THE ECONOMY OF OBLIGATION: CONTRACT AMBIGUITY AND THE WELFARE STATE

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Abstract

During several phases in the life cycle there is little to bargain with. Individuals can transfer resources over time by means of financial intermediaries. But law, economics, psychology, and politics all suggest that long-term contracts are not reliable. People are myopic. Financial intermediaries exact high rents, and market entitlements are volatile. Stock markets are too small to support welfare transfers. Government converts private life cycle transfers into intergenerational cross-sectional ones, financed by ‘pay as you go’ taxation. Costs are low, transfer levels represent a political equilibrium, and the resource base is stable. The constraints are (1) the demand for security (2) taxable capacity (3) integrity and competence of government (4) potential capture by finance.

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Governments in affluent market societies present two puzzles. Why are they so large, and why not any larger? Between the 1930s and the 1970s, rich-country governments increased their share of national income allocation between two- and four-fold. For the next two decades, despite the dominance of market-liberal doctrines, their share of national income held steady, while welfare spending continued to rise (figure 1).

(a) General government expenditure as percentage of GDP.

(b) Transfers and subsidies as percentage of GDP.

FIGURE 1. Government allocation as share of GDP, c. 1870-1990s.

What do governments actually do? After World War II they came to focus on two main functions (figure 2). First, on core public goods like administration, law enforcement, and defence (in the UK, about one quarter of expenditure c. 2000-2005). The remainder, almost three-quarters, was spent on discharging remote or contingent obligations: delivering on past obligations, or providing for future ones—inter-generational transfers like pensions and education, life-cycle contingencies like medical treatment, disability, unemployment, and also infrastructure, i.e. roads, science, culture, environmental protection, and sport.

![Figure 2. Mean UK government expenditure by category, 2000-2005](http://www.hm-treasury.gov.uk/economic_data_and_tools/finance_spending_statistics/pes_publications/pespub_pesa07.cfm)

I argue that government can manage such long-term obligations more effectively than financial markets, because private long-term contracts are insecure. Government pay-as-you-go (PAYGO) finance transforms long-term obligations into current ones, and reduces reliance on contracts. More recently, the capacity of governments to perform has been undermined by market-liberal norms.
THE RICH AND THE REST

In the course of the life cycle, every person goes through periods when they cannot provide for themselves. Infancy and childhood, education, illness, unemployment, disability, and old age, are all costly and time-consuming. Several social institutions provide for these dependencies, including family, charity, ‘clubs’ (mutual insurance or aid associations), employers, legal trustees and fiduciaries, governments, financial markets, insurance payouts and tort awards. Each of these has its limitations. The focus here is comparing the roles of government and financial markets.

The best provision for welfare dependency is to be rich. Their risks are diversified, their wealth exceeds their consumption. They demand attention and care without having to provide it in return. But only a minority can be cared for like the rich. Those who attend to the rich cannot all be rich themselves. Imagine the opposite: everyone equal in endowments and ability, and the only output is care (there are other needs, but this is the one that counts). This resembles a baby-sitting circle. If some couples only receive sitting but never give it in return, the others will only contribute under duress. The problem resembles a variant of Samuelson’s overlapping generations model, with two life stages, production and dependency, and two co-existent generations, the active and the old, with only one good (care), which cannot be stored, and no capital. The old have nothing to bargain with. This can be remedied by social reciprocity or money.¹

These sketches demonstrates how the interests of the rich can be at odds with those of the rest. Without reciprocal entitlement, the role of the many is to service the

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few, with no confidence of being cared for in return. The fewer the rich, the more secure
they are in being attended to. Edmund Burke wrote, ‘all the classes and descriptions of
the Rich—they are the pensioners of the poor.’\textsuperscript{2} The rich have done well from market
competition, and advocate it for the rest. In the United States, a well-funded ‘personal
responsibility crusade’ advocates that everybody should stand on their own feet.\textsuperscript{3} But not
everyone can do so all the time. Social mobility in Britain and the USA is declining, and
inequality has risen.\textsuperscript{4} The ‘ownership society’ exalts private success, but discourages
other routes to security. If the winners can limit non-market entitlements, it makes the
rest more dependent upon them.\textsuperscript{5}

The advocates of ‘personal responsibility’ would have individuals provide for the
contingencies of dependency by entering into long-term contracts with financial
intermediaries.\textsuperscript{6} Such contracts aspire to lock in the future, but the future is elusive. Law
suggests that contracts are indeterminate, economics that they are incomplete,
psychology that agents are short-sighted, and markets reveal that intermediaries can be
expensive and opportunistic. Government can change the rules or act corruptly. Consider
these aspects in sequence.

\begin{footnotesize}
\begin{enumerate}
\item[2] Edmund Burke, \textit{Thoughts and Details on Scarcity Originally Presented to the Right Hon. William Pitt in
\item[4] Cheti Nicoletti and John F Ermisch, ‘Intergenerational Earnings Mobility: Changes across Cohorts in
Britain’, \textit{The B. Journal of Economic Analysis & Policy}, 7 (2007), 1-36; Robert J. Gordon and Ian Dew-
(Cambridge, MA, 2008); Frank Levy and Peter Temin, ‘Inequality and Institutions in 20th Century
\item[5] Avner Offer, \textit{The Challenge of Affluence: Self-Control and Well-Being in the United States and Britain
\end{enumerate}
\end{footnotesize}
Market delivery depends on contracts. But the bargain is not secure. There are two legal views of contract, the ideal and the real. The first is the ‘classic’ legal model of contract, the standard textbook theory. Two parties enter into a voluntary agreement and both of them benefit. This assumes ‘freedom of contract’. Agreement is a ‘meeting of wills’, or of ‘minds’. It is binding: *Pacta sunt servanda*—agreements must be kept.

