

THE CONSTITUTION AND ITS MORAL WARNINGS

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The recent meltdown in our financial institutions, to say nothing of our portfolios and 401(k)s, seemed to confirm the view of Thomas Reid, Justice James Wilson, and others that we are not skeptics by nature.¹ David Hume might have raised metaphysical doubts that we could speak with surety about “causation,” but when the financial crisis set in, the common sense assumption of ordinary folk was that someone had *caused* these things to happen. President Obama has been convinced, of course, that the gravest problems in our national life are always caused by someone else. He affects to be blissfully unaware that he and his party contributed to the recent crisis as they sought to ward off any attempt on the part of the Bush Administration to rein in Fannie Mae, with its policy of spreading subprime mortgages throughout the land. There is no want of theories about whom or what to blame, and yet it is striking that the Constitution has emerged from this crisis unscathed, in the sense that no one blames the Constitution. Whatever the Federal Reserve did in keeping interest rates low and sustaining the bubble in housing, whatever the Democrats did in giving a free rein to Fannie Mae to encourage people to take on mort-

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1. As Justice Wilson argued in his lectures on jurisprudence, the “propensity to speak the truth”—in giving directions, offering testimony, and guiding children—is “more universally predominant, than is generally imagined. . . . Even the most consummate liar declares truths much more frequently than falsehoods.” JAMES WILSON, LECTURES ON LAW (1804), reprinted in 1 THE WORKS OF JAMES WILSON 385 (Robert McCloskey ed., 1967). Justice Wilson was guided by the great Scottish philosopher, Thomas Reid, whom he cited in his very first opinion for the Supreme Court in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Here, at the beginning of American jurisprudence, Justice Wilson set the stage with the general principles of jurisprudence, but before even that, he invoked the teachings of Thomas Reid “in his excellent enquiry into the human mind, on the principles of *common sense*, speaking of the sceptical and illiberal philosophy, which under bold, but false, pretensions is liberality, prevailed in many parts of *Europe* before he wrote.” *Id.* at 453–54.

gages they could not afford, whatever mistakes Secretary Hank Paulson and Chairman Ben Bernanke made in arranging the bailouts and enlarging the powers of the federal government in the crisis, none of this was evidently enjoined or determined by the Constitution. And yet this crisis arguably has been amplified in its dimensions and its tragic effects precisely because men and women in high public office were no longer attentive to the moral cautions that members of the political class used to see vividly. These cautions had been seen more sharply when the political class took the provisions of the Constitution more seriously.

There seemed to be a keener sense, in an earlier time, of the deep moral principles that lie behind certain provisions of the Constitution. Justice Holmes thought that the modern legal project could be advanced “if every word of moral significance could be banished from the law altogether.”² The measure of his triumph is that several generations of lawyers have come to make a facile distinction between the things that are moral and those that are “legal.” When they managed to screen from their own sight the moral meanings contained in the Constitution, it is arguable that they were schooled over the years not to notice the moral cautions that the Constitution persistently cast up for people exercising the powers of law.

Richard Epstein has argued that we cannot diminish the extended effects of the crisis by dismissing the simple and venerable idea of the “Obligation of Contracts” as something instantly to be flicked aside in a moment of trouble.³ Pension funds and ordinary folk bought bonds in Chrysler, and yet found their claims thrust aside in the political management of the crisis, rather than taking their place in line under the laws of bankruptcy administered by a federal judge.⁴

The first generation of jurists in the Framing era had a clearer sense of the connection between law and moral judgment, for they seemed to understand the moral groundwork that stood beneath the provisions of the Constitution and the statutes that

2. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897).

3. Richard Epstein, *Why Constitutions Matter: Examining the legal root of the financial crisis*, NAT'L REV., May 4, 2009, at 39, 39–40.

4. Declan McCullagh, *Chrysler Bankruptcy Exposes Dirty Politics*, CBSNEWS.COM, May 7, 2009, <http://www.cbsnews.com/stories/2009/05/07/politics/otherpeoplesmoney/main4997900.shtml> (describing how the government violated the contractual rights of senior debt holders to facilitate a political deal to resolve the bankruptcy of Chrysler).

