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JOBS AND JUSTICE: RETHINKING THE STAKEHOLDER DEBATE†

There can be no doubt that our property laws do confer sovereign power on our captains of industry and even more so on our captains of finance ...

[T]he recognition of private property as a form of sovereignty is not an argument against it. Some form of government we must always have ... While, however, government is a necessity, not all forms of it are of equal value. At any rate it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government.[1]

– Morris R. Cohen

Our interest in property is effectively an interest in the political and economic structure of society.[2]

– Jeremy Waldron

I *What are the stakes for workers?*

A. GETTING AND KEEPING GOOD JOBS

On 25 February 1992, General Motors announced that it plans, over the next several years, to lay off permanently approximately 74,000 workers.[3] Many other companies have similarly laid off large numbers of workers in recent years.[4] These mass lay-offs reflect both changes inside the US economy and the changing position of the United States in the world economy. At least in the short run, the economy appears not to be generating comparable jobs for many of these displaced workers. Some of these workers will not find new jobs at all; others will find only unskilled

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1 Morris R. Cohen 'Property and Sovereignty' (1927) 13 *Cornell LQ* 8, 29, 14

2 Jeremy Waldron *The Right to Private Property* (1988) 328

3 Doron P. Levin 'The G.M. Cutbacks: G.M. Picks 12 Plants To Be Shut As It Reports a Record U.S. Loss' *New York Times* 25 February 1992

4 Mike Meyers 'Who got us in this fix? The fault is not in our stars but in our managers that so many are bankrupt' *Star Tribune* 5 March 1992 (estimating that 150,000 businesses went under in both 1990 and 1991, roughly 50 per cent more than the national average for the 1980s)

jobs in the service sector, which will pay wages much lower than the jobs they lost.[5]

About two months after General Motors' announcement, the United Auto Workers, traditionally one of the strongest unions in the United States, virtually capitulated from its strike of the Caterpillar company after management threatened simply to replace all the workers.[6] Negotiations continued, but it was clear that the workers had very little in the way of bargaining power, given the legality of hiring replacement workers during a strike, the low percentage of US workers who are union members, the availability of a reserve army of the unemployed, the relatively low wages in the service sector, the increasing mobility of capital, and increasing international competition.[7]

A couple of weeks after the Caterpillar strike ended, on 29 April 1992, the jurors in the trial of the Los Angeles police officers who beat Rodney King announced their astonishing verdict, acquitting the officers on all charges except one count of excessive force against Officer Lawrence Powell, on which they were unable to reach a decision.[8] The riots that erupted afterwards reflected anger over the inability of the legal system to accord justice to African-American citizens. But they also grew out of the despair faced by communities that have been ravaged by the inability of the economy to provide good jobs at good wages and by a government that has refused to acknowledge, much less deal with, this problem.

In the midst of all this, the US Census Bureau released a study that found 18 per cent of all workers in 1990 were earning incomes so low that they would leave a family of four below the poverty line, despite working full time.[9] The figures for African-American and Hispanic-American workers were especially bad. One out of every four black workers and one out of every three Hispanic workers fit into this category.[10] The study further concluded that, in 1989, 45.3 per cent – *almost half* – of all African-American men aged 25 to 34 were either unemployed or earned incomes insufficient to raise a family of four above

5 See Barry Bluestone 'Deindustrialization and Unemployment in America' in P. Staudohar and H. Brown (eds) *Deindustrialization and Plant Closure* (1987) 3; Barry Bluestone and Bennett Harrison *The Deindustrialization of America: Plant Closings, Community Abandonment, and the Dismantling of Basic Industry* (1982).

6 Kenneth C. Crowe, 'Strikes Are a Dud in Union Arsenal' *Newsday* 3 May 1992 at 78

7 James B. Atleson 'Reflections on Labor, Power, and Society' (1985) 44 *Maryland LR* 841

8 'L.A. Policemen Acquitted on Brutality Charges' *Reuters* 29 April 1992

9 Peter G. Gosselin 'Poverty traps more workers, study says; census cites change in '80s' *Boston Globe* 12 May 1992

10 Ibid.

the poverty line.[11] The study concluded that most full-time workers who received low wages managed to stay above the poverty line *only* by sending more household members out to work.[12]

The US economy is increasingly unable to provide secure, well-paying jobs for everyone who wants to work. Vast numbers of workers apparently now face perpetual uncertainty about whether they will have a job when they show up at work tomorrow. Moreover, millions of people are condemned to scavenge along the margins of the economy in low-paying jobs that are insufficient to lift them out of poverty. Millions more are shut out of the economy entirely.

Partly in response to mass lay-offs of the sort recently announced by General Motors, many states in the United States have passed stakeholder statutes that allow – and in one case, require – boards of directors of corporations to consider the interests of nonshareholder constituencies, including workers, in formulating corporate policy.[13] These statutes raise a host of issues about what they were intended to accomplish, how to interpret them, what their effects are likely to be under alternative possible interpretations, and whether they wrongfully redistribute property rights from shareholders to other groups. In this essay, I will focus on two questions relevant to the broad philosophical underpinnings of the statutes.

First, what is the social problem stakeholder statutes were passed to alleviate, and was any remedial legislation necessary? In other words, what was the question to which stakeholder laws were supposed to be the answer, and did this question require an answer at all? Stakeholder statutes were probably adopted at the behest of managers hoping to protect their control of corporations.[13a] At the same time, these statutes were politically attractive because they did not appear to be merely special interest legislation. Rather, they seemed to legislators to do something to combat the problem of massive job loss associated both with takeovers and plant closings generally, and did so in a way that did not involve raising taxes.

Some scholars argue that job stability is not a social problem about which we should be concerned as a matter of social justice. They further

11 Ibid.

12 Peter G. Gosselin 'Sensitive issues reportedly kept poverty study quiet for months' *Boston Globe* 13 May 1992

13 Symposium 'Corporate Malaise – Stakeholder Statutes: Cause or Cure?' (1991) 21 *Stetson LR* 1

13a Charles Hansen 'Other Constituency Statutes: A Search for Perspective' (1991) 46 *Business Lawyer* 1355, 1356

argue that, even if it is a problem, 'government intervention' in the market is inevitably destined to make things worse rather than better for the existing and potential workers who are the intended beneficiaries of government action; regulation necessarily winds up hurting its intended beneficiaries by depriving them of choices and forcing them to accept arrangements they would not have voluntarily adopted. I will argue, instead, that job creation and job security are crucial issues of both justice and liberty, and that the issue of who controls corporations implicates the values underlying democratic government. I will further argue that governmental regulation of corporate governance is unavoidable and is not inevitably destined to make workers worse off in their own terms. Rather, regulation of worker/management relationships often makes workers better off in their own terms and helps them to get what they want out of the employment relationship.

Second, if something can and should be done to respond to the problems of job creation and stability, are stakeholder statutes the answer? Are they part of the answer? Or are they likely to be counterproductive? If, as I conclude, stakeholder statutes as currently enacted are not likely to remedy these problems, what perspective should we adopt in formulating social policy in this area? This is an incredibly complicated question. To answer it adequately would require developing a detailed analysis of the changing US and world economies, the role of existing laws and institutions in shaping those economic systems, the effects of specific changes in those laws and institutions, and current political realities that determine the scope of remedies which have some chance of being legislatively or judicially adopted.[14] Rather than answer this question fully, I will suggest the outlines of a pragmatic approach to protecting legitimate worker interests in times of economic change.

II *Proprietary liberty and distributive justice*

In a capitalist order, one person's proprietary value (or power) is obviously relative to other people's. A constitutional system of proprietary liberty is, therefore, incomplete without attending to the configurations of the values of

14 For examples of such analyses, see Michael L. Dertouzos, Richard K. Lester, Robert M. Solow *Made in America: Regaining the Productive Edge* (1989); David T. Ellwood *Poor Support: Poverty in the American Family* (1988); Bennett Harrison and Barry Bluestone *The Great U-Turn: Corporate Restructuring and the Polarizing of America* (1988); Robert Kuttner 'An Economics for Democrats' (Winter 1992) *The American Prospect* 25; Robert Kuttner *The End of Laissez-Faire: National Purpose and the Global Economy after the Cold War* (1991); Robert B. Reich *The Next American Frontier: A Provocative Program for Economic Renewal* (1983) 235–39.

various people's proprietary liberties. The question of distribution is endemic in the very idea of a constitutional scheme of proprietary liberty.[15]

– Frank I. Michelman

If I say that the General Justifying Aim of the institution of private property is to foster the development of individual liberty, then unless I am treating liberty merely as a social goal ..., I am committed immediately to a particular approach to distribution. Since I evince a concern that liberty should be regarded as important in the case of each individual, and since I want to argue that the possession of private property is necessary for the development of liberty, I cannot then go on to say that the distribution of property is something to be determined on quite separate grounds which have nothing to do with this General Justifying Aim. To put this another way: in the right-based tradition at least, the justification of an institution like private property just is a matter of showing the importance of a certain distribution of goods, liberties, and opportunities for individuals.[16]

– Jeremy Waldron

A. IS THERE A PROBLEM?

Should anything be done about job security or job creation? Do recent mass lay-offs and unemployment represent a failure of either the market or government policy? Or, on the contrary, do they represent a success, demonstrating the flexibility and efficiency of market systems? On the one hand, these seem to be empirical questions. They require an assessment about whether recent lay-offs represent overdue reforms in corporate structure that combat waste and inefficiency or whether they represent bad management and promote waste of human capital. They further require an assessment about how well the market actually responds to mass lay-offs, including how fast the transition to new jobs and industries occurs, how easy it is for workers to move to other parts of the country where employment is expanding. On the other hand, it is clear that scholars with differing ideological views assess exactly the same data differently. They do not only differ in their predictions about what is likely to happen; rather, scholars with different political ideologies clearly tend to differ in their evaluative reactions to the same set of facts. If this is the case, it means that judgments about what *ought* to be affect assessments about what *is*. Although there is clearly no one-to-one correspondence between one's views about how society should be organized and one's views about how well the economy is working, there is a significant

15 Frank Michelman 'Liberties, Fair Values, and Constitutional Method' (1992) 59 *U. Chi. LR* 91, 99

16 Waldron, supra note 2, 332

relationship between one's political views and one's conclusions about whether a particular set of facts should be viewed with alarm or equanimity.

