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TWENTIETH-CENTURY AMERICA AS A DEVELOPING COUNTRY: CONFLICT, INSTITUTIONS, AND THE EVOLUTION OF PUBLIC LAW

Mariano-Florentino Cuéllar,* Margaret Levi,† and Barry R. Weingast‡

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Between roughly the end of the nineteenth century and the end of World War II, the United States experienced a remarkable transformation. Over the course of several decades, it changed from a country with a weak national government and considerable domestic instability to a geopolitical power where judicial and administrative institutions were routinely used to resolve internal conflicts. We explore in this paper how this transition occurred and how it illuminates both public law and the study of law and development. We start from the premise that the existence of relatively stable institutions able to channel a great deal of political conflict is a condition that needs to be explained rather than one that necessarily follows from culture, geography, or wealth. Our pre-

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* Justice, Supreme Court of California, Herman Phleger Visiting Professor and Former Stanley Morrison Professor of Law, Stanford Law School, and Affiliated Scholar, Freeman Spogli Institute for International Studies, Stanford University.

† Director of the Center for Advanced Study for the Behavioral Sciences and Professor of Political Science, Stanford University.

‡ Senior Fellow, Hoover Institution and Ward C. Krebs Professor of Political Science, Stanford University. We appreciate the excellent research assistance of Kyle Griegel, Haley Amster, and Derin McLeod, and feedback from participants at workshops at Indiana University Bloomington, Harvard University, and University of Oxford.

mise applies to all countries, even developed ones such as the United States. Indeed, the extent of corruption and labor conflict in the United States in this period—from the Haymarket riots in Chicago to the West Virginia Coal Wars in Appalachia to corruption among judges and within electoral institutions—belies the idea the country was always able to resolve most or all conflict effectively through public institutions.

The story we tell to resolve this question has its grounding in another puzzle: Why by the end of World War II did public corruption decline, labor-related violent conflict subside, governmental capacity to regulate and collect taxes grow, and major public law disputes about the structure and control of agencies get resolved at least in preliminary form? Our most general claim is that these developments occurred together for a reason, and understanding them together sheds light not only on the American political economy but on how institutions can be used to channel conflict and mitigate violence. Our second claim is that the prevailing narrative of American institutions devotes insufficient attention to the early-twentieth century. In particular, scholars have ignored the mix of unregulated violence, corruption mitigation, capacity growth in the federal state, and compromise and accommodation that assuaged major conflict after technological and geopolitical changes. Our most specific claim concerns the pivotal years between passage of the National Labor Relations Act (NLRA) and the Administrative Procedure Act (APA). During the early 1930s and the late 1940s, new forms of public law institutionalized compromise and facilitated the channeling of conflict into formal institutions. Examples include fierce statutory labor compromise and adaptive nationwide agencies such as the National Labor Relations Board (NLRB), constitutional compromises on delegation and executive power cutting against corporatism, and new administrative procedures. This transformation was the crucial backdrop not only to the emergence of the United States as the preeminent geopolitical power of the latter half of the twentieth century, but to the conflicts over public power and social change that continue to bedevil the United States today.

I. Introduction

Over a twelve-month period in 1935, the federal government endured three judicial setbacks in cases raising questions about its power over the national economy. At the heart of these conflicts was the National Industrial Recovery Act (NIRA), the flagship statute of the early New Deal, which extended the national government's regulatory and governance power of the United States's continent-sized economy. The Roosevelt administration described the NIRA as pivotal to its strategy for economic recovery yet insufficiently attended to procedural constraints that would become familiar elements of the modern administrative state. Thus, it is not totally surprising that courts found the NIRA wholly inadequate as a framework for structuring expanded federal power over the national economy, as illustrated in the following cases. *Panama Refining v. Ryan*,[1] a dispute over the extent of federal power to regulate interstate commerce through codes of fair competition governing the petroleum industry, ended badly for the government in the U.S. Supreme Court. The Court decided the case on non-delegation grounds and decried the government's inability to even produce an official compila-

[1] 293 U.S. 388, 448 (1935).

tion of the code.[2] In *United States v. Belcher*,[3] federal authorities asked the Supreme Court to settle a dispute concerning alleged violations of a presidentially-approved code governing lumber industry prices and product specifications. The President made no findings in approving the code and purported to adopt the findings of an administrative agency. When the government realized the agency had made no findings, the newly appointed "Solicitor General, Stanley Reed, asked the Supreme Court to dismiss the government's own petition."[4] And in the infamous case of *A.L.A. Schechter Poultry v. United States*,[5] the Court cited the rarely-used non-delegation doctrine in subjecting the NIRA to a fatal blow.

As American courts and lawyers handling high profile public law disputes navigated the aftermath of the NIRA's collapse and sought to resolve related disagreements about government power, outside the courthouse the country continued to live through a mounting crisis of the Great Depression. U.S. steel plants operated at twelve percent capacity by 1932,[6] and for sixteen days in 1934, 376,000 textile workers shut down the industry in twenty states.[7] Strike and labor activism increased dramatically over levels in the 1920s.[8]

Playing out in the background was civil unrest, rising interest in socialism, and unresolved sources of conflict that had in earlier decades flared into labor-related violence and riots.[9] Around the world, many democratic governments faced similar pressures.[10] More than half of the new European democracies formed after World War I collapsed into various forms of authoritarian governance—with stark consequences for judges, lawyers, and legal systems. Democracy also failed in much of Latin America, including relatively wealthy Argentina. Military coups and authoritarian regimes were common, perhaps more so than in any other era and especially in Europe.[11]

Not so in the United States. In *Panama Refining*, the justices expressed astonishment to Assistant Attorney General Harold Stephens at the absence of any publication of the relevant orders and then ruled against the government.[12] Yet nothing indicates that they worried about their positions or per-

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[2] *See* MERLO JOHN PUSEY, 2 CHARLES EVANS HUGHES 734 (1952).

[3] 294 U.S. 736, 736 (1935).

[4] Seth P. Waxman, *The Physics of Persuasion: Arguing the New Deal*, 88 GEO. L.J. 2399, 2405 (2000) (discussing the result of *Belcher*).

[5] 295 U.S. 495, 542 (1935).

[6] *See* WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 39 (1963); DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945, at 218–19 (1999).

[7] BERNARD BELLUSH, THE FAILURE OF THE NIRA 129–30 (1975).

[8] *See* Peter Turchin, *Dynamics of Political Instability in the United States*, 1780–2010, 49 J. OF PEACE RES. 577, 584 (2012).

[9] *See* KENNEDY, *supra* note 6, at 218–19.

[10] *See generally* Andreas Wimmer & Brian Min, *From Empire to Nation-State: Explaining Wars in the Modern World, 1816-2001*, 71 AM. SOC. REV. 867 (2006).

[11] *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 3–4 (2018).

[12] *See* PUSEY, *supra* note 2, at 734–35.

sonal safety when they disagreed with the Executive Branch.[13] By then, elites and the public accepted courts and lawyers as legitimate vehicles—however imperfect—for resolving raw disputes about public power and holding government accountable when (for example) the President sought to rely on agency findings that did not exist.

The survival of constitutional democracy in the United States is a phenomenon we cannot take as given but must explain.[14] We argue that the emergence of new forms of public law, legislation, regulation, and constitutional interpretation all emerged together not by happenstance but for an important structural reason: to facilitate the massive increase in the role of the national government and its relationship to the country's political economy while establishing procedural frameworks to resolve disputes within institutes and facilitating the ascent of the United States as a geopolitical power. Although these transformations are not without nuance, they illuminate certain recurring themes in the relationship between conflict, institutional change, and public law that affect the system of law in the United States and much of what lawyers do.

By analyzing those relationships, this project seeks to illuminate aspects of the United States rarely explored fully in either the legal or political science literatures on American political development. We are especially interested in the "law and development" backdrop to the New Deal cases the federal government lost, as well as the logic of compromise among the courts, agencies, and elected branches. These compromises empowered institutions to limit the bounds of the festering conflict that might otherwise have boiled up into actual conflict.[15]

We pursue this agenda by exploring the substitution of bargaining and compromise for violence. We explain how, during the early-twentieth century, the United States struggled with intense labor conflict, unstable institutions, geographic fragmentation, economic uncertainty, and disorder. Between roughly 1918 and the onset of World War II, institutional changes reduced conflict by channeling disputes over labor regulation, federal control of industry, and social insurance into courts and administrative agencies. Doctrinally, these changes played out in legal arguments and legislative battles affecting separation of powers, federalism, expanding powers of the national government (for example, under the Commerce Clause), and administrative procedure. In the background lurked more subtle but no less important shifts in the strategies, attitudes, and norms that policymakers

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[13] *Id.*

[14] *See* Sonia Mittal & Barry R. Weingast, *The Self-Enforcing Constitution: With an Application to Democratic Stability in America's First Century*, 29 J.L. Econ. & Org. 278–302 (2013).

[15] Douglass C. North, John Joseph Wallis, and Barry R. Weingast argue that a major feature of political development is creating a state with a monopoly on violence under civilian control. *See generally* Douglass C. North, John Wallis & Barry R. Weingast, Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History (2009).

used to manage the defining conflicts—particularly labor strife—that could rupture a complex, continent-sized national project. 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 from the depths of the Depression into a geopolitical power following World War II.

Compromises in constitutional interpretation led to rejection of arrangements such as the NIRA while nonetheless permitting a larger role of the federal government in the economy. Equally significant, new substantive legal arrangements arose to channel (for example) workplace disputes through the NLRB, or anxieties about rising prices during World War II through the Office of Price Administration (OPA).[16] These compromises between the courts and political officials reduced the tensions inherent in allocating power over a more capable national government. They also facilitated the development of norms among public officials and the public that sustained allocations of power and helped take the edge off many ordinary legal and policy disputes.

Our account of these changes does not completely reject a number of previously-offered narratives explaining the mix of change and stability reflected in American public law and institutions since the 1930s.[17] We recognize the 1930s as a pivotal moment for American law—though one that cannot be understood without a more sustained focus on the conflict and tensions that preceded the Roosevelt administration, or the institutional changes that matured only in the succeeding years of World War II and the Cold War. We also believe some changes in constitutional interpretation reflected the clash between competing visions of constitutional interpretation and the rule of law playing out in debates within the world of practicing lawyers and the judiciary. Yet a focus on how debates occurred in the world of judges, appellate lawyering, and doctrinal scholarship begs the question of how the diverse and frequently divided, continent-spanning society navigated its painful transitions to channel conflicts away from violence and into institutions. Neither modernization theory, nor geographic determinism, nor the study of constitutional doctrine in isolation offers a satisfying account of the timing or substance of American institutions, nor do they help place the American story in the broader context of global development. Also missing is a fuller account of how changes in the United States's economy, society, and politics pressured the country's system of public law to develop adminis-

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[16] *See infra* Part IV.

