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SAYING NO TO STAKEHOLDING

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THE STAKEHOLDER SOCIETY. By Bruce Ackerman and Anne Alstott. New Haven: Yale University Press. 1999. Pp. xi, 296. \$26.

“What if America were to make good on its promise of equal opportunity by [XXX]? That’s the bold proposal set forth by Yale law professors Bruce Ackerman and Anne Alstott”¹

The quotation above is from the Yale University Press announcement describing Bruce Ackerman² and Anne Alstott’s³ new book, with one change: we have substituted “[XXX]” for the authors’ catchphrase summary of their proposal. What do you think the missing words might be? How would you enable America “to make good on its promise of equal opportunity”?

As you ponder that question, you might consider the following feature of the Ackerman/Alstott proposal. It calls for the federal government to spend an additional \$255 billion per year (p. 35). Perhaps that is not surprising; perhaps you might have trouble spending much less if you wanted to make good on the promise of equal opportunity.

So what would Ackerman and Alstott do?

We believe that it is easiest to grasp the full import of their proposal by considering its impact on the lives of five hypothetical young Americans. Below is each individual’s situation without the Ackerman/Alstott plan:

- Alan is born to a single mother in a desperately poor neighborhood of Chicago. His mother dropped out of high school and works odd jobs at minimum wage. They live in a housing project. Without the Ackerman and Alstott plan, he receives inadequate health care and a very poor education in the public schools. He

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1. *Forty Acres, A Mule, and \$80,000: Making Equal Opportunity a Reality*, YALE BOOK NEWS (Yale Univ. Press, New Haven, CT) (announcing the April 12, 1999 publication date for THE STAKEHOLDER SOCIETY), at 1.

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drops out of school in the tenth grade and lives his adult life on the fringe of the formal economy.

- Bonita is born overseas in a poor developing country. Her family emigrates to the United States when she is twelve, settling in Arlington, Virginia. Without the Ackerman and Alstott plan, Bonita receives adequate health care and a decent public school education. She learns English quickly and is an excellent student in high school. Her parents have trouble finding jobs that pay well enough to support the family, but they manage. Upon graduation, Bonita cannot take the risk of borrowing money for college for fear that she will become dependent on her family. She decides to go right to work as a legal secretary.
- Carolyn is born to a working-class couple in Pittsburgh. Her parents rent a comfortable apartment in a safe neighborhood. They have no accumulated wealth and live frugally, but they are able to make ends meet. Without the Ackerman and Alstott plan, she receives acceptable health care through her father's company HMO and a tolerable public school education. She is not a particularly strong student, but she finishes high school. She works in retail sales for four years before going back to community college for two years, eventually becoming a medical technician.
- Dierdre is born to a middle-class academic couple in Newton, Massachusetts. Her parents make monthly mortgage payments on a comfortable house in a safe neighborhood. Without the Ackerman and Alstott plan, she receives very good health care and a fine education in an excellent suburban public school system. She is not a particularly strong student in high school, so she attends and completes her four years of college at the University of Massachusetts — a good school, to be sure, but not as prestigious or as highly regarded as the most selective private universities her top-of-the-class high school friends attend. She does well there, majoring in economics. With help from her family, she secures a two-year entry-level job in her field, and then earns an M.B.A. from Columbia. She becomes a successful financial analyst for a large mutual fund group.
- Edward is born to a wealthy professional couple in New York City. He grows up in a Greenwich Village brownstone. Without the Ackerman and Alstott plan, he enjoys the privileges of wealth: the finest health care extant, private nannies and tutors, elite private education from kindergarten through high school, box seats at the Yankees and the Metropolitan Opera, worldwide travel in limousines and on private jets. He is a superb student, goes to Yale College and Yale Law School, joins a top-ranked law firm (one with which his family has been associated for gen-

erations), moves in-house with a major corporation, and eventually becomes its C.E.O.

These stylized hypotheticals capture a disquieting truth about American society: we do not have equal opportunity. Some Americans barely have the shadow of a chance to succeed; some must live with the consequences of their mistakes; some find their mistakes forgiven; others are insulated from ever making mistakes at all. For some Americans, the prospect of an upper-middle-class adulthood is extremely remote; for others it is virtually assured; in between, there is an enormous range.

So, here is what Ackerman and Alstott would do:

1. Each of the five children would grow up in the same circumstances that he or she would have grown up in without the plan. There would be absolutely no change in any child's circumstances until his or her eighteenth birthday, at the very earliest.

2. As soon as they reach their *eighteenth* birthdays, Dierdre and Edward (and any other college-bound young adult) would each receive \$20,000 cash each year from the federal government, for four consecutive years, for an undiscounted total of \$80,000 (this \$80,000 "stake," received over four years, is the source of the book's title).

3. As soon as she reaches her *twenty-first* birthday, Carolyn (and any other high school graduate who does not attend college) would receive \$20,000 cash each year from the federal government, for four consecutive years. She would also receive three years' worth of interest on each payment, to reflect that she had to wait longer than Dierdre and Edward to get her money.

4. As soon as he reaches his *twenty-first* birthday, Alan (and any other high school dropout who has not been convicted of a serious felony) would receive \$4,000 cash each year from the federal government, for as long as he remains crime-free. In addition, he could have more immediate access to up to the "full" \$80,000 in distributions from the federal government, but only for certain limited purposes: buying a house, going back to school, or paying extraordinary medical expenses.

5. Bonita will never be eligible to receive a stake. Only citizens are eligible for stakeholding, and even a citizen must have lived in the United States for at least eleven of her first twenty-one years to qualify. She will fall short by two years and get nothing.⁴

4. The same rule applies to young adults born in the United States of America to parents whose families spend too many years abroad pursuing private-sector overseas interests. The reason for the rule in cases like Bonita's is political expediency; the reason for its extension to the American-born is the possibility of constitutional challenge. See pp. 46-47.

This program of stake distribution is the core of the Ackerman/Alstott plan, and we shall henceforth refer to it as AAP. AAP is part of a larger program that includes other elements as well — a payback scheme (pp. 77-93), a financing scheme (pp. 94-112), and a related but severable program for retirement funding (pp. 129-54). But AAP is enough to occupy us here.

