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State Insurance Takeover Acts: A Constitutional Analysis After *Edgar v. MITE*

State legislatures have adopted corporate takeover acts to supplement protection afforded by the federal Williams Act\(^1\) to investors confronted with a tender offer. In *Edgar v. MITE Corp.*,\(^2\) the Supreme Court found the Illinois takeover statute unconstitutional under the commerce clause.\(^3\) A five justice majority held that the burdens on commerce imposed by the Illinois Act's ability to delay a tender offer outweighed the state's interest in protecting resident shareholders and regulating Illinois corporations. Members of the Court's majority, however, also formed pluralities to find the act unconstitutional under two additional grounds: preemption and direct restraint on commerce. Consequently, the constitutional scope of the *Edgar* decision appears unclear.

Implicit in all three grounds of unconstitutionality discussed in the *Edgar* opinion is a congressional policy favoring a dominant federal interest in a national securities market. In relying upon this congressional characterization of the tender offer activity to invalidate the state's encroachment into the national securities field, the *Edgar* Court created an almost insurmountable constitutional barrier to the state regulation of tender offers. *Edgar* leaves uncertain the constitutionality of state insurance takeover acts. The insurance statutes differ from the general acts in that they protect not only stock owners, but also policyholders during a tender offer for insurance company stock. By drawing the constitutional parameters set by the *Edgar* opinion and applying these boundaries to insurance takeover regulation, this Note concludes that state insurance takeover acts are unconstitutional.

In Part I this Note discusses the advent of corporate acquisitions through tender offers and examines the distinctions among the three levels of takeover regulation. Part II offers a constitutional analysis of *Edgar v. MITE*, revealing the congressional policy underlying all three grounds of unconstitutionality. Part III applies this analysis to insurance takeover regulation, hypothesizing that although Congress permits the states to regulate the "business of insurance" in the McCarran-Ferguson Act,\(^4\) the federal statute fails to establish any congressional directive necessary to exclude state regulation of insurance company securities from the national market concept. Consequently, the insurance statutes do not survive *Edgar*'s pervasive sweep of unconstitutionality.

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The 1960's were an age of developing conglomerates. The prosperity of that decade allowed corporations to maintain large stores of working capital and retained earnings. Overflowing with liquid assets, corporations expanded their control and power by undertaking a new form of investment activity: the acquisition of other corporations through mergers, stock transfers, and proxy contests. The conglomerate merger explosion of the early to mid 1960's saw the birth of a new method for acquiring corporate control, the tender offer. During the past two decades, tender offers have become a popular method for gaining control of corporations.

Because of the insurance industry's large reservoir of liquid assets and the depressed price of insurance stocks, insurance companies became one of the more attractive targets in the tender offer phenomenon, especially in the late 1960's. Conglomerates acquired both life and property liability insurers to gain liquid capital from insurance premiums and investments. This conglomerate activity was coupled with insurance companies forming or becoming part of holding company systems in attempts to better use their large pools of liquid assets. Thus, the insurance industry exposed itself to the tender offer/takeover mania.

5. Generally, a tender offer may be defined as a public offer by an individual, group, or corporation (raider or offeror), to buy a block of or all securities of a publicly held corporation (target) for a fixed price during a fixed period of time. The offeror solicits target corporation shareholders directly, offering to purchase target stock with cash or securities for a price higher than its current market value. See Aranow & Einhorn, State Securities Regulation of Tender Offers, 46 N.Y.U. L. Rev. 767, 767 n.1 (1971). Bypassed in the tender offer transaction, the target corporation's management (incumbent) often opposes the takeover attempt out of fear of being ousted or losing managerial independence once corporate control switches from the target shareholders to the raiding corporation. Thus, target management sometimes works to defeat the tender offeror's takeover bid. See generally E. Aranow & H. Einhorn, Tender Offers for Corporate Control 70 (1973); Note, Commerce Clause Limitations Upon State Regulations of Tender Offers, 47 S. Cal. L. Rev. 1133, 1138 (1974).

The Williams Act did not offer a precise definition of "tender offer." Consequently, many public offer transactions go unregulated by the disclosure and proration requirements of the federal takeover provision. See infra notes 11-18 and accompanying text. The lack of definition has been the source of much litigation. See, e.g., Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir. 1974); and Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979). In an attempt to bring precision and certainty to this area, the SEC included a definition of "tender offer" in Proposed Rule 14d-l(b)(1), Securities Exchange Acts Release No. 16,385 (44 Fed. Reg. 70,349, 70,358) (1979).

6. Foremost among the factors contributing to the increasing popularity of the tender offer mechanism is that takeovers through tender offers are quicker, less expensive, and more successful than through proxy contests. Also, economic conditions of the past two decades have been conducive to expanded tender offer activity. For a discussion of economic developments that have made tender offers attractive to acquirors, see Empirical Research Project, Blue Sky Laws and State Takeover Statutes: New Importance for an Old Battleground, 7 J. Corp. L. 689, 727-29 (1982); see generally E. Aranow & H. Einhorn, supra note 5, at 65-66; Note, supra note 5, at 1138-39.

Securities regulations existing in the 1960's were not applicable to the tender offer mechanism. No regulation required the offeror to disclose its identity, its purpose, or its planned means of implementing the takeover bid. This lack of regulation meant that the investor confronted with a tender offer had inadequate information and insufficient time to make an intelligent investment decision. Also, there lingered a fear that hostile corporate raiders used the tender offer mechanism merely to gain control of a solvent company in order to loot its liquid assets, leaving the target corporation a skeletal remains. Federal and state governments reacted to the problem of inadequate regulation of tender offers on three levels.

The Williams Act

Congress enacted the Williams Act in 1968, for the stated purpose of protecting investors confronted with takeover and tender offer situations. See Note, supra note 5, at 1139. Senate Comm. on Banking and Currency, Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids, S. Rep. No. 550, 90th Cong., 1st Sess. 2-4 (1967). Note, The Constitutionality of State Takeover Statutes: A Response to Great Western, 53 N.Y.U. L. Rev. 872, 875 (1978) (citing 113 Cong. Rec. 857-58 (1967) and 111 Cong. Rec. 28,257-58), see also remarks of Senator Kuchel, one of the Williams Act's sponsors, at 113 Cong. Rec. 9338 (1967) ("But where no information is known about the prospective purchasers or their plans, the shareholder may be ignorantly participating in the rape of the corporation. Control and liquidation are often attempted under the secretive guise of the cash tender offers."). 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976). The Williams Act amended the 1934 Securities Exchange Act by adding sections 13(d) and (e) and sections 14(d), (e), and (f). Section 13(d) applies to acquisitions of stock in non-tender offer situations, requiring purchasers of more than 5% of registered equity securities to disclose certain information to the SEC and the issuer of the acquired stock within ten days after the acquisition. The information must include the purchaser's identity and background, its source of funds, the number of shares the purchaser presently owns, and the purpose of the purchase, including any plans for significant changes in the target corporation. 15 U.S.C. § 78m(d) (1976 & Supp. IV 1980). Section 13(d) applies to acquisitions through open market transactions or private negotiations. Section 14(d), on the other hand, regulates situations in which the offeror attempts to convince stock owners to tender shares by using premium prices, a time limit for the investment decision, and a limited number of shares purchased on a first tender, first purchase basis. Thus, unlike section 13(d), section 14(d) is aimed at preventing pressure transactions for corporate control during which stock owners would be afforded very little time and information to make deliberate investment decisions. See S. Rep. No. 550, supra note 9, at 3-4. Disagreement concerning the overall legislative purpose of the Williams Act focuses on whether Congress intended solely to protect investors or whether its purpose was to strike a neutral balance between offeror and target management, thus explicitly favoring tender offers by precluding incumbent management from implementing effective defenses against the takeover. Legislative history reveals that Congress' primary objective in passing the Williams Act was to protect investors confronted with a takeover situation or tender offer by providing full disclosure. See 1968 U.S. Code Cong. & Ad. News 2813-14, deriving its stated legislative history from remarks of the Act's sponsor, Senator Williams, at 113 Cong. Rec. 24,644 (1967); Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S.510 Before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 188 (1967) (during the hearings on Williams' bill, SEC Chairman Cohen stated: "The principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor. . . . This is our concern and our only concern."). See also S. Rep. No. 550, supra note 9, at 3-4; Note, supra note 10, at 876.
tion 14(d)" of the Act is the primary mechanism regulating the tender offer activity. Section 14(d) requires any person making a tender offer for more

This Note focuses on the tender offer provisions of the Williams Act, particularly section 14(d). Other substantive provisions of section 14 support the investor protection purpose. Section 14(d)(1) authorizes the SEC to require offerors to provide additional information if the Commission finds such additional disclosure "necessary or appropriate in the public interest or for the protection of investor." 15 U.S.C. § 78n(d)(1) (1976). Four other substantive provisions shield stock owners from quick, pressured decisions, insure fair opportunity to offer the shares, and ensure equal treatment for all tendering stock owners. These protections include an antifraud provision, 15 U.S.C. § 78n(e) (1976), a shareholder withdrawal option, 15 U.S.C. § 78n(d)(5) (1976), a pro rata acceptance rule, 15 U.S.C. § 78n(d)(6) (1976), and a requirement that any increase in consideration before the offer ends must be paid to all selling shareholders, 15 U.S.C. § 78n(d)(7) (1976).

The concept of neutrality derives from an offeror being permitted to delay the announcement of the tender offer until the moment the offer is effectuated. See infra text accompanying note 16. This practice results in no extensive delays in the offer and no advance warning to target management. The suggestion that neutrality is the purpose of the Act derives from the frequently cited language of S. REP. No. 550, supra note 9, at 3:

"The committee has taken extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The bill is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case."

See also GAF Corp. v. Milstein, 453 F.2d 709, 717 n.16 (2d Cir.), cert. denied, 406 U.S. 910 (1971) ("the Act was designed for the benefit of investors and not to tip the balance of regulation either in favor of management or in favor of the person seeking corporate control.").

As this Note argues below, neutrality between the offeror and incumbent management is not an objective of the Williams Act, but is simply a means to implement its purpose. See Empirical Research Report, supra note 6, at 766 (suggesting that neutrality was "merely a by-product which is not required as long as investors are being protected."). The legislative history suggests that neutrality between offeror and management was actually a compromise between conflicting views expressed during congressional debates, one expressing fear that corporate raiders misuse unregulated takeovers, the other maintaining takeovers are beneficial. See Note, supra note 9, at 876; Empirical Research Project, supra note 6, at 730, 734. The ultimate objective of investor protection during a potential change in corporate control is implemented by this compromise. The Williams Act maintains neutrality over the two groups between which the investor is caught, the offeror and target management.


14. Although this Note does not focus upon state or federal regulation of creeping tender offers, a brief analysis of this acquisition practice serves to draw the distinction between sections 13 and 14 of the Williams Act. Creeping tender offers are pre-offer purchases which deprive selling shareholders the opportunity to receive a premium for their securities. See E. ARANOW & H. EINHORN, supra note 5, at 17. Courts have held that this practice is not subject to the requirements of section 14(d). See, e.g., Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 356 F. Supp. 1066, 1073-74 (S.D.N.Y.), aff'd on other grounds, 476 F.2d 687 (2d Cir. 1973). The requirements of section 13(d), however, apply to the creeping tender offer situation when the aggregate amount purchased is more than 5% of the total registered securities.

