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State Takeover Statutes Revisited†

*Richard A. Booth**

I have a confession to make. The title of my article that appeared recently in this review, *The Promise of State Takeover Statutes,*[1] was deliberately chosen for its shock value. Since few if any reflective works have supported state takeover statutes,[2] it occurred to me that a title suggesting there was something positive in them might get someone's attention. Clearly it did. In a recent piece entitled *Missing the Point About State Takeover Statutes,*[3] Professors Lyman Johnson and David Millon take issue with my title. I say that they take issue with my title because it does not appear that they read the article itself.

Johnson and Millon have two complaints. First, they point out that partial and two-tier tender offers are far less common today than are tender offers for all of a target company's outstanding common shares.[4] The suggestion is that my analysis of state takeover statutes in general and control share acquisition statutes in particular is irrelevant. They neglect to note that I acknowledged the decline of coercive offers.[5]

Second, Johnson and Millon complain that my analysis proceeds from the assumption that shareholder welfare ought to be the standard by which we judge the wisdom of corporation laws.[6] They neglect to note that I acknowledged the broader issue of whether other constituencies such as employees, suppliers, customers, or bondholders are harmed by takeovers and explained that, even if they are, the question remains whether the mechanisms by which takeover bidders buy control is fair to shareholders.[7]

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1. Booth, *The Promise of State Takeover Statutes,* 86 MICH. L. REV. 1635 (1988).

2. Indeed, I have not found any that unequivocally qualify for this honor, though Professor Bebchuk has noted that control share statutes are similar in important respects to the tender offer mechanism he has advocated. Bebchuk, *The Sole Owner Standard for Takeover Policy,* 17 J. LEGAL STUDIES 197, 222-23 (1988).

3. Johnson & Millon, *Missing the Point About State Takeover Statutes,* 87 MICH. L. REV. 846 (1989).

4. *Id.* at 846-47.

5. Booth, *supra* note 1, at 1651 n.46.

6. Johnson & Millon, *supra* note 3, at 847-57.

7. Booth, *supra* note 1, at 1659-61, 1668-69.

As for the first complaint, Johnson and Millon are of the opinion that too much has been written about the nearly extinct coercive tender offer. To some extent, I would agree with that sentiment. But given my conclusion that the problem of coercion was illusory,[8] it should have been apparent that my analysis of state takeover statutes was likely to proceed differently from earlier works that saw coercion as a problem.[9] The reason I addressed coercive offers was because there was evidence that when they were used premiums were demonstrably lower.[10] Thus whether coercive offers continue to be used widely is quite beside the point.

Nevertheless, I am not so sure that coercive offers are dead. They could just be hiding. It may be that defensive tactics such as fair price amendments and poison pills and now state takeover statutes (which are really nothing more than the same defenses statutorily standardized)[11] are the reason that two-tier offers have been forsaken (if indeed they have been). If so, it makes sense to take a hard look at which mechanism for their elimination works best.[12] In other words, state takeover statutes should not necessarily be viewed as an additional layer of defense. It may well be that a state's official adoption of a defense will be interpreted by the courts as a condemnation of other nonstandardized tactics.[13]

Moreover, while coercive offers may be less common than they once were, they still are used. In the six-month period ending March 12, 1989, there were sixty-eight third-party tender offers announced in the *Wall Street Journal*, of which sixteen were partial or two-tier bids.[14] These included friendly offers, hostile offers, and buyout offers. Indeed, it has been noted elsewhere that coercive bids are still frequently used in connection with management buyouts.[15] Admittedly, state takeover statutes will not ordinarily affect a management buyout.[16] But that is beside the point. Maybe they should. It is every

8. *See, e.g., id.* at 1655.

9. *Id.* at 1636.

10. *Id.* at 1643-59.

11. *See id.* at 1679-80.

12. *Id.* at 1668-69.

13. *See id.* at 1678 n.161.