Some scholars argue that mass lay-offs are not a problem about which we should be very concerned. They contend that nothing needs to be done; the market will take care of it. The best mechanism for creating jobs and providing appropriate levels of job security is to leave all this to the private ordering processes of the market. New investments will arise and workers will adjust by seeking and obtaining jobs elsewhere. Moreover, workers can protect themselves from lay-offs by contracting for a range of benefits; they can trade off current income for employment security, or not, as they wish. Either way, they will get exactly what they bargained for and are not entitled to more than that. Government regulation of employment relationships will only deprive workers of bargains that maximize their welfare while discouraging new investment.[17] This argument is partly an empirical assessment that the observable costs of economic transition are either unavoidable or easily surmounted by individual effort and that government intervention can only make things worse, and partly an elaboration of the value judgment that society as a whole bears no moral responsibility for the fate of those who are the victims of economic change.

Other scholars, myself among them, have voiced alarm at the enormous personal and social costs of economic transition. On the empirical side, we have argued that mass lay-offs cause substantial negative externalities that are not internalized by corporations and that cannot easily be remedied by the ordinary workings of the market system. We have raised questions about whether the rules in force might profitably be altered to give corporations greater incentives to minimize the costs of economic change. On the value side, we have argued that one goal of the legal system should be to encourage desirable economic change without unnecessary social misery. We have also argued that workers have legitimate interests in relying on a long-term relationship with their employer that may entitle them to greater legal protection

17 William J. Carney 'Does Defining Constituencies Matter' (1990) 59 *Cin. LR* 385, 405 (arguing that the employment market 'seems to give most employees the combination of compensation and working conditions they prefer, given the budget constraints they face'); Jonathan R. Macey 'Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes' (1989) *Duke LJ* 173, 174 (arguing that with 'respect to the external effects of fundamental corporate changes ... the private contracting process, though not perfect, generates outcomes superior to the outcomes generated by government regulation')

than is accorded within the four corners of their employment contracts.[18]

Different scholars have therefore drawn opposite conclusions about the need for a governmental response to mass lay-offs and the increasing dearth of well-paying jobs for persons at the bottom of the economic ladder. The question is whether both job creation and job security are problems for which the legal system bears some responsibility and about which we should be concerned as a matter of social justice and individual liberty. The fact that we cannot even agree about whether these are serious problems means to me that we disagree both about the values we want a decentralized market system to exhibit and about whether the market institutions currently supported by the legal system adequately embody those values. If this is true, we face not merely a technical question about how best to implement economic change but a substantive question of justice. To address this question means that we must consider the form of social life we support and to which we are committed as a matter of principle. To analyse this disagreement, we cannot simply ask whether people are getting what they want given the alternatives open to them and the constraints under which they are operating. At issue is the justice or injustice of the constraints themselves.

B. MARKET VALUES AND THE SYSTEMIC LEGAL RULES THAT CONSTITUTE MARKETS

What does it mean to create a well-working market system? What values underlie democratic market systems, and how are those values institutionalized in legal rules that define the contours of the social relationships that comprise markets? To answer these questions, it may be easier to start by asking what would *not* constitute a well-functioning market system. Consider the recent transition to private property in Eastern Europe. What paths of development would fall totally outside the scope of what most people mean when they think of a well-functioning market? Examples that come to mind include slavery, apartheid, feudalism, and state communism. Slave systems treat particular groups of people as property rather than as free, self-directing persons. They therefore both exclude those persons from participation in economic life on an equal basis with others and grant some individuals inordinate and illegitimate

18 Joseph William Singer 'The Reliance Interest in Property' (1988) 40 *Stan. LR* 611. See also John C. Coffee Jr 'Unstable Coalitions: Corporate Governance as a Multi-Player Game' (1990) 78 *Georgetown LJ* 1495, 1521–8 (arguing that failures in the contracting process have induced employees to seek ways to participate in decisions about corporate structure and ownership).

power over other individuals. They deny basic humanity. Apartheid systems and many slave systems establish a racial caste system. They create status distinctions among persons, defining separate markets and social relations based on race. In so doing, they similarly deny the equal humanity of all persons. In economic terms, it is possible, on the one hand, to understand them as inhibiting legitimate, voluntary transactions between individuals, wrongfully preventing the free flow of resources. On the other hand, if some individuals do not *want* to contract with persons of other races, apartheid systems protect those choices. In contrast, a free market system regulates individual relationships to *require* market participants to contract without regard to race or status. Feudal systems similarly establish social hierarchies that tie legal rights to unequal status positions ascribed by heredity; people may be legally bound to particular parcels of land and subject to the arbitrary control of an overlord. Eastern European-style state communism centralized control of economic life in state bureaucracies.

Consider now the distribution of property that characterizes a well-functioning market system. Suppose the government in an Eastern European country with a population of ten million people attempted to make the transition from state ownership and control to capitalism by transferring ownership of all state enterprises and all land to fifty families. Would we be satisfied that this new arrangement adequately embodied the ideals of a free market system? I think we would not, and for obvious reasons. When we talk about market systems, we imagine widespread ownership of property and dispersal of access to valued resources. Undue concentration of ownership or control of resources allows power to be wrongly concentrated in a manner that immunizes power holders from accountability. Too much concentration of ownership would concentrate market power in a way that might enable those owners to exact unjust agreements from non-owners. This would be true even if there were competition among the original fifty owners. The result has the potential to make the system come perilously close to feudalism.

Another instructive example is the company town. While part of a larger market and political system, the company town unites local political and economic power in a manner reminiscent of feudalism. It extends the market beyond its appropriate sphere in social life, depriving citizens of the ability to elect their local political leaders democratically.[19] In addition, completely separate from the question of whether a private, profit-maximizing entity has wrongfully displaced democratic control of government, it is apparent that one defect of the company town is the

19 See Michael Walzer *Spheres of Justice* (1983) 291–303.

lack of local competition in the marketplace. Company towns were not organized in a manner that granted ownership rights to worker/residents. Rather, they were characterized by a small number of owners or shareholders who were not generally worker/residents. This ownership system concentrates power in a manner that is contrary to a well-functioning market system. A single corporate owner of all property in a locality does not constitute a private property system; on the contrary, in many ways, it is the opposite of a private property system. By reserving ownership of all productive resources to a single entity owned by outsiders, and by tying workers to the company town by means of debt, the company town completely displaces the market. In the place of the market is a centralized power structure whose authority is backed up by the coercive force of law.

These examples demonstrate that well-functioning market systems are expected to disperse power, to place certain kinds of decisions under democratic control, and to ensure a widespread distribution of access to valued resources. When we consider these non-market or imperfect market systems, it becomes apparent that the among the central ideals of a democratic market system are equal political status, democratic control of powerful institutions, universal access to the market, a widespread dispersal of ownership of property, decentralization of economic decision-making, efficiency in allocation of resources, and social relationships that minimize the exercise of illegitimate coercion.

These multiple goals underlying markets often conflict with each other. For example, the goal of decentralization may conflict with the goal of universal access. Without government policies in place to ensure full employment, the normal operation of the market system, in conjunction with international competition, bad management, and lack of effective competition at home, may lead to massive unemployment and underemployment, thereby excluding significant portions of the population from the marketplace. Similarly, the *initial* distribution of both human capital and investment capital must be relatively widespread, both to allow universal participation and to attain the goal of decentralizing both economic and political power. However, the normal functioning of the market over time may result in the *reconcentration* of ownership and power at the local or national or even international level. To combat this inevitable problem, (1) power must be lodged in multiple institutions and (2) property entitlements must be *redefined* over time as power becomes illegitimately concentrated. Both of these steps are necessary to preserve the market system from destroying itself. Thus, some amount of centralized control of legal entitlements, subjecting them to redefinition when ownership or power becomes too concentrated, is necessary both to preserve the widespread access to the entitlements necessary for

universal access to the economic system and the decentralization of economic power.

