cong Rec 479–480 (1945) (remarks of Sen. Ferguson); id., at 487 (remarks of Sen. Ellender).

The drafters of the Act were sensitive to the same concerns Alabama now vainly seeks to bring to this Court's attention: the greater responsiveness of local insurance companies to local conditions, the different insurance needs of rural and industrial states, the special advantages and constraints of state-by-state regulation, and the importance of insurance license fees and taxes as a major source of State revenues. See, e.g., Hearings on S 1362 before the Senate Subcommittee on the Judiciary, 78th Cong, 1st Sess, 3, 10, 16–17 (1943) (letter of Gov. Sharpe of South Dakota stressing role of domestic insurers that provide "poor man" and rural policies adapted to farming concerns); 90 Cong Rec 6564 (1944) (remarks of Rep Vorhis). "As this Court observed shortly afterward, '[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.' Prudential Insurance Co. v Benjamin, 328 US 408, 429 [90 L Ed 1342, 66 S Ct 1142, 164 ALR 476] (1946)." St. Paul Fire & Marine Insurance Co. v Barry, supra, at 539, 57 L Ed 2d 932, 98 S Ct 2923.

The majority opinion correctly notes that Congress did not intend the McCarran-Ferguson Act to give the States any power to tax or regulate the insurance industry other than they already possessed. But the legislative history cited by the majority, ante, at ——, n 7, 84 L Ed 2d 760, relates not to differential taxation but to decisions of this Court that had invalidated State taxes on contracts of insurance entered into outside the State's jurisdiction. See H R Rep No. 143, 79th Cong, 1st Sess, 3 (1945). The Court fails to mention that at the time the Act was under consideration the taxing schemes of Alabama, Arizona, Arkansas, Illinois, Kansas, Kentucky, Maine, Michigan, Mississippi, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, and Wisconsin all incorporated tax differentials favoring domestic insurers. See App 377–379.

Any doubt that Congress' intent encompassed taxes that discriminate in favor of local insurers was dispelled in Prudential Insurance Co. v Benjamin. Cf. Note, Congressional Consent to Discriminatory State Legislation, 45 Colum L Rev 927 (1945) (discussing the issues of constitutional power posed by the Act). There a foreign insurer challenged a tax on annual gross premiums imposed on foreign but not domestic insurers as a condition for renewal of its license to do business. Congress, the foreign insurer argued, was powerless to sanction the tax at issue because "the commerce clause 'by its own force' forbids discriminatory state taxation." Prudential Insurance Co. v Benjamin, 328 US 408, 426, 90 L Ed 1342, 66 S Ct 1142, 164 ALR 476 (1946). A unanimous Court rejected the argument that exacting a 3% gross premium tax from foreign insurers was invalid as "somehow technically of an inherently discriminatory character." Id., at 432, 90 L Ed 1342, 66 S Ct 1142, 164 ALR 476. The Court concluded that the McCarran-Ferguson Act's effect was "clearly to sustain the exaction and that this can be done without violating *any* constitutional provision." Id., at 427, 90 L Ed 1342, 66 S Ct 1142, 164 ALR 476 (emphasis added).

Benjamin expressly noted that nothing in the Equal Protection Clause forbade the State to enact a law such as the tax at issue. Id., at 438, and n 30, 90 L Ed 1342, 66 S Ct 1142, 164 ALR 476. In this regard the Court relied in part on Hanover Fire Ins. Co. v Harding, 272 US 494,

[1] "Industrial insurance" is the trade term a low face-value policy typically sold door- oor and maintained through home collec- of monthly or weekly premiums. Ala- a currently has more industrial insurance force than any other State. Burial insurance is another form of insurance popular in rural Alabama that is offered exclusively by local insurers. By contrast, Metropolitan Life, like many multistate insurers, has discontinued writing even whole-life policies with face values below $15,000. App 173–176.