14. A summary of my study is on file with the *Michigan Law Review*.

15. Grundfest, *Two-Tier Bids Are Now a Defensive Technique*, Natl. L.J., Nov. 9, 1987, at 26, col. 1.

16. Management proposing a buyout will ordinarily have the right to vote by virtue of earlier approval by the shareholders, and thus will be able to vote in connection with the buyout unless additional shares are acquired outright or other shareholders join with management in the proposal such that the percentage of votes owned or controlled exceeds a new threshold. *See, e.g.*, IND. CODE ANN. §§ 23-1-42-1 to -9 (West 1989).

bit as possible (indeed more so) for management as for outsiders to coerce shareholders into tendering in connection with a buyout.[17] The tests and procedures that are implicit in state takeover statutes could well be extended to buyouts.[18] To be sure, Delaware has, as a matter of case law, effectively imposed a voting scheme on all mergers that is the substantial equivalent of a control share statute, at least from the point of view of incumbent management.[19] Under Delaware case law, management must submit any proposal for a merger in which it has a conflicting interest—as in a cashout merger—to a vote of the disinterested shareholders (in addition to the statutorily required vote of all the shareholders) in order to enjoy the presumption that the merger price is fair. In short, the voting scheme imposed under control share statutes is amenable to broader application and has, in fact, found broader application.

In addition to buyouts, there are other transactions related to corporate control that are tinged with the same problems of coercion as those associated with partial and two-tier offers which could well benefit from a broadly applicable scheme of shareholder approval such as the one embodied in the revised control share statute that I propose. For one, recapitalizations, though they are now the subject of an elaborate Securities and Exchange Commission rule[20] and, like buyouts, are not addressed by state takeover statutes, were frequently carried out (before the new rule) by means of a supposedly voluntary exchange offer that in form is very like a coercive bid.[21] (Indeed, the fact that recapitalizations often so proceeded strongly suggests that coercive tactics would still be freely used if they had not been eliminated first by shark repellent amendments, then by poison pills, and now by state takeover statutes.) For another, greenmail is arguably the same thing as a partial bid in which the bidder is bribed to go away.[22] Indeed, it might well be that the recent decline in hostile coercive bids is roughly offset by a more frequent incidence of the open market assemblage of a threatening block of stock in the absence of a formal tender

17. *See* Grundfest, *supra* note 15.

18. *See* Booth, *Management Buyouts, Shareholder Welfare, and the Limits of Fiduciary Duty*, 60 N.Y.U. L. REV. 630 (1985).

19. *See* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

20. Exchange Act Rule 19c-4, 53 Fed. Reg. 26,394 (1988) (to be codified at 17 C.F.R. § 240.19c-4). *See generally* Voting Rights Listing Standards — Disenfranchisement Rule, Exchange Act Release No. 25,891, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,247 (July 7, 1988).

21. *See* Gilson, *Evaluating Dual Class Common Stock: The Relevance of Substitutes*, 73 VA. L. REV. 807 (1987).

22. *See* Booth, *The Problem with Federal Tender Offer Law*, 77 CALIF. L. REV. (forthcoming 1989).

offer. Interestingly enough, new and powerful techniques such as the "street sweep,"[23] by which large blocks of stock can be assembled without ever declaring a tender offer, have been invented more or less simultaneously with the decline of the coercive offer. Could it be, between the invention of new takeover techniques and management becoming more alert to serious threats to its control (as well as more exposed to suit for failure to accept an attractive bid[24]), that the coercion problem still exists as strongly as ever (or even more so) but is hardly ever played out so late in the game as to arise in connection with a tender offer itself?

That brings me to the real reason for the title of my article. The promise of state takeover statutes may lie primarily in the regulation of transactions other than takeovers. As I point out in the article, control share statutes have apparently inadvertently suggested solutions to other vexing problems of corporation law. For one thing, they may eliminate greenmail: no one can accumulate stock and threaten a takeover solely for the purpose of exacting a bribe that injures remaining shareholders if the remaining shareholders have the ability to block the greenmailer's ultimate accession to power.[25] Control share statutes may also preclude sales of control by controlling shareholders without disinterested shareholder approval.[26] Indeed, in a pending Ohio case (with which I have had some involvement), a bidder has argued that target management's efforts to shore up control by converting non-voting preferred stock and debentures into common stock so as to increase its voting power from 17% to 47% violates the Ohio control share statute which requires an advance shareholder vote on any acquisition raising a shareholder's ownership over the one-fifth or one-third threshhold.[27] In other words, the Ohio statute arguably regulates any number of defensive tactics that operate by placing additional votes in friendly hands (including lockups, poison pills, and recapitalizations). Needless to say, these possibly salutary effects of control share statutes may be modified or eliminated if incumbent management reserves the power to approve a deal without a share-