The goal of decentralization may conflict with the goal of regulating the contours of social relationships. Centralized control of entitlements may be necessary to ensure that market relationships do not degenerate into relations characterized by coercion or exploitation, dangers that are endemic to market systems. For example, centralized government may need to intervene to force businesses to provide safe workplaces for their employees. Local decision-makers may also select criteria for hiring that have a disparate impact on groups differentiated by such factors as disability, race, religion, sexual orientation, and sex. Regulation to prevent illegitimate hierarchies is necessary to prevent the establishment of a racial caste system.

The goal of decentralization may conflict with the goal of democratization. Companies may choose forms of management that are overly hierarchical, interfering with both efficient production and participation rights. Particular companies may also come to dominate particular localities. When this happens, decisions by companies to close major plants may devastate the economy of an entire region. Unelected 'officials' of the corporation may therefore be exerting power over all the citizens and residents of a particular area, including those who are not 'members' of the organization. The market may very well not adjust in a way that rejuvenates the economy of the region. When this occurs, democratic values have been sacrificed by a system that effectively delegates decision making power to 'private' market actors. Controlling private economic decisions to prevent the illegitimate use and concentration of both economic and political power requires tempering market power with political power through laws that help to channel market investments in ways that serve the general welfare.

Achieving these multiple goals requires a legal structure that adjudicates conflicts among them and strives to (1) allocate entitlements to ensure a relatively widespread dispersal of access to property; (2) promote decentralization of economic decision-making and prevent the illegitimate reconcentration of both ownership and other forms of power over time; (3) shape the outer contours of the social relationships that comprise the market system to limit illegitimate coercion and to prevent the recreation of illegitimate social hierarchies; and (4) create democratic control of powerful institutions.[19a]

19a See Duncan Kennedy 'The Role of Law in Economic Thought: Three Essays on the Fetishism of Commodities' (1985) 34 *Am. U. LR* and Duncan Kennedy 'The Stakes

These principles entail difficult value judgments. Because they may push in different directions in particular contexts, it is necessary to create legal rules that can concretize these principles in the form of actual social institutions and can adjudicate conflicts among them. These judgments are institutionalized through the myriad legal rules governing the market structure. These rules include, but are not limited to, property, contract, corporate, and labour law. A significant number of legal rules in these areas serve the *systemic* function of creating and preserving the conditions under which the social relationships that comprise a decentralized market system can flourish. It may be helpful to see how this works in practice.

1. Widespread dispersal of ownership and decentralization of power

Because the goal of decentralizing power cannot be achieved if ownership is unduly concentrated, well-functioning markets entail legal rules to fulfil the systemic function of ensuring continued widespread dispersal of access to property. The opposite of a market system is a system characterized either by centralized power structures (dictatorship, centralized bureaucratic state communism, company town) or by fixed social hierarchies (feudalism, apartheid). One of the goals of a democratic market system is therefore to achieve *decentralization*, with power shifted downward so that individual persons have a fair amount of freedom in deciding how to participate in economic life and a fair amount of ability to participate in controlling both the human and capital assets that are the conditions of such participation and the political institutions that police the social relationships that comprise the market.

A variety of legal rules serve the systemic function of preventing property owners from acquiring too much power over time such that they are able to prevent other persons from participating on equal terms in the market system. For example, nuisance law prevents property owners from exercising their property rights in ways that interfere substantially with the use and enjoyment of neighbouring property. Similarly, antitrust law prevents some market actors from amassing too much market power in order to preserve the rights of other people to enter the market on equal terms. The rule against perpetuities and the various rules prohibiting unreasonable restraints on alienation ensure that property is available for use by current possessors for current needs, rather than controlled by restrictions and encumbrances placed on that property long ago.

of Law, or Hale and Foucault' (1991) 15 *Leg. Studies Forum* 327 (both explaining the relation between law and the economy).

Many observers of market systems have a particular image of what decentralization means. They follow John Locke in imagining a wilderness to which settlers move and stake their claims. Decentralization is achieved by protecting first occupancy and allocating the fruits of labour to those who work the land. It is also achieved by allowing individual owners to contract with others to rent land and to offer both human services and investment capital. Decentralization comes about by strict enforcement of original title and by deference to, and enforcement of, contractual arrangements arrived at voluntarily by collaborative ventures between free economic actors. This image combines a particular picture of private property and free contract as the engine of decentralization. Its crucial elements are (1) identifying which person has *title* to property and deferring to that person's decisions about how the resources should be used; and (2) enabling individuals to *freely contract* with others by creating property rights in expectations through enforcement of voluntary promises. In this social vision, property rights are consolidated in particular persons and the crucial question is who the owner is, or who has title. Free contract is conceptualized as deference to (and enforcement of) whatever arrangements these owners come to among themselves.

I want to argue that this image is fundamentally defective. First, it is not the case that property rights in the United States have their origin in individual settlement in the wilderness; rather, they originate in the dispossession of the original inhabitants of the land by force and the redistribution of land under a wide variety of principles designed to achieve a complex of public policies.[20] Title to property does not emerge only from individual effort and desert. Rather, it is assigned by governmental power and in accord with public policy. Second, in place of the central image of *title*, with its connotation of consolidated powers and fixed rights, I want to substitute the conception of *relationship* as the central image for understanding what property rights mean.[20a] A paradigm case of this conception is nuisance doctrine. Under nuisance law, rights to use property are not fixed for all time; rather, they vary depending on their *effect* on other persons. Those effects change over

20 See Francis Paul Prucha *The Great Father* (1984); Robert A. Williams Jr *The American Indian in Western Legal Thought: Discourses of Conquest* (1990). See also Joseph William Singer 'Re-Reading Property' (1992) 26 *N. Eng. LR* 711; Joseph William Singer 'Sovereignty and Property' (1991) 86 *Nw. U. LR* 1.

20a See, e.g., Carol C. Gould *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (1988); Jennifer Nedelsky 'Law, Boundaries, and the Bounded Self' (1990) 30 *Representations* 162.

time as the neighbourhood changes. Although one may have a legal right to operate a factory in a particular location, that right may be taken away by either nuisance or zoning law if a residential neighbourhood grows up around the factory. Legal rights – including property rights – are limited to protect the legitimate interests of others. The end result is that the definition and allocation of property rights themselves must be both *dynamic* and *contextual*.

This understanding of property helps us to see that well-functioning market systems achieve decentralization, not only by assigning ownership and allowing free enterprise and voluntary contract, but by limiting the power of market participants in a way that disaggregates property rights and defines their nature and extent by reference to the social context within which they operate and the effects their exercise has on others.

Achieving the goals of dispersal of property and decentralization of power similarly requires legal rules governing private property to be both dynamic and contextual. Property rights must be redefined over time to prevent property owners from exercising their property rights in ways that arrogate to themselves too much power over other people. Power can result from illegitimate uses of property that impinge on the interests of other persons or from the illegitimate concentration of ownership in particular markets. Both the definition and the distribution of property rights must therefore change over time as relationships and the social context changes. Operation of a lawful business may become unlawful if it becomes a monopoly or constitutes a nuisance to other property owners. Both the terms of contracts and the powers that go along with ownership must be regulated by law to ensure that the goal of a decentralized system open to all persons is preserved over time.

This is the answer to Nozick's famous Wilt Chamberlain example.[21] Nozick argued that the voluntary transactions of the thousands of individuals who pay to see Chamberlain play justify the concentration of property in the hands of Chamberlain and prevent outside interference with his use of the property justly acquired. The reason it may be legitimate to limit the amount of property Wilt Chamberlain owns or to limit his powers over the property he owns is that the failure to so regulate his ownership rights may have the effect of giving him too much power over other people. That concentration of power changes the context within which others find themselves in a way that may prevent

21 Robert Nozick *Anarchy, State, and Utopia* (1974) 160–4

others from exercising the same rights that he exercised.[22] Property rights mean something different when the context changes; what, in one context, appears to be legitimate individual use of resources, appears, in another context, to be illegitimate control of other persons that prevents them from similarly developing their individual life plans.

Two conclusions follow from this analysis: (a) property rights will differ depending on the *context* within which they are exercised and the *effects* they have on other market actors; and (b) they must be *redefined over time* to prevent the illegitimate concentration or use of power in ways that prevent individuals from participating in the market system on equal terms.

2. *Universal access and equal status: Shaping the contours of social relationships*

A second systemic function of legal rules governing property is defining the contours of the social relationships that comprise the market. Market systems must be open to all persons. Disabilities cannot be recognized on the basis of race, sex or other arbitrary characteristics, or group memberships. Market systems exclude formal, coercively imposed, social hierarchies based either on racial caste, family membership, or other illegitimate criteria. They exclude unequal statuses coercively imposed by state or federal laws, such as the Jim Crow laws in the United States, which imposed forced racial segregation. However, they also exclude legal rules that tolerate or enforce *private* acts of discrimination that have the effect of systematically disadvantaging particular groups of people. Thus, they exclude both enforcement of racially restrictive covenants and the liberty to discriminate in the housing, real estate, and employment markets and in public accommodations. To achieve the goal of preventing illegitimate social hierarchies from being coercively imposed by either public or private actors requires the existence of legal rules and institutions that regulate the contours of social relationships to prevent coercive creation of a caste system. Racially restrictive covenants in real estate deeds are unenforceable to prevent the emergence of a particular form of social life inimical to a free market, that is, apartheid.

