

CONFLICT, INSTITUTIONS, AND PUBLIC LAW: REFLECTIONS ON TWENTIETH-CENTURY AMERICA AS A DEVELOPING COUNTRY

Mariano-Florentino Cuéllar, Margaret Levi, and Barry Weingast

During the early 20th century the United States struggled with intense labor conflict, unstable institutions, geographic fragmentation, and economic uncertainty and dislocation. Between roughly 1918 and the onset of World War II, institutional changes reduced conflict and channeled disputes over labor regulation, federal control of industry, and social insurance into courts and agencies. Doctrinally, implementation encompassed separation of powers, federalism, and administrative procedure. By reflecting on the larger context of societal conflict and institutional change playing out in the United States at the time, we can better understand the constitutional and statutory changes occurring during the country's remarkable evolution into a geopolitical power, as well as its subsequent struggles to assuage conflict over civil rights and its continuing challenges in assuring the integrity and efficacy of its institutions.

Imagine for a moment a child growing up somewhere near here, in the heartland of the United States, in 1928. Their world was replete with contradictions. America was a vast country that had survived a civil war and more than a century and a half of history to become a massive international creditor.¹ But across the heartland many Americans were living in poverty.² The country's leaders were divided about our role in the world.³ And storm clouds loomed on the horizon on economics and security. Just five years later, the unemployment rate would rise from 4.4 percent to almost a quarter of the labor force and eventually a third of it, and net personal income would plummet from \$79.8 billion to \$47.2 billion.⁴ But all this lay in the future of the developing country that was the United States in 1928. Across the Atlantic, a secret analysis from the British Foreign Office written in November of that year captured the growing importance of America as it wrestled with domestic challenges and its role in the world:

Britain is faced in the United States of America with a phenomenon for which there is no parallel in our modern history—a state twenty-five times as large [as Britain], five times as wealthy, three times as populous, twice as ambitious, almost invulnerable, and at least our equal in prosperity, vital energy, technical equipment, and industrial science. This state has risen to its present state of development at a time when Great Britain is still staggering from the effects of the superhuman effort made during the [First World War], is loaded with a great burden of debt, and is crippled by the evil of unemployment.' However frustrating it might be to search for cooperation with the

United States, the conclusion could not be avoided: 'in almost every field, the advantages to be derived from mutual co-operation are greater for us than for them'.⁵

People say the British are prone to understatement, but there was none here. The memo is interesting because of when it emerges: during roughly the midpoint of a remarkable transition the United States was experiencing, from relative international weakness and domestic instability to preeminent geostrategic power with relatively reliable institutions and domestic quiescence. Recall that the United States in the years between 1890 and the 1930s struggled with problems that bedevil many developing countries. Only a limited sense of national unity or purpose wove together Southern farms and Midwestern factories, despite economic ties. Life in America during the first half of the 20th century involved a mix of security, prosperity, instability, and violence.⁶

Two factors particularly impeded the national government's efforts to engender confidence in its administrative effectiveness. The first was crass corruption, the kind involving bags of cash paid to a judge or public official in a county courthouse or a government clerk's office. Crass corruption was rampant throughout the nineteenth century and well into the 1920s—and later in some parts of the country and of the government. It signaled the failure of central state to manage the bureaucracy and courts to serve the whole public and not just those able to purchase its services or inhibit legal enforcement of laws.

The second was violence.⁷ Labor-related riots and violent strikes were the stuff of daily life.⁸ The Haymarket Square bombing in Chicago in 1886 began as a peaceful demonstration of workers, but exploding dynamite and a haze of bullets turned it deadly.⁹ The Chicago clothing workers' strike in 1910 mobilized 41,000 workers,¹⁰ and the coal miners strikes in 1913 and 1914 led to the shooting of strikers and, in Ludlow, Colorado, the death of 11 children who were suffocated or burned.¹¹ In 1922, after mine workers failed in their negotiations to get higher wages, 600,000 of them went on strike.¹² In June, a company guard allegedly shot a striker in Herrin, Illinois, which led to violence and explosions at the mine headquarters.¹³ Across a variety of divisions, people did not necessarily expect major disputes about key issues like labor to be resolved in courtrooms and administrative agencies. Other forms of violence also persisted. The legal Jim Crow regime in the South—backed by legal state and extra-legal vigilante violence, such as imposed by the Klu Klux Klan—maintained African-Americans in a state of quasi-servitude.¹⁴ (We shall return to racial violence in another chapter).

By the time American soldiers entered World War II, you could see a different picture had emerged. Labor-related riots and mass demonstrations were increasingly rare.¹⁵ Scholars measuring labor-related violence document a stark drop in such unrest between about 1910 and 1940.¹⁶ Measuring corruption is more difficult, but analyses based on media coverage and qualitative accounts converge in suggesting that crass corruption became substantially less common between about 1900 and the mid-1930s (by one measure there was a drop of about 80% during that time).¹⁷ How can we understand what happened, taking seriously the risks that history could have turned out quite differently.