State regulation of creeping tender offers gives the target company and shareholders notice of a possible tender offer earlier than would section 14(d) of the Williams Act. Consequently, this regulation would be inconsistent with the concept of neutrality and therefore invalid under this Note's analysis. When narrowing the analysis to section 13(d), however, state regulation of pre-offer purchases is consistent with this specific provision's policies and purpose. Section 13(d) was enacted to "require disclosure of information by persons who have acquired a substantial interest, or increased their interest in the equity securities of a company by a substantial amount, within a relatively short period of time." GAF Corp. v. Milstein, 453 F.2d 709, 717 (2d Cir. 1971) (citing S. REP. No. 550, supra note 9, at 7). Thus, section 13(d) was intended to alert the public
than five percent of a class of registered equity securities to disclose certain information any time prior to or concurrent with the commencement of the offer. This information must be supplied to both the target corporation's security holders and management, as well as the Securities and Exchange Commission (SEC). Content of the disclosure required by section 14(d) includes the name of the target, the identity and background of the tender offeror, the source and amount of funds to be used to purchase the securities, and the purpose of the transaction, including plans to change drastically the structure or operation of the target, such as takeover and liquidation.15

Section 14(d) allows an offeror to file this information any time prior to the first announcement of its offer. As a general practice, however, offerors do not disclose until the last possible minute before the tender offer takes effect.16 Consequently, section 14(d) strikes a balance among the interests of three groups. The offeror maintains an advantage of surprise, being able to plan the transaction secretly and confront the target and its shareholders suddenly. The surprise element affords incumbent management limited time to form defenses countering the takeover attempt.17 Finally, the investor confronted with a tender offer has adequate information necessary to make a rational decision, but is given a limited amount of time to consider the offer.18

**General State Takeover Acts**

In response to the complaint that the Williams Act did not provide adequate investor protection because of the limited time investors and management had to evaluate the tender offer, thirty-seven states enacted more stringent regulations to supplement the federal legislation.19 The jurisdictional basis for such authority is founded upon the relationship between the state and the target corporation. There are four possible connections which combine to create the relationship: the target is incorporated in the state, the target has its principal place of business in the state, the target has a significant amount of securities registered in the state, or the target engages in significant business transactions in the state.20 The states that enacted their own takeover legislation generally sought to protect investors by requiring disclosure and establishing procedures for special meetings and shareholder votes.21

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17. See E. Aranow, H. Einhorn & G. Berlestein, Developments in Tender Offers for Corporate Control 218 (1977) (discussing defense tactics that target management might use to thwart cash takeover bids); see also Note, supra note 5, at 1136.
18. Arguably, the ten day pro rata provision in the Williams Act forces a tender offer to remain in effect for at least ten days. 15 U.S.C. § 78n(d)(6) (1976). Rules promulgated by the SEC suggest that the minimum offering period is twenty days. 17 C.F.R. § 240.14e-1(a) (1981). See E. Aranow, H. Einhorn & G. Berlestein, supra note 17, at 218; Empirical Research Project, supra note 6, at 733.
principal place of business in the state, the target's substantial assets are in the state, or the target is doing business in the state.\textsuperscript{20}

State takeover statutes have much the same purpose as the Williams Act: investor protection. And the two levels of regulation accomplish this purpose by the same means: disclosure.\textsuperscript{21} Two provisions, however, mark the distinction between the state statutes and the requirements of the Williams Act. First, unlike concurrent filing permitted by the Williams Act,\textsuperscript{22} the state regulations require the offeror to file its intent to make a tender offer with the state and with the target some ten to sixty days before the offer takes effect. This premature disclosure to the target corporation creates a waiting period during which investors purportedly have adequate time to consider the offer. Second, the states are actively involved in assessing the adequacy and fairness of the disclosure through a hearing provision in the statutes. The majority of states delegate to a securities commissioner the discretion to call a hearing in which the adequacy of the offer is judged. In some states the target corporation can request that a hearing as to the tender offer be held. The state commissioner must then approve the offer before it can be made.\textsuperscript{23} The commissioner usually has between thirty to one-hundred and twenty days to conduct the hearing and make the determination.\textsuperscript{24} In addition to the jurisdictional bases of the takeover acts, these two areas create doubt as to the constitutionality of the statutes.

The practical effect of the pre-offer disclosure and hearing requirements is that the commencing of the tender offer is delayed considerably. Also, target management is given substantial warning of the upcoming offer.\textsuperscript{25} This eliminates from the transaction the keys to successful tender offers: secrecy and speed.\textsuperscript{26} The delay generated by pre-offer disclosure and substantive hearings provides target management adequate time to try to persuade target shareholders not to accept the offer. Also, target management is afforded time to initiate defenses to fight off the takeover bid.\textsuperscript{27} Such efforts by in-

\begin{itemize}
  \item \textsuperscript{20} See Note, supra note 10, at 881.
  \item \textsuperscript{21} Generally, state takeover statutes require more detailed disclosure about the offeror than does section 14(d) of the Williams Act. See E. Aranow, H. Einhorn & G. Berlstein, supra note 17, at 212-13. It has been argued that the more extensive disclosure requirement makes it more difficult to complete the takeover, thus frustrating the policy of neutrality. Arguably, this effect of the discrepancy between the federal tender offer provision and the state acts would create a conflict resulting in the preemption of the state statutes. See Empirical Research Project, supra note 6, at 760-61. This argument for preemption confuses the quantity of disclosure with the timing of the disclosure. More extensive disclosure beyond the minimum amount required by section 14(d) would be consistent with the investor protection objective of the Williams Act and would not upset the neutral balance between the offeror and incumbent management. A discrepancy of when disclosure is required, however, would tip the balance in favor of incumbent management. See infra text accompanying note 49.
  \item \textsuperscript{22} See Note, supra note 5, at 1147 (discussion comparing concurrent filing and pre-offer disclosure).
  \item \textsuperscript{23} For a discussion concerning the validity of state merit review provisions, see infra note 63.
  \item \textsuperscript{24} See Note, supra note 10, at 882-84.
  \item \textsuperscript{25} See generally E. Aranow, H. Einhorn & G. Berlstein, supra note 17, at 19-21.
  \item \textsuperscript{26} See Note, supra note 5, at 1150.
  \item \textsuperscript{27} See supra note 17, noting that defenses are available to target management.
\end{itemize}
cumbent management conceivably result in the tender offer being rejected, defeated, or challenged by competing offers, thus leading to a bidding war.28

State Insurance Takeover Acts

Forty-two states have enacted legislation governing the acquisition of insurance companies and insurance holding companies through stock purchases and mergers.29 Generally, the requirements imposed on an offeror by these insurance takeover acts parallel those of the general takeover acts.30 The legislative jurisdiction of insurance takeover statutes derives from the authority of the state to protect and regulate domestic insurers.31 Domestic insurers falling within the state's regulatory authority include insurance companies organized under the laws of the state32 or non-domestic insurers authorized to do business in the state.33

The state's purpose in regulating the takeovers of domestic insurers is to protect both the domestic insurer's policyholders and its shareholders, thus safeguarding the public interest by providing adequate insurance services.34 This need for protection stems from the potential for abuse upon target insurance companies once the offeror has gained control. Particularly, the statutes were enacted to prevent an offeror from raiding an insurer's liquid assets or from turning the insurance operations over to inexperienced management. These abuses would result in the insurer's insolvency, leaving policyholders and creditors unprotected.

The statutory requirements of the insurance takeover regulations support this dual objective of policyholder and shareholder protection. The offeror is required to disclose to the state and to the target insurance companies its intent to make an offer before the offer becomes effective. Also, in this pre-offer notification the offeror must disclose information concerning its past business practices, its present financial condition, and its future intentions regarding the insurer, including plans to liquidate or sell the target corporation's assets.35

Within thirty days of receiving such information, the state insurance commissioner is required to hold a public hearing to elicit testimony concerning

29. The eight states that do not regulate acquisitions of control over domestic insurers are Hawaii, Louisiana, Michigan, Mississippi, North Carolina, Ohio, Oregon, and Wyoming.
31. This authority derives from the congressional grant of authority to the states to regulate the "business of insurance." This federal legislation is discussed extensively infra at text accompanying notes 164-96.
32. See Schwing, supra note 30, at 111.
the takeover. After deliberating upon the offer and proposed takeover, the commissioner must decide whether to approve the tender offer. This decision is based on the acquired insurer's continued ability to write lines of insurance after the takeover, the insurer's financial stability as measured by the offeror's financial soundness, the fairness of the offer to the insurer's shareholders (some statutes provide this protection only for resident shareholders), the fairness of the plans to liquidate, and the competence of the new management.\(^\text{36}\)

As with the general takeover statutes, the premature disclosure and hearing provisions of the insurance takeover acts create considerable delay in the actual commencement of the offer. This delay affords target management time to try to block the tender offer, conceivably resulting in an unsuccessful takeover bid. However, this delay is not the only source for the tender offer's failure. The state insurance commissioner has the power to withhold approval of the planned takeover of the domestic insurer. Thus, the state insurance takeover statutes create two obstacles which the offeror must overcome in acquiring control of the target insurance company.\(^\text{37}\)

II

In *Edgar v. MITE Corp.*,\(^\text{38}\) the Supreme Court invalidated the Illinois Business Takeover Act, finding it unconstitutional as an indirect burden on

\(^{36}\) For a discussion of factors taken into consideration by an insurance commissioner in assessing a tender offer for insurance company stock see Schwing, *supra* note 30, at 116-17; Kennedy, *supra* note 33, at 378-79; Dedman, *supra* note 35, at 976-77.

\(^{37}\) For a discussion concerning the validity of state "merit review," see infra note 63.

\(^{38}\) 457 U.S. 624 (1982). The Illinois Business Takeover Act was a typical general state takeover statute with pre-offer disclosure and hearing provisions. *See Ill. Rev. Stat.* ch. 121 1/2, § 137.51 (1979). The Illinois Act required an offeror to disclose to the Secretary of State and the target company its intent to make a tender offer and the terms of that offer twenty days before the commencement of the offer. Also, the Secretary of State could, at his discretion, call a hearing any time during this twenty-day period to assess the adequacy of the information disclosed and the substantive fairness of the offer's terms. Finally, the Act's protections extended to target corporations in which Illinois shareholders owned 10% of the equity securities or which met two of the three conditions: the target had its principal executive office in Illinois, was organized under Illinois laws, or had at least 10% of its stated capital and paid-in surplus in Illinois.

MITE Corporation, a Delaware corporation with its principal office in Connecticut, initiated a cash tender offer for all the outstanding stock of Chicago Rivet and Machine Company, an Illinois corporation. MITE complied with the Williams Act, making the proper disclosures by filing Schedule 14D-1. MITE, however, did not comply with the requirements of the Illinois Act. Instead, MITE filed an action in the federal District Court of Northern Illinois seeking a declaratory judgment that the state Act was preempted by the Williams Act and that the Act violated the commerce clause. MITE sought to enjoin the Secretary of State from enforcing the Act.

The District Court issued a preliminary injunction restraining the state from enforcing the Act against MITE. After MITE commenced its offer, Chicago Rivet made an offer for 40% of its own shares at a price higher than that offered by MITE. The district court declared that the Illinois Act was preempted and in violation of the commerce clause, thus preventing enforcement of the Illinois Act against MITE. After negotiating with Chicago Rivet and inspecting that target's books, MITE decided to retract its tender offer. The Seventh Circuit upheld the decision of the district court that some parts of the Illinois Act were unconstitutional on preemption and commerce clause grounds. *See MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980).*
interstate commerce under the balancing test of *Pike v. Bruce Church, Inc.*

Despite apparent simplicity in the application of the *Pike* balancing approach to assess the effect of a state regulation on interstate commerce, the *Edgar* opinion does not allow a clear and simple drawing of the constitutional parameters applicable to state takeover regulations.

It is significant to realize the possible grounds for unconstitutionality discussed in *Edgar* and the lineup of the justices on the various grounds. Only six justices addressed the constitutional arguments. Justices Brennan, Marshall, and Rehnquist dissented, finding the issue moot. Chief Justice Burger and Justices White and Blackmun agreed that the Illinois Act conflicted with the goals and purposes of the Williams Act and therefore was preempted under the supremacy clause. A plurality of the Court in Chief Justice Burger and Justices White, O'Connor, and Stevens agreed that the Illinois takeover statute was a direct restraint on commerce, "interdict[ing] interstate commerce, including commerce wholly outside the State." Finally, Justice Powell joined the direct restraint plurality to form a majority which held that the burdensome economic effects on interstate commerce resulting from Illinois' ability to block a nationwide tender offer outweighed the putative, state interests: resident shareholder protection and regulation of the internal affairs of a corporation incorporated under Illinois law.