Similarly, a warranty of habitability is implied into all residential real estate leases in order to ensure that landlords comply with minimum

22 Waldron makes an argument similar to this, based on the distinction between special and general rights to property. Protection of property rights acquired by individual action or exchange (special rights) cannot prevent other persons from similar participation in the economic system (general rights). Waldron, supra note 2, 423–45

standards. Owners are free to rent their property to others. However, once they open their property to the rental real estate market, they have no right to rent a place that fails to comply with minimal standards of decency, *even if that is what the tenant wants*. The objection to failing to provide heat to tenants is an objection to a particular form of social life, that is, slum tenements. What is wrong with this social relationship is that it wrongfully allows someone to earn a living by exploiting other people's misery.

Grantor consent clauses in deeds that reserve to the developer of a subdivision the right to approve all future sales of parcels are unenforceable under legal rules invalidating unreasonable restraints on alienation. Similarly, current legislation forces developers of condominiums to relinquish control of the condominium after a certain number of units have been sold. By contrast a variety of restraints on alienation, such as rights of first refusal, are enforceable when vested in condominium associations, although even here, the rules in force may limit the discretion of condominium associations to do what they please. What accounts for the difference?

Condominiums are viewed as legitimate means both to increase opportunities for ownership of real property by making it more affordable and to provide a certain amount of collective control over one's immediate environment. For these reasons, they are thought to increase both individual autonomy and democratic decision making – although the principle of individual autonomy and the principle of collective control inevitably conflict in particular cases. Nevertheless, grantor consent clauses in subdivisions and developer control of condominiums appear to concentrate too much power in the hands of a single entity that uses its property rights to exert continuing control over a geographic area, preventing power from devolving to the owners of individual parcels. This power is objectionable both because it may be used wrongfully to exclude minority groups and because it prevents individual owners from controlling 'their own' property. The normal operations of the market are unlikely to rectify either of these problems. Indeed, to the extent such power is used to exclude particular groups of persons in ways that cater to the prejudices or vested interests of current residents, the market is likely to exacerbate, rather than alleviate the problem of exclusion. To the extent that condominium developers are able to take advantage of imperfect information or market power to induce purchasers to sign long-term management contracts with those developers, they may be able to get and retain unwarranted economic control of the association, and this result will not be corrected by normal market processes.

The rules in force distinguish between forms of power that are legitimate exercises of individual autonomy and collective control and forms of power that constitute illegitimate concentrations of power in the hands of an initial developer or owner. Objection to continued control by developers amounts to objection to a particular way of life that comes too close to something like feudalism or the company town. Objection to exclusionary practices by condominium associations similarly represents an objection to a form of social life that tolerates and enforces illegitimate segregation, that is, apartheid.

3. Democratic control of powerful institutions

Modern market systems are also associated with a high level of democratic control over the political institutions that define the legal rules that will regulate the contours of social relationships. This helps to ensure that legal rules that limit freedom of action benefit a wide spectrum of the population and are therefore likely to be autonomy-enhancing, rather than merely restricting liberty. In addition, the rules in force ensure a minimum amount of participation in management of business corporations by those groups and individuals that have the greatest interests in corporate policy. Shareholders have the right to elect the board of directors under state corporate law. State corporate law prohibits insulating boards completely from shareholder voting control. Workers are granted limited rights to participate in corporate management through laws that protect the right to organize unions and that require companies to bargain in good faith with unions over certain specified subjects of bargaining.

At the same time, a growing number of scholars have argued that corporations are not sufficiently democratic. Managers are effectively insulated to a certain extent from control by shareholders through direct voting mechanisms or through market devices, such as the sale of stock, takeovers, or the market for managers. Fewer and fewer workers are in unions, and, as the recent Caterpillar strike demonstrates, workers appear to have less and less to say about corporate policy. Finally, corporations have been able to bargain with cities and towns for tax abatements; such practices may help create some investment and job creation, or they may simply determine which region or area gets the jobs that are created. Local tax abatements may also decrease funds needed for education of future workers, creating externalities that are not sufficiently internalized, and thus may generate perverse results. Corporations have the power to determine the future economic health of particular regions. Some see this as the beneficial decentralization of power from centralized government officials to decentralized market participants; others, however, see this as the centralization of power in

the hands of corporate bureaucrats and the loss of control of public policy by democratically elected officials. Both these descriptions are partially correct, and legal rules and institutions are necessary to shape the relationship between different forms of power and different kinds of decentralization, that is, free markets and democratic polities.

C. IS REGULATION INEVITABLY SELF-DEFEATING?

Market enthusiasts argue that government regulation is almost always counterproductive. Rather than helping its intended beneficiaries, regulation generally harms them by interfering in the ability of the 'free market' to work its magic by reallocating resources in an efficient manner. This is especially the case when regulations impose compulsory terms in contracts because those terms necessarily prevent the parties from reaching the deal they would have voluntarily adopted in the absence of the mandatory legislation. Requiring employers to give early notice of plant closings or to give workers greater severance benefits, for example, will simply force those employers to compensate by decreasing other benefits, such as wages. The result will be a trade-off of different benefits that is less appealing to workers than the package they would have voluntarily adopted if the government had left them alone to maximize their own welfare.[23]

This argument assumes that the original distribution of both investment and human capital is sufficiently equal and just to conclude that market participants are *able* to get what they are *willing* to pay for. If, as I believe, the existing distribution of economic benefits is not just, then the results of private contracting *may* reflect, not the voluntary arrangement that maximizes the joint interests of both parties, but the imposition of exploitative terms by the more powerful party on the more vulnerable party. The question is not whether the parties get what they are willing to pay for, but whether each party has sufficient bargaining power to obtain *just terms* from the contractual relationship. If they do not have such power, there is no reason to conclude that compulsory terms necessarily leave the parties worse off in their own terms. Rather than interfering with the preferences of private actors by limiting their contractual freedom, imposition of compulsory terms in contracts often respects the preferences of those benefited by the statute by *giving them what they want but do not have enough bargaining power to get in the private market.*

An objection to this argument is that, even if it is true that workers have insufficient bargaining power and therefore get inadequate compensation and benefits, they are still the best judges of what trade-

23 Macey, supra note 17

offs to make. Compulsory terms force employers to cut back on other benefits; this, in turn, forces employees to accept a different mix of benefits than those to which they would otherwise have agreed, thereby making them worse off in their own terms. But if it is true that compulsory terms necessarily hurt their intended beneficiaries, why do labour unions lobby for legislation that guarantees minimum terms in employment contracts? Is it sensible to argue that regulations override workers' preferences *when workers support and lobby for the legislation*?

One answer to this question is workers irrationally think compulsory terms legislation will give them something for nothing; they falsely believe that employers will not respond to minimum standards legislation by cutting back on other benefits. Market valuations are more rational than political valuations because they force actors to take into account the problem of scarce resources and to determine how much they are *willing to pay* for a particular entitlement. Political choices are inferior because they mask such considerations.

On the other hand, we might argue the opposite: political preferences are rational because they are based on considered judgments about justice and the contours of appropriate and supportable social arrangements. Market judgments, in contrast, are irrationally biased by the need to pay for each entitlement. Imagine, for example, that workers had no protection against being beaten on the job; they might very well agree to work without job security in order to obtain the right not to be beaten. The point is that there are some things that should simply not have to be bargained for, but that are owed to each person as a matter of common decency. To put it bluntly, slaves should not have to pay for their freedom. To ask whether slaves really value freedom by asking whether they are willing to buy it may result in an answer that they do not so value their freedom; this answer may result from their inability to afford to pay for their freedom. In contrast, a political choice is not wrongly influenced by such considerations.

Neither of these arguments is completely correct, but neither is completely wrong either. People behave differently and exhibit different preferences depending on the social role they are assuming. People may want different things depending on whether they are acting as *consumers* or acting as *citizens*.[24] Both political and market understandings of our interests have their place and are legitimate expressions of human life.

24 Cass Sunstein *After the Rights Revolution: Reconceiving the Regulatory State* (1990) 47–73; William H. Simon 'Contract versus Politics in Corporation Doctrine' in David Kairys *The Politics of Law* rev. ed. (1990); James Boyd White 'How Should We Talk About Corporations: The Languages of Economics and of Citizenship' (1985) 94 *Yale LJ* 1416

It is not the case that one kind of preference can be identified as real and the other as distorted; they are both real and they are both 'distorted' by the narrowness of the perspective within which they were developed. Neither way of thinking can be permanently treated as superior to the other for all purposes.