The erosion of crass corruption

It's tempting to think that as countries get wealthier and institutions more familiar, countries simply mature into a different stage of development. But as the stories of countries ranging from Brazil to Thailand indicate, there's little to support that idea.¹⁸ Instead we might tell a more nuanced story, that seems to go something like this.

American society gradually appears to have entered into a series of compromises to build the capacity of the national government while imposing limits on how that capacity is controlled and used. By capacity we mean the ability of government's key organizations — especially agencies — to get things done: to hire people, to learn what companies are doing, to tax and spend, and to adapt to changing circumstances. Labor disputes, for example, cannot be meaningfully adjudicated without some degree of capacity, nor can wars be won. Growing capacity means the stakes are higher when it comes to who controls government. This puts in perspective the stakes not only of reducing crass corruption that could buy and sell decisions of courts and agencies, but also U.S. Supreme Court's separation of powers cases from the 1920s to the 1940s. And it puts in perspective some of the interdependent norms associated with today's public law, including separation of powers, administrative procedure, due process, and statutory rights.

The story that we feel provides best context for understanding public law begins not with philosophical questions about the meaning of "executive" power or the enumerated powers of Congress. Instead it begins in earnest with gradual changes across many of the country's courthouses and public offices sometime between roughly 1890 and the 1930s.¹⁹ In the four decades beginning in the 1890s the United States experienced massive change: historic numbers of immigrants arriving to become new Americans, for example, and the emergence of an increasingly networked national economy linked by railroad and telegraph. But some of the most important changes involved what we'd call crass corruption. That was not a small part of American life, but it appears to have begun a steady decline in most quarters of the legal and administrative system in the late 19th century. One study relies on econometric techniques to analyze media coverage of corruption between 1815 and 1975 and tries to control for selection effects. It suggests that crass corruption declined significantly between the mid-1870s and roughly the time of the Teapot Dome Scandal in 1922.²⁰

People argue about whether the declines were affected by changes in politics, law enforcement, federalism, or culture.²¹ Our own view is that the media-enabled political backlash of the American Progressive Era in the late 19th and early 20th century almost certainly made it more difficult to ignore this kind of crass corruption.²² That backlash was sometimes spurred by distrust of big city political machines, and sometimes concern over trusts and railroads. It was felt strongly in California, for example, where anxiety over the political power

of the railroads led to a state constitutional provision in force to this day providing that any public official accepting free transportation forfeits her office.²³

Federalism was also likely important in changing norms about crass corruption. Notice the dynamics that emerge from the competition between sovereigns implicit in robust federalism. Federal officials can do more than critique — they can investigate and prosecute state-level corruption. State officials could offer alternatives to federal investigation and prosecution, as the Manhattan District Attorney's Office did in the late 20th century in the context of Watergate.

And more fundamentally, the distribution of land and wealth in the United States was also markedly different — and dispersed enough to facilitate the rise of a relatively large merchant and artisan middle class wary of corruption — compared to countries like Argentina and Mexico that emerged from the Spanish colonial empire.

Of course, crass corruption of the kind involving outright dealmaking to sell official power never disappeared entirely in the United States. We witness all too many scandalous episodes like the one a few years ago involving a Pennsylvania judge colluding with a private prison company to fill more beds by sending juveniles into detention. And to the extent norms changed, they did so more quickly in some areas of the country compared to others, and in some institutions. Moreover, we can distinguish crass corruption from other practices where concentrated power gains advantage — sometimes through official channels, as through lobbying or campaign contributions. It is enough for our purposes to emphasize that crass corruption among public officials is something we can witness because it can often be detected and punished. And there would be lower stakes in discussing the subtle implications of concentrated power if it were easy to purchase biased outcomes retail.

Corruption weakens both public support for the capacity of public institutions, and the ability of bureaucrats and judges to operate with integrity. Who's going to have confidence in a court or government clerk that can be easily bought or sold? Without change in norms about the integrity of institutions, courts and agencies could not become more legitimate or powerful as sites for figuring out how much of a voice workers might have in a workplace, or whether certain dealings between companies violated antitrust law. So the state remains transactional in the darkest sense of that term. Not so in the United States. From changes in media coverage and case studies, it appears crass corruption gradually ebbed to the point that it could not be described as a nationally-pervasive, routine practice. This at least opened the door to capacity-building and adaptation that could not have happened otherwise.

