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REVISITING THE FABLE OF REFORM

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In United States v. Auto Workers, a landmark 1957 decision by the Supreme Court, a fable of campaign finance reform was born. Writing for the Court, Justice Frankfurter described a history of reasonable and measured regulation of campaign finance by Congress. Subsequent decisions have relied heavily on this version of history to justify deference to the Legislative Branch on this issue. This Article corrects the flawed history depicted in *Auto Workers* by illustrating how reform was actually dictated by political opportunism. Politicians used reform to exploit public sentiment and reduce rivals' access to financial resources. The Article argues that judges should closely examine campaign finance regulation and look for the improper use of legislation for political gain instead of simply deferring to Congress. Undue deference to the *Auto Workers* fable of reform could lead to punishment for the exercise of political rights. Correcting the history is thus essential to restoring proper checks on campaign finance legislation.

I. INTRODUCTION

There is history, and there is fable. History informs us about what happened, allowing us to draw whatever lessons we may wish to learn from it. Fables deliver a lesson, often animated by a story. The contradictions and nuances that make history interesting are death to an effective fable. But a fable can benefit from the gloss of authenticity that comes from some use of history. That use will necessarily be selective but is dishonest when the fable is itself cast as history.

In the Supreme Court's 1957 majority opinion in *United States v. International Union United Automobile, Aircraft, and Agricultural Implement Workers of America*,[1] known more commonly as *Auto Workers*, Justice Frankfurter's opinion for the Court added the history necessary to make the reform fable work. Reciting the "history" of reform was technically unnecessary to answer the question before the Court—whether Congress could bar labor unions from making federal election expenditures, or whether that spending was constitutionally protected. The history in *Auto Workers* went further, contending that Congress had applied measured and incremental reform step-by-step as the need for regulation arose.

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[1] United States v. UAW-CIO, 352 U.S. 567 (1957) [hereinafter *Auto Workers*].

Subsequent campaign finance decisions lean heavily on this account of the reasonable and measured history of campaign finance regulation.[2] Judges rely on the decision's expression of "history" to justify deference to regulatory judgments. If one believes the history, this should be the courts' reaction. One would not want unelected judges to interfere in such a delicate process.

This Article corrects and supplements the history in *Auto Workers*. It examines in detail the specific events Frankfurter cited in his opinion.[3] It shows how the opinion avoided political context and truncated political and legislative history. What emerges from a more complete account is a messy, complicated record, dictated by political opportunism.[4] At each step, reform was a way to capitalize on public sentiment and restrict political rivals' access to financial resources, using little debated legislative vehicles and parliamentary skill. After an examination of the Court's dependence on *Auto Workers* in section II, section III of this Article takes the opinion's history piece by piece, and provides the necessary detail so readers can appreciate each episode. In section IV, the Article attempts to explain why Frankfurter wrote *Auto Workers* this way.

Finally, section V explains why the reader should care. If Congress's credibility as a source of reform is derived from a mistaken view of its record, then judges may be too willing to accept Congress's rationalizations for legislative choices. Judges should look closely at the purpose and effect of rules that burden political activity, to make sure that—despite post hoc avowals to the contrary—congressional incumbents or partisan leadership are not using legislation for improper political advantage or insulation.

If, out of misplaced respect for a fable, courts allow the enforcement of laws that burden political activity, citizens and activists outside the bubble of congressional protection risk disproportionate punishment for exercising political rights. Some players are escorted from the field. The political process becomes less responsive, representatives need be less "representative," and elections do a poorer job of reflecting public preferences for leadership and policy. Correcting the flawed historical premise and setting courts to the task of closely evaluating all these laws would go some distance to restoring proper checks upon campaign legislation.

Courts, legislators, and lawmakers need to understand history. Especially in campaign regulation, where high purpose can conceal self-interest, it does no good to adopt a fable as history, or to adapt history to a fable. The

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[2] *See* discussion *infra* section II.

[3] *See Auto Workers*, 352 U.S. at 570–585 (relating history of campaign finance reform).

[4] Other authorities have made this point, with less detail than this Article, but courts remain resistant to incorporating this idea. *See* ALEXANDER HEARD, THE COSTS OF DEMOCRACY 9–10, 169–70 (1960); BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 21–31 (2001); MELVIN I. UROFSKY, MONEY & FREE SPEECH: CAMPAIGN FINANCE AND THE COURTS 19–23 (2005); JOHN SAMPLES, THE FALLACY OF CAMPAIGN FINANCE REFORM 10–13 (2006). This theme runs throughout ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW (1988).

animating impulse for the reform fable is no doubt sincere. But the reform argument must reflect an honest assessment of what really happened, why it happened, and what effects were felt afterward. Only then can reform advocates make the convincing case that certain regulations are in fact the correct prescription for some political ailment.

II. The *Auto Workers* History Has Broad Influence On Courts and Congress

The history of campaign finance reform articulated in *Auto Workers* has received uncritical adoption in subsequent opinions. It has provided a handy articulation of the assumption that lawmaking in this field has proceeded logically and reasonably toward the goal of reducing corruption in political campaigns. Courts, academics, and counsel cite *Auto Workers* frequently. A recent KeyCite of the opinion produced 150 citations in cases, 229 in secondary sources, and 231 in appellate court documents available on Westlaw.[5] Eighteen Supreme Court opinions cite the decision and eight discuss the decision at some length.

The 2003 Stevens/O'Connor co-authored opinion in *McConnell v. FEC*,[6] notorious for its length,[7] is but one example. In *McConnell*, the Court upheld against constitutional challenges the Bipartisan Campaign Reform Act of 2002 ("BCRA").[8] BCRA contained laws barring national party committees from raising or spending nonfederal "soft money," limited the contact state parties and candidates could have with this kind of funding, and restricted the sources of funds for certain "electioneering communications."[9] BCRA was a long and complicated piece of legislation, and necessarily the Court's consideration would require some length and detail to address the legal issues alone. Adding to its length, that opinion included at the outset a recitation of the history of reform as presented in *Auto Workers*.[10] It commenced with an invocation of the "sober-minded Elihu Root," drawn directly from Frankfurter's opinion.[11]

The Court included this extensive reference to *Auto Workers* to justify judicial deference to BCRA. Said the *McConnell* decision, "Congress's careful legislative adjustment of the federal election laws, in a cautious advance step by step . . . warrants deference."[12] The *McConnell* Court

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[5] Westlaw Keycite run Aug. 13, 2007.

[6] 540 U.S. 93 (2003).

[7] *See* Vic Snyder, McConnell v. FEC: *Another Unfortunate Demonstration of Judicial Disregard for the Value of Brevity: A Concise Analysis*, 42 Willamette L. Rev. 77 (2006).

[8] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

[9] *McConnell*, 540 U.S. at 132 (describing scope of BCRA).

[10] *Id.* at 115–117.

[11] *Id.* at 115.

[12] *Id.* at 117 (citing FEC v. National Right to Work Comm., 459 U.S. 197, 209 (1982)) (internal quotations omitted). As noted below, *National Right to Work* also depends heavily on *Auto Workers* for its recitation of reform history.

thus relies explicitly on an account that I will show is more fable than history.

The *McConnell* opinion is not alone. Justice Souter, who joined the Stevens/O'Connor opinion in *McConnell*, pulled *Auto Workers* references into his majority opinions in *FEC v. Beaumont*,[13] *FEC v. Colorado Republican Federal Campaign Committee*,[14] and *Nixon v. Shrink Missouri Government PAC*.[15] In *Beaumont*, Souter included a passage on campaign finance history drawn from *Auto Workers*, arguing that it showed "continual congressional attention to corporate political activity," which "was meant to strengthen the original, core prohibition on direct corporate contributions."[16] "[N]ot only has the original ban on direct corporate contributions endured, but so have the original rationales for the law."[17] Thus, Souter reasoned, a statutory prohibition on contributions by ideological non-profit organizations (in *Beaumont*, a state-level "right to life" committee) fit comfortably within this legislative history, and such a "historic prologue would discourage any broadside attack on corporate campaign finance regulation."[18]

Before *Beaumont*, the Court had held that another right to life group possessed the right to make independent expenditures in federal elections, despite Congress's "attention to corporate political activity." In *FEC v. Massachusetts Citizens for Life*, Justice Brennan, writing for the Court, invoked the *Auto Workers* recitation of history, making the modest point that Congress meant to prohibit contributions and expenditures by corporations.[19] Yet when the Court applied this restriction to the Massachusetts group, it found unconstitutional the bar on making an independent expenditure in a federal election. *Auto Workers*, for Brennan, did not justify a ban on this group's political spending. Instead, that precedent showed that a spending ban is only appropriate when the incorporated entity poses a danger of corruption through the deployment of wealth. Noted Brennan in his opinion: "Groups such as MCFL, however, do not pose that danger of corruption."[20]

Yet, in Justice Souter's hands, the *Auto Workers* history led to the opposite conclusion in *Beaumont*. Most recently, Souter again relied on *Auto Workers* and the "history of progress" in campaign reform in his dissenting opinion to the court's recent *Wisconsin Right to Life* decision.[21] Joined by Justices Stevens, Ginsburg, and Breyer, Souter contended that recent campaign finance developments had eroded the logic of *Massachusetts Citizens for Life*, and, as before, Congress properly responded. The Court, in the dis-

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[13] 539 U.S. 146, 152 (2003).
[14] 533 U.S. 431, 452 (2001).
[15] 528 U.S. 377, 389 (2000).
[16] *Beaumont*, 529 U.S. at 153.
[17] *Id.* at 154.
[18] *Id.* at 156.
[19] 479 U.S. 238, 246 (1986).
[20] *Id.* at 259.
[21] FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652, 2689–91 (Souter, J., dissenting) (retelling *Auto Workers* history).

senters' view, should have upheld the application of a statutory rule that would bar this group from spending its funds on a lobbying advertisement that criticized an officeholder who was also running for re-election.[22]

Assuming the *Wisconsin Right to Life* litigants would have appeared to Justice Brennan to be sufficiently "like" their Massachusetts kin to deserve protection, Souter needed some basis in *Wisconsin Right to Life* to argue that times had changed, and that these changes justified a different holding. The reasoning of *Auto Workers*, coupled with recent developments, fit the bill. Thus, Souter wrote "[f]rom early in the 20th century through the decision in *McConnell*, we have acknowledged that the value of democratic integrity justifies a realistic response when corporations and labor organizations commit the concentrated moneys in their treasuries to electioneering."[23] In short, if Congress knows more now, it can regulate more now.

Auto Workers is also a key precedent in Justice Rehnquist's opinion for the Court in *FEC v. National Right to Work*.[24] Here, the Court considered to what degree the corporate contribution and expenditure ban restricted an ideological group from soliciting contributions from potential donors. Rehnquist used *Auto Workers* to demonstrate Congress's continued regulation of corporations in campaign finance. He noted that the history in *Auto Workers* "is set forth in great detail" and concluded that he "need only summarize the development here."[25]

It is worth observing that the opinions discussed above often cite both *Auto Workers* and *National Right to Work* as sources of the history of campaign finance regulation.[26] Readers should realize that citations to *Right to Work* for this history are essentially cumulative references to *Auto Workers*.

Looking backward, and comparing *McConnell* and *Beaumont* with *Massachusetts Citizens for Life*, it may be that the meaning of *Auto Workers* has evolved. Justice Brennan used it in a decision that saved a political nonprofit from regulation; Justice Souter used it to justify deference to greater regulation. Today, it is a key case for those Justices inclined to favor campaign finance restrictions. In the most recent cases, the history is invoked to demonstrate a careful and thoughtful progression of regulation for reducing corruption, appropriate to the era and reflecting legislative experience.

Auto Workers contains not history but a fable. It is a singularly influential fable that forms the foundation of key campaign finance decisions and the rationale for deference to Congress. A reexamination of *Auto Workers* is important to understand what the true history has been: it provides insight into how and why Congress has enacted certain laws and not others, and it

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[22] *Id.* at 2697–98.
[23] *Id.* at 2697.
[24] 459 U.S. 197, 208–09 (1982).
[25] *Id.* at 208.
[26] *See* McConnell v. FEC, 540 U.S. 93, 115–17 (2003); FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 257 (1986); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000); FEC v. Beaumont, 529 U.S. 146, 153–54 (2003).

allows us to reevaluate what discretion Congress deserves in this highly-charged and conflicted area.

III. The *Auto Workers* History Significantly Misleads Courts and Congress

The following section takes significant fragments from the history in *Auto Workers* point by point, and shows the assumptions and omissions that render that account unreliable. Citations and some narrative are removed for brevity's sake, but as edited, the reader should get a fair picture of *Auto Workers*.

A. Prologue

Frankfurter's *Auto Workers* opinion takes twenty-five pages in the U.S. Reports, of which nineteen are devoted to history. Frankfurter began his history of campaign finance reform with a justification of the long recitation to follow:

> Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us. Speaking broadly, what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society.[27]

With this bold introduction, Frankfurter demonstrated that understanding the history of reform was necessary to determine the proper scope of particular reforms. That history, we might anticipate at this point, will reveal a series of legislative responses to various threats to the "integrity of our electoral process" and the "responsibility of the individual citizen" in that process. Thoughtful management of this problem, Frankfurter might say, should be left to the people's representatives.[28]

Yet what Frankfurter meant by "integrity" and the citizen's "responsibility" remained undefined. At this point in the opinion, it is not clear whether the interests of citizens and the process are at odds with, or congruent with, the appellee labor union's political activity. Possibly the legislation's context could indicate reason for suspicion that the statute undercut the "integrity of the electoral process."

Frankfurter takes the first perspective. His opinion wastes no time establishing that, at least as far as corporations are concerned, their political

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[27] *Auto Workers*, 352 U.S. 567, 570 (1957).

[28] For an example of Frankfurter's deference to legislative judgments, *see* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947).

activities are antagonistic to the interests of citizens and the integrity of the process:

> The concentration of wealth consequent upon the industrial expansion in the post-Civil War era had profound implications for American life. The impact of the abuses resulting from this concentration gradually made itself felt by a rising tide of reform protest in the last decade of the nineteenth century. The Sherman Law was a response to the felt threat to economic freedom created by enormous industrial combines. The income tax law of 1894, reflected congressional concern over the growing disparity of income between the many and the few.
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> No less lively, although slower to evoke federal action, was popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption. The matter is not exaggerated by two leading historians:
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> "The nation was fabulously rich but its wealth was gravitating rapidly into the hands of a small portion of the population, and the power of wealth threatened to undermine the political integrity of the Republic."[29]

In these passages, Frankfurter placed the legacy of campaign reform along a continuum that included antitrust reform in 1890 and the income tax in 1894. He asserted that these laws together reflect a developing realization, articulated in federal legislation, that wealthy corporations act to the detriment of equality and economic and political freedom. But, already, this neat story weakens a bit under greater scrutiny.

Perhaps to make the chronology flow better, Frankfurter invokes the 1894 income tax, a two percent levy which was overturned as unconstitutional only a year later.[30] The Sixteenth Amendment, which allowed Congress to enact the U.S. income tax, dated to 1913.[31] Frankfurter might have made the point that judicial interference with the 1894 Act was unwise, as shown by the eventual amendment of the Constitution. That point would have obvious implications for the case before the Court, since it would counsel the Court to use caution when declaring a federal statute unconstitutional. Yet he did not make it.[32] Instead he used these dates to begin his summary at an earlier point, and then turned the opinion toward the roots of the corpo-

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[29] *Auto Workers*, 352 U.S. at 570 (quoting 2 SAMUEL E. MORISON & HENRY S. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 355 (4th ed. 1950)).

[30] *See* Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 607–08 (1895) (holding 1894 income tax unconstitutional).

[31] U.S. CONST. amend. XVI.

[32] The quote from Morison and Commager comes at the outset of a long chapter on the Progressive movement. It discusses at length various reforms from that era, but nowhere mentions the corporate contribution ban among them. *See* 2 MORISON & COMMAGER, *supra* note 29, at 380 (listing progressive political reforms of women's suffrage, Australian ballot, direct

rate contribution ban. In the account that followed, Frankfurter seriously misstated the history and motives of the first modern "reformers."

B. Early Reform in New York

Once Frankfurter's opinion had set the stage in Gilded Age America, he moved the discussion into the reformers' first responses. Frankfurter explained the imposition of corporate contribution prohibitions as a logical step in the wake of the "failure" of publicity laws:

> In the '90's many States passed laws requiring candidates for office and their political committees to make public the sources and amounts of contributions to their campaign funds and the recipients and amounts of their campaign expenditures. The theory behind these laws was that the spotlight of publicity would discourage corporations from making political contributions and would thereby end their control over party policies. But these state publicity laws either became dead letters or were found to be futile. As early as 1894, the sober-minded Elihu Root saw the need for more effective legislation. He urged the Constitutional Convention of the State of New York to prohibit political contributions by corporations:
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> 'The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public. It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government. And I believe that the time has come when something ought to be done to put a check to the giving of $50,000 or $100,000 by a great corporation toward political purposes upon the understanding that a debt is created from a political party to it.' Quoted in Hearings before House Committee on Elections, 59th Cong., 1st Sess. 12; see Root, Addresses on Government and Citizenship (Bacon and Scott ed. 1916), 143.[33]

primaries, direct election of Senators, referenda, home rule, civil service reform, "short ballot," regulation of campaign expenditures, executive leadership, and tax reform).

[33] *Auto Workers*, 352 U.S. at 570–71 (omission in original).

This passage stands as one of the most frequently cited, and thus most influential, in the *Auto Workers* decision.[34] Yet Frankfurter's account is misleading in several respects.