Sir George Jessel, a senior British judge, pronounced in 1875:

If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the Courts of Justice.

These are Liberal principles: abiding by promises underpins personal responsibility, and autonomy of the individual. Contract binds the parties in a ‘private law’ which they write themselves, and gives rise to ‘private ordering’, a spontaneous and benign system that is independent of the state. Advocates of the classical contract prefer plain readings. ‘Justice is blind’, and should be. A strictly literal reading of contracts makes outcomes predictable, and facilitates co-operation and exchange. For one author, the term ‘sanctity of contract’ evoked a pre-modern world of mediaeval oaths and gentlemanly honour. It transcended mere self-interest. The mutual reliance of the

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9 He was Master of the Rolls and Head of the Court of Appeal, and had been Solicitor-General. *Printing and Numerical Registering Co. v. Sampson* (1875) *Law Reports* 19, Eq. 462, at 465.
parties creates an ethical duty, which is widely acknowledged, although with ample qualifications. Agreement, however, presents an opportunity for one party to take advantage of the other’s commitment. Economists call such defection ‘moral hazard’ or ‘opportunism’, implying that contracts are morally binding. Keeping promises is a virtue.

But the modern market-liberal ethos is not virtue, it is calculating self-regard. Even as Jessel spoke, contracts had already been stripped of moral obligation by the courts. The American jurist Oliver Wendell Holmes, Jr. (later Supreme Court Justice) wrote provocatively in 1881 that a person was free to break his legally binding promise, subject only to the payment of damages. James Gordley highlights ‘virtue’ as an Aristotelian norm that was discarded at the onset of modern jurisprudence in the 17th century, and is still conspicuous in its absence.

There is a void at the centre of classical contract theory. If the will is free, why can it not change its mind? Why should promises be kept? Fear of punishment alone is not a powerful sanction. What makes agreement binding? Insisting on the literal text implies that current intentions both anticipate and dominate any future contingencies.

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But why should prior choice override current preference? Holding parties strictly to their promises, ‘might operate harshly and unfairly in many instances.’

In contrast to the formalism of classical contract theory, it has long been argued that contract is inherently indeterminate. ‘No legal system has ever carried into practice the theory of absolute contractual liability.’ Even Jessel had exempted the incompetent and the under-aged. An array of doctrines and devices allow jurists and judges to relax the stipulations of contract.

‘Freedom of contract’ is valued by those with market power: ‘the terms of all contracts are determined by the relative bargaining power’. For example, there is no general duty of disclosure to prevent one party from taking advantage of the other’s ignorance. A written contract binds even if the person signing could not have read it. A printed standard contract might appear unfair to a judge, and be upheld as efficient by another. Corporations enter contracts but have no personal ‘will’. Exemption clauses, especially one-sided ones, are pervasive: stronger parties include clauses which allow them to change the terms unilaterally. Claims of error or mistake provide one escape from liability, and default or bankruptcy provide another.

The choice of court can affect outcomes. Judges have biases and personalities, and lawyers strive be heard by sympathetic ones. In the United States, most judges stand for

21 Brian Grow and Robert Berner, ‘Credit Cards: Behind the Consumer Rage’, *Business Week* (11 May 2009 pp. 48-51.)
election.\textsuperscript{22} Federal judicial appointments are politically partisan.\textsuperscript{23} Court conventions vary: the United States has fifty distinct state jurisdictions, and a Federal one as well.\textsuperscript{24} Mitigations are numerous, and are open to judicial discretion. When judges exercise discretion, they undermine certainty. The abundance of options may give rise to passivity: ‘Courts act passively... because they do not know how to be active.’\textsuperscript{25} Evidence is challenged. Contracts must be offered and accepted correctly, and are set aside for ignorance or error, misrepresentation and duress. Agreements are ambiguous, contain implied terms, and are open to dispute. The courts can decide whether non-performance is justified by circumstance. In the United States, lay juries participate in civil trials. When agents are not be aware of their own interests, e.g. children or the mentally disordered, then paternalist intervention is warranted. A contract might impose harm on bystanders. ‘Public policy’, a principle invoked by Jessel, is open-ended. Judgements are not always fully enforced.

The debate on contract among jurists is persistent and partisan.\textsuperscript{26} The sway of classical contract has been shrinking since the 19th century.\textsuperscript{27} On the one hand, fairness

\begin{itemize}
\item John A. G. Griffith, \textit{The Politics of the Judiciary} (Manchester: Manchester University Press, 1977);
\item Adams and Brownword, \textit{Understanding Contract Law}, pp. 7-13, 211-235.
\end{itemize}
undermines certainty, on the other, a harmful finality may not be worth having. This discourse does not inspire confidence in the capacity of contracts to deliver public policy. Contract validity was widely discussed during the public controversy over bankers’ bonuses in spring 2009.28

Contract doctrines rely on case law. But cases are atypical. Businessmen settle disputes by other means.29 The ‘real deal’ diverges from the ‘paper deal’, the implicit contract from the formal one. Instead of litigation, business people seek to re-align their interests. This is known as ‘relational contracting’. It looks beyond written intentions to enduring interests, and takes context into account.30 If the classic contract is like a duel, a ‘relational’ contract is recursive. The parties do not aim merely to prevail, but also to keep the deal going. The law of contract finds it difficult to deal with extended time frames. Long-term contracts typically specify arbitration, rather than litigation.31