It would be unrealistic to delineate the constitutional scope of the *Edgar* decision merely by using the majority's balancing approach. The fact that four members of the five-justice majority found the Illinois Act to be a direct restraint on commerce is significant, especially in light of the observation that this test has been rejected as "overly conclusive and misleadingly precise" since the 1930's. And although the balancing of burdens against benefits approach has been readily employed by the Court to invalidate state regulations, especially during the past six terms, one must go beyond the *Edgar* Court's motions to realize the decision's far reaching effect. Each of the possi-

39. 397 U.S. 137 (1970). "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

40. As the Maryland district court stated, "*Edgar* is not exactly a model of judicial unanimity, in as much as there are six opinions and seven different viewpoints." Bendix Corp. v. Martin Marietta Corp., 547 F. Supp. 522, 526 (D. Md. 1982).


42. *See id.* at 646-47.

43. In discussing *Edgar*, Professor Loss stated, "[b]ut so many flowers bloomed among the seven opinions . . . as to make this case less than definitive." *Loss, Fundamentals of Securities Regulation* 609 (1983).


45. *See Eule, Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 427 (1982). For a list of recent Supreme Court cases in which state regulations have been invalidated under the commerce clause, see *infra* note 86.
ble grounds of unconstitutionality, preemption, direct restraint on interstate commerce, and burdens on commerce outweighing state interests, is based upon a congressional policy in support of a national securities market. Consequently, little constitutional room is left for state regulation of takeovers.

**Preemption**

The *Edgar* Analysis

Justice White was joined by Chief Justice Burger and Justice Blackmun in finding that the Illinois statute was preempted by the Williams Act. While this part of the Court's decision was neither its holding nor its opinion, its analysis is crucial to realizing the scope of the Court's commerce clause finding. Justice White embraced a preemption analysis which found that the Illinois Act frustrated "the objectives of the Williams Act in some substantial way."

Justice White construed the legislative history behind the Williams Act as disclosing two congressional purposes in the legislation's enactment: to protect investors and to strike a neutral balance between incumbent management and the tender offeror during takeover transactions. The Illinois statute frustrated this dual purpose in two ways. First, the twenty day precommencement disclosure requirement and the hearing provision frustrated the neutrality objective of the Williams Act by creating delays. These delays gave incumbent management an advantage by generating time during which the management could formulate defenses to defeat the tender offer. Second, the hearing provision, which allowed the secretary of state to adjudicate the substantive fairness of the tender offer, clashed with the Williams Act by not allowing investors to make free, autonomous decisions based simply on the information disclosed to them. This procedure conflicted with the intent of Congress that investors and target shareholders be free to make their own decisions, no matter how wrong or stupid those decisions might be.

Although "*Edgar* . . . cannot stand for a broad preemption principle under

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46. Two justices, Powell and Stevens, explicitly refused to join the supremacy clause analysis, espousing support for some state regulation of takeovers. See *Edgar*, 457 U.S. at 646-47 (Powell, J., and Stevens, J., concurring).

47. *Id.* at 632. Justice White reasoned that Congress did not expressly intend to prohibit states from regulating takeovers and that there was no conflict between the two acts; i.e., it was not impossible to comply with either. See *id.*

48. Congress embraced a policy of "evenhandedness," avoiding giving either side in the takeover contest any advantage. "Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice." *Id.* at 634.

49. "Investors are protected under the Williams Act through what has been termed a 'market approach.' The function of the federal legislation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself." MITE Corp. v. Dixon, 633 F.2d at 492 (quoting the Fifth Circuit in Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1279 (5th Cir. 1978), *rev'd sub nom*, Leroy v. Great W. United Corp., 443 U.S. 173 (1979)).
which any state regulation of tender offers would have to be invalidated,"\textsuperscript{50} the Court’s nonreliance upon White’s preemption conclusion does not preclude lower federal courts from using preemption as a basis for striking down other states’ takeover statutes.\textsuperscript{51} And, regardless of the impact the Court’s preemption analysis has on lower federal court decisions, \textit{Edgar’s} treatment of the preemption issue is integral to determining the entire opinion’s constitutional scope. Because preemption is still a viable ground for finding a takeover statute invalid, an alternative preemption analysis is proposed.

An Alternative Preemption Analysis

Under the proposed analysis, state takeover acts would be preempted by the Williams Act under any one of three possible situations.\textsuperscript{12} First, preemption would result if it were the “clear and manifest purpose of Congress” to occupy the field in regulating the activity.\textsuperscript{13} Second, if actual and real conflict existed between the federal regulation and the state statute so that “compliance with both federal and state regulations is a physical impossibility,” preemption would occur.\textsuperscript{14} Finally, if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” the state law would be preempted.\textsuperscript{55}

As the \textit{Edgar} preemption analysis correctly noted, there was no actual conflict between the Williams Act and the Illinois statute;\textsuperscript{56} since the Williams Act allowed an offeror to make its disclosure any time before or concurrent with the announcement of the offer, compliance with both was possible.\textsuperscript{57}

Under an occupation of the field analysis, Congress did not express explicit intent to disallow any state regulation of tender offers and takeovers. The Act’s legislative history gives no indication that Congress was even aware of the state takeover statute concept when it enacted the federal Act.\textsuperscript{58} Furthermore, in enacting the Williams Act, Congress did not amend section 28(a) of the 1934 Securities and Exchange Act\textsuperscript{59} which provides, “[n]othing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any state over any security or any

\textsuperscript{50} 50. Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029, 1036 (1st Cir. 1982).
\textsuperscript{51} 51. See, e.g., Bendix Corp. v. Martin Marietta Corp., 547 F. Supp. 522 (D. Md. 1982) (Maryland takeover law was held unconstitutional under the supremacy clause because the preoffer notification and hearing provisions conflicted with the Williams Act by giving incumbent management an advantage in the tender offer transaction). See also National City Lines, Inc. v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982).
\textsuperscript{52} 52. See generally Note, Preemption and the Constitutionality of State Tender Offer Legislation, 54 NOTRE DAME LAW. 725 (1979).
\textsuperscript{55} 55. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
\textsuperscript{56} 56. See \textit{Edgar}, 457 U.S. at 632.
\textsuperscript{57} 57. See supra text accompanying note 54.
\textsuperscript{58} 58. See \textit{Edgar}, 457 U.S. at 631 n.6.
person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.\textsuperscript{60} The present existence of this clause in the 1934 Act, to which the Williams Act is an amendment,\textsuperscript{61} arguably implies that Congress did not intend to preempt by occupying the field. Some federal courts have construed the clause as explicitly recognizing the authority of the states to regulate tender offers.\textsuperscript{62} And, the Supreme Court itself has concluded that section 28(a) "was plainly intended to protect, rather than to limit, state authority."\textsuperscript{63}

A valid preemption analysis, then, depends upon whether the state regulation poses some indirect conflict with the Williams Act by frustrating its purposes and objectives. The Williams Act itself simply imposes certain minimal disclosure requirements on the offeror. The state acts expand these disclosure requirements, but are aimed at protecting the investor just like the Williams Act requirements.\textsuperscript{64} By giving incumbent management an advantage over the offeror in the war for corporate control, however, the state's advance disclosure requirements upset the policy of neutrality discussed in the Williams Act's legislative history.\textsuperscript{65}

Analysis of that Act's legislative history, however, indicates that although Congress expressly adopted a policy promoting a neutral stance between management and offeror, this policy was only a by-product of the actual congressional objective or purpose: full disclosure to protect the investor.\textsuperscript{66} Thus, while state regulations might alter this policy of neutrality, they do not con-

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\textsuperscript{62} See Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1035 (4th Cir. 1980).

\textsuperscript{63} Leroy v. Great W. United Corp., 443 U.S. 173, 182 (1979). The hearing provisions of both the general and the insurance takeover statutes permit state officials to decide upon the fairness and adequacy of the tender offer. Most states empower administrators with authority to block tender offers altogether. In Kidwell, the Fifth Circuit suggested this authority resulted in a conflict between the state's fiduciary approach and the Williams Act's market approach. See supra note 49. The appellate court argued that by preventing stock owners from making their own investment decision under a market approach, the state's authority to hold hearings was inconsistent with the federal Act's neutrality concept and thus was preempted. See Kidwell, 577 F.2d at 1276-78.

This conflict, if substantial enough to raise preemption issues, would implicate the constitutionality of the state's authority to conduct "merit review" of securities transactions. For background discussion of merit review, see Goodkind, Blue Sky Laws: Is There Merit in the Merit Requirements?, 1976 Wisc. L. Rev. 79. The Supreme Court, however, has implicitly rejected such a drastic extension of the preemption doctrine, preserving some room for state authority over securities regulation. See Leroy, 443 U.S. at 182 n.13. The precise extent of the state's authority to determine whether a tender offer may proceed at all has not been addressed. And the validity of merit review of the tender offer's fairness, while arguably inconsistent with Congress' policy of neutrality, is beyond the scope of this Note. Although the Court's opinion in Leroy impliedly preserves the state's authority to conduct hearings concerning the tender offer, the effect of delay caused by those hearings is within the Edgar Court's reach of unconstitutionality.

\textsuperscript{64} See supra text accompanying note 21.

\textsuperscript{65} For a discussion of neutrality as a possible purpose of the Williams Act, see supra note 12.

\textsuperscript{66} For an extensive discussion of the legislative purpose behind the Williams Act, see supra note 12.
flict with investor protection and therefore should not be found invalid under the supremacy clause.

The Supreme Court explicitly rejected the idea that Congress intended neutrality between offeror and management to be one of the major purposes behind the Williams Act. In *Piper v. Chris-Craft Industries*, the Court explained that neutrality was merely a means to achieve the end goal and sole purpose of the Williams Act, investor protection. Thus, state takeover regulations, which conceivably favor management through pre-offer disclosure and delay, do not conflict with the purposes or objectives of the Williams Act.

Federalism and Preemption

In *Edgar*, the majority did not rely upon preemption to find the Illinois Act invalid. Considering the precise interpretation of the Williams Act's legislative history, above, such nonreliance is technically correct. However, this indicates more than a possible weakness in Justice White's preemption analysis. The majority not only disagreed with White's reading of the Act's legislative history, it felt that the congressional policy behind the Act would be better applied in a commerce clause analysis. It is the position of this Note that the *Edgar* Court desired to maintain a "restrained approach to federalism," an attitude recently embraced by the Court when undertaking preemption questions.

67. 430 U.S. 1 (1977) (The Court addressed the issue of an unsuccessful offeror's standing to sue the target's management for violating the Williams Act in defeating the offeror's takeover bid).

68. Chief Justice Burger, in writing the opinion of the Court, stated:

- Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors. Indeed, the statements concerning the need for Congress to maintain a neutral posture in takeover attempts are contained in the section of the Senate Report entitled, "Protection of Investors." Taken in their totality, these statements confirm that what Congress had in mind was the protection of shareholders, the "pawn[es] in a form of industrial warfare." The Senate Report expressed the purpose as "placing investors on an equal footing with the takeover bidder," Senate Report 4, without favoring either the tender offeror or existing management. This express policy of neutrality scarcely suggests an intent to confer highly important, new rights upon the class of participants whose activities prompted the legislation in the first instance.

Id. at 29-30.

69. See Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 Wash. & Lee L. Rev. 733, 749-50 (1979). One commentator has interpreted the legislative history of the Williams Act as allowing states to regulate tender offers by any means as long as within the confines of the commerce clause. Such an interpretation is consistent with the thesis that Congress' desire to avoid favoring either management or offeror was distinct from the legislative intention to avoid imposing substantial federal control over tender offers. This latter desire was the true intent of Congress and was achieved through the neutrality mechanism. See infra text accompanying notes 103-06.