23. *See generally* Acquisitions of Substantial Amounts of Securities and Related Activities Undertaken During and Following a Tender Offer for Those Securities, Exchange Act Release No. 24,976, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,160 (Oct. 1, 1987).

24. *See, e.g.*, Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264 (2d Cir. 1986); Revlon v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

25. *See* Booth, *supra* note 1, at 1685-87.

26. *See id.* at 1690-91.

27. Plaintiff's Second Amended Complaint, Granada Investments v. DWG Corp., No. 1:89CV0641 (N.D. Ohio 1989).

holder vote (as is typically the case in connection with a nonstatutory poison pill).[28] But that too is quite beside the point. The point is that the central *idea* of a shareholder vote to determine whether control prerogatives may be exercised by an existing or potential controlling shareholder is promising.

Ironically, a well-conceived control share statute probably will do little to stop the takeover of a company ripe for it, even though there is little doubt that the true motivation for state takeover laws has been the desire of state legislators to prevent the takeover of resident companies.[29] The reason, of course, is that shareholders like takeovers and will likely vote in favor of an attractive offer. Thus it should not be surprising that the statutes of most states, as they currently appear on the books, include any number of procedural devices intended to favor target management.[30] As I pointed out, Indiana itself, in a veritable legislative frenzy, adopted three other forms of takeover statutes in combination with the control share statute upheld by the Supreme Court.[31]

In short, the ultimate point of my article is not, as Johnson and Millon seem to think, to demonstrate that we are in fact better off because of the adoption of state takeover statutes. Rather, my point is precisely the one suggested by the title, namely, that control share statutes could have a good deal of merit if appropriately reworked. In other words, my point is much like the point often made about vicarious liability of "masters" for the torts of their "servants": it no doubt is a vestige of feudal times and was based on a view of relationships that is no longer valid, but, as it turns out, there are powerful economic arguments that justify its retention.[32] Control share statutes

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28. *See, e.g.*, Moran v. Household Intl., Inc., 500 A.2d 1346 (Del. 1985).

29. *See* Booth, *supra* note 1, at 1668-70.

30. As I have pointed out, the requirement that a bidder be enfranchised in as many as three separate votes is otherwise difficult to justify. *Id.* at 1699.

Johnson and Millon also think I may have misread the Indiana statute as regards the ability of tendering shareholders to vote on whether to enfranchise a bidder. They point out that the bidder will not ordinarily have purchased tendered shares by the time the record date for the vote has been set. Johnson & Millon, *supra* note 3, at 852 n.21. They ignore the fact that (at least before the advent of control share statutes) ordinarily a bidder would seek and obtain a proxy in connection with the tender of shares. No doubt a tactic under a control share regime will be to refrain from soliciting a proxy in order to allow tendering shareholders to vote in favor of the offer as they no doubt would. Whether tendering shareholders are allowed to vote under the Indiana statute is, however, unclear. Certainly it is contrary to the spirit of the statute; and it is quite arguable, even as the statute currently reads, that tendered shares should be grouped with interested shares for purposes of a control share vote. If not, it is a defect that could easily be fixed. In any event, the point is a mere technicality and does not detract in the least from the broader arguments in favor of control share statutes. As I have noted and renoted, the Indiana act is far from perfect as it stands and could do with major reworking in many respects.

31. Booth, *supra* note 1, at 1681.

32. *See, e.g.*, Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE

may well be a similarly serendipitous development.