It seems self-evident to us that AAP cannot begin to “make good on America’s promise of equal opportunity.” In many ways it would seem to distribute opportunity even *less* equally than it is distributed today. Thus, in our example, Alan and Bonita would seem to be even *more* disadvantaged relative to Edward and Dierdre than they are without AAP. Edward and Deirdre would have started life with social and economic advantages even without their stakes; stakeholding adds to their existing resources. Alan and Bonita started out disadvantaged and are made relatively more so in relation to stakeholders in their age cohort: Bonita because she has no stake, and Alan because restrictions on his access to stake funds diminish his ability to put them to good economic use.⁵

So what exactly is going on in this book? We shall approach that question in two steps. First, we argue that AAP is best understood not as a counterproductive plan for equalizing opportunity (which, we admit, was our first reaction to it), but rather as the legitimate offspring of two normative impulses: Ackerman and Alstott’s commitment to “antipaternalistic liberalism” and their desire for “fair opportunity.” Second, we take a critical look at some aspects of the authors’ self-presentation that, in all candor, stand in the way of efforts to give the book the generous reading any serious work of scholarship deserves.

5. There is no reason to think that schooling, house-buying, and extraordinary medical expenses are the only, or even the most, sensible uses of funds for non-high-school-graduates seeking to survive in the market. For example, it would be a perfectly rational use of stake principal, in communities with poor public transportation, for dropouts to use stake principal to purchase and maintain a car as an aid in gaining and keeping employment. Other rational uses of stake principal abound that the authors exclude. And the alternatives they permit might be among the *least* sensible. As to home-buying, it is highly unlikely that high school dropouts will have the savings or credit ratings to purchase homes. See Statistical Abstract of the United States Table No. 756 (stating that median yearly earnings for persons with 9 to 12 years of education but no diploma are \$16,818 for males and \$8,861 for females). And they may well not be able to afford homes in neighborhoods in which house values keep pace with general market inflation. If dropouts do buy homes, they may rapidly lose their equity if they cannot use their stake principal to cover mortgage payments and other expenses during spells of unemployment. As to medical expenses, impoverished high school dropouts with children may be eligible for Medicaid, which since 1996 has operated on different terms from cash welfare. See generally <<http://www.hcfa.gov/medicaid/meligib.htm>>.

* * *

The Stakeholder Society makes many references to the ideal of equal opportunity, but these references are not the proper point of entry into the book. To understand Ackerman and Alstott, one should begin with their statement that they stand for a “new liberalism.” They want to combine “a commitment to individualism” with “an appreciation of the pervasive impact of economic inequality” (pp. 21-22).

To discern what the authors mean by “individualism,” it is helpful to look outside the covers of *The Stakeholder Society*, and back to Ackerman’s 1980 book, *Social Justice in the Liberal State*. In that book, he elaborated a particular brand of individualism as the central premise of liberalism, namely, “the liberal’s opposition to paternalism.”⁶ In the course of that elaboration, he set forth a series of inter-related ideas.

First, Ackerman presented his idea of undominated conversation: “A power structure is illegitimate if it can be justified only through a conversation in which some person (or group) must assert that he is (or they are) the privileged moral authority”⁷ What kinds of conversational moves should be considered an assertion that one is “the privileged moral authority”? For Ackerman, such a move is one that violates his “Neutrality Principle”:

No reason is a good reason if it requires the power holder to assert:

- (a) that his conception of the good is better than that asserted by any of his fellow citizens, *or*
- (b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens.⁸

Under this Neutrality Principle, one may thus claim neither intrinsic superiority over one’s dialogic partner nor access to a superior conception of the good. Ackerman called for a liberal state structured to effectuate that Neutrality Principle as follows:

A political community of diverse individuals can organize its power struggle consistently with Neutral discourse if it takes steps to assure that:

- a. No citizen *genetically dominates* another.
- b. Each citizen receives a *liberal education*.
- c. Each citizen begins adult life under conditions of *material equality*.
- d. Each citizen can *freely exchange* his initial entitlements within a *flexible transactional network*.

6. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10 (1980). Anne Alstott also embraces antipaternalistic liberalism in her recent writing. See Anne Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 *YALE L.J.* 967 (1999).

7. ACKERMAN, *supra* note 6, at 10-11.

8. *Id.* at 11.

- e. Each citizen, at the moment of his death, can assert that he has fulfilled his obligations of *liberal trusteeship*, passing on to the next generation a power structure no less liberal than the one he himself enjoyed.

If a social world fulfilled all these conditions, I shall say that its inhabitants enjoy the condition of *undominated equality* that is required by an undeviating insistence on liberal dialogic legitimacy.⁹

Note here that within Ackerman's conception, the words "undominated" and "equality" are linked. Indeed, it is fair to say that the primary form of equality sought by Ackerman is a world in which people are equally undominated. Equal distribution of wealth at birth, equally available education, and other equalities are means to the end of equal undomination.

Of course, the inhabitants of our world are far from enjoying the condition of undominated equality prescribed by Ackerman's " 'perfect' technology of justice."¹⁰ The real world is one in which some people inherit genetically determined illnesses and impairments that put them in a poor position to compete in liberal markets. Our real-world system of racial and gender inequality disadvantages those who are born nonwhite or nonmale. Our real-world educational system fails to deliver to many even the most basic literacy and numeracy skills, let alone the capacity to participate in liberal political dialogue. And material inequality is so entrenched in our real world that only the most radically expropriatory redistributive policies could set it straight, and — significantly for Ackerman — the resulting equality would last only until two sets of parents made choices that created materially unequal circumstances for their respective offspring.

Those concerned with the real world, Ackerman argued, must develop second-best and third-best compromises. *The Stakeholder Society* is instructively read as an experiment in compromise within the terms set forth by *Social Justice in the Liberal State*.

One can, of course, imagine many different ways to strike compromises in the real world. For example, one might say that until the first three of Ackerman's five conditions¹¹ are satisfied, we should relax the fourth condition (free exchange) and we should be willing to allow society *collectively* to act paternalistically. More concretely, one might say that in order to promote a world of material equality at birth and liberal education throughout a person's formative years, our society ought to override the choices that parents would otherwise make about how to live their lives and spend their resources.