were consistent with the Constitution. Nowhere has the discrepancy between that earlier generation and our own been as striking, and as portentous, to our political life as in the understanding of the Contracts Clause.⁵ Hobbes famously remarked that contracts are “but words and breath, have no force to oblige, contain, constrain, or protect any man, but what [they have] from the public sword”⁶—from the coercive power that is necessary to enforce a contract. In this reckoning, an unenforceable contract is no contract at all. Hobbes, of course, preceded the American Framers, and yet his understanding is closer to the changes produced in our own time since the New Deal. For once Hobbes’s understanding is in place, it is a short step to the conclusion that the power of law is a necessary component in anything that would be taken seriously as a contract. And so, if the people exercising political power think that an injury to the common good could be averted by altering the terms of a private contract, the authority to make those changes is simply built into the responsibilities they bear in the exercise of that public power. That was essentially the understanding that Chief Justice Hughes drew upon when he sought to explain, in *Home Building & Loan Ass’n v. Blaisdell*,⁷ why the legislature of Minnesota might have been justified, in the exigencies of the Depression, in averting the foreclosure of farms by declaring a moratorium on foreclosures. Cicero, much earlier, caught the moral sense of the problem when he commented on schemes to solve the enduring tension between debtors and creditors in this way: What is the meaning, he asked, of an “abolition of debts, except that you buy a farm with my money; that you have the farm, and I have not my money?”⁸

That understanding can be countered only by an understanding of what there is in the idea of a contract that is not dependent on the conventions of the law. In the early jurisprudence of the republic, that understanding was expressed with uncommon clarity by Chief Justice John Marshall in *Ogden v. Saunders*.⁹ Daniel Webster, in his brief on the case, set forth the

5. U.S. CONST. art. I, § 10.

6. THOMAS HOBBS, *LEVIATHAN* 115 (Basil Blackwell ed., Oxford 1960) (1651).

7. 290 U.S. 398, 444–45 (1934).

8. CICERO, *DE OFFICIIS* 261 (T.E. Page & W.H.D. Rouse eds., Walter Miller trans., Macmillan 1913).

9. 25 U.S. (12 Wheat.) 213, 345 (1827).

problem as clearly as Chief Justice Marshall would later explain the matter.¹⁰ Webster framed the problem with stringent clarity upon which it is hard to improve:

If the contract be lawful, the party is bound to perform it. But bound by what? What is it that binds him? And this leads to what we regard as a principal fallacy in the argument on the other side. That argument supposes, and insists, that the whole obligation of a contract has its origin in the municipal law. This position we controvert. We do not say that it is that obligation which springs from conscience merely; but we deny that it is only such as springs from the particular law of the place where the contract is made. It must be a lawful contract, doubtless; that is, permitted and allowed; because society has a right to prohibit all such contracts, as well as all such actions, as it deems to be mischievous or injurious. But, if the contract be such as the law of society tolerates—in other words, if it be lawful—then, we say, the duty of performing it springs from universal law.¹¹

Webster imagines that a man promises to pay money in New York. Does the obligation to respect that contract emanate only from the laws of New York, “or does it subsist independent of those laws?”¹²

We contend that the obligation of a contract, that is, the duty of performing it, is not created by the law of the particular place where it is made, and dependent on that law for its existence; *but that it may subsist, and does subsist, without that law, and independent of it. The obligation is in the contract itself, in the assent of the parties, and in the sanction of universal law.*¹³

Let us sort this out. Contracts must be made, in the first place, for legitimate purposes only. As Justice Rufus Peckham would later make explicit, the courts will not uphold “immoral” contracts:¹⁴ They will not uphold contracts for hit murders or for prostitution.¹⁵ The laws in particular places may vary in their stringency. Pornography might be a perfectly legitimate calling in San Francisco, but not in Boston, and if the

10. See Daniel Webster, *Argument of Daniel Webster in the Case of Ogden v. Saunders*, in A COLLECTION OF ARGUMENTS AND SPEECHES 67, 71 (William L. Snyder ed., 1901).

11. *Id.*

12. *Id.*

13. *Id.* (emphasis added).

14. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

15. See HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND 275 (1994).

laws in Massachusetts bar pornography, the courts will not enforce contracts to engage in pornography. Those are the parts that are bound to particular places. What, then, is the part of contract that is “universal,” as Webster said?¹⁶ As he suggests in a stroke of imagination, it is the part that would exist even when there is no government on the scene.¹⁷ Let us recall those two people making a contract in New York. If one of them moves to Pennsylvania, we assume that the obligation to honor the contract has not been altered by the shift in locale. But let us suppose that the contract has been made

between two persons cast ashore on an uninhabited territory, or in a place over which no law of society extends. There are such places, and contracts have been made by individuals casually there, and these contracts have been enforced in courts of law in civilized communities. Whence do such contracts derive their obligation, if not from universal law?¹⁸

Suppose instead that the two people are stranded on a deserted island. They promise each other that they will each explore a different part of the island, and if either one finds help or rescue, he will notify the other. On the strength of that promise, each person stakes his interest in his safety. If the promise is not kept, the other person could lose his life. It is the awareness of that potential injury at stake in making the promise, and trust that the promise will be kept, that forms the obligation of the contract. In a domestic example, carpenters and workmen think they have the commitment of a builder to do the work he has engaged them to do. On the strength of that promise, they forego other work that would be necessary to sustain themselves and their families. They put themselves at risk, then, of a serious injury when they depend on the promise in the contract. And it is that serious injury that justifies the move of the community to make that promise enforceable in the law. That is why we have a law of contracts.