The second complaint that Johnson and Millon have with my article is essentially that I did not write a different article. As they see it, too little thought has been given to the fact that state takeover statutes are designed to impede takeovers. The implication is that states have abandoned shareholder welfare as the standard in connection with corporation law and now seek to protect other constituencies.[33]

In recent months, there has been a flurry of propaganda extolling the responsibility of public corporations to their "stakeholders," defined by one proponent as a company's shareholders, customers, suppliers, employees, and community.[34] The idea seems to derive from the fairly orthodox notion that a firm is a "nexus of contracts," a possibly fleeting meeting of efficiencies that results in the establishment of an organization, the firm, rather than leaving the various parties to rely on open market transactions to accomplish their ends.[35] The stakeholder concept pretty much neglects further analysis of this insight and jumps to the conclusion that since a firm is a collection of relationships, more and less formal, it should not be so easy for it to be dismantled by unscrupulous corporate raiders who pander to the greed of fickle shareholders.

The idea is not without merit. Consider a hypothetical break-even company that is making no money for its shareholders, has no prospects of ever making any money for its shareholders, and has no assets that are capable of being sold off or put to any more profitable use. Does such a company have any value? Clearly the company has no value to its shareholders. Nevertheless, it does continue to consume goods and services and pay some sorts of taxes. Thus the company has value to its suppliers, employees, and community. Of course, such a company is in no real danger of being taken over. But suppose now

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L.J. 499 (1961); Douglas, *Vicarious Liability and the Administration of Risk* (pts. 1 & 2), 38 YALE L.J. 584, 720 (1929); Holmes, *Agency* (pts. 1 & 2), 4 HARV. L. REV. 345 (1891), 5 HARV. L. REV. 1 (1891); Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345 (1982); Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916); Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1934); Smith, *Frolic and Detour* (pts. 1 & 2), 23 COLUM. L. REV. 444, 716 (1923); Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988); Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984); Wigmore, *Responsibility for Tortious Acts: Its History* (pt. 2), 7 HARV. L. REV. 383 (1894).

33. *See* Johnson & Millon, *supra* note 3, at 847-54.

34. *See* Boland, *Shareholders vs. 'Stakeholders,'* Wall St. J., Feb. 10, 1988, at 20, col. 3; *see also* Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1 (1987).

35. *See* Coffee, *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 99-100 (1986).

that the company can be put to a more profitable use by dismantling its plant and equipment and reassembling the whole thing in Tasmania. The shareholders would presumably sell out for even a minimal payment. The question becomes whether the gain to the shareholders exceeds the loss to the other "stakeholders."

There is a genuine question whether claimants who cannot diversify their investments should be entitled to some protection.[36] The usual response has been that every claimant senior to the shareholders — which is every other claimant — should be left to private contractual remedies. It is quite clear, however, that an undiversified claimant takes greater risk and that the return enjoyed is thus worth less, dollar for dollar, than the return enjoyed by a diversified claimant. Ordinarily, of course, shareholders assume (and prefer) greater risk than senior claimants because they are paid only out of residual return which, by definition, fluctuates. Senior claimants in theory bear no such volatility risk. They bear only default risk. But it seems at least conceivable that sometimes shareholders will be able to diversify away enough risk that senior claimants are left with more overall risk than equity investors.

There is some tension here, too, with the way we view managers. One model that has been somewhat discredited with the recent trend toward "deconglomeration"[37] is the idea that the talented manager can run any firm no matter what it makes or does. The other model, of course, counsels the manager to stick to his or her last and not to stray too far from the business which he or she knows.[38] If a manager's "human capital" can be put to many uses, then the takeover of the firm is primarily a reflection of the job the manager has done. If, on the other hand, the manager is more or less dedicated to a line of business, then the takeover of the firm may have more to do with the view of a well-financed outsider that the business itself is obsolete (which, of course, it may be).

Interestingly, financial creditors never seem to be mentioned as stakeholders. Could it be that the only stakeholders who have been targeted in this campaign to project responsibility are those who have relatively little bargaining power and are being exploited by the stake itself? And if so, to whom does the benefit of these attractive relationships, namely higher than ordinary returns, belong?[39]

36. *Id.* at 16-24.

37. *Id.* at 31-35.

