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A CORPORATE PALEONTOLOGIST'S LOOK AT LAW AND ECONOMICS IN THE SEVENTH CIRCUIT

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I. DISCLAIMERS

I am a corporate law "liberal"—a populist who believes in shareholder rights and who is distrustful of aggregations of economic power anywhere, but especially in the hands of corporate managers. Few of us "liberals" remain. Law and economics and the so-called nexus of contracts approach to corporation law statutes have enveloped us, rendering us obsolete.[1]

I, therefore, have come to regard myself as a corporate paleontologist. I examine fossils such as the corporate law duty of care or the derivative action, holding them up for closer examination, occasionally lamenting their demise.[2] I then return them carefully to a shelf in the corporation law wing of some Field Museum of Natural History which houses fossils from that day upon the earth when we still had something known as corporate law.

A second disclaimer everyone must make is to recognize the unarguable contribution that economic analysis has made to corporate law. Law and economics has swept the academic corporate law area like prairie fire. Economic analysis of law has informed, if not controlled, both judicial and legislative developments as well.[3] No respectable academic can remain unaware of the contributions of Dean Henry Manne, or Professor

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1. *See, e.g.*, the arguments for retention of some substantive content in corporate law statutes in Branson, *Countertrends in Corporation Law: Model Business Corporation Act Revision, British Company Law Reform, and Principles of Corporate Governance and Structure*, 68 MINN. L. REV. 53, 72-88 (1983). Mainstream academic thought quickly rendered those arguments anachronistic. *See, e.g.*, *Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989). *But see* Bratton, *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989).

2. *See, e.g.*, Branson, *The American Law Institute Principles of Corporate Governance and the Derivative Action: A View From the Other Side*, 43 WASH. & LEE L. REV. 399 (1986); Branson, *Assault on Another Citadel: Attempts to Curtail the Fiduciary Standard Applicable to Corporate Directors*, 57 FORDHAM L. REV. 375 (1988).

3. For example, the auction model of target company directors' response to takeover bids, adopted by the Delaware Supreme Court in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), traces its roots to an academic debate a few years previous and dominated by L&E scholars, including then Professor Easterbrook and Professor Dan Fischel. *See* Easterbrook & Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1 (1982); Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 STAN. L. REV. 51 (1982).

Daniel Fischel, or Professors turned Judges Posner and Easterbrook. The market for corporate control, the passivity thesis, agency cost theory, and the efficient market hypothesis either are the inventions of these scholars or have been presented to us in new and useful ways by their writings.

II. INTRODUCTION

That said and done, I proceed to an analysis of Professors Honabach and Dennis's article.[4] The authors' examination of five Seventh Circuit opinions demonstrates all that is wrong with economic analysis today and hints at all the mischief overuse of these models and this mode of analysis is about to cause. That is not to say that Professors Honabach and Dennis adhere to all the extreme implications that law and economics is producing for our time. They present the full panoply of L&E analysis and models, and, although they come perilously close to the brink at times, they pull back and do not sign on to all the malarkey L&E now seems to be producing.

In short, I intend to use my colleagues Dennis Honabach and Roger Dennis's article as a takeoff point for a demonstration of what is wrong with law and economics, at least in its present day application to corporate law, and not specifically what is wrong with their article.

I group my comments under three banners. First is overuse of, or overaggregation of phenomenon under, now shopworn L&E principles or models.[5] Second is a certain hypocrisy and falsity that has begun to creep into economic analysis, leading scholars to play up fundamental tenets when their thesis is thereby advanced, but to ignore them altogether when the building block concepts contradict their desired conclusion. Third, and most damning, is the overwhelmingly apologist flavor of law and economics scholarship. That scholarship now seems totally outcome oriented. The outcome to be arrived at, and to justify, is what managers of Fortune 500 corporations want, whether it be the death of the derivative action, de facto elimination of the duty of care, or upholding management entrenchment devices such as the device euphemistically known as "dual class capitalization" or the more aptly named poison pill. In Professors Honabach and Dennis's piece, abolition of any remaining semblance of common law fiduciary duties and upholding of state

4. Honabach & Dennis, *The Seventh Circuit and the Market for Corporate Control*, 65 CHI.-KENT L. REV. 681 (1990).

5. Professor Jack Coffee has referred to "overaggregated" perspectives, many emanating from law and economics. *See* Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1148 (1984).

antitakeover statutes that insulate managers from all real accountability are ends that would appease corporate powers greatly.