[17] *See, e.g.*, IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 251 (2013); BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 280–81 (2000); MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 1–4 (2004). *But see infra* notes 119, 123 and accompanying text (discussing revisionist perspectives, including the work of Barry Cushman).

trative arrangements that channeled conflict and avoided the political breakdowns that all too frequently bedeviled other countries.

We advance three principal conclusions with implications for law, development, and politics. First, it was not a forgone conclusion that the United States would successfully channel conflict into institutions, mitigate violence, and secure its preeminent geopolitical position. Second, for the United States, as for many countries facing internal conflict and weak state capacity, the inability to forge and sustain political compromise implies an absence of a viable path to development. As stability increases along with the growing capacity to channel conflict, bargaining and compromises among elites become instantiated in norms that can turn political economic bargains into normative ideals. But without political compromise and restraint, the threat of violence emerges, making it difficult for states to develop the capacity to channel conflict effectively or the norms that later make institutions more stable. Third, specific features of American public law—including the National Labor Relations Act[18] (NLRA), the constitutional separation of powers doctrine, and the rise of administrative law—helped solve the problem of violence and conflict. At least in the United States, the great expansion of public law from 1933 through 1946 provided an important foundation for the maintenance of public order.

The argument unfolds in five parts. In Part II, we describe some of the difficulties the United States faced in the nineteenth and twentieth centuries in consolidating and expanding the capacity and legitimacy of now-familiar national administrative agencies and judicial institutions. In Part III, we focus on public corruption and its corrosive impact on the capacity of institutions to play a mediating role in societal conflict. Part IV addresses the emergence of more viable institutional arrangements, including administrative agencies with greater capacity to tax, regulate, and administer public benefits, and the resulting new dilemmas in public law around the time of the New Deal. In overcoming its previous difficulties with corruption and labor-related violence the country benefited not only from social movements and elite bargains, but from changing norms and carefully calibrated strategic action from political leaders, civil servants, and civic entrepreneurs. We emphasize that the evolution of public law in the 1930s and 1940s played a far more central role than generally recognized in the growth of the national government and the stability of American democracy. Part V describes the impact of the World War II experience on consolidating institutional change and alludes to how important societal questions—particularly involving race and civil rights—remained unresolved despite the newly prominent role of institutions both empowered and constrained by public law and norms. Part VI contrasts the American experience during the first half of the twentieth century with the difficulties encountered by Argentina, another relatively

[18] National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449.

wealthy country possessing formal institutions enshrining democracy and the rule of law.

In describing these interdependent changes, we do not mean to imply that the United States fashioned optimal responses to its dilemmas at the time. Nor do we suggest that this is the only decisive transition in American society, or that this period can even be fully separated from the fits of institution-building that came before or the unresolved conflicts that followed. By seeing the early-twentieth century history through a "law and development" lens, we gain indispensable context for the United States's early-twenty-first century institutional dilemmas. Further, we gain an appreciation of the fragile compromises that allowed a pivotal geopolitical power to forge—however imperfectly—legal arrangements incorporating norms of non-arbitrariness in a society so often riven by conflicts and competing agendas.

II. American Law and Governance in the Early-Twentieth Century: Challenges and a Framework for Understanding Change

A decade after the end of World War I and its debut as a genuine geopolitical power, the United States found itself at a delicate juncture. It was a continent-sized country that had survived a civil war and more than a century and a half of history to become a massive international creditor.[19] 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.[20]

All this lay in the future during the late 1920s. Yet even during a decade that had brought considerable economic growth and seen the country assume greater influence abroad, across the heartland of the country many Americans were living in poverty.[21] The country's leaders were divided about its

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[19] 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, America and the Remaking of the Global Order, 1916-1931, at 467 (2014).

[20] Bureau of the Census, U.S. Dep't of Commerce, Historical Statistics of the United States: Colonial Times to 1957, at 73, 139 (1960), https://fraser.stlouisfed.org/files/docs/publications/histstatus/hstat_1957_cen_1957.pdf [https://perma.cc/CVU6-8FTS] (comparing 1928 to 1933).

[21] The United States government did not publish an official poverty rate until 1959, but some researchers estimate the poverty rate to be roughly sixty percent in 1929. *See, e.g.*, John Iceland, 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 Bureau of the Census, *supra* note 20, at 165 (showing that 67.2% of American families had an income of less than $3,000 in 1929 (calculated in 1950 dollars)); *see also* 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 farms in the time periods from 1913-1920 and 1941-1950).

role in the world.[22] Storm clouds loomed on the horizon for economics and security. Legal disputes festered about the scope of government power, and the federal government boasted only a limited bureaucratic capacity to raise revenue or implement laws throughout the country.

Despite such apparent weakness, analysts from the world's then-preeminent geopolitical power were fretting on the other side of the Atlantic. A secret memorandum from the British Foreign Office written in November of 1933 captured the growing importance of America as it wrestled with domestic challenges and its role in the world:

> 'Great 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.'[23]

People say the British are prone to understatement, but there was none here. The British analysis is telling because of when it emerged: 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 1890s and the 1930s struggled with problems that bedevil many developing countries. Already the United States had begun to play an increasingly pivotal role in

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[22] *See, e.g.*, 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, 122–24 (1958) (describing the Harding, Coolidge, and Hoover administrations' foreign involvements from 1920 through 1932). On the broader divisions within government and in civil society about the role of the United States, *see generally* KATZNELSON, *supra* note 17.

[23] TOOZE, *supra* note 19, at 463–64 (quoting DOCUMENTS ON BRITISH FOREIGN POLICY, 1919-1939, series 1a, col. 5, (E.L. Woodward and Rohan Butter eds., 1973)). The tone of the British memo is echoed at least faintly by some American analyses of China in the early-twenty-first century. *See, e.g.*, David Dollar, *China's Rise as a Regional and Global Power: The AIIB and "One Belt, One Road"*, 4 HORIZONS 162, 163 (2015) ("China's initiatives in Asia are seen in many quarters as a setback for the United States. The U.S. government contributed to this narrative through its efforts to discourage allies from joining the new AIIB. In the end, major American allies, such as the United Kingdom, Australia, and South Korea, did join the Chinese initiative, and Japan is seriously considering becoming a member.").

global affairs during World War I. Navigating both the domestic and international politics of a world that was wearily accommodating to the rising importance of the United States economy, Woodrow Wilson sought to project American influence abroad as part of a larger effort to shape global norms. But he was keen to achieve this goal without entangling the United States in military alliances or conflict. In this respect, the use of hard power that World War I demanded was a failure for Wilson.[24] As the need to project American power grew, domestic cleavages became more of a liability both practically and symbolically. Yet well into the twentieth century, only a limited sense of national unity or purpose wove together Southern farms and Midwestern factories, despite economic ties. Life in America at that point still involved a mix of security, prosperity, instability, and violence.[25]

Two factors particularly impeded the national government's efforts to engender confidence in its administrative effectiveness, and through that confidence, to channel conflict over sensitive issues such as labor and the workplace into institutions. The first was crass public corruption, that is, the illegal and direct purchase of government services or votes. Far from subtle, this sort of corruption involves bags of cash paid to a judge or public official or direct payment in beer or money to a voter by a political machine. Crass corruption was rampant throughout the nineteenth century and well into the 1920s—and even later in some parts of the country and within the government. It signaled the failure of a 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.[26] Labor-related riots and violent strikes were the stuff of daily life.[27] 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.[28] The Chicago clothing workers' strike in 1910 mobilized 41,000 workers,[29] and the coal miners' strikes in 1913 and

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[24] *See* Adam Tooze, *1917—365 Days that Shook the World*, PROSPECT MAG. Dec. 13, 2016, at 20, https://www.prospectmagazine.co.uk/magazine/1917-year-shook-the-world-russian-revolution-united-states [https://perma.cc/WY8B-JSPG].

[25] *See, e.g.*, Turchin, *supra* note 8, at 584 (showing a peak in political instability in the late 1910s, using a database of instability events compiled from previous researchers and electronic media archives).

[26] *See* NORTH, WALLIS & WEINGAST, *supra* note 15; Margaret Levi, Tania Melo, Barry Weingast & Frances Zlotnick, *Opening Access, Ending the Violence Trap: Labor, Business, Government, and the National Labor Relations Act*, *in* ORGANIZATIONS, CIVIL SOCIETY, AND THE ROOTS OF DEVELOPMENT 331–66 (Naomi R. Lamoreaux & John Joseph Wallis eds., 2017).

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

[28] *See* LABOR CONFLICT IN THE UNITED STATES: AN ENCYCLOPEDIA 166–68 (Ronald L. Filippelli ed., 1990).

[29] *See id.* at 98–100.

1914 led to the shooting of strikers and, in Ludlow, Colorado, the death of eleven children who were suffocated or burned.[30]

Moreover, many violent strikes were long and complex. For example, the so-called West Virginia "Coal Wars" that began in 1912 and stretched for nearly a decade, marked what are described as violent battles both by historians and in union lore.[31] Conventional pluralist politics and courts did little to quell a struggle between miners and business owners that triggered open armed conflict,[32] and the U.S. Army was ordered to intervene four times.[33] In 1921, following a series of smaller but significant strikes beginning in 1912, an estimated 600,000 workers marched off their jobs after mine workers failed in their negotiations to get higher wages. Conflict continued to escalate, until a full-scale battle broke out between some 6,000 miners and some 2,000 pro-corporate forces.[34] Violence ceased only when federal troops arrived.[35]

Virtually no one, whatever their political perspective or geographical location in the country, expected major disputes about key issues to be resolved in courtrooms or administrative agencies. This was as true for racial as well as labor violence. The legal Jim Crow regime in the South—backed by state and vigilante Ku Klux Klan violence—maintained African Americans in a state of quasi-servitude.[36]

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[30] *See id.* at 297–300.

[31] *See, e.g.*, Irving Bernstein, The Lean Years: A History of the American Worker, 1920–1933, at 1–16 (1969); Irving Bernstein, The Turbulent Years: A History of the American Worker, 1933–1941, at 1–45 (1971).

[32] *See* Hoyt N. Wheeler, *Mountaineer Mine Wars: An Analysis of the West Virginia Mine Wars of 1912-1913 and 1920-1921*, 50 Bus. Hist. Rev. 69, 70 (1976).

[33] *See* Clayton D. Laurie, *The United States Army and the Return to Normalcy in Labor Dispute Interventions: The Case of the West Virginia Coal Mine Wars, 1920-1921*, 50 W. Va. Hist. 1, 1 (1921).

[34] Wheeler, *supra* note 32, at 80–81.