In cases since 1973, the Supreme Court has demonstrated a reluctance to find state laws preempted when there exists no exclusive federal regulation over "matters which are necessarily national in import." Recent preemption cases indicate that the Court has adhered to a flexible concept of federal-state relations, permitting concurrent jurisdiction over certain matters where Congress has not expressly manifested its intent to exert exclusive control. And, where a conflict between concurrent regulatory schemes is peripheral to the purpose of the statute, the state statute is not per se invalid under the supremacy clause.  

This "restrained federalism" concept may be applied to the Edgar preemption discussion. It is apparent that Congress did not clearly intend to preempt state takeover statutes with exclusive jurisdiction in the Williams Act. And, the conflict between the regulatory requirements, one allowing delay and the other not, can be described as peripheral to the investor protection purpose. But as the decision in Edgar demonstrates, the presumption favoring state concurrent regulation extends only so far. The Court was confronted with a congressional policy that gave the activity being regulated, tender offers and cash takeover bids, a strong national import. The Edgar opinion can be viewed as the Court's struggle to balance a restrained federalism with solicitude towards state interests on one hand, and a congressional indication of an activity as "necessarily national" on the other. As this Note's analysis of Edgar's dual commerce clause grounds explains, this policy or "congressional characterization" caused the scales to tip against the state's authority to regulate tender offers.

**Commerce Clause**

The Edgar Analysis

Chief Justice Burger and Justices O'Connor and Stevens agreed with Justice White that the Illinois Act violated the commerce clause because it was a direct restraint on interstate commerce. This direct restraint conclusion derived from the Act's potential power to affect or block a nationwide sale of securities. Two factors supported the finding that the statute's "sweeping extraterritorial effect" resulted in a direct restraint on commerce. First, the conditions for the state law's jurisdiction did not create a sufficient legislative nexus between the state and the parties it regulated. This due process component of the

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71. See id. at 640.
72. See id. at 635-42.
73. Edgar, 457 U.S. at 642.
74. In discussing the insufficient legislative nexus between Illinois and target corporations, the Court said:

Indeed, the Illinois law on its face would apply even if not a single one of Chicago Rivet's shareholders were a resident of Illinois, since the Act applies to every tender
Court's commerce clause analysis was reflected in the use of *Shaffer v. Heitner* as authority: "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the state's power." Second, upholding the validity of the Illinois statute would permit other states to impose similar regulations, thus creating a cumulatively strong impediment to interstate commerce.

The four justices who found the Illinois Act to be a direct restraint on commerce also found, with Justice Powell, that the Act's ability to block a nationwide tender offer imposed burdens on interstate commerce which were unduly substantial when weighed against the state interests served by the statute. The Court examined general burdensome effects created by the statute's national reach. These burdens were all based upon the economic usefulness of tender offers and takeovers. And, the insufficiency of the state's interests in protecting investors and regulating Illinois corporations derived from two sources. First, the insufficient nexus resulting from the extraterritorial jurisdiction created interests beyond Illinois' power to regulate: nonresident shareholder protection and the regulation of the internal affairs of foreign corporations. Second, the protections afforded to resident shareholders were speculative in light of the protections supplied by the Williams Act.

The actual opinion of the Court held that the Illinois Act was unconstitutional under the *Pike* balancing approach because the economic burdens outweighed the local benefits. The fact that four of the five justice majority also found the Act was a direct restraint on commerce, however, suggests the Court's willingness to interfere in state economic regulation. Thus, to analyze the constitutional scope of *Edgar* using simply the majority's balancing approach would be unrealistic. Several observations demonstrate a need to go beyond this balancing analysis to delineate constitutional parameters pertinent to state insurance takeover regulations.

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offer for a corporation meeting two of the following conditions: the corporation has its principal executive office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented in Illinois. Thus the Act could be applied to regulate a tender offer which would not affect a single Illinois shareholder.


*Id.* at 197.

The effects of allowing Illinois . . . to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so stock prices remain high is reduced.

*Edgar*, 457 U.S. at 643.

*See supra* note 47.

*See Teshnut, Rethinking the Dormant Commerce Clause, 1979 Wisc. L. Rev. 125 and Eule, supra note 45, at 426-27 (where the author discusses the increasing willingness of the Court to invalidate state regulations under the commerce clause).*
Recent decisions in which the Court has reviewed the validity of state regulations reveal underlying defects in the balancing test. First, the Court has demonstrated that it is uncertain how to balance burdens against state interests. One recent example of the Court's confusion in applying the balancing test is *Kassel v. Consolidated Freightways Corp.* In *Kassel*, the Court examined the constitutionality of an Iowa safety statute which prohibited the use of 65-foot double trucks on Iowa highways. In deciding that the statute impermissibly burdened interstate commerce under a balancing approach, a plurality of the Court found that the safety purposes asserted by Iowa were speculative. The plurality based this finding on a belief that the factual trial evidence did not show that the regulation contributed to highway safety.

Two justices concurred in the *Kassel* plurality's conclusion that the state safety regulation was "protectionist" in nature, but disagreed as to how the balancing test should be applied. Rather than weighing the burdens against factual evidence proving the statute's effectiveness in furthering safety interests, the proper standard of review, argued the concurrence, was to "balance the burdens imposed on commerce against the local benefits sought to be achieved by the State's lawmakers."

The Court's ambiguous application of the balancing test creates doubt as to what importance state interests really play in the constitutional evaluation of state statutes. The Court's alleged deference to state interests is weakened when one realizes it is virtually impossible to balance economic interests against noneconomic interests. This "problem of balancing incommensurables" is most apparent in highway safety statute cases where a state's valid interests in safe highways is weighed against a federal interest in the free flow of goods in a national market.

Despite the weaknesses and inconsistencies in the balancing approach, the Court has increased its invalidation of state commercial regulations. Over the past six terms, the Court has found state statutes unconstitutional in seven
out of ten cases where a state’s authority to regulate has been in issue. It would appear that, in reality, the Court is determined to limit strictly the power of the states to regulate, paying little or no attention to state or local interests.

The problems inherent in the Court’s use of the balancing test do not imply that the proper constitutional analysis is the plurality’s direct-indirect approach. As with the balancing approach, the “mechanical, uncertain” application of the direct-indirect analysis prevents it from serving as an adequate measure of constitutional scope. Also, reliance upon the plurality’s direct restraint test would undermine the validity of many state laws previously assumed permissible under the commerce clause, including state environmental protection statutes and local employment protection laws. The uncertainties and inconsistencies in these two approaches negate their usefulness. Consequently, to delineate accurately the constitutional boundaries of Edgar, an analysis more sophisticated than balancing or direct-indirect tests must be used.

Congressional Policy as a Basis for Commerce Clause Analysis

This Note hypothesizes that the limits of permissible state regulation under the commerce clause depend upon how the Court characterizes the activity being regulated. Some expression of congressional policy that the activity is of national scope and importance provides the basis for the Court’s label. Should the Court perceive some congressional intent to maintain a dominant federal interest in the activity, the state regulation affecting the activity almost certainly will be invalidated. Thus, if the Court discovers some congressional directive characterizing the activity as national in import, the Court’s opinion

86. See generally Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981) (Iowa statute generally prohibiting the use of 65 foot double trailer trucks within its borders); Lewis v. BT Inv. Managers, 447 U.S. 27 (1980) (Florida statute prohibiting banks, trust companies, and bank holding companies operating principally outside of Florida from owning local businesses providing trust or investment advisory services); Hughes v. Oklahoma, 441 U.S. 322 (1979) (Oklahoma statute prohibiting transportation or shipment of minnows procured within the state for sale outside state); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (New Jersey law prohibiting importation of most solid and liquid waste); Raymond Motor Transp. v. Rice, 434 U.S. 429 (1978) (Wisconsin regulation generally barring trucks longer than 55 feet from state highways); Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333 (1977) (North Carolina statute prohibiting labeling of apple containers with any but U.S. grade); Great At. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976) (Mississippi regulation permitting sale of milk in state on a reciprocal basis). This rash of invalidation is extreme compared to the Court finding state regulations valid only four times over the preceding 24 terms.

87. See, e.g., DiSanto v. Pennsylvania, 273 U.S. 34, 44 (1927). Justice Stone, dissenting, described the direct-indirect test as an unreliable standard:

[W]ether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, “direct” and “indirect interference” with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.

Id.

88. See Boehm, supra note 69, at 743-44, 753-54; L. Tribe, supra note 44, § 6-12.
may say state interests are important; but the actual constitutional parameters of that decision will be very narrow, creating an almost insurmountable barrier for the state to overcome.  

Modern Supreme Court decisions support the idea that congressional policy declarations provide the primary foundation for the Court's adjudication of state regulatory schemes. In *Parker v. Brown,* the Court rejected a commerce clause challenge to a state statute intended to promote a local economic interest. California instituted a raisin crop proration program designed to stabilize the marketing of that crop. The program required raisin producers to sell and market a substantial part of their crop outside the state. Despite ninety-five percent of the crop being poured into interstate commerce, the Court held that the program was valid under the commerce clause because such a regulation was supported by congressional policy as declared in two federal statutes. The Court reasoned that Congress, by its agricultural legislation, recognized the distressed economic situation towards which the state regulation was aimed and therefore meant to permit California’s encroachment upon interstate commerce.

The Court’s curt treatment of a commerce clause challenge in *Huron Portland Cement Co. v. City of Detroit* is another example of the significant role congressional policy plays in determining the constitutionality of state regulation. In *Huron* the Court evaluated the application of the city's smoke abatement ordinance to transport ships in light of the commerce and supremacy clauses. The Court’s opinion focused on the preemption claim, which it rejected because of the “[c]ongressional recognition that the problem of air pollution is peculiarly a matter of local concern.” The commerce clause issue derived from the city ordinance's requirement that a transport company must replace or alter the structure of its ships’ boilers if the smoke emitted from them exceeds certain maximum standards. The Court quickly

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89. See, e.g., *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 43 & n.10 (1980) (where the Court noted the presence of federal regulation in refusing to find that local interests justified the state statute).
91. These two federal statutes were the Agricultural Marketing Act of 1937, 7 U.S.C. § 601 (1940) and the Agricultural Adjustment Act of 1938, 7 U.S.C. § 1302 (1940).
92. The *Parker* Court recognized that there were possible conflicting interests between state and national economic concerns; but which interests would prevail was determined by congressional policy:

In comparing the relative weights of the conflicting local and national interests involved, it is significant that Congress, by its agricultural legislation, has recognized the distressed condition of much of the agricultural production of the United States.

. . . It thus appears that whatever effect the operation of the California program may have on interstate commerce, it is one which has been the policy of Congress to aid and encourage through federal agencies in conformity to [the two federal statutes].
94. *Id.* at 446.
disposed of this challenge, apparently relying upon the congressional policy
coloring air pollution as a nonnational activity.

Finally, the Court’s commerce clause analysis in Exxon Corp. v. Governor
of Maryland95 indicates that in light of congressional silence as to the economic
importance of certain activities, the Court embraces a nonnational characteriza-
tion. A Maryland statute prohibited petroleum producers and refiners from
operating retail service stations in the state. The gasoline producers argued
that the statute caused a decrease in the total flow of goods in a nationwide
petroleum market. Because the cumulative effect of other states enacting similar
legislation would have been to hinder seriously a national market activity,
no state should have retained the power to regulate the retail market of
gasoline.