1. Publicity v. Prohibition

New York, as it happens, was the first state to enact disclosure laws, in 1890.[35] Its law required only candidates (not political committees) to report their spending. Laws enacted in Colorado and Michigan in 1891 followed suit. In 1892 Michigan enacted a stronger law to require reporting by candidates and committees and centralization of candidates' expenditures solely within their committees,[36] and to provide for better enforcement.[37] Massachusetts, California, Kansas, and Missouri soon adopted their own disclosure laws.[38] From 1890 to 1895, many states passed publicity laws, each with its own specific provisions.[39]

Auto Workers asserted that the theory behind publicity laws held that such exposure would discourage corporate funding.[40] But accounts from the period leave one with a very different impression. In 1890, the corrupt uses of money in New York and elsewhere were more obvious and acute. Money (from a variety of sources) bought votes—directly through the bribery of voters, and less directly through the employment of certain "workers" and "counters" and the larding of registration rolls with false names.[41] Among other reforms, reformers sought a "secret ballot" that would deny the vote-buyer proof that the voter had voted as promised.[42] Even so, a variety of corrupt election-day activities persisted.[43]

Requiring disclosure of campaign finance activity—especially expenditures—was part of this larger effort to thwart corrupt campaign practices, vote buying, bribery, and voter intimidation centered in the parties and candidate campaigns.[44] Public exposure of foul uses of campaign money would

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[34] *See* discussion *supra* section II. This influence is not limited to court decisions. Other accounts of the history of campaign finance reform quote the same passage. *See* UROFSKY, *supra* note 4, at 12; JOHN T. NOONAN, JR., BRIBES 624 (1984).

[35] EARL R. SIKES, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 122 (1928) (citing 1890 N.Y. Laws 263-66).

[36] PERRY BELMONT, RETURN TO SECRET PARTY FUNDS: VALUE OF REED COMMITTEE 128–29 (1927).

[37] *Id.* at 129.

[38] *Id.* at 129–31.

[39] *Id.* at 128–34.

[40] *Auto Workers*, 352 U.S. 567, 571 (1957).

[41] *See* Abram C. Bernheim, *The Ballot in New York*, 4 POL. SCI. Q. 130, 134–38 (1889).

[42] *Id.* at 142; *see also The One Cure for Bribery*, N.Y. TIMES, Nov. 20, 1888, at 4; *Real and Sham Reform*, N.Y. TIMES, Mar. 16, 1889, at 4.

[43] Ernest Ingersoll, *Election Day in New York*, CENTURY ILLUSTRATED MAG., Nov. 1896, at 3, 3–15 (describing use of watchers, pasters, ward heelers, and captains on election day).

[44] BELMONT, *supra* note 36, at 134 (describing corporate prohibitions as an "innovation . . . independent . . . of other provisions related to corrupt practices."); *see also* Bernheim, *supra* note 41, at 151 (describing disclosure as a supplement to ballot reform); George Fox, *Corrupt Practices and Elections Laws in the Unites States Since 1890*, 2 PROCEEDINGS OF THE

discourage such activities. By 1895, thirteen states had enacted laws requiring expenditure reports.[45] Whether corporate contributions as a subset of "money" were desirable or undesirable was simply not part of this legislative debate. Reformers wanted to restrain corrupt use of money, from whatever source.

The legislative "innovation" barring corporations from contributing did not appear until 1897—when it was in Tennessee, Missouri, Florida and Nebraska.[46] As a legal matter, states had broad independent police power to limit corporate activities: "Since the corporation is the creature of the state, with the purpose of its existence stated in its articles of incorporation, the state is at perfect liberty to forbid it doing a thing which is not mentioned in its charter."[47]

In contrast to the claim made in *Auto Workers*, these reforms were independent of other "corrupt practices" or publicity measures enacted in these states.[48] Corporate contributions were a separate object of reform with separate justifications.[49]

Typically, corporate bans arose once particular corporations provoked the ire of legislators.[50] In the context of the 1897 statutes, railroads were a main target. "It has been charged that the railways exercise a strong influence in politics in these and other western states, and while both the propri-

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AM. POL. SCI. ASS'N 171, 177 (1905); Moorfield Story, *Noteworthy Changes in Statute Law*, 5 MICH. L.J. 315, 325 (1896) (describing Ohio disclosure law as discouraging corrupt expenditures); David B. Hill, *Hill Cheerfully Approves*, N.Y. TIMES, Apr. 5, 1890, at 2.

[45] BELMONT, *supra* note 36, at 134–35; E. Dana Durand, *Political and Municipal Legislation in 1895*, 7 ANNALS AM. ACAD. POL. & SOC. SCI. 35, 40 (1896).

[46] Robert Mutch, *Before and After Bellotti: The Corporate Political Contributions Cases*, 5 ELECTION L.J. 293, 293 n.1 (2006) (citing state statutes); *see also* BELMONT, *supra* note 36, at 134–35.

[47] SIKES, *supra* note 35, at 127; *see also* People v. Gansley, 158 N.W. 195, 200 (Mich. 1916) ("[T]he police power of the state is exercised over [its] corporations with great freedom for the general good."). The scope of state supervision over corporations was changing during this period, from reliance on state enforcement of charters to shareholder derivative suits for *ultra vires* but otherwise legal corporate acts (political spending, for example). *See* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960, at 77–78 (1992); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937, at 59–63 (1991).

[48] E. Dana Durand, *Political and Municipal Legislation in 1897*, 11 ANNALS. AM. ACAD. POL. & SOC. SCI. 38, 43 (1898).

[49] *See* sources cited *supra* note 44. I find no commentary from contemporaneous sources to the contrary, and many references suggesting that the remedy for inadequate publicity laws was to strengthen and improve those specific laws. Perry Belmont, *Publicity of Election Expenditures*, 180 N. AM. REV. 166 (1905), *reprinted in* PERRY BELMONT, THE ABOLITION OF THE SECRECY OF PARTY FUNDS: THE ORIGIN OF THE MOVEMENT, S. DOC. NO. 495, at 50–88 (2d Sess. 1912). Some argued that the solution to corporate funding of campaigns was better disclosure, thus applying publicity to the problem of corporate activity rather than the other way around. *See*, *e.g.*, Joseph B. Bishop, *The Price of Peace*, CENTURY ILLUSTRATED MAG., Sept. 1894, 667 (remedy for political extortion of corporate contributions lies in sworn disclosure statements and what Bishop called "the awakened moral sense of the people who buy the peace.").

[50] One scholar explained the lack of political response to corporate political activity in previous decades by noting that "Republican and Democratic leaders alike were too involved with corporations to make partisan issues of such disputes about corporate power." B.W. Collins, *Community and Consensus in Ante-Bellum America*, 19 HIST. J. 635, 661 (1976).

ety of such unqualified prohibition and the possibility of preventing the abuse by laws alone may be questioned, some step in this direction was doubtless expedient," noted one observer at the time.[51] Such sentiments would have been magnified by the populist rhetoric central to the 1896 presidential election. States adopting corporate contribution bans in 1897 all voted for William Jennings Bryan in 1896.[52]

In short, the *Auto Workers* assertion that the corporate contribution bans enacted in early states were in response to dissatisfaction with the state disclosure laws seems unlikely. The more evident explanation, reading contemporaneous sources, was that state corporate contribution bans were in fact about prohibiting controversial and unpopular corporate forces from making political contributions, notwithstanding any other dissatisfaction lawmakers might have had with state disclosure requirements.

The New York history of the corporate contribution ban had its own interesting twists. Generally, at this time New York state-level reformers wanted to deprive the political machines of the tools necessary to retain control.[53] Some reformers focused on the purchase of votes and voter bribery, and called for "secret ballot" reform to ensure that these corrupt agreements were not verifiable.[54] Others sought publicly run elections, including government printed ballots to replace party-distributed ballots. Political machines would then neither exact assessment of "election expenses" from candidates nor provide marked ballots to bribed voters.[55] Uniform government-supervised voter registration was another reform goal.

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[51] Durand, *Political and Municipal Legislation in 1897*, *supra* note 48, at 43. No doubt, populist opposition in these states to the 1896 election of William McKinley also helped these corporate contribution bans pass. *See* MUTCH, *supra* note 4, at xvii; HERBERT D. CROLY, MARCUS ALONZO HANNA: HIS LIFE AND WORK 334 (1912) ("Nowhere in the country had Mr. Hanna [McKinley's key political and fundraising agent] been more abused than by the "Populist" orators of the Northwest."); *May Go To Madrid*, CHI. DAILY TRIB., May 28, 1897, at 1 (reporting rumors that Hanna agreed to a bill for railroads in return for contributions in the 1896 election, which Hanna denied).

[52] *See* APPLETONS' ANNUAL CYCLOPAEDIA 1896, at 770–71 (1897). Nebraska in particular had "strong populist tendencies." *Id*. at 772. Railroads were a key target for populist legislatures. George E. Bearn, *The Populist Legislatures*, INDEPENDENT (New York), July 8, 1897, at 4.

[53] WILLIAMS M. IVINS, MACHINE POLITICS AND MONEY IN ELECTIONS IN NEW YORK CITY 82–89 (1887).

[54] *The One Cure for Bribery*, *supra* note 42, at 4.

[55] *See* 1890 N.Y. Laws 263–66; s*ee also Purifying the Elections*, N.Y. TIMES, Mar. 22, 1887 at 5; *Real and Sham Reform*, *supra* note 42, at 4; *The Corrupt Practices Act*, N.Y. TIMES, Nov. 15, 1890, at 8. The 1890 disclosure law read:

> Every candidate who is voted for at any public election held within this State shall, within ten days after such election, file as hereinafter provided an itemized statement, showing in detail all the moneys contributed or expended by him, directly or indirectly, by himself or through any other person, in aid of his election. Such statement shall give the names of the various persons who received such moneys, the specific nature of each item, and the purpose for which it was expended or contributed.

1890 N.Y. Laws 265.

When New York's 1890 "corrupt practices" publicity measure passed its legislature, it was tied to a ballot reform bill that received the greater portion of attention of the press.[56] There were partisan differences in enthusiasm for disclosure; Republicans cheered ballot reform in 1890, but the Democratic Governor "cheerfully approved" this reform package only after it was sweetened by the inclusion of a disclosure requirement.[57] The subsequent disclosure reports, albeit limited, were of some interest at the time. Reporters dug into the lists to find funds spent improperly, such as extraordinary sums for "pasters."[58]

Mere months after passage, even as candidates filed their first reports, critics decried the disclosure law's inadequacies: "It ought to define legitimate election expenses, limit the amount that any candidate may incur, prohibit assessments of candidates, and require all campaign committees as well as candidates to file a statement."[59] The disclosure law's shortcomings were evident from the first, but had nothing to do with disappointment about its effect on corporate political activity, as *Auto Workers* claims.[60]

2. The New York 1894 Constitutional Convention

As *Auto Workers* notes, New York first considered a corporate contribution ban during the 1894 state constitutional convention. In that year, New York held one of a series of irregularly scheduled constitutional conventions.[61] When it commenced, participants in the convention anticipated that several "voting" related issues would be placed before them. Women's suffrage and reapportionment were the key contentious matters.[62] Some sug-

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[56] *See Ready for Hill's Veto*, N.Y. TIMES, Mar. 21, 1890, at 5. The heated debate of that legislative day concerned a measure to transfer to State care the "pauper insane" confined to county asylums. By contrast, "[t]he Corrupt Practices Bill, as amended in the House, was also passed without debate and forwarded to the Governor." *Id*. The Governor signed the bill, in his statement touting the ballot reform aspects as well as the disclosure provisions. Hill, *supra* note 44, at 2.

[57] Hill, *supra* note 44, at 2.

[58] *The Corrupt Practices Act*, *supra* note 55, at 3 ("The Tammany Hall candidates . . . declare on oath that they spent enough money for pasters to purchase about 50,000,000 of the small, or 10,000,000 of the large, pasters."). Pasters were glued papers printed with candidate's names. Election-day workers would give voters these pasters, along with instructions about where on the ballot to use them. *See* Durand, *Political and Municipal Legislation in 1895*, *supra* note 45, at 38.

[59] *Election Expenses*, N.Y. TIMES, Nov. 12, 1890, at 4. This remained a prescription for reform of publicity laws through 1893. *See Suppressing Political Corruption*, N.Y. TIMES, Mar. 31, 1893, at 4.

[60] Even so, New Yorkers were well aware of corporate political activity. *See* 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 128–29 (1888) (identifying tariff industries, railroads, and government contractors as sources of corruption).

[61] *The Constitutional Convention*, HARPER'S WKLY., May 26, 1894, at 483 ("It has been said that the real legislature of the State of New York is not the nominal Legislature that meets every year, but the Constitutional Convention which meets at long and irregular intervals . . . .").

[62] *Id*.; *see also* 1 REVISED RECORD OF CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 6 (1900) (on taking the chair as President of the constitutional convention, Joseph

gested that the convention take up voting by machine, and hold separately local and federal elections.[63] Limits on corporate contributions were not on that list, although it was anticipated that the convention would examine the State's relationships with its private corporations in other areas.[64]

Since the corporate contribution ban was not an anticipated topic at the convention, one wonders where it came from. Elihu Root might have believed, in 1894, that this would be a popular idea. In general, hostility to corporations had already borne political fruit with the passage of the Sherman Act in 1890 as well as the enactment of similar laws in many states.[65] The popularity of such sentiments, and related political populist economic causes, like free silver, increased in the wake of the financial panic of 1893.[66]

More specifically, proposing a corporate contribution ban at the 1894 New York constitutional convention could score political points by exploiting another unpopular corporate activity—in this case the unfolding Sugar Trust scandal. When the Senate that year considered amendments removing the tariff on sugar, representatives from Louisiana lobbied for a tariff on raw sugar, and the Sugar Trust successfully lobbied for a tariff on refined sugar. During the debate, stories broke that Senators were themselves speculating in sugar certificates.[67] Controversy prompted the Democrat-controlled U.S. Senate to launch an inquiry into the sources for the various stories.[68] During these hearings, Sugar Trust executive Henry O. Havemeyer testified that the Trust made campaign contributions to both parties, so "wherever there is a dominant party . . . that is the party that gets the contribution, because that is the party which controls the local matters."[69]

Choate remarked: "I have no doubt that the demands of those who call for an extension of the suffrage to all human beings without regard to sex, will receive at least the respectful attention and consideration of this Convention . . . .").

[63] *See New York Constitutional Convention*, 49 ALBANY L.J. 291, 291–92 (1894); *First Step Toward Municipal Reform*, CENTURY ILLUSTRATED MAG., Feb. 1894, at 630, 630–31.

[64] *See New York Constitutional Convention*, *supra* note 63, at 292.

[65] JONATHAN HUGHES, AMERICAN ECONOMIC HISTORY 370 (1983).

[66] STANLEY L. JONES, THE PRESIDENTIAL ELECTION OF 1896, at 29–46 (1964).

[67] SPECIAL COMM. TO INVESTIGATE ATTEMPTS AT BRIBERY, INVESTIGATION OF ATTEMPTS AT BRIBERY, S. REP. NO. 606 (2d Sess. 1894); *see also From Washington*, CONGREGATIONALIST, June 14, 1894, at 822; Kate Foote, *Our Washington Letter*, INDEPENDENT (New York), Sept. 6, 1894, at 11; *National Lobby at Washington*, FRANK LESLIE'S POPULAR MONTHLY, Nov. 1903, at 2, 7.

[68] S. REP. NO. 606, *supra* note 67, at 85 (questioning of Elisha J. Edwards, Philadelphia Press); *id.* at 113 (questioning of John S. Shriver, New York Mail and Express); *id.* at 121 (questioning of Harry W. Walker, St. Louis Post-Dispatch, New York Daily America, and Wall Street News Agency).

[69] S. REP. NO. 485, at 3 (1894); *see also* William V. Allen, *Mr. Havemeyer Talks: President of the Sugar Trust Before the Committee*, WASH. POST, June 13, 1894, at 1. Coincidentally, Root had represented the Havemeyer sugar interests as a private attorney several years before when they reorganized their trustee plan. *See* RICHARD W. LEOPOLD, ELIHU ROOT AND THE CONSERVATIVE TRADITION 16 (1954).

Havemeyer's testimony did not go over well with the Committee or with editorial writers.[70] By October, a grand jury had indicted Havemeyer and the Trust for dictating the terms of the sugar tariffs "in consideration of the large sums of money contributed by the company to the Democratic Party to aid in the election to the Senate of members of that party."[71]

Through the summer of 1894, New York media provided prominent coverage of the Sugar Trust scandal, including the Senate hearings, and revelations continued to surface as the state constitutional convention reconvened in September.[72] Senate Democratic leaders in particular found themselves targets of public outrage, as that party had campaigned successfully against the "McKinley tariff" in 1892, only to "sell out" to the demands of the Sugar Trust.[73] This about-face offered Republican convention delegates an opportunity to capitalize on public animosity towards the Democrats.

Not surprisingly, the Republican-controlled New York constitutional convention wasted no time in presenting the newly-useful "trusts in politics" issue to the convention.[74] On August 21, Root, as Chair of the Judiciary

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[70] *See Populist Allen's Report*, N. Y. TIMES, July 22, 1894, at 2. Even so, the report's suggested remedy was to forbid speculation by congressional members, and provide the Senate Committee with greater authority to enforce its subpoenas. *Id*. The editorialist for the *Outlook* called for "absolute publicity for all campaign contributions" as a remedy for the Sugar Trust scandal. Editorial, *This Week*, OUTLOOK, June 23, 1894, at 1133.

[71] *Sugar Trust Indictments: Some of the Opinions and Findings of the Grand Jury*, N.Y. TIMES, Oct. 3, 1894, at 4.

[72] *See* Kate Foote, *Our Washington Letter*, INDEPENDENT (New York), Aug. 2, 1894, at 11 (coverage of sugar tariff politics). For criticism of the scandal during the convention, see *The Democratic Failure*, HARPER'S WKLY., Aug. 25, 1894, at 794 ("The Democrats permitted a violation of their principles for pecuniary considerations."). *See also Criticised by Men of Business: The Least Severe Say it was a Deplorable Indiscretion*, N.Y. TIMES, Aug. 26, 1894, at 2 (castigating Secretary of Treasury Carlisle for meeting with Sugar Trust); *Tales Told Out of School*, N.Y. EVANGELIST, Aug. 30, 1894, at 24 (noting sugar trading by Senators); *New York in the Senate*, HARPER'S WKLY., Sept. 1, 1894, at 818; *The True Issue*, HARPER'S WKLY., Sept. 8, 1894, at 842 ("No more purchase and sale of laws!"); *Republican Senators and the Sugar Trust*, N. Y. TIMES, Sept. 10, 1894, at 4; *The Democratic Opportunity*, HARPER'S WKLY., Sept. 15, 1894, at 866.