[35] *See id.*

[36] Legally based segregation, violence, and disenfranchisement in the South persisted well into the twentieth 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); *see also* 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); Grace E. Hale, *"For Colored" and "For White": Segregating Consumption in the South*, *in* Jumpin' Jim Crow: Southern Politics from Civil War to Civil Rights 162, 173–78 (Jane Dailey et al. eds., 2000) (describing Jim Crow laws throughout the South as captured by Farm Security Administration photographs); 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). 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. *See* 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. govern-

To some extent, violence in the form of individual acts against persons and property can remain a persistent problem even in countries with reliable institutions and advanced economies. How it is controlled and to what extent is certainly one metric for determining the quality of a government and its rule of law.[37] That said, the kind of violence of concern here is collective violence as a weapon in political conflict. Indeed, one true test of political development is the capacity of a society to manage intense political conflicts by means other than violence. Aggrieved groups can make their case peacefully and without fear of violent reprisals by employers, governments, or competitors. At least during some periods of the late-nineteenth century and early-twentieth century, the lack of capacity to resolve political and economic conflict without violence was in question. Violence surrounding labor organization continued for much of a century prior to the NLRA of 1935.

Yet by the time American soldiers entered World War II, a different picture had emerged. As can be observed from the results of studies measuring violence and instability in American history, violence and political instability declined by mid-century. Specifically, the frequency of "instability events"—such as major riots and mass demonstrations—per five years was markedly lower by the 1940s than it had been in the late 1910s and the early 1920s. During that earlier period, the number of instability events recorded was slightly higher than even during the Civil War, and indeed was at the highest level observed in the whole history of the United States (with approximately 150 events). From the outset of the postwar period, these events were increasingly rare.[38] The frequency of such events in the 1940s was similar to the frequency observed in the 1830s, with fewer than 20 incidents per five-year period.[39] Even during the height of the 1960s, "instability events" carrying the risk of violence serious enough to be included in the study occurred at a fraction of the rate observed during the 1920s (fewer than 20 in the first half of the 1960s, compared to about 150 in the first half of the 1920s).

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 eighty percent during that

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ment records of lynchings during this time period, see BUREAU OF THE CENSUS, *supra* note 20, at 216.

[37] *See, e.g.*, WORLD JUSTICE PROJECT, WJP RULE OF LAW INDEX 2017–2018, at 10 (2018), https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf [https://perma.cc/HJL4-9J7H].

[38] *See* Turchin, *supra* note 8, at 585–86 (showing an average of fifteen riots per five years in the 1940s, compared to a peak of roughly 150 riots per five years in the late 1910s and the early 1920s). Using a different methodology, Dubofsky documents a steep decline in the early 1940s in the three-year moving average of labor unrest (based on mentions in newspaper database). *See* Dubofsky, *supra* note 27, at 131.

[39] *See* Turchin, *supra* note 8, at 584.

time).[40] How can we understand what happened, taking seriously the risks that history could have turned out quite differently?

It is tempting to think that as countries get wealthier and institutions more familiar, countries simply mature into a different stage of development. In practice, garden-variety "modernization theory" tends to falter in explaining development.[41] As the stories of countries ranging from Brazil to Thailand indicate, there is little to support that idea.[42] Instead a more nuanced story emerges about how the United States evolved on the eve of the country's transformation into a geopolitical power—one that proceeds roughly as follows.

American society appears to have entered gradually 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 accomplish complex goals delegated by Congress, 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 of reducing crass corruption that could buy and sell decisions of courts, agencies, and voters. It clarifies the significance of the U.S. Supreme Court's separation of powers cases from the 1920s to the 1940s and the contribution of interdependent norms associated with today's public law, including separation of powers, administrative procedure, due process, and statutory rights.

The story that provides best context for understanding public law begins not with philosophical questions about the meaning of "executive"

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[40] *See* Introduction to Corruption and Reform: Lessons from America's Economic History 3, 15 (Edward L. Glaeser & Claudia Goldin eds., 2006), https://www.nber.org/chapters/c9976.pdf [https://perma.cc/HE8Q-8C6L].

[41] *See generally* Nils Gilman, Mandarins of the Future: Modernization Theory in Cold War America (2003) (presenting a general account of modernization theory).

[42] 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*, Economist (Jan. 2, 2016), https://www.economist.com/leaders/2016/01/02/brazils-fall [https://perma.cc/H6XP-SYLZ]. Similarly, Thailand experienced rapid economic growth in the 1980s and 1990s, with its growth rate almost doubling between 1987 and 1995. Int'l Monetary Fund, Thailand: Selected Issues 2 (2000), https://www.imf.org/external/pubs/ft/scr/2000/cr0021.pdf [https://perma.cc/SHM3-VXEK]. 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*. Unsustainable growth, coupled with Thailand's financial crisis in 1997, led to an estimated seventy 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. *See* Tomas Larsson, *The Strong and the Weak: Ups and Downs of State Capacity in Southeast Asia*, 5 Asian Pol. & Pol'y 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).

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.[43] In these four decades the United States experienced massive change. For example, historic numbers of immigrants became new Americans, and an increasingly networked national economy linked by railroad and telegraph emerged. But some of the most important changes involved the interaction between social and economic change, risks of violence, and crass corruption.

Painting in broad brushstrokes, our account plays up the impact of new economic and social pressures arising from industrialization, the rise of railroads, and growing market integration along with (eventually) geopolitical imperatives. These factors create pressure for action by the national government, including new governance arrangements. The decline in corruption creates an opportunity to use institutions in a different way: national governmental capacity is useful for channeling conflict, regulating a national economy, and playing an expanded geopolitical role, but only under conditions of compromise and restraint. That compromise, instantiated in public law, then preserves and further supports capacity growth.

The intense labor conflict we have described played out at a time when the American economy was becoming more integrated and national. Consequently, new problems arose that states and localities could not solve alone (*e.g.*, railroad regulation) because of their limited authority and difficulties in coordination.[44] In contrast, the national government had the authority to achieve considerably greater coordination across the national economy. In *Wabash v. Illinois*,[45] the Supreme Court reversed its earlier position in *Munn v. Illinois*[46] by recognizing a role for more expansive federal legislation based on the Commerce Clause while limiting state powers. In *Munn*, the Supreme Court had recognized state authority to experiment with regulatory reforms to solve a variety of problems, most notably with railroads.[47] In *Wabash*, the Court emphasized that states cannot regulate interstate commerce.[48]

By limiting state authority over railroads, *Wabash* underscored how the solutions to widespread public concerns about the national economy depended heavily on federal action. In the four years or so following Haymarket Square and *Wabash*, the federal government enacted legislation

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[43] *See* INTRODUCTION TO CORRUPTION AND REFORM, *supra* note 40, at 15 (demonstrating a roughly eighty percent decline in explicit corruption, calculated on the basis of newspaper coverage, between 1890 and 1930).

[44] *See* Daniel B. Rodriguez & Barry R. Weingast, Engineering the Modern Administrative State, Part I: Political Accommodation and Legal Strategy in the New Deal Era 13–14 (Nw. Pub. Law Res. Paper No. 19-03, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335114 [https://perma.cc/2KLQ-5BBT].

[45] 118 U.S. 557 (1886).

[46] 94 U.S. 113 (1877).

[47] *See id.* at 129, 135.

[48] 118 U.S. at 563.

under the Commerce Clause addressing disease control, railroads, and antitrust.[49] But conflict continued to grow over how these powers should be used, and for whose benefit. On no issue (we think) was the conflict at the time as pitched, and ultimately violent, as on labor. At the same time, we observe the gradual emergence of the United States as a major geopolitical power—a situation that engendered its own tensions and pressures for development. How these conflicts were sufficiently assuaged and channeled at a critical time therefore becomes, for us, a story that deserves somewhat more attention than it has received, and one that runs at least partly through the statutory, constitutional, and norm-related changes we describe below.

III. The Decline in Crass Corruption Creates an Opportunity

During the late-nineteenth and early-twentieth centuries, crass corruption was pervasive enough to affect not only mayors, state government, and federal offices, but also the judiciary.[50] And while prevailing attitudes about the law, along with sociological factors, had some impact on courts' use of injunctions to curb labor influence in the late nineteenth century, outright judicial misconduct also affected labor disputes.[51] Renowned litigator and labor lawyer Clarence Darrow was not alone in encountering prosecutorial and judicial misconduct.[52] True, "judicial ethics were loosely defined a century ago."[53] But even at the time certain norms of legal ethics—such as those governing ex parte communications—were well established.[54] When labor disputes were involved, certain judges were willing to flout these norms.[55] Consider, as an example, the conduct of Luther J. Goddard of the Colorado Supreme Court.[56] A noted opponent of labor, Justice Goddard en-

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[49] *See* Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7); Agricultural Experiment Stations Act, Pub. L. No. 49-314, 24 Stat. 440 (1887) (disease control); Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379 (railroads).

[50] *See* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 Yale L.J. 1362, 1373 (2010) (quoting Henry Adams as saying that "[o]ne might search the whole list of Congress, Judiciary, and Executive during the twenty-five years 1870-1895 and find little but damaged reputations" (quoted in Sean Dennis Cashman, America in the Gilded Age: From the Death of Lincoln to the Rise of Theodore Roosevelt 214 (1984))).

[51] *See, e.g.*, Francis Bowes Sayer, *Labor and the Courts*, 39 Yale L.J. 682, 682 (1930) ("There can be no question but that in the issue of labor injunctions many courts have abused their powers.").

[52] *See generally* Gerald F. Uelmen, *Fighting Fire with Fire: A Reflection on the Ethics of Clarence Darrow*, 71 Fordham L. Rev. 1543 (2003) (chronicling the travails of one high-profile labor lawyer who engaged in unethical combat to counteract the prosecution engaging in the same tactics).

[53] *See id.* at 1553.

[54] *See id.*

[55] *See id.* at 1545–46.

[56] The examples that follow are drawn from events surrounding two high-profile trials: that of Bill Haywood in 1907, and that of J.J. McNamara in 1911. *See generally id.* at 1543–56.

tered into ex parte communications with the prosecution.[57] During that time, he advised them as to how best to carry out a scheme of illegal kidnapping to circumvent habeas relief.[58] He also stated that he wanted to see the union leaders hanged, and that he would "see they are gotten [to the gallows]."[59] Meanwhile, Chief Justice Stockslager of the Idaho State Supreme Court was part of a three-judge panel which rejected a writ of habeas corpus pertaining to the kidnapping of a prominent labor official.[60] He had played a key role in hiring the private detective responsible for orchestrating the kidnapping.[61] Justice Stockslager was a political candidate for Governor at the time and believed that assisting the criminal investigation of organized labor would favor his campaign.[62]

At times, even the United States Supreme Court was not above controversy. A lawyer arguing a labor case disclosed to a third party that he "had a 'long talk' with Justice Harlan, whom he had known for some years" about the merits of an upcoming case.[63] This included a discussion of material which he intended to have a "good effect" on the final outcome of the case.[64] Such conversations may not have occurred in every case with high economic stakes, and it is sometimes difficult to assess precisely the extent to which these ex parte communications shaped the outcome in cases where they occurred. That the historical record reveals their disclosure to third parties nonetheless conveys something of the differing norms associated with the conduct of lawyers and judges.