Ackerman and Alstott do not want to go there. They find "traditional forms of bureaucratic control" unattractive (pp. 9-10). They

9. *Id.* at 28.

10. *Id.*

11. See *supra* text accompanying note 9.

want "to break the hold of a familiar vision of the welfare state in America" (p. 8). They do not want to "transform stakeholding into yet another exercise in paternalistic social engineering" (p. 9) and "create an excuse for a vast new bureaucracy intervening in our lives" (pp. 9-10).

In sum, Ackerman and Alstott want to propose a system that makes compromises, but does not compromise the antipaternalistic vision of individualism. The "undeviating" commitment in this project is to avoid having to say to a citizen, "I won't let you do what you want with the resources you have, however you may have come by them." It should be "up to each citizen — not the government — to decide how she will use" her resources (p. 3). Ideally, for Ackerman and Alstott, this rule applies not only to resources that citizens earn themselves, but also to resources that citizens obtain through government transfers. For Ackerman and Alstott, the phrase "economic independence for all" (p. 11) does not mean freedom from dependency on the wage market.¹² It means freedom from bureaucratic restrictions on one's economic choices.

Of course, a rigid hands-off approach to individual choice is difficult to square with equal opportunity in a society that respects the family as a fundamental, autonomous unit of child socialization.¹³ Newborns cannot spend money without help; some guardian — familial or governmental — must do the spending for them. In this country, we leave that to parents. Yet, even if all parents in fact *wanted* to spend money in ways that would maximize their children's life chances (and of course they do not), not every parent would choose to do so in the same way (for starters, nobody really knows what it means to speak of "maximizing" a child's life chances). So in the end, children will reach adulthood in different positions.

In *Social Justice in the Liberal State*, Ackerman argued that "undominated equality" requires that each citizen begin *adult life* under conditions of *material equality*.¹⁴ That, of course, won't happen in the real world. And so, Ackerman and Alstott set for themselves the second-best goal of allowing each citizen to begin adult life under conditions of *fair opportunity*. The "liberal state . . . must . . . assure each citizen a level playing field when he enters the marketplace as an adult. Without this fair start, individual freedom for some is oppression for others" (p. 22).

So, what is a "fair start"? What makes for a "level playing field" in adulthood? We read Ackerman and Alstott's understanding of these

12. For further discussion of this phrase, see *infra* text accompanying notes 15-16.

13. See generally, e.g., JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY (1983).

14. ACKERMAN, *supra* note 6, at 28.

ideas as having both static and dynamic elements. The static element has to do with ensuring that (almost) everyone is placed above a morally significant baseline. The dynamic element has to do with ensuring that (almost) everyone is given incentives for which they can be held morally accountable.

In its static sense, the notion of a “fair start” calls for us to examine where young adults end up under AAP. As we noted above, AAP has a tripartite benefits structure for its eligible beneficiaries — different benefits are bestowed upon the college-bound student, the non-college-bound high school graduate, and the high school dropout.¹⁵ Short-tenured immigrants — like Bonita — get nothing, and teenagers who commit crimes face the possibility of partial- or full-stake forfeiture (pp. 49-51). That structure obviously does not create a “level playing field” in a literal sense. Those most deeply injured by childhood inequality may find themselves caught up in the criminal justice system and will get no stake. Those who do not graduate from high school will only be able to use a small yearly allowance from their stake fund, for limited purposes that may not address their economic needs, and they will be substantially worse off, for that reason, than those who graduate from high school. High school graduates who are the only stakeholders in their poor families may yield to social pressure and share their stakes, leaving little for their own needs. Better-off high school stakeholders may keep their stakes for themselves, but they will remain worse off than college graduates whose stakes, at the very least, have assured them a larger income stream. Those whose financial resources are exhausted by college costs will be worse off than those for whom the college degree is just one more asset in a family-funded portfolio. Stakeholding raises the absolute level of economic resources available to all but the bottommost group, but keeps the other groups at the same distance from one another.

What Ackerman and Alstott are seeking, however, is a level playing field in a moral rather than an economic sense. They are establishing, for us and for themselves, a morally significant level of economic endowment — a minimum standard above which differences in resources bear no moral relevance. They want to “revitalize the liberal ideal of an independent, responsible, property-owning citizenry” (p. 46) — a concept in which a more robust model of economic equality has little place. “[E]conomic independence” (p. 24), in their narrow sense, means having the minimum resources necessary to avoid “short-termism” (p. 35) in the making of key life decisions in early adulthood. Once that minimum is provided, stakeholders are to be

15. Whether or not one thinks the benefits are economically equivalent (because the AAP has somehow hit upon the perfect discount rate), they are nonetheless different. For a discussion of discount rates, see *infra* text accompanying note 23.

held fully accountable for their choices and results. Differences in resources above the minimum do not enter the moral calculus at all.

This minimum-standards notion of what “a level playing field” looks like does, in fact, have its place in American culture. One version of the American conception of class is predicated on the notion that distinctions above an approved minimum make no difference. Once one is not poor in America, one is middle-class.¹⁶ All middle-class people are assumed to be “solid individual achievers in an essentially classless society composed of human beings engaged in bettering themselves.”¹⁷ Those at the top of the middle class are presumed not to have gotten there by oppressing those at the bottom. All are seen as having real possibilities for economic mobility (downward or upward), and, in this minimum-standards sense, all play on “a level playing field” (p. 22). In that sense, Ackerman and Alstott get the culture just right.

But it would be a serious mistake to take at face value the American myth that all those who are not poor are basically the same. Notwithstanding that myth, Americans are capable of being exquisitely sensitive to differences in resources and their reflection in patterns of consumption.¹⁸ The advertising industry has a detailed, empirically based sense of how subtle differences in consumption choices map onto important and durable social distinctions.¹⁹ That these relationships are superficially manipulable to a degree — we can, after all, use the short-term strategy of going into debt to appear better off than we are — does not make them less real.²⁰

Furthermore, even unperceived differences can have significant effects in the real world. A working-class parent may be satisfied with her child's high school because it offers one or two advanced place-

16. Americans lack a stable conception of a “working class,” in part because for so many years the collar-color line was cross-cut by the income line (in the case of the high-earning unionized craft and industrial workers). For struggles over line-drawing for purposes of wage and hour legislation, as an example of the legal consequences of the complexity of class in the United States, see Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212 (1998).