71 L Ed 372, 47 S Ct 179, 49 ALR 713 (1926), a decision that explicitly recognized that differential taxation of revenues of foreign corporations may not be arbitrary or without reasonable basis. See Western & Southern Life Ins. Co. v State Board of Equalization, 451 US, at 664, n 17, 68 L Ed 2d 514, 101 S Ct 2070. The Commerce Clause, Benjamin emphasized, is not a "one way street" but encompasses congressional power "to discriminate against interstate commerce and in favor of local trade," "subject only to the restrictions placed upon its authority by other constitutional provisions." 328 US, at 434, 90 L Ed 1342, 66 S Ct 1142, 164 ALR 476. Where the States and Congress have acted in concert to effect a policy favoring local concerns, their action must be upheld unless it unequivocally exceeds "some explicit and compelling limitation imposed by a constitutional provision or provisions designed and intended to outlaw the action taken entirely from our constitutional framework." Id., at 435–436, 90 L Ed 2d 1342, 66 S Ct 1142, 164 ALR 476.

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

The contemporary realities of insurance regulation and taxation continue to justify a uniquely local perspective. Insurance regulation and taxation must serve local social policies including assuring the solvency and reliability of companies doing business in the State and providing special protection for those who might be denied insurance in a free market, such as the urban poor, small businesses and family farms. GAO Report 10–13; State Insurance Regulation, Hearing before the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary, 96th Cong, 1st Sess, 19–21 (1979) (hereinafter Insurance Regulation). Currently at least 28 of the 50 States employ a combination of investment incentives and differential premium taxes favoring domestic insurers to encourage local investment of policyholders' premiums and to partially shelter smaller domestic insurers from competition with the large multistate companies. App 66.

State insurance commissions vary widely in manpower and expertise. GAO Report 14. In practice, the State of incorporation exercises primary oversight of the solvency of its insurers. Id., at 36–38. See generally Dunne, Risk, Reality, and Reason in Financial Services Deregulation: A State Legislative Perspective, 2 J Ins Reg 342 (1984) (prepared by the Conference of Insurance Legislators). See, e.g. Ala Code § 27-2-21 (Supp 1984); Ill Rev Stat, ch 73, ¶ 745 (1983); (power to examine books of domestic insurers); Ala Code § 27-32-1 et seq. (1975); Ill Rev Stat, ch 73, ¶¶ 799, 800 (1983) (commissioner's authority to assume control to prevent insolvency); see generally Wis Stat Ann, ch 620, Prefatory Commit-

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The contemporary realities of in-surance regulation and taxation con-tinue to justify a uniquely local per-spective. Insurance regulation and taxation must serve local social poli-cies including assuring the solvency and reliability of companies doing business in the State and providing special protection for those who might be denied insurance in a free market, such as the urban poor, small businesses and family farms. GAO Report 10-13; State Insurance Regulation, Hearing before the Sub-committee on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary, 96th Cong, 1st Sess, 19-21 (1979) (hereinafter Insurance Regulation). Currently at least 28 of the 50 States employ a combination of investment incentives and differential premium taxes favoring domestic insurers to encourage local investment of policy-holders' premiums and to partially shelter smaller domestic insurers from competition with the large multistate companies. App 66.

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tee Comment—1971, pp 536, 546 (1980) (noting lesser control over nondomestic's financial operations). Even the State-of-incorporation's ef-forts to regulate a multistate insurer may be seriously hampered by the difficulty of gaining access to records and assets in forty-nine other States. Dunne, supra, at 356. Thus the secu-rity of Alabama's citizens who pur-chase insurance from out-of-state companies may depend in part on the diligence of another State's in-surance commissioner, over whom Alabama has no authority and lim-ited influence. In the event of finan-cial failure of a foreign insurer the State may have difficulty levying on out-of-state assets. See, e.g., South Carolina ex rel Phoenix Life Ins. Co. v McMaster, 237 US 63, 73, 59 L Ed 839, 35 S Ct 504 (1915). Since each State maintains its own insurance guarantee fund, the domestic insur-ers of the States where a multistate insurer is admitted to do business may ultimately be forced to absorb local policyholders' losses. Dunne, supra, at 372-373.