A variety of factors may have contributed to this willingness to bend the law for corporate interests. One is that judges often ran in the same elite social circles as corporate leaders and the prosecutors that corporations bankrolled, and appear to have had weaker countervailing norms constraining the informal but potentially powerful tendency to accommodate the interests of those within their social milieu.[65] Second, money frequently changed hands—at least between the prosecution and jurors.[66] While election of state judges had recently become commonplace,[67] newfound fund-

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[57] *See id.* at 1553.

[58] *See id.*

[59] *See id.*

[60] *See id.* at 1550.

[61] *See id.* at 1548, 1550.

[62] *Id.* at 1548.

[63] *Id.* at 1553–54.

[64] *See id.*

[65] *See id.* at 1554 (noting that in one case "[t]he judge was a member of the most elite club in the city, and no one would be allowed on the jury who did not own property and was not acceptable to the prosecution"). *See also id.* at 1545–49 (explaining how private interests often funded the prosecution).

[66] *See id.* at 1554 ("The forces of capital bribed jurors too, but the approach was a bit more subtle.").

[67] The 1840s and 1850s saw a wave of state constitutional amendments to make their judiciary elected, rather than appointed. This was in response to a populist insurgency against perceived cronyism by judicial appointees. *See* Keith R. Fischer, *Education for Judicial Aspirants*, 31 J. NAT'L ASS'N L. JUD. 99, 111 n.40 (2011).

raising challenges left judges especially vulnerable to moneyed interests.[68] Together, these factors underscore the extent to which crass corruption not only diminished the basis for confidence in the judiciary, but also specifically exacerbated tensions over labor.

Corruption 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-nineteenth century and in the electoral system in the early twentieth. 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.[69]

There is debate about whether the declines were affected by changes in politics, law enforcement, federalism, or culture.[70] Our own view is that the media-enabled political backlash of the American Progressive Era in the late-nineteenth and early-twentieth century almost certainly made it more difficult to ignore this kind of crass corruption.[71] That backlash was sometimes spurred by distrust of big-city political machines, and sometimes concern over trusts and railroads.[72] It was felt strongly in California, for

[68] *See, e.g.*, Renee L. Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York*, 15 Geo. Mason L. Rev. 109, 118–19 (2007) (explaining that in the 1860s and 1870s, judges in New York sometimes fell under the sway of corrupt party bosses).

[69] *See* Introduction to Corruption and Reform, *supra* note 40, at 3, 15.

[70] For a discussion of the literature on the relationship between corruption, poor government, and growth, *see id.* at 15 (describing three major theories of reform, looking at the roles of institutions, certain producers, and political entrepreneurs in shaping reform against corruption); *see also* Rebecca Menes, *Limiting the Reach of the Grabbing Hand: Graft and Growth in American Cities, 1880 to 1930*, *in* Introduction to Corruption and Reform, *supra* note 40, 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. *See* Matthew Gentzkow et al., *The Rise of the Fourth Estate: How Newspapers Became Informative and Why It Mattered*, *in* Introduction to Corruption and Reform, *supra* note 40, 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. *See* Menes, *supra*, at 70.

[71] Indeed, "[t]he 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 1 (2016), https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-84?print=pdf [https://perma.cc/PC2J-AABC]. Many political progressives attacked patronage politics and advocated for a shift to a merit-based civil service. *See id.* at 5. Other progressive initiatives aimed to limit the power of political parties. Governor Robert La Follette'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. *See id.*

[72] *See generally* Alexander Keyssar, The Right To Vote: The Contested History of Democracy in the United States (2009); Donald W. Rogers, Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America (Donald W. Rogers & Christine Scriabine eds., 1992).

example, where anxiety over the political power of the railroads led to a state constitutional provision in force to this day stipulating that any public official accepting free transportation forfeits her office.[73]

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.[74] State officials could offer alternatives to federal investigation and prosecution in possible instances of corruption, such as what happened in Watergate.[75]

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. Political strategies responsive to anti-corruption concerns almost certainly played a role in bolstering emerging norms governing the administration of public programs.[76] In contrast, countries such as Argentina and Mexico emerged from the Spanish colonial empire without the substan-

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[73] *See* CAL. CONST. art. XII, § 7; CAL. CONST. art. XII, § 19 (repealed 1974); *see also* 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 eighty-five percent of the state's rail line and was both the largest landowner and largest employer in the state).

[74] *See* Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171 (1976).

[75] *See* George T. Frampton, Jr., *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5, 15, 26 (1976); *see also* Michael E. O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 278, 289–90 (2003). For more on post-Watergate federalism concerns with respect to federal and state prosecution of corruption, *see* Sara S. Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 700–07 (2000); George D. Brown, *Should Federalism Shield Corruption?: Mail Fraud, State Law, and Post-*Lopez *Analysis*, 82 CORNELL L. REV. 225 (1997); Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75 (2003).

[76] This point cannot be overstated. Although it would be a stretch to presume that these historical factors guaranteed a robust American anti-corruption constituency, it is difficult to cast aside the likely impact of long-term structural issues in creating the conditions for the Progressive Era and shaping the priorities of political leaders in the late-nineteenth and early-twentieth centuries. Consider, for example, the Roosevelt administration's New Deal-era dilemma as described by John Wallis, Price Fishback, and Shawn Kantor:

> Surprisingly . . . while the administration of public relief was widely regarded as corrupt before 1933, the modern federal/state public welfare system that developed out of the New Deal reforms is often castigated as bureaucratic, but rarely corrupt. What changed? How did the country enter the Depression with a public welfare system riddled with political manipulation and emerge with one that was not? Our answer is straightforward. The president, Franklin Roosevelt, and other members of the executive branch gained little or nothing from the kinds of local corruption involved in public relief. But they stood to incur enormous losses if the New Deal relief program was perceived as politically manipulative and corrupt by the voting public.

John J. Wallis, Price V. Fishback & Shawn E. Kantor, *Politics, Relief, and Reform: Roosevelt's Efforts to Control Corruption and Political Manipulation During the New Deal*, *in* INTRODUCTION TO CORRUPTION AND REFORM, *supra* note 40, at 343–44.

tial rural middle class that generated market opportunities for local manufacturers.[77] While instances of public corruption sometimes still arise in the United States, Mexico and Argentina appear to face more chronic difficulties on this issue.[78] Courts and the legal system illustrate this difference: the rule of law—and hence the absence of corruption—is more secure in the United States than in Argentina or Mexico. U.S. courts are more likely to enforce the law than accept bribes or bend the law under political pressure than are courts in Argentina and Mexico.[79]

Of course, crass corruption involving outright deal-making to sell official power never disappeared entirely in the United States. The public still bears witness to 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.[80] To the extent norms changed, they did so more quickly in some areas of the country relative to others, and in some institutions.[81] 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 wholesale.

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[77] *See* David Rock, Argentina, 1516-1987, at xxvi (1987).

[78] *See Corruption Perceptions Index 2018*, Transparency Int'l, https://www.transparency.org/cpi2018 [https://perma.cc/RW4Q-DWX8] (ranking Mexico and Argentina as more corrupt than the U.S. at, respectively, 28th out of 100 and 40th out of 100, compared to 71st out of 100).

[79] On Mexico, see generally Beatriz Magaloni, *Authoritarianism, Democracy, and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico*, *in* Democratic Accountability in Latin America (Scott Mainwaring & Christoper Welna eds., 2003). On Argentina, see generally Rebecca Bill-Chavez, John A. Ferejohn & Barry R. Weingast, *A Theory of the Politically Independent Judiciary*, *in* Courts in Latin America (Gretchen Helmke & Julio Rios-Figueroa eds., 2011).

[80] *See* John Hurdle & Sabrina Tavernise, *Former Judge is on Trial in 'Cash for Kids' Scheme*, N.Y. Times (Feb. 8, 2011), https://www.nytimes.com/2011/02/09/us/09judge.html [https://perma.cc/SZ2B-RLGZ].

[81] Anti-corruption reformers that came to office in the first two decades of the twentieth century followed a similar pattern across the Northeast, upper Midwest, and in California, making names for themselves fighting corruption and turning to popular rather than patrician support once in office. *See* John D. Buenker, Urban Liberalism and Progressive Reform 27–41 (1973). Yet, differences remained during the first part of the twentieth century. Anticorruption concerns in the North focused on the big city machines, while in the South and West the focus was, generally speaking, on the power of industry and the railroads. Dewey W. Grantham, Southern Progressivism: The Reconciliation of Progress and Tradition 153, 155 (1983). However, scandals remained an issue, with high-profile corruption emerging, for example, in propping up the challenger to Upton Sinclair in his California governor race, Kathryn S. Olmsted, Right Out of California: The 1930s and the Big Business Roots of Modern Conservatism 182–83 (2015), and in keeping Huey Long in power as governor in Louisiana, Anthony J. Badger, New Deal/New South 10, 13 (2007).

Corruption weakens both public support for the capacity of public institutions and the ability of bureaucrats and judges to operate with integrity.[82] Who is going to have confidence enough to support vesting greater authority in a court, government clerk, or an ostensibly professional police force 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. Violence, too, can become routinely entangled with such corruption in at least two ways. Government officials who are easily bought or sold have less reputational capital to use in making the case for themselves as legitimate alternatives to contentious conflict. And when public officials have little to fear from engaging in corruption, they can extract rents not only by offering benefits to the highest bidder but by threatening physical coercion in the absence of bribes. So, the state remains transactional in the most literal sense of that term. Yet for all its imperfections, this was not a picture describing the mine-run of governance in the United States by the second decade of the twentieth century. 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.

IV. Channeling Conflict and Building National Institutional Capacity: From World War I to the 1930s

Before the country could fully inhabit its new role as a geopolitical power, it had to contend with a vital question: how would business and labor compete and negotiate over control of the workplace? Industrialization heightened both growth and conflict. As the political theorist Judith Shklar put 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."[83] Yet the rise of unions made work not only a source of dignity and shared belonging but also 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

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[82] Karen Cook, Russell Hardin & Margaret Levi, Cooperation Without Trust? 78–79, 156–65 (2005).

[83] Judith N. Shklar, American Citizenship: The Quest for Inclusion 1–2 (1991).

emergence of non-violent resolution of disputes.[84] These new institutional solutions to the commitment problem arose in the New Deal with the passage of the NLRA and the creation of the 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, "[t]he sharp decline in the level of industrial violence is one of the greatest achievements of the National Labor Relations Board."[85]

Why did labor violence prove 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 the potential for 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 corporate profits—could not commit to eschew violence. Nor could the 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 do so.[86]

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 ongoing 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 preordained. Much of the literature implicitly accepts these bounds as natural and given, but they do so only by ignoring the central problem of violence. So why and how was this 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

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[84] The discussion of the institution of labor violence draws heavily on a chapter by Levi et al., *supra* note 26.

[85] Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, *in* Violence in America: Historical and Comparative Perspectives 281, 384 (Hugh Davis Graham & Ted Robert Gurr eds., 1969).

[86] *See* Levi et al., *supra* note 26, at 333.

radical, even revolutionary, movement in the United States.[87] We further argue that the acceptance and sustaining of the legislation also required transformations in the substance and implementation of administrative law.