Regulations often help people get what they want by shaping of the contours of relationships that comprise the market system to achieve a form of social life that can be supported as just. We take for granted the social relationships that comprise the market system. As an extreme example, consider the institution of slavery. One might argue that a free market system that is determinedly anti-paternalistic and protective of individual liberty would not balk at enforcing slave contracts by which one individual freely and with full disclosure of the consequences agreed to become the slave of another. After all, who are we to interfere in such a private choice? But the truth of the matter is that we rarely hear such an argument proposed seriously. The question is: why not?

Consider also the problem of the deep pit filled with poisonous snakes into which a woman falls. A passerby sees her precarious situation. A ladder is nearby and the passerby offers to lower it into the pit if the woman will agree to sacrifice her first-born child. The woman agrees and is able to climb out of the pit. We do not enforce the contract: why not?

In a presidential election year, a poor woman agrees to sell her vote to the highest bidder so that she can better provide for her family. We do not enforce the contract: why not?

The answer to these questions is partly that the morally repugnant nature of the contract in each case causes us to reject the view that rational people would freely agree to such terms; we therefore can conclude that the contracts were coerced rather than voluntary. But I believe we would reach the same conclusion even if we thought that the agreements were voluntary. Slavery, human sacrifice, and the buying and selling of votes for political office are beyond the pale. Such human relationships are excluded from the vision of the market and democratic governance as they are conceived of by their supporters; protection against them is not something one should have to bargain for, but is owed to every human being.

It has been my purpose in this article to argue that the implications of this insight are of crucial significance. It applies not only to such wild hypotheticals as slavery, human sacrifice, and the sale of public offices, but to mundane examples as well. Employers have no right to discriminate on the basis of race, sex, or disability. Landlords have no right to throw tenants out on the street with no notice, even if those tenants wrongfully stopped paying rent. They must give notice, go to court, and

possibly give the tenants time to find a new place to live and move their belongings.

I want to argue that many of the legal rules that affect the market are of this type. There is substantial room for freedom to develop alternative forms of human relationship without having government dictate the terms of association. But there are also bounds to what is acceptable; this is why minimum standards legislation is necessary. Legal rules structure the contours of the relationships within which bargaining occurs. It is, in fact, impossible for such bargaining to occur without legal rules in place setting the ground rules or the baselines from which bargains are made. It is not enough to suggest that private ordering should answer this question; the problem is to identify the legal structure that will define the outer contours of these bargaining relationships. Legal rules shape the contours of the social relationships that comprise the form of social life to which we are committed. Those rules do not interfere with individual liberty; rather, they establish liberty by giving all persons a safe environment within which to live. Such rules do not paternalistically deprive individuals of autonomy; rather, by requiring everyone to treat fellow citizens with common decency, they assure each person the ability to exercise autonomy.

D. JOBS AS PRECONDITIONS TO PROPRIETARY LIBERTY, DISTRIBUTIVE JUSTICE, AND DEMOCRATIC GOVERNANCE

From the foregoing discussion, we can conclude that property rights in the market place can only be justified if (1) access to property is universally available and inequalities in the distribution of property are minimized to prevent the emergence of illegitimate power relationships (the principles of *proprietary liberty* and *distributive justice*); and (2) the exercise of property rights within the market is shaped in ways that reconcile those rights with the principles of *democratic governance*. Because employment is the entryway into the economic system, and because individuals cannot be excluded from the economic system without violating the principles of individual liberty on which it is founded, access to paid employment is a precondition for the just operation of a market system. If this is true, the failure to provide good jobs for everyone who wants to be part of the paid workforce constitutes a *structural* problem in the economy – a market failure of the most fundamental (and intractable) sort.[24a]

24a Dertouzos, supra note 14; Robert Kuttner 'An Economics for Democrats' (Winter 1992) *Amer. Prospect* 25; Kuttner *End of Laissez-Faire* supra note 14; Reich, supra note 14, 235–9. This market failure is disturbing on *both* distributive and efficiency

1. Access to employment

Workers are entitled to *universal access to well-paying employment.* An economic system that fails to ensure universal access to well-paying jobs is fundamentally unjust. Access to employment of some sort is a precondition for human flourishing in a modern economy; so is access to an adequate income. Some individuals are excluded from the economic system by the unavailability of jobs; others are excluded by being forced to engage in unpaid or underpaid labour. A political/economic system that functions systematically to exclude segments of the population from meaningful opportunities to participate in economic life through remunerative employment fails to treat its citizens with equal dignity and respect.[25]

For these reasons, government policies must ensure universal access to well-paying employment. This does not mean that government jobs should replace jobs in the market sector; nor does it mean that government policies should create such high levels of economic security that they reduce incentives to engage in risky, but socially desirable, productive activity. It does mean that the combination of legal rules, government policies, educational systems, market structures, and patterns of economic relationship and production must provide every person the opportunity to participate in the economic system. Jobs are the entryway into that system. Without the ability to obtain a well-paying job, individuals are excluded from the benefits of participating in the creation of social wealth and sharing in that wealth. This, in turn, deprives individuals of the ability to enjoy a full human life. Access to decent, well-paying employment is a precondition both for individual liberty and social justice.[26]

2. Job Security

Under current law, employers are entitled to renege on implicit contracts made with workers. For example, some employers have breached

grounds. I have focused in this article on the distributive justice component of the argument. However, the failure to fully utilize all workers not only exacerbates increasing inequalities in economic welfare but wastes valuable human resources by excluding many workers from productive labour.

25 Judith N. Shklar *American Citizenship: The Quest for Inclusion* (1991)

26 See Waldron, supra note 2; Michelman, supra note 15. Both Kantian and utilitarian analyses presume that no individual can be sacrificed for the good of the community. If this is true, the economic system must be organized so as to enable each person to participate in it. Without this structural component, there is simply no reason to conclude that the ordinary operations of the market constitute a legitimate system for organizing productive activity. The universal availability of jobs therefore constitutes a precondition *both* for social justice and for efficiency.

promises to provide health insurance by changing the benefits structure to cut off workers who get AIDS.[27] In addition, employers are entitled to treat their long-term workers like strangers, firing them in times of economic hardship to cut costs and effectively transferring to the public sector the costs of maintaining these displaced workers. Employers are entitled under federal law to refuse to negotiate with workers about plant closings, and have no obligations to communities that may be devastated by their business decisions. Mass lay-offs create substantial negative externalities, imposing costs on the workers' families, public services, and other businesses in the community. Because the costs of economic transition are partly borne by taxpayers, allowing employers to fire workers *en masse* without minimum levels of benefits subsidizes those employers.

There are good arguments of both justice and efficiency to give corporations greater incentives than they currently have to minimize the external costs of mass lay-offs and to protect the interests of workers who have relied on a long-term relationship with their employer, at least in the absence of other remedial legislation that can better accomplish these goals. In some cases, large corporations have moral obligations, which should be legally enforceable, to provide greater job security to workers than is currently provided, to help generate new jobs by shifting the business to another line of production and retraining current workers for those new positions, and to assist in finding alternative employment when jobs become obsolete. These moral obligations exist as a matter of social justice at least when government policy has failed to provide adequate protection of workers in times of economic transition. In some cases, these moral obligations may actually increase efficiency by inducing enterprises to minimize the social waste associated with discarding workers.

All workers are entitled to *appropriate levels of job security*. This does not mean that workers can never be fired or that companies can never be restructured in ways that reduce their workforce. However, it does mean that corporations owe obligations to long-term employees that may well go beyond the scope of bargained-for contractual obligations, especially when alternative methods of preserving individual interests in access to employment are missing. In addition, it means that employers should not have the legal right to fire workers without just cause. A hospital should not be allowed to fire a nurse without liability simply because she

27 Thomas B. Stoddard 'Now You're Insured, Now You're Not' *New York Times* 23 May 1992

honestly criticized the hospital's patient-care practices to a review board appointed by the hospitals' parent corporation.[27a] A private corporation should not be allowed to fire an employee without liability when he complains to his superiors that the company should stop dumping toxic waste in violation of federal law.[27b]

3. Transition policies: retraining and job placement

Policies must be in place to protect workers whose jobs are legitimately terminated through the process of economic change. As long as workers are granted minimum entitlements to job security compatible with their reliance interests in a continuing relationship with their employer, it matters little whether transition policies are implemented through direct government expenditures (such as unemployment benefits, public retraining programs, tax benefits to induce businesses to create new jobs, or public employment programs) or through privately bargained-for benefits provided by employers (such as severance payments, retraining or relocation assistance, opportunities for workers to buy outdated factories if they can be run profitably by the union). The goal is to have some combination of governmental and employer policies in place to ensure that workers are not permanently excluded from the employment market over time by the ordinary processes of economic change. Transition policies are necessary to ensure continued universal access to the market and to protect both individual dignity and social justice by ensuring that the costs of economic change are not unfairly borne by particular individuals or groups of individuals and families. The social costs of desirable economic change that benefits the public at large must be equitably shared; subgroups of people cannot justly be used by others for the purpose of creating social wealth that does not benefit those subgroups. Moreover, in the modern world, efficient maximization of social welfare requires both continuing investment in human capital and government policies designed to promote the creation of well-paying jobs. The absence of such policies not only creates problems of social justice, but fails to promote efficiency by responding to the failures of markets as currently structured.