The Exxon Court rejected the national characterization espoused by the
petroleum producers. It reasoned that the statute was not directed towards
an interstate market activity, but towards particular “interstate firms,”96 a
subject not within the commerce clause’s protective purview. In rejecting the
national market argument, the Court displayed its dependence upon some sort
of congressional directive as to the nature of the activity being regulated:

  this Court has rarely held that the Commerce Clause itself preempts an
entire field from state regulation, and then only when a lack of natural
uniformity would impede the flow of interstate goods . . . . The problem
thus is not one of national uniformity. In the absence of a relevant con-
gressional declaration of policy . . . we cannot conclude that the States
are without power to regulate in this area.97

Several policy reasons support the hypothesis that the Court, in reality,
pays little deference to state interests in light of a congressionally posited
national activity. First, when Congress does dictate policy, indicating its desire
to maintain dominant federal interests over certain areas, uniformity in regula-
tion is needed. The interests seeking such uniform regulation will be national
in scope. Actually allowing states to assert legitimate interests within a single
national activity would promote nonuniformity among the laws of the states.98
Creating such a “crazy quilt” of state regulatory requirements over areas of
national concern undermines the goal of the commerce clause: to maintain
an “arena of free trade among the several states,”99 amounting to a virtual
“national common market.”100

Second, as is discussed below, it is arguable that the Court uses the balanc-

96. Id. at 127.
97. Id. at 128-29 (emphasis added).
98. See id. at 128 (discussing the arguments espoused by the petroleum producer).
     Edgar Court recognized such a problem in paying deference to state interests: “interstate com-
     merce in securities transactions would be thoroughly stifled” with many, individual state regu-
     lations. Edgar, 457 U.S. at 643.
ing approach as a tool to justify its decisions and promote state-federal relations. There is little precedential value in analyzing state regulatory schemes on a case-by-case basis. Examination of the factual record to determine if the statute actually furthers the state's interests causes constitutional adjudication to depend upon courtroom trial techniques. And, to analyze the state's legislative intent behind a statute presupposes the existence of some characterization against which to weigh the state interests. The Court's ambivalence over how to apply the balancing approach demonstrates this tool's inherent weakness.

Congressional Policy, Commerce Clause, and Federalism

By designating an activity national in scope, congressional policy plays a dominant role in Supreme Court evaluation of state regulatory authority. This prevalence is reflected in the symbiotic relationship between commerce clause adjudication and preemption analysis.

Burbank v. Lockheed Air Terminal demonstrates the intermingling of the commerce clause and preemption doctrines. A local airport imposed a curfew restricting times for takeoffs and landings in an effort to curb airport noise. In a 5 to 4 decision the Court held that the statute was preempted because of the "pervasive nature" of the federal scheme of federal regulation of airport noise. Yet, in arriving at this decision, the majority used commerce clause guidelines. These included a congressional determination that the timing of takeoffs and landings was of national significance and that nonuniform regulation by the potential enactment of many similar local statutes imposed significant burdens on a national activity.

It is significant to note that the sole difference between the majority and the dissent in Burbank is the dissent's disagreement with the majority's interpretation of congressional intent. In its analysis of the history of the federal aviation legislation, the dissent concluded that there was no clear and explicit

101. See Comment, The Supreme Court, 1980 Term, 95 HARV. L. REV. 91, 98 (1981) discussing the use of Kassel in future commerce clause adjudication: "The inability of any opinion to command a majority, and the plurality's failure to define the scope of its decision, seriously limits Kassel's precedential value and makes it difficult to assess the constitutionality . . . of state safety regulations generally." Id. at 98.

102. See Teshnut, supra note 79, at 161.

103. See supra text accompanying notes 80-88 (discussing the inherent defects in the balancing approach).


105. Id. at 633.

106. [The pervasive control vested in E.P.A. and the F.A.A. [by Congress] under the 1972 [Noise Control] Act seems to use to leave no room for local curfews or other local control. . . . If we were to uphold the . . . ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of the F.A.A. in controlling air traffic control.

Id. at 638, 639. See also supra text accompanying notes 100-02.
congressional purpose to preempt. However, the dissent fully agreed with the majority's use of federal directives to test the validity of state regulatory schemes as it also invoked an analysis derived from the commerce clause. 107

In many recent preemption cases the Court has taken a restrained approach to federalism in an effort to maintain some sort of harmony between the federal and state governments. 108 Finding a state regulation per se invalid under the commerce clause, however, would undermine the goal of federalism. Therefore, to demonstrate that it is promoting state-federal relations, the Court purportedly takes into consideration state interests. But, as this Note has hypothesized, when Congress signals that the activity is of national import, state interests are actually of little consequence. Congress might not expressly state an intent to occupy the field conclusively or declare a single, clear purpose in enacting legislation. Nevertheless, congressional policy describing the activity as a national one is certain death for a state regulatory scheme.

As the following discussion demonstrates, such was the case in Edgar. Congress did not declare any intent to occupy the securities field exclusively, but did regulate a significant aspect of the national securities market through the Williams Act. Consequently, the Court did not rely on preemption grounds to invalidate the Illinois Act. 109 Nevertheless, the Court's invalidation of the state statute on commerce clause grounds was unequivocal.

**Congressional Policy and the Edgar Court**

The Williams Act and a National Securities Market

Congress embraced a neutral stance in its federal takeover legislation by favoring neither the raiding offeror nor the target's management. Although such a policy of neutrality was merely a by-product of or means to the goal of investor protection, its known effect was to facilitate takeovers by preventing target management opportunity to build defenses against the raiding corporation's offer. 110 Thus, Congress did express a federal interest in the positive aspects of takeovers. 111

The Supreme Court has recognized that Congress, through the Williams

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107. See Burbank, 411 U.S. at 643 (Rehnquist, J., dissenting).

108. See supra text accompanying notes 71-72.

109. See supra text accompanying notes 66-70.

110. The sponsor of the Williams bill, Senator Harrison Williams, offered support for the tender offer mechanism during congressional debates:

*There is no intention in any way to prohibit tender offers. As a matter of fact, I think it might encourage them. Through this legislation people will have more information, and will be able to accept a tender offer and sell their shares to a group which may wish to obtain a controlling interest.*

111. See supra note 5, at 1169 (discussing the legislative history of the Williams Act: "[I]t can be argued that an implied purpose of the Williams Act is to allow tender offers.").
Act's desire for neutrality, intended to promote tender offers within certain guidelines. Consequently, a state regulation that hinders such an activity interferes with a matter of national scope and importance.\textsuperscript{112} It has been argued that the Court overstated Congress' sentiment for tender offers and that the Williams Act's legislative history did not indicate a congressional desire to promote that activity.\textsuperscript{113} The inquiry more appropriate to this Note's analysis of the constitutionality of state takeover regulations, however, is not what Congress actually intended in enacting the federal legislation, but how did and does the Supreme Court perceive and interpret signals from Congress. Regardless of the exact congressional attitude towards tender offers, the fact that Congress took a neutral stance by passing minimal regulation of tender offers indicates that it wanted to permit a national market to operate independently.

The securities market is a national system with most transactions crossing state lines.\textsuperscript{114} Congress has buttressed the dominant federal interest in maintaining this national market by enacting the Securities Acts Amendments of 1975.\textsuperscript{115} Recognizing that individual, dispersed markets were "an important national asset which must be preserved and strengthened,"\textsuperscript{116} Congress enacted the amendments.\textsuperscript{117} This legislation created a federal scheme for a national securities market by increasing the Securities and Exchange Commission's authority to create, police, and maintain a central market system. Congressional enactment of these amendments lends support to the idea that Congress favors a national description of the tender offer activity.

\textit{Edgar} and a Concern for a National Securities Market

All three grounds for the Illinois Act's unconstitutionality in \textit{Edgar} were based upon a national securities market characterization. This common basis

\begin{itemize}
\item \textsuperscript{112} In Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975), the Court stated: The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party. . . . The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the "extreme care" which was taken "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." . . . [Congress] also recognized "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management.
\item \textsuperscript{113} See Note, \textit{The Indiana Business Takeover Act}, 51 IND. L.J. 1051, 1089-91 (1976).
\item \textsuperscript{114} See Note, supra note 10, at 920.
\item \textsuperscript{116} See id. at 1269 (citing congressional findings in considering the 1975 amendments).
\end{itemize}
was evident in the preemption analysis in the three justice plurality finding the Williams Act's neutrality policy frustrated by the state regulation. The use of congressional policy to derive a national character for takeovers also was evident in both commerce clause analyses. This common dependence was indicated in three ways: condemning the act's extraterritorial reach, finding harmful economic burdens created by the state statute, and almost summarily rejecting legitimate state interests. These actions taken by the Court flowed from its presupposition that the state statute affected the regulation of securities in a national market.

In Edgar's direct restraint analysis, the plurality's reliance upon the "sweeping extraterritorial effect," created by the insufficient nexus between the state and the target, indicated its adherence to a national market approach. Such a dependence was achieved in three ways. First, the Court distinguished between state "blue sky" laws, "affecting interstate commerce only incidentally," and state takeover acts, which potentially regulate out-of-state securities transactions. Second, the plurality emphasized the potential power of the act to block nationwide tender offers, which conceivably affected only nonresidents. And third, the plurality emphasized the disruptive effect many nonuniform state takeovers regulations would have on the national securities market. The interference with "interstate commerce in securities transactions" referred to by the plurality is analogous to the adverse effect many local airport noise ordinances would have had on the Federal Aviation Administration's uniform control of air space in Burbank v. Lockheed Air Terminal. This analogy to Burbank's preemption analysis strengthens the argument that congressional policy lies behind all three Edgar grounds.

The keystone of the majority's balancing analysis was the Illinois Act's potential extraterritorial ability to block nationwide tender offers. Reliance upon this rationale suggests that the burdens on commerce were imposed against national economic interests. The Court determined that the burdensome regulation caused three harmful effects to investors and the market, all founded upon the apparent assumption that pre-offer disclosure and delay would virtually halt nationwide tender offers.

118. See supra text accompanying notes 46-49.
120. Id. at 642.
121. See supra text accompanying notes 73-74 and note 74.
122. Edgar, 457 U.S. at 642.
123. See 411 U.S. 624, 638 (1973); see also supra text accompanying notes 104-06.
124. See generally Note, supra note 5, at 1165.
125. See Edgar, 475 U.S. at 644, and supra note 77. Commentators have supported the idea that the takeover acts' ability to block tender offers is harmful to the economic market. Blocking tender offers causes fluctuations in the securities market which result in a halt in trading, consequently impairing national securities trading; blocking tender offers also discourages takeover bids, thus allowing inefficient management to retain control and prohibiting investors from selling their stock at a premium. See generally Langevoort, State Tender Offer Legislation: Interests, Effects, and Political Competency, 62 Cornell L. Rev. 213, 238 (1975), and Note, supra note 5, at 1151.
The majority based this economic evaluation upon congressional judgment and analysis. The overwhelming influence congressional directives and decisions played in this instance of commerce clause adjudication is most poignant when one realizes that the economic and behavioral effects of state takeover laws are still open to debate. Commentators have acknowledged the possible benefits accruing to investors from the pre-offer disclosure and delay consequences of the state takeover regulations. These speculative advantages include creating in auction market, thus bringing into the open offerors who will pay higher premiums to tendering shareholders, and calming a panic atmosphere created by sudden tender offers, thus permitting more rational, deliberate decisions beneficial to the entire marketplace. Also, empirical evidence indicates that state takeover statutes do not, in fact, block or inhibit takeovers. Despite the delay caused by the statutes enacted in thirty-seven states, the number of takeovers has continued to increase. Finally, it is argued that if state statutes do, in fact, block takeovers, the legislation bestows a benefit on the economic market in the long run. Because better run corporations will be more attractive targets, a takeover might result in replacing good management with inefficient management. Thus, the takeover could cause the target corporation to lose some corporate independence without injecting increases in synergistic value, productivity, or technical capability.