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> [I]t is true that the bill as it stands is a Democratic measure, and for it the party must take the full political responsibility. It is equally true that the bill is false to the pledges of the platform, unsatisfactory to most advocates of tariff reform, and a compromise based not on principle but expediency.

OUTLOOK, Aug. 25, 1894, at 293. A summary of editorial commentary from Republican, Democrat and Independent newspapers is excerpted in *Current History and Opinion*, CHAUTAUQUAN (Meadville, Penn.) Oct. 1894, at 91. In general, the Republican papers were happy to denounce the Democrats, and the Democratic papers were divided between those who criticized and those who excused the party for supporting the tariff bill.

[74] Throughout the proceedings, the Republican leadership at the convention made key decisions in party caucus. *See Politics and Statesmanship*, HARPER'S WKLY., June 2, 1894, at 507. *See generally* RICHARD L. MCCORMICK, FROM REALIGNMENT TO REFORM: POLITICAL CHANGE IN NEW YORK STATE, 1893–1901, at 52–56 (1981) (describing structure and goals of the convention's Republican leadership). Root served as Chairman of the Judiciary Committee, Chairman of the Rules Committee, and a leader of the Republican Caucus (dubbed the House of Lords), which controlled the convention's majority. *See Joseph H. Choate to Preside: Of-*

Committee, reported that the Committee would offer, as a substitute to two earlier amendments, a proposed constitutional amendment adding new sections relating to the use of money for political purposes.[75] On September 3, 1894, the first observation of the Labor Day holiday, Root brought the amendment before the Committee of the Whole, after a vote consenting to hear it earlier than scheduled.[76] The first of the amendment's two sections granted the legislature the power to declare lawful certain uses of money by or on behalf of a candidate, while prohibiting other uses.[77] The second section, an amendment to article 2, section 7 of the constitution, provided:

> No corporation shall directly or indirectly use any of its money or property for, or in aid of, any political party or organization, or for, or in aid of, any candidate for political office of for nomination for such office, or in any manner use any of its money or property for any political purpose whatever, or for the reimbursement of indemnification of any person for moneys or property so used.
>
> Every domestic corporation which violates this section shall forfeit its charter, and every foreign corporation which violates this section shall forfeit the right to do business in this State.[78]

Immediately, at-large delegate Frederick Holls offered an amendment to exempt corporations organized expressly for political purposes, which Root embraced.[79] John H. Peck, a Democratic delegate from the Eighteenth District, and Morris Tekulsky, a Democrat and Tammany Hall associate from the Eighth District,[80] both asked whether this exemption would protect Tam-

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ficers of the Constitutional Convention Named, N.Y. TIMES, May 8, 1894, at 1; *The Convention Near Its End: All Amendments Which Will be Taken Up Disposed Of*, N.Y. TIMES, Sept. 22, 1894, at 5 ("House of Lords" reference). Of the 175 delegates elected to the convention, 108 were Republicans and 67 were Democrats. *See* TRIBUNE ALMANAC AND POLITICAL REGISTER 361–62 (1894). This total includes 15 at-large Republican delegates, among them Joseph H. Choate, Elihu Root, and William Goodelle.

[75] 2 REVISED RECORD OF CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 948 (1900). The new amendment was numbered O.I. 391, Printed No. 443. The substituted amendment replaced No. 334, offered by Mr. Foote, which would require the legislature to regulate primaries and conventions and restrict the use of money in these meetings. *See* 1 REVISED RECORD, *supra* note 62, at 702 (O. 326). "Nathaniel Foote, of Rochester, is a prominent lawyer of excellent reputation. He is a Republican." *The New York State Constitutional Convention*, AM. LAW., May 1894, at 212.

[76] 3 REVISED RECORD OF CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 876 (1900). The Republican leadership had rejected a request to adjourn for Labor Day. *See Adjourned, but Not for Good: The Convention Stops Work Till Next Thursday*, N.Y. TIMES, Sept. 16, 1894, at 5 (noting Labor Day holiday).

[77] *See* 3 REVISED RECORD, *supra* note 76, at 876 (amendment to article 2, section 6).

[78] *Id.* at 885.

[79] *Id.* at 886. Frederick Holls was a wealthy lawyer from Yonkers and an active Republican. *See The New York State Constitutional Convention*, *supra* note 75, at 212.

[80] *See*, *e.g.*, *Divver and Tekulsky*, N.Y. TIMES, Oct. 20, 1894, at 6, 6–8 (describing fight between two Tammany associates). Tekulsky was a saloon owner and President of the New York State Liquor Dealers Association. *See P. Divver's Nose Battered: Bruised and Given a Fresh Twist by Morris Tekulsky*, N.Y. TIMES, Oct. 19, 1894, at 6.

many. No doubt they intended to goad Root, whose association with reform and the Union Club was anathema to them.[81] Other delegates thought all corporate money should be barred, with no exceptions.[82] Root defended the Holls revision, noting that the object of the law "is solely to prevent the application of the funds of corporations engaged in business in this state, to political purposes."[83] He continued: "I do not know that there is any greater objection to three men or thirty men getting together and contributing their money for a political purpose than there is to an individual contributing his money to a political purpose."[84] The Holls Amendment seemed to Root a reasonable middle ground between Peck and Tekulsky's remarks about protecting Tammany Hall, and the concerns of other delegates who favored banning corporate contributions altogether.

As the debate continued, William P. Goodelle objected that this measure was more properly left to the legislature, rather than amended into the constitution.[85] Goodelle also noted that by singling out corporations, the constitution itself might attract corporate opposition and lose popular approval on the November 1894 ballot.[86] Delegate Louis McKinstry moved to amend the exception for political corporations, to read that the section "shall not apply to any corporation organized expressly for political purposes, with effect to prevent such a corporation from using its property for political purposes to the extent made lawful . . . in section 6."[87] Root adopted this amendment, noting that this would allow the press to continue to express political views.[88]

It is only at this point in the debate that Root expresses his oft-quoted view that the law is to prevent "the great moneyed corporations from furnishing the money with which to elect members of the Legislature . . . ."[89] In context, Root meant to draw a distinction between political organizations and large corporations like the Sugar Trust.[90] Root was not expressing a general sentiment about the scope and worthiness of the proposal as applied to any corporation; he was emphasizing its limitations in order to persuade delegates of its reasonable scope. Possibly he also meant to emphasize to a

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[81] *See* 1 PHILIP C. JESSUP, ELIHU ROOT, 1845–1909, at 171–72 (1938).
[82] *See* 3 REVISED RECORD, *supra* note 76, at 887.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 889–93. Judge Goodelle was a Republican at-large delegate from Syracuse.
[86] *Id.* at 893.
[87] McKinstry was a Republican delegate for the Thirty-Second District, from Fredonia.
[88] 3 REVISED RECORD, *supra* note 76, at 893–94.
[89] *Id.* at 894–95.
[90] Notably, when Root referred to a need "to check to the giving of $50,000 or $100,000 by a great corporation toward political purposes" he cited sums similar to those the Sugar Trust allegedly had given. *See* S. REP. No. 53-606, at 77–84 (1894) (reporting investigation of attempts an bribery and reprinting *Philadelphia Press* coverage from May 14, 1894); 3 REVISED RECORD, *supra* note 76, at 92 (questioning of Elisha J. Edwards, writer of *Philadelphia Press* letter alleging the Trust gave $250,000 to $300,000 to the Democratic campaign).

larger audience the parallels with the continuing Sugar Trust scandal.[91] In Frankfurter's hands, however, this portion of the debate is used to show the longevity and consistent application of laws barring all corporate contributions. A speech meant to reassure Gilded Age Republicans of the selectivity and modesty of Root's proposal was, in *Auto Workers*, reconfigured to support federal corporate and labor bans that were neither selective nor modest.

The convention's debate then addressed the question of how the exemption would apply to the press, Tammany Hall, and reimbursements to individuals from corporate funds. Hostile delegates lobbed questions Root's way. Delegate Adolph C. Hottenroth queried whether the Attorney General could be relied upon to proceed against members of his own party. Root, possibly exasperated, replied that "we cannot say that there shall be one Attorney-General elected by the people, and another whom the people have refused to elect to prosecute members of the prevailing party."[92] Delegate John Bigelow expressed doubt as to the law's ability to prevent bribery in politics at all.[93] Root responded that the current bribery laws were ineffective, so that "we deem it advisable to provide limitations short of the actual commission of the crime." He continued:

> I apprehend that many corporations, which are now called upon before each election to contribute large sums of money to campaign funds, would find in an absolute prohibition . . . a reason why they should not make such contributions. I think it will be a protection to corporations and to candidates against demands upon them . . . .[94]

The McKinstry Amendment and section 7 passed the Committee of the Whole as amended, despite objections from delegates that no quorum was present.[95] Debate continued over the substitute Goodelle Amendment, and whether the forfeiture of a corporate charter would unjustly punish innocent individual investors.[96] Eventually the Committee of the Whole reported

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[91] 3 REVISED RECORD, *supra* note 76, at 92. Root would appreciate these distinctions among corporations. His corporate legal practice represented more modest interests against predation by large combinations. *See, e.g.*, JESSUP, *supra* note 81, at 97-104 (describing Root's private practice).

[92] 3 REVISED RECORD, *supra* note 76, at 896–97. Hottenroth was a Democratic delegate for the Fifteenth District, from New York City.

[93] Bigelow, like Tekulsky, was a Democratic delegate for the Eighth District, from New York City.

[94] 3 REVISED RECORD, *supra* note 76, at 897.

[95] *Id.* at 899–900; *see Adjourned, but Not for Good*, *supra* note 76, at 5. A short time later Root asked that publishing corporations be expressly added to the exception, which was "determined in the affirmative" apparently without objection, although it is clear from the record that some delegates could not hear what business transpired. *See* 3 REVISED RECORD, *supra* note 76, at 903.

[96] *See* 3 REVISED RECORD, *supra* note 76, at 913–14.

Root's amendment, as amended by McKinstry, to the convention by a 72-21 roll call vote.[97]

The next day, however, Republican Delegate Daniel H. McMillan, an at-large Republican delegate from Buffalo, moved successfully to reconsider the vote and thereby tabled the amendment.[98] On September 15, the convention approved a motion by Root to print the constitution with amendments reported up to that time, essentially abandoning the corporate contribution amendment. The record demonstrates that delegates understood that their vote would have such an effect. Rural Republican Delegate I. Sam Johnson pointed out as much in his objection to the motion, when he accused the leaders of wishing to "bury everything else."[99] Johnson and a number of other delegates were angry at what they perceived as an effort by the convention leadership to pass through favored amendments and leave the remaining ones untouched.[100] Johnson's efforts failed, and the convention adjourned for six days until September 20.[101]

On September 21, one day before the convention leadership intended to adjourn, Johnson again attempted to bring up the political spending and corporate contribution amendments.[102] In response, Daniel McMillan explained that he had moved for reconsideration of its passage after several delegates expressed concern that the amendment would interfere with the work of reform clubs and the press, and "solely for the purpose of permitting those who were specially interested in the matter to perfect it."[103] The convention

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[97] *Id.* at 917–19. Coverage of this debate can be found in *To Purify the Ballot Box*, N.Y. Times, Sept. 4, 1894, at 8.

[98] More delegates were present on the 4th, perhaps because it was not a holiday. For the roll call vote, see 3 Revised Record, *supra* note 76, at 979 (139 delegates voting). For the roll call vote on the corporate contribution amendment, see *id.* at 918–19 (93 delegates voting). As with modern practice, motions to reconsider must be made by a delegate voting in favor of the matter to be reconsidered. *See* Robert's Rules of Order § 37 (10th ed. 1993). McMillan, like Root, was a Republican corporate lawyer active in state politics. Nothing in the Revised Record, press, or biographical materials indicates that McMillan and Root were rivals or hostile to one another. Both delegates served on the Rules Committee, the Judiciary Committee and the Committee on the Address to the People.

[99] 4 Revised Record of Constitutional Convention of the State of New York 887–88 (1900). Johnson was a Republican delegate for the Thirty-Second District from Warsaw, in Wyoming County, New York. He secured his delegate position by one vote after three tie-ballots in the County Republican Convention. *I. Sam Johnson is Prepared*, N.Y. Times, Sept. 19, 1893, at 8. His opponent, Augustus Frank, part of the Republican establishment, was afterwards named an at-large delegate to the convention. Johnson had been registered as a Democrat until 1876, when he switched to the Republican Party. *See New York State Constitutional Convention*, *supra* note 75, at 212.

[100] *See Adjourned, but Not for Good*, *supra* note 76, at 5.

[101] Root initially moved that Johnson's motion not be taken up, but was defeated. Later, Judge Veeder successfully moved to table Johnson's proposal. *Id.* at 5. Johnson and Root had been on opposite sides of an intra-caucus battle over whether the convention should adjourn *sine die* on September 22, or remain in session to act on all submitted amendments. *A Victory for the Canal Men*, N.Y. Times, Sept. 21, 1894, at 5.

[102] 4 Revised Record, *supra* note 99, at 1010.

[103] *Id.* at 1011.

then voted against Johnson's motion, and the corporate contribution amendment died for good.[104]

In review, we know that Root called up his amendment banning corporate contributions out of order on a day when convention attendance was low. We can infer that Republicans would reap some political advantage from its consideration and passage because of the unpopular position the Democratic Party had assumed via the Sugar Trust scandal, which was making headlines at this time. Keeping that story in the minds of voters would be useful in the upcoming elections, and would deflect attention from the Republicans' own unpopular position favoring tariffs and protectionism.

On the other hand, one would also expect Republicans to oppose a reform proposal outlawing corporate sources for funding. Instead, the Republican leadership at the convention appears to have engineered a solution that allowed them to reap short-term political advantage without suffering longer term financial burdens. Even with Root's central role in the convention's leadership, the death blow to the corporate ban came from a Republican colleague just one day after the vote to adopt it. What happened? It may be that Root knew his proposal, even if sincere, was a bit too progressive for his colleagues.[105] After all, not everyone was displeased with the limits the leadership placed on the constitution—the *Yale Law Journal*, for one, praised the convention for its overall conservatism and restraint.[106] Understanding that larger battles remained, Root may have consented to dropping the matter on the condition that it would receive a hearing, even if that hearing took place

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[104] *Id.* at 1013. Johnson described the opposition as primarily concerned with the harm section 7 would do to shareholders and investors, as opposed to officers, while others thought section 6 would allow the legislature to approve corrupt uses of money. *Id.* at 1012–13. Of more than 400 proposed amendments, the convention ultimately adopted 35, abandoning 38 special orders passed out of the Committee as a Whole. *See* 5 REVISED RECORD OF CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1049–54 (1900) (listing "Overtures Left on General Orders").

[105] Editorial, *Corporations and Campaign Funds*, WASH. POST, June 17, 1894, at 4 (criticizing the amendment because "there is a grave reason to question the constitutionality of a constitutional amendment which should undertake to deprive a corporation, and more than the individual members of the corporation, of the liberty of making contributions to campaign funds."). No other reformers at the time seemed to be advocating the passage of a corporate contribution ban. New York state reformers preferred to fix the evident deficiencies of the New York Corrupt Practices Act by enacting more effective publicity laws. *See Suppressing Political Corruption*, N.Y. TIMES, *supra* note 59, at 4 (describing a secret ballot initiative and "absolute and explicit publicity as to all moneys received or disbursed for political purposes."); Editorial, *The Week*, OUTLOOK, *supra* note 70, at 1133 (demanding "absolute publicity for all campaign contributions").

[106] *The New York Constitutional Convention*, 4 YALE L.J. 213, 216, 222 (1895). Even absent the corporate contribution ban, the amended constitution contained a number of political provisions. It prohibited issuing free railway passes to public officials, reapportioned the state, and required personal registration of voters. For the text of the amended constitution, see 5 REVISED RECORD, *supra* note 104, at 732–80, in particular art. I, § 4 (registration), art. III, §§ 3–4 (districting), and art. XIII, § 5 (prohibiting public officials from directly or indirectly receiving or requesting "any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates from any person or corporation").

on Labor Day. It may be that Root offered the amendment merely for partisan advantage and did not actually intend for it to succeed.[107]

Whatever the arrangement, it is hard to believe that the Republicans, as a caucus, were unaware on September 3 that their votes in favor would be reconsidered on September 4. The relative quiet with which Root and the Republicans (the gadfly Johnson excepted) greeted developments on September 4 would suggest acquiescence with the amendment's demise. One could conclude that Root and these other previous supporters had not really expected the corporate contribution ban to succeed, or had conceded its disposal in return for something else. Press coverage was similarly quiet, and none of the convention's retrospectives from the time make any mention of this episode.[108]

Thus, the *Auto Workers* version of the 1894 corporate contribution debate is deficient in several respects. First, it describes a logical progression not supported by any evidence. Corporation contributions laws were not advocated as a remedy for deficient publicity laws. Publicity laws were intended to expose bad acts by committees and candidates. Corporate contribution bans struck back at specific corporations and the "supply side" of political finance. Each was a weapon against its own foe.

Second, *Auto Workers* used certain fragments from the 1894 constitutional convention debate out of historical context. Understanding Root's points requires reading more than simply his responses to questions from delegates. *Auto Workers* pulls Root's words out of the larger debate. The reader cannot understand his oft-quoted reply as reassuring the convention of the proper scope of the ban—namely, reining in large entities like the Sugar Trust, and not corporations formed for political purposes. Third, the *Auto Workers* account leaves the reader ignorant of the partisan positioning in the convention, and why this issue would be particularly appealing to Republicans. It does not serve the purposes of the fable to admit that the debate might have been, in 1894, motivated more by political opportunism than by a genuine desire for reform.