III. OVERUSE AND OVERAGGREGATION

Economic analysis might intimate that ideas and concepts reach points beyond which their marginal utility begins to decline.[6] Law and economics scholars, however, have not yet begun to realize that with equal force this tenet of declining marginal utility applies to their mode of analysis. Every L&E concept is pushed to and beyond its usefulness, beyond marginal utility or any utility at all. The interest group model for legislation, the efficient market hypothesis, portfolio diversification, the market for corporate control, agency cost theory, and other L&E constructs are valuable tools. But today they are stretched to and beyond their breaking points. More phenomena are grouped under each than common sense or logic can justify.

For example, since markets are efficient, one leading law and economics scholar has suggested that all securities analysts should be required to throw their briefcases in the Hudson River and find new lines of work.[7] An early law and economics *Stanford Law Review* piece recommended that, based upon the efficient market hypothesis, all securities research should carry a cautionary label, not unlike packs of cigarettes.[8] These overuse-overaggregation errors result from the failure to realize that the market may be efficient only on average or with respect to actively traded securities. Because of this, investors and analysts continue to seek out undervalued stocks, and since market efficiency is a self-referential concept, the minute the analysts throw their briefcases away and quit analysis the market will cease being efficient.

Professors Honabach and Dennis fall into the overaggregation error with their view of the market for corporate control:

> Direct monitoring of managerial behavior and judicial enforcement of fiduciary duties is costly and imperfect. Fortunately, for the shareholders in publicly held corporations, the market for control is a much more effective, efficient tool.... Share-holders who couple [the protection of the market for corporate control] with appropriate diversification of their portfolio minimize the cost of managerial behavior.[9]

With that as raw material, they then extract from the dicta in the *CTS*

6. *See, e.g.*, P. SAMUELSON, ECONOMICS 408-09 (11th ed. 1980); R. LIPSEY & P. STEINER, ECONOMICS 133-35 (3d ed. 1972).

7. *See* N. WOLFSON, THE MODERN CORPORATION 110 (1984).

8. Comment, *Broker Investment Recommendations and the Efficient Capital Market Hypothesis: A Proposed Cautionary Legend*, 29 STAN. L. REV. 1077 (1977).

9. Honabach & Dennis, *supra* note 4, at 691-92 (footnote omitted).

decisions the theories of a hypothetical Judge Posner. Hypothetical Posner would eliminate application of the common law of fiduciary duty, save for cases that would have been violations of the duty of loyalty, and therefore, might affect the market for corporate control. "[C]hallenges to managerial decisions which do not threaten to displace the market for corporate control" would be given short shrift, notwithstanding the presence of self-dealing.[10] By contrast, "challenges to any managerial acts which affect the market for control" would be carefully reviewed to determine whether the affect is too great to be acceptable,[11] presumably using something resembling traditional fiduciary duty analysis.

The above discussion presents no fewer than three overaggregation errors. First is the reliance upon diversification as a safety net to protect shareholders when market forces fail. This is the standard L&E fallback argument for elimination of all legal controls on corporate managers. If the market for corporate control fails to protect shareholders of a particular company from management wrongdoing, those shareholders could have minimized, if not avoided altogether, the impact upon their economic well-being by having had diversified portfolios.[12]

But what if some investors are not diversified? Must they bear the full brunt of a market failure? If of any number, they deserve protection. The law should have in place some substantive rights and remedies to protect them. As a judge charged with doing justice or equity in individual cases, Judge Posner may be encountering the reality of what laws are for and what judges do. Hence, in his opinions one does find "a curious blend of traditional and sometimes incomplete economic analysis"[13] which Professors Honabach and Dennis lament.

Nondiversification may also serve other laudable goals. Firm-specific investment by employee-shareholders, members of local communities, or investors serves to promote loyalty to the enterprise that a corporation represents.[14] In addition, the under-diversified shareholder

10. *Id.* at 713.

11. *Id.*

12. *See, e.g.*, Easterbrook & Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 713 (1982) ("the existence of diversification—not its employment—supports our argument"); Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1268 n.27 (1982) ("the option of diversification, an option available to every investor, greatly minimizes investors' concern with financial collapse").