In its balancing analysis, the Edgar majority rejected Illinois' contention that the takeover Act promoted two state-related interests. The Court reasoned that the protections afforded by the state regulation were speculative or beyond the state's authority. This Note posits that because the Court embraced a national securities market characterization, any state interests purported to be protected by the takeover acts would be deemed "insufficient." Illinois asserted that its interest in protecting target shareholders was sufficient. Although this interest was certainly within the national securities market approach, the protections provided on behalf of this interest were speculative in light of the protections afforded by the Williams Act. Illinois also discovered that asserting interests outside the Court's characterization was futile. Illinois maintained that its interest in regulating an Illinois corporation's internal affairs

126. See MITE Corp. v. Dixon, 633 F.2d at 469-70.
129. See McCauliff, supra note 128, at 307. See also E. Aranow, H. Einhorn & G. Berlstein, supra note 17, at 218-19.
130. See E. Aranow, H. Einhorn & G. Berlstein, supra note 17, at 218-19.
133. See Liman, supra note 132, at 707.
was legitimate. A state’s authority to regulate such an interest embraces a
traditional corporate fiduciary law approach. The majority alluded to this
impermissible incongruity by using the insufficient nexus rationale to dispense
with the state’s second interest. The majority concluded that the Illinois Act
“applies to corporations that are not incorporated in Illinois and have their
principal place of business in other states. Illinois has no interest in regulating
the internal affairs of foreign corporations.”

Although the Edgar Court found the nexus insufficient, commentators have
recognized that state takeover regulations may well be aimed at protecting
or promoting a state’s noneconomic or corporate interests. These valid
interests include maintaining the quality of life within the state’s borders, pre-
serving localized control and decision making responsibility of economic en-
tities, encouraging civic responsibility, and insuring management’s fiduciary
obligations to shareholders.

Thus, despite the existence of legitimate state interests, states find themselves
in a “Catch-22” situation under the Edgar balancing analysis. Any attempt
by a state to assert an interest that could be characterized as within the national
securities market would be invalid because protections beyond those provided
by the Williams Act would be “speculative,” which is simply a less offensive
way of saying contrary to the congressional policy of neutrality. And, asserting
interests unrelated to the securities market would also be futile for two
reasons. First, the nexus between the state and the targets would always be
deemed insufficient. Second, the overriding federal interest in a national
securities market would always cause the balance to tip against state interests.

In his concurrence Justice Powell expressed a concern with the adverse effects
of corporate takeovers on the general public interest. Thus, he agreed only
with the Court’s balancing analysis because its “reasoning leaves some room
for state regulation of tender offers.” Such an interest in noneconomic con-

134. See Boehm, supra note 69, at 742; Shipman, supra note 132, at 740-43.
135. Edgar, 457 U.S. at 647.
136. See generally Boehm, supra note 69, at 743-46, 754-55, and Shipman, supra note 132,
at 741-45.
137. See generally sources cited supra note 136.
138. See Boehm, supra note 69, at 755.
139. Justice Powell, in his concurring opinion, stated, “there are certain adverse consequences
in terms of general public interest when corporate headquarters are moved away from a city
and State.” 457 U.S. at 647 (Powell, J., concurring). In a footnote to his concurring opinion,
Justice Powell expressed his concern for non-economic interests:

The corporate headquarters of the great national and multinational corporations
tend to be located in the large cities of a few States. When corporate headquarters
are transferred out of a city and State into one of these metropolitan centers, the
State and locality from which the transfer is made inevitably suffer significantly.
Management personnel—many of whom have provided community leadership—
may move to the new corporate headquarters. Contributions to cultural, charitable,
and educational life—both in terms of leadership and financial support—also tend
to diminish when there is a move of corporate headquarters.

Id.
140. Id.
tributions to a local community, however, does not fall within the national securities market approach relied upon by the Court throughout its decision. Thus, just as Illinois did, Justice Powell ventured outside the Court's characterization.

Justice Powell's emphasis on state interests and his refusal to rely on national securities market concerns is significant when one realizes his swing vote marked the distinction between the majority and a plurality which ruled the state act was a direct restraint on commerce. The relevance of his concern over a state's authority to regulate tender offers is diminished by his asserting a noneconomic interest outside the Court's national market approach, a move which, when tried by the state, was rejected. Thus, the sincerity of the balancing approach's solicitude towards state interests is cast into doubt. And the gap between the direct restraint analysis and the indirect balancing analysis is closed, creating a finding of unconstitutionality that is practically impossible for state takeover schemes to overcome.

The certainty of Edgar's finding of unconstitutionality is further evidenced by the Court's willingness to base its reasoning upon speculative assumptions. For instance, not only did the Court base its decision on arguable assumptions concerning the effects of state takeover statutes in general, but it readily found the Illinois Act violative of the commerce clause despite the fact the particular effects of the delay caused by the statute had not been established by the trial court. Additionally, in condemning the sweeping extraterritorial effect caused by the insufficient nexus between the target and the state, the Court indicated a willingness to find unconstitutional any statute that potentially regulates out-of-state transactions affecting any nonresidents. The actual nexus between the target and the state was irrelevant; if the act remotely affected out-of-state investors, it was invalid. And, because the Court did not conclude the Illinois Act had in fact prevented tender offers, its decision indicates that any potential power to do so would impose substantial burdens on interstate commerce.

Several lower federal courts have recently relied upon Edgar to address the unconstitutionality of other state takeover statutes. These courts have recognized the Edgar decision's extremely narrow constitutional parameters, finding takeover statutes of four individual states invalid on commerce clause grounds. The hypothesis that these lower court decisions embraced the Supreme

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141. See supra text accompanying notes 127-33.
142. See MITE, 633 F.2d at 498.
143. For instance, in the MITE Corporation situation, 27% of the target corporation's shareholders, holding 43% of that company's stock, were Illinois residents. The 7th Circuit dismissed this substantial factual nexus as "fortuitous." See MITE, 633 F.2d at 501.
Court's national securities market rationale is supported by two observations. First, four post-Edgar findings of unconstitutionality were based upon the states' interference in the marketplace caused by the takeover laws. Second, in at least two cases, the nexus between the state and the target corporation was stronger than that created by the Illinois Act in Edgar. Yet, despite the facts that state authority was limited only to state corporations and that local shareholders constituted a major percentage of the total number of investors, the courts found the statutes invalid, thus relying upon speculative burdens in a national securities market system.

Under the foregoing analysis, this Note has argued that despite the Edgar Court's purported deference to state interests and concern for federal-state relations, the opinion creates a very narrow constitutional area for permissible state takeover regulations. Because Edgar applies only to state statutes regulating the takeover of general corporations, however, it leaves uncertain the constitutionality of state statutes regulating takeovers of financial institutions such as banks and insurance companies. The decision did not preclude the applicability of its reasoning to those specialized statutes. In Part III this Note's foregoing constitutional analysis is used to examine the validity of state insurance takeover acts under Edgar's narrow parameters.

III

Constitutional Problems

State insurance takeover statutes are directed towards dual objectives: policyholder protection and shareholder protection. Herein lies the constitutional uncertainty surrounding the insurance takeover statutes. The protection of a domestic insurer's policyholders is clearly within a state's sphere of authority and interest, especially in light of the McCarran-Ferguson Act, which was passed by Congress to delegate to the states regulatory authority over the business of insurance, including regulation free from commerce clause restrictions. The requirements of the state insurance takeover statutes, however, clearly parallel those unconstitutional elements of the general takeover statutes.

145. See Esmark, 14 SEC. REG. & L. REP. (BNA) 1857 (the Kentucky takeover act was found invalid as causing an undue burden on interstate commerce despite over 50% of the target corporation shareholders being Kentucky residents); Telvest, 51 U.S.L.W. 2427 (the Virginia act was limited to Virginia corporations and 60% of the target shareholders were residents of the state, thus imposing a lesser burden on commerce, yet the state act was found invalid under a balancing analysis).
146. See Comment, supra note 127, at 67 n.35.
147. See supra text accompanying notes 34-37.
148. See supra note 4.
149. See infra text accompanying notes 164-77 (discussing the McCarran-Ferguson Act's purposes and scope of authority).
The insurance takeover statutes provide protection only to insurers formed under the laws of the state or nondomestic insurers authorized to do business in the state.\textsuperscript{150} Thus, it would seem that the state has a sufficient connection with the corporations it is protecting to survive an \textit{Edgar} commerce clause analysis. However, this nexus between the state and the domestic insurer is of little relevance when one realizes that the shareholders who own stock in the insurance company are distinct from the owners of the insurance policies.\textsuperscript{151} Thus, the owners of the insurance company stock are not necessarily residents of the regulating state. If the statutes are described as shareholder protection measures, then the insurance acts have the same potential "sweeping extraterritorial effect" upon tender offers in the securities market as did the Illinois Act in \textit{Edgar}. Such a potential effect on a national securities market is invalid.

The \textit{Edgar} Court based its decision concerning the burdensome effects of the Illinois statute on the pre-offer disclosure and delay consequences of the Act.\textsuperscript{152} These consequences are arguably more burdensome in the insurance statutes. The mandatory public hearing by the insurance commissioner leaves no doubt that there will always be a considerable delay between the public announcement of the intent to make a tender offer and the actual commencement of the offer. And, the state's power to create delay is supplemented by provisions that give the insurance commissioner absolute authority not to approve the tender offer transaction. This approval depends on whether the proposed takeover is detrimental to the security of the policyholders and whether the tender offer is fair to the shareholders.\textsuperscript{153} The state has the power to bring certain death to a tender offer, thus affecting shareholders outside its borders and inhibiting transactions in a national securities market. Some commentators have seized upon the effects these insurance acts have on a nationwide securities transaction, contending that they were, in reality, anti-takeover measures using the hearing provision as a means to hinder the tender offer objective.\textsuperscript{154}

Four district courts have wrestled with the constitutionality of state insurance takeover statutes. In \textit{National City Lines, Inc. v. LLC Corp.},\textsuperscript{155} the District Court for Western Missouri found parts of the Missouri Insurance Holding Company Act invalid on two grounds. First, the administrative review procedures conflicted with the Williams Act's policy of affording investors the opportunity to make their own decisions. Second, certain provisions imposed excessive burdens on interstate commerce. The \textit{National City} court invalidated only those parts of the Act that created delay: the precommencement notifica-

\textsuperscript{150} See supra text accompanying notes 31-33.
\textsuperscript{152} See supra text accompanying note 77.
\textsuperscript{153} See supra text accompanying note 36.
\textsuperscript{154} See Clark, supra note 34, at 793.
tion requirement, the administrative hearing provision, and the offeror disclosure requirement. Recognizing the distinction between investor protection and policyholder protection, the district court reasoned that although the state did have a legitimate interest in protecting the state's insurers and their policyholders, this objective could be accomplished through other parts of the Act less burdensome to the market. The National City court concluded that the state's interest in policyholder protection does not extend to the regulation of securities. Thus, the court applied a securities market rationale to certain parts of the act while recognizing an insurance policyholder protection approach for others.

In *Gunter v. Ago International*, the northern Florida district court also followed a securities market approach to find the Florida Insurance Holding Company Act preempted by the Williams Act. Although it did not reach issues arising under the commerce clause, the *Gunter* court based its invalidation of the state statute upon the act's pre-offer disclosure and delay provisions. More significantly, the court reasoned that the statute frustrated the "market approach" of the Williams Act by impeding the effectuation of takeovers.

Other courts, however, have not agreed with the reasoning of the Florida and Missouri courts. In *Professional Investors Life Ins. Co. v. Roussel*, the district court of Kansas held that the Kansas Insurance Holding Company Act was valid because the McCarran-Ferguson Act provided the statute with blanket protection from commerce clause attacks. The court reasoned that the state regulations protected the interests of Kansas insurance com-

156. "Since the [state's] interest in protecting policyholders does not extend to the regulation of securities, the challenged sections of the Insurance Act pose a significant burden on commerce." *Id.* at 912.

157. On appeal, the Eighth Circuit examined the general Missouri takeover statute and the state insurance takeover act. *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982). The appellate court found the general takeover statute unconstitutional on two grounds. First, citing the Supreme Court's decision in *Edgar*, the Eighth Circuit found that because the Missouri takeover act was not significantly different from the Illinois Act in *Edgar*, the Missouri statute was invalid under the *Edgar* majority's commerce clause analysis. *Id.* at 1128. The appellate court went beyond the commerce clause ground, however, to find that the delay, additional disclosure, and discriminatory substantive requirements of the state Act disrupted "the neutrality essential to the proper operation of the market approach of protecting investors utilized by the Williams Act." *Id.* at 1133.