It is possible to make too much of judicial indeterminacy – very few civil cases ever come to trial. In the United States at least, both legal conservatives and radicals appear to agree that the distinction between obligations arising from contract (i.e. voluntary agreement by parties) and from tort (obligations imposed by law) is no longer very

meaningful. To measure litigious activity, it is convenient to deal with them together. In the United States, several million disputes a year required at least the threat of litigation to resolve. In 2005, some 7.6 civil claims were filed in intermediate courts, and more than 10 million in lower ones. But only a tiny fraction of cases (about 3 per cent in intermediate courts, and approximately 33,000 cases a year including federal ones) ever came to trial. On another measure, only 1.8 per cent of Fortune 500 corporate law cases reached final judgement. In England the proportion of cases coming to trial was higher, but still only about 17,000 trials a year in the intermediate courts.

Insurance companies were the most likely source of contractual or legal redress. If disputes were not taken to trial, it is tempting to assume that this was because they were resolved ‘in the shadow of the law’: If the law was straightforward, companies would seek to settle rather than litigate. But the avoidance of trials can be interpreted differently, as a wariness of judicial uncertainty. The investment in civil cases was massive. The scale of tort awards in the USA in 2002 was about one per cent of GDP,
with legal costs (excluding the costs of the courts) coming to an additional 0.75 per cent, making it a costly form of welfare transfer.\textsuperscript{36} Claims were resisted stubbornly: the average Fortune 500 case lasted three years.\textsuperscript{37} A separate study of medical malpractice suits showed ‘For every dollar spent on compensation, 54 cents went to administrative expenses (including those involving lawyers, experts, and courts).’\textsuperscript{38} The debate on tort in the USA is partisan, but supporters and opponents both agree that only about half the sums awarded actually reach the claimants.\textsuperscript{39} At issue is not only uncertainty, but also expense. Intermediaries imposed a massive rent on legal restitution, a pattern that recurs in other forms of market provision.

ECONOMICS

The focus of economics, as of classic contract law, is on self-regarding individuals who maximize their advantage in market settings. As in law, exchange is voluntary and benefits the parties in proportion to their bargaining power. Each party maximizes ‘net present value’, the discounted sum of future payoffs. As in classic contract, they are assumed to know the future at the point of agreement, so have no reason to ever change their minds (this is the assumption of time-consistency, which is an attribute of formal rationality). Hence there is no need for enforcement. In any case, ‘Economic models of renegotiation assume that either party can costlessly enforce any term in the original


\textsuperscript{37} Henry, ‘\textit{Fortune} 500: Total Cost of Litigation’.


The Coase theorem, ‘with zero transaction costs’, is such an ‘invisible hand’ efficiency model. It postulates that trading will deliver assets to those who can use them best, regardless of initial endowment. The analogous ‘incentive theory’ also assumes perfect information and costless enforcement. Suggestive as this might be, it does not greatly correspond to reality.

The other version of the Coase theorem assumes that transactions are costly. Agents do not have perfect foresight, and act with limited information and bounded reason. They do not deal fairly, but with ‘opportunism and guile’. Contracts cannot anticipate every contingency, so are inevitably incomplete. Parties are not equally well-informed, and private knowledge provides a bargaining advantage. Those who come forward to deal have an incentive to conceal risk (‘adverse selection’), while those who sign up are tempted to defect afterwards (‘moral hazard’). The incentives of agents can be aligned with the interests of principals. This sounds clever, but corporate managers can outwit incentive designers: ‘no good regulatory solutions for inevitably incomplete contracts exist.’ Contract designs that harness self-interest signal an assumption that agents will place their own personal objectives before any other obligations. But a market driven exclusively by self-interest cannot work. ‘Judges and

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the police may indeed be paid, but the system itself would disappear if on each occasion they were to sell their services and decisions.⁴⁶

The two versions of the Coase theorem reflect an historical shift in economic behavioural assumptions from co-operation to cheating. The traditional assumption of market harmony was reasserted in the 1970s with models of efficient markets and rational expectations.⁴⁷ In contrast, new models of asymmetric information and game theory demonstrated that the better-informed party had an incentive to cheat. Good faith could no longer taken for granted. In the 1990s, behavioural economics began to investigate the propensities to co-operate and to dissemble, and found that both were pervasive.⁴⁸ In dealing with strangers, neither deceit nor decency can be assumed, which increases uncertainty.

PSYCHOLOGY
Hume thought that it human nature had a fatal preference for the present over the remote.⁴⁹ Adam Smith wrote that for good choices, willpower was as vital as reason.⁵⁰ Empirical research confirms these insights.⁵¹ Immediate desires are urgent, later ones are

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⁵¹ George Loewenstein, Daniel Read and Roy F. Baumeister, Time and Decision : Economic and Psychological Perspectives on Intertemporal Choice (New York: Russell Sage Foundation, 2003); Offer, Challenge of Affluence, chs. 3-4.
Inconsistency between present desires and future ones can make a choice intractable. It is difficult to override immediate desires but equally difficult to know how much they should be overruled. Myopia undermines prudential provision.