13. Honabach & Dennis, *supra* note 4, at 742.

14. The limited studies available demonstrate that because of other values associated with their shareholdings many investors such as senior managers tend significantly to be under-diversified. *See, e.g.*, Demsetz, *The Structure of Ownership and the Theory of the Firm*, 26 J.L. & ECON. 375, 387-90 (1983).

often is an additional monitor.[15] In fact, the paradigm may be the under-diversified/ monitor-shareholder turned aggressor who makes the market for corporate control work. Consistently, however, the fallback justification for elimination of this or that legal control is that diversification, and not legal controls, should be the shareholders' second line of defense against managerial misbehavior.

The front line defense, the market for corporate control, no doubt exists and functions well, at least at the Fortune 1000 level. The market for corporate control bases itself in turn on market efficiency. It depends upon share prices reflecting with some accuracy the inefficient or opportunistic behavior occurring within a company. But market efficiency attenuates dramatically even with respect to less actively traded New York Stock Exchange listed stocks.[16] Market efficiency cannot be said to exist in many nooks and crannies of the over-the-counter market in which 12,000-14,000 companies' shares sometimes trade. Yet, at the urging of law and economics scholars, the entire face of corporate law is to be changed based upon the market efficiency that exists and functions only with respect to a small minority of corporations. That is overaggregation error number two.

In part because market efficiency attenuates, the market for corporate control is at best only a rough-hewn tool. Long before share prices fall sufficiently to justify acquisitions by a potential aggressor, managerial behavior of shocking proportions can occur. A Victor Posner can milk public companies dry over twenty years or more and the market for corporate control would never reach him or the misconduct.[17] Even at the Fortune 500 level, an F. Ross Johnson can assemble the RJR Nabisco Air Force and strings of condominiums and homes at corporate expense, and move an entire corporate headquarters at vast expense, solely on a whim, like some corrupt potentate in colonial India.[18] The market for corporate control either never reaches the misconduct or does so only very gradually. The market for corporate control works imperfectly or slowly, and does not reach at all into even some middle rungs of the corporate ladder. To treat it as a universal construct, as do Professors

15. Economists seem to recognize this. *See, e.g.*, Amihud & Lev, *Risk Reduction as a Managerial Motive for Conglomerate Mergers*, 12 BELL J. ECON. 605 (1981).

16. *See, e.g.*, Gordon & Korhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. REV. 761, 770-96 (1985); Wang, *Some Arguments that the Market is not Efficient*, 19 U.C. DAVIS L. REV. 341, 376-77 (1986).

17. *See* Allen, *Posner Agrees to Formation of a Panel on Pay, Transactions Within His Empire*, Wall St. J., June 30, 1987, at 5, col. 1.

18. *See* B. BURROUGH & J. HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO 94-95 (1990).

Honabach and Dennis as well as other L&E scholars, is overaggregation error number three.

Removing the protection of fiduciary duty leaves a great gap between managerial misbehavior and the market for corporate control, in which no deterrent would exist (assuming that the market for corporate control operates somewhat efficiently in that sector of the markets in which the particular corporation is situated). That gap represents a moral hazard of proportions yet unseen in our jurisprudence. No method would exist whereby shareholders could challenge perquisites and self-dealing, short of acquiring the company themselves or waging a proxy fight to oust the self-dealing managers. Such a state of affairs would be morally reprehensible to most individuals in our society. The distributional aspect, permitting the wealthiest sector of the population to become even wealthier through self-dealing at others' expense, would be politically unpalatable. Last of all, the whole concept might be bad economics. Necessary capital formation would be impeded to a great degree by the moral revulsion and political dissatisfaction the new scheme engenders.

I am not sure that Judge Posner, aware as he is of the judge's role in individual cases, would sign on to the economic analysis viewpoint that Professors Honabach and Dennis attempt to ascribe to him. If he did, however, I would caution him on the errors of overaggregation and the creation of an universal legal model that works tolerably well only at the upper reaches of the corporate sphere.