4. Democratic governance

Workers are entitled to *participate in formulating corporate policy in a democratic manner*. Workers have legitimate interests in greater, and more

27a *Wright* v. *Shriners Hospital for Crippled Children* 589 NE.2d 1241 (Mass. 1992)
27b *Phung* v. *Waste Management, Inc.* 491 NE.2d 1114 (Ohio 1986)

democratic, participation in corporate decision-making than is allowed or encouraged under current labour and corporate law. A variety of forms of participation are consistent with broad democratic principles, including both collective bargaining and ownership or control interests in governing boards. Multiple venues for influence are probably preferable to a single institutional role.[28] However it is accomplished, greater participation on the part of workers in formulating corporate policy is essential to reconcile management of the economy with the political principles underlying democracy as a form of government.[29]

III *A pragmatic approach to protecting workers*

[T]he problem is not to choose between coercion and concensus. It is rather to invent the consensual or coercive solutions that go farther than do existing economic regimes toward freeing economic initiative from the constraints of administrative or proprietary privilege ...[30]

The basic legal principle of this alternative economic order is the disintegration of property: its breakup into distinct powers, vested in different agents ... [T]he proposed regime offers an institutional framework within which the principle of deliberate social control over the forms and consequences of economic accumulation can be more fully reconciled with decentralized economic decision making than it can be within a market order using consolidated property as its device of decentralization and occasional administrative regulation as its means of control.[31]

– Roberto Mangabeira Unger

A. ARE STAKEHOLDER STATUTES THE ANSWER?

Commentators disagree about whether stakeholder statutes represent radical changes in the law of ownership rights in corporations or whether

28 See, e.g., Michael C. Harper 'Reconciling Collective Bargaining with Employee Supervision of Management' (1988) 137 *U. Pa. LR* 1; Karl E. Klare 'Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform' (1989) 38 *Cath. U. LR* 1; Katherine Van Wezel Stone 'Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities' (1988) 55 *U. Chi. LR* 73.

29 Robert A. Dahl *A Preface to Economic Democracy* (1985); Roberto Mangabeira Unger *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy; Part I of Politics, a Work in Constructive Social Theory* (1987). See also Abram Chayes 'The Modern Corporation and the Rule of Law' in Edward Mason (ed.) *The Corporation in Modern Society* (1959) 25 (arguing that corporations are repositories of power); Morton J. Horwitz '*Santa Clara* Revisited: The Development of Corporate Theory' (1985–86) 88 *W. Va. LR* 173 (explaining the history of conceptions of the corporation).

30 Unger *False Necessity* supra note 29, 488

31 Ibid. 492

they merely codify pre-existing corporate law doctrine.[32] However this question is answered, stakeholder statutes have generated a debate about both their fairness and effectiveness. On one side are those who argue that constituencies other than shareholders have legitimate interests in corporate policy that are insufficiently protected under current law, and that remedial legal changes are needed to protect those interests.[32a] On the other side are those who argue that stakeholder statutes, as currently drafted, are likely to insulate managers from control by anyone.[32b] I want to argue that both sides in this debate are partially correct. For now, I want to assume the premises that workers have legitimate interests both in access to employment and in participation in democratic management of large enterprises. Given these premises, the question is whether stakeholder laws will, in any way, serve to promote these interests.

1. What stakeholder laws might do for workers

To better protect workers' interests, some scholars, including Marleen O'Connor, Lawrence Mitchell, and David Millon, have argued that stakeholder statutes should be interpreted to create enforceable obligations for nonshareholder constituency groups.[33] Although none of these laws provides an explicit private right of action, these advocates employ traditional methods of statutory interpretation to derive such rights.

32 Compare Steven M.H. Wallman 'The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties' (1991) 21 *Stetson LR* 163 (stakeholder laws codify pre-existing doctrine) with Nell Minow 'Shareholders, Stakeholders, and Boards of Directors' (1991) 21 *Stetson LR* 197 (stakeholder laws alter the traditional model of director responsibility to a single constituency of shareholders by allowing directors and managers to justify their actions by reference to the interests of multiple constituencies).

32a Morey W. McDaniel 'Stockholders and Stakeholders' (1991) 21 *Stetson LR* 121; Katherine Van Wezel Stone 'Employees as Stakeholders Under State Nonshareholder Constituency Statutes' (1991) 21 *Stetson LR* 45; Wallman, supra note 32

32b James J. Hanks Jr 'Playing With Fire: Nonshareholder Constituency Statutes in the 1990s' (1991) 21 *Stetson LR* 97; Jonathan R. Macey 'An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties' (1991) 21 *Stetson LR* 23; Minow, supra note 32

33 Marleen O'Connor 'Restructuring the Corporations' Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers (1991) 69 *NCLR* 1189; Lawrence E. Mitchell 'A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes (1992) 70 *Tex. LR* 579; and David Millon 'Redefining Corporate Law' (1991) 24 *Ind. LR* 223. See also Klare, supra note 29. Cf. Stephen M. Bainbridge 'Interpreting Nonshareholder Constituency Statutes' (1992) 19 *Pepperdine LR* 971 (arguing that stakeholder laws create no enforceable rights of action on the part of workers but do authorize managers to make trade-offs between shareholder and stakeholder interests, including the right to reduce shareholder gains for enhanced stakeholder welfare).

At first glance, the argument for finding implied private rights of action in statutes that merely grant directors *discretion* to consider the interests of workers appears far-fetched. After all, it is not the case that the statutes would do nothing if they were interpreted not to contain private rights of action; they would, at least, broaden the discretion of managers by widening the business judgment rule and narrow or modify the doctrines that impose duties of both care and loyalty on directors. However, on closer examination, it is evident that analysis of stakeholder statutes that finds an implied private right of action is plausible as a legal argument. I do not mean to argue that it would be easy to convince a judge to accept it; it would not be easy to so convince a judge. However, given a small number of plausible assumptions about legislative motivation, the argument can be made on the basis of conventional canons of statutory interpretation.

As an initial matter, these worker rights advocates accept the argument put forth by *shareholder* rights advocates such as Nell Minow and Robert Monks to the effect that, at least in the absence of any enforceable obligations or changes in voting rights, stakeholder laws are likely to do nothing more than entrench the power of corporate managers at the expense of the interests of *both* workers and shareholders. Without enforceable obligations, the effect of these statutes is simply to give directors a new defence to claims by shareholders that those managers have violated their duties of either care or loyalty to the corporation by ineffective management or by appropriation to themselves of corporate assets that rightfully belong to shareholders or to workers. Almost any corporate action can be justified as in the interests of some constituency group. These laws thereby give managers a long list of excuses for doing anything they like, even if it winds up harming the corporation, as long as they can make a plausible argument that their actions are intended to benefit some constituency group.[34] Since the market for corporate control, corporate managers, and products are unlikely to provide sufficient safeguards against managerial discretion, the result may be to entrench management and remove it from the control of anyone. In the absence of significant additional remedial changes in corporate law, stakeholder statutes may enable corporate managers to have carte blanche to further their own interests at the expense of both shareholders and workers. So interpreted, these statutes are counterproductive; rather than constraining managers or giving them an incentive to protect the interests of

34 Robert A.G. Monks and Nell Minow *Power and Accountability* (1991); Nell Minow, supra note 32

nonshareholder constituencies, these laws would grant managers uncontrolled discretion.

The second step in the argument is to suggest that the purpose of stakeholder laws was to protect the interests of workers and other nonshareholder constituencies by obligating corporate directors to maximize shareholder gain in a way that minimizes costs to non-shareholder constituencies. This, worker rights advocates argue, is the reason legislatures passed them.[35] However, in the absence of enforceable duties, directors and managers will not only be immune from accountability to shareholders, but will have no incentive to further the interests of workers. Because stakeholder laws do not change the fact that the power to elect directors is allocated solely to shareholders, they give directors no reason to promote the interests of workers. They are therefore totally ineffective at achieving their intended purpose.

The final step in the argument is to appeal to the notion of legislative intent. Stakeholder laws *might* have been intended merely to grant directors and managers greater discretion to consider the interests of workers. However, this interpretation is plausible *only* if one believes that it is likely to be the case that managers are generally motivated by a sincere interest in protecting worker and community interests. It is at least arguable that this assumption is highly implausible. If it is implausible, then worker rights advocates are correct to argue that stakeholder laws would have *no significance* in the absence of enforceable private rights of action, other than granting uncontrolled discretion to managers – a goal that cannot plausibly be accepted as a legitimate legislative purpose that legislators would willingly use to justify publicly their support for the statute. Given that stakeholder laws will prove either totally ineffective or counterproductive if they are interpreted simply to give managers carte blanche in running the corporation, the worker rights advocates conclude that courts should interpret stakeholder laws to contain implied private rights of action on the part of their intended beneficiaries. They should do so in order to effectuate the legitimate legislative purposes that these statutes were intended to serve.[36]

35 I agree with this formulation of the goal for corporate management policy. Moreover, although they strongly oppose stakeholder laws, proponents of shareholder rights like Nell Minow similarly argue that such a principle is likely to be in the long-term best interests of shareholders, as well as non-shareholder constituencies. Nell Minow, supra note 32, 218–9 ('Directors who fail to consider the interests of customers, employees, suppliers, and the community fail in their duty to shareholders; a company that neglects those interests will surely decline.')