17. BENJAMIN DEMOTT, *THE IMPERIAL MIDDLE: WHY AMERICANS CAN'T THINK STRAIGHT ABOUT CLASS* 43 (1990).

18. See, e.g., PAUL FUSSELL, *CLASS: A GUIDE THROUGH THE AMERICAN STATUS SYSTEM* 77-78 (1983); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEXAS L. REV. 1847, 1883-85 (1996). Americans use absolute meanings of class (e.g., middle class means a managerial position or a college degree) for some purposes and “a relative-comparisons model that ranks people along a continuum of social standing” for others. See REEVE VANNEMAN & LYNN WEBER CANNON, *THE AMERICAN PERCEPTION OF CLASS* 145 (1987).

19. See, e.g., Kenneth Labich, *Class in America*, FORTUNE, Feb. 7, 1994, at 114, 116.

20. Groups differ in their ability to develop “symbolic strategies . . . to jam” the messages of class distinction: the middle classes have it, while the lower classes do not. Pierre Bourdieu, *What Makes a Social Class: On the Theoretical and Practical Existence of Groups*, 32 BERKELEY J. SOC. 1, 12 (1987).

ment courses and sends a healthy percentage of its graduates to the local state college. She may herself have grown up in a poorer neighborhood with worse schools, and all she sees is her family's upward mobility. That same parent may not be aware that the best suburban high school in the area offers twenty advanced placement courses, and sends a large proportion of its graduates to top private colleges and to the state's flagship university campus. These differences will matter to her child's life chances, even if she is protected by social segregation from having any knowledge of them.

The data about income mobility during adulthood confirm the extent to which differences in starting points define different opportunity sets for Americans today. An adult between the ages of 22 and 39 who was in the bottom fifth of the income distribution in 1968 had only a 20% chance of being in the top 40% in 1991; an adult who was in the top fifth had a 72% chance of being in the top 40% twenty-three years later.²¹

Ultimately, we find it difficult to accept the notion that under AAP all of the remaining tilts in the playing field are morally irrelevant. But before we can say that we disagree with Ackerman and Alstott's claim that AAP creates a "fair start" (p. 22), we must consider the dynamic aspect of that term. The authors claim, and not without reason, that AAP will create a new incentive structure for long-tenured citizens at the threshold of adulthood. (For Bonita and those in her situation, AAP unfortunately creates no new behavior incentives.) The authors contend that AAP's differential treatment of Alan (the high school dropout) and Carolyn (the stake-eligible high school graduate who does not attend a four-year college) is "fair" because it is a morally acceptable consequence of the choices they made.

The dynamic sense of a "fair start" calls for us to examine whether AAP's static inequalities, both preserved and created, are morally acceptable consequences of individuals' prior behavioral choices. Ackerman and Alstott clearly believe they are. The best evidence comes from their treatment of people who do not complete high school and therefore are ineligible for an \$80,000 "stake."

Ackerman and Alstott would offer those who stay crime-free but do not finish high school a lifelong allowance of \$4,000 per year.²² Four thousand dollars a year is the economic equivalent of \$80,000, but only if one uses a 5% discount rate; if one uses a discount rate derived from, say, the S&P 500, \$4,000 a year is worth only about

21. See Peter Gottschalk & Sheldon Danziger, *Family Income Mobility: How Much Is There and Has It Changed?* 19 FOCUS, Summer-Fall 1998, at 20, 22 tbl. 2.

22. Those who do not graduate from high school have access to the full \$80,000 for certain paternalistically limited purposes. See *supra* note 5 for an explanation of why those limitations are unwise.

\$36,000.²³ Clearly, then, those who do not graduate from high school are financially punished for their failings by AAP. Ackerman and Alstott ground this decision in the proposition that such Americans have proved themselves to be lacking in “self-discipline” (p. 9) and therefore incapable of managing a stake.

The authors seem to assume that self-discipline is the primary factor influencing high school graduation. But that assumption would seem to call for more evidence than Ackerman and Alstott provide. Why does self-discipline have more explanatory power than conflict in the home environment, violent neighborhoods and high schools, inadequate primary education, learning disabilities, or any of the myriad factors that correlate poverty with noncompletion of high school? Is there any evidence, using our hypothetical examples, that a Carolyn, who decides to finish high school, has more self-discipline than an Alan, who sees the inadequacy of his school and concludes that an extra two years of schooling in that environment won't aid his economic survival?²⁴

To be sure, it may well be that a poor teenager who completes a sorely inadequate high school program has more self-discipline than one who does not.²⁵ But why is that the relevant comparison? It takes far less self-discipline to finish high school when your school creates a positive environment and when you come from a middle-class family that fully supports your right to have a childhood protected from outside demands.

Moreover, if one's primary concern is with self-discipline, high school graduation seems a poor proxy for opposite reasons as well. The AAP does not seek out signs of lack of self-discipline among middle-class youth — for example, the “gentleman-C” record collected by a child capable of far better work. In our example, Dierdre is not punished for attending the University of Massachusetts because she failed to apply herself to her studies seriously enough to earn a spot at one of the Ivies. There is no suggestion of taking stakes away from the least self-disciplined young adults. Rather, they would be taken away

23. The average rate of return on a diversified portfolio of large company stocks from the beginning of 1926 to the end of 1997 was 11% per year. See Ibbotson Assocs., *Stocks, Bonds, Bills, and Inflation: 1998 Yearbook* app. C, tbl. C-1 at 271 (1998).