Many have sharply criticized this piecemeal system, see, e.g., GAO Re-port i-iii; Schmalz, The Insurance Exemption: Can it be Modified Suc-cessfully?, 48 ABA Antitrust L J 579 (1979), but Congress has resisted sug-gestions that it modify the McCar-ran-Ferguson Act to permit greater federal intervention. See GAO Re-port 1; Insurance Regulation, supra. This Court cannot ignore the exigen-cies of contemporary insurance regu-lation outlined above simply because it might prefer uniform federal regu-lation. Given the distinctions in ease of regulation and services rendered by foreign and domestic insurers, we cannot dismiss as illegitimate the State's goal of promoting a healthy local insurance industry sensitive to regional differences and composed of companies that agree to subordinate themselves to the Alabama Commis-sioner's control and to maintain a principal place of business within Alabama's borders. Though econo-mists might dispute the efficacy of Alabama's tax, "[p]arties challenging legislation under the Equal Protec-tion Clause cannot prevail so long as 'it is evident from all the considera-tions presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.'" Western & Southern Life Ins. Co. v State Board of Equalization, 451 US, at 674, 68 L Ed 2d 514, 101 S Ct 2070, quoting United States v Carolene Products Co. 304 US, at 154, 82 L Ed 1234, 58 S Ct 778. Moreover, appellants waived their right to challenge the tax measure's effectiveness.

III

Despite abundant evidence of a legitimate state purpose, the majo-rity condemns Alabama's tax as "purely and completely discrimina-tory" and "the very sort of parochial discrimination that the Equal Pro-tection Clause was intended to pre-vent." Ante, at ——, 84 L Ed 2d 759. Apparently, the majority views any favoritism of domestic commer-cial entities as inherently suspect. The majority ignores a long line of our decisions. In the past this Court has not hesitated to apply the ra-tional basis test to regulatory classi-fications that distinguish between domestic and out-of-state corpora-tions or burden foreign interests to protect local concerns. The Court has always recognized that there are certain legitimate restrictions or poli-cies in which, "[b]y definition, dis-

crimination against nonresidents would inhere." Arlington County Board v Richards, 434 US 5, 7, 54 L Ed 2d 4, 98 S Ct 24 (1977) (per curiam). For example, where state of incorporation or principal place of business affect the State's ability to regulate or exercise its jurisdiction, a State may validly discriminate between foreign and domestic entities. See G. D. Searle & Co. v Cohn, 455 US 404, 71 L Ed 2d 250, 102 S Ct 1137 (1982) (difficulty of obtaining jurisdiction over nonresident corporation provides a rational basis for excepting such corporations from statute of limitations); Metropolitan Casualty Ins. Co. v Brownell, 294 US 580, 79 L Ed 1070, 55 S Ct 538 (1935) (domicile of insurer relevant to statute of limitations as foreign insurers offices and funds generally located outside state); Board of Education v Illinois, 203 US 553, 562, 51 L Ed 314, 27 S Ct 171 (1906) (State's greater control over domestic than foreign nonprofit corporations justifies discriminatory tax).

A State may use its taxing power to entice useful foreign industry, see Allied Stores of Ohio, Inc. v Bowers, 358 US, at 528, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312, or to make residence within its boundaries more attractive, see Zobel v Williams, 457 US 55, 67-68, 72 L Ed 2d 672, 102 S Ct 2309 (1982) (Brennan, J., concurring). Though such measures might run afoul of the Commerce Clause, "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." Bacchus Imports, Ltd. v Dias, 468 US ——, ——, 82 L Ed 2d 200, 104 S Ct 3049 (1984); Western & Southern Life Ins. Co. v State Board of Equalization, supra, at 668, 68 L Ed 2d 514, 101 S Ct 2070. Cf. Edgar v MITE Corp. 457 US 624, 646, 73 L Ed 2d 269, 102 S Ct 2629 (1982) (Powell, J. concurring in part) (noting State's interest in protecting regionally based corporations from acquisition by foreign corporations).