When Chief Justice Hughes in the *Blaisdell* case held that the contracts contained in mortgages may be suspended or revised by the authorities because of the hardship of the Depression, he made a nullity of the contracts. And in the sweep of his grand

16. Webster, *supra* note 10, at 71.

17. *Id.* at 71–72.

18. *Id.*

gesture it apparently escaped his notice—as it had not escaped the notice of Cicero—that the benefits conferred in this way on the farmers holding mortgages would be paid for by the costs imposed on depositors in the banks. Those depositors would no longer stand to receive the returns of interest they had been promised for leaving their money with the bank, and indeed, they could lose the savings they had deposited. As Justice George Sutherland remarked in dissent, the Contracts Clause in the Constitution was not to be suspended because of the exigencies of an emergency; it was made precisely as something that had to be honored in the presence of a real emergency.¹⁹

In the same way, there was a remarkable flippancy when the latter-day followers of Chief Justice Hughes and the jurisprudence of the New Deal decided that the best way to prop up the Chrysler corporation and the union of auto workers was to treat as expendable those pensioners and investors who had bet a good portion of their savings on bonds in Chrysler.²⁰ They depended on the obligations that traditionally flowed to the holders of bonds. It may require interviews by an anthropologist to tell us more accurately how the decision makers in the Obama Administration understood these matters. But on the surface of things, it would be hard to account for the way they acted without imputing to them remarkable obtuseness, which somehow blocked from their notice the injuries that would take place, the deep moral faults that would be marked, by this willingness simply to flick away the obligations of contract. But that is precisely what the Constitution in an earlier day helped people in authority to see. When the legal imagination was cultivated by this understanding, the bells and alarms sounded a warning that these people in authority were doing something truly portentous.

In the famous *Legal Tender Cases* in 1870, Chief Justice Salmon Chase managed to pierce to the moral reasoning that lay behind the provisions in the Constitution in the same way.²¹ Strictly speaking, the Contracts Clause bore only on state gov-

19. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448–49 (1934) (Sutherland, J., dissenting) (“A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.”).

20. See McCullagh, *supra* note 4.

21. See *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 570 (1870) (Chase, C.J., dissenting).

ernments.²² But Chief Justice Chase understood a deep principle behind that clause, one that would also apply to the federal government if it sought to alter contracts by political fiat.²³ The government did precisely that in a series of cases, for it required debts contracted in gold to be satisfied by payments rendered in paper money, which had lost about two-thirds of its value.²⁴ But the Chief Justice gave us another example that seems to have disappeared from the sensibilities of many lawyers and judges in our own time. Chase focused for a moment on the Takings Clause of the Fifth Amendment: that “private property [shall not] be taken for public use, without just compensation.”²⁵ There was, of course, no “taking” of property in cases that involved the requirement of paper money in payment of debts. Literally speaking there was no transfer of ownership from a private owner to the public authorities. The Chief Justice suggested, however, that with a modest engagement of the moral imagination, the principle behind this provision would plausibly extend beyond the narrow terms of the text:

[The provision on the taking of property] does not, in terms, prohibit legislation which appropriates the private property of one class of citizens to the use of another class; but if such property cannot be taken for the benefit of all, without compensation, it is difficult to understand how it can be so taken for the benefit of a part without violating the spirit of the prohibition.²⁶

Imagine that the government seizes an apartment building from an owner, without compensation, and transfers that property to the ownership of the government. Would it be a different case, in principle, if the government seized the same building, without compensation, and transferred ownership to the tenants? Would the government then be able to evade the discipline of the Constitution and the need to pay compensation? And would it evade, with the same move, the need to justify to the voters and taxpayers the taxes that would be necessary to fund these expenditures?

22. U.S. CONST. art. 1, § 10.

23. See *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 623 (1869).

24. *Id.* at 606–08.

25. U.S. CONST. amend. V.

26. *Hepburn*, 75 U.S. (8 Wall.) at 623–24.