Finance is replete with examples of time-inconsistency. Investors pile in when markets are high, and cash out when prices are low. Passive enrolment raises participation in pension plans. Insurance policies impose mandatory payments. Investors diverge from the rational-choice assumptions of finance theory. If clients are myopic, they also likely to undersave, and to raid accounts prematurely.

Myopia is hard to overcome. Commitment is costly. Orthodox economists have conceded the point: education, for example, which confers a capacity for foresight, is worth acquiring by the well-off more than the poor. ‘Patience capital’ embodies the capacity to defer.

Cognitive biases are a challenge to ‘will theory’ and ‘freedom of contract’. They show that choice is fallible. But choices still have to be made. When calculation is difficult, people fall back on ‘commitment devices’, social institutions and conventions like education, insurance, and marriage. Classical contract and economic rationality

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57 Offer, *Challenge of Affluence*, pp. 48-52.
might themselves be seen as such devices, evolved to as tools to master commitment: Not models of human nature, but attempts to cope with its limitations. Government is another instrument of commitment. One of its functions is to help individuals to cope with myopia, to act as their commitment agent.

OPPORTUNISM AND GUILE

Contract timing is difficult to get right. It comes too late for the ageing—no time left to build up entitlements. For the sick, disabled, and unemployed, the contingency has already arrived. The young are not yet competent to sign. Future needs, decades hence, are difficult to anticipate.

Financial entitlements endure for many years, and transaction costs absorb much of the outlay. Initial marketing, administration, trading charges, taxes, returns on company capital, salaries and bonuses all have to be paid for. A pension saver, for example, faces three types of cost: a management charge, usually expressed as a percentage of the accumulated asset value, the cost of shifting between providers (few investors stay the course with one firm), and the cost of taking out an annuity.\(^{58}\) The management cost is the ‘charge ratio’, expressed as a percentage of the aggregate contributions to the fund. As a rule of thumb (assuming a fund return of five per cent real), a management fee of one per cent of assets translates into a charge ratio of 20 per cent, i.e. reduces the total accumulated by that magnitude.\(^{59}\) More straightforwardly, a one-per cent-of-assets management charge reduces yield by one per centage point. Typical charges on equity-based private-account pensions range between one and two

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per cent of assets every year. Charge ratios vary widely, e.g. between about 10 per cent (Bolivia) and 35 per cent (Australia, Mexico, UK). Extra transfer and annuity costs, as well as dealing charges, are not included. In the UK in 1999, taking all costs, and based on the first decade’s experience of personal private pension accounts, the average charge ratio, estimated conservatively, came to 43 per cent. This is consistent with published trade assumptions. Some funds charged much more. The cost of investing in managed equity trusts and life offices in the UK came, implicitly, to about one third of the payoff: an investment of £1.50 was required to obtain the market rate of return on £1. The UK government treats such levels of costs as reasonable – its voluntary 1999 ‘stakeholder pension’ for low earners permitted management costs (before dealing charges) of up to 1.5 per cent, implying a charge ratio of more than 30 per cent (the public has largely kept away).

John C. Bogle, a senior American financial market insider, has railed about the cost of market investment. As the long-time head of a low-cost index fund, he may be partial—but the expertise is authentic. He points to additional costs of herd behaviour (bad market timing, bad stock selection), survivor bias (some firms fail), up-front and redemption fees, manipulative and costly marketing, and excessive churning, which generates brokerage fees and tax liabilities. His data indicate that the average investor

gets only 54 per cent of the stock market annual return, and 33 per cent of the fund’s final gross value. 63 Furthermore, corporate managers in listed companies manipulate returns so as to maximize their own payoffs at shareholder expense. 64 Intermediaries and agents, whether fund managers or corporate executives are no longer fiduciaries, but are in it for themselves. Bogle writes of a ‘a skimming operation’, ‘fleecing machine’, ‘giant scam’, ‘looted funds’. 65

Equities have outperformed fixed-income securities consistently for more than a century. 66 This is the prime justification for entrusting entitlements to financial markets. But gross returns are misleading. The recent crisis, for example, destroyed five decades of equity advantage. 67 High returns require long-term abstinence to achieve. Asset prices incorporate a high prospective risk premium, which implies a high time-discount rate. If the investor is risk averse then risk adjustment reduces a rate of return which has already been lowered by costs and taxes. The investor ends up with close to the riskless (government bond) rate of return – which is what should be expected. There should not be any free lunch. 68 Holding stocks for long does not reduce the risk. It merely makes

62 ‘One must invest about £1.50 in an actively managed unit trust or through a life office in order to obtain the market rate of return on £1’ (Kevin R. James, ‘The Price of Retail Investing in the Uk’, Financial Services Authority, Occasional Paper 6, (London, February 2000), p. 5); see also p. 7.
63 John C. Bogle, The Battle for the Soul of Capitalism (New Haven ; Yale University Press, 2005), ch. 7, and table 7.3, p. 167. Costs can be reduced by investing in low-cost index funds, but only a minority do so.
65 Ibid., pp. 212, 229.
the loss greater when it finally occurs.\textsuperscript{69}

Government pay-as-you-go systems are between one and two orders of magnitude cheaper to run than stock-market provision. In the USA in 1999, Social Security administrative expenses amounted to 0.5 per cent of benefit payments.\textsuperscript{70} This is about 1/50th of the management charges on individual private pension accounts. A more pessimistic estimate for average OECD pay-as-you-go costs (3 per cent of contributions), still suggests that they are ten times cheaper than individual market-based pension accounts.\textsuperscript{71} Government creates large risk pools, it deals uniformly with large numbers of people and it does not need to sell: it can mandate participation to suppress free riding. A similar advantage of public over private was found in health: private insurance administrative costs in the USA were estimated at 12 per cent of spending, compared to 1.3 per cent in the tax-financed health service in Canada.\textsuperscript{72}