Moreover, the Court has held in the dormant commerce clause context that a State may provide subsidies or rebates to domestic but not to foreign enterprises if it rationally believes that the former contribute to the State's welfare in ways that the latter do not. Hughes v Alexandria Scrap Corp. 426 US 794, 49 L Ed 2d 220, 96 S Ct 2488 (1976). Although the Court has divided on the circumstances in which the dormant Commerce Clause allows such measures, see id., at 817, 49 L Ed 2d 220, 96 S Ct 2488 (Brennan, J., dissenting), surely there can be no dispute that they are constitutionally permitted where Congress itself has affirmatively authorized the States to promote local business concerns free of Commerce Clause constraints. Neither the Commerce Clause nor the Equal Protection Clause bars Congress from enacting or authorizing the States to enact legislation to protect industry in one State "from disadvantageous competition" with less stringently regulated businesses in other States. Hodel v Indiana, 452 US 314, 329, 69 L Ed 2d 40, 101 S Ct 2376 (1981). See also Western & Southern, supra, at 669, 68 L Ed 2d 514, 101 S Ct 2070 (with congressional approval, States may promote domestic insurers by seeking to deter other States from enacting discriminatory or excessive taxes).

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that a State purpose might be legitimate for purposes of the Commerce Clause but somehow illegitimate for purposes of the Equal Protection Clause. No basis is advanced for this theory because no basis exists. The test of a legitimate State purpose must be whether it addresses valid State concerns. To suggest that the purpose's legitimacy, chameleon-like, changes according to the constitutional clause cited in the complaint is merely another pretext to escape the clear message of this Court's precedents.

Next the majority asserts that "a State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence," citing cases that rejected discriminatory ad valorem property taxes, defended as taxes on the "privilege" of doing business. Ante, at ——, 84 L Ed 2d 759–760. See, e.g., WHYY, Inc. v Glassboro, 393 US 117, 21 L Ed 2d 242, 89 S Ct 286 (1968); Wheeling Steel Corp. v Glander, 337 US 562, 93 L Ed 1544, 69 S Ct 1291, 40 Ohio Ops 101, 55 Ohio L Abs 305 (1949); Hanover Fire Ins. Co. v Harding, 272 US 494, 71 L Ed 372, 47 S Ct 179, 49 ALR 713 (1926); Southern R. Co. v Greene, 216 US 400, 54 L Ed 536, 30 S Ct 287 (1910). These decisions were addressed in Western & Southern, and the classifications were characterized as impermissibly discriminatory because they did not "'rest on differences pertinent to the subject in respect of which the classification is made.'" 451 US, at 668, 68 L Ed 2d 514, 101 S Ct 2070, quoting Power Manufacturing Co. v Saunders, 274 US 490, 494, 71 L Ed 1165, 47 S Ct 678 (1927). As the majority concedes, none of these decisions intimates that the tax statutes at issue in the decisions rested on relevant differences between domestic and foreign corporations or had purposes other than the raising of revenue at the out-of-state corporations' expense.

In fact, the Court noted in several of these opinions that foreign corporations *may* validly be taxed at a higher rate if the classification is based on some relevant distinction. No such distinction, however, had been demonstrated or even alleged. See WHYY, Inc. v Glassboro, supra, at 120, 21 L Ed 2d 242, 89 S Ct 286 ("This is not a case in which the exemption was withheld by reason of the foreign corporation's failure or inability to benefit the State in the same measure as do domestic nonprofit corporations"); Wheeling Steel Corp. v Glander, 337 US, at 572, 93 L Ed 1544, 69 S Ct 1291, 40 Ohio Ops 101, 55 Ohio L Abs 305 ("the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction"); Southern R. Co. v Greene, 216 US, at 416–417, 54 L Ed 536, 30 S Ct 287 (parties conceded that the business of the foreign and domestic corporations was precisely the same).[2] Lack-

2. The only cited authority that arguably addressed the issue raised in the instant case is a per curiam reversal and remand without opinion of a decision upholding a discriminatory ad valorem tax on a foreign insurer's fixtures and other tangible property. See Reserve Life Ins. Co. v Bowers, 380 US 258, 13 L Ed 2d 959, 85 S Ct 951 (1965). A reversal and remand is more enigmatic even than a summary affirmance, which has precedential value only as to "the precise issues necessarily presented and necessarily decided." Mandel v Bradley, 432 US 173, 176, 53 L Ed 2d 199, 97 S Ct 2238 (1977). Decisions without opinion may not be equated with "an opinion by this Court treating the question on the merits." See Edelman v Jordan, 415 US 651, 670–671, 39 L Ed 2d 662, 94 S Ct 1347 (1974).

ing the threshhold requirement of an articulated distinction relevant to an asserted purpose, the classifications at issue in these decisions could never have survived rational basis scrutiny and no such analysis was even attempted. These precedents do not answer the question posed by this case: whether a legislature may adopt differential tax treatment of domestic and foreign insurers not simply to raise additional revenue but with the purpose of affecting the market as an "instrument of economic and social engineering"? P. Hartman, Federal Limitations on State and Local Taxation § 3:2 (1981). The majority's suggestion that these cases necessarily decided the issue before us, as promotion of domestic business is "logically the primary reason for enacting discriminatory taxes such as those at issue [in the cited cases]," is mere speculation. See ante, at ——, n 6, 84 L Ed 2d ——.