38. *See* Hayes & Abernathy, *Managing Our Way to Economic Decline,* HARV. BUS. REV., July-Aug. 1980, at 67.

39. Coincidentally, there has been increasing attention in the legal literature to fraudulent

Politically, nonshareholder constituencies may do better in the psychological battle over takeover policy than shareholders, precisely because shareholders are diversified and other constituencies tend not to be and indeed usually cannot be.[40] In the end, it is just this discrepancy that has worried most commentators on state corporation statutes. That is, the worry has been that political forces are behind statutes designed to impede the market for corporate control for the benefit of constituencies other than the shareholders.[41]

Thus the central question is whether the shareholders who are the big winners are enjoying the premiums they do because bidders with better ideas are willing to share the wealth (which is fine), or whether premiums sometimes (or even often) are paid out of savings expected to be generated by the acquirer's reneging on contracts with managers, suppliers, customers, or employees (which may not be fine).

Corporation law provides no unequivocal answers here. Consider the following scenario. An able manager approaches the stockholders of a company that is just breaking even under current management. The prospective manager claims that the company can be run in such a way that it will be worth $10 million, but in exchange for turning the company around, the manager insists on $5 million. As an indication of good faith, the manager agrees to be paid only if the company's performance in fact improves. For one reason or another the shareholders are persuaded and agree to the deal. The manager takes charge and after a time it becomes apparent that indeed the company will increase in value. However, an outsider somehow discovers that the fortunes of the company are about to improve and learns of the deal with the current manager. The outsider proposes to buy the shareholders' shares for an aggregate payment of $9 million. The

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conveyance issues in connection with tender offer defenses and leveraged buyouts. *See, e.g.*, Kirby, McGuinness & Kandel, *Fraudulent Conveyance Concerns in Leveraged Buyout Lending*, 43 BUS. LAW. 27 (1987); Murdoch, Sartin & Zadek, *Leveraged Buyouts and Fraudulent Transfers: Life After* Gleneagles, 43 BUS. LAW. 1 (1987); Note, *Fraudulent Conveyance Law and Leveraged Buyouts*, 87 COLUM. L. REV. 1491 (1987).

40. *See* Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 120-22, 134-36, 187-88 (1987); Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510 (1979). There are some notable possible exceptions. For example, large-scale suppliers and customers might prefer a freer market for corporate control on the theory that stronger demand or oversupply will be generated and that the benefits of such competition will outweigh the cost of any disruption in particular contracts.

41. *See* Coffee, *supra* note 35; Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on* CTS Corp. v. Dynamics Corp. of America, 101 HARV. L. REV. 96 (1987); Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983); Romano, *supra* note 40; Warren, *Developments in State Takeover Regulation:* Mite *and Its Aftermath*, 40 BUS. LAW. 671 (1985); Note, *The Constitutionality of Second Generation Takeover Statutes*, 73 VA. L. REV. 203 (1987); Note, *supra* note 40; Note, *The Tender Offer Regulation Battle Continues: Should States Regulate Only Local Companies?* 60 IND. L.J. 721 (1985).

shareholders, of course, sell. The new owner fires the incumbent manager, who has neglected to provide adequately for such a contingency in connection with the $5-million compensation arrangement. The new owner thereby escapes having to pay the old manager and keeps the $1 million difference.

Should the manager in such circumstances be free to defend against the bidder or should the manager's duty to the shareholders override the contract that the manager made with the company? The manager, of course, has a duty first to the company. That duty presumably comprehends a responsibility to see to it that the company lives up to contracts into which it has entered. But the company has a contract with the manager. It would seem that the manager's duty to the company allows the manager, in appropriate circumstances, to take actions that are also intended to benefit the manager. Similar, indeed stronger, arguments can be made for the other constituencies.