A contract for delivery decades hence is uncertain. For a pension contract the risks include: market volatility, costly annuities, inflation, outliving savings, mismanagement, opportunism, default, regulatory and political risk. Take volatility:


\textsuperscript{71} Assume the rate of return of private pension funds to be 5 per cent: an administrative charge of 1.5 per cent of assets would be comparable to 30 per cent of contributions (calculated from Olivia Mitchell, ‘Administrative Costs in Public and Private Retirement Systems’, in Martin Feldstein, ed., \textit{Privatising Social Security} (Chicago: Chicago University Press, 1998), pp. 403-52, tables 10.1, 1.10) i.e. roughly about ten times as much as the public system (where payments are about the same as contributions).

Burtless ran a simulation of a personal-account pension invested in the American stock market over the period 1871-1999. A worker invests six per cent of income annually for forty years with two per cent wage growth a year. The best outcome is almost six times higher than the worst one. The simulation delivered an initial replacement rate for a joint survivor annuity ranging between 14 per cent of the four best earning years, to 78 per cent, with one-quarter of cases falling below 26 per cent. This is actually a considerable overestimate of the payout, which assumes no charges, transaction costs, or taxes.

Risky counterparties are likely to offer the most attractive terms, and it is easy to be misled by marketing spin. Taking discount rates at five per cent, market horizons are only twenty years, and shorter at higher rates. Life cycles and contracts are longer than that. Stock-picking funds underperform the index and are five times more costly than passive index tracking ones, but most private savers choose these active funds, largely in response to marketing. As entitlements build up, savers can face decades of moral hazard – the firm has a steady income stream, and a standing temptation to defect. For example, income protection single-premium policies were widely bundled with insurance and credit in Britain. The Financial Services Authority found that half the policies restricted the ability to claim, or provided very limited cover. Premiums were

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several times higher than payouts. The regulator fined some companies, had premiums repaid, and after much delay, is phasing the contract out.\textsuperscript{77} Financial intermediaries and corporate managers take advantage of outsiders, e.g. by means of ‘market timing’ (selling outside market hours using breaking information).\textsuperscript{78} Even insiders are alarmed. Warren Buffet has described mutual fund directors who buy management services from themselves, as looters.\textsuperscript{79} The practice is pervasive and legal, but criminal fraud and mismanagement are also endemic. Maxwell, Enron, Tyco, Worldcom, Global Crossing, Madoff, and Stanford, have all stolen money directly from pensioners, savers, and shareholders.

When the time comes to claim, clients may find themselves disqualified by small print.\textsuperscript{80} Insurers resist claims aggressively.\textsuperscript{81} Corporations threaten claimants with litigation, and (like several American airlines) can escape from pension liabilities by


\textsuperscript{78} Bogle, \textit{Battle for the Soul of Capitalism}, ch. 7.


temporary bankruptcy.\(^{82}\) Contracts are sometimes used as risk allocation devices. A private person who loses the gamble will suffer the force of the law, but corporate managers are protected by limited liability and bankruptcy. Government guarantees for bank deposits, pensions, and life insurance attempt to correct this asymmetry, but in doing so provide opportunities for corporations to take on even more risk.

How much saving is enough? Time-inconsistent allocation offers no guidance.\(^{83}\) Actual levels of assets in private pension savings accounts are inadequate as a main resource for retirement. In the UK private sector in 2004-5, more than half the workers were making no pension contribution.\(^{84}\) Tax subsidies for saving went largely to high earners: ‘Overall, around 70\% of defined-contribution pension and IRA assets are held by the richest fifth of Americans.’\(^{85}\)

Contracts also face political and regulatory risk.\(^{86}\) The Thatcher government capped the growth of state pensions, and later cut them down. Since 1993 the British Treasury has reduced tax relief on dividend income for occupational pension funds by £150-225bn.\(^{87}\)

GOVERNMENTS AND MARKETS

It is not widely appreciated that stock markets are not large enough to carry the weight


\(^{83}\) Offer, *Challenge of Affluence*, pp. 48-9.


of social insurance. Even in the USA, with the smallest welfare state and largest stock market among rich societies, the total reported earnings of the equities market was less than half the level of government transfers. Average government transfer payments (11.4 per cent of GDP) from 1989 to 2005 were more than twice as large as the average flow of stock market earnings (4.6 per cent). Over the period 1960-2000, average annual stock market realized rates of return (4.06 per cent) were only slightly higher than the annual growth of real government transfers per capita (3.69 per cent), but volatility was three times as high (figure 3 below). Net of transaction costs, stock market returns would have been much lower.

Advocates of ‘personal responsibility’ in the United States, and their counterparts in Britain, have worked hard to transfer social insurance management into stock market funds. But financial markets have no spare capacity to take on this role. In the 1990s, more than 90 per cent of financial wealth belonged to the top quintile – almost fifty per cent to the top one per cent; not the sort of people who would welcome a redistribution towards those dependent on social insurance. Stock market returns are

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89 Figure 3 sources. Realized rates of return are calculated as (capital gains or losses + dividend payments)/previous year’s asset prices.