Unlike the district court, however, the Eighth Circuit did not address the substantive validity of any provisions of the Missouri Insurance Holding Company Act. Instead, the appellate court found that the insurance statute, which governed acquisition of control of domestic insurers, was not applicable to the acquiring insurance company in this case because the target entity was not engaged in the business of insurance as required by the statutory definition of domestic insurer. *Id.* at 1134.


159. *Id.* at 90. In discussing the Williams Act, the *Gunter* court said:

>Congress recognized that tender offers often benefit investors: therefore, the Williams Act was not designed to obstruct legitimate takeover bids. The law imposes neutrality, among the contestants in a tender offer by requiring full and fair disclosure for the benefit of investors while simultaneously providing the offeror and management equal opportunity to fairly present their case.

*Id.* at 89.
pany policyholders, thus falling within the federal Act's "business of insurance" protective umbrella. In drawing a distinction between policyholder protection and shareholder protection, the court considered general takeover statutes completely different from insurance takeover acts. The insurance acts were not securities regulations measures and thus were not within the market characterization. The general takeover statutes did fall into the market rationale, however, because "they have a greater impact upon commerce . . . than a law concentrating on insurance company transactions."161

Finally, the constitutionality of the Idaho insurance takeover act was upheld by the district court for Idaho in John Alden Life Insurance Co. v. Woods.162 The Idaho court reasoned that by requiring scrutiny of the financial and managerial reliability of the offeror, the state act focused on the relationship between the insurance company and the policyholder. The act's primary concern with this relationship qualified it for the McCarran-Ferguson Act's protection from commerce clause attacks.163

The varying opinions among these lower federal courts reflect the difficulty in trying to analyze the constitutionality of state insurance takeover acts. The decisions depict the struggle between two conflicting state interests created by the statutes. Policyholder protection is a valid state interest under the McCarran-Ferguson Act; shareholder protection is not a valid state interest under the Edgar decision.

The state's interest in protecting policyholders requires scrutiny of an offeror's financial condition. Attempts to balance this state interest against the burdens imposed on an interstate securities market by the insurance acts result in a confusing and unsupported analysis. Both concerns are distinct in approach and importance. Balancing the conflicting objectives would be tantamount to comparing apples with oranges.

Because the insurance acts and general takeover acts have almost the same elements and effects, it is reasonable to conclude that the insurance acts fall within Edgar's far reaching conclusion of unconstitutionality. However, this would summarily label the acts as investor protection measures, disregarding their policyholder protection function. A more careful constitutional analysis, taking into consideration policyholder protection, examines whether there exists some congressional policy which affirmatively excludes these insurance acts from the Edgar Court's national securities market characterization. The lower court cases reveal that this policy might be found in the McCarran-Ferguson Act's protection of the state's authority to regulate the business of insurance.

161. Id. at 408.
163. See infra text accompanying notes 190-91 (discussing what constitutes the "business of insurance").
The Unconstitutionality of Insurance Takeover Acts

The McCarran-Ferguson Act

The McCarran-Ferguson Act was enacted by Congress in direct response to the Supreme Court's decision in United States v. Southeastern Underwriters Association. That decision centered around alleged conspiracies to fix insurance premium rates and agents' commissions. Members of an insurance underwriters association allegedly used boycotts and other coercive methods to compel noninsured persons to buy solely from association members. In upholding the use of federal antitrust laws over the insurance industry, the Supreme Court held that "insurance companies which conduct their activities across state lines are within the regulatory power of Congress under the Commerce Clause." The Court's decision cast doubt upon the authority of states to regulate insurance companies, particularly the right to collect taxes. To ensure the validity of such state authority and negate any idea that the insurance industry was under exclusive federal control, Congress passed the McCarran-Ferguson Act.

By its terms, the Act reserves to the states power concurrent with that of the federal government to regulate the "business of insurance." Although Congress limited the states' power to the "business of insurance," it left that term undefined. Of central importance to this Note's constitutional analysis is whether Congress intended to permit states to regulate in areas of overriding federal concern.

A general analysis of the Act's legislative history offers little guidance in

166. Southeastern Underwriters, 322 U.S. at 535.
167. The Act provides in relevant part:
   Congress hereby declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states. . . .
   (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.
   (b) No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of Insurance: Provided, That after June 30, 1948 the . . . Sherman Act, and the . . . Clayton Act, and the . . . Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law.
168. Id. Under the McCarran-Ferguson Act, states may enact legislation regulating the business of insurance without federal laws invalidating, impairing, or superceding such state acts.
discovering any areas especially reserved to state authority. In hastily drafting and enacting the McCarran-Ferguson Act, Congress did not allude to any specific interests or activities which might fall under the "business of insurance." And, it is unlikely Congress considered the relationship between a federal securities market and the "business of insurance" when it passed the Act, as cash takeover bids and tender offers were phenomena of the 1960's. Thus, insurance takeover regulation was probably not within Congress' original grant of authority to the states, whatever that grant contained.

Commerce Clause Limitations: A Concern for a Free Market

In permitting the states to regulate the business of insurance, Congress imposed one major limitation upon state authority. The McCarran-Ferguson Act's legislative history suggests that Congress sought to maintain a dominant federal interest in a national free market, expressly limiting the states' power to enact legislation affecting interstate markets. Such a limitation is evident on two grounds.

First, Congress expressly provided that state authority to regulate insurance practices did not extend to activities having extraterritorial effects. This authority was appropriately limited by the commerce clause. Consequently, states were restrained by commerce clause considerations when regulating the "business of insurance." Second, congressional concern in passing the Act focused on state authority to tax the insurance industry and to regulate insurance policies. Debates over the McCarran-Ferguson bill centered on reconciling the powers of the states to tax insurers with the applicability of federal antitrust laws to the insurance industry. Ultimately it was decided that the Act was not intended to defeat

170. See supra text accompanying notes 164-69.
171. See 91 Cong. Rec. 1483 (1945).
172. Id.
173. In Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 429 (1945), the Supreme Court construed the Act broadly to perceive one congressional purpose behind its enactment: complete insulation of existing as well as future state regulation of the insurance industry from commerce clause challenges. See also Barry, 438 U.S. at 539 and Western and Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648 (1981). This judicial perception inaccurately presupposed that the parameters of permissible state regulation and the definition of the "business of insurance" had been precisely established. As this Note suggests in Part III, however, whether certain activities, such as transactions involving insurance company securities, fall within the scope of the "business of insurance" is not clear. If an activity is within this definition, one may assume state regulation of it would not be subject to commerce clause limitations.
174. Debates in the Senate focused on potential state authorization of attempts to monopolize resulting from the Act's grant of concurrent power. House debates expressed concern over the coercion or intimidation of small insurers by large companies which enter into rate fixing agreements. Senate debate over the conference bill indicated that while Congress intended for
the purpose of federal antitrust legislation by inhibiting competition in a free, national market.\textsuperscript{173} If such free market concerns are extended, it is plausible to infer that Congress sought to prohibit states from imposing limitations upon activities of national scope and importance.\textsuperscript{174} Although the McCarran-Ferguson Act’s unique grant of authority theoretically permits the states as well as Congress to regulate, this concept of concurrent authority is illusory. Congressional determinations of national activities under exclusive federal control through the commerce clause limit the actual scope of state power.\textsuperscript{175}

The Supreme Court recognized a national market limitation in delineating activities within a state’s regulatory ambit in \textit{F.T.C. v. Travelers Health Association}.\textsuperscript{176} A health insurance company mailed advertising materials into neighboring states. Although such mailings were regulated by the laws of the insurer’s state, the Federal Trade Commission maintained that the insurer’s activities constituted interstate commerce. Therefore, they were subject to the FTC’s authority. In language resembling the Court’s \textit{Edgar} opinion, the \textit{Travelers Health} Court expressed concern with one state’s attempt to regulate an extraterritorial activity at the expense of federal jurisdiction over the activity.\textsuperscript{177} In interpreting the McCarran-Ferguson Act’s legislative history, the Court emphasized that section 2(b) of the Act did not authorize the state to regulate extraterritorial activities. Congress intended state regulation of insurance to be limited to activities within that state’s border.\textsuperscript{178} The Court held that the interstate mail order insurance business was not within the Act’s protection of state insurance regulation.

\textsuperscript{173} Insurance companies to be exempt from federal antitrust legislation, the Act was not to be used to endorse attempts by a group of insurers to monopolize through rate fixing agreements. See generally 91 Cong. Rec. 479, 1087, 1443 (1945); Barry, 555 F.2d at 9-11 (presenting comprehensive discussion of the Act’s legislative history).

\textsuperscript{175} During Senate debates, Senator Mahoney pointed out that allowing certain coercive agreements among groups of insurers would “invade the field of Congress to regulate commerce.” 91 Cong. Rec. 1485 (1945).

\textsuperscript{176} See Comment, \textit{The Supreme Court, 1968 Term}, 83 Harv. L. Rev. 255 (1969). In \textit{Maryland Cas. Co. v. Cushing}, 347 U.S. 409 (1954), the Supreme Court extended such congressional free market concerns by refusing to give effect to state insurance regulation that would “seriously undercut congressional legislation in an important area of federal control.” Id.

\textsuperscript{177} See Dowling, \textit{ Interstate Commerce and State Power—Revised Version}, 47 Colum. L. Rev. 547, 556 (1947) (criticizing the Supreme Court’s interpretation of the McCarran-Ferguson Act, labeling the Act’s grant of authority as a concept of “co-ordinated action”).

\textsuperscript{178} 362 U.S. 293 (1960).

\textsuperscript{179} “[W]e are asked to hold that the McCarran-Ferguson Act operates to oust the [Federal Trade] Commission of jurisdiction by reason of a single State’s attempted regulation of its domiciliary’s extraterritorial activities. But we cannot believe that this kind of law of a single State takes from the residents of every other State the protection of the . . . Commission.” Id. at 297-98.

\textsuperscript{180} Citing the Act’s legislative history, the Court noted that the three Senate conferees, including the bill’s two sponsors, “repeatedly emphasized that the provision did not authorize state regulation of extraterritorial activities. See, e.g., 91 Cong. Rec. 1481-83, 1484.” \textit{F.T.C.}, 362 U.S. at 301.
The Dominant Federal Interest in
Insurance Securities Regulation

This extraterritorial limitation of the state's power to regulate insurance extends directly to insurance regulation in the securities market. A state's general authority to regulate securities is prohibited if such regulation would encroach upon an important national activity. The Supreme Court has not recognized any congressionally mandated exception to this Note's general conclusion when states attempt to justify securities regulation with the McCarran-Ferguson Act. The following discussion of recent decisions indicates the narrow parameters of the states' particular authority when the national securities market is even tangentially involved.

In SEC v. Variable Annuity Insurance Co., the Court narrowly defined the concept of insurance over which state regulatory authority is controlling. The Court held that "insurance" embraces the idea that the insurer take investment risks. The SEC sought to enjoin annuity insurers from offering their variable annuity policies to a public market without registering them with the Commission. Arguing that the states have exclusive authority to regulate such transactions as "insurance," the annuity insurers maintained that requiring them to comply with federal securities legislation would supercede the state's authority under the McCarran-Ferguson Act. The Court rejected this argument, noting that variable annuities placed all risks on the policyholder and not on the insurer. This placement of risk caused the insurance policies to fall outside the state's authority over "insurance" and within the authority of the federal securities commission.

Thus, the Court has narrowed the state's regulatory ambit under the McCarran-Ferguson Act. The Variable Annuity decision supports this Note's thesis that when a national securities market interest is involved, the state's power over the "business of insurance" will be limited, not expanded. This constriction of a state's authority over insurance applies to state regulation of the transformation of an insurance company's corporate structure, which brings into play the conflict between territorial limitations on the state's power to affect a national market system and the state's interests in protecting policyholders.