The NLRA achieved several well-known legal changes. It legalized unions and required collective bargaining. It defined a number of common anti-union tactics, such as wildcat strikes,[88] as "unfair labor practices" and hence illegal. And it created an enforcement mechanism to make the private sector take these codes seriously.[89]

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, such as demands for representation on corporate boards or for a role in management. Moreover, by making non-violence a criterion for recognition by the NLRB, the NLRA also prevented unauthorized strikes, helping unions control their more radical and extreme elements who favored goals beyond wages and benefits.[90]

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. Collective bargaining reduced the bargaining asymmetries between employer and employee. 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 NLRB as 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-agent problem that we now take for granted. The problem, from our perspective, was this: without transgressing the due process rights of citizens and firms, the emerging machinery of a much larger state had to reconcile congressional authority in establishing a broad legislative framework while creating an administrative apparatus under presidential control.

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[87] *Id.*; KATZNELSON, *supra* note 17, at 10.

[88] Wildcat strikes are strikes not called by union leadership and not occuring as part of contract negotiations. *See* NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 60–62 (2002).

[89] *See generally* Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169 (2015).

[90] Levi et al., *supra* note 26, at 333.

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. This gain in state capacity (to design and implement credible commitments) is part of the process of political development, again in the form of compromise leading to reductions in violence by channeling conflicts out of the realm of violence and into legal and administrative institutions. 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.

Compromise was possible because gradually and in different settings, labor, business, and political leaders came to understand that some kind of accommodation would be useful, and that norms of restraint would support accommodation. Important examples of accommodation and restraint bearing on our framework occurred during the New Deal, but also predated and followed that period. Among labor leaders, Samuel Gompers eventually embraced a more cautious approach to strike use and an incremental stance to reform, and he focused greater attention on legal strategy.[91] Because of protections for unions written into these statutes, labor leaders partially supported the Clayton Act and eventually the NLRA.[92] Compromise was also evident in the strategies of some politicians. For example, in the early days of the aforementioned West Virginia coal wars, Governor Hatfield pursued a more conciliatory approach, initially defusing much of the conflict that had broken out in Paint Creek in 1912.[93]

The development of the NLRA framework was a preeminent example—not only because of how it was a model for attempting to split the difference, but because much was left unresolved. The 1947 Taft-Hartley amendments[94] to the NLRA underscore how conflict continued as Southern Democrats, Republicans, and business understood what had happened and pushed back.[95] But the Wagner Act[96] was nonetheless a watershed in resolving important pre-existing conflicts.[97] Wagner himself was deeply committed

[91] *See* William Forbath, Law and the Shaping of the American Labor Movement 41–42 (1991).

[92] Levi et al., *supra* note 26, at 359.

[93] *See* Lawrence R. Lynch, *The West Virginia Coal Strike*, 29 Pol. Sci. Q. 626, 640 (1914); *see also* Wheeler, *supra* note 32, at 73.

[94] Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136.

[95] *See* Katznelson, *supra* note 17, at 228–32; *see also* Ira Katznelson, *When Affirmative Action Was White*, 15 Poverty & Race, Mar.–Apr. 2006, at 1.

[96] National Labor Relations Act of 1935, Pub. L. No. 721-198, 49 Stat. 449.

[97] Indeed, one count has them enjoining labor unions over 4,300 times. *See* Kate Andrias, *Building Labor's Constitution*, 94 Tex. L. Rev. 1591, 1609–12 (2016) (providing a summary of judicial antagonism against labor unions).

to principles of cooperationism, writing that "[a] true cooperation, based on mutual understanding, is the only solution for our difficulties."[98] His brief on the *Interborough Rapid Transit* case appears to accumulate statements in support of this position from labor management leaders, employees, academics, and economists alike.[99] A belief in the value of cooperation appears to have been far from uncommon,[100] even if one takes some of the statements from business and labor leaders with some grains of salt.[101] Later, business leaders stayed within the NLRA framework and then pursued change through the legislative process to yield Taft-Hartley. They took part in mobilization, and largely accepted the growth of the administrative state.[102] Once empowered, agencies, too, engaged in compromise: during World War II, the OPA avoided zero tolerance enforcement. Before promulgation of the Administrative Procedure Act[103] (APA), agencies engaged in notice and sought comment. As agencies gained power to enforce the law, make policy, and resolve conflict, they became part of a system that appeared keen, at least in the normal course of business or "on the equilibrium path," to exercise restraint and foment cooperation where possible.

Yet innovation in this domain required far more than legislation, even legislation as important as the Wagner Act. Agencies had to be capable of gathering information, adjudicating and issuing decisions, and administering them. Gradual compromise in the early decades of the twentieth 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 NLRB.

It was partly growth in state capacity that made it even possible to channel disputes into formal institutions: regional offices for the NLRB, for

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[98] Mark Barenberg, *Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1427 n.220 (1993).

[99] *See* ROBERT WAGNER ET AL., INTERBOROUGH RAPID TRANSIT COMPANY AGAINST WILLIAM GREEN, ET AL., BRIEF FOR DEFENDANTS (1928); *see also* Barenberg, *supra* note 98, at 1429 n.230.

[100] *See* Barenberg, *supra* note 98, at 1428 ("From the end of World War I into the 1930s, a cluster of influential labor, engineering, managerial, and academic progressives had assiduously promoted—and practically tested—institutions of collective bargaining designed to encourage collaboration and to reshape conflicting group interests.").

[101] *See* Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 675–77 (2004) (arguing that the public statements of labor leaders expressing optimism were tools for operationalizing their political base); *id.* at 698–99.

[102] *See* Katznelson, *supra* note 17.

[103] 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1958).

example, and employees who were more than the product of patronage. Channeling of disputes also meant a change in attitudes among elites—including union leaders and business willing to tolerate rulings of the NLRB and to split the institutional advantage in light of the NLRA and the Taft-Hartley Act. As labor disturbances leveled off, courts eventually took up cases addressing issues such as whether decisions of the NLRB to certify collective bargaining units could be reviewed by the D.C. Circuit[104] and under what circumstances a union could challenge an employer's decision not to bargain collectively with employee representatives.[105] These cases reflected the extent to which labor conflict had largely become a 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. Economic risk was a problem for law and politics not in absolute terms, but because it fell on people with no ability to manage it, with devastating consequences for them and creating increasing consternation in a polity that was already fragile. By reducing the idiosyncratic risk of the market, social insurance legislation reduced the appeal of various forms of anti-market backlash.[106]

The response was piecemeal but on a much more ambitious scale than, say, what had been done for discrete categories of people such as veterans and widows,[107] and workers maimed by the new industrial economy.[108] Roosevelt set in motion policies to manage risk, but the project was complicated by race-related issues in the South.[109] The race-related challenges were partially overcome by President Lyndon Johnson in the mid-1960s, but to this day controversy persists about the role of race-related motivations in policy debates about social insurance programs. Moreover, without substantial government reform of social insurance policies—aside from changes in access to health insurance under the Affordable Care Act[110]—real wages have shrunk since the 1970s once health care costs are taken into account.[111]

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[104] Am. Fed'n of Labor v. NLRB, 308 U.S. 401 (1940).

[105] Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941).

[106] *See generally* Torben Iversen & David Soskice, Democracy and prosperity: Reinventing Capitalism through a Turbulent Century (2019); Isabela Mares, The Politics of Social Risk: Business and Welfare State Development (2003).

[107] *See* Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States ix (1995).

[108] *See generally* John Fabian Witt, The accidental Republic: Crippled Workingmen, Destitute Widows and the Remaking of American Law (2006).

[109] *See* Eric Schickler, Racial Realignment: The Transformation of American Liberalism, 1932-1965, at 101–49 (2016).

[110] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.).

[111] *See* Alyson Haslam et al., *Where Does the Blame for High Health Care Costs Go? An Empirical Analysis of Newspaper and Journal Articles Criticizing Health Care Costs*, 132 Am. J. Med. 718, 718–21 (2019); Drew Desilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, Pew Res. Ctr.: Fact Tank (Aug. 7, 2018), https://www.pewresearch.org/

We know there are alternatives to the way the U.S. manages and mitigates economic risk from what we observe in other countries, notably parts of Europe.[112]

As with the labor issues, building institutional capacity to manage social welfare policy depends on having a sufficiently credible arrangement that at once empowers the state with new authority while at the same time constraining the state to fulfill the goals set down in the legislation. Among other things, such arrangements limit the ability of those who run it so they do not solely favor their friends and allies. Moreover, the growing role of social welfare in holding the constitutional order together also implicates the concerns associated with public law, such as separation of powers, non-arbitrariness, and due process.

The increasing governmental presence in the economy raised the stakes of power. As public organizations gained the resources, bureaucratic authority, and organizational knowledge to resolve labor disputes, provide social insurance, mobilize for war, and collect taxes on a massive scale, fights over the control and role of national institutions became more intense. This brings us to New Deal-era legal conflicts. To understand decisions in cases such as *Humphrey's Executor v. United States,*[113] Schechter Poultry,[114] and eventually the *Steel Seizure* case,[115] we must take account not only of the immediate disagreements at the time 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.[116] Yet they

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fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/ [https://perma.cc/U5ZR-GAMY]; Jay Shambaugh & Ryan Nunn, *Why Wages Aren't Growing in America*, HARV. BUS. REV. (Oct. 24, 2017), https://hbr.org/2017/10/why-wages-arent-growing-in-america [https://perma.cc/9JP8-FNER]. The share of wealth controlled by those in the top 0.1% of the wealth distribution has considerably increased in recent decades, from 7% in 1978 to 22% in 2012. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 519–25 (2016). The top one percent of households own more wealth than the bottom ninety percent combined. Christopher Ingraham, *The Richest 1 Percent Now Owns More of the Country's Wealth Than at Any Time in the Past 50 Years*, WASH. POST: WONKBLOG (Dec. 6, 2017), http://wapo.st/2jZS69P?tid=ss_tw&utm_term=.dbcd0be4188c [https://perma.cc/C6AH-VK97]. Whereas the poor and middle class saw the largest income growth in 1980, the very affluent see the largest income growth today. David Leonhardt, Opinion, *Our Broken Economy, in One Simple Chart*, N.Y. TIMES (Aug. 7, 2017), http://www.nytimes.com/interactive/2017/08/07/opinion/leonhardt-income-inequality.html [https://perma.cc/Z8HN-RX93].

[112] *See e.g.*, PETER A. HALL & DAVID SOSKICE, VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE CAPITALISM (2001); ISABELA MARES, TAXATION, WAGE BARGAINING, AND UNEMPLOYMENT (2006); MARES, *supra* note 106.

[113] 295 U.S. 602 (1935).

[114] 295 U.S. 495 (1935).

