

# THE CONSTITUTIONAL VIRTUES AND VICES OF THE NEW DEAL

AKHIL REED AMAR\*

The topic of our panel today—the New Deal—is a vast one, so let me try to identify six features of it, three that I like (sorry, Richard) and three that I don't (sorry, Bruce).<sup>1</sup>

In the course of addressing these six issues, I shall try to take seriously the thought experiment that my Yale colleague, Professor Bruce Ackerman, has extended to us all. He would like us to think about the New Deal as a constitutional moment akin to the Founding and the Reconstruction—a moment that, in effect, gives us the constitutional equivalent of a formal textual amendment.<sup>2</sup> Only that thought experiment, he suggests, can truly make sense of all the ways in which modern jurisprudence changed as a result of the New Deal. Unless we posit something like this hidden constitutional amendment with a certain kind of gravitational pull—like some unseen, distant planet out there whose existence can be deduced only from its effects—Ackerman argues that we can't make sense of our current state of affairs.

I propose that, at least as to the three things that I like about the New Deal, we need not posit an unwritten New Deal amendment; and as to the three things that I don't particularly like about the New Deal, perhaps it's a good thing that no written New Deal amendment exists. (Maybe we are not stuck with those things.)

## I. VIRTUES

First, the New Deal, as I understand it, affirms the

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\* Southmayd Professor of Law, Yale Law School. What follows is a lightly revised version of oral remarks delivered at the Seventeenth Annual Student Symposium of the Federalist Society.

1. I allude here to my co-panelist and New Deal critic Richard Epstein, and to my colleague and New Deal champion Bruce Ackerman.

2. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 34-57 (1991).

permissibility of governmental redistribution. This is a good thing. In my view, it is a legitimate government function to take from the rich and give to the poor in the name of democratic equality and a suitably republican vision of equal citizenship.

Now, this is precisely what *Lochner v New York*<sup>3</sup> rejects. Many of you might think that *Lochner* is basically about freedom of contract, but this is not quite so. A careful reading of the case shows that *Lochner* is willing to make its peace with all sorts of paternalistic legislation interfering with an individual's ability to contract. What *Lochner* rejects is the legitimacy of what it calls "a labor law, pure and simple,"<sup>4</sup> by which it means a law designed to alter the bargaining power between employers and employees, or more generally, the haves and the have-nots, the rich and the poor. That's the essence of *Lochner*, as I understand it—the illegitimacy of governmental redistribution.

Now, as an original matter, I am not sure that this follows from our original constitutional structure. Yes, you could look at the Takings Clause, which originally applies only to the federal government,<sup>5</sup> and you could look at the Contracts Clause, which applies only to state governments,<sup>6</sup> and you could try to put the two together and deduce some broad structural principle opposed to redistribution. You could even look at early judicial statements that the government may not take from A and give to B<sup>7</sup>—but you would be misreading those early judicial statements, because A and B were *individuals* in those cases, and when the government acts on an *individual* to his detriment and takes something from individual A, that's a bill of attainder violating basic ideas of legislative generality and prospectivity.<sup>8</sup> I do not read these cases as saying that government may never take from *class* A and give to *class* B when legislation is suitably general and prospective—but it's a

3. 198 U.S. 45 (1905).

4. *Id.* at 57.

5. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .")

6. U.S. CONST. art I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .")

7. *See, e.g., Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) (limiting the reach of the ex post facto clause).

8. *See generally* Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 208-21 (1996).

debatable question at the Founding.

So, I can understand why friends of *Lochner* may say something like the following: "We are simply deducing a basic structural principle opposed to redistribution. Madison does not have very nice things to say about redistribution in *The Federalist* No. 10 when he talks about paper money and other terrible ideas."<sup>9</sup>

On the other hand, even before the Civil War, there's the Republican Government Clause,<sup>10</sup> which is about creating a society of equal citizens, and even James Madison believed that it was essentially un-republican to have a regime in which you had a very few wealthy people and lots of people without anything. That was not the social and economic structure on which a suitably democratic or republican society of equal citizens could be built, and even Madison believed in laws that would silently equalize the extremes of wealth and poverty.<sup>11</sup>

But even if you don't buy my argument as a Founding matter, consider the Reconstruction. Here we have a massive taking from the A's of the world and giving to the B's. It's called emancipation. This is a massive redistribution of *lawful* property, property that was lawful at the time; the government simply modifies that and gives people their bodies, even though their bodies, at one point, had been lawfully owned by someone else. Thus sayeth the Thirteenth Amendment and the Emancipation Proclamation. Section 4 of the Fourteenth Amendment goes even further. It prohibits any compensation of slave-holders for the taking of their once-lawful property, even in the so-called border states—the middle states which had remained faithful to the Union.<sup>12</sup>

So I am not convinced *Lochner* actually is the best reading of the Constitution in 1905, but it is a plausible one.