24. Note that Ackerman and Alstott fear that tying the stake to high school graduation will create enormous incentives for schools to lower graduation standards, and they would require high school graduates to pass a federal or state stake-eligibility examination in order to become stakeholders. See p. 38 n.*. The authors nowhere acknowledge that poorer students attending poorer schools are far less likely to pass such an examination than are middle-class students, and that African-American students are particularly likely to be disadvantaged by the hypothetical tests. On the latter point, see *THE BLACK-WHITE TEST SCORE GAP* (Christopher Jencks & Meredith Phillips eds., 1998).

25. Even that is not certain. The high school graduate may have had fewer immediate wage-earning options to lure him away from school, or may have felt less responsibility to bring money into the household as soon as possible.

from those (mostly poor) young adults who have not managed to earn high school diplomas.²⁶

You get the idea. Only if non-high-school-graduates' failings are their own moral fault and college-attenders are morally blameless does it make sense in moral terms to deny a full stake to the former while granting a full stake to the latter. Neither condition is met.

So what if we could persuade the authors that their denial of a "stake" to some young adults is indefensible, and they agreed to drop the restrictions? Would we then have a program of "fair opportunity"?

At this juncture it is appropriate to consider the manner in which the authors derive the amount of their proposed stake: \$80,000. Ackerman and Alstott arrive at the \$80,000 figure from the cost of tuition at the average private college: \$18,071 a year for four years.²⁷ They then state:

As we have seen, eighty thousand dollars is enough to pay for four years of tuition at the average private college in the United States

Four years at college will not magically eliminate the need for hard choices about career, family, and the meaning of life. Nonetheless, the skills and self-understandings that these students will gain will place them in a fair position to take responsibility for these choices. At the very least, they will not be locked into dead-end jobs or locked out of the vast range of cultural opportunities open to them as citizens of the twenty-first century. In a rough-and-ready way, a college education serves to redeem the promise of maturity in contemporary society.

But if this is so, eighty thousand dollars should also set the standard for the three out of four Americans who don't earn bachelor's degrees. As equal citizens, they too are entitled to confront their adult years with their heads held high while preparing themselves for the future as they see fit. . . . [I]f eighty thousand dollars suffices to provide the top quarter of the population with effective economic independence, shouldn't all other Americans obtain equivalent resources? [pp. 58-59; footnote omitted]

Here we begin to see the gears spinning in the authors' heads, and we can understand some of the motivations for AAP. The authors are clearly concerned by the financial difficulties that middle-class students face today when they attend private colleges. Federally guaranteed Stafford Loans of up to \$18,500 per year can only cover tuition;

26. According to the National Center for Education Statistics, the eventual dropout rates in 1997 for grades 10-12, ages 15-24, were 12% for children from low-income families, 4% for children from middle-income families, and 2% for children from high-income families. Philip Kaufman et al., *DROPOUT RATES IN THE UNITED STATES: 1997* (U.S. Dep't of Educ. NCES 1999-082, 1999). Note here that Ackerman and Alstott are careful to suggest that degree requirements need to be kept tight, and would happily require tests. See p. 38 n.*. That would make it even harder for the poor, given the poor quality of schools available to them, to obtain eligibility for their stakes.

27. P. 55.

living expenses must be financed in other ways. Students are emerging with unprecedentedly high levels of debt — levels that might well seem to compromise our sense that “the promise of maturity” has been redeemed.

So why not do what other countries do? Why not provide a free college education for those who are admitted?

One problem is that in most of those countries the free college education is available only at public institutions, and Ackerman and Alstott would like to ensure that the best and the brightest students (like Dierdre’s Harvard- and Yale-bound classmates) have opportunities to select freely among America’s many fine private institutions and are not restricted to choosing among the elite public institutions, most of which charge high tuition to nonresidents in any event. The only remaining possibility is some form of voucher, and that is the basis for AAP: at its core, one finds a \$20,000 per year federal college education voucher. And its major effect will likely be to shift enrollment from public to private universities.²⁸

It is illuminating to consider why Ackerman and Alstott did not stop there. What would have been wrong with a proposal simply to provide vouchers to cover the cost of college for any student who gets in (with repayment obligations along the lines spelled out in the book)? The answer clearly has to do with the fact that not everyone gets admitted to a college, and with some sense that it would be unfair to help those fortunate high school graduates who do without helping the unfortunates who do not.

The unfairness here is not so obvious as one might assume. One might defend subsidized college as a kind of cost equalization system. After all, young adults who attend college face a set of expenses that are not incurred by high school graduates who do not attend. And it is not self-evidently unfair to eliminate those cost barriers for all those who must face them without doing anything for those whose lives do not carry such added costs.

Ultimately, however, we are no more persuaded by that argument than are Ackerman and Alstott. For college attendance is a mixed good, part public (the entire society benefits if some of its citizens have advanced educations) and part private. But the private aspect predominates. The person who is educated captures most of the returns to education, and those returns provide an excellent return on the investment in tuition.²⁹ While it might be important for the gov-

28. At present 75% of Americans do not earn four-year college degrees, *see* pp. 51, 58, and Ackerman and Alstott assume that 73% will not attend four-year colleges even after stakeholding goes into effect, *see* p. 220. So the main use of the money will be not to create new college graduates, but to broaden the choices of those who would already have gone to college.

29. *See, e.g.*, Orley Ashenfelter & Alan Krueger, *Estimates of the Economic Return to Schooling from a New Sample of Twins*, 84 AM. ECON. REV. 1157, 1171 (1994) (predicting

ernment to take steps to ensure that credit is available for all who would attend college, or perhaps to ensure that need-based subsidies exist, there would seem to be no cause for an across-the-board subsidy for those who would invest in an already profitable enterprise.

A different defense might describe subsidized college as a hard-earned prize for the meritorious. If a race is fair, then there is nothing wrong with providing a prize for the winner and not the loser. Yet we surely understand why Ackerman and Alstott might not want to rest on that notion either. As we have noted earlier, whatever else they may be, the first eighteen years of life in America hardly look like a free sprint across a level playing field.

And so there is great attraction to the idea that, if one is going to provide college tuition vouchers for college students, then one should provide something for the non-college-bound as well. It might seem unfair to do otherwise. Even if the concept of unfairness seems too strong, one might still believe that there are political advantages to coupling a college voucher program for the haves with a different carrot for the have-nots.