[115] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[116] Perhaps understandably, all of these cases treat the core separation of powers problem at the heart of the analysis as a standard-setting issue. But they do relatively little to explain the scope of the relevant standards, or their potential application in different contexts. And to some extent, they fall well short of reconciling the holding with previous case law while also avoiding repudiation of earlier cases. In *Schechter Poultry*, for example, the majority does little to

make sense 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, to delegate agency power to the private sector, or to justify the use of executive-directed state coercive capacity.

Scholars are drawn to writing about the pitched legal battles of the New Deal, and rightly so. Canonical cases abound, such as *Panama Refining Co. v. Ryan*,[117] *Schechter Poultry*, and *Humphrey's Executor.* Yes, the Supreme Court exhibited some hostility to the New Deal agenda. But neither the simple hostility story nor the focus on politics of the so-called "switch in time that saved nine" appreciates the nuances of these constitutional battles. Justice Cardozo may have persuaded Justices Hughes and Roberts to join in the majority in *Nebbia v. New York*,[118] for example.[119] 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.[120] As Cuéllar describes in *Governing Security*,[121] 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. *NLRB v. Jones & Laughlin Steel Corp.*[122] is often seen as pivotal, as it signaled the end of the Court's tendency to strike down New

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explain the origins or limit of its aversion to delegating public power to private entities, nor does it resolve exactly how *Schechter* fits into the tapestry of previous decisions upholding broad delegations. *See e.g.*, 295 U.S. at 537. *Humphrey's Executor* reaches a conclusion that hardly follows from *Myers v. United States*, 272 U.S. 52 (1926). *Compare Myers*, 272 U.S. at 163–64, *with Humphrey's Ex'r*, 295 U.S. at 625–26. And the *Steel Seizure* case produced a panoply of opinions collectively offering important insights but little ultimate clarity about the scope of the President's authority in situations where presidential assertions of authority are not explicitly contradicted by statutes. *Compare Youngstown Sheet & Tube Co.*, 343 U.S. at 583–89, *with id.* at 634–56 (Jackson, J., concurring).

[117] 293 U.S. 388 (1935).

[118] 291 U.S. 502 (1934).

[119] See Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution 170 (1998).

[120] *See* Waxman, *supra* note 4, at 2404.

[121] Mariano-Florentino Cuéllar, Governing Security: The Hidden Origins of American Security Agencies 55–56 (2013).

[122] 301 U.S. 1 (1937).

Deal legislation and recognized the extent of congressional power under the Commerce Clause. As Professor Barry Cushman points out, however, the 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*.[123] 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—along with continuing judicial efforts to balance their doctrinal commitments with the practical challenges faced by an expanding federal government—fits with an argument Seth Waxman advanced at a Yale Law School lecture nearly two decades ago, though he used somewhat different language.[124] 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.[125] 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.[126] Hence, *Yakus v. United States*[127]—playing out a few years later against the backdrop of World War II—was not just a rerun of *Schechter Poultry*.[128] Rather, price controls affecting business, labor, and consumers involved more limited authority, were subject to public oversight, and gave courts some basis for judicial review.[129] And the executive made the case for expanded delegations in terms of America's interests as a newly emerged geopolitical power.[130]

Another critical factor emphasized by recent legal scholarship is that the New Dealers reacted to the criticisms of the Supreme Court by adapting the statutes creating the New Deal administrative apparatus. The NLRA, as we have emphasized, became a watershed statute. In contrast to its predeces-

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[123] *See generally* Barry Cushman, *The Commerce Clause: The New Deal*, *in* THE CONSTITUTION AND ITS AMENDMENTS (1999); PETER H. IRONS, THE NEW DEAL LAWYERS (1993); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2002).

[124] *See* Waxman, *supra* note 4.

[125] *See id.* at 2400.

[126] *Id.* at 2402.

[127] 321 U.S. 414 (1944).

[128] Waxman, *supra* note 4, at 2405–08 (describing legal developments post-*Schechter Poultry*).

[129] *See* Yakus v. United States, 321 U.S. 414, 423–24, 427 (1944) (describing the Emergency Price Control Act as a valid exercise of Congress's legislative power in that "Congress has stated the legislative objective, has prescribed the method of achieving that objective . . . and has laid down standards to guide the administrative determination of both the occasions for exercise of the price-fixing power, and the particular prices to be established" and comparing the regime to legislative acts in a number of post-*Schechter Poultry* cases).

[130] *See id.* at 426–27.

sor, the NIRA, the NLRA contained many of the procedural safeguards later embodied in the APA and vested power in a multi-member board.[131] The agency was granted capacious powers, but its ability to use them was subject to court-like procedural constraints in adjudication and sufficient agreement among board members whose agreement was far from guaranteed.

V. The Legacy of World War II for Public Law, and the Problems Left Unresolved

When societies are riven by riots, internal conflict, and instability, they face greater difficulty building and deploying influence in the international system. Internal divisions do not dissipate by themselves. 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 small, the eighteenth largest in the world in the spring of 1940, just behind the Dutch army that had recently surrendered to the Nazis.[132] The federal government had few if any agencies that operated with truly nationwide scope, and only about ten percent of the population paid any federal income taxes.[133]

How Roosevelt 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 or 1930. The norms that developed between the early New Deal and World War II upheld the arrangement. Upsetting those norms was never more possible than during the wartime apogee of presidential power. Roosevelt ally Clifford Durr, from his perch as Chair of the Federal Communications Commission, urged him to treat the wartime period as a second bite at the apple to reshape the American social compact further, as he had sought to do with the NIRA.[134]

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[131] See Rodriguez & Weingast, *supra* note 44, at 45–49, for an analysis and review of the literature, including Cushman, *supra* note 123, Irons, *supra* note 123, White, *supra* note 123, and Daniel R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940 (2014).

[132] Arthur Herman, Opinion, *The FDR Lesson Obama Should Follow*, Wall St. J. (May 10, 2012), https://www.wsj.com/articles/SB10001424052702304451104577390192565641460 [https://perma.cc/HR7G-TEEC].

[133] 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 ten percent in 1940 to sixty-five percent in 1946).

[134] 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

Such a path is not one Roosevelt ultimately countenanced. What happened instead is that Roosevelt deployed an ideologically heterodox coterie of aides such as Harry Hopkins and Jimmy Byrnes. 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.[135] The administration considered legislation to implement forced work orders in war-related industries in tandem with policies supporting union growth as the labor force increased.[136] 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.[137] 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 decision-making took hold.[138]

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 have enough confidence in government institutions 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 confidence. 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.[139]

> with the standard of living which 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).

[135] Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1356–62 (2014).

[136] *Id.* at 1387–91.

[137] *Id.* at 1424–25.

[138] *Id.* at 1420–28.

[139] 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. *Id.* at 133. 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,

Despite the importance of the leaders and members of the public who helped the United States navigate the Depression and World War II, it is a mistake to give too much weight to the New Deal by itself. World War II gave Roosevelt and his coalition the ability to reshape America even more drastically—achieving what the NIRA had failed to do.[140] FDR kept 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.[141] That 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.[142]

The role the United States played in the decades after World War II, during the Cold War, provides the backdrop for a more recent episode of channeling contentious disputes into institutions: civil rights. Even after labor-related violence abated, intense episodes of violence associated with race persisted in the American South.[143] It took the Civil Rights Movement of the 1960s to achieve the next major step, by eventually—through a combination of extensive social mobilization and legal change—helping to move disputes about equality and race into the more structured world of federal courts, state tribunals, and federal and state agencies such as the Equal Employment Opportunity Commission.[144] As with labor conflicts, the schisms over race in the United States spurred enormous upheaval, encompassing targeted organizing in the South and urban centers, mass protests, and violence that featured prominently on the new medium of television. The Cold War context loomed in the background, but so did the experience of channeling labor conflict largely into institutions, almost certainly making it more plausible to marchers in Selma, Alabama, that legal changes could quench at least some of their thirst for justice. Throughout the process, federalism was

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see generally ASHRAF GHANI & CLAIRE LOCKHART, FIXING FAILED STATES (2008) and DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL (2012).

[140] *See* Cuéllar, *supra* note 135, at 1386.

[141] *See id.* at 1420–28.

[142] *See, e.g.*, TOOZE, *supra* note 19, 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").

[143] *See, e.g.*, *20th Bombing Here Against Negroes*, BIRMINGHAM POST-HERALD (Sept. 16, 1963), http://bplonline.cdmhost.com/digital/collection/p4017coll2/id/545. These attacks often targeted African Americans who moved into traditionally "white" neighborhoods, and African-American churches were frequently the target of such violence, particularly in the 1950s and 1960s. *See Mapping Violence Against African American Churches*, STORYMAP, https://s3.amazonaws.com/uploads.knightlab.com/storymapjs/0bf95573598f0b95125a529e591dbabf/black-church-bombings/index.html [https://perma.cc/4F2M-P42D] (last visited July 31, 2017) (documenting attacks on African American houses of worship in chronological order).

[144] *See* SCHICKLER, *supra* note 109.

an important subtext because dual sovereignty creates both constraints—by engendering conflict between governments, for example—and competitive pressures. That legacy takes time to fully describe, but suffice to say that channeling involved a process of state and federal change that gave rise to new institutions and dilemmas. Some of the tensions persist.

Such lingering friction underscores the importance of how legal and societal changes affecting a previous set of societal tensions nonetheless contributed—gradually at first—to norms against arbitrary government action. In this context, "norms" refers to shared expectations about the use of public power and the necessary behavioral regularities, including observations of limits on self-interested strategic behavior, associated with participation in civic activity. Over time, these norms almost certainly made it riskier for individual officials or judges to engage in crass corruption. With important exceptions, they made it costlier for executive branch officials to implement without justification decisions about labor or mobilization. Together with the institutional compromises forged in the early decades of the twentieth century, these realities facilitated the 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. Without the channeling of labor conflicts or the Roosevelt administration's observance of limits on government arbitrariness and control of industry, the United States would likely be a fundamentally different country.

VI. Argentina: A Contrasting Example

Argentina and the United States are similar in geography and resources, and both are "New World" countries. They have been the subject of multiple comparisons.[145] From 1900 to 1930, Argentina experienced substantial and relatively steady economic expansion.[146] Argentina's growth rate was higher than that of the United States, even as its inflation rate remained quite steady and scarcely higher.[147] Indeed, the Argentine economy was strikingly more stable than the United States from 1900 to 1940.[148] It did not last.[149] Coups and widespread political instability—reflecting the absence of widely held norms supporting the constitution, elections, and courts—proved a major factor in the economic decline. For example, the rule of law is a necessary factor for long-term economic growth. Yet coups bring in authoritarian governments which virtually always violate the rule of law. Because the rule of

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[145] *See, e.g.*, Douglass C. North, William Summerhill & Barry R. Weingast, *Order, Disorder, and Economic Change: Latin America vs. North America*, *in* Governing for Prosperity 17 (Bruce Bueno de Mesquita & Hilton Root eds., 2000).

[146] Marie-Ange Véganzonès & Carlos Winograd, Argentina in the 20th Century: An Account of Long-Awaited Growth 206 (1997).