Channeling conflict and building national institutional capacity

Before the country could fully inhabit its new role as a geopolitical power, it had to contend with the question of who controlled the workplace and how business and labor competed. Industrialization heightened both growth and conflict. Little wonder: As the political theorist

Judith Shklar puts it, in the United States even the idea of citizenship is very much connected to the idea of work and the dignity that comes from it. “The opportunity to work and to be paid an earned reward for one’s labor was a social right, because it was a primary source of public respect.”²⁴ Yet the rise of unions made work not only a source of dignity and shared belonging but a setting for intense disagreement. Early agreements to allow government agencies to play a larger role in resolving such conflict depended on accommodation from emerging union leaders, corporate managers, and the lawyers who represented both of them.

Labor peace emerged only with the invention of new administrative structure and process; that is, a set of new regulatory institutions that solved a series of commitment problems that plagued the emergence of non-violent resolution of disputes.²⁵ These new institutional solutions to the commitment problem arose in the New Deal with the passage of the National Labor Relations Act (NLRA) and the creation of the National Labor Relations Board (NLRB) in 1935. Since the late 1930s, labor violence has been far lower and labor-firm cooperation far higher. In the words of Taft and Ross, “The sharp decline in the level of industrial violence is one of the greatest achievements of the National Labor Relations Board.”²⁶

Why was the labor violence so intractable for so long? What exactly did the NLRA/NLRB do that – somehow – solved the problem of violence? And, if this legislation solved the problem, why didn’t Congress do so earlier, thereby saving the deadweight losses associated with years of violence, strikes, and a considerably lower level of cooperation between firms and their workers?

Although substantial gains from cooperation existed among government, labor, and business, all three faced commitment problems. Business – fearful of labor’s threat to its control over business management, the labor force, and to corporate profits – could not commit to eschew violence. Nor could government commit to being an impersonal arbiter instead of being an agent of firms against labor. Too often, government officials associated labor organization with anarchy and revolution, and they considered business a source of stability and economic growth. Further, the law of property and contracts favored business, providing an important legal basis for government to collaborate with firms. Labor could not commit to eschewing political demands for foundational changes in the economy; nor could it commit extremists to forego violence at moments when the great majority would prefer not to.

The stakes were therefore high. Legalization of unions would foster the growth of powerful actors in opposition to business, making labor demands more pressing. Without solving labor’s commitment problems, business was rationally reluctant to support legislation that would authorize unions. The result was on-going violent suppression of labor with considerable foregone gains from cooperation between labor and business.

The 1930s legislation channeled labor-business conflict to focus on wages and working conditions, an outcome that was not pre-ordained. Much of the literature implicitly accepts these bounds by ignoring the central problem of violence. So why and how was solution institutionalized in the NLRA? Motivating the change was labor’s existential threat to business

during this period when unions and labor organization were perceived as potential collaborators in a growing radical, even revolutionary, movement in the United States. We further argue that the acceptance and sustaining of the legislation also required transformations in the substance and implementation of administrative law.

The NLRA had several well-known accomplishments. It legalized unions, required collective bargaining; it defined a number of common anti-union tactics as “unfair labor practices” and hence illegal; and it created an enforcement mechanism to make it work.

In addition, however, the legislation accomplished several ends largely unrecognized in the literature. We list three. First, the NLRA dramatically lowered the stakes for firms. It narrowed considerably the legitimate range of bargaining between labor and business, focusing on wages and conditions; the legislation removed labor’s threat to business management and firm capital; it also prevented unauthorized strikes, helping unions control their more radical and extreme elements who favored goals beyond wages and benefits.

Second, the legislation transformed government from an advocate of business using violence against labor into an impersonal arbiter, impersonal in the sense that regulators had incentives to punish either side for failing to abide by the rules. Equally important, the legislation provided obvious advantages for labor. It legitimized unions, allowing labor organization to form, grow, and advance workers’ interests. As union ranks grew considerably, labor became an important political force, able to support its position in a manner not previously possible. By counterbalancing business, labor provided new and substantive support for the NLRA an impersonal arbiter.

Third, to accomplish these ends, organizational and legal innovations were necessary to create a new form of regulatory delegation that sat comfortably within the constitutional framework. Put simply, for the new system to work, political officials and the courts had to solve the principal agency problem that we now take for granted: creating a regulatory agency that implements the intentions of Congress while not transgressing the due process rights of citizens and firms.

Our framework affords answers to each of the questions we asked at the outset. Labor violence proved long-lived and intractable because of commitment problems, None of the three parties – labor, business, and government – were willing or capable of unilaterally eschewing violence. The NLRA ended a century of violence because it solved the various commitment problems facing the three sets of players. Finally, this legislation could not have been implemented earlier because it required significant innovation in public law and organization that occurred only in the context of the multi-pronged regulatory framework of the New Deal.