The onslaught of corporate contribution legislation instead occurred in 1907, in the wake of the life insurance scandal, and resulted in the passage of several state bans, as well as a federal ban in the Tillman Act.[109] The *Auto Workers* history correctly states that the life insurance investigations scan-

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[107] The Democrats were of this view. *See To Purify the Ballot Box*, N.Y. TIMES, *supra* note 97, at 8 ("Several Democrats were of the opinion that the whole business was buncombe, pure and simple, and reported only for the sake of allowing Republicans to deliver patriotic speeches for the record and their constituents.").

[108] *See*, *e.g.*, APPLETON'S ANNUAL CYCLOPAEDIA 1894, at 531–34 (1895). The convention's revisions passed handily in the November 1894 election. MCCORMICK, *supra* note 74, at 63.

[109] RICHARD L. MCCORMICK, *The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247, 259–70 (1981) (explaining factors that led to a dramatic increase in legislative action against corporate political activity in 1906).

dalized policymakers and provoked legislative responses nationwide.[110] The bulk of individual middle-income savings at the time was in life insurance, and it would be hard to exaggerate the impact this news made on the attitudes of voters.[111] By 1910, Professor Robert C. Brooks observed that "there are few students of our public life who would dissent from Mr. Root's judgment of the seriousness of the question raised by corporate contributions to campaign funds."[112] When habits of thinking change, they can change quickly.

Even here, however, the *Auto Workers* history is significantly misleading. As historian Robert Mutch has explained, the bill enacted in 1907 was essentially legislation authored by Republican Senator William Chandler (R-N.H.) in 1901.[113] After the life insurance investigation made headlines, Chandler recruited Southern partisan Democrat Ben Tillman (D-S.C.) to carry the legislation as a populist weapon against corporate power.[114] Mutch's thorough research, which I will not repeat here, reveals that Theodore Roosevelt's national address against corporate contributions was not the catalyst propelling the Tillman Act, as *Auto Workers*, and conventional wisdom, would have it.[115] The causal relationship between the scandal and the proposal is not as tidy as the Court's rendition.

C. Reforming Zeal, Poison Pills, and The Hatch Act's Limits

The *Auto Workers* history then brings the Hatch Acts of 1939 and 1940, and wartime labor contribution ban of 1943, into the historical narrative. Frankfurter wrote:

> When, in 1940, Congress moved to extend the Hatch Act . . . which was designed to free the political process of the abuses deemed to accompany the operation of a vast civil administration, its reforming zeal also led Congress to place further restrictions upon the political potentialities of wealth. Section 20 of the law amending the Hatch Act made it unlawful for any 'political com-

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[110] *See Auto Workers*, 352 U.S. 567, 571 (1957). To conserve the reader's stamina, I have omitted this specific *Auto Workers* passage from this paper. I have little to add to the authoritative analysis in MUTCH, *supra* note 4, at 4–8.

[111] *See* RICHARD HOFSTADTER, THE AGE OF REFORM 220–23 (1955); Adam Winkler, *Other People's Money: Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 887–93 (noting scale of insurance scandal and providing context and contemporary reactions). Winkler's work identifies another motive for restrictions on corporate contributions: the feeling that the money was not, in fact, the "corporation's" to use without regard for the interests of shareholders. *Id.* at 893.

[112] ROBERT C. BROOKS, CORRUPTION IN AMERICAN POLITICS AND LIFE 245 (1910).

[113] MUTCH, *supra* note 4, at 4.

[114] *Id.* at 5. Chandler and Tillman were close friends. *See* FRANCIS BUTLER SIMKINS, PITCHFORK BEN TILLMAN: SOUTH CAROLINIAN 18–19 (Univ. of S.C. Press 2002) (1944). Tillman and Theodore Roosevelt disliked each other a great deal. *See id*. at 408–13.

[115] MUTCH, *supra* note 4, at 6–8; *see also* Winkler, *supra* note 111, at 920–26.

> mittee,' as defined in the Act of 1925, to receive contributions of more than $3,000,000 or to make expenditures of more than that amount in any calendar year. And § 13 made it unlawful 'for any person, directly or indirectly, to make contributions in an aggregate amount in excess of $5000, during any calendar year, or in connection with any campaign for nomination or election, to or on behalf of any candidate for an elective Federal office' or any committee supporting such a candidate. . . . In offering § 13 from the Senate floor Senator Bankhead (D-Ala.) said:
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> > We all know that money is the chief source of corruption. We all know that large contributions to political campaigns not only put the political party under obligation to the large contributors, who demand pay in the way of legislation, but we also know that large sums of money are used for the purpose of conducting expensive campaigns through the newspapers and over the radio; in the publication of all sorts of literature, true and untrue; and for the purpose of paying the expenses of campaigners sent out into the country to spread propaganda, both true and untrue.[116]

Reforming zeal? Again, the story behind the contribution limit is not nearly as flattering to Congress, and a bit more complicated than the *Auto Workers* fable allows.

Restrictions directed specifically at labor organizations, and more relevant to the matter before the Court in *Auto Workers*, had been considered before 1939. The Senate Committee that investigated campaign expenditures in the 1936 election[117] uncovered extensive campaign spending by labor organizations.[118] It included in its recommendations a ban on contributions to parties and candidates from "*all organizations, associations, or enterprises, incorporated or unincorporated, whose aims or purposes are the furtherance of group, class or special interests*."[119] Congress, dominated by Democrats after the 1936 Franklin Roosevelt landslide, showed no enthusiasm to act on this breathtakingly broad proposal.[120]

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[116] *Auto Workers*, 352 U.S. 567, 577–78 (1957).

[117] The Lonergan Committee, chaired by Senator Augustine Lonergan (D-Conn.), S. REP. NO. 75-151, at 127–33 (1937).

[118] *See* S. REP. No. 75-151, *supra* note 117; *see also* Joseph E. Kallenbach, *The Taft-Hartley Act and Union Political Contributions and Expenditures*, 33 MINN. L. REV. 1, 2 (1948). At this time, while the law required campaigns to file disclosure reports, information from these reports was difficult to use—that is, when the reports were filed at all. Instead, regular congressional investigations provided post hoc disclosure of campaign financial activity. *See* MUTCH, *supra* note 4, at 26.

[119] S. REP. NO. 75-151, *supra* note 117, at 135.

[120] Kallenbach, *supra* note 118, at 135.

Similar efforts to restrict political spending by certain disfavored groups, particularly unions, did poorly. Senator Arthur Vandenburg (R-Mich.) offered an amendment to the Wagner Labor Relations Act in 1937, declaring as an unfair labor practice "any compulsory assessment, or . . . any contribution, for political purposes."[121] That bill died in committee. In 1939, Senator Millard Tydings (D-Md.) proposed language that would make it illegal for any person to contribute to a party or candidate funds "paid as dues, assessments, or fees by members" of any organization.[122] Like the Lonergan Senate Committee proposal from 1937,[123] this restriction applied to all "pressure groups," not just unions.[124] Still, this unsuccessful legislation would have curtailed unions more than it would have any other pressure groups.[125]

The year 1939 saw passage of the Hatch Act, which prevented federal employees from engaging in political activity and left attempts at regulating "pressure groups" for another day.[126] The Act of 1939, sponsored by Senator Carl Hatch (D-N.M.), sought to undercut President Franklin Roosevelt's use of federal workers to campaign on behalf of favored candidates and against those incumbents who had not fully supported the New Deal.[127]

The Hatch Act Amendments of 1940, which are more significant to our discussion, initially were intended merely to extend the 1939 Act's limits on political activity to state government workers paid from federal funds.[128] Placing such restrictions upon state workers, however, limited a source of financial support, and political manpower, for Democratic officeholders who had supported the 1939 Act.[129]

Democrats thus opposed to the 1940 Hatch Act extension, and hoping to undermine Republican support for the bill, attempted to poison it by offering their own amendments attacking Republican financial sources.[130] One failed amendment would have barred individuals from contributing if they owned an interest in a corporation with a government contract.[131] A second attempt, culminating in Senator John Bankhead's amendment limiting indi-

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[121] *Id.* at 3; *see also* S. 2712, 75th Cong. (1937).

[122] 84 CONG. REC. 10,436 (1939) (statement of Sen. Tydings). Tydings had been a target of Franklin Roosevelt's 1938 "purge," and, not surprisingly, supported limitations on the political use of government funding and personnel. *See* John B. Oakes, *Senate Likely to Sidetrack Hatch Act Extension*, WASH. POST, Mar. 10, 1940, at 1.

[123] *See supra* note 118.

[124] Kallenbach, *supra* note 118, at 3.

[125] *Id.* at 3.

[126] *See* Hatch Act, ch. 410, 53 Stat. 1147 (1939).

[127] MUTCH, *supra* note 4, at 33.

[128] *See* S. REP. NO. 76-1236, at 1 (1940) (Comm. Rep. on S. 3046, 76th Cong. (1940)).

[129] MUTCH, *supra* note 4, at 33.

[130] *Id.* at 34. The legislation containing the amendments was S. 3046, 76th Cong. (1940). *See* Oakes, *supra* note 122, at 1 (describing Democrat amendments and filibustering tactics).

[131] MUTCH, *supra* note 4, at 34 (citing CONG. REC. 2616–27 (1940)).

vidual contributions to $5000 in the aggregate, was "in doubt until the last vote was counted,"[132] but passed narrowly on March 13, 1940.[133]

Democratic Senator Bankhead represented Alabama in the Senate from 1931-46, after prevailing in a bitter election challenge brought by the defeated incumbent J. Thomas Heflin (D-Ala.). Bankhead was an ally of the New Deal, "[a]n avowed opponent of the Hatch Bill," and offered the amendment as a "poison pill" to drive away Republican support and defeat the bill.[134] The *Auto Workers* opinion thus cites as its evidence of congressional "reforming zeal" a floor statement made by a Congressman who was openly trying to defeat the bill.

The amended bill passed the Senate the next day, with all Republicans voting in favor of it against expectations.[135] At least one magazine, however, attributed this decision to vote for the bill to "the simple, political reason that [the Republicans were] confident it would never pass the House."[136] Twenty Democratic senators who voted in favor of the poison pill $5000 limit also voted against passage on the Senate floor.[137] Once in the House, the Judiciary Committee added two particular elements: extending the $5000 limit beyond individuals to "an individual, partnership, committee, association, corporation, and any other organization or group of persons," and adding a $3 million expenditure ceiling for national political committees.[138] After these adjustments, however, the measure languished in committee. If the Republicans in the Senate had indeed voted for the bill on the assumption that it would never pass the House, the House Judiciary Committee's neglect of it appeared to confirm that belief.

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[132] John B. Oakes, *Senate Adds Curb on Gifts to Hatch Bill*, WASH. POST, Mar. 15, 1940, at 1.

[133] *Id*. That $5000 limit "slip[ped] into the Senate version by an extremely narrow margin" of 40–38. Joseph Tanenhaus, *Organized Labor's Political Spending: The Law and Its Consequences*, 16 J. OF POL. 441, 442 (1954); *see also* MUTCH, *supra* note 4, at 34. A $1000 per year limit had been proposed, and defeated, the previous day. Tanenhaus, *supra*, at 442 n.7; John B. Oakes, *Can't Block Hatch Bill, Minton Admits*, WASH. POST, Mar. 14, 1940, at 2 (noting vote was taken Mar. 13 on Bankhead's $1000 amendment, which "was defeated, 45 to 36, at the hands of the now familiar coalition of the Democratic minority led by Senators Barkley and Hatch, and a solid bloc of Republicans."); s*ee also* 86 CONG. REC. 2790–91 (1940).

[134] Oakes, *Senate Adds Curb on Gifts to Hatch Bill*, *supra* note 132, at 1.

[135] MUTCH, *supra* note 4, at 34 (citing CONG. REC. 2853 (1940)). The bill passed 58-38.

[136] *Hatched by Dempsey*, TIME, July 22, 1940, at 17, 17.

[137] B. Putney, *Money in Politics*, *in* 1 EDITORIAL RESEARCH REPORTS 291, 291 (Richard M. Boeckel ed., 1940).

[138] Tanenhaus, *supra* note 133, at 442 (quoting 86 CONG. REC. 2852 (1940)); *see also* H.R. REP. NO. 2376, at 10 (1940) (Judiciary Comm. Rep.) (describing committee amendments to "person"); *id*. at 14 (reiterating committee addition of $3 million limit, without any explanation). The $3 million expenditure limit was proposed by Rep. Francis E. Walter (D-Pa.) with Senator Hatch's consent. Hatch noted the amendment was "in accord with my idea of reducing campaign expenditures," and Senator Barkley (D-Ky.), Senate Majority Leader and Act supporter, had said that the limit was "fair to both sides." Putney, *supra* note 137, at 292. Walter was the chairman of the House subcommittee in charge of the Hatch Act Amendments. *House Buries Hatch Bill on Calendar*, WASH. POST, Mar. 20, 1940, at 9.

After months of inactivity, the bill was reported out of committee in July 1940. In the Committee of the Whole, the House added Representative Albert Vreeland's (R-N.J.) amendment, which excluded from the $5000 limit "contributions made to or by a State or local committee, or other State or local organization."[139] The House and Senate both approved the final package as amended without debating these additional limits at all.[140]

What provoked this rapid movement? Several weeks before the bill's final passage, Wendell Willkie, the Republican presidential nominee, had announced that his campaign would comply with the $5000 per individual limit in the "as yet unpassed Hatch Bill."[141] Willkie also urged passage of the bill.[142] Three days later, congressional leaders in the House announced that the Hatch Bill would be up for a vote on the floor, after what accounts described as "two months of stormy sessions" in the House Judiciary Committee.[143] On July 9 and 10, heated debate reached the floor over the propriety of limiting the political activities of public workers, but none of the accounts include any commentary on the contribution or expenditure lim-

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[139] Tanenhaus, *supra* note 133, at 443 (quoting 86 CONG. REC. 9452 (1940)). Perhaps Vreeland should be credited as the inventor of "soft money."

[140] MUTCH, *supra* note 4, at 34–35; *see also* Jack W. Robinson, *Revision of Federal Law on Campaign Finances*, 30 GEO. WASH. L. REV. 328, 339 (1961) (noting that legislative history is of no use in determining whether aggregate committee limits should be construed broadly or narrowly, because there is no legislative history). Recall that candidates for House and Senate seats were already subject to expenditure limits. *See* Act of Aug. 19, 1911, ch. 33, 37 Stat. 25; LOUISE OVERACKER, MONEY IN ELECTIONS 238–40 (The Macmillan Co. 1974) (1932) (describing expenditure limits). A number of states had imposed contribution and expenditure limits of their own. OVERACKER at 308–12.

[141] William F. Kerby, *Willkie's Campaign Promises to Follow 'Unorthodox' Lines*, WALL ST. J., July 3, 1940, at 1. Willkie was nominated at the Republican convention in late June, and the Roosevelt political team took Willkie seriously as an opponent. *See* 3 THE SECRET DIARIES OF HAROLD L. ICKES 221–22 (1954); AMITY SHLAES, THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION 351, 374–75 (2007). Roosevelt's staff wanted a public financing measure introduced in Congress to "get the money issue into the campaign" and to call attention to Willkie's expenditures. 3 SECRET DIARIES, *supra*, at 225.

[142] *Gifts for Willkie to Buy No Favors; He Picks 12 Aides*, N.Y. TIMES, July 3, 1940, at 1; *see also Willkie Bars Corporation Campaign Aid*, WASH. POST, July 3, 1940, at 1; Kerby, *supra* note 141. Note that all three major papers featured this story on the front page.

[143] *Hatch Bill Vote Expected Next Week in House*, WASH. POST, July 6, 1940, at 1; *House Leaders Set Hatch Bill Debate*, N.Y. TIMES, July 6, 1940, at 7. The subcommittee of the House Judiciary Committee had placed the Hatch amendments lower on the calendar than the controversial Logan-Walters bill, which would submit administrative agency decisions to judicial review. *House Buries Hatch Bill on Calendar*, WASH. POST, Mar. 20, 1940, at 9. The full House Judiciary Committee tabled the bill on May 1, but then voted 16-7 on May 29 to send the bill to the floor. *See Hatch Act Bill Approved by House, 243 to 122,* WASH. POST, July 11, 1940, at 1. The Committee Chairman, Hatton Summers (D-Tex.), opposed the bill, and had held a secret ballot that (he claimed) tabled it 14-10. But Congressman John Dempsey (D-N.M.), an ally of Hatch's, complained that 13 committee members had told him they supported the bill. Dempsey fought for an open vote in Committee, which he finally received on May 29. *Hatched by Dempsey*, *supra* note 136, at 17. On July 8, Roosevelt's political staff asked Dempsey to assist with a public financing amendment to the Act from the floor, but Dempsey and Senator Hatch believed it would prevent the bill from passing. 3 SECRET DIARIES, *supra* note 141, at 236.

its.[144] The bill passed July 10, with 89 Democrats, 152 Republicans, and two Progressives voting in favor, and 120 Democrats, one American Labor Party member, and one Republican opposing.[145] The Senate concurred in the House amendments without debate.[146] President Roosevelt signed the bill July 20, and it became effective immediately.[147]

Yet only two days after passage, before the President had signed the bill into law, attention moved away from the effect the bill would have on local public employees, turning instead to the effect the new contribution and expenditure limits would have in the upcoming federal elections. With evident surprise, the *New York Times* described the new expenditure limits as a "bombshell," noting that "[p]arty managers in recent times have come to look upon $3,000,000 as chicken feed."[148]

Slightly over a week after enactment, the *Times* reported a planned "scheme" to evade the limits through airing "guest" political speakers on commercial radio programs.[149] Within days, press reports described other methods for accommodating these limits, tactics familiar to students of modern campaign finance reform: they divided contributions among donors and recipients, and donated to state and local party committees instead of the national party.[150] Supporters formed independent campaign groups, and business concerns raised separate funds outside the national party $3,000,000 limit, thus leading to proliferation of multiple committees in the latter

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[144] Henry N. Dorris, *Attacks on Willkie Delay Hatch Bill*, N.Y. TIMES, July 10, 1940, at 11; *Democrats Fight Over Hatch Bill*, WASH. POST, July 10, 1940, at 4.