In treating these cases as apposite authority, the majority again closes its eyes to the facts. Alabama does *not* tax at a higher rate solely on the basis of residence; it taxes insurers, domestic as well as foreign, who do not maintain a principal place of business or substantial assets in Alabama, based on conceded distinctions in the contributions of these insurers *as a class* to the State's insurance objectives. The majority obscures the issue by observing that a given "foreign insurance company doing the same type and volume of business in Alabama as a domestic company" will pay a higher tax. Ante, at ——, 84 L Ed 2d 755. Under our precedents, tax classifications need merely "res[t] upon some reasonable consideration of difference or policy." Allied Stores of Ohio, Inc. v Bowers, supra, at 527, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312. Rational basis scrutiny does not require that the classification be mathematically precise or that *every* foreign insurer or *every* domestic company fit to perfection the general profile on which the classification is based. "[T]he Equal Protection Clause does not demand a surveyor's precision" in fashioning classifications. Hughes v Alexandria Scrap Corp. 426 US at 814, 49 L Ed 2d 220, 96 S Ct 2488.

IV

Because Alabama's classification bears a rational relationship to a legitimate purpose, our precedents demand that it be sustained. The Court avoids this clear directive by a remarkable evasive tactic. It simply declares that the ends of promoting a domestic insurance industry and attracting investments to the State *when accomplished through the means of discriminatory taxation* are not legitimate state purposes. This bold assertion marks a drastic and unfortunate departure from established equal protection doctrine. By collapsing the two prongs of the rational basis test into one, the Court arrives at the ultimate issue—whether the *means* are constitution—without ever engaging in the deferential inquiry we have adopted as a brake on judicial impeachment of legislative policy choices. In addition to unleashing an undisciplined form

[1]Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." Fusari v Steinberg, 419 US 379, 392, 42 L Ed 2d 521, 95 S Ct 533 (Burger, C. J., concurring) (1975).

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of Equal Protection Clause scrutiny, the Court's approach today has serious implications for the authority of Congress under the Commerce Clause. Groping for some basis for this radical departure from equal protection analysis, the Court draws heavily on Justice Brennan's concurring opinion in Allied Stores v Bowers, 358 US 522, 530, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312 (1959), as support for its argument that "the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.'" Ante, at ——, 84 L Ed 2d 759, quoting 358 US, at 533, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312.

As noted in Western & Southern, Justice Brennan's interpretation has not been adopted by the Court, "which has subsequently required no more than a rational basis for discrimination by States against out-of-state interests in the context of equal protection litigation." 451 US, at 667, n 21, 68 L Ed 2d 514, 101 S Ct 2070. More importantly, to the extent the Court today purports to find in the Equal Protection Clause an instrument of federalism, it entirely misses the point of Justice Brennan's analysis. Justice Brennan reasoned that "[t]he Constitution furnishes the structure for the operation of the States with respect to the National Government and with respect to each other" and that "the Equal Protection Clause, among its other roles, operates to maintain this principle of federalism." 358 US, at 532, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 312. Favoring local business as an end in itself might be "rational" but would be antithetical to federalism. Accepting arguendo this interpretation, we have shown that the measure at issue here does not benefit local business as an end in itself but serves important ulterior goals. Moreover, any federalism component of equal protection is fully vindicated where Congress has explicitly validated a parochial focus. Surely the Equal Protection Clause was not intended to supplant the Commerce Clause, foiling Congress' decision under its commerce powers to "affirmatively permit [some measure of] parochial favoritism" when necessary to a healthy federation. White v Massachusetts Council of Construction Employers, 460 US 204, ——, 75 L Ed 2d 1, 103 S Ct 1042, (1983). Such a view of the Equal Protection Clause cannot be reconciled with the McCarran-Ferguson Act and our decisions in Western & Southern and Benjamin.