The innovation required far more than legislation, even legislation as important as the Wagner Act. Agencies had to be capable of gathering information, adjudicating issuing decisions, and administering. Gradual compromise in the early decades of the 20th century allowed for channeling of labor disputes into formal institutions and did much to distinguish America from

other middle income countries trying to build their institutions and economies. Crucially, disputes — and especially labor disputes — moved from the factory floor and the street to courts and administrative agencies as institutions became more reliable and elite bargains favored their use. By “elite bargains,” we mean not only business and union interests seeking a measure of accommodation in crafting federal and state labor legislation, but also a degree of convergent interest in avoiding efforts to sabotage outright the growth in capacity of nascent institutions, especially the National Labor Relations Board.

It was partly growth in state capacity that made it even possible to channel disputes into formal institutions: regional offices for the NLRB, for example, and employees who were more than the product of patronage. Channeling of disputes also meant a change in attitudes among elites — including unions leaders and business willing to tolerate rulings of the National Labor Relations Board and to split the institutional advantage in light of the Wagner Act and the Taft Hartley Act. As labor disturbances leveled off, courts eventually took up cases addressing issues like whether decisions of the National Labor Relations Board to certify collective bargaining units could be reviewed by the DC Circuit (in *American Federation of Labor v. NLRB*, 1940),²⁷ and under what circumstances could a union challenge an employer’s decision not to bargain collectively with employee representatives (in *Pittsburgh Plate Glass v. NLRB*, 1941).²⁸ These cases reflected the extent to which labor conflict had become legal and administrative conflict by World War II. Meanwhile, social insurance, carefully crafted to survive the legislative process and legal constraints, promised to take the edge off some of the economic risk that could exacerbate labor conflict and damage internal cohesion.

But as institutions acquired greater capacity — becoming more capable of resolving labor disputes, providing social insurance, collecting taxes on a massive scale, or fighting a war — it became more urgent to determine who controls them and how much power they have. Which brings us to New Deal-era legal conflicts. To understand decisions in cases like *Humphrey’s Executor*,²⁹ *Schechter Poultry*,³⁰ and eventually the *Steel Seizure* cases,³¹ we must take account not only of the immediate disagreements as lawyers presented the cases. We must also consider the growing and more powerful machinery of state capacity that made control of the federal government a higher-stakes game. In some ways the majority opinions in these cases were doctrinally awkward. Yet one might understand them as part of a compromise enabling a higher-stakes game associated with creating a more powerful federal state, though with specific limitations — limits on executive power to control agencies, delegate agency power to the private sector, or justify the use of state coercive capacity – even on national security grounds – through executive actions in contravention of statute.

Scholars are drawn to writing about the pitched legal battles of the New Deal, and rightly so. Canonical cases abound, like *Panama Refining*, *Schechter Poultry*, and *Humphrey’s Executor*. It’s surely true there was some hostility to the New Deal agenda in the courts and among the societal networks from which many judges were drawn. What neither the simple hostility story nor the focus on politics of the so-called “switch in time that saved nine” appreciates are the nuances. Justice Cardozo may have persuaded Justices Hughes and Roberts to join in the

majority in *Nebbia v. New York*, for example.³² Some adaptation in legal position and legislative design occurred on different sides, and government lawyers sometimes erred both in the selection of cases and their approach to advocacy — as when Assistant Attorney General Harold Stephens botched the government's position at oral arguments.³³ As Cueller describes in a piece called “Securing the Nation,” FDR faced steep political costs from the so-called court packing plan, making it a less credible threat than some scholars have suggested. And structurally the courts were navigating a time of expanding capacity in American national government that made somewhat more urgent questions of who controlled that capacity.

Taking these nuances more seriously, we can see the New Deal-era court decisions challenging the Roosevelt administration as more than simply a rejection of certain New Deal policies. Instead, they can also be understood as an attempt to demarcate a space for policies that might generate only limited friction when reconciled with prevailing doctrine, and even the kinds of legal arguments that would help achieve at least some of the administration's goals without creating quite as much risk to the emerging institutional equilibrium. The *Jones & Laughlin Steel* case in 1937 is often seen as pivotal, as it signaled the end of the Court's tendency to strike down New Deal legislation and recognized the extent of congressional power under the Commerce Clause. As professor Barry Cushman points out, though, the U.S. Supreme Court had already recognized the ambiguity of the public/private distinction and expanded the scope of businesses that could be deemed to affect interstate commerce in *Nebbia v. New York*. Even as the court set structural limits on legislative and executive power, it also recognized that appropriate federal legislation could regulate workplace relations, since interstate commerce was affected and advocates had persuaded the court that liberty of contract was in conflict with workers' freedom of association to join a union.