90 Arguably, asset prices already embody dividend expectations, so the return is set too high. The data are taken from December of every year, by which time most dividends would have been paid.


a) USA revenue flows as percent of GDP

b) USA asset/endowment/transfer growth rates

FIGURE 3. USA equity market, GDP and government expenditure volatilities, in current prices.

much more volatile than GDP (figure 3b). But they continue to give government securities the highest security rating. In contrast to stock markets, the tax base is stable. Real budget social transfers per capita have grown steadily, and have hardly ever declined.

Governments succeed where markets fail because they do not commit to long-term contracts. Welfare state entitlements are ‘relational contracts’, not classical ones. They are not adversarial but cooperative, and are designed to endure over the long-term: contracts are re-opened when circumstances change.⁹³ They operate on a PAYGO basis and avoid the problems of future delivery. Transfer levels reflect a political equilibrium between taxpayers and recipients. Politicians and voters are also myopic. PAYGO avoids myopic bias by not requiring a long future commitment. Transfers take place in the present. A financial balance is a hoard. Once spent, it is gone. A public pension entitlement also insures for longevity and inflation. PAYGO is a claim on ‘the community’s indestructible real tax base’.⁹⁴ In effect, it is a claim on a share of GDP—how much to be revealed when it becomes due for payment.

Dependants have little to trade with. So how can they compel delivery? Despite being a minority, their bargaining power is not zero. Their needs are salient in a way that claims in some remote future are not. Claimants are present and able to bargain. Welfare entitlements often rely on a record of contributions. The old, the ageing, and parents vote disproportionately. From 1964 to 2006, of those between 18 and 24, less

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⁹⁴ Samuelson, ‘The Exact Consumption Loan Model’, p. 482, n. 23.
than a third voted in congressional elections, about one-half of those aged 25-44, and 62 per cent of those older than 45.\textsuperscript{95} An implicit contract rests on the norm of reciprocity. The old have paid taxes in the past, and fair dealing entitles them to something in return. The young who pay now can expect to benefit in the future. If there were no social insurance, families would carry much of the burden,\textsuperscript{96} and government welfare provides insurance against this liability. The entitlement may be ‘soft’, but ‘hard’ ones are not more robust.

There is good deal of alarm about the solvency of American and European welfare systems.\textsuperscript{97} But if taxpayers can’t pay, they won’t pay. Long before collapse, the terms get revised. American Social Security payouts were raised under Nixon, and were lowered under Reagan, in both cases in line with changing actuarial expectations, and are now reasonably secure, and provide quite substantial replacement rates. They form the bulk of retirement income for most people. They will be revised again if necessary. The Thatcher government (more radical than Reagan in this respect) began its administration by detaching pensions from wage levels, and linking them to prices instead.\textsuperscript{98} It reduced the benefits of the earnings related state pension (SERPS), and nudged savers towards financial intermediaries by means of tax incentives.\textsuperscript{99}

\textsuperscript{96} Offer, Challenge of Affluence, pp. 88-9.
The relational contract gets modified to reflect voters’ changing level of generosity. Entitlement was not thrown out. It was tightened. Contribution-based entitlement was replaced by a means-tested one, but still an entitlement by another name (in this case, ‘Minimum Income Guarantee’), with no requirement to build up contributions. It has remained a good deal. Samuelson considers that PAYGO beneficiaries cannot expect more than the increase in national income per head in return for their contributions. But overall, in 2003, for £32bn that were paid in that year as National Insurance Contributions, UK pensioners received £46bn retirement pensions, a notional ‘rate of return’ of 43 per cent. The total of contribution-earned transfers was £58bn (a notional return of 81 per cent), with means-tested benefits on top of that. If distribution was still dire, it was because of rising inequality and poverty in Britain during the Thatcher years. The well-off would like to expose public employees to same market rigours experienced by private sector ones. In the meantime, the New Labour tax on occupational pensions hastened the decline of final salary schemes, and they survive mostly in the public sector. Wealthy-country governments have not repudiated the relational contract in recent decades, but there is no guarantee that they never will. In the United States, medical treatment still falls outside it. In 2007, one in ten children,

100 Samuelson, ‘The Exact Consumption-Loan Model’.
and one in five non-elderly adults had no health insurance. Such adults were 25 per cent more likely to die, and accounted for some 18,000 excess death a year.\textsuperscript{104}

**OBLIGATION AND MARKET LIBERALISM**

Welfare state entitlement was challenged from the 1960s by the re-emergent doctrine of market liberalism.\textsuperscript{105} It can be interpreted as a desire by society’s winners (and their acolytes) to withdraw from the relational contract: the most enduring theme has been the quest for lower taxes.\textsuperscript{106} It was also a bid by finance to capture social insurance from the state. Stuart Butler, a vice-president of the market-liberal Heritage Foundation, and a movement strategist, has made no bones about it:

> What we say is "Let’s essentially privatize the risk management for health or retirement." You give people other vehicles to manage the risk of living too long or being sick. You wean people gradually off social insurance risk management into private risk management without making them fearful about it. You have to do it in steps and have some government protection, at least in the beginning.\textsuperscript{107}

The prizes were a surge in financial intermediation, tax cuts for the wealthy, and more dependence for everybody else. Privatisation of social insurance undermines pay-as-you

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go entitlements, and shifts market risks onto people who are not well placed to bear them. Its advocates did not themselves rely on social insurance.