As before, one must not mistake the universal distribution of equal-sized grants for the achievement of true equality. Indeed, the authors surely exaggerate when they suggest that universal \$80,000 grants would enable all young high school graduates to “enjoy the kind of relative economic independence that many children of the upper middle class take for granted today” (pp. 192-93). Upper-middle-class children carry a lifelong advantage in the form of priceless cultural and social capital.³⁰ They may draw on their parents’ experience and sophistication for valuable advice at critical moments. Moreover, preexisting wealth differences will leave intact the distinction between those who graduate from college with small amounts of debt and those who emerge with enough wealth to attend graduate school or start a business, buy a house, *and* pay for their own children’s private schooling — thereby perpetuating their privileged position into the next generation. Indeed, to the extent that stakeholding increases access to private university education at the undergraduate level, the

that each additional year of schooling increases wages by 12-16%); Paul E. Gabriel, *Estimating the Returns to College: A Longitudinal Analysis*, 2 APPLIED ECON. LETTERS 255 (1995) (estimating 12-15% rate of return for white males completing four years of college during early 1980s). To be sure, not everyone experiences the success the averages describe. Wrong economic choices are nonetheless made: students major in dying fields, or they follow their hearts into the arts and humanities and never earn enough to repay their debts. But it seems to make little sense to relieve college graduates entirely of the consequences of their choices (some of which might in fact have improved their lives in countless nonmonetary ways), particularly if the only way to do so is to take on the added cost of subsidizing those who achieve economic success.

30. See PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, *REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE* (Richard Nice trans., SAGE Publications 1977) (1970); see also Malamud, *supra* note 18, at 1880-82.

likely result will be that a private university degree will have *less* social value than it does at present. Graduate school or other indicia of social status will simply replace it as a badge of distinction.³¹

The distribution of an equal demogrant would surely not produce equal opportunity. Equal opportunity would of course require the least advantaged to receive more assistance than the most advantaged. Still, equal demograts would provide *more* equal opportunity than the status quo. Would they provide *minimally* fair opportunity to all? Suppose that by that term we mean that people with talent should, in a country as wealthy as America today, have at least the minimum resources necessary to develop that talent. Surely for many people, the assured knowledge that they could afford to pay for college would make the difference between not having that minimal level of hope and having it. For others, whose talents call for entrepreneurial capital and/or experiences that college cannot provide, an \$80,000 cash stake might not be enough. Suppose, instead, that what we mean by minimally fair opportunity is that all Americans ought to have the “equivalent” resources (p. 58) to protect themselves from the indignities of reversals of economic fortune. Why is it so clear that “equivalence” can be achieved with merely equal resources when the likelihood of economic misfortune is so much greater for those without college degrees?

But that only brings us back to earlier questions. Why were Ackerman and Alstott unwilling to provide truly equal demograts to all? Why did they choose to make the non-college-bound wait until age twenty-one? Why do the non-college-bound receive their stakes over a period of four years — a schedule that makes sense for the payment of college tuition but may not make sense for house down-payments, business start-ups, or other legitimate uses of the funds? Why did they decide to provide a financially inferior stake to those who fail to complete high school?

The limitations not only compromise the program’s steps toward equality, they strike us as being equally inconsistent with their other guiding principle — antipaternalism. For when all else fails, the entire program makes perfectly clear that the authors believe that attending college — preferably a private college — is the right thing to do. Those who do not finish high school are deemed undeserving and

31. For the dynamic nature of social hierarchies, see PIERRE BOURDIEU, *THE STATE NOBILITY* 277 (Laurette C. Clough trans., 1996) (1989) (distinguishing between “upward mobility” and “structural shift” — the latter being present when a seeming improvement in credentials or occupation in fact merely maintains a person’s status relative to others who are also “upwardly mobile”); see also CULTIVATING DIFFERENCES: SYMBOLIC BOUNDARIES AND THE MAKING OF INEQUALITY 5 (Michele Lamont & Marcel Fournier eds., 1992) (“According to Bourdieu, if there is a principle of organization to all forms of social life, it is the logic of distinction. In any differentiated society, individuals, groups, and social classes cannot escape this logic — which brings them together while separating them from one another.”).

treated accordingly. Those who finish high school but do not attend college receive full (if delayed) stakes, but both the size of the stake and its division into four-year increments make it clear to all that the program was not created with their needs in mind. A paternalist might well endorse the view that college graduation is vital for economic survival in the modern American economy. Ackerman and Alstott eschew paternalism. But how else can their program be justified?

* * *

Permit us to shift our focus now, from matters of substance to matters of rhetoric. In writing their book, Ackerman and Alstott chose to use three rhetorical tropes that are so distracting that it becomes difficult to engage the substance of their proposals. None of them would be worthy of mention if it were an isolated exception in a 220-page book. But each is characteristic here, and together they warrant critical comment.

The first trope might be called “overclaim now, qualify later.” This is a kind of intellectual bait-and-switch, whereby the authors associate AAP with an extraordinarily lofty ideal, and then, later, admit that, of course, AAP realizes that ideal only incompletely. In their most exuberant voice, Ackerman and Alstott claim that stakeholding offers Americans:

- “real equality of opportunity” (p. 7);
- a “fair chance to pursue happiness” (p. 9);
- “a fair share of the patrimony left by preceding generations” (p. 9);
- “a priceless buffer against the predictable shocks of the marketplace” (p. 10);
- “a cushion in hard times and a source of entrepreneurial energy in better ones” (p. 10);
- “a beacon of hope” “[f]or those growing up in the ghettos of America” (p. 10);
- “economic independence for all” (pp. 11, 25), and
- “a genuine alternative to social division and moral drift” (p. 217).

At other points, they make surprisingly broad claims about the collateral effects of their proposal:

- “[Stakeholding] will . . . inject much-needed competition among universities for the stakeholding dollar” (pp. 10, 53).
- “[S]takeholding will create a certain space for civic reflection . . .” (p. 185).

- “[S]takeholding will also encourage a purer form of patriotism” (p. 186).