This measure of partial continuity in doctrine fits with an argument Seth Waxman advanced at a Yale Law School lecture nearly 20 years ago, though he used somewhat different language. True to his experience as a consummate advocate, Waxman reminds us to consider the technical changes in legal argument that almost certainly facilitated later victories of Justice Department lawyers defending legal arrangements reflecting expanded federal power. He also emphasized that the administration itself learned a thing or two, and managed to avoid the more provocative institutional arrangements delegating, for example, public power almost directly into private hands. Hence, the *Yakus* case — playing out a few years later against the backdrop of World War II, wasn't just a rerun of *Schechter Poultry*. Price controls affecting business, labor, and consumers involved more limited authority, subject to public oversight, and giving courts some basis for judicial review. And the executive made the case for these in terms of America's interests as a newly emerged geopolitical power.

The legacy of World War II for public law

When societies are riven by riots, internal conflict and instability, they face greater difficulty building and deploying influence in the international system. Internal divisions don't dissipate by themselves, because of something in the water or some unavoidable teleological

progression. Internal cohesion allows a country to develop greater capacity to respond to international crises, but those crises also test leaders and citizens in novel ways. Roosevelt on the eve of World War II faced daunting challenges. The public was deeply divided and quite skeptical about foreign entanglements. The American army was the 18th largest in the world in the spring of 1940, just behind the Dutch army that had just surrendered to the Nazis.³⁴ The federal government had few if any agencies that operated with truly nationwide scope, and only about 10% of the population paid any federal income taxes.³⁵ How FDR and his administration navigated the transition from New Deal to wartime footing is revealing. Logically, greater state capacity made separation of powers a much higher-stakes game, because the machinery of the national government could accomplish far more in 1940 than it could in 1910. Hence the importance of the norms that developed between the early New Deal and World War II. Upsetting those norms was never more possible than during the wartime apogee of presidential power. Roosevelt ally Clifford Durr, from his perch as FCC Chair, urged him to treat the wartime period as a second bite at the apple to reshape the American social compact further, as he'd sought to do with the National Industrial Recovery Act.³⁶

But FDR did nothing of the sort. What happened instead is chronicled in a piece Cuellar wrote a few years ago entitled *Administrative War*. He deployed an ideologically heterodox coterie of aides such as Harry Hopkins and Jimmy Byrnes, and with their help and allies in Congress, he forged a broad coalition of business and labor that also accommodated the interests of the military, agriculture, and consumers.³⁷ Restrictions on strikes and wage increases were coupled with policies supporting union growth as the labor force increased. Familiar features of the administrative state became commonplace then: broad delegations of legislative power to agencies with nationwide scope, administrative subpoenas, mass federal taxation, and White House supervision of administrative agencies.³⁸ Some agencies began using notice and comment even before it was required by the Administrative Procedure Act. Even more remarkable was what did *not* change: there was no move to nationalize industrial sectors or displace the private sector, price controls took account of political realities and particularly agricultural interests, and norms involving judicial review and pluralist accommodation in administrative decisionmaking took hold.³⁹

Given these accommodations amidst further growth in capacity, the administration's actions amounted to the crucial next chapter in the story of conflict, institutions, and public law. In fits and starts, leaders in labor, business, and government had come to trust institutions enough to channel conflict through them. A sharp break with American norms — not only those involving widespread judicial review, but also involving limited government ownership of industry and business — would almost certainly have put at risk that trust. Even with favorable geography and the right international circumstances, institutional progress is contingent on and depends in part on state capacity, which further enhanced the prospects of channeling that conflict into courts and agencies that could actually implement policies.⁴⁰

The extraordinary generation that helped our country through the Depression and World War II figures prominently in the story. But it's a mistake to give too much weight to the New Deal by

itself. World War II then gave Roosevelt and his coalition to reshape America even more drastically — achieving what the NIRA had failed to do.⁴¹ FDR resisted, keeping in place a kind of centrist compromise that respected certain unwritten but almost quasi-constitutional norms: pluralist procedural accommodation (even before the APA), very limited if any direct government ownership of business and industry, and meaningful judicial review.⁴² That's what described the core of the administrative state in World War II, and it became the core of the administrative state in the Cold War and even today. As state capacity grew, the country was able to avoid the problems of the interwar period — described in detail by Adam Tooze as a period where the U.S. was largely unable to assert the kind of global leadership that the period demanded.⁴³

Conclusion

We experience our country not only as a set of static legal arrangements, but as value commitments made real by institutions. Through them, we channel conflict, solve common problems of economic policy and geopolitics, and endeavor to treat people in non-arbitrary fashion. That the system so often works at least reasonably well is a testament to our constitutional system, but more specifically to how we've made that system a part of our culture and norms. We expect each generation of new Americans, whether born or naturalized, to be fiduciaries for those norms. A recent naturalization ceremony in Oakland gave reflects how these ideas play out in daily life. In the spirit of demonstrating that the British Foreign Office was right when it called America a country "twice as ambitious" as others, we close with a few lines from that speech.