Western & Southern established that a state may validly tax out-of-state corporations at a higher rate if its goal is to promote the ability of its domestic businesses to compete in *interstate* markets. Nevertheless, the Court today concludes that the converse policy is forbidden, striking down legislation whose purpose is to encourage the *intrastate* activities of local business concerns by permitting them to compete effectively on their home turf. In essence, the Court declares "We will excuse an unequal burden on foreign insurers if the State's purpose is to foster its domestic insurers activities in *other* States, but the same unequal burden will be unconstitutional when employed to further a policy that places a higher social value on the domestic insurer's *homestate* than interstate activities." This conclusion is

not drawn from the Commerce Clause, the textual source of constitutional restrictions on State interference with interstate competition. Reliance on the Commerce Clause would, of course, be unavailing here in view of the McCarran-Ferguson Act. Instead the Court engrafts its own economic values on the Equal Protection Clause. Beyond guarding against arbitrary or irrational discrimination, as interpreted by the Court today this Clause now prohibits the effectuation of economic policies, even where sanctioned by Congress, that elevate local concerns over interstate competition. Ante, at ——, 84 L Ed 2d ——. "But a constitution is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views." Lochner v New York, 198 US 45, 75–76, 49 L Ed 937, 25 S Ct 539 (1905) (Holmes, J., dissenting). In the heyday of economic due process, Justice Holmes warned:

> "Courts should be careful not to extend [the express] prohibitions [of the Constitution] beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." Tyson & Brother v Banton, 273 US 418, 445–446, 71 L Ed 718, 47 S Ct 426, 58 ALR 1236 (1927) (Holmes, J., dissenting, joined by Brandeis, J.) (emphasis added).

Ignoring the wisdom of this observation, the Court fashions its own brand of economic equal protection. In so doing, it supplants a legislative policy endorsed by both Congress and the individual States that explicitly sanctioned the very parochialism in regulation and taxation of insurance that the Court's decision holds illegitimate. This newly unveiled power of the Equal Protection Clause would come as a surprise to the Congress that passed the McCarran-Ferguson Act and the Court that sustained the Act against constitutional attack. In the McCarran-Ferguson Act, Congress expressly sanctioned such economic parochialism in the context of state regulation and taxation of insurance.

The doctrine adopted by the majority threatens the freedom not only of the States but also of the Federal Government to formulate economic policy. The dangers in discerning in the Equal Protection Clause a prohibition against barriers to interstate business irrespective of the Commerce Clause should be self-evident. The Commerce Clause is a flexible tool of economic policy that Congress may use as it sees fit, letting it lie dormant or invoking it to limit as well as promote the free flow of commerce. Doctrines of equal protection are constitutional limits that constrain the acts of federal and state legislatures alike. See, e.g., Califano v Webster, 430 US 313, 51 L Ed 2d 360, 97 S Ct 1192 (1977); Cohen, Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma, 35 Stan L Rev 387, 400–413 (1983). The Court's analysis casts a shadow over numerous congressional enactments that adopted as federal policy "the type of parochial favoritism" the Court today finds unconstitutional. White v Massachusetts Council of Construction Employers, 460 US, at ——, 75 L Ed 2d 1, 103 S Ct 1042. Contrary to the reasoning in Benjamin, the Court today indicates the Equal Protection Clause stands as an independent barrier if

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courts should determine that either Congress or a State has ventured the "wrong" direction down what has become, by judicial fiat, the one-way street of the Commerce Clause. Nothing in the Constitution or our past decisions supports forcing such an economic straight-jacket on the federal system.

V

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

> "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. New Orleans v Dukes, 427 US, at 303–304, 49 L Ed 2d 511, 96 S Ct 2513 (citations omitted).