[145] Henry N. Dorris, *Wider Hatch Bill Adopted by House; Vote is 243 to 122*, N.Y. TIMES, July 11, 1940, at 1. Approval came after five hours of debate and consideration of ten amendments, most hostile. *Hatch Bill Approved By House*, *243 to 122*, *supra* note 143, at 1. Thomas R. Ball (R-Conn.), a one-term member, was the lone Republican voting against the bill.

[146] *Hatch Bill Sent to White House*, N.Y. TIMES, July 12, 1940, at 17.

[147] *President Signs Wider Hatch Act*, N.Y. TIMES, July 21, 1940, at 2; MUTCH, *supra* note 4, at 35.

[148] Luther Huston, *Campaign Outlays Will be Cut Hard*, N.Y. TIMES, July 14, 1940, at 57. This article noted that the Hoover-Smith campaign of 1928 had cost the parties $16,500,000, and that radio alone in 1936 cost "well above . . . $2,000,000." *Id.*; *see also Fall Campaign Altered by Hatch Bill Signing*, WASH. POST, July 21, 1940, at 3 (describing major changes in fundraising). The *Washington Post* argued that the new laws would chiefly affect the Democratic Party by the removal of patronage workers. Editorial, *The President Signs*, WASH. POST, July 21, 1940, at B6. But the *Wall Street Journal* noted that this party still controlled governmental largess from the Executive branch. Frank R. Kent, *The Great Game of Politics*, WALL ST. J., July 24, 1940, at 4 ("a 'gentle rain' of checks from [Agricultural Secretary Henry A.] Wallace will descend upon the 'tillers of the soil' during the next four months while he campaigns across the country.").

[149] *Evade Hatch Act on Paid Air Time*, N.Y. TIMES, July 31, 1940, at 12. The new law also required broadcasters to reconsider how to handle President Roosevelt's "fireside chats" which had been broadcast without charge. *President's Status as Speaker*, N.Y. TIMES, July 31, 1940, at 12.

[150] *Jackson Gives GOP Warning on Hatch Law*, WASH. POST, Aug. 5, 1940, at 1; *GOP Obeys Hatch Act, Fletcher Says*, WASH. POST, Aug. 6, 1940, at 1. The Department of Justice in response circulated a statement on enforcement of the Hatch Act. *Hatch Law Statement*, WASH. POST., Aug. 14, 1940, at 7.

months of 1940.[151] Donors made "loans" instead of contributions to bypass the $5,000 contribution limit.[152]

Overall, the Hatch amendments failed to prevent spending, instead channeling it out of the parties and into independent groups.[153] "[T]he [Hatch] law . . . accomplished little except to decentralize campaign finance and to make effective publicity of campaign expenditures more difficult."[154]

Under the Hatch Act amendments, a union could contribute $5,000 to any one candidate, could contribute as much as it liked to state and local committees, even those "primarily concerned with supporting candidates for federal office," and could set up multiple committees, each of which could spend $3 million.[155] "The Second Hatch Act," wrote New York University Professor Joseph Tanenhaus in 1954, "was so full of loopholes as to place no effective restriction on labor's political contributions—or anyone's else [sic] for that matter."[156]

Recall that the original intent of these limits was to work as a poison pill and kill this extension of Hatch limits to state employees, rather than a sincere effort to limit political contributions or expenditures. So, one might not be surprised at the measure's mixed effect.

The 1940 Act broke new ground in federal regulation of political funding by attempting to limit, albeit ineffectively, individual contributions to a national committee and the amounts such a committee could spend.[157] Yet it remains impossible to describe this result as the product of "reforming zeal"—as *Auto Workers* does, taking Senator Bankhead's floor comments, without guile, at face value. Rather, these limits are the product of a partisan battle designed to limit opponents' political resources; the underlying law had burdened New Deal and local-machine Democrats, and the amendment's limits allegedly exacted a countervailing toll upon the wealthy and Republicans, tit for tat.

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[151] *Campaign Fund Loophole Reported*, WASH. POST, Oct. 22, 1940, at 6; *Republicans Deny Outlay Exceeded Limit*, WASH. POST, Nov. 13, 1940, at 3.

[152] *Quayle Tells of $275,000 Election Loan*, WASH. POST, Jan. 10, 1941, at 12.

[153] Hedley Donovan, *Hatch Act Held Failure*, WASH. POST, Mar. 8, 1941, at 7. The total spent, $21 million including independent committees and state parties, was the highest on record. MUTCH, *supra* note 4, at 35. Meanwhile, the sources of funding had changed. Whereas before the Depression both parties received financial support from finance and industry, in 1940 and 1944, the major interests giving to the Democratic Party were officeholders and organized labor. *See* CHARLES MERRIAM & HAROLD GOSNELL, THE AMERICAN PARTY SYSTEM 399 (1969).

[154] MERRIAM & GOSNELL, *supra* note 153, at 411; Louise Overacker, *Campaign Finance in the Presidential Election of 1940*, 35 AM. POL. SCI. REV. 701, 725–27 (1941).

[155] Tanenhaus, *supra* note 133, at 443.

[156] *Id*.

[157] Overacker, *supra* note 154, at 702.

D. "War Chests" and the 1943 Labor Contribution Ban

With the preceding "history of progress" in campaign finance regulation as prologue, Frankfurter's opinion then addresses the roots of the labor expenditure ban—the statute actually at issue in *Auto Workers*:

> Thus, in 1943, when Congress passed the Smith-Connally Act to secure defense production against work stoppages, contained therein was a provision extending to labor organizations, for the duration of the war, § 313 of the Corrupt Practices Act. 57 Stat. 163, 167. The testimony of Congressman Landis (R-Ind.), author of this measure, before a subcommittee of the House Committee on Labor makes plain the dominant concern that evoked it:
>
> > [P]ublic opinion toward the conduct of labor unions is rapidly undergoing a change. . . . The public was aroused by many rumors of huge war chests being maintained by labor unions, of enormous fees and dues being extorted from war workers, of political contributions to parties and candidates which later were held as clubs over the head of high Federal officials. . . . The source of much of the national trouble today in the coal strike situation is that ill-advised political contribution of another day (referring, apparently, to the reported contribution of over $400,000 by the United Mine Workers in the 1936 Campaign, see S. Rep. No. 151, 75th Cong., 1st Sess.). If the provision of my bill against such an activity has [sic] been in force when that contribution was made, the Nation, the administration, and the labor unions would be better off. Hearings before a Subcommittee of the House Committee on Labor on H.R. 804 and H.R. 1483, 78th Cong., 1st Sess. 1, 2, 4.[158]

Frankfurter's presentation of the history is selective. More persuasively, historian Robert Mutch attributed the 1943 extension of the contribution ban to unions to two political reasons: the relative strength of anti-labor members in the 1943-44 Congress, and the staggering unpopularity of the United Mine Workers' 1943 strike.[159]

Only a month before passage, the Roosevelt Administration had seized the nation's coal mines after United Mine Workers ("UMW") president John L. Lewis refused to take wage demands to the War Labor Board ("WLB")

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[158] *Auto Workers*, 352 U.S. 567, 578–79 (1957).
[159] MUTCH, *supra* note 4, at 153.

or order miners to work.[160] The Smith-Connally bill was thus debated as the UMW and the Administration threatened and negotiated with one another over wartime work stoppages.[161] "The defiant attitude of Lewis . . . has convinced even a substantial number of New Deal supporters that the time has come to qualify, if not revoke, some of the privileges which unions have received . . . ."[162]

Anti-union Republicans and Southern Democrats in the House of Representatives, provided a political moment, took advantage of it. Senator Tom Connally's (R-Tex.) anti-strike and plant seizure bill, the War Labor Disputes Act or S. 796, had passed the Senate 63-16 in early May 1943.[163] These House members saw the bill as an opportunity to move additional stalled anti-labor proposals.[164] So, the House Military Affairs Committee added by unanimous vote several additional clauses to limit strikes, borrowed from Representative Howard W. Smith's (D-Va.) moribund strike bill that lay dead in the Senate.[165] The unions and their allies seemingly did little, perhaps

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[160] *See* SAUL ALINSKY, JOHN L. LEWIS, AN UNAUTHORIZED BIOGRAPHY 299–306 (1970); Ben W. Gilbert, *Action Taken Without Troops*, WASH. POST, May 2, 1943, at M1; *Text of Order on Seizure of Coal Mines*, WASH. POST, May 2, 1943, at M5.

[161] *See* Ben W. Gilbert, *1400 Quit, Roosevelt Hits Mine Strikes*, WASH. POST, May 8, 1943, at 1 (reporting on threat of mid-May strike).

[162] Warren Francis, *President May Face Issue Over Union Curb Soon*, L.A. TIMES, May 9, 1943, at 19.

[163] 89 CONG. REC. 3993 (1943) (vote passing S. 796); Robert C. Albright, *Senate Passes No-Strike Bill by 63-16 Vote*, WASH. POST, May 6, 1943, at 1. At this point the bill was devoted to antistrike and seizure matters, including provisions giving the WLB more power and independence. *Id.*; *see also Demands Grow in Congress for No-Strike Laws*, CHI. DAILY TRIB., May 4, 1943, at 15 (noting some Republican opposition to "nationalization of industry"). The administration opposed this bill, and feared that once in the House "sharper antilabor teeth [would] be added." Albright, *supra*, at 8; *see also* Mark Sullivan, *Antistrike Legislation*, WASH. POST, May 31, 1943, at 6 ("President Roosevelt has sought to prevent Congress from acting on labor bills, sought to keep labor matters in his own hands."). Anti-labor bills originating in the House had been killed in Senate Committee. Albright, *supra*, at 8; *see also House Takes Action to Revive Rep. Smith's Antistrike Bill*, WASH. POST, May 7, 1943, at 6. The War Labor Disputes Act by its terms applied only during wartime, and would expire six months after termination of hostilities. *See* 89 CONG. REC. 3808–09 (1943) (discussing termination of bill at war's end); *id.* at 3812 (text of section 6 of S. 796 with bill termination provision); *id.* at 3897 (vote on amendment to S. 796); *id.* at 3993 (vote on passage, text of section 5 of final version).

[164] Robert C. Albright, *Labor Lid Off In House*, WASH. POST, May 8, 1943, at 11; *House Military Group to Consider Anti-Strike Legislation Tomorrow; Connally Bill Considered Too Weak*, WALL ST. J., May 10, 1943, at 2. Many states, also hard hit by wartime strikes, had enacted laws strictly regulating unions, and requiring reporting and licensing. These laws, while politically popular, were vulnerable to court challenges. *See Unions Begin Battle to Kill New Restrictions on Them in Nine States*, WALL ST. J., June 9, 1943, at 1; Thomas v. Collins, 323 U.S. 516 (1945).

[165] *Approve Bill to Ban War Industry Strikes*, CHI. DAILY TRIB. May 12, 1943, at 1; *Representatives Push Law to Outlaw Strikes*, L.A. TIMES, June 2, 1943, at 9; JAMES B. ATLESON, LABOR AND THE WARTIME STATE 34–35 (1998) (noting that the Smith bill passed in the House 252-136 on Dec. 3, 1941—the Wednesday before the attack on Pearl Harbor—"with little serious consideration of its provisions"). Rep. Smith represented northern Virginia in the House from 1931 to 1967. He was a leader of the southern Democrat-Republican coalition in the Rules Committee during this period, and eventually became Chairman of that powerful body in 1955. *See* Charles O. Jones*, Joseph G. Cannon and Howard W. Smith: An Essay on the*

believing that the more extreme these amendments, the less likely any bill would pass.[166] Meanwhile, as May and June of 1943 unfolded, the administration attempted unsuccessfully to manage the mine workers labor dispute, which remained an unpopular controversy among the press and public.[167]

It was in that spirit that the House considered the Committee's amended bill. As debate began, newspaper headlines made plain the connection with the UMW stoppage: "Mine Tieup Spurs Bill to Ban Strikes."[168] Sensing the political wind at their backs, anti-labor Republicans pulled concepts from Congressman Gerald Landis's own languishing proposal banning labor contributions, introduced in January, and inserted it into this Senate legislation.[169] New Landis-inspired language, offered June 3 on the floor during a flood of activity, had been drafted mere hours before.[170] It amended the Corrupt Practices Act to prohibit labor organizations from making any contributions in connection with any election to federal office or for candidates,

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Limits of Leadership in the House of Representatives, 30 J. OF POL. 617, 635 (1968); JULIAN E. ZELIZER, ON CAPITAL HILL: THE STRUGGLE TO REFORM CONGRESS AND ITS CONSEQUENCES, 1948-2000, at 22–29 (2004) (describing the roots of the anti-Roosevelt block and congressional committee system).

[166] *House Group Writes Stiffer Antistrike Bill*, WASH. POST, May 11, 1943, at 7; *see also* Robert C. Albright, *Teeth Added to Connally War Plant Seizure Bill*, WASH. POST, May 12, 1943, at 1; Raymond Moley, *What Is the Connally-Smith Bill?*, WALL ST. J., May 14, 1943, at 6; *Backers Map Move to Call Up Antistrike Bill in House Today*, WASH. POST, June 2, 1943, at 1. Not everyone in labor's camp was complacent. Labor officials wrote Congress to declare their opposition to the bill, predicting it would promote labor unrest and interfere with war production. *U.S. Officials Fight Bill to Curb Strikes*, CHI. DAILY TRIB., May 18, 1943, at 7; *Representatives Push Law to Outlaw Strikes*, L.A. TIMES, June 2, 1943, at 9 (describing administration testimony in the House).

[167] Leo Wolman, *Public Now Inclined to Blame U.S. for Difficulty in Mines*, WASH. POST, May 16, 1943, at B4; Ben W. Gilbert, *Secretary Believes He Can Settle Case Speedily if Board Will Give Consent*, WASH. POST, May 18, 1943, at 1; Ben W. Gilbert, *Last-Minute Efforts Fail to Halt 2d Walkout*, WASH. POST, June 1, 1943, at 1; George Gallup, *The Gallup Poll: 80% of Members Favor Having Unions Made Financially Accountable to U.S.*, WASH. POST, June 2, 1943, at 13.

[168] William Moore, *Mine Tieup Spurs Bill to Ban Strikes*, CHI. DAILY TRIB., June 3, 1943, at 1.

[169] MUTCH, *supra* note 4, at 153–54; Tanenhaus, *supra* note 133, at 444; *see also* 89 CONG. REC. 378 (1943) (introduction of Landis's H.R. 1483). Press reports linked the House consideration of the anti-strike bill to the coal walkout ordered by John L. Lewis on June 1. *See* Robert C. Albright, *Angry House Votes to Call Up Antistrike Bill*, WASH. POST, June 3, 1943, at 3; *Roosevelt Prepares to Act in Coal Strike*, WALL ST. J., June 3, 1943, at 2. Yet "Administration Democrats" sought in vain to "restore the bill" to the Senate version, asserting that a more stringent House version would not pass the Senate. Albright, *supra*, at 2. Note the inaccurate implication in the *Auto Workers* account that the Landis bill was itself enacted. *See Auto Workers*, 352 U.S. 567, 579 (1957).

[170] 89 CONG. REC. 5328 (1943) (text of Rep. Harness's (R-Ind.) substitute). During that debate, Rep. Sadowski (D-Mich.) asked Rep. Harness, who served on the Judiciary Committee, if he had submitted his substitute to the Committee. Harness replied he had not, but that "[w]e discussed every section in this bill, time and time again." 89 CONG. REC. 5330 (1943). When Sadowski asked why Harness had not submitted this specific bill to the Committee, Harness replied: "[b]ecause I just got it written this morning." *Id.* Rep. Thomason noted shortly thereafter that Harness assisted with writing the Committee's bill, voted for the rule, yet now "he submits an entirely new bill of four single-spaced typewritten pages" that no one had read, adding "I claim that is not a very safe way to legislate . . . ." *Id.*

political committees, or other persons to accept these prohibited contributions.[171]

Contemporaneous accounts show that the floor fight was between administration supporters, led by Majority Whip Robert Ramspeck (D-Ga.), a New Deal ally who advocated a more limited bill comparable to the version that passed the Senate, and the anti-union coalition of southern Democrats and Republicans who sought criminal penalties and subpoena powers for the War Labor Board and other tools to combat strikes.[172] The subsequent vote on the bill was marked by procedural confusion.[173] One reporter described it as "a parliamentary tangle so involved that members pled ignorance of what they were voting on."[174] Louise Overacker observed of the contribution ban: "[T]he provisions were not germane to the main purpose of the bill . . . [and] were inserted with little discussion of underlying issues."[175] Essentially, a substitute measure sponsored by Representative Forest Harness (R-Ind.), once approved as amended through a complicated series of motions, foreclosed consideration of the administration's preferred legislation.[176] "Denunciation of John L. Lewis enlivened" the debate.[177]

The next day, June 4, the House passed the amended bill by a comfortable margin.[178] On June 5, UMW President John L. Lewis called a "truce" in the miners' strike, ordering miners back to work June 7, and setting a June 20 deadline.[179] With the Smith-Connally bill now in the hands of a House-Senate conference committee, the conferees reacted on June 7 by adding additional penalties to the bill, and had the entire bill "whetted and sharpened into a single, fine-edge strike axe" by June 9.[180]

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[171] 89 CONG. REC. 5328 (1943).

[172] Robert C. Albright, *Strictly Mine Strike Bill Threatened in House*, WASH. POST, June 4, 1943, at 4.

[173] *See* 89 CONG. REC. 5341–47 (1943); Tanenhaus, *supra* note 133, at 444; *see also* Louise Overacker, *Presidential Campaign Funds, 1944*, 39 AM. POL. SCI. REV. 899, 919 (1945).