Sometime in the late 1970s, the recognition was settling in among the political class that voters were reaching the limits of their willingness to be taxed. The movement for Proposition 13 in California sounded the telling note here in forcing a limit on taxes, and perhaps prefiguring the Age of Reagan.²⁷ But then a countering stratagem began to recommend itself to the political class: The government could simply mandate that private owners provide public goods. For example, the government could require owners of oceanfront property to provide access to the shore for the public if they wished to receive special permission to build on their properties.²⁸

But some have tried to take this tactic to a new level by requiring private employers to provide health insurance for their employees, as though this were a measure within the police powers of government to act for the safety and health of workers. Michael Dukakis in 1988 raised this argument to the level of a presidential campaign,²⁹ and now President Obama has made it, of course, a part of his sweeping health care scheme.³⁰ An employer might be taxed at eight percent of the average wages he pays to provide that health care if he does not.³¹ The government will then exempt, with the usual gestures of liberality, those businesses too small to bear these public obligations.³² If these measures had been advocated at the end of the nineteenth century or early in the twentieth, the alarm would have gone off at once. Our predecessors would have called the proposed health care bill "class legislation," government action that confiscates the property of A in order to transfer it to B, as though B had done something wrong and A, somehow mistreated or injured, deserved compensation. There would have been no doubt that we were at the threshold of policies that raised the gravest constitutional questions. But now we glide easily across these distinctions that once marked real moral and

27. See *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (upholding the constitutionality of Proposition 13, which amended the California constitution to cap property taxes).

28. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834–36 (1987).

29. See Joel C. Cantor, *Expanding Health Insurance Coverage: Who Will Pay?*, 15 J. HEALTH POL. POL'Y & L. 755, 758 (1990).

30. See Affordable Health Care for America Act, H.R. 3962, 111th Cong. §§ 411–416 (2009) (as passed by House, Nov. 7, 2009).

31. *Id.* § 413(a).

32. *Id.* § 413(b) (providing a complete exemption for employers with a payroll of less than \$500,000).

constitutional barriers, and we do it without the least sense that anything of constitutional import may be taking place. We may argue, at most, about the utility or effectiveness of the proposed policy. But it is a telling measure of our political life today that the question of constitutionality is virtually never heard. It has disappeared from the public sensibility, in the way that the text of the Constitution seems to have receded into a fog of memory of things distant.

Harry Truman once remarked that “the only thing new in the world is the history you don’t know.”³³ If there is one constitutional issue that marks the most dramatic passage from the Constitution as it was to the Constitution as remade and unmade by the Progressives and the New Deal, it is the issue of the “delegation of authority.” It is the issue that Justice Scalia had in mind when he warned that the Constitution confers on the legislative branch “the power to make laws, not the power to make legislators.”³⁴ That issue was momentous as it lingered in the New Deal, even after the grave breaches coinciding with the rise of the administrative state under Woodrow Wilson. The country gained a plethora of new independent agencies that were neither of the executive, nor of the legislature, nor of the judiciary. And they were charged with using their discretion to achieve the public good. They set the grooves of precedent in which Secretary Paulson could freely act during the financial meltdown in the fall of 2008, when he was given the authority to expend money under the new TARP program with no more guidance than the assignment of acting for the public good. Let us try to recapture the sense of the moral and constitutional problem by recalling one of the more vivid cases from New Deal days.

Jacob Maged, forty-nine years old, a tailor in Jersey City, was sentenced to three months in jail in 1934 and fined \$100, his wife and four daughters compelled then to run his shop in his absence. What had he done? Knowingly, deliberately, he had pressed a suit for one of his customers for thirty-five cents instead of the forty cents mandated under the National Recovery Act. And Abe Traube, the head of the Cleaners and Dyers Board, said, “We think that this is the only way to enforce the

33. MICHAEL BESCHLOSS, *PRESIDENTIAL COURAGE: BRAVE LEADERS AND HOW THEY CHANGED AMERICA 1789–1989*, at 211 (2007).

34. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 35 (Amy Gutmann ed., 1997).

NRA. If we did the same thing in New York City we would soon get the whole industry in line."³⁵ With the delegation of authority, an unelected board composed of businessmen and union members in the same business could wield the powers of law to set prices and hours and punish anyone, like Jacob Maged, who might try to earn a living during the Depression by working for a little less, or working a little longer, than other people.

We assume that such things were put away by the courts during the New Deal. But we do not notice when they come back, and so apparently no moral signals are sounded for President Obama as he and his team contemplate a grand administration of health care that delegates the authority to decide just how much is worth spending on the medical care of any patient, especially older patients.³⁶ If the question had been put before a legislative committee—if Congressmen had to vote about which procedures were worth covering and which were not—the measure would have a hard time surviving congressional scrutiny and gaining enough votes to pass.