[147] *Id.* at 209.

[148] *Id.*

[149] *Id.*

law is essential for growth, coups that remove the rule of law hinder growth.[150]

Until 1916, the government was dominated by a landed elite and governed largely for their benefit.[151] This elite showed little interest in manufacturing.[152] By 1914, ninety percent of Argentine exports were farm products, and eighty-five percent were shipped to Europe.[153] The government also made significant infrastructure investments at this time.[154]

In 1916, Hipólito Yrigoyen was elected President of Argentina. His earlier activism helped establish universal male suffrage in Argentina in 1912. As president, Yrigoyen presided over progressive social reforms and continued in office for over a decade. But on September 6, 1930, a military coup ended the presidency of Yrigoyen.[155] The coup was the first military overthrow of an elected government since the 1853 constitution had helped to consolidate institutions.[156] The coup sparked the beginning of a thirteen-year period known as "the infamous decade." What was infamous about it, in retrospect, was the erosion of citizen confidence in government and institutional norms.[157] Military governments whittled away at the space for self-government, and when elections occurred, they often involved fraud.[158] And the coup triggered a period of repression towards labor.[159]

As the post-1930 crisis played out and conflict with labor continued, the country's previously rapid economic growth stalled at a delicate moment.[160] Because of the Depression, exports had fallen by thirty-four percent in 1930, and overall production fell by fourteen percent during the 1929–1932 period.[161] Along with the creation of the Central Bank, the government sought to enact a banking law to establish a regulatory framework for banks, which had previously come under the civil and commercial code.[162] Trade union membership only accounted for "around 10 per cent of total salaried workers in 1940, and only around 30 per cent of industrial [labor]."[163]

Labor tensions continued in June 1943, when another military coup overthrew the government of President Ramón Castillo. It was not the last

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[150] Barry R. Weingast, *Why Developing Countries Prove So Resistant to the Rule of Law*, *in* Global Perspectives on the Rule of Law 28 (James J. Heckman, Robert L. Nelson & Lee Cabatingan eds., 2010).

[151] Jill Hedges, Argentina: A Modern History 24 (2011).

[152] *Id.* at 26.

[153] *Id.*

[154] *Id.*

[155] *Id.* at 46.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.* at 57.

[160] Véganzonès & Winograd, *supra* note 146, at 209.

[161] Hedges, *supra* note 151, at 47–48.

[162] Véganzonès & Winograd, *supra* note 146, at 211.

[163] Hedges, *supra* note 151, at 58.

one. The justification many of its participants gave was simple: they were avoiding what was taken to be a fraudulent election favoring Castillo's chosen successor, a large landowner from Salta named Robustiano Patrón Costas.[164] Unlike the 1930 coup, this one was engineered not by senior generals but by a group of junior officers who had formed a secret society known as the GOU.[165] But there was little "goo" to hold together the GOU, as they agreed on the need to prevent Patrón Costas from becoming president but little else.[166] Following a short power struggle, General Pedro Ramírez emerged as president of the Republic, and General Edelmiro Farrell as his vice president and war minister.[167] Colonel Juan Perón was Farrell's secretary at the war ministry.[168]

Perón did not stay there long. In late 1943, Perón was put in charge of the National Labour Department.[169] Trade union membership began to rise during the Perón era as he reversed earlier policies. In 1945, there were 529,000 union members across 969 trade unions. By 1947 there were 1.5 million union members, and 3 million by 1951.[170] As early as 1945, the ambitious Perón had already become vice-president, war minister, and secretary of labor.[171] Perón's policies consistently sought to win the support of the army and to marry those interests to those of labor and the working classes.[172] These became the two pillars of Perón's support, although the army's role in the coalition declined as that of labor grew.[173]

Given Perón's high profile and what he represented politically, it is not altogether surprising that he found himself at the center of dissatisfaction both within and outside the military by late 1945.[174] Protesters took to the streets on September 19, 1945 to protest the army as a whole, with Perón as the march's particular target.[175] He resigned from his post in early October and was placed on house arrest,[176] and union leaders soon led workers in strikes and marches in protest over Perón's detention.[177] On October 17, it is estimated at least 300,000 workers from the industrial suburbs of Buenos Aires and other protesters poured into the city center.[178] At 10:30 p.m., Perón

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[164] *Id.* at 81.

[165] *Id.* The initials of GOU are variously said to stand for *Grupo de Oficiales Unidos*, *Gobierno! Orden! Unidad!*, or *Grupo Obra de Unificación*. *Id.*

[166] *Id.* at 82.

[167] *Id.*

[168] *Id.*

[169] *Id.* at 90; Daniel James, *October 17th and 18th, 1945: Mass Protest, Peronism and the Argentine Working Class*, 21 J. Soc. Hist. 441, 441 (1988).

[170] Hedges, *supra* note 151, at 58.

[171] *Id.* at 96; Marysa Navarro, *Evita and Peronism*, *in* Juan Peron and the Reshaping of Argentina 16–18 (Frederick C. Turner & José Enrique Miguens eds., 1983).

[172] Hedges, *supra* note 151, at 83.

[173] *Id.*

[174] *Id.* at 98.

[175] *Id.*

[176] *Id.* at 100; James, *supra* note 169, at 441.

[177] Hedges, *supra* note 151, at 100–01; James, *supra* note 169, at 441, 443.

[178] Hedges, *supra* note 151, at 102; James, *supra* note 169, at 441.

finally appeared on the balcony of the Government House and gave a speech to the crowd below.[179]

As global war was ebbing in Japan and Europe, Argentine politics reached a turning point. According to Jill Hedges, the backlash empowering Perón was "the first great political success of a previously marginalized class," marking the rise of labor's importance.[180] In presidential elections conducted on February 24, 1946, Perón was nominated for the presidency by multiple political parties and won with fifty-two percent of the vote.[181] Summarily promoting himself to the rank of general, Perón was sworn in as president in June of 1946.[182]

The experience of the judiciary in Argentina after the 1930 coup offers just one illustration of how, in the absence of elite commitments and public norms supporting institutions, enormous limitations exist in formal legal arrangements promising judicial independence and procedural regularity in government. After General José Felix Uriburu's coup on September 6, 1930, the Argentine Supreme Court quickly ratified events just ten days later through "a far-reaching decision that would establish a precedent on the problem of recognition of de facto governments."[183] The court's explanation of its decision is striking in its blunt focus on the provisional executive branch's capacity to impose public order—and by implication, its de facto ability to coerce:[184]

> [C]onstitutional and international doctrine is uniform in the sense of considering [the provisional executive branch's] acts valid, whatever the deficiency or defect in their appointment or election, on the basis of public order and need and for the purpose of protecting the public and the individuals whose interests may be affected, since the latter could not carry out inquiries nor change the legality of the appointment of officials who are in apparent possession of their offices and functions. That the provisional government that has just been formed in the nation is, therefore, a de facto government, whose title cannot be successfully challenged judicially by individuals since it exercises administrative and polit-

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[179] Hedges, *supra* note 151, at 103; James, *supra* note 169, at 441.

[180] Hedges, *supra* note 151, at 105–06; *see also* Manuel Mora y Araujo & Peter H. Smith, *Peronism and Economic Development: The 1973 Elections*, in Juan Peron and the Reshaping of Argentina 172 (Frederick Turner & José Enrique Miguens eds., 1983).

[181] Hedges, *supra* note 151, at 111, 114.

[182] *Id.* at 116; *see also* Véganzonès and Winograd, *supra* note 146.

[183] Alberto Ciria, Parties and Power in Modern Argentina (1930-1946), at 9–10 (Carlos A. Astiz & Mary F. McCarthy, trans., State Univ. of New York Press 1974) (1964).

[184] *Id.* at 10–11. The original text appears in Decree of Sept. 10, 1930, 158 Fallos 291 (Arg.).

> ical functions derived from its possession of power as the key to social order and safety.[185]

The court's swift ratification of Uriburu's de facto government was far from obviously in harmony with prevailing constitutional doctrine.[186] The outcome may have reflected official pressure the justices received, or perhaps a broader concern for the fortunes of the entire judicial branch.[187] At a minimum, the court almost certainly understood that to rule against the legitimacy of the de facto government would have placed the judiciary in a precarious position—either because of a severe backlash from the executive branch's new masters or because of the judiciary's obvious lack of power or public support to make its decision matter. Yet even as it allowed Uriburu and his allies to sidestep the need for neutral, procedural justification in its seizure of power, the court sought jurisprudential justification for its ruling. It found some of this justification in Canadian judge Albert Constantineau's 1910 book, entitled *Public Officers and the De Facto Doctrine in its Relation to Public Officers and Public Corporations*.[188] Constantineau defended the notion of a "de facto officer" doctrine conferring validity on acts performed by a person acting under color of official title, even if it is later discovered that the legality of that person's appointment or election to office is deficient.[189] Although Constantineau claimed to have relied primarily on English common law, some of his examples were drawn from American cases.[190] That Argentina was dealing with an outright coup did not restrain the Court from deploying this logic.

The court's ratification of Uriburu's coup by relying on this "de facto doctrine" became a pattern, if not a compelling precedent. It would cause later courts to also easily confer some degree of legality to various undemocratic governments. For instance, three days after the June 4, 1943 coup, the Supreme Court issued a decision with language that closely echoed its opinion thirteen years prior:

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[185] CIRIA, *supra* note 183, at 11. To convey that despite this decision the institution nonetheless retained some relevance in the future, the Court hedged by adding the following paragraph:

> That this notwithstanding, if, once the situation is normalized in the course of the activities of the de facto government, the officials constituting it should ignore personal or property guaranties or others safeguarded by the Constitution, the court charged with enforcing compliance with such guaranties would restore them in the same manner and with the same effect as it would have done under a de jure executive branch.

Id.

[186] RAFAEL BIELSA, DERECHO CONSTITUCIONAL 857–59 (3d ed. 1959).

[187] CIRIA, *supra* note 183, at 304 n.20 (citing GABRIEL DEL MAZO, 2 EL RADICALISMO 156–59).

[188] ALBERT CONSTANTINEAU, PUBLIC OFFICERS AND THE DE FACTO DOCTRINE IN ITS RELATION TO PUBLIC OFFICERS AND PUBLIC CORPORATIONS 246 (1910).