IV. L&E Concepts as Playdough

Overall, law and economics used to opine that common-law adjudication was efficient.[19] Courts are markets in which supply and demand forces interact. Over time this marketplace of ideas produces a legal scheme that nicely balances the doing of fairness and equity in individual cases with the goal of economic efficiency or other broad public policy goals.[20]

19. *See generally* Kornhauser, *A Guide to the Perplexed Claims of Efficiency in Law*, 8 HOFSTRA L. REV. 591, 627-33 (1980) (so-called evolutionary efficiency of the common-law method); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977). *See also* Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775, 780 (1981) (positive theory of efficiency as policy guide for gap filling in common-law adjudications).

20. In the fiduciary duty area, in their most recent writing, Judge Easterbrook and Professor Fischel actually have concluded that fiduciary duty is a mechanism for relatively efficient "forms of subsequent settling up" that have evolved "[o]ver tens of years and thousands of firms." Easterbrook & Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1420-21 (1989). Ex ante fiduciary duty is an inexpensive deterrent to managerial conduct that may be harmful:

Occasionally, market failures occur. Tugged into doing so by their heartstrings, caught up in the severity of the harm that has occurred, or propelled by their emotions, judges err on the side of fairness, or their view of it, in an individual case at the expense of efficiency. Yet those "knee jerk" reactions are relatively rare. Stare decisis, res judicata, appellate courts, and a whole variety of institutional and other factors constrain judges.[21] Over time, "knee jerks" fall by the wayside and layer upon layer, the common law builds fairly efficiently in a marketplace of ideas and arguments.

By contrast, the legislature is the forum in which *Art of the Deal*[22] might be required reading. Subject to the glare of publicity and the need to be re-elected, legislators are the government officials far more likely to produce a "knee jerk" reaction to some case of serious injury or obvious inequity. In other matters, legislation introduced by an authoritative source such as a major corporate citizen or a bar association committee can go from germination to the governor's desk with little scrutiny. If proponents meet with failure in a current legislative session, no bar such as res judicata prevents them from pursuing a legislative goal again and again. Neither stare decisis nor *Lochner v. New York's*[23] substantive appellate review exists.

We are now told, according to doctrinaire L&E analysis (and not necessarily Professors Honabach and Dennis),[24] that all of this has changed. Courts are now bad and legislatures are good. In this area, courts apply "notoriously nebulous concepts" such as "fairness."[25] Parenthetically, one can note that it was legislatures, beginning with California in the late 1930s, and not courts, that made fairness the touch-

> The expensive legal system is not cranked up unless there is evidence of wrongdoing; if the anticipated penalty (the sanction multiplied by the probability of its application) is selected well, there will not be much wrongdoing, and the costs of the system are correspondingly small.

Id. at 1421.

21. R. DWORKIN, LAW'S EMPIRE 36-41 (1986), and elsewhere, gives a good description of the many forces constraining judges' apparent freedom to act as they wish.

22. D. TRUMP, THE ART OF THE DEAL (1987). *See also* D. TRUMP, SURVIVING AT THE TOP (1990).

23. 198 U.S. 45 (1905), substantially restricted by Nebbia v. New York, 291 U.S. 502 (1934).

24. *See, e.g.*, Honabach & Dennis, *supra* note 4, at 733, differentiating between legislative design of efficient corporate law rules and legislative design of antitakeover statutes:

> The benefits derived from competition among states for corporate charters in large part depend on the market for control. To the extent that legislation like the Indiana control share statute insulates managers from the market for control, they need be less sensitive to shareholder interests when choosing the state of incorporation. Given the diminished likelihood of a hostile takeover, they need not seek out "superior" corporate rules. Hence, statutes like Indiana's actually reduce the values of federalism.

25. Honabach & Dennis, *supra* note 4, at 687.

stone in the corporate law duty of loyalty area.[26]

Judicial intervention is "costly" for corporations and their managers and therefore must be avoided.[27] When Judge Posner resorts to common law, he chooses "the alternative of liberating the fiduciary genie from her bottle."[28] "The tantalizing, indeed troubling, question is whether he can ever recapture her."[29] Common-law fiduciary duty should be eliminated altogether in favor of contract or invoked only when managers' actions threaten the workings of the market for corporate control.