36 This interpretation can be further supported by appealing to several traditional canons of statutory interpretation, including: (1) statutes should not be interpreted in a way

If courts were to accept this line of argument and imply private rights of action into stakeholder laws, workers would directly benefit in two different ways.[37] First, it would substantially increase the bargaining power of workers by enabling them to force management to consider seriously any worker proposals for corporate policy that could plausibly be interpreted as alternative paths for corporate development, which could maximize shareholder profits while preserving employment. The ability to threaten litigation on this issue would strengthen labour's hand in negotiations.

Second, it would encourage courts to consider seriously worker arguments to create specific compulsory terms in employment contracts for protecting legitimate worker interests that could be shown either to inhere in the contractual relationship between those workers and the corporation or that could not reasonably be understood to harm legitimate shareholder interests. The precise content of these implied contract terms could be worked out over time in the course of litigation. There is substantial evidence that managers sometimes oppose worker rights that in themselves pose no significant threat to managerial discretion or corporate profits but are highly valued by workers. A prime example is legislation requiring prior notification of plant closings. The available evidence is that such legislation has not harmed business interests in any way while it has proved useful in minimizing the costs of worker dislocation. Some business interests opposed such legislation because they irrationally feared that it would harm corporations and because they feared that passage of any kind of plant closing legislation would open the door to further regulation. This legislation can be justified as efficiency-promoting because it corrects a market failure based

that deprives them of any significance or as merely precatory or surplusage; (2) statutes should not be interpreted so as to create absurd results that could not have been contemplated by the legislature; (3) remedial statutes should be broadly interpreted to effectuate their purposes; and (4) statutes should be interpreted with reference to the ostensible or rational policies they were intended to achieve that were either articulated by legislators or that can be reasonably postulated by the court as legitimate public purposes.

This interpretation rejects the argument that might be made by recent public choice theorists that would recognize that these laws were passed more on the behest of management groups who hoped to protect their own power than because of lobbying by workers or unions, and who would argue for interpreting the statutes to serve the interests of the *actual* intended beneficiaries (managers rather than workers or shareholders) or would argue for narrow interpretation of these statutes since they are likely not to promote the public interest, but rather the illegitimate private interests of a faction interested in obtaining undeserved economic advantages.

37 For an explanation of the different forms of regulation of employment relations, see Klare, supra note 28, and Stone, supra note 28.

on imperfect information and irrational assessments of those business managers who opposed it. Creation of a private right of action would therefore help workers by providing a statutory basis for implying non-waivable terms in the employment relationship.

2. Limitations of stakeholder laws for workers

While stakeholder laws *might* help workers in the ways outlined above, there are good reasons to believe that stakeholder statutes are not *realistically* likely to achieve these goals. If our objectives are to promote desirable economic change while both minimizing the costs of that change and preventing an unfair distribution of those costs, then the stakeholder statutes that have been passed by the various states – under any interpretation of them – are unfortunately unlikely to achieve those goals; in addition, if they are interpreted the way I think they will be interpreted, they may even be counterproductive.

First, it is crucial to remember that no statute expressly provides a private right of action for stakeholder groups other than shareholders; nor has any statute yet been interpreted to contain implied rights of action. A dispassionate assessment is that judges are unlikely to create an implied right of action. In the absence of such private rights of action, shareholder rights advocates are likely to be correct in arguing that the effect of these statutes may be to further entrench managerial power. Although stakeholder laws give managers and directors discretion to consider the interests of workers, there is little reason to believe they will actually do so. Stakeholder laws give them no incentive to do so, and it is therefore highly unlikely that managers will begin seriously to explore ways to maximize shareholder gains in ways that minimize harms to workers. Rather, managers are likely to *invoke* the interests of workers when it serves *managerial* interests in answering claims by shareholders that they have failed adequately to serve the interests of the corporation. In addition, when there is an actual conflict between the interests of workers and either shareholders or managers, there is no reason at all to believe worker interests will prevail or even be taken into account. Since the most likely result in the courts is that stakeholder laws will not be interpreted to grant workers private rights of action, the sad conclusion is that, contrary to the intent of the legislatures that passed them, they may do nothing more than entrench managerial power. To the extent that worker interests diverge from managerial interests, the result may actually be harmful to workers.

Second, stakeholder statutes are unlikely to help workers significantly even if they are interpreted to grant private rights of action to workers. It will almost always be possible for management to argue that the policy

it has adopted was intended to maximize shareholder gain at minimum expense to workers and other stakeholders. For example, General Motors could easily argue that there was no other way to protect the long-run, best interests of the corporation without laying off thousands of workers. Moreover, it is unlikely to matter if workers could argue that they have come up with a better way of handling the current crisis. This is both because any worker plan is likely to be different in some significant respect that arguably places some greater vulnerability on shareholders than the plan adopted by management and because, in the absence of *specific* legislation to the contrary, courts are loath to interfere with what they view as business management decisions.

Even if workers could come up with a convincing argument that they have identified a corporate policy that would serve shareholder interests as well as the policy chosen by management but at less cost to the workers, it is likely to be extremely difficult to convince the courts to strike down the policy chosen by management. Unless it can be plausibly argued that an obligation formed part of the workers' justified expectations under their existing contracts, and therefore can be viewed as an implied duty under their employment contract, the courts have proven to be extremely reluctant to substitute their judgment for the judgment of corporate managers.[38]

Courts are likely to be reluctant to 'second-guess' managerial decisions for a variety of reasons. For one thing, judges are likely to see managers as 'experts' in business policy and thus will be loath to substitute their judgments for those of management. Moreover, despite recent descriptions of corporations as a 'nexus of contracts,' traditional views of shareholders as the 'owners' of the corporation are likely to exert a powerful influence on judges' perceptions of managerial activity. The doctrine of managerial prerogatives in labour law[39] and the business judgment rule in corporate law[40] both illustrate the courts' extreme reluctance to alter fundamentally the balance of power inside business corporations. Stakeholder statutes are likely to be interpreted in the context of these other legal rules.

It might be argued that these other legal rules should be reinterpreted in the light of the stakeholder statutes, or that these statutes have in fact

38 See *Local 1330, United Steel Workers* v. *United Steel Corp.* 631 F.2d 1264 (6th Cir. 1980); Singer *Reliance Interest* supra note 18.

39 *Fibreboard Paper Products Corp.* v. *NLRB* 379 US 203 (1964); *First National Maintenance Corp.* v. *NLRB* 452 US 666 (1981). See also Karl Klare 'The Public/Private Distinction in Labor Law (1982) 130 *U. Pa. LR* 1358, 1401–3.

40 Nell Minow, supra note 32, 199–212

changed these other legal rules. After all, one interpretation of stakeholder laws is that they radically alter ownership rights in corporations by requiring directors to act as fiduciaries for a range of groups, which include, but are not limited to, shareholders. Further, if corporations have a duty to maximize shareholder profits in ways that minimize avoidable worker losses, workers could argue that this general obligation requires courts to change a variety of crucial doctrines of labour, contract, and employment law that have the effect of systematically decreasing the bargaining power of workers vis-à-vis managers but that cannot be shown to protect legitimate corporate interests. Those doctrines include, for example, the employment-at-will doctrine, the rule allowing employers to replace striking workers, and the rule that companies have no duty to bargain with unions over plant closing and relocation decisions.[41]

However, because of the way stakeholder laws are structured, judges are likely to continue to view shareholders as the 'owners' of the corporation and to view corporate managers primarily as agents of shareholders. This is because shareholders alone have the power to vote for the board of directors, which, in turn (at least in theory) has the power to select management. Because stakeholder laws leave decision-making power in the hands of the board of directors, and fail to grant workers any power to participate in voting for members of the board of directors, the courts are likely to continue to interpret corporate, labour, contract, and employment law in ways that will continue to grant broad discretion to managers.

For these reasons, as a purely practical matter, I do not believe stakeholder statutes, by themselves, are likely to rectify fundamentally the imbalance of power between employees and employers, to give workers greater rights to participate in discussions about fundamental corporate changes, or to solve the problem of encouraging desirable economic change without unnecessary social misery on the part of displaced workers. Nor do these statutes do anything to help the people who have been effectively excluded from the employment market. These conclusions obtain even if stakeholder statutes are interpreted to give workers private rights of action. My criticism is that, however radical stakeholder laws appear to shareholder rights advocates, and however hopefully they are viewed by worker rights advocates, stakeholder laws are not radical enough in altering corporate governance to protect the legitimate interests that workers have in democratic economic institutions.

41 *First National Maintenance Corp.* v. *NLRB* 452 US 666 (1981)

Whatever help these statutes may provide, it is likely to be both too little and too late.