[174] Albright, *Strictly Mine Strike Bill Threatened*, *supra* note 172; *see also* 89 CONG. REC. 5341 (1943) (quoting Rep. Bradley (D-Penn.): "There is not a Member on the floor right now who has any idea of what the Harness amendment stands for, what the amendment of Mr. Smith is, or any other amendment."); *id*. at 5347–48.

[175] Overacker, *supra* note 173, at 919.

[176] Robert C. Albright, *Quick Approval After Conferences Expected; Measure Aims at Coal Strike*, WASH. POST, June 5, 1943, at 1 (describing compromises and procedure). Rep. Harness, like Rep. Landis, was a Republican member elected from Indiana in 1939, who like Landis also served from 1939–49 in the House. *See* Biography of Forest Harness, http://www.senate.gov/artandhistory/history/common/generic/SAA_Forest_Harness.htm (last visited Mar. 16, 2008). Both were defeated in the 1948 election, which turned out to be a very good cycle for Democrats and unions. *See* ZACHARY KARABELL, THE LAST CAMPAIGN: HOW HARRY TRUMAN WON THE 1948 ELECTION 254–58 (2000).

[177] Albright, *Quick Approval After Conferences*, *supra* note 176, at 4.

[178] *Id.* at 1 (vote of 231-141, with Senate leaders predicting "final enactment of many House bill provisions.").

[179] *Lewis Limits Coal Truce; June 20 Set As Deadline*, WASH. POST, June 6, 1943, at M1.

[180] Robert Albright, *Strike Bill Toughened To Provide Lewis Curb*, WASH. POST, June 8, 1943 at 1; Robert C. Albright, *Conference Version Outlaws Stoppages in U.S.-Owned Plants*, WASH. POST, June 10, 1943, at 1. The labor contribution ban was retained in the conference version, and was "not seriously contested." Albright, *Conference Version, supra,* at 4; 89

The labor contribution ban survived conference committee consideration without much apparent controversy. The House conferees reportedly advocated keeping it and the Senate conferees were willing to concede the issue.[181] Understandably, the criminalizing of strikes against government mines, with such a strike looming in less than two weeks, attracted the most attention.

The House accepted the conference report on June 11 by a 219-129 vote after a perfunctory hour-long debate.[182] On June 12, the Senate, in a rare Saturday session, did likewise by 55-22.[183] Debate, once again, hit hard on the UMW crisis. Among the Senators invoking it was New Deal "bitter-ender" Senator Claude Pepper (D-Fla.), who called John L. Lewis "one of the most dangerous men in America."[184] The Senate, in contrast with the House, gave the report eight hours of debate, during which the political contribution ban suffered some criticism.[185] In response to colleagues' concerns, Senator Carl Hatch promised he would draft legislation to extend the same ban to "employer organizations."[186]

CONG. REC. 5720 (1943) (text of conference version). Senator Connally (D-Tex.) and Rep. Andrew Jackson May (I-Ky.) led the committee. 89 CONG. REC. 5720 (1943); *see also* William Moore, *Conferees O.K. Compromise on Anti-Strike Bill*, CHI. DAILY TRIB., June 10, 1943, at 11. Rep. May had been a union target for defeat in 1942 "and since [then] ha[d] been in no mood to be kindly toward labor unions." Robert De Vore, *After Five Years, Howard Smith Scores Victory Over Labor*, WASH. POST, June 13, 1943, at B4.

[181] Tanenhaus, *supra* note 133, at 445; *see also* 89 CONG. REC. 5721 (1943) (Sen. Connally stating that the House conferees insisted on the contribution ban, and the Senate Conferees "had to agree" to get a conference agreement on the bill). Comments made by a conferee during the House consideration of the conference report, however, indicated that "[n]either the House nor the Senate was wedded to anything." 89 CONG. REC. 5734 (1943) (statement of Rep. Merritt (D-N.Y.)). Even as the House debated, President Roosevelt issued an order directing striking miners to return to work. *President's Back-to-Work Order to Striking Miners*, WASH. POST, June 4, 1943, at 1.

[182] Robert C. Albright, *House Passes Antistrike Bill By 219-129 Vote*, WASH. POST, June 12, 1943, at 5. The partisan breakdown on the vote showed 101 Democrats and 118 Republican in support, and 77 Democrats and 48 Republicans against. *See* 89 CONG. REC. 5736–37 (1943).

[183] Robert De Vore, *Senate Votes Approval of No-Strike Bill*, WASH. POST, June 13, 1943, at M3. Thirty Democrats and twenty-five Republicans supported the report, and sixteen Democrats, five Republicans and one Progressive (Senator La Follette (Wis.)) opposed it. *Id*. The Senate debate did include criticism (ultimately to no avail) of the labor contribution ban and its effect on Democratic fundraising. Robert C. Albright, *Bill's Ban on Political Contributions by Labor Unions Sets off Barbed Controversy in Senate*, WASH. POST, June 13, 1943, at M7.

[184] *Senate Approves War Strike Curb*, L.A. TIMES, June 13, 1943, at 1; *see also* 89 CONG. REC. 5786-87 (1943) (Sen. Pepper comments on John L. Lewis); *id*. at 5795 (Senate vote on conference report).

[185] De Vore, *supra* note 183.

[186] 89 CONG. REC. 5721 (1943); *Bill Banning Strikes Passes Senate, 55-22*, CHI. DAILY TRIB., June 13, 1943, at 1. Hatch later introduced just such a bill, which passed the Senate but died in the House. *See* S. 412, 78th Cong. § 1 (1943); 89 CONG. REC. 6503 (1943); 90 CONG. REC. 1643 (1944). His bill would also have made the labor expenditure prohibitions in Smith-Connally permanent. *See* Kallenbach, *supra* note 118, at 5–6.

Labor had powerful friends in Congress, yet their resistance in light of the overwhelming hostility to the UMW strike came to nothing.[187] An American Institute of Public Opinion poll taken June 17, 1943 asked "What is your opinion of John L. Lewis?" and 87% responded with "unfavorable opinions."[188] Contemporaneous statements suggest that some union officials believed the contribution measure was "pretty much the same law already in the Hatch Act," which had limited contributions to $5,000.[189] This might have been a genuine sentiment, or it could have been a post hoc justification attempting to put the best face on this defeat. Note that administration allies and union leaders, after the Senate's passage, recognized the ban's effect on Democrat fundraising and union political power and sought the President's veto for that reason, according to contemporaneous reports.[190]

The June 20 UAW-imposed contract deadline arrived, and Lewis called another strike—which lasted until June 22, when Lewis ordered work to resume—provided the government retained control of the mines.[191] Lewis set another deadline of October 31.[192] Observers noted this long period would allow Roosevelt to veto Smith-Connally and bargain with Congress for an alternative.[193] Roosevelt issued a statement on June 23 praising the return of the miners, and followed it with his veto of Smith-Connally on June 25.[194]

Roosevelt vetoed the Act in part because the labor contribution ban, which as we have seen occupied very little of Congress's overall attention, "obviously ha[d] no relevancy to a bill prohibiting strikes."[195] Noting that Congress had not focused on this section, Roosevelt added: "If there be merit in the prohibition, it should not be confined to wartime, and careful

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[187] Unions apparently attempted to defeat the measure in a last-minute telegram campaign, and issued threats of electoral defeat against members who voted for it. *Labor Concentrates Fire as Conferees Report Favorably*, WASH. POST, June 11, 1943, at 3.

[188] *Public Opinion Polls*, 7 PUB. OPINION Q. 478, 485 (1943). Nine percent had "favorable opinions" and a mere four percent had "no opinion."

[189] Tanenhaus, *supra* note 133, at 445 (quoting Congressman John Sparkman (D-Ala.), 89 CONG. REC. 5401 (1943)).

[190] Albright, *Bill's Ban on Political Contributions, supra* note 183, at M7. Union leaders called publicly for a veto. *See* Ben W. Gilbert, *Green Predicts Labor Revolt If Strike Bill Becomes Law*, WASH. POST, June 15, 1943, at 1; Ben W. Gilbert, *Labor Held Cut Off WLB In Strike Bill*, WASH. POST, June 18, 1943, at 1.

[191] *See* Ben W. Gilbert, *Union Insists U.S. Continue Operation Of Mines*, WASH. POST, June 23, 1943, at 1.

[192] *Id.*

[193] *Id.*

[194] Franklin D. Roosevelt, Statement on the End of the Coal Strike (June 23, 1943), *available at* www.presidency.ucsb.edu/ws/?pid+16416; S. DOC. NO. 78-75 (1943) (Roosevelt's veto message for S. 796). Even so, a large number of miners refused to return to work. *See* Ben W. Gilbert, *President Won't Admit Oct. 31 Limit*, WASH. POST, June 26, 1943, at 1.

[195] S. DOC. NO. 78-75, at 3 (1943).

consideration should be given to the appropriateness of extending the prohibition to other nonprofit organizations."[196]

Both Houses overrode Roosevelt's veto that same day, a mere three hours later.[197] The administration had tried to delay the House vote, but once the Senate voted to override, any House parliamentary resistance evaporated. Twenty-five more House members voted to override than had voted for original passage, and segments of the Smith-Connally opposition—specifically the New York "Tammany" delegation and representatives of urban Pennsylvania districts—were not, for some reason, present to vote.[198] "The overriding of the veto was greeted in the House with an avalanche of applause and cheers and in the Senate by applause in the galleries, started by service men in uniform, significant of the indignation that has swept our fighting fronts overseas at the paralysis of production by strikes," reported the *Chicago Daily Tribune*.[199] "Not since its inception has the Roosevelt administration suffered a more significant defeat," observed the *Los Angeles Times*.[200]

After a careful look at the events surrounding the enactment of the labor ban in 1943, it is impossible to see any exercise of reasoned policy judgment justifying it. The legislation was focused elsewhere, on unpopular strikes and how to bring the UMW to heel. The contribution ban was a lucky fellow traveler swept into the law by the parliamentary footwork of certain House Republicans, in a below the radar beggar-thy-opposing-party move that proved successful. This story isn't extraordinary—legislation is frequently enacted by the votes of Members who do not recognize or do not care about the import of certain provisions. However, the *Auto Workers* fable depends for its persuasive force on Congress's use of reasoned legislative judgment that, once again, simply was not part of the record.

E. Loopholes, By Accident or By Design

Two weeks later in July 1943, the Congress of Industrial Organizations ("CIO") established the first political action committee, or PAC, to support labor legislation.[201] Through the CIO PAC and general education expendi-

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[196] *Id.* Roosevelt had opposed the entire legislative effort from the outset, and so this post hoc justification should not be taken as a complete description of the administration's opinion. *See Attack Fails to Halt Plant Seizure Bill*, WASH. POST, May 5, 1943, at 8.

[197] Tanenhaus, *supra* note 133, at 445; Mutch, *supra* note 4, at 154; George Gallup, *The Gallup Poll: Antistrike Bill*, WASH. POST, June 16, 1943, at 17 (reporting all provisions of antistrike bill popular with public); *see also* Arthur Sears Henning, *Pass Strike Law Over Veto*, CHI. DAILY TRIB., June 26, 1943, at 1 (noting that the President acted at 3:13 p.m., the Senate at 3:30 and the House at 5:28); *How Congress Voted to Upset Veto*, CHI. DAILY TRIB., June 26, 1943, at 2.

[198] Robert C. Albright, *Both Houses Overwhelm President's Objections*, WASH. POST, June 26, 1943, at 1.

[199] Henning, *supra* note 197, at 1.

[200] Editorial, *Antistrike Bill is Now Law*, L.A. TIMES, June 26, 1943, at A4.

[201] On July 7, 1943, the executive committee of CIO established the CIO Political Action Committee, and named Sidney Hillman its Chairman. JOSEPH GAER, THE FIRST ROUND: THE

tures, unions spent more money in the 1944 election than ever on politics, "voter education," and communications to members.[202] The CIO PAC was openly partisan, with an overt preference for Democrats.[203] Union officers and counsel contended that the scope of "contribution" in Smith-Connally did not reach this union spending.[204] In response to congressional complaints against unions, the Department of Justice concurred with the unions.[205]

A fair reading of the law would affirm that view—no one had interpreted the Corrupt Practices Act to deem that "contributions" included independent spending. Such a forced reading would mean, among other things, that the separate $3 million committee expenditure limit added in the Hatch Act would make no sense, because both contributions and "expenditures" would have been governed by the $5000 limit.[206] A more natural reading would interpret "contribution" "as but one form of 'expenditure.'"[207]

But that reasoning was little comfort to members targeted by union activities in 1944, among them Senator Robert Taft (R-Ohio). No surprise,

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STORY OF THE CIO POLITICAL ACTION COMMITTEE 60–63 (1944) (reproducing the report to CIO convention delegates). The CIO justified the PAC as a response to the "deplorable record of the 78th Congress . . . ." *Id.* at 61. Hillman had been John L. Lewis's chief rival before Lewis's break with Roosevelt, and Hillman aligned the CIO politically with Roosevelt and the New Deal. ROBERT H. ZIEGER, THE CIO 1935–1955, at 90–110 (1995). The CIO feared that further erosion in union support in Congress would roll back labor legislation. It also feared that its rival, the AFL, was aligning with congressional conservatives against the CIO, and CIO leadership believed that some pro-union members had voted to override the veto of Smith-Connally with the secret blessing of the AFL. JAMES C. FOSTER, THE UNION POLITIC: THE CIO POLITICAL ACTION COMMITTEE 11–12 (1975). Yet the Smith-Connally law "had none of the drastic effects anticipated by its opponents or its advocates." JALES B. ATLESON, LABOR AND THE WARTIME STATE 195–96 (1998).

[202] Overacker, *supra* note 173, at 920; Tanenhaus, *supra* note 133, at 446; MUTCH, *supra* note 4, at 154–55; *see also* Louis Waldman, *Will the CIO Capture the Democratic Party*?, SATURDAY EVENING POST Aug. 26, 1944, at 22. As these sources describe in detail, in the 1944 primaries the PAC used union general treasury funds, believing that the scope of the Corrupt Practices Act included only general elections. Once the parties chose their nominees, the PAC began "A Buck for Roosevelt" and solicited CIO members for individual contributions. A related committee, the National Citizens Political Action Committee ("NC-PAC"), raised money from sympathetic non-union donors. Readers who recall the politics of the early 1980s may be amused to compare the 1940s NC-PAC with the more contemporary and conservative National Conservative Political Action Committee ("NCPAC").

[203] *See, e.g.*, Nicholas A. Masters, *The Politics of Union Endorsement of Candidates in the Detroit Area*, 1 MIDWEST J. OF POL. SCI. 136, 142–44 (1957) (discussing PAC partisanship in Michigan).

[204] Tanenhaus, *supra* note 133, at 447 ("'[A] labor organization may spend its monies . . . by distribution of leaflets, arranging meetings of its members . . . . Such activities would merely be the exercise by the union and its members of such constitutional rights as free speech, press, and free assembly.'" (quoting Les Pressman, General Counsel to the CIO)).

[205] *Department of Justice Clears PAC*, 4 LAW. GUILD REV. 49 (1944) (quoting Justice Department press release, which notes that the same activities were done by incorporated newspapers).

[206] In the general election, the CIO PAC followed the Hatch Act limits, and "the combined expenditures of all three CIO funds were less than half $3,000,000, and the $5000 boys, for obvious reasons, were not throwing their contributions in the direction of organized labor." Overacker, *supra* note 173, at 923.

[207] Comment, *Section 304, Taft Hartley Act: Validity of Restrictions on Union Political Activity*, 57 YALE L.J. 806, 811–12 (1948) [hereinafter Comment, *Section 304*].

then, that as the *Auto Workers* history recites, congressional pressure to restrict union activity remained. In the aftermath of the 1944 election, investigative committees concluded that the restrictions on "contributions" should be extended to "expenditures" and that the law should expressly apply to primaries as well as general elections.[208] Coming out of the 1944 elections, the unions' PAC and member-related spending led some to anticipate or fear the rise of labor as the vanguard of a new progressive political block in 1946.[209] Yet, for a variety of reasons "[t]he results on November 5[, 1946] were disastrous [for labor]."[210]

F. Taft-Hartley, the Prosecution of CIO, and Auto Workers

Whatever temporary setbacks labor suffered in 1946, unions' willingness to invest time, energy, and money in politics alarmed Republicans and anti-union Democrats. In 1946, given their power, perhaps this anti-union coalition could do something about it. "For the first time since 1930 Republicans controlled both houses,"[211] and following the switch in congressional control to Republicans, anti-union legislation in the form of the Labor Management Relations Act of 1947 (or "Taft-Hartley") moved up the legislative agenda.[212] As the *Auto Workers* history described it (sans partisan context):

> Shortly thereafter, Congress again acted to protect the political process from what it deemed to be the corroding effect of money

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[208] Even so, the House committee made the astonishing assertion, quoted in *Auto Workers*, that:

> The intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term 'making any contribution' related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?
>
> 'The committee is firmly convinced, after a thorough study of the provisions of the act, the legislative history of the same, and the debates on the said provisions when it was pending before the House, that the act was intended to prohibit such expenditures.'

H.R. REP. NO. 79-2739, at 39–40 (1946). The reader who has waded thus far through the legislative history will wonder what debate the committee could have read. The Committee report, for its part, neglects to cite any sources. *See id*.

[209] ZIEGER, *supra* note 201, at 241 (1995). Yet with the death of President Roosevelt in April 1945, "the liberal cause seemed to drift." *Id*. at 244.

[210] *Id.* at 245.

[211] *Id*. at 245. CIO-PAC leader Sidney Hillman, who "regarded the PAC as his personal operation" died in July 1946. Following his death, "the CIO's political operations sputtered." *Id*. at 242–44.

[212] Taft-Hartley mainly addressed management concerns over collective bargaining. It included a list of unfair labor practices, eased anti-union injunctions, and banned secondary boycotts and featherbedding (hiring more workers than necessary), among other provisions. It also required unions to purge their leadership of Communists. *See* ZIEGER, *supra* note 201, at 246–47.