Capture has not succeeded more because markets are not effective managers of social risk. The privatized American health care system, for example, has only a few impartial defenders left. Capture was justified by a range of academic and other doctrines (efficient markets, public choice, monetarism, rational expectations, ‘leviathan’, supply-side economics) but the role of theory should not be exaggerated. It might be more an effect than a cause. Its function was to argue from first principles that government is inferior to ‘markets’ (in quotes, because existing institutions were typically compared with utopian market models). The real driver was politics.

Market liberalism can be seen as a quest by the wealthy to impose rents on the rest of society. In the early 1970s, corporate profits were declining.\textsuperscript{108} From the 1980s, the liquidity that flowed into stock markets lowered returns and created a shortage of yield. American equity price/earnings ratios rose from 16 to 43 (1990-2000), and market capitalization tripled to 1.6 times GDP.\textsuperscript{109} The paucity of stock-market yield was must have been one factor that drove finance so avidly into mortgages. The public services also presented a large business opportunity.

Market liberalism aspired to capture government tax revenues, get access to household incomes, and divert them into corporate cash flows. As corporate revenues these flows could deliver markups, and be managed, traded, leveraged, and financial-engineered to enrich financial operators, ancillary services, and their acolytes in the

\textsuperscript{109} Shiller, ‘Stock Market Data’.
political, business, academic and media elites. In the United Kingdom, the transition was abrupt. ‘Since 1970, the UK economy has expanded 130 per cent in real terms, while output of the financial intermediation sector has almost trebled. In the United States, the share of financial intermediation in GDP approximately doubled between 1970 and 2005 to about 8 per cent; in the UK it grew less, but rose to a higher level of 14 per cent of GDP (figure 4 (a)). A large spike in the 1980s, may have traced the expansionary bubble of financial liberalization in the Thatcher decade. The share of manufacturing and extraction in GDP fell by more than half from 36 per cent, while the ‘transactions’ sector (finance, business services, and imputed rentals of owner-occupation) increased by the same proportion, up to 36 per cent of GDP (fig. 4b). The other two sectors (‘other services’ and government) remained generally flat.

In the USA, the rise of transacting was exemplified in runaway health spending. In the UK, it was housing and pensions. In 1980 government-owned housing was put up for sale (about thirty per cent of the housing stock). Two years later, joint stock companies were allowed to enter housing finance, which was previously serviced by mutual building societies. In 1988 ten of the top societies converted themselves into joint stock banks. They wasted no time taking on more risk. Cheaper credit pushed up house prices, and housing costs captured a growing share of household income. By the

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112 Regression analysis does not single out any single sector that contracted at the same time. It could be a data artefact.
(a) Gross value added in financial intermediation

(b) Gross value added by sector, UK


(b) calculated from Great Britain, National Statistics, National Accounts Blue Book, Gross Value Added by Industry at Basic Prices.

Note: FISIM is an estimate of financial services not charged for directly, but derived from the margin between borrowing and lending.

time of the banking crisis of 2008-9, the privatized societies had all been taken over or failed, but most of the remaining mutual ones remained independent and solvent.\textsuperscript{114}

Privatization shifted much social insurance and utility business to the private sector within the space of a decade. Any efficiency gains were modest, with shareholders and managers benefiting at the expense of consumers.\textsuperscript{115} Inequality rose very sharply, with

the household income Gini coefficient increasing permanently from about .25 to about .35 in a decade, and a doubling of poverty rates to some 20 per cent. Private corporations gained about seven per centage points of national income value added at the expense of employees.\footnote{Offer, Challenge of Affluence, fig. 12.1. p. 272; income share calculated from Great Britain, National Statistics, Economic Trends Annual Supplement, 26 (London, 2000), table 1.4, p. 29.}

LIFE INSURANCE

Life insurance has been sold for more than two centuries, and is the most established use of private contracts to deliver remote obligations. But those who pay the premiums cannot judge performance: they are dead. For beneficiaries, the benefits are a windfall. Life insurance attracts tax subsidies and is used as a vehicle for saving. In the British ‘with-profits’ (or ‘endowment’) system, policyholders also get bonuses based on investment performance. Compensation for a death is incidental. Such contracts are meant to smooth returns from rising stock markets, to finance mortgages and pensions. Figure 5 shows the level of life insurance premiums as a percentage of GDP in six affluent countries since 1960. Before 1980 the level of premiums paid was about 3 per cent of GDP in Britain, and lower in other countries. After financial liberalisation in the 1980s, premiums took off. Over these countries as a whole, premiums never rose above 5 per cent of social expenditure. In the UK however, by the late 1990s, the level was more than twice as high, and more than half of all government social expenditure.

The contractual frailty of this approach soon became apparent. Terminal payoffs were often lower than the principal that mortgage borrowers had to repay. Advisers were paid by commission, and steered savers to the policies most profitable to
FIGURE 5. (a) Life Insurance Premiums and (b) Social Expenditure as percentage of GDP.


them. In response to complaints, government regulators found pervasive mis-selling, and forced insurers to compensate.\(^{117}\) By 2004, some 430,000 homebuyers received £1 billion in compensation.\(^{118}\) Pension mis-selling was greater still: 1.7 million policyholders had cases reviewed, at a cost to insurers and financial advisers of almost £12 billion in compensation.\(^{119}\)


\(^{118}\) Lorna Bourke, ‘Check Your Compensation for Endowment Mortgage Mis-Selling’, Daily Telegraph, 14 September 2004

Equitable Life is a British mutual life assurance company, founded in 1762 and owned by its 425,000 policyholders in 2000. In that year it went through an upheaval that demonstrates some of the risks that savers faced. The trigger was contractual ambiguity.\textsuperscript{120} The society's pension saving policies were converted into annuities on termination, and in the late 1960s it began to guarantee annuity rates in pursuit of market share. In 1983, it stopped setting aside reserves to support this liability.\textsuperscript{121} In the 1990s interest rates fell, and it reduced final bonuses to guaranteed policyholders (but not to the others) in order to meet the extra cost. It then went to court to validate this policy, but the House of Lords found against it.\textsuperscript{122} Equitable Life closed for new business, froze accounts, and cut benefits.