The question is ultimately the same one that arose in the epic battle between Texaco and Pennzoil.[42] Which will prevail: contract or fiduciary duty? The answer that is most frequently given is that managers and other constituents, whose interest is limited to a more or less fixed senior return, are free to negotiate contracts that will protect them from raiders.[43] It is unclear what the response of corporation law will ultimately be. Some states, including Ohio, have taken steps to expand fiduciary duty to include such other interests.[44] Other states, notably Texas, have arguably strengthened the contracts that are formed in such contexts.[45] Still other states, such as Delaware, have taken steps to allow individual companies to adopt their own definitions of a director's duty.[46] To set up boards of directors as "agents" of more than one constituency and thus to compromise the time-tested notion that a fiduciary can serve only one master strikes me as unwise.[47] On the other hand, it is not at all clear that these other constituencies can always predict as well as diversified stockholders (including repeat-performing takeover bidders) the dangers that they may face in connection with the long-term contracts they may desire to make with the companies they serve or with whom they

42. *See* Mnookin & Wilson, *Rational Bargaining and Market Efficiency: Understanding* Pennzoil v. Texaco, 75 VA. L. REV. 295 (1989).

43. *See* Coffee, *supra* note 35; *see also* Johnson & Siegel, *Corporate Mergers: Redefining the Role of Target Managers,* 136 U. PA. L. REV. 315 (1987).

44. OHIO REV. CODE ANN. § 1701.59(E) (Anderson Supp. 1988).

45. *See* Mnookin & Wilson, *supra* note 42.

46. *See* DEL. CODE ANN. tit. 8, § 102(b)(1) (1983).

47. *See* Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928).

do business.[48]

Against all this is the simple fact that we have enjoyed a remarkably sustained bull market since 1982 with one notable break which seems to have had little effect on the market for corporate control.[49] This run-up has been fueled at least in part by takeover activity (or at the very least has been undampened by it). And most if not all of the real innovations in corporation law have occurred simultaneously with this takeover activity. The suspicion has to be that we are doing something right.

Regrettably, Johnson and Millon have allowed their politics to block their view of what I was trying to say. I do not think I agree with their politics (though they seem to waiver a bit).[50] But that is beside the point. It was not really my idea to take sides in the fray over state takeover statutes. The idea was to investigate the coercion claim and to suggest that there might be hidden benefits in control share statutes. On the other hand, perhaps my role was rather like that of the nuclear scientist who, in the pursuit of pure science, unleashed the atomic bomb.

Johnson and Millon say that there is nothing mysterious going on in connection with the adoption of takeover statutes.[51] I really must take issue with that. I agree that state takeover statutes have been prompted by a desire to avoid takeovers and that the explicit or implicit justification of shareholder welfare is only a guise. What Johnson and Millon fail to see, however, is the possibility that corporation law may exacerbate the problem by creating (or failing to cure) imbalances in shareholder power that result in more takeovers than might otherwise arise. Their disdain for coercion or quasi-coercion as a subject worthy of study does a great disservice. Again, I do not disagree that the possibly legitimate interests of other constituencies should be investigated. I just think we can do more than one thing at a time.

48. *Cf.* Sykes, *The Economics of Vicarious Liability, supra* note 32, at 1253-54 (discussing increased availability of monitoring devices in multi-period agencies).

49. *See* Burrough, *Companies Take Over the Takeover Game From Flashy Raiders,* Wall St. J., Jan. 25, 1988, at 1, col. 6; Wallace, *Arbitragers Return to the Game,* N.Y. Times, Feb. 13, 1988, at 37, col. 2; Wayne, *Business World Awhirl Again As the Big Deals Come Back,* N.Y. Times, Mar. 19, 1988, at A1, col. 1; *Takeovers Are on the Rise Again,* Natl. L.J., Feb. 1, 1988, at 1, col. 3.

50. The tone of their piece suggests that they are skeptical of and, at the same time, sympathetic to the interests of non-investor constituencies. *See* Johnson & Millon, *supra* note 3, at 847-57; *see also* Johnson & Millon, *Misreading the Williams Act,* 87 MICH. L. REV. 1862 (1989); Johnson & Millon, *Does the Williams Act preempt State Common Law in Hostile Takeovers?,* 16 SEC. REG. L.J. 339 (1989) (both suggesting that the argument that federal tender offer law preempts state law is broader than generally recognized and questioning argument itself).

51. *Id.* at 848.