> employed in elections by aggregated power. Section 304 of the labor bill introduced into the House by Representative Hartley in 1947 . . . embodied the changes recommended in the reports of the Senate and House Committees on Campaign Expenditures. It sought to amend § 313 of the Corrupt Practices Act to proscribe any 'expenditure' as well as 'any contribution,' to make permanent § 313's application to labor organizations and to extend its coverage to federal primaries and nominating conventions. The Report of the House Committee on Education and Labor, which considered and approved the Hartley bill, merely summarized § 304 . . . and this section gave rise to little debate in the House.[213] Because no similar measure was in the labor bill introduced by Senator Taft, the Senate as a whole did not consider the provisions of § 304 until they had been adopted by the Conference Committee.[214]

The reader may sense a pattern by now, in which successful efforts to limit contributions and expenditures are enacted as obscure and little-debated provisions of hotly contested legislative packages.[215]

The *Auto Workers* narrative also implied that extending this ban to expenditures is the only next step. But other approaches to reform, among them a proposal to remove limits and rely instead on publicity, were on the table at the time.[216] Reasoned congressional deliberation, such as that idealized in the *Auto Workers* opinion, would include a weighing of the costs and benefits of different approaches, or at least involve some debate, argument, and responsive amendments. Yet, again, only after the Taft-Hartley conference committee had met and submitted its report for final passage, very late in the legislative day, did members feel moved to question the Taft-Hartley expenditure ban.[217] *Auto Workers* relates that event as follows:

> In explaining § 304 to his colleagues, Senator Taft, who was one of the conferees, said:

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[213] "Little" in this context means that over a three day debate, only one member, George P. Miller (D-Cal.), mentioned section 304, calling it "irrelevant" and "unnecessary." 93 CONG. REC. 3522–23 (1947); *see also* Tanenhaus, *supra* note 133, at 450–51 (noting also that two conferees, Senator Allen Ellender (D-La.) and Landis, were ardent union foes).

[214] *Auto Workers*, 352 U.S. 567, 582–83 (1957).

[215] Taft-Hartley was but one of two major and antagonistic packages facing Truman at the time. The other was a $4 billion tax cut. Both the tax and labor packages reflected positions the Republicans had used in the successful 1946 congressional campaign, and "both [were] laden with domestic TNT for the elections next year." *Labor, Tax Bills Loaded with TNT For Truman*, WASH. POST, June 2, 1947, at 3.

[216] *See* S. Rep. No. 79-101, at 80–83 (1945); *see also* Overacker, *supra* note 173, at 924–25.

[217] Other aspects of the bill had received considerable attention. The Taft-Hartley Bill as passed by the House was much more radical, and some labor interests had hoped it would remain that extreme to easily justify administration opposition. However, the package was moderated in the Senate, and those amendments survived House-Senate conference. *See* Ernest K. Lindley, *To Veto or Not To Veto*, WASH. POST, June 2, 1947, at 8.

> 'In this instance the words of the Smith-Connally Act have been somewhat changed in effect so as to plug up a loophole which obviously developed, and which, if the courts had permitted advantage to be taken of it, as a matter of fact, would absolutely have destroyed the prohibition against political advertising by corporations. If 'contribution' does not mean 'expenditure,' then a candidate for office could have his corporation friends publish an advertisement for him in the newspapers every day for a month before election. I do not think the law contemplated such a thing, but it was claimed that it did, at least when it applied to labor organizations. So all we are doing here is plugging up the hole which developed, following the recommendation by our own Elections Committee . . . .'
>
> After considerable debate, the conference version was approved by the Senate, and the bill subsequently became law despite the President's veto.[218]

During the debate over the Conference Report, labor's supporters in the Senate dogged Senator Taft with questions about how the expenditure ban would affect labor newspapers.[219] To them, Taft-Hartley represented something new, with uncertain boundaries and worrisome implications. Yet it was disingenuous for Senator Taft to assert that the bill was a correction to an unexpected "loophole" in Smith-Connally. Republicans in Congress had instead seized upon the opportunity to enact restrictions on union political activity, under cover of a circumvention argument.[220]

Unions understood the stakes, and mobilized an immense effort to secure Truman's veto and raise public awareness and opposition to Taft-Hartley.[221] In accord with their wishes, and the advice of staff, Truman vetoed the

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[218] *Auto Workers*, 352 U.S. at 583–84.

[219] 98 CONG. REC. 6436–37 (1952). Taft drew a distinction between subscription-paid press and press supported by union finances. *Id.* Questioners also wondered when a campaign could be declared begun, and what kinds of statements would be deemed political rather than educational or informational. *Id*. at 6438–47; *see also* Tanenhaus, *supra* note 133, at 452–53.

[220] *See Measure May Get to White House Monday; Truman's Attitude Uncertain*, WASH. POST., June 7, 1947, at 7 (quoting Senator Claude Pepper saying the union expenditure ban should be called the "political Insurance Section for the Republican Party"). To be sure, had Congress taken no action, the restrictions on contributions in Smith-Connally would have expired June 30, 1947, since that Act was a temporary wartime measure. Kallenbach, *supra* note 118, at 6; War Labor Disputes Act, 57 Stat. 163 (1943) (expiring within six months after termination of hostilities); Cessation of Hostilities of World War II, Proclamation No. 2714, 12 Fed. Reg. 1 (Jan. 1947) (declaring hostilities ended December 31, 1946).

[221] Unions declared June 4 "Veto Day" and held rallies in support of a veto and of anti-Taft-Hartley Senators. Robert S. Bird, *O'Dwyer Assails GOP; Tells 25,000 Enslavement of Workers is Aim*, WASH. POST, June 5, 1947, at 1. Even with Truman's veto, labor anticipated that the House could summon the votes to override, but the Senate was a somewhat closer question. Alfred Friendly, *Measure May Get to White House Monday; Truman's Attitude Uncertain*, WASH. POST, June 7, 1947, at 1 (noting veto sustained if seven Senators change votes). Labor's public opinion suffered again when Lewis's UMW called strikes to protest Taft-Hart-

bill June 20.[222] In President Truman's veto message, among a long list of objections to the bill's sweeping pro-management reforms, he criticized the expenditure ban as a "dangerous intrusion on free speech, unwarranted by any demonstration of need, and quite foreign to the stated purposes of this bill."[223]

The House quickly overrode the veto, but the Senate vote was delayed by a pro-veto filibuster to give Truman and veto supporters the opportunity to rally support, especially among a group of southern Democrat Senators who might switch their votes.[224] Once it was clear the votes would not materialize, on June 23 the Senate overrode Truman's veto 68-25, six votes more than the two-thirds necessary.[225]

Truman noted that the Section 304 expenditure ban would extend as well to radio and newspaper corporations.[226] As the *Yale Law Journal* stated in a 1948 comment evaluating Taft-Hartley, "[T]he prohibition on 'expenditures' may be interpreted as placing drastic limitations upon the activity of any political group, such as, for example, the League of Women Voters, which happens to be corporate in structure."[227] Reflecting legal doubts about the no-expenditure clause, five days after the veto override, AFL counsel advised all affiliated unions to "affirmatively violate" the new law "to bring about a constitutional test of the law."[228]

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ley. *11,100 Miners Out in Protest on Labor Bill*, WASH. POST, June 10, 1947, at 1. Noted one contemporaneous observer: "They could not have been more poorly timed. They inflamed anti-labor sentiment . . . ." JACK REDDING, INSIDE THE DEMOCRATIC PARTY 77 (1958).

[222] MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 80-334 (1947).

[223] *Id.* at 9.

[224] *See* Alfred Friendly, *Taylor, Pepper Lead Democratic Fight to Delay Action on Veto*, WASH. POST, June 21, 1947, at 1; *see also* Alfred Friendly, *Labor Bill Foes Admit Fight Futile, Regard Overriding Virtually Certain*, WASH. POST, June 22, 1947, at M1.

[225] Alfred Friendly, *Truman's Final Appeal Rejected; 6 Votes to Spare in Showdown*, WASH. POST, June 24, 1947, at 1. This decisive vote boosted the political profiles of Senator Robert Taft, a presidential contender in 1948, as well as of Senator Irving Ives (R-N.Y.), a close associate of 1948 Republican presidential nominee Thomas Dewey. *Id.* at 2.

[226] H.R. Doc. No. 80-334, at 9–10 (1947). At this time there would have been no statutory exemption for news or commentary, as there is in the present law. *See* Federal Election Campaign Amendments of 1974, Pub. L. 93-433, § 102(d), 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. § 431(9)(B)(i)(2000)).

[227] *Section 304, Taft-Hartley Act: Validity of Restrictions on Union Political Activity*, 57 YALE L.J. 806, 811 n.19 (1948). The campaign finance restrictions on incorporated political groups remain controversial. *See, e.g.,* FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 259 (1986); FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007).

[228] *AFL to Scorn No-Strike Rule Pay Contracts*, WASH. POST, June 29, 1947, at M1. The Supreme Court had held not long before that a state criminal statute requiring paid union organizers to register violated the First Amendment. Thomas v. Collins, 323 U.S. 516 (1945) (Justice Frankfurter joining Justice Roberts' dissent). Another encouraging precedent from the Massachusetts Supreme Court found that a state labor union expenditure ban was unconstitutional as a violation of the guarantees of freedom of the press and assembly. Kallenbach, *supra* note 118, at 11 (discussing Bowe v. Secretary of the Commonwealth, 69 N.E.2d 115 (Mass. 1946)).

The first "test case" arose quickly out of the endorsement of a candidate in a special election of July 1947 by the *CIO News*.[229] In a strained opinion, a majority of the Supreme Court concluded that Congress could not have intended Taft-Hartley to reach this activity and refused to consider the constitutional question.[230] As the nation entered the 1948 presidential election season, one observer noted that "political activity on the part of unions is greater now than probably ever before . . . despite the prohibition, under criminal penalties, in the new law."[231]

If the Republicans had anticipated that Taft-Hartley would ease their transition into the White House in 1948, they were wrong: Truman defeated Thomas Dewey with 303 electoral votes and 49.5 percent of the popular vote, and Democrats took comfortable control of both houses of Congress.[232] Meanwhile, unions were left to wonder at the scope of the prohibition. As one author from the period observed: "[T]his provision exhibits a truly remarkable trust in the omniscience of the Department of Justice and the judiciary to determine the actual intent of the legislative body and in their capacity to shape a 'blunderbuss' regulation into a workable, fair and effective rule for achieving the desired end."[233]

By the time the Department of Justice filed its case against the UAW in *Auto Workers*, prosecutors had litigated three other cases against alleged union violations of Taft-Hartley's expenditure ban. Like the case against the CIO, none went well. As noted above, in *United States v. CIO*, the Supreme Court had concluded the statute would not apply to a regular publication of a union's newspaper that included, among other things, an endorsement.[234] Then in 1949, a federal court of appeals in *United States v. Painters Local Union No. 481* dismissed an indictment against a union for purchasing ad-

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[229] The District Court dismissed the indictment, finding that the expenditure ban violated the First Amendment. United States v. CIO, 77 F. Supp. 355 (D.D.C. 1948).

[230] United States v. CIO, 335 U.S. 106, 121–22 (1948). Justice Frankfurter, for his part, was less than impressed with the Government's efforts defending the law. *Id.* at 126 (Frankfurter, J., concurring). Four Justices would have affirmed the district court. *Id.* at 130 (Rutledge, J., concurring in the result). The dissenters would have reached the constitutional issue and held the law unconstitutional. *Id.* at 155.

[231] Edwin E. Witte, *An Appraisal of the Taft-Hartley Act*, 38 AM. ECON. REV. 368, 372 (1948).

[232] *See* ZACHARY KARABELL, THE LAST CAMPAIGN 254 (2000). Hostility to Taft-Hartley among workers helped, as did union political action among them, but Truman made substantial gains in farm states, rather than industrialized states. *Id.* at 257–58; *see also* ARTHUR SCHLESINGER & FRED ISRAEL, HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 3138-39 (1971).

[233] Kallenbach, *supra* note 118, at 13.

[234] United States v. CIO, 335 U.S. 106 (1948). This conclusion came despite the fact that the Union had printed 1000 additional copies to "remove all doubt" that an "expenditure" of general union funds was involved. United States v. CIO, 77 F. Supp. 355, 356 (D.D.C. 1948). The case was heard on direct appeal to the Supreme Court under the Criminal Appeals Act of 1907. *CIO*, 355 U.S. at 109. The district court dismissal of the indictment as unconstitutional was front-page news, and the *New York Times* also saw fit to reprint the entire court opinion. *See Taft-Hartley Act Held Void in Part on Political Fund*, N.Y. TIMES, Mar. 16, 1948, at 1; *see also U.S. Court Order Upholding Spending for Union's Political Views*, N.Y. TIMES, Mar. 16, 1948, at 24.

vertisements advocating defeat of Senator Taft and several members of Congress who supported Taft-Hartley.[235] In 1951, in a third case brought by a disgruntled former union officer, rather than by the government as an overt "test case", a federal district judge acquitted a union that had paid salaries for three employees who engaged their time in political organization.[236]

After these defeats, the Department of Justice declined to prosecute union political expenditures for about six years.[237] The Department doubted that the Court would find the expenditure ban constitutional. After all, no Justice in the *CIO* Court signaled any inclinations in that direction.[238]

Union counsel took from this record a mixed message. After *CIO*, they advised that unions use treasury funds for registration, getting out the vote, and "regular union publications," but to fund other political activity with PAC funds raised from individual members.[239] Unions proceeded to register voters, endorse candidates, raise funds from voluntary contributions for overtly political action, host political speakers, and electioneer to the membership.[240]

Apprehensions about union political power remained. In 1953 and 1954 the AFL and CIO negotiated a "no raiding" agreement. This was the first step in a series of agreements that led to the merger of these competing union federations in December 1955.[241] Unity alarmed a number of prominent Republicans. Senator Barry Goldwater (R-Az.), for one, called it "a 'conspiracy of national proportions' to control all elections."[242] Labor leaders hoped that a merger would strengthen union political power.[243]

Perhaps in response to this alarm, in July 1955, the Eisenhower administration's Justice Department empanelled a Detroit grand jury, seeking in-

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[235] United States v. Painters Local Union No. 481, 172 F.2d 854 (2d Cir. 1949), *rev'g*, 79 F. Supp. 516 (1948). The district judge had concluded that the law applied to these advertisements, and the defendants were tried, found guilty, and fined. Tanenhaus, *supra* note 133, at 459 (citing N.Y. TIMES, Sept. 24, 1948). The government did not seek certiorari review of the Second Circuit's dismissal in favor of defendants.

[236] United States v. Construction & Gen. Laborers Union No. 264, 101 F. Supp. 869 (W.D. Mo. 1951); *see also* Tanenhaus, *supra* note 133, at 460.

[237] *See* Motion to Affirm at 12, *Auto Workers*, 352 U.S. 567 (1957) (No. 44) (available through InfoTrac).

[238] *Federal Election Act of 1955: Hearing on S. 636 Before the S. Comm. on Rules and Admin.*, 84th Cong. 201–10 (1955) (statement of Warren Olney III, Assistant Attorney General).

[239] Tanenhaus, *supra* note 133, at 463 (citing LABOR'S LEAGUE FOR POLITICAL EDUCATION, BLUEPRINT FOR VICTORY 9)

[240] *See* Ruth Alice Hudson & Hjalmar Rosen, *Union Political Action: The Member Speaks*, 7 INDUS. & LAB. REL. REV. 404, 407–08 (1954) (describing the labor political program). In this study, 55% of rank and file surveyed agreed that unions should "usually" be active in politics, while 24% said they should "sometimes" be active, and 21% percent answered "seldom or never." *Id.* at 408. Eighty-one percent answered that, if active, unions should endorse candidates "who back legislation good for labor." *Id.* at 409.

[241] *Report of the Joint AFL-CIO Unity Committee*, 9 INDUS. & LAB. REL. REV. 461, 462 (1956).

[242] Edwin E. Witte, *The New Federation and Political Action*, 9 INDUS. & LAB. REL. REV. 406 (1956).

[243] *Id.* at 417.

dictment of the United Auto Workers Union. The union had spent about $5000 on television broadcasts that supported Democratic candidates for federal office in 1954.[244] The grand jury indicted the Union on four counts for making expenditures in violation of federal law.[245] The indictment described the union's funding of four particular "Meet the UAW-CIO" broadcasts, a regular series covering unions news and activities on Detroit's WJBK-TV, as containing "expressions of political advocacy . . . intended by defendant to influence the electorate generally, including electors who were not members of defendant union."[246] Explaining this prosecution after several years of apparent quietude, William Olney III, chief of the Justice Department's Criminal Division, remarked that the "facts were 'so clear' that the Government 'had no alternative other than to prosecute.' "[247]

The district court nevertheless granted the UAW's motion to dismiss the indictment. Following what the court saw to be the clear precedent set forth in *CIO*, the judge remarked that the government's efforts to distinguish *CIO* and other decisions were "either futile or picayune."[248] The judge acknowledged that the prosecution had presented a "very scholarly brief . . . tracing the history and objectives of this legislation," but that such arguments could not overcome three precedents concluding that such activity must be excluded from regulation, lest the statute place an unconstitutional burden on speech.[249]

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[244] *Jury Probes Political Spending of Auto Union*, CHI. DAILY TRIB., July 6, 1955, at 3. Union officials alleged that the investigation was at the behest of Michigan Republican leaders John Feikens and Arthur E. Summerfield, who had complained to the Justice Department about union expenditures in March 1954. *Id*. The Department denied any connection. *Id*. Labor invested heavily in Michigan's 1954 election, believing that incumbent Senator Homer Ferguson (R-Mich.) was vulnerable and that Democrats could, with union support, pick up two congressional seats. They succeeded. Foster, *supra* note 201, at 186–87.