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

Introduced: 1/31/86
Referred: Labor and Commerce
and Finance

IN THE SENATE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

SENATE BILL NO. 379

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the premium tax for domestic insurers."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 21.09.210(b) is amended to read:

(b) Each insurer, and each formerly authorized insurer with respect to premiums received while an authorized insurer in this state, shall pay a tax on the total direct premium income received during the year ending on the preceding December 31 and paid for the insurance of property or risks resident or located in the state other than wet marine and transportation insurance, after deducting from the total direct premium income the applicable cancellations, returned premiums, the unabsorbed portion of any deposit premium, all policy dividends, unabsorbed premiums refunded to policy holders, refunds, savings, savings coupons and other similar returns paid or credited to policyholders with respect to their policies. No deductions may be made of cash surrender value of policies. Considerations received on annuity contracts <u>are</u> [SHALL] not [BE] included in the direct premium income and <u>are</u> [SHALL] not [BE] subject to tax. The tax <u>must</u> [SHALL] be paid to the director annually before April 1, and, except as provided in AS 21.69.390(c), is computed at the rate of

(1) [FOR DOMESTIC COMPANIES, 1 PER CENT;]

(2) for hospital and medical service corporations, 6 percent of their gross premiums, less claims paid;

(3) for companies other than [DOMESTIC AND] hospital and

medical service corporations, 3 percent.

* Sec. 2. This Act applies to the tax due by April 1, 1987 for the tax year beginning January 1, 1986 and to the tax due for subsequent tax years.

BILL SHEFFIELD
GOVERNOR

d379

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 31, 1986

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the premium tax paid by domestic insurers.

Under present law, AS 21.09.210(b) provides that domestic insurers pay premium tax at the rate of one and one-half percent of gross premiums, while nondomestic companies pay three percent of gross premiums. A recent U.S. Supreme Court case, Metropolitan Life Insurance Co. v. Ward, ___ U.S. ___, 53 U.S.L.W. 4699 (June 10, 1985), raises serious questions concerning the constitutionality of the differential rate structure. In order to correct this problem and not jeopardize our premium tax laws, this bill will eliminate the preference for domestic insurers by standardizing the rate at three percent for both categories of insurance companies. The bill has the further benefit of raising the total amount of premium taxes collected. I urge your support of this bill.

Sincerely,

Bill Sheffield

Bill Sheffield
Governor

COMMITTEE REPORT

SENATE

FURTHER: FINANCE

1/31/86

Date 12 March 86

Mr. President

The Committee on Labor & Commerce considered SB 379

relating to the premium tax for domestic insurers.

and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass

[ ] do pass with attached amendment(s)

[X] replace with/or adopt CS for SB 379 (Joe)
[X] new title
[ ] same title and recommends _____

[ ] and attached a "LETTER OF INTENT" [ ] NEW FISCAL NOTE

[ ] reports it back without recommendation

[ ] recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS

Bill Ray

Chairman

Do Pass.

Chairman recommendation

COMMITTEE REPORT

SENATE

FURTHER:

4/23/86

Date _____

Mr. President

The Committee on FINANCE considered SB 381

making special appropriations to the Public School Foundation Account; efd.

and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass

[ ] do pass with attached amendment(s)

[ ] replace with/or adopt CS for _____
[ ] new title
[ ] same title and recommends _____

[ ] and attached a "LETTER OF INTENT" [ ] NEW FISCAL NOTE

[ ] reports it back without recommendation

[ ] recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

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MEMBERS HAVING
OTHER RECOMMENDATIONS

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_____
Chairman

_____
Chairman recommendation

COMMITTEE REPORT

SENATE

FURTHER: FINANCE

1/31/86

Date _____

Mr. President

The Committee on HESS considered SB 381

making special appropriations to the Public School Foundation Account; efd.

and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass

[ ] do pass with attached amendment(s)

[ ] replace with/or adopt CS for _____
[ ] new title
[ ] same title and recommends _____

[ ] and attached a "LETTER OF INTENT" [ ] NEW

[ ] reports it back without recommendation

[ ] recommends referral to _____

MEMBERS SIGNING
DO PASS

MEMBERS H
OTHER R

_____

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_____

_____

Introduced: 1/31/86
Referred: Health, Education and
Social Services and Finance

Funding Information	
General Fund	$ 936,711,800
Other Funds	63,288,200
	$1,000,000,000