B. A WORKER-ORIENTED INDUSTRIAL POLICY

Robert Reich notes that '[a]ll too often, when a company fails, its plant and equipment are quickly redeployed, but its workers are, in effect, scrapped.'[42] It is increasingly apparent that this practice is not only unjust but inefficient. I promised to suggest a pragmatic approach to the question of how best to protect workers' interests in times of economic transition, given my conclusion that stakeholder laws are likely to be either ineffective or counterproductive in accomplishing this goal. A real answer to this question would require public policy analysis of a comprehensive and unwieldy sort, given the numerous institutional, social, and legal mechanisms that impinge on the problem. For now, I simply want to highlight four lines of inquiry that are likely to prove productive.[43]

1. Job creation and economic transition policies

I argued that the legal system should recognize a basic entitlement to a good job. This means that overall economic policy should ensure the creation of jobs either in the private or the public sector. Protecting the ability of people to get and to keep good jobs requires analysis of a host of fields, including industrial policy, education policy, the 'internal' affairs of business corporations, welfare and family policy, international relations, and anti-discrimination policy. This analysis requires attention to the political feasibility of alternative proposals and whether particular policies or law reform changes are desirable as 'second-best' approaches when the presumed 'ideal' arrangements either have no chance of being politically implemented or are likely to be so distorted that they are counterproductive.

First, the government should be the employer of last resort when the so-called 'private' sector fails to generate sufficient employment and no alternative public policies remedy the failure. The refusal of the government to ensure access to good jobs is a failure to respect the individual dignity and humanity of its citizens.

Second, the basic entitlement to employment requires us to take seriously the work that takes place in the home, especially when it involves the work of taking care of children. Because this socially desirable labour is uncompensated and because many people cannot

42 Reich, supra note 14, 237

43 For more comprehensive analyses, see Dertouzos, supra note 14; Kuttner *End of Laissez-Faire* supra note 14; Reich, supra note 14.

count on relationships with others who do have access to jobs to help pay for the costs of such work, it is imperative for the United States to develop a minimally acceptable child-care system. Such a system may involve a guaranteed income to parents of young children, or it may involve a right to affordable, high-quality day care for parents who need to work and have no other family member on whom they can rely to take care of their children.

Third, the basic entitlement to employment means that the government must also have in place policies to protect workers in times of economic transition. Those policies may take a wide variety of forms. They may include, for example, tax policies that create appropriate incentives to minimize unemployment and to create new jobs, perhaps by giving companies tax advantages when they invest in job creation and increasing their obligations to unemployment compensation insurance pools when they routinely discard workers rather than retain and retrain them. Tax policy may also be used to encourage institutional investors to invest long-term and to protect their investments by greater oversight of the corporations they own.[44]

In addition, it is apparent that, in comparison with other countries with whom the United States competes and who are doing better in international competition, the United States has a woefully inadequate education system. We need a system of lifelong education and retraining for both current and displaced workers in order to compete internationally. Germany has a system of universal apprenticeship training for students who do not go into universities. Sweden has comprehensive policies to train workers in new skills, especially in times of high unemployment, and to help them find and move to new jobs, partly by arranging for new jobs to be created in the communities in which those workers live. France requires companies to spend a fraction of their gross earning on worker training or to pay a tax into a common fund for this purpose. A better system of education for both young people and adult workers is essential for the future of the US economy.[45]

2. Steps to increase workers' bargaining power

A variety of legal rules need to be changed to increase workers' bargaining power. These rules include, for example, the absence of an obligation on the part of management to share relevant information about the company with workers, the prohibition of secondary boycotts, the narrowing

44 Kuttner *End of Laissez-Faire* supra note 14, 269–87; Reich, supra note 14, 240–6

45 Kuttner *End of Laissez-Faire* supra note 14, 269–87; Reich, supra note 14, 237–41

of the rights of non-employee union organizers to contact employees in non-work-related areas of the employer's property, managerial prerogatives doctrine that excludes certain subjects (such as plant closing decisions) from the scope of collective bargaining, and the ability of employers to hire strike-breakers. These changes in labour law should not go so far as to immunize workers from the need to respond to changes in the marketplace in order for the business to remain competitive. However, they should redress the current imbalance in bargaining power, which gives employers the ability to insist on employment arrangements that do not protect workers' legitimate interests in times of economic change.

3. Job security

A minimum entitlement to job security should be made mandatory in all employment contracts. The weakest version of such an entitlement would prevent employers from firing workers without just cause. A more generous entitlement would adopt the suggestion of the worker rights advocates discussed earlier who propose that large corporations should have an obligation to maximize shareholder gains in a manner that both minimize losses to other stakeholders and respect the implicit long-term contracts with those stakeholders. This general standard could be adopted generally – through interpretation of state stakeholder laws or through additional legislation. However, it is more likely to be effective if it is adopted in the form of more specific legislative proposals. Examples might include recognition of a right of first refusal in the workers when a large factory closes or a requirement of adequate severance pay.

The problems of job creation and job security are interrelated, and it is a mistake to analyse these issues separately. A minimum amount of job security and right to participate in management of large corporations is necessary for human flourishing and can be justified by reasons of justice, individual liberty, and democracy. Similarly, a minimum amount of protection for displaced workers during periods of economic transition is necessary for reasons of both justice and social welfare. Greater entitlements may be appropriate if both the market and the legal system fail to generate either sufficient jobs or transition policies. Conversely, the greater the ability of the legal and economic system to generate new jobs in times of economic transition, the less need – and the less political pressure – there is for rules that protect existing job holders or help support displaced workers.

In any case, it is increasingly apparent that one reason US businesses are not doing as well in international competition as they could is that

they fail to utilize their workforces effectively. The refusal to grant workers job security deprives them of incentives to increase productivity.[46] Workers 'deserve assurance that their striving to increase the productivity of the firm will not simply result in their becoming unnecessary and expendable commodities.'[47] Again, this does not mean that workers can never be fired; it does mean that existing institutional mechanisms fail to give corporations sufficient incentives to provide adequate job security and rights to participate in corporate management. 'From the company's point of view, the workforce will be transformed from a cost factor to be minimized into a precious asset to be conserved and cultivated.'[48]

4. Democratic governance

I have argued that the principles underlying democratic government apply to corporations, although perhaps in a modified form. Corporations exercise a form of power that is akin to – and sometimes identical with – political power, and if we believe that certain kinds of decisions should be made in a democratic way then we have an obligation to modify at least some of the ways in which corporations currently operate. A wide variety of mechanisms might give workers more direct control over the corporations to which they are connected.

One possible mechanism would give workers nondisclaimable rights to participate on an equal basis on the board of directors. The West European countries' model of parity codetermination gives workers and shareholders equal numbers of board representatives with one or more neutral members picked jointly or by a government agency. This model appears to increase the ability and incentive of workers to take responsibility for the ultimate economic health of the enterprise and forces shareholders to adopt policies that minimize costs to workers.[49] I believe that some version of either codetermination or direct worker ownership of shares with voting rights is essential both to give workers sufficient job security and adequate rights to participate in corporate management.

Codetermination is a complicated topic. Some forms of worker representation on boards of directors work better than others. Such representation raises questions of conflict of interest and the definition of roles for worker representatives. It also raises the question of the relationship between board representation and collective bargaining. Not

46 Dertouzos, supra note 14, 122, 137–8
47 Ibid. 137
48 Ibid. 135
49 Harper, supra note 28, 87–93

all forms of representation work well, and different kinds work well in different contexts. However, if properly structured in particular cases, such representation offers significant advantages for workers.[50]

An alternative mechanism is through stock ownership by employees, either through an employee stock ownership plan or through more direct control by employees of the investment policies of their own pension funds.[51] If it is the case that pension funds are coming to own the bulk of large businesses in the United States, there is a possibility that workers may use this mechanism to reassert control over the conditions of their own lives. If shareholders are the 'owners' of corporations, and pension funds are major shareholders, then it may be appropriate to take the next step and recognize that pension funds are owned by their ultimate beneficiaries – the workers. At the same time, workers do not currently exercise *effective* control of the investment policies of their pension funds. It is at least possible that exercising such control, if structured properly, could channel corporate policy in a way that would more closely approximate workers' judgments about social justice. To the extent that this would redistribute power to persons who are relatively vulnerable under the current system, it might even represent a change towards a more egalitarian society. Even if it would not alter the investment decisions of pension fund managers, it would force workers to confront directly the conflict between their desire to protect their own jobs and those of their colleagues with their desire to maximize the short-run return on the investments in their pension funds.

Each of these areas of inquiry is complicated and requires in-depth study. My point here is that the legitimate interests of workers in access to employment, adequate job security, protection in times of economic transition, and the ability to participate in democratic governance of economic institutions can only be adequately furthered by such a complex of approaches. As radical as stakeholder laws appear to their critics, they are not radical enough to achieve their intended goals.

50 See ibid; Klare, supra note 28; Stone, supra note 28; Clyde W. Summers 'Codetermination in the United States: A Projection of Problems and Potentials' (1982) 4 *J. Comp. Corp. L. & Sec. Reg.* 155.

51 These options have the advantage of forcing employees to face their own conflict of interest between maximizing short-term gains through higher wages and long-term gains in the form of high returns on their pension fund investments.