The society had offered a ‘relational’ argument: it was trying to equalize outcomes between different types of policyholders, all of whom paid similar premia and were equal members. Counsel had endorsed their policy, it was upheld by a lower court, and by a minority opinion in an intermediate one. The decision could have gone the other way. A noted commentator called it ‘economically illiterate’.\textsuperscript{123} The House of Lords chose a classical rather than a relational interpretation of the contract, and it had a ‘classical’ effect: it brought an end to an ancient and effective institution. The ‘winners’ did not do too well either.

\textsuperscript{121} R. H. Ranson and C. P. Headdon, ‘With Profits without Mystery’, \textit{Transactions of the Faculty of Actuaries,} 42 (1990), 139-86.
\textsuperscript{122} \textit{Equitable Life Assurance Society v. Hyman,} 2000.
\textsuperscript{123} Anatole Kaletsky, ‘Regulation Killed the Pensions Industry’, \textit{The Times,} 16 October 2006.
But a different decision might not have saved the society. It had taken on excessive risk, and regulators failed to stop it. The Financial Ombudsman upheld policyholder complaints, and government accepted liability. The Lords expounded a classic view of contract, but the ombudsman invoked a relational one. Although the society was mutual, it failed to avoid the pitfalls of market provision. Individual pension accounts in the UK began to contract after these setbacks (figure 5).

Another form of private pension was also in terminal decline: corporate final-salary (‘defined-benefit’) pensions had suffered several shocks in succession: £400 millions embezzled by Robert Maxwell in 1991, 140,000 contributors who lost their pensions when their companies failed, levies on pension company investment in the 1990s, and the closure of company schemes, in the USA as well. UK pension policy was now ailing. Some occupational or and corporate club-like final salary schemes appear to remain healthy. They share the risk like a small state, and rely substantially on PAYGO. But their robustness is only as strong as the market power of the ‘club’, be it a corporation like General Motors, or an occupation like that of British University teachers. Such market power is vulnerable over periods of decades. The best security remains to be rich. This was underlined by the £730,000 annual pension carried off by Sir Fred Goodwin at the age of 50, after presiding over the collapse of the Royal Bank of Scotland in 2008.

Pensions, mortgages, health, infrastructure -- in each one of these areas market solutions have run into problems, and have had to be punished or bailed out by government. The interim judgement is that market provision of remote and contingent

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obligations has not been adequate. And when the market works, it relies on explicit or implicit state guarantee or subsidy.

THE CAPACITY TO GOVERN

Politicians and voters are myopic too. PAYGO reduces the need to lock in the future. But the state can fail.¹²⁵ The commitment state works best in affluent countries, and even there it encounters resistance. The well-off have an interest in keeping others dependent. Finance has sought to actively weaken government. This has a broad social appeal. Majorities oppose inheritance taxes, although only a few end up paying them.¹²⁶ In 2005 a survey claimed that people trusted financial companies with their pensions more than they trusted government.¹²⁷ Ronald Reagan’s chronic budget deficits were designed to “starve the beast.”¹²⁸ A more subtle strategy is to ‘dumb the beast,’¹²⁹ which is achieved by capping public service pay, and draining talent away.¹³⁰ Market incentives in government services have subverted public service norms.¹³¹

PAYGO is no magic bullet. If government defects, or if the taxpayer does, relational entitlement is a poor bulwark. It is underpinned by the taxpayer’s consent. Beyond that level of provision, individuals have to take on more risks themselves.

¹²⁷ Helen McCarthy, ABI (Association of British Insurers), ‘The State of the Nation’s Savings 2005’ (London, 2005), slides 10-11. [available on request]
¹²⁹ Heard in a conference.
Given the uncertainty of all claims on the future, it is prudent to diversify. Those who can afford it will have a portfolio: government entitlements, financial instruments, housing, family resources, human and social capital. A robust social contract is the ultimate safety net. Only a minority can be rich, and they depend on society too.

CONCLUSION

Rich societies can afford to anticipate remote contingencies. Kenneth Arrow gives two reasons why private markets for insurance may be faulty. One is moral hazard. ‘The second is that such markets would require complicated and specialized contracts which are costly.’ The state can sidestep this difficulty by converting personal transfers over the life cycle into intergenerational transfers now. Paradoxically, PAYGO is suited for delivering on long-term obligations. The elegance of this approach helps to account for its ubiquity. It also indicates the scope that government has to act as a commitment agent. Other wants compete with the demand for long-term security, and this places a limit on taxable capacity. When waiting times are short, the market is often superior. Where the state is venal, distrusted, or undermined, there is less security and equity all round. In these circumstances, the market is also likely to fumble. The financial crisis which began in 2007 demonstrates the unfitness of finance to manage social insurance, but the cost of the bailouts may disable governments from discharging that role as well.

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