Whatever else you remember from this beautiful day and all that's happening in the country right now, we want you to recall that democracy, equality, and the rule of law can never be taken for granted. They emerged from conflict and careful judgement. They must be defended in what you teach your kids. In what you do and say to keep at bay the cynics. In the effort you make to pay the right amount of taxes or take seriously that jury summons from state or federal court. In how you share your story with and learn from people around you who've never known someone of your background, and how you bring light to those in the darkness of ignorance. Through these and countless actions, democracy, equality and the rule of law must be defended not just today or tomorrow, but time and again — without compromise. And without hesitation.

¹ Between 1923 and 1930, European countries signed over \$22.2 billion in war debt agreements with the United States. ADAM TOOZE, *THE DELUGE: THE GREAT WAR AND THE REMAKING OF THE GLOBAL ORDER* 467 (2014).

² The United States government did not publish an official poverty rate until 1959, but some researchers estimate the poverty rate to be roughly 60 percent in 1929. See, e.g., JOHN IRELAND, *POVERTY IN AMERICA: A HANDBOOK* 82 (3d ed. 2013) (showing poverty rates in the United States from 1929 to 2010). For more statistics illustrating the economic struggle of many Americans in the late 1920s, see U.S. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1957*, U.S. DEP'T OF COMMERCE 165 (1960), https://fraser.stlouisfed.org/files/docs/publications/histstatus/hstat_1957_cen_1957.pdf (showing that 67.2 percent of American families had an income of less than \$3,000 in 1929 (calculated as 1950 dollars)), and Lee J. Alston, *Farm Foreclosures in the United States During the Interwar Period*, 43 J. ECON. HIST. 885, 888 (1983) (finding that farm foreclosures averaged 17.6 per thousand farms in 1928, whereas the farm foreclosure rate averaged 3.2 per thousand in the time periods from 1913–1920 and 1941–1950).

³ RONALD E. POWASKI, *TOWARD AN ENTANGLING ALLIANCE: AMERICAN ISOLATIONISM, INTERNATIONALISM, AND EUROPE* 28–29 (1991) (describing how the United States expanded its role in world affairs during the 1920s while different American administrations simultaneously sought to avoid political entanglements with European nations); Bernard Fensterwald, *The Anatomy of American "Isolationism" and Expansionism*, J. CONFLICT RESOL. 111, 122–124 (1958) (describing the Harding, Coolidge, and Hoover Administrations' foreign involvement from 1920 through 1932). Also, see Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Liveright Pub. Corp., 2013).

⁴ U.S. Bureau of the Census, *supra* note 2, at 73, 139 (comparing 1928 to 1933).

⁵ TOOZE, *supra* note 1, at 463–64.

⁶ See, e.g., Peter Turchin, *Dynamics of Political Instability in the United States, 1780-2010*, 49 J. PEACE RES. 577, 584 (2012) (showing a peak in political instability in the late 1910s, using a database of instability events compiled from previous researchers and electronic media archives).

⁷ See Douglass C. North, John Wallis, and Barry Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (New York: Cambridge University Press, 2009).

⁸ Melvyn Dubofsky, *Labor Unrest in the United States, 1906-90*, 18 REVIEW 125, 126 (1995) (describing labor unrest in the early 20th century, with the highest recorded level of strikes in 1917 and continued labor unrest in the 1930s); Turchin, *supra* note 6, at 584–85 (showing a peak in political violence, particularly in riots and lynchings, around 1920).

⁹ LABOR CONFLICT IN THE UNITED STATES: AN ENCYCLOPEDIA 166–68 (Ronald L. Filippelli ed., Garland Publishing, Inc. 1990).

¹⁰ *Id.* at 98–100.

¹¹ *Id.* at 297–300.

¹² *Id.* at 232–34.

¹³ *Id.* at 232–34.