However, it is not a plausible reading, in my view, after the Sixteenth Amendment,<sup>13</sup> the income tax amendment, which is

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9. See THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961) (criticizing the "rage for paper money" and "other improper or wicked project[s] . . .")

10. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .")

11. See James Madison, *Parties*, NAT'L GAZETTE, Jan. 23, 1792 reprinted in 14 THE PAPERS OF JAMES MADISON 197-98 (Robert A. Rutland ed., 1983).

12. U.S. CONST. amend. XIV, § 4 ("But neither the United States nor any State shall assume or pay any . . . claim for the loss or emancipation of any slave . . .")

13. U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes

not just about an income tax, but a *progressive* income tax, a *redistributive* income tax, an income tax that's going to be a 5-percent tax on the income of millionaires, designed to reduce the great inequalities of wealth between rich and poor. That is what the Sixteenth Amendment is all about, so even if redistribution was arguably an illegitimate governmental purpose in 1905, it clearly wasn't after 1913.

You might respond that the Sixteenth Amendment was about the federal government and not the states, but I think it affirms the permissibility of a certain kind of government action, and this affirmation has profound implications even for the states. And that connects to my second point, which is a point about rights generally. The basic idea of the Fourteenth Amendment, after all, is that Americans should generally have the same set of fundamental civil rights against both state and federal governments. That is the basic meaning of incorporation of the Bill of Rights against the states, and reverse incorporation of equal protection principles against the federal government. After the Fourteenth Amendment, we moved away from the Founders' world where Americans had different sets of rights against the different governments—for instance, Contract Clause rights against the states<sup>14</sup> and Takings Clause rights against the Feds.<sup>15</sup>

So the second point that I like about the New Deal is, in short, footnote four of *Carolene Products*<sup>16</sup> The first paragraph of footnote four basically anticipates the incorporation idea, that there are certain rights originally defined against the federal government, that are every bit as important and specific when made fully applicable against states. That's paragraph one, what we call today incorporation. Paragraph two affirms the importance of protecting political inputs—speech, press, petition, and assembly—the openness of a political process against incumbents who might try to choke off criticism or opposition speech. Paragraph three talks about the importance of protecting discrete and insular minorities.

Now, in Professor Ackerman's account, just as he posits a

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on incomes . . . .")

14. U.S. CONST. art I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .")

15. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .")

16. See *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4 (1938).

sort of New Deal amendment to validate governmental redistribution, he says that once the courts get out of the property-protection business, they must have something to do, so they need to get into the rights-protecting business in the three paragraphs of *Carolene Products*—via a kind of law of conservation of judicial energy.<sup>17</sup>

I doubt we need anything so indirect to justify footnote four. We need only take seriously the words and the spirit of the Fourteenth Amendment, and along all three of these dimensions of footnote four, the Fourteenth Amendment provides very strong support. First, the Fourteenth Amendment is about incorporation of the Bill of Rights against the states. I can't prove that big point in the small time I have now, but I have tried to prove that point in my book on the Bill of Rights.<sup>18</sup> The Fourteenth Amendment is also about specially protecting things like speech, press, petition, and assembly from intolerant governments, state and federal, which tried to shut down broad movements like abolitionism. Finally, the Fourteenth Amendment is about protecting discrete and insular minorities—paradigmatically, black people and Unionists in the South.

So, in my view, we don't need some fancy New Deal Amendment to account for all three paragraphs of footnote four—we just need to take seriously the pre-existing Fourteenth Amendment.

The third thing that I like about the New Deal is its repudiation of *Hammer v. Dagenhart*<sup>19</sup> and its embrace of a suitably broad, but not unlimited, reading of the Commerce Clause.<sup>20</sup> By "suitably broad," I mean the following: Things that are truly interstate in their effects can be regulated by the legislature in which all the states are represented, whereas things where the basic effects are felt within a state—where there's no externality, positive or negative—should be regulated by the individual states. So I would focus less on the word "commerce" and more on the interstate-intrastate idea.

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17. See Ackerman, *supra* note 2, at 113-30.

18. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

19. 247 U.S. 251 (1918).

20. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

We have, in my view, broader congressional power to regulate interstate commerce after 1937, not because of some amendment-equivalent adopted as a result of a constitutional moment, but just because, in the real world, a lot more things are interstate due to improvements in transportation and communication technology. The percentage of our genuine Gross Domestic Product that involves people and things that cross state lines—pollution molecules, wild animals, the internet, and so on—is just much, much bigger than it was prior to 1937.