In American General Life Insurance Co. v. F.T.C., the District Court of Southern Texas examined the state's power to regulate the merger of a

181. See supra text accompanying notes 112-25.
183. For a definition of "variable annuity" see id. at 69.
184. See also United Benefit Life Ins. Co. v. SEC, 387 U.S. 202 (1967) (where the Court held that a flexible fund annuity contract was a security and therefore subject to the SEC registration requirements).
185. See Mearns, The Commission, The Variable Annuity, and the Inconsiderate Sovereign, 45 VA. L. REV. 831 (1959), "Whatever else the case of SEC v. Variable Annuity . . . decided, it settled the question that federal agencies could take a hand in the regulation of insurance." Id.
life insurance holding company and a commercial property insurer. In opposing the FTC’s authority over such a transformation, the holding company contended that the McCarran-Ferguson Act granted to the states exclusive power to regulate insurance company mergers. The district court rejected this argument, reasoning that Congress did not give to the states any exclusive authority over mergers when the impact of that corporate transformation would be felt in the national market. The American General court relied upon the Supreme Court’s Travelers Health decision in imposing such extraterritorial limitations on the state’s authority over mergers.

The Narrow Concept of the “Business of Insurance”

The American General court also examined whether merger activities constituted the “business of insurance” within the McCarran-Ferguson Act’s grant of authority. In concluding that the state’s control over the “business of insurance” did not extend to mergers, the district court relied upon the Supreme Court’s decision in SEC v. National Securities, Inc.187

The National Securities Court confronted the issue of conflicting objectives, shareholder protection and policyholder protection, in a state scheme regulating the transformation of insurance companies’ corporate structure. An Arizona statute required that a merger between two insurance companies be approved by the state. Arizona approved a merger between National Securities and Producers Life Insurance Company under two statutory requirements: that the merger be fair to the insurer’s shareholders, and that the merger not reduce the policyholders’ security. In seeking injunctive relief to undo the merger, the SEC brought suit, alleging that National Securities violated section 10(b) of the 1934 Securities Exchange Act188 by making fraudulent misstatements and omissions of material fact in securing the approval of Producers’ shareholders to merge with the defendant company.

The Court recognized the supremacy of state law in regulating the “business of insurance” under the McCarran-Ferguson Act.189 The Court, however, narrowly construed the “business of insurance” concept to include exclusively activities that focus on the relationship between the insurer and the policyholder, the type of policy which could be issued, and that policy’s reliability, interpretation, and enforcement. This included selling and advertising policies, licensing insurance companies and their agents, and fixing rates.190 Thus, the states’ authority to regulate the “business of insurance” is limited to regulating a relationship involving the insurance contract.

The National Securities Court concluded that mergers did not fall within the narrow “business of insurance” concept. Therefore, the SEC had the

189. See National Securities, 393 U.S. at 459.
190. See id. at 460.
authority to undo the fraudulently induced merger. And, by imposing local control over insurance companies engaged in a corporate securities activity, the state was improperly regulating in an area of national scope and import:

In this case, Arizona is concerning itself with a markedly different set of problems. It is attempting to regulate not the "insurance" relationship, but the relationship between a stockholder and the company in which he owns stock. This is not insurance regulation, but securities regulation. It is true that the state statute applies only to insurance companies. But mere matters of form need not detain us. The crucial point is that here the State has focused its attention on stockholder protection; it is not attempting to secure the interests of those purchasing insurance policies. Such regulation is not within the scope of the McCarran-Ferguson Act. 9

The issue confronted by the Court was not whether allowing the SEC to exercise authority conflicted with state law. Rather, the issue was whether the federal Act's grant of authority to the states was so complete as to dominate federal policies of fair treatment and total disclosure in securities market trading. The Court implicitly considered whether the McCarran-Ferguson Act manifests some congressional policy that would exempt the effects of a state regulatory action from the supremacy of federal interests, 192 but held that "the McCarran-Ferguson Act furnishes no reason for refusing the remedies the Commission is seeking." 193

The Court found that undoing the merger did not undermine the substantive aims of the Arizona statute, policyholder and shareholder protection. Consequently, the state's authority to approve mergers under the McCarran-Ferguson Act was not impaired. 194 In reality, however, by permitting the federal securities agency to have the relief it sought under the 1934 Act, the Court disregarded Arizona's authority to approve the merger. In so doing, the Court reaffirmed Arizona's authority to approve the merger. In so doing, the Court reaffirmed the importance of a federal interest in protecting the autonomy of investors to make decisions based on minimal information. 195 The National Securities decision indicates that the prevalent federal interest in securities regulation is not to be diminished or sacrificed in favor of state protection of policyholders under the McCarran-Ferguson Act. 196 Thus, in its analysis

191. Id. at 463.
192. The Court stated: "The question is, then, whether the McCarran-Ferguson Act bars a federal remedy which affects a matter subject to state insurance regulation . . . we do not think it does." Id. at 462.
193. Id.
194. See id.
195. The Court's attitude favoring investor autonomy is derived from its adherence to the "market theory approach." See supra note 49. Congress embraced such an approach when it enacted the Williams Act. See 113 Cong. Rec. 854 (1967). This approach is an integral part of the Court's adjudication based upon a national securities market characterization.
196. The Court put the federal interest on equal footing with the state interest:
   The paramount federal interest in protecting shareholders is in this situation perfectly compatible with the paramount state interest in protecting policyholders. And the remedy the Commission seeks does not affect a matter predominantly of concern to policyholders alone: the merger is at least as important to those owning stock as it is to those holding policies.
393 U.S. at 463.
of the Act's purpose and powers, the Supreme Court perceived no congressionally mandated exemption to the national securities market characterization. Without this congressionally mandated exemption, a state's interest in policyholder protection is not sufficient to survive Edgar's pervasive finding of unconstitutionality.

The National Securities Court concluded that regulating the transfer of stock in a merger was not within the state's "business of insurance" ambit.\(^\text{197}\) Rather, the insurance merger activity is within the national securities market characterization. It is arguable, however, that the Court's analysis in National Securities is to be narrowly construed to apply only to the state regulation of mergers. This Note's final inquiry examines whether tender offers for the takeover of insurance companies are distinguishable from the merging of two insurance companies. If a significant distinction is found, it is possible that the tender offer activity in the insurance industry is within a state's "business of insurance" authority and not within a national securities market concept.

Mergers and takeovers through tender offers both involve some movement of securities resulting in a transformation of the corporate structure. This transformation has some impact on the financial stability of the insurance corporation which, in turn, affects its ability to provide security to its policyholders.\(^\text{198}\) There are distinctions between the two activities, however, which arguably indicate a more urgent need for policyholder protection measures in the tender offer. Theoretically, mergers entail negotiations between the managements of the consolidating companies. These discussions examine whether the merger would be beneficial to policyholders and shareholders of both corporations.

On the other hand, takeovers through tender offers involve no management negotiations or deliberations. Without state insurance takeover regulation, an offeror would be free to try to acquire control of the target insurer through a surprise tender offer and quick purchase of securities.\(^\text{199}\) In most cases, management of the acquiring corporation does not negotiate with management of the target. The betterment of the insurer's stability is not always the goal of the tender offer maneuver. Rather, robbing the target insurer's liquid assets could be the motive behind the raiding corporation's tender offer.\(^\text{200}\) Thus, compared to mergers, takeovers through tender offers are conceivably more dangerous to the target insurer's financial stability and ability to write and cover policies.\(^\text{201}\)

Lawmakers and commentators, however, have made no distinction between

\(^{197}\) See supra text accompanying note 191.

\(^{198}\) See Comment, Insurance Companies—Applicability of the Federal Securities Laws—Conflict with the McCarran Ferguson Act, 20 CASE W. RES. 883 (1969) (discussing that mergers affect the ratio of assets to contingent liabilities, determining the insurer's solvency).

\(^{199}\) See supra text accompanying notes 25-27.

\(^{200}\) See supra text accompanying notes 34-35.

\(^{201}\) This danger is reflected in the heightened responsibility of target management to scrutinize offerors in takeover attempts. See Levi, The Contested Acquisition of an Insurance Company From the Target's Point of View, 17 FORUM 212 (1981).
the two activities. While separate in state statutory schemes, laws regulating both were enacted with the same objectives in mind: to protect policyholders and shareholders by preventing corrupt management from depleting liquid assets for non-insurance purposes. Both groups, shareholders and policyholders, needed substantial protection from two unfair practices of the insurance holding company phenomenon: conglomerates acquired insurers to use their assets for non-insurance activities, and insurance companies merged to use the combined assets for future non-insurance related acquisitions. Finally, despite the rubric of management negotiations, financial insolvency and inability to underwrite or cover policies are possible consequences of the merger activity as well as the tender offer activity.

Thus, although tender offers may present a greater need for policyholder protection than do mergers, it is doubtful such a speculative difference would be sufficient to transcend the federal interest in a national securities market. This observation is supported by the judiciary's consistent deference to this prevalent federal interest in cases involving the securities of insurance companies. No lower federal court has held any provision of the federal securities laws inapplicable because of the McCarran-Ferguson Act's grant of state authority.

Additionally, the Supreme Court has confirmed its narrow view of a state's authority under the McCarran-Ferguson Act when such authority is exerted in a securities market activity. In Group Life & Health Ins. Co. v. Royal Drug Co., the Court elaborated upon the scope of its National Securities decision, stating, "[i]f a merger between two insurance companies is not the 'business of insurance,' then an acquisition by an insurer of a manufacturer . . . is also not the 'business of insurance.'"

Finally, Congress has enacted legislation which reflects its intent that tender offers for insurance company stock is a federal activity, not an insurance activity reserved to the states. Insurance companies were exempt from the registration requirements of the 1934 Act and, therefore, were not protected by the Williams Act when it was enacted in 1968. Offerors were not required to file a disclosure statement with the SEC or target corporation when the target of such a takeover bid was an insurance company. Prompted by a series

202. See generally, Schwing, supra note 30; Note, supra note 7.
203. See Note, supra note 7, at 654, 656.
204. See id.
205. See id. at 657-58.
208. Id. at 216 n.13. The Royal Drug case held that agreements between insurers and retail pharmacies to fix drug prices did not "relate so closely to their status as reliable insurers" to fall within the business of insurance. Consequently, the agreements were not exempt from federal antitrust laws, despite their being made to improve the insurer's ability to meet its obligations to its policyholders.
of insurance company takeovers, the insurance industry urged Congress to include insurance securities within the Act’s protection. Congress did so in its 1970 amendments to the Williams Act. Thus, target insurance stockholders confronted with a tender offer were protected by disclosure requirements of the federal tender offer legislation. Congress explicitly provided that the takeover of an insurance company is an activity of national scope, strengthening the presumption against the state’s vested involvement in this activity.

CONCLUSION

*Edgar v. MITE* is hardly an example of judicial unanimity or clear precedent. It is a frustrating task to interpret and apply signals from the Supreme Court when it renders many opinions in one decision, none of which form a strong majority. Consequently, to realize any utility and predictability from such a decision, one must attempt to discern some ground common to the reasoning of all the viewpoints expressed by the Court.

Admittedly, this Note has taken interpretive liberty in its model of constitutional adjudication. In examining the validity of one narrow form of state legislation in light of the invalidity of another more general statute, this Note’s analysis leaps from fragmented opinions to one rationale. Reflected in all issues addressed by the *Edgar* Court, however, is the primacy of a national market concern embodied in the congressional directives of the Williams Act. Despite the different policy concerns, protected interests, and possible origins of authority distinguishing the general takeover acts from insurance acts, both have adverse effects on the national securities markets. In the absence of explicit countervailing congressional policies excluding such insurance regulation from the broad sweep of concerns expressed in *Edgar*, this Note concludes that there is a presumption that state insurance takeover statutes are unconstitutional.

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210. See Note, supra note 209, at 716.