IN THE SENATE

BY FERGUSON, FAHRENKAMP AND KERTTULA

SENATE BILL NO. 381

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act making special appropriations to the Public School Foundation Account; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. FINDINGS. The legislature finds that public school education is among the highest priorities of state government. Each fiscal year, the legislature appropriates more than $500,000,000 or more than 25 percent of the entire state government operating budget for all elementary and secondary education programs in school districts throughout the state. School districts rely on state funding to provide for the overwhelming majority of their annual revenue. Further, school districts have expressed extreme frustration with attempting to budget, offer teacher contracts and plan school programs six months before knowing how much funding they will actually receive from the state. Therefore, the legislature finds that "forward funding" for the public school foundation program is a state government priority thereby providing local school districts with annual funding amounts one year in advance.

* Sec. 2. The sum of $468,355,900 is appropriated from the general fund to the Department of Education for deposit into the Public School Foundation Account under AS 14.17.010 for the fiscal year ending June 30, 1987.

* Sec. 3. The sum of $25,644,100 is appropriated from the federal receipts (P.L. 81-874) to the Department of Education into the Public School Foundation Account under AS 14.17.010 for the fiscal year ending June 30, 1987.

* Sec. 4. The sum of $6,000,000 is appropriated from the Public School Fund to the Department of Education into the Public School Foundation Account under AS 14.17.010 for the fiscal year ending June 30, 1987.

* Sec. 5. The sum of $468,355,900 is appropriated from the general fund to the Department of Education for deposit into the Public School Foundation Account under AS 14.17.010 for the fiscal year ending June 30, 1988.

* Sec. 7. The sum of $6,000,000 is appropriated from the Public School Fund to the Department of Education into the Public School Foundation Account under AS 14.17.010 for the fiscal year ending June 30, 1988.

* Sec. 8. Federal or other program receipts that exceed the amounts appropriated in this Act are appropriated conditioned upon compliance with the program review provision of AS 37.07.080(h).

* Sec. 9. If federal or other program receipts exceed the estimates appropriated by this Act, the appropriation from state funds for the affected program may be reduced by the amount of the excess if the reductions are not inconsistent with applicable federal statutes.

* Sec. 10. If federal or other program receipts fall short of the estimates appropriated by this Act, the affected appropriation shall be reduced by the amount of the shortfall in receipts.

* Sec. 11. This Act takes effect July 1, 1986.

ALASKA STATE LEGISLATURE

.14th.. Legislature ....2nd. Session

SENATE BILL ..... NO. 381

By FERGUSON, FAHRENKAMP ..... KERTTULA

"An Act making special appropriations to the Public School Foundation Account.

Introduced in the Senate ....1/31/ 1986.

HISTORY IN THE SENATE

19		
86		Read first time and referred to Committee on
1	31	HESS & FINANCE
	23	Reported back with recommendation that
		Read second time and
		Read third time and

PASS	Effective Date
Yeas	Yeas
Nays	Nays
Absent	Absent
Excused	Excused

Reconsideration

PASS	Effective Date
Yeas	Yeas
Nays	Nays
Absent	Absent
Excused	Excused

Reported correctly engrossed
Signed by President
Sent to House

SECRETARY OF THE SENATE

HISTORY IN THE HOUSE

19		
		Read first time and referred to Committee on
		Reported back with recommendation that
		Read second time and
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PASS	Effective Date
Yeas	Yeas
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Reconsideration

PASS	Effective Date
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Nays	Nays
Absent	Absent
Excused	Excused

Reported correctly engrossed
Signed by Speaker
Returned to Senate

CHIEF CLERK OF THE HOUSE

HISTORY IN THE SENATE

19		
		Received from House
		To enrolling
		Reported correctly enrolled
		Sent to Governor
		..... by Governor
		Filed with Lt. Governor
		Chapter No. .....

Introduced: 1/31/86
Referred: Health, Education and
Social Services and Finance

Funding Information

General Fund	$ 936,711,800
Other Funds	63,288.200
	$1,000,000,000

BY FERGUSON, FAHRENKAMP AND KERTTULA

IN THE SENATE

SENATE BILL NO. 381

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SENATE

FURTHER: FINANCE

1/31/86

Date

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MEMBERS SIGNING
DO PASS

MEMBERS H
OTHER R