Having said all that, we could still perfectly well say that a case like *United States v. Lopez*<sup>21</sup> is properly decided. Congress does not enjoy unlimited power, and crime in schools might be a genuinely *national* problem (a problem everywhere), but not a *federal* problem (not an *interstate* problem) because the effects are so localized. Because blood is so immediate in time, its effects tend to be localized in space. I fail to see why we would necessarily need an interstate federal government to get involved; it may not be a truly federal problem even though it might be a national problem.

## II. VICES

There are at least three things that I do not particularly like about the New Deal. First, it repudiates the unitary executive. I am thinking here of the case of *Humphrey's Executor v. United States*,<sup>22</sup> and the larger specter of a headless fourth branch of government conjured up by that case. Federal officers who enforce federal laws should, in some sense, be accountable to and part of the executive department headed by a President of the United States in whom the executive power is vested. This was a sensible idea 200 years ago, and remains sensible today. The most difficult counter-example is the Federal Reserve. There may be reasons to deny a modern-day plebiscitarian presidency—a partisan presidency—complete power over the money spigot. This is a problem the Founders did not anticipate—in which a post-Twelfth Amendment presidency

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21. 514 U.S. 549 (1995) (striking down federal statute criminalizing guns in schools, as beyond the proper scope of congressional power under the commerce clause).

22. 295 U.S. 602 (1935) (allowing Congress to limit the President's removal of quasi-legislative, quasi-judicial officers).

interacts with Keynesian and post-Keynesian economics. It might also be worth discussing, if we wanted to indulge in Lessigian “translation,” the quasi-independent first and second national banks, which were not controlled completely by the presidents of the United States.

Second, I do not particularly like the New Deal’s hostility to and repudiation of juries, both criminal and civil—institutions that were central to the Founding experience. A 1930s case that exemplifies this hostility is *Patton v. United States*,<sup>23</sup> which says, notwithstanding the words of Article III,<sup>24</sup> that you can have federal criminal trials without juries. I fail to see why that’s so. I understand why the New Deal is very pro-administrative agency and hostile to certain forms of citizen participation, but if we don’t have Bruce Ackerman’s unwritten New Deal amendment, perhaps we need not accept the trivialization of the jury.

Finally, the non-justiciability of Article V is a basic artifact of New Deal jurisprudence as laid down in the case of *Coleman v. Miller*.<sup>25</sup> If Article V and its pre-existing practice and precedent are taken seriously, I fail to see why the amendment process is non-justiciable. I understand why *Coleman* was decided the way it was, and it connects to our earlier story. Congress tried to regulate child labor via the commerce clause, but the Court said no, you can’t do that.<sup>26</sup> Had the states tried to regulate trans-state child labor via the police power, the Court doctrine would have said no, you can’t do that.<sup>27</sup> And so, a constitutional amendment was proposed to overrule Supreme Court case law. When opponents of the amendment appealed to the Supreme Court arguing that the amendment hadn’t been ratified quickly enough and had thus lost its vitality, the Court felt a prudential awkwardness about limiting the one override that the Constitution clearly gives the people when they dislike a Supreme Court case. So the *Coleman* Court essentially said that the entire Article V process is non-justiciable,<sup>28</sup> and thus

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23. 281 U.S. 276 (1930).

24. U.S. CONST. art. III, § 2, cl. 3 (“The Trial of *all* Crimes . . . shall be by Jury”) (emphases added).

25. 307 U.S. 433 (1939).

26. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

27. See PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISION MAKING 321 (3d 1992).

28. See *Coleman*, 307 U.S. at 450 (“We think that . . . the question of the efficacy of

removed itself from the process.

I think that was an overreaction. You could imagine other constitutional amendments that are not targeted at the Court but rather are targeted at Congress. In such a case, it would be quite useful for the courts to weigh in, as they weigh in elsewhere, to decide what the law is and whether a certain alleged amendment really has met the formal requirements of the Constitution.

So, in the spirit of disaggregation, I propose that there are some aspects of the New Deal that we should embrace and others that we should not. On these six topics, at least, perhaps we do not really need Professor Ackerman's unwritten constitutional amendment to make good sense of our current constitutional condition.<sup>29</sup>

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ratifications by state legislatures . . . should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.")

29. As should be evident from my extremely informal presentation, my thinking about the New Deal is still highly preliminary, and I shall need to study it a good deal more before reaching any final conclusions on Professor Ackerman's bold thesis. The legal community is very much in his debt for urging us to rethink our basic constitutional narrative.