¹⁴ Legally-based segregation, violence, and disenfranchisement in the South persisted well into the 20th century. See GRETA DE JONG, *A DIFFERENT DAY: AFRICAN AMERICAN STRUGGLES FOR JUSTICE IN RURAL LOUISIANA, 1900–1970*, at 116-43 (2002) (describing persistent segregation and discrimination in Louisiana during and after World War II); NEIL R. McMILLEN, *DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW* 3-32 (describing Jim Crow laws and disenfranchisement in Mississippi from 1890 to 1940); Bryant Simon, *Race Reactions: African American Organizing, Liberalism, and White Working-Class Politics in Postwar South Carolina*, in *JUMPIN' JIM CROW: SOUTHERN POLITICS FROM CIVIL WAR TO CIVIL RIGHTS* 239, 239–55 (Jane Dailey et al. eds., 2000) (describing the legally-backed segregation, violence, and disenfranchisement that persisted in South Carolina through the 1930s and 1940s); Grace Elizabeth Hale, *"For Colored" and "For White": Segregating Consumption in the South*, in *JUMPIN' JIM CROW*, *supra* note **Error! Bookmark not defined.**, at 162, 173–78 (describing Jim Crow laws throughout the south as captured by Farm Security Administration photographs). Lynching increased dramatically in both frequency and intensity after the Civil War and Reconstruction, peaking from the 1890s through the first decade of the twentieth century. AMY LOUISE WOOD, *LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890–1940*, at 3 (2009). Although determining the exact number of lynchings is difficult, one researcher estimates that white mobs in the South killed at least 3,200 black men between 1880 and 1940. *Id.* For U.S. government records of lynchings during this time period, see U.S. Bureau of the Census, *supra* note 2, at 216.

¹⁵ Turchin, *supra* note 6, at 585 (showing an average of 15 riots per five years in the 1940s, compared to a peak of roughly 80 riots per five years in the 1920s).

¹⁶ Dubofsky, *supra* note 8, at 131 (showing steep decline in the early 1940s in the three-year moving average of labor unrest, based on mentions in newspaper database).

¹⁷ Edward L. Glaeser & Claudia Goldin, *Introduction to CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY* 3, 15 (Edward L. Glaeser & Claudia Goldin eds. 2006), <http://www.nber.org/chapters/c9976.pdf> (demonstrating a roughly 80% decline in explicit corruption, calculated on the basis of newspaper coverage, between 1890 and 1930).

¹⁸ Brazil, for example, experienced significant economic growth and democratization after the end of military rule in 1985. Yet recently, this “supposed . . . vanguard of fast-growing emerging economies . . . faces political dysfunction and perhaps a return to rampant inflation.” *Brazil's Fall: Disaster Looms for Latin America's Biggest Economy*, *THE ECONOMIST* (Jan. 2, 2016), <http://www.economist.com/news/leaders/21684779-disaster-looms-latin-americas-biggest-economy-brazils-fall>.

Similarly, Thailand experienced rapid economic growth in the 1980s and 1990s, with its growth rate almost doubling between 1987 and 1995. IMF Staff Country Report No. 00/21, *Thailand: Selected Issues*, INTERNATIONAL MONETARY FUND 2 (Feb. 2000) <https://www.imf.org/external/pubs/ft/scr/2000/cr0021.pdf>. But this rapid growth, due in part to over-investment after regulatory and economic policy reforms in the 1980s, threatened the sustainability of Thailand's economy. *Id.* at 2. Unsustainable growth, coupled with Thailand's financial crisis in 1997, led to an estimated 70 percent cumulated fall in gross investment between 1996 and 1998. *Id.* at 7. Since 1997, the government has passed significant reforms to tax administration and the welfare state. Tomas Larsson, *The Strong and the Weak: Ups and Downs of State Capacity in Southeast Asia*, 5 *ASIAN POLITICS & POLICY* 337, 345–46 (2013); see also *id.* at 351 (observing that Thai legal-administrative state capacity has been transformed in tandem with the country's economic and industrial structures).

¹⁹ Glaeser & Goldin, *supra* note 17, at 15 (demonstrating a roughly 80% decline in explicit corruption, calculated on the basis of newspaper coverage, between 1890 and 1930).

²⁰ See Edward Glaeser and Claudia Goldin, *Corruption and Reform: Introduction in Corruption and Reform: Lessons from America's Economic History* 3, 15 (Edward L. Glaeser and Claudia Goldin, eds., 2006).

²¹ For a discussion of the literature on the relationship between corruption, poor government, and growth, see Glaeser & Goldin, *supra* note 17, at 15 (describing three major theories of reform, looking at the roles of institutions, certain producers, and political entrepreneurs in shaping reform against corruption), and Rebecca Menes, *Limiting the Reach of the Grabbing Hand: Graft and Growth in American Cities, 1880 to 1930*, in *CORRUPTION AND REFORM*, *supra* note 17, at 63, 69–73 (discussing academic literature on the relationship between corruption, poor government, and growth). The rise and fall of corruption, for instance, roughly follows the rise and fall of political machines. *Id.* at 85–89. In addition, the decline of corruption corresponded with the rise of the independent press, as newspapers became demonstrably less connected to political parties. Matthew Gentzkow et al., *The Rise of the Fourth Estate: How Newspapers Became Informative and Why It Mattered*, in *CORRUPTION AND REFORM*, *supra* note 17, at 187, 190–91. In the same period, American cities competed with each other to attract businesses by adopting good government and pro-growth policies. Menes, *supra* note 21, at 70.