Legislatures, on the other hand, are now producers of bargains that must be upheld. "[T]he law and economics interest group approach . . . suggests that much legislation is the product of compromise among competing interest groups."[30] For example,

> [J]udge Posner subscribes to the interest group/public choice theory of legislation. He argues that legislation is the product of competition among interest groups to purchase products from the legislature . . . . Judge Posner maintains that the role of the court in statutory interpretation should be to enforce the deal reached between the relevant interest groups and the legislature.[31]

Judge Easterbrook's attitude is similar, thus seemingly deserving of praise.[32]

Suddenly, common-law fiduciary duty, the product of courts and a hundred years or more of supply and demand in a marketplace of ideas, is bad, while antitakeover statutes, the product of state legislatures, have become good. Similarly, the market for corporate control and the passivity thesis, which states that law ought to prohibit all defenses to takeovers so that the disciplinary aspect of the market for corporate control can work its magic, now give way to upholding tinhorn state antitakeover statutes. How did we get here?

V. THE OVERWHELMING APOLOGIST FLAVOR OF IT ALL

"On the one hand L&E scholars champion managerial discretion and deference to state legislation. On the other, they are wary of . . . self-

26. Corporate lawyers and legislators caused fairness to be added as an alternative test so as to save some interested director transactions which more hard and fast common law rules would have made voidable at the corporation's option. *See, e.g.*, Bulbulia & Pinto, *Statutory Responses to Interested Directors' Transactions: A Watering Down of Fiduciary Standards?*, 53 NOTRE DAME L. REV. 201, 204 n.8 (1977); Marsh, *Are Directors Trustees?: Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 39-40 (1966).

27. *See* Honabach & Dennis, *supra* note 4, at 686-89.

28. *Id.* at 711.

29. *Id.*

30. *Id.* at 725.

31. *Id.* at 728 (footnote omitted).

32. *See id.* at 736-38.

help measures [such as suits based upon breaches of fiduciary duty] intended to undercut the market for corporate control."[33] Indeed, many L&E scholars whose work Professors Honabach and Dennis review, somewhat approvingly, claim to see no difference between the duties of care and loyalty and would abolish common-law fiduciary duty altogether, except perhaps as a default rule in cases in which parties had not otherwise provided by contract.[34]

To the skeptic, all of this has an overwhelming apologist flavor. L&E scholars seem duty bound ex post to provide a rationale for everything corporate titans need or want. Their mission seems to require them to place total credence in averages or medians even if exceptions are great in number and the potential for individual harm severe. Thus, they berate the traditional work of courts, doing justice in individual cases, in favor of a broad-based, excessively Darwinian view.

Most elementally, however, they just have it all flat wrong. It begins, as much of law and economics' shortcomings, with an overaggregation error. The proponents of the interest group/public choice analysis model of legislation group all legislation and legislatures under a model apparently based on something resembling the United States Congress.[35] In Congress, perhaps, legislation is the product of competition and bargains struck between special interest groups. The stakes tend to be large. A number of interest groups compete to have their views embodied in the legislative product. Scrutiny from congressional staffs and broadcast and print media give some assurance that at least the worst legislative deals and bargains do not survive the process.

Part-time state legislatures are altogether a different matter. Even with legislation as major as state antitakeover legislation, bills can almost advance or pass the point of passage with no scrutiny or opposition. In a single committee meeting, weary citizen legislators may deal with topics as diverse as juvenile justice, workers' compensation, land use legislation,

33. *Id.* at 743.

34. *See, e.g.*, Fischel & Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 CORNELL L. REV. 261, 290-91 (1986) (distinction between duty of care and loyalty is "not at all clear" to the authors); *Edited Transcript of Proceedings of the Business Roundtable/Emory University Law and Economics Center Conference on Remedies Under the ALI Proposals: Law and Economics*, 71 CORNELL L. REV. 357, 368 (1986) (remarks of Daniel Fischel). These arguments have begun to creep into the promanagement practitioner literature. *See, e.g.*, Block, Radin & Rosenzweig, *The Role of the Business Judgement Rule in Shareholder Litigation at the Turn of the Decade*, 45 BUS. LAW. 469, 507 (1990) (the "line between the duty of care and the duty of loyalty is not at all clear" and "more rigorous judicial review is [not] needed in the context of duty of loyalty cases").

35. *See, e.g.*, Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 51 (1988) (United States Congress used as the only model of the legislative process).

and a proposed state antitakeover statute. Two, or perhaps three, committee members will have read the proposed statute. Only one may fully understand or grasp its import.