We don’t mind bold claims, but something is amiss here. These are not the conclusions that follow upon pages of analysis. They come as disembodied pronouncements in the text, and then become the premises for further discussion. Perhaps that is an appropriate way to write a lobbyist’s brief. But it is frustrating and confusing for someone who is just trying to figure out what direction public policy ought to be take.

Nor is the problem ameliorated when, in other passages, the authors seem to be making much more modest claims:

- “We do not suppose that our proposal suffices to achieve the ideal of equal opportunity. Not only educational reform but the special problems posed by serious physical or mental handicaps are beyond the scope of our initiative” (p. 34).
- “To be sure, it only takes one large step toward equal opportunity” (p. 42).
- “Stakeholding cannot directly compensate for differentials in early education and childhood experiences. But it can guarantee access for all college-ready students regardless of their parents’ income and wealth” (p. 52).
- “Even if stakeholding were adopted, we would be far from an America in which all children began adult life with first-rate educations and roughly equal resources, regardless of their parents’ success or failure in the marketplace” (p. 103).

Rather than helping to clarify the authors’ broader claims, these more measured statements serve only to exacerbate our confusion about why the aggressive claims were made in the first place.

The second trope is a seemingly unembarrassed misanthropy, directed at everyone but the solid college-attending upwardly mobile middle class. Ackerman and Alstott patronize the working class and demonize the wealthy. Four examples (again, the emphasis is ours):

- “*Joe Six-Pack* is every bit as much of an American as Joe College Because these high school graduates are not going to college, they will have to wait until their twenties to gain access to their stakes. But we do not think that this delay will prove very controversial. Most high school graduates would themselves concede that they need some seasoning in the school of hard knocks before they can be trusted with eighty thousand dollars” (p. 56).
- “[A larger stake would be unwise . . .] [W]ould it really be good to transform the average American into a *spoiled brat* living in New York on an overly large trust fund?” (p. 192).

- “It will be easy for culture critics to sneer as *Joe American* uses his stake to agonize over the car he should buy or the clothes he should wear” (p. 192).
- “Some *spoiled brats* from the suburbs will blow their stakes, while millions of poor kids from the center city *will make the most of their one big chance*” (p. 197).

What kind of intellectual work is all this doing? Maybe it is merely intended to show that Ackerman and Alstott want everyone to be more like the solid American scion of the middle class — Joe College. Maybe it is intended to show that members of the working classes — Joe Six-Pack or Joe American — are hopelessly vain and must pass through the crucible of hard experience before achieving the rational temperament that is the middle-class birthright. The fact that some “hard knocks” have long-term negative consequences seems not to matter to the authors as they insist that members of the working classes wait an extra four years to start working toward economic adulthood. Maybe these comments are intended to show that the wealthy and the suburbanite young adults are really spoiled brats for whom we should have no sympathy. Coming from two members of the Yale Law School faculty, however, it all reads as decidedly inappropriate. What is the point of antipaternalism if it is mixed with such obvious disrespect?

Through their negative typecasting of all but the solid college-attending middle class, the authors miss much of the moral drama that will face the new stakeholders from sub-middle-class families. Young adults will be under tremendous moral pressure to use stake resources to help other members of their families — be it parents, grandparents, or non-stake-eligible siblings. Young African Americans will likely feel particularly strong pressure in this regard, both because their extended families are more likely to experience economic downturns³² and because the cultural norms of the community lean toward greater interdependency.³³ Women will face particularly harsh choices. A woman can bet on the stability of her marriage and use her stake funds to substitute for her paycheck in order to stay home with her children — or, instead, she can look at the hard statistics on divorce in this country³⁴ and take a marriage-threatening stand by investing in her

32. See Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 967-88 (1997) (describing the economic precariousness of the Black middle class).

33. See John Simpkins, *All in the Family*, *THE NEW REPUBLIC*, July 1, 1996, at 27, 27 (“[T]his endless succession of family obligations can make it impossible to accumulate wealth. Everyone survives, but people with the ability and opportunity are prevented from moving ahead.”); see also Rose Merry Rivers & John Scanzoni, *Social Families Among African Americans: Policy Implications for Children*, in *BLACK FAMILIES* 333, 341-43 (Harriette Pipes McAdoo ed., 3d ed. 1997).

own education and career. The authors acknowledge the difficult choices young adults will face.³⁵ But they trivialize these choices when they insist on characterizing young people as vain, ignorant, short-sighted, or spoiled.

The third stylistic trope is a willingness to construct hypothetical straw critics of their proposal (styled as welfarists, libertarians, or communitarians), and then to caricature and ridicule them. Once again, a few examples should illustrate the point (here, too, the emphasis is ours):

- “This question [whether there should be restrictions on how a stake is used] bears the mark of the welfarist mindset” (p. 9).
- “We do not join those who would *cheerfully sweep away the legislative achievements* of the Progressives, the New Deal, and the Great Society” (p. 11).
- “[T]he libertarian would have us ignore the more subtle, yet still pervasive, ways in which educational inequalities shape the future capacities of children to form and achieve their objectives in later life” (p. 23).
- “We disagree [with communitarians] It is *simply silly* to suppose that elected politicians, *of all people*, could lead a sensitive moral dialogue . . .” (p. 43).
- “At this point, we expect, libertarians will begin squirming But . . . [o]ur hypothetical libertarian has *cried ‘thief’* one time too often in condemning the trusteeship tax [a proposed annual tax equal to 2% of wealth]” (pp. 85-86).

Once again, we do not understand what intellectual work these passages are doing. Why are Ackerman and Alstott bothering to respond to critics who are imprisoned by their mindsets, who would cheerfully sweep achievements away, who ignore subtleties, who make silly suppositions about the capacities of politicians, and who cry thief? Why are they not identifying the more serious questions about their proposal and simply addressing them?

* * *

These rhetorical distractions might be only minor distractions if they were only a little bit of clutter in a book that was willing to de-

34. See, e.g., Larry L. Bumpass, *What's Happening to the Family? Interactions Between Demographic and Institutional Change*, 27 DEMOGRAPHY 483, 485 (1990) (projecting that 60% of first marriages will end in divorce if current trends persist).