²² The decades from the 1890s into the 1920s produced reform movements that resulted in significant changes to the country's social, political, cultural, and economic institutions. Maureen A. Flanagan, *Progressives and Progressivism in an Era of Reform*, in *OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY* (2016), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-84?print=pdf>. Many political progressives attacked patronage politics and advocated for a shift to a merit-based civil service. *Id.* Other progressive initiatives aimed to limit the power of political parties. Governor Robert La Follete's “Washington Plan,” for example, exemplified these efforts by instituting reforms in Washington state that replaced party control of nominations with a popular direct primary and gave voters the power to hold referenda on proposed legislation. *Id.*

²³ CAL. CONST. art. XII, § 7; CAL. CONST. art. XII, § 19 (1879); JOSEPH R. GRODIN ET AL., *THE CALIFORNIA STATE CONSTITUTION* 15–16 (2d ed. 2016) (describing growth and consolidation of railroads in California under the Central Pacific Railroad, which by the late 1870s controlled over 85 percent of the state's rail line and was both the largest landowner and largest employer in the state).

²⁴ JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 1–2 (1991).

²⁵ The discussion of the institution of labor violence draws heavily on a chapter by Levi, Melo, Weingast, and Zlotnick in the forthcoming University of Chicago book *Organizations, Civil Society, and the Roots of Development*, edited by Naomi Lamoreaux and John Wallis.

²⁶ Philip Taft and Philip Ross, "American labor violence: Its causes, character, and outcome," *Violence in America: Historical and comparative perspectives* 1(1969)., 292.

²⁷ *Am. Fed'n of Labor v. Nat'l Labor Relations Bd.*, 308 U.S. 401 (1940).

²⁸ *Pittsburgh Plate Glass Co., v. Nat'l Labor Relations Bd.*, 313 U.S. 146 (1941).

²⁹ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

³⁰ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

³¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

³² See Cushman, *Rethinking the New Deal Court* 170 (1998).

³³ See Seth Waxman, *The Physics of Persuasion, Arguing the New Deal* (1999), *Occasional Papers, Yale Law School. Paper 3*

³⁴ Arthur Herman, *The FDR Lesson Obama Should Follow*, WALL ST. J., May 10, 2012, at A15.

³⁵ JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 126 (1985) (showing a sharp increase in taxable returns as a percentage of the labor force, from roughly 10 percent in 1940 to 65 percent in 1946).

³⁶ At the time, Durr called for more dramatic and long-term reforms in the relationship between government and private industry:

We have learned already that we cannot obtain the production we need for waging the war as an undirected by-product of what we commonly refer to as "sound business principles." Neither can we expect such by-product to furnish us after the war with the standard of living we shall be warranted in expecting . . . There must be some over-all source of direction more concerned with [these] objectives . . . than with the profits or losses of individual business concerns.

Clifford J. Durr, *The Postwar Relationship Between Government and Business*, 33 AM. ECON. REV. (PAPERS & PROC.) 45, 47 (1943).

³⁷ Mariano-Florentino Cuéllar, *Administrative War*, 82 Geo. Wash. L. Rev. 1343, 1356–62 (2014).

³⁸ *Id.* at 1425.

³⁹ *Id.* at 1422–28.

⁴⁰ As institutions transform and state capacity increases, confidence in these institutions steadily increases. THE WORLD BANK, *WORLD DEVELOPMENT REPORT: CONFLICT, SECURITY, AND DEVELOPMENT* 103 (2011). The development community has recognized how this feedback loop drives a state from violence and fragility to institutional resilience and growth. *Id.* Accordingly, development agencies increasingly focus on building state capacity to channel conflict. In Afghanistan, for example, donors attempted to build state capacity by establishing more than 22,500 community development councils through the National Solidarity Program. THE WORLD BANK, *WORLD DEVELOPMENT REPORT: CONFLICT, SECURITY, AND DEVELOPMENT* 133 (2011). These local councils invested in critical infrastructure projects, increasing state capacity. *Id.* Research suggested these councils increased villagers' trust in all levels of government. *Id.* For further discussion on how institutional progress and state capacity are linked, see generally ASHRAF GHANI & CLAIRE LOCKHART, *FIXING FAILED STATES* (2008) and DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL* (2012).

⁴¹ See Cuéllar, *supra* note 37, at 1386.

⁴² See *id.* at 1422–28.

⁴³ See, e.g., TOOZE, *supra* note 1, at 515–16 (describing American impulse in the interwar period as "fundamentally, in its view of America itself, in its conception of what might be asked of America . . . profoundly conservative").