In the days of the New Deal, Huey Long complained that the New Deal had "[e]very fault of socialism . . . without one of its virtues."³⁷ He pointed out that regulations were issued, with the force of law, from administrative agencies, regulations that could not have passed the Congress if they had been put forth as measures to be enacted into law. And now we fast-forward, as they say, and we may ask the question, in the spirit of Huey Long: On what basis, in what statute, did President Obama find the authority to cashier the President of General Motors?³⁸ Granted, the taking of massive public funds creates some sense of obligation to the public. And yet, a statute providing funding in an emergency to financial institutions would not itself convert a private entity into a public entity, nor clearly transfer

35. ARKES, *supra* note 15, at 160–61.

36. See 3962, §§ 221–224 (establishing a "Health Benefits Advisory Committee" to recommend minimum health insurance coverage standards to the Secretary of Health and Human Services for adoption by notice-and-comment rulemaking).

37. ROBERT MANN, *LEGACY TO POWER: SENATOR RUSSELL LONG OF LOUISIANA* 26 (1992).

38. See Mike Allen & Josh Gerstein, *GM CEO resigns at Obama's behest*, POLITICO, Mar. 30, 2009, <http://www.politico.com/news/stories/0309/20625.html> (describing the resignation of GM CEO Rick Wagoner after GM received a \$9.4 billion loan from the government).

to the hands of the government the authority to name the management of the company.

On that kind of question, it is never out of season to recall John Marshall's classic argument in the Dartmouth College case.³⁹ The Chief Justice made interesting concessions to the political leadership in New Hampshire, which had sought to take over this private college and turn it into a public entity with members of the board appointed by the legislature.⁴⁰ Education was of inestimable significance for the life of a republic—as the health of the auto industry is for the country in our own day—but that did not convert a private entity into a public entity.⁴¹ No more did a corporate charter conferred by the State.⁴² It was of inestimable value that Dartmouth was an entity that could endure over time even as the president and the board—and the students—changed. But as the Chief Justice argued, it no more made Dartmouth a public entity than the conferring of immortal life on any person would convert that person into a public entity.⁴³ What the legislature had done was “to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men,” into an instrument directed by the government of New Hampshire.⁴⁴ But then came Chief Justice Marshall's concession: “This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.”⁴⁵

We might imagine the legislature of an earlier day in Massachusetts taking charge of the board at Harvard and appointing Henry James and Mark Twain. Or in our own day, appointing to the board of Amherst College John Updike and Philip Roth. It would no doubt be a board of more literary excellence. But it would not be the board arranged by the founders of the institution, their legal successors, and their alumni. It could be, quite arguably, a better literary institution. But it would not be *theirs*.

39. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

40. *Id.* at 626.

41. *Id.* at 634–35.

42. *Id.* at 638.

43. *Id.* at 641–42.

44. *Id.* at 653.

45. *Id.*

It would no longer be that private college, shaped by judgments that had been formed to an uncommon, cultivated standard. And for all we know, General Motors and Chrysler might be better businesses if they were run by Larry Summers or Steve Rattner, but they would not be private firms organized by their own, private criteria.

It is one of the deceptive ironies of our time that we have heard more about “privacy” as the anchor of our claims to personal freedom and constitutional rights at a time when private rights have never been so deeply disrespected. At the time of the *Civil Rights Cases* in the 1880s, it seemed to be understood that a liberal constitutional order began with a respect for the domain of privacy in marking off a hard limit to the reach of *public* authority.⁴⁶ That zone of privacy offered a certain insulation for people to do it their own way, even when their private discriminations conveyed the most undisguised contempt for the people and the styles of demeanor they meant to bar from their presence. And yet all of that could be accepted with a certain shrug as one of those inescapable marks of a regime of constitutional restraints, a regime that confirmed for people a freedom to arrange things according to their own, private criteria in private businesses, private clubs, and private families.

To recall these understandings is to tell the story of a people more and more convinced that they have become the bearer of constitutional rights ever broader, ever grander than what has been known before, even as they have detached themselves ever more from the moral grounds that stood beneath those constitutional rights. The political class has tutored the public to a cluster of constitutional rights, but can no longer give a moral account of those rights. And hence, when the financial crisis hit with its deepening effect, most of our people could no longer detect the alarms that alerted us in an earlier time that something was awry in the constitutional order—something of profound moral significance. The loss of that awareness threatens to make a lasting difference in the lives we have together as a people, living in a republic, and living with the benign illusion that we were living under the protections of the Constitution.

46. See *Civil Rights Cases*, 109 U.S. 3, 11 (1883).