35. They in fact seem to endorse the choice to stay at home, saying that “[i]n the short term, stakeholding will enhance the power of women to make the most sensible accommodation to an unjust reality.” See pp. 207-08. Sensible for whom? The children, or the women in marriages of which half will end in divorce?

fend its premises head-on. But *The Stakeholder Society* is not that book.

Take, for example, the antipaternalist premise. Over the past three decades, several prominent economists and policy analysts have supported the idea of giving every young person a “human capital account” that could be used for education and training over the course of their lives.³⁶ Ackerman and Alstott dismiss such proposals as follows:

[A]s a matter of principle, we reject this notion of freedom-within-boundaries. . . . [A] large middle group will be denied real freedom. For them, building ‘human capital’ may not be the best life plan. . . . [T]hey may put a premium on some seemingly frivolous, but to them important, item like foreign travel or an unforgettable wedding. We believe that these young men and women should be no less free than their college-bound peers or the richer kids across town who are making similar decisions with their parents’ money. *We are repelled by programs that require kids from the wrong side of the tracks to justify their lives to a government bureaucrat.* [pp. 215-216; emphasis added]

Ackerman and Alstott do not seem to care that this form of argument proves way too much. As far as they are concerned, once one has decided to use a public program to transfer resources to a recipient, any restrictions on the use of those resources become threats to both liberty (the recipient’s freedom to choose without having to answer to a “government bureaucrat”) and equality (the recipient’s ability to be as frivolous as a richer kid).

This principle would seem to require that all in-kind programs, from public schools to food stamps, from subsidized housing to Medicaid, be “cashed out.” Universal health care would be an infringement on the individual’s right to buy cigarettes rather than penicillin. The fact that in-kind programs have expanded rapidly in America over the past thirty years, while cash programs have stagnated, might lead one to wonder why the general public has missed Ackerman and Alstott’s point.

The answer is that, in a capitalist economy rooted in a conception of private property, the collective decision to tax and redistribute is morally significant. It involves a joint decision to infringe on the “freedom” of the taxpayer. The principles that justify that decision, grounded in commitments to the collective good, serve just as well to justify restrictions on the “freedom” of the recipient. If the reason to take money away from the rich is that we want to enhance opportunities for the less fortunate, that same reason is perfectly adequate to say

36. Ackerman and Alstott’s cites include ROBERT HAVEMAN, *STARTING EVEN* 168-71 (1988); James Tobin, *Raising the Incomes of the Poor*, in *AGENDA FOR THE NATION* 77, 92-93 (Kermit Gordon ed., 1968); and William A. Klein, *A Proposal for a Universal Personal Capital Account*, 268 n.56 (Institute for Research on Poverty Working Paper No. 422-77, 1977).

that we want to spend the money in ways that will have that effect for more than just a day.

That brings us to our final criticism. Ackerman and Alstott have proposed a very expensive program. The \$255 billion per year they propose to spend on stakeholding is almost as much as the nation currently spends on public primary and secondary education.³⁷ But they offer no reason why anyone not hobbled by their self-imposed antipaternalism constraint would choose to spend the money on stakeholding rather than on programs targeted at the needs of the most disadvantaged members of our society. For Ackerman and Alstott, “the point of stakeholding,” first and foremost, “is to liberate each citizen from government” (p. 9). But for many of their readers — and certainly for us — the point of social spending on this scale should be to liberate the most disadvantaged among us from their dire unmet social and economic needs. While we are very cognizant that social and economic inequalities are meaningful and are a matter of concern even when they occur among those in the upper half of the American income distribution,³⁸ we find the unmet needs of those in the bottom half far more compelling on a moral level.

If we had \$255 billion a year to spend, we would spend it on programs aimed at the massive inequalities experienced by poor children in their early years. Consider the case of families with one child, under the age of six years old. About 40% of them have annual incomes of \$50,000 a year or more; 10% have incomes of more than \$100,000 per year. But over a million such families — 18% of the total — have less than \$15,000 in annual income.³⁹ Rates of childhood poverty vary by race and ethnicity: in 1998, 10.6% of non-Hispanic White children were living in poverty, compared with 34.4% of Hispanic children and 36.7% of Black children.⁴⁰ The disproportionate concentration of poverty within certain minority groups provides still another reason why we align ourselves with those who find the greatest moral significance in the needs of America’s least fortunate.⁴¹

The problem is that poverty programs, to be effective, need government. They need social workers. They need people with expertise

37. See U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999 tbl. 512 (119th ed. 1999) [hereinafter 1999 STATISTICAL ABSTRACT], <<http://www.census.gov/govs/school/96tables.pdf>> (showing U.S. expenditures of \$264,240,000,000 and \$279,353,000,000 for fiscal year 1995 and 1996, respectively).

38. See, e.g., Malamud, *supra* note 18.

39. See U.S. Census Bureau, *Income in the United States: 1998* (P60-206) tbl. 5 (last revised Mar. 3, 2000), <<http://www.census.gov/hhes/www/income98.htm>>.

40. See *id.* app. B, tbl. B-2.

41. See, e.g., GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990); ROBERT G. GOODIN, *REASONS FOR WELFARE* (1988); Thomas C. Grey, *Poverty and Need: The Welfare State and Theories of Distributive Justice*, 28 *STAN. L. REV.* 877 (1976).

that poor parents lack. They are paternalistic at their core. And they are expensive. Ackerman and Alstott report that the sums we now spend on Project Headstart are “piddling,” that a “first-class program” along the outlines of Headstart would cost billions of dollars, and that “our society’s failure to make such basic investments in its youngest and most vulnerable citizens is simply scandalous” (p. 28).

Why, then, divert \$255 billion of scarce funds to a stakeholding program? Why dress that program in the rhetoric of “equal opportunity,” and encourage people to believe in the moral fault of those who do not survive the inequalities of childhood and emerge as stakeholders? If a prior commitment to antipaternalism is the reason, why not write a more humble book, one that admits the social costs of antipaternalism and plainly advocates stakeholding as the best an antipaternalist can do? Why not go even further and reevaluate antipaternalism — especially if antipaternalism means stakeholding is the best we can do?