In most state legislatures, there are no bargains struck among competing special interest groups. In 9 of 10, or 19 of 20 cases not a single individual appears to give testimony in opposition to legislation or to lobby for or wrangle a modification to suit their interest. A bar association committee or a single publicly-held corporation within the state lobbies for and massages the antitakeover statute through the 60 or 90 day annual or even biennial legislative session.[36]

This pattern repeats itself with Boeing Company in Washington State, Nike in Oregon, Greyhound in Arizona, Dayton Hudson Corp. in Minnesota, Aetna Insurance in Connecticut, Burlington Industries in North Carolina, Arvin Corp. in Indiana, and so on.[37] The legislative/special interest group model L&E scholars have concocted has so little connection with reality that its value as a predictive or analytical tool is nil.

What has happened is that corporate titans and lawyers have discovered that the cheapest source of takeover defensive protection is the state legislative process. Or, more accurately, the cheapest defense in terms of out-of-pocket cost is a state antitakeover statute. Assuming that a given amount of defensive protection costs a given amount, the question then becomes who bears those costs.

The best defense of all for managers might be to own all or most of the stock themselves. Yet that is the most expensive alternative for them. Less expensive but similar takeover protection can be obtained through the leveraged buyout (LBO) in which managers, possibly in partnership with a LBO firm, put up ten percent of the equity and borrow the remainder needed to purchase the stock. In absolute terms, however, the out-of-pocket costs for managers are still enormous. Other defensive measures, such as poison pills or dual class capitalizations, bestow a

36. My personal experience includes 15 years' service on a state bar association corporate law revision committee that has prepared legislative packages on a biennial basis. I have also had legislative involvement through membership on not-for-profit and limited partnership law revision committees. I have been personally involved with four proposed state antitakeover statutes, on two occasions testifying before a state senate committee and on one occasion conducting a teach-in on state antitakeover statutes for a joint special session of the Washington State Senate and House of Representatives.

37. Professor Roberta Romano, in *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111 (1987), describes and documents this model of statutory adoption at the behest of one dominant firm within a state.

given amount of protection for a set cost. It is unclear who bears that cost.

In terms of the lowest out-of-pocket costs for a given amount of takeover protection, however, nothing can compare to a state antitakeover statute. All a corporation need do is wrap itself in the state flag, hire one of the state's large, prestigious law firms and, in the case of a Boeing, fly to Olympia, or with a Nike, run to Salem. With the protection of an antitakeover statute, a great amount of protection is obtained for very little out-of-pocket cost. Who bears the rest of that given cost for a given amount of takeover protection? Shareholders and our national economy do. On corporate managers, part, it is self-dealing on a grand scale.

Judge Easterbrook is thus totally amiss in positing that:

> [c]ompetition among the states in the long run will cause corporations to migrate to states with optimum corporate governance rules. Competition will 'grind under' bad state decisions. Court intervention will disturb that competitive process . . . . Competition among the states is the optimum process for revealing the best equilibrium.[38]

In the area of state antitakeover legislation we truly have Mr. Justice Brandeis's "race not of diligence but of laxity"[39] and Bill Cary's "Race to the Bottom."[40] For L&E scholars to be advocates of state antitakeover legislation or of the state legislative processes that produce it doubly underscores the apologist flavor of law and economics in the corporate law arena. From this point to a corporate law liberal's skepticism of much of the law and economics teaching in the corporate field needs no explanation.

VI. CONCLUSION

This diatribe is aimed at party-line law and economics attitudes and output in the corporate law area. Its criticisms do not apply with full force to Professor Honabach and Dennis's piece, although their article does provide starting points and illustrative material for many of the points made here.

One other area of disagreement I have with my colleagues Honabach and Dennis is their explanation of why Judges Posner and Easterbrook do not give full rein to law and economics views in the Seventh Circuit opinions they authored. The judges are constrained by "circuit politics." The judges are limited by the dictates of state law. A

38. Honabach & Dennis, *supra* note 4, at 740 (footnote omitted).

39. Liggett Co. v. Lee, 288 U.S. 517, 550 (1933) (Brandeis, J., dissenting).

40. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974).

possible explanation comes from the opposite direction. Perhaps the judges are learning what it is to be judges and how weighty is the mandate to do equity and substantial justice in the individual cases that come before them.