[189] *Id.*

[190] *Id.*

> [I]n order to consider the note by which the president of the provisional executive branch of the nation, Gen. Pedro Pablo Ramírez, informed this Supreme Court of the constitution of a provisional government for the nation arising from the successful revolution of 4 June of this year, and whereas a situation has arisen analogous to that envisaged by this Supreme Court in its decision of 10 September 1930. . . .[191]

The court's conservative approach in 1930 and 1943—accepting and validating the de facto government—has been interpreted as being conducted "with the hope of thus assuring [the court's] own survival as a body and the often proclaimed 'independence' of the Judicial Branch."[192]

The Argentine Supreme Court did not fare as well in the end—as court packing worked better for Perón than FDR. Often at odds with the Perón government,[193] the Court eventually saw its fortunes wane. Three of its members were impugned on the contradictory grounds that they had allegedly acted illegally by recognizing the de facto governments after the 1930 and 1943 coups, yet they had unlawfully impeded the actions of the second de facto government by taking decisions which blocked its measures.[194] In April 1947, Congress removed all three justices from their posts, allowing the government to pack a court of its own design.[195] In 1955, the members of the judicial branch and the Supreme Court as a whole were removed from their posts and replaced as one of the first measures Lonardi took to "de-Peronize" the judiciary. The new Supreme Court quickly issued a decision legalizing the palace coup that had raised Pedro Eugenio Aramburu to the post of successor on November 13, 1955.[196] After the 1966 "Argentine Revolution," all of the justices were removed once again.[197]

Any comparison between these events in Argentina and the experiences of the United States during a similar period must frankly acknowledge fundamental distinctions. The colonial experience in Argentina was different from the American one and created divergent economic and social institutions. In Argentina, the pattern largely followed the traditional Spanish colonial project, involving large concentrations of land and exploitation of local populations. Essentially, the sixteenth-century recipient of a royal grant of land (or "*encomendero*") turned into the nineteenth-century owner or manager of a cattle ranch (or "*estanciero*").[198] A far smaller middle class of landholders and artisans developed later in the nineteenth century. Instead, the Argentine economy relied more heavily on importing manufactured

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[191] Ciria, *supra* note 183, at 81–82.
[192] *Id.* at 287.
[193] Hedges, *supra* note 151, at 120.
[194] *Id.*
[195] *Id.*
[196] *Id.* at 287–88.
[197] *Id.* at 289.
[198] Rock, *supra* note 77, at xxv.

goods, and a long-term conflict emerged between the urban core in Buenos Aires, through which shipping was channeled, and the rest of the fertile country. Nothing quite like this story unfolded in the United States, with its multiple ports and a more dispersed land-ownership structure in many of its regions.

That said, the institutional developments reflected in Argentina's history during the first half of the twentieth century prove important—including as a partial comparison to the United States. Despite the earlier historical distinctions, the two countries had much in common: abundant resources, vast land, links to Europe, recent experience with sustained immigration, and a legacy that included democracy. Argentina's situation—though perhaps constrained by its history—was far from predetermined by history or geography. As the anti-labor backlash began to play out in the early 1930s, and immigration ebbed during that decade, divergent paths remained—as they did elsewhere. And even if Argentina was partially constrained, it is revealing to see how those constraints translated into the language of specific institutions, laws, and policies affecting the country's tumultuous twentieth century. Consider the role of the military. A focus on the military's penchant for coups in Argentina must be seen in context to make more sense—including breakdowns in trust in a society whose politics long seemed defined by conflict between Buenos Aires and rural regions from which the military drew support. Meanwhile, historical legacies made Americans fragment control of military reserves and distrust domestic military activity.

Second, debates about the fundamental definition of corruption should not obscure the difficulty of creating—or the importance of maintaining—norms against ordinary, crass forms of corruption that erode institutional trustworthiness through bribes and abuse of public power. It was telling that the prosecution of key figures in the military regime in Argentina decades later focused not on human rights abuses, but crass corruption. Such prosecutions underscore the relative ease of engaging in crass corruption on a major scale well into the 1970s in Argentina, along with the country's more recent efforts to strengthen norms to the contrary.

Third, forging and maintaining the institutional trust necessary to channel disputes away from the streets and into formal institutions is both difficult and enormously consequential.[199] No one story is likely to be precisely the same as any other, but some patterns emerge from this and other work: the role of elite bargains and state capacity, in particular, brings to the fore the question of constraints on the control of state capacity. We can learn much about countries from Argentina to the United States by asking how much channeling was achieved, whether it sufficiently benefited different societal interests to become more robustly entrenched, and whether societies

[199] *See* COOK, HARDIN & LEVI, *supra* note 82; *see generally* Margaret Levi, *Trustworthy Government and Legitimating Beliefs*, *in* POLITICAL LEGITIMACY (J. Knight & M. Schwartzberg eds., 2019).

forged the necessary governmental capacity and norms to unlock its promise.

VII. Conclusion

The study of law and development not only helps us understand the transformation of American government and public law but also remains deeply relevant to understanding nearly every aspect of modern life. Without a profound understanding of the origins of public institutions, for instance, we cannot hope to understand how institutions allow some societies to resolve civic disputes, how certain legal arrangements foster sufficient trust for those institutions to function, and how norms help people with diverging interests understand their shared stake in those arrangements.[200]

In this paper, we use a law and development perspective to enhance our understanding of how risks of violence and instability, changes in institutional arrangements, and an evolving role for public law shaped the United States as it became a geopolitical power capable of channeling internal conflict into judicial and administrative institutions. At the close of the nineteenth century, the United States was by many measures, a developing country with limited state-capacity. Even as late as 1932, the national government still had but few means for solving major problems it confronted, including industrial recovery or the century-long problem of sustained labor violence. We observe this capacity being invented between the early-twentieth century and the close of World War II.

Once the necessary preconditions were present in the United States, the process of channeling disputes played out in no small measure through elite bargains involving labor and business leaders, lawyers, and public officials ranging from legislators to governors and executive branch officials. These bargains took time to bear fruit, but eventually left their mark on the fabric of public law in the United States, especially the NLRA, the separation of powers doctrine, and eventually, administrative law and procedure.

An exceptional nation, the United States of the mid-twentieth century nonetheless merits scrutiny as a still-developing country that had to overcome intense divisions, weak government capacity, and problems associated with massive concentrations of economic and political power in the late-nineteenth century. Even after important changes were already underway by the early-twentieth century, such as the retreat of crass corruption in many quarters and the state-building experience of World War I, Americans initially faced labor instability and the dislocations of the Great Depression with a government of limited capacity and major internal divisions over pub-

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[200] Nobel Prize-winning economic historian Douglass C. North called this capacity "adaptive efficiency." Douglass C. North, Understanding the Process of Economic Change 15 (2005). For an analysis of adaptive efficiency, see Mittal & Weingast, *supra* note 14. *See also* Margaret Levi, Consent, Dissent, and Patriotism (1997).

lic power. Part of the political and constitutional struggles over the New Deal were not only over policy, but over how to structure administration in a manner that simultaneously pursued the policy goals of the national government while providing the procedures and institutional checks that would help maintain a semblance of the rule of law. The NIRA had been an utter failure at both goals, and the Supreme Court not only said so in *Schechter*, but in parts of the opinion generally ignored by constitutional law scholars, Chief Justice Charles Evans Hughes explained how the government could succeed with a different approach.[201] Part of the legislative and executive answer came in the form of the NLRA, a monumental but under-appreciated statute that was in many respects the harbinger of a new American national state. This statute accomplished two important goals. First, it solved the problem of a century of labor violence, an accomplishment taken for granted in most of the literature. Second, it served as Congress's codification of administrative law eleven years before the APA. Along with the procedural mechanisms implemented to facilitate agency public consultation and compromise in implementation during World War II, some of the NLRA's structure and process served as a model for parts of the APA.[202]

As the story of Argentina underscores during a similar timeframe, these conditions are far from unique. Our account emphasizes not only the strength and continuity of arrangements forged in the late-eighteenth century, but also the compromises and prudent strategizing that reshaped law and politics over time, particularly around contentious labor disputes, as a precondition of sorts to the rise of the United States as a geopolitical power. In the American experience, a crucial and often underappreciated part of the law and development story plays out in the six decades or so connecting the tumultuous late-nineteenth century and a more settled mid-twentieth century reality of relatively established organizational practices constraining arbitrary government action, facilitating greater government capacity and global power, and depending on norms of support for established institutions.

That transition playing out during the first half of the twentieth century was so critical not only because certain aspects of it reflect the distinctive continent-sized scale of the United States, but because in one respect the American experience is far from unique relative to other complex societies—exposure to violent conflict and serious risk of instability at certain historical junctures. Almost inevitably, conflict and instability interfere with the institutional trust and confidence necessary for civic progress, economic growth, and geopolitical influence. To reduce such risks and channel conflict into institutions, we emphasize the importance of several key factors: control of public corruption; increases in capacity of the state's bureaucratic institutions, including mechanisms for social insurance to mitigate the public's ex-

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[201] Rodriguez & Weingast, *supra* note 44, explore this claim and provide evidence supporting it.

[202] *See* Levi et al., *supra* note 26; Rodriguez & Weingast, *supra* note 44.

posure to economic risk; and credible means for resolving disputes about control of and limits on public power.

Obviously, certain periods of conflict in the United States, such as the Civil War, also loom large in the country's legal and political history. But, the period between 1890 and 1950 strikes us as pivotal for several reasons. First, technological changes—especially railroads—growing economic integration, and geopolitics created distinctive new dilemmas facing the United States. These dilemmas, in turn, resulted in pressures for national-level governance. Second, in this period, labor conflict transformed from severe to tamed, and that needs to be explained. Third, key aspects of public law and the American political economy—including the rise of modern administrative procedure and White House oversight, limits on delegation and "corporatization" of the American economy, and mass federal taxation—were all commonplace by the end of this period, while non-existent at the beginning. Fourth, many democracies failed during this period.

Today that historical tumult likely feels remote to most Americans. Many of its citizens and residents experience the United States not only as a set of static legal arrangements, but as value commitments made real by institutions. Through them, Americans seek to 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 the American constitutional system, but more specifically to how that system became part of a shared culture and norms relevant both to the mass public and elites. We expect each generation of new Americans, whether born or naturalized, to be fiduciaries for those norms.

The consolidation of those norms and the practices underlying them was made possible by a series of changes that took some of the edge off labor tensions fostered by an emergent industrial economy spanning an entire continent. By channeling labor conflict and converging on a relatively stable framework of norms and legal arrangements for resolving public law controversies, the United States not only established a pattern for assuaging domestic conflict, but also paved for itself an easier path towards global influence. Turning strikes and riots into NLRB proceedings and separation of powers disputes also provided the template for Americans to address, in meaningful but inevitably flawed fashion, tensions over issues involving race and civil rights. Ironically, many of these compromises also contained within them the seeds of political changes that engendered subsequent conflict. Institutionalizing the means of resolving labor conflict almost certainly tamed organized labor and curbed its power—instrumental to channeling in the first place—as income inequality eventually began to grow. In the second half of the twentieth century, policymakers used similar administrative and adjudicatory mechanisms with a public law backstop to manage transformations in civil rights and migration against a Cold War backdrop. Yet in many regions of the country, the resulting societal conflicts involving the

inclusion of previously disenfranchised racial groups through civil rights law and the incorporation of millions of immigrants into American civic life were deferred but not entirely assuaged.[203] The resulting strains still bedevil us, and indeed, tell much of the story of the contentious American present.

[203] *See generally* SCHICKLER, *supra* note 109.