[245] *UAW is Indicted for Election TV*, WASH. POST & TIMES HERALD, July 21, 1955, at 34.

[246] Indictment, United States v. UAW-CIO, 138 F. Supp 53 (E.D. Mich. 1956) (No. 35004) (in archived file of *Auto Workers* case, available from the National Archives Great Lakes Region, Chicago, IL, and on file with author); see also *UAW is Indicted for Election TV, supra* note 245, at 34; Motion to Affirm at 2, *Auto Workers*, 352 U.S. 567 (1957) (No. 44) (describing indictment). This was during a period of active CIO engagement with broadcasting and public relations on a wide variety of issues, with publicity outlays exceeding $1 million annually. *See* ZIEGER, *supra* note 201, at 351–52; JOHN BARNARD, AMERICAN VANGUARD: THE UNITED AUTO WORKERS DURING THE REUTHER YEARS 267 (2004) (describing UAW media activity including the "Meet the UAW-CIO" series, launched in 1951).

[247] *UAW is Indicted for Election TV*, *supra* note 245, at 34.

[248] United States v. UAW-CIO, 138 F. Supp. 53, 58 (E.D. Mich. 1956). Judge Frank Picard, assigned to the case, was a Democrat appointed to the federal bench in 1939 by President Roosevelt. He had been active in politics and was the 1934 Democratic nominee against Senator Arthur Vandenburg (R-Mich.).

[249] *Id*. at 58. Sadly, a copy of this "scholarly brief" is not preserved with the archived case file. In the transcript of the hearing on the union's motion to dismiss, the Government argued that Congress could treat union broadcasts different from editorializing by newspapers and broadcasters, and that "this is what the legislative history shows they have done." *See* Transcript of Record at 28-29, *Auto Workers*, 352 U.S. 567 (1957) (No. 44). This colloquy suggests that at least the Taft-Hartley legislative history was before the court.

The Government appealed this judgment under the Criminal Appeals Act to the Supreme Court, and this time prevailed in *Auto Workers*.[250] Before this Court, the Government's legal arguments found a more sympathetic audience than they had in 1948.[251] Reversing the District Court, the Supreme Court held that the facts alleged could state a violation of the federal statute prohibiting labor expenditures in federal elections. Frankfurter, writing for six justices in *Auto Workers*,[252] declined to reach the issue of whether, so construed, prosecution would violate the union's constitutional rights. In contemporary doctrinal terms, the Court permitted facial application of the law, but reserved for a later date whether "as applied" this prosecution unconstitutionally burdened the UAW. Justice Douglas wrote for the dissent, which was joined by Justices Black and Chief Justice Warren, and underscored the potential breadth of the labor ban: "Until today, political speech has never been considered a crime."[253]

But the constitutional issues avoided in this round of *Auto Workers* never matured. After a trial on the merits, on November 6, 1957, a jury found the union defendants not guilty.[254]

IV. WHY WAS *AUTO WORKERS* WRITTEN THIS WAY?

After wading through the political context and legislative manipulation behind campaign finance regulation, in particular the ban on labor expenditures in federal elections, the reader may now wonder why Frankfurter included this long historical passage in the *Auto Workers* decision. One need not spin history to come to the conclusion that the Act, as amended, meant to

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[250] *See* 352 U.S. at 567.

[251] The Court and Justice Frankfurter were more receptive this time, notwithstanding the fact that one of the UAW-CIO attorneys, Joseph L. Rauh, Jr., clerked for Frankfurter as a holdover from Justice Cardozo's chambers in 1939. *See* Transcript of interview by Niel M. Johnson with Joseph L. Rauh, Jr., in Washington, D.C., at 4–7 (June 21, 1989), *available at* http://www.trumanlibrary.org/oralhist/rauh.htm (noting that Frankfurter was a major influence on Rauh, helped him obtain his first job in Washington, and later hired him as a clerk). This would appear to be a disqualifying conflict, but the character of such contacts had been clouded at the Court since the painful 1946 feud between Justices Black and Jackson over Black's participation in *Jewel Ridge Coal v. UMW*, 325 U.S. 897 (1945). Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 208 (1988). Justices might have concluded that Frankfurter's link, given the fact the Justice would be ruling against the party represented by his former clerk, was not worth another potentially divisive fight.

[252] *See Auto Workers,* 352 U.S. at 591. Frankfurter was joined by Justices Reed, Burton, Clark, J.M. Harlan II, and Brennan.

[253] *Id.* at 594.

[254] Jury verdict, United States v. UAW-CIO, 138 F. Supp. 53 (E.D. Mich. 1956) (No. 35004) (on file with author); *see also Find UAW Not Guilty in TV Political Show*, CHI. DAILY TRIB., Nov. 7, 1957, at B2 (reporting that verdict came after two hour deliberation, trial lasted one week); *UAW Found Innocent of Charge of Illegal Electioneering in '54*, WALL ST. J., Nov. 7, 1957, at 8. The District Court's jury instructions noted that no union members objected when their dues were set in 1954, and that the jury should take this into account when deciding whether the money for the broadcasts was obtained on a voluntary basis. John F. Lane, *Political Expenditures by Labor Unions*, 9 Lab. L.J. 725, 733–35 (1958) (quoting jury instructions).

restrict union political advertising, and that the indictment against the UAW stated a violation of that statute. Not long before, Frankfurter, in a 1947 *Columbia Law Review* article, had offered a defense for the "plain reading" of statutes and against "loose" judicial constructions, and so would have been well-positioned to bring this argument into the case.[255]

Moreover, elaborating on this history would not seem to save the Court from an inquiry into the constitutionality of the labor expenditure provision, if the Court had been willing to address that question.[256] Nor does it serve to form a basis for distinguishing between *Auto Workers* and *CIO* or *Painters*, since each case was brought under the same version of the statute. Finally, none of the parties here briefed this material, so assembling the history meant additional work.[257] Why is it here?

For a Justice who had been on the Court in *CIO* nine years before, and for one willing to consult those files or direct his clerk to them, this opinion involved less work than it would initially seem. The Government briefed the legislative history thoroughly, yet unsuccessfully, in its *CIO* brief. That brief is practically identical in many places to the Frankfurter history in *Auto Workers,* nine years later.

For instance, the precise quote from Elihu Root's 1894 address is in the Government's *CIO* brief (although deeming him "sober-minded" was Frankfurter's flourish.)[258] Both the narrative in the *Auto Workers* opinion and *CIO* brief unfold alike until Frankfurter added a section about the 1940 Hatch Act Amendments, a piece the Government's brief relegated to a footnote.[259]

Ironically, the Government's account of the legislative history behind the 1943 Smith-Connally Act is less sweeping and laudatory than the account given in *Auto Workers*. The Government's brief admitted that hearings on the bill had not focused on the union contribution ban, and was careful to note that Congressman Landis's remarks, pivotal in *Auto Workers*, were about a different and unsuccessful measure.[260]

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[255] Frankfurter, *supra* note 28, at 536, 545.

[256] Comment, *Section 304*, *supra* note 207, at 814.

[257] Frankfurter's file from this case can be found in the Papers of Felix Frankfurter, Harvard Law School Library, Box 96, Folders 11 to 15. Notations on drafts of the *Auto Workers* opinion indicate that Frankfurter was assisted by Harry H. Wellington, who clerked for the Justice in 1955 and 1956. Wellington is now an emeritus Professor of Law at Yale Law School. Court scholars observe that Frankfurter made heavy use of clerks for opinion writing. *See* ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 205–06 (2006).

[258] Brief for the United States at 15, *Auto Workers*, 352 U.S. 567 (1957) (No. 44); Felix Frankfurter, Draft of *Auto Workers* Opinion at 6 (with notation in Frankfurter's hand inserting "sober-minded"). The quotes from Alton Parker and President Theodore Roosevelt that follow the Root quote in the opinion (but which we do not discuss specifically here), are also exactly as quoted in the Government's *CIO* brief. *See* Brief for the United States, *supra*, at 16. The quote from Senator Robinson (R-Ind.) that follows, *Auto Workers*, 352 U.S. at 576, is also drawn directly from the Government's CIO brief. Brief for the United States, *supra*, at 22.

[259] *Auto Workers*, 352 U.S. at 577–78; Brief for the United States, *supra* note 258, at 23.

[260] Brief for the United States, *supra* note 258, at 23–25.

In general, the Government brief's descriptions and excerpts about the later congressional investigations and debate are more fair, even-handed, accurate, and quite a bit longer than the *Auto Workers* opinion's coverage of the same material. The Government wasn't simply being generous. A key element of its defense of Congress's actions, in light of the dearth of debate on any of the key campaign finance restrictions, was that Congress had already engaged in the necessary debate in these special investigations. "As a result," explained the Government, "very little material on Section 504 is found in the hearings on the Taft-Hartley bills."[261] The lack of formal legislative debate, the Government would have the Court believe, was a manifestation of efficiency, not a lack of focus. The Government thus explained away an otherwise key problem with looking to the legislative history for evidence of Congress's "careful" weighing of alternatives—the fact that congressional deliberation is not much in evidence.[262] The *Auto Workers* narrative, by contrast, admits of no problem with the lack of debate requiring explanation.

It should be troubling that the Court adopted the history as argued by a litigating party in another case as its own. Lawyers, as advocates, are expected to use history differently than are judges or historians.[263] "The lawyer's use of history, states a federal judge flatly, 'is entirely pragmatic or instrumental. His history may be fiction, from the standpoint of a scholarly historian, but if it produces victory, it has served its purpose.' "[264] Moreover, the *Auto Workers* account exaggerated the Government's history. Had the source of this material been clearer or even cited, one wonders whether subsequent courts would have been more skeptical about adopting this narrative without taking a closer look.

Even after learning the genesis of this material, the reader may still wonder why it was included—and embellished in some places to better serve the fable of reform. One possible answer is that the Court felt it necessary to make a strong argument to provide rhetorical support for deference to Congress in this context. At this point in doctrinal development, courts still evaluated many First Amendment cases using the "clear and present dan-

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[261] *Id.* at 40.

[262] The Government's brief, in summation, provided an eloquent defense for Congress's choice, that appeared nowhere in Congress's debates:

> No man was intended to be silenced by the prohibition of this statute, no group of men voluntarily formed for political expression to be gagged. But existing economic units, created for economic objectives, may not, under the terms of this statute, profess to speak for all their investors or members when the fact is that such profession of unanimity can be false, and the ability to make the profession can be the result of economic fraud . . . or economic duress. . . .

Id. at 58.

[263] Alfred Kelly labeled this practice "law-office" history, the selection of certain historical information by parties "favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered." Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13.

[264] CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 192 (1969).

ger" test.[265] Under that formulation, legislatures could restrict speech only when its utterance threatened serious and imminent destruction of life, property, breach of the peace or other violence.[266]

One might reasonably have predicted that union political expenditures could not be restricted under the "clear and present danger" test.[267] Congress's justification for prohibiting union expenditures, setting aside politics momentarily, was not that the union's expression would cause violence or other "danger," but merely that union members who were in the minority might otherwise be coerced into supporting political objectives with which they disagreed.[268] A decision holding the law constitutionally infirm would seem especially justified when the statute, as was the case in *Auto Workers*, carried criminal penalties. One 1946 constitutional law treatise, which one might expect to reflect the general wisdom of the time, noted simply that the First Amendment protected non-libelous "political activity and propaganda."[269]

Yet in reality the Court's decisions preceding *Auto Workers* were not this consistent. The Court sustained a number of laws against First Amendment challenges without reference to the "clear and present danger" test.[270] It also protected speech against regulation without expressly applying the test.[271] Justice Frankfurter, for his part, could argue for broad protections for speech in one case,[272] and for a more deferential balancing test that deferred

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[265] *See* 12 WILLIAM M. WIECEK, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 151 (2006) (noting that until 1942 the "clear and present danger" test was the only doctrine available in political speech cases).

[266] *See, e.g.*, AFL v. Swing, 312 U.S. 321, 325 (1941) (Frankfurter, J.) (concluding that no "imminent and aggravated danger" existed yet reversing injunction of picket, affirming right of non-employee picketers); Thornhill v. Alabama, 310 U.S. 88, 104–05 (1940) (invalidating criminal prosecution of AFL pickets); Carlson v. California, 310 U.S. 106 (1940) (similar); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (reversing criminal conviction for playing anti-sect record on streets). *See generally* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 88–39, at 871 (1963).

[267] *See* United States v. CIO, 77 F. Supp. 355, 356–58 (D.D.C. 1948) (applying "clear and present danger" test to union newspaper expenditure, and finding legislation unconstitutional).

[268] Comment, *Section 304*, *supra* note 207, at 818. This Comment explores whether the position of dissenting minorities in political matters is different than in other matters, and if it is, whether it could be remedied by measures short of a ban, such as an opt-in or opt-out system. *Id*. at 818–22.

[269] SAMUEL P. WEAVER, CONSTITUTIONAL LAW AND ITS ADMINISTRATION 433 (1946).

[270] *See* Comment, *Section 304*, *supra* note 207, at 818 n.45 (citing Public Workers v. Mitchell, 330 U.S. 75 (1947) (Reed & Frankfurter, JJ., concurring) (rejecting CIO challenge to Hatch Act political activity limits); Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U.S. 722 (1942) (Frankfurter, J.) (upholding injunction on picket at restaurant when restaurant not locus of labor dispute); Milk Wagon Drivers Union of Chicago, Local 1753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941) (Frankfurter, J.) (enjoining picket when labor dispute has involved violence); *see also* Jones v. Opelika, 316 U.S. 584 (1942) (Reed, J.) (upholding conviction of Jehovah's Witnesses for failing to pay fees before selling books).

[271] *See* Schneider v. New Jersey, 308 U.S. 147 (1939) (Roberts, J.) (reversing prosecution of pickets for violating various laws).

[272] AFL v. Swing, 312 U.S. 321, 326 (1941) (decided Feb. 10, 1941); *see generally* Royal C. Gilkey, *Mr. Justice Frankfurter's Interpretation of the Constitutional Right of Labor in a*

to "reasonable regulations"[273] in remarkably similar cases spanning just a little over a year's time.

Frankfurter had little use for the "clear and present danger" test. He observed once that "clear and present danger" "was a literary phrase not to be distorted by being taken from its context."[274] Also, several decisions could support the position that unions did not enjoy the same First Amendment rights extended to natural persons, and that Congress could thus regulate their speech without showing a "clear and present danger."[275]

Lower courts, for the most part, had upheld "corrupt practices" laws as a rational regulation of elections, and accordingly had permitted legislatures to regulate a variety of candidate and party activity.[276] But as reform laws reached beyond those political entities to "outside" groups and "independent" activity, as in Taft-Harley, would they be found to tread on protected rights of speech and association?[277] This question remained unresolved. Test cases arising out of previous union prosecutions under Taft-Hartley, as we saw above, had not gone well for the government.[278]

The Government in its Supreme Court brief in *CIO*, observing the difficulties for its case posed by the "clear and present danger" test, argued that the this test should not bar enforcement of a statute "where the right to be protected, the right of free elections, is as basic to democratic government as the First Amendment itself."[279] The Court, as we know, avoided the entire area in that case. By concluding that the activity in *CIO* fell outside those "expenditures" regulated by Congress, the Court did nothing to clarify the constitutional burden, and left this argument lingering.[280]

Statutory Context With Special Attention to Picketing and Associated Union Activity, 18 UMKC L. REV. 133, 161-64 (1949–50) (discussing Frankfurter's record in labor and expression decisions).

[273] *Ritter's Cafe*, 315 U.S. at 726.

[274] Pennekamp v. Florida, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring); *see also* Dennis v. United States, 341 U.S. 494, 527 (1951) (Frankfurter, J., concurring) (describing "clear and present danger" test as an "uncritical libertarian generalit[y]").

[275] *See* Lane, *supra* note 254, at 737–38 (citing, *inter alia*, Hague v. CIO, 307 U.S. 496 (1939)). A court's singular consideration of the *corporate* contribution ban, in a 1916 decision, didn't view the law as a burden on speech or press at all. United States v. U.S. Brewers' Ass'n., 239 F. 163, 169 (W.D. Pa. 1916).

[276] *See* Kallenbach, *supra* note 118, at 18–20.

[277] *Id*. at 20-23; *see also* UROFSKY, *supra* note 4, at 23 (noting that *Auto Workers* "marked the first time that any group had been indicted for speaking to the public about political issues . . . .").

[278] *See supra*, notes 229–238. In the *Painters* test case, the trial court's opinion denying the union's motion to dismiss contains a recitation of the legislative history of the corporate and labor ban. *See* Transcript of Record at 18, United States v. Painters Local Union No. 481, 172 F.2d 854 (2d Cir. 1949) (No. 139-21162) (on file with author). If the government had filed briefs at trial, those briefs were not preserved in the file, so it is not possible to see whether or not the trial judge adopted the government's briefed history as its own.

[279] Brief for the United States, *supra* note 258, at 9. The Government also argued that, were the Court to conclude that this test applied, the aggregate wealth of entities "is a clear and present danger to free federal elections." *Id*. at 78.

[280] United States v. CIO, 335 U.S. 106 (1948).

The *Auto Workers* case came to the Court at a time when the Court's First Amendment doctrine was in transition.[281] The "clear and present danger" test had been giving way to more nuanced balancing tests, as the Court grappled with a variety of new speech restrictions, among them laws requiring oaths of loyalty and restrictions on activities by Communists, lobbyists, and government employees.[282] Consequently, any additional support in history that could be found by a decision's author—especially a Justice with what had been described as "tenderness for legislative judgment"—adds force and credibility to the conclusion.[283] Several of Frankfurter's colleagues apparently agreed. Justice Burton wrote in his note concurring with Frankfurter's draft that "the legislative history is appropriate and extremely helpful," and Justice Reed called the draft "a fine example of the persuasiveness of the historical treatment."[284]

Frankfurter was more restrained than many of his colleagues about whether the Court's constitutional interpretation should trump the wisdom of legislatures and how willing it should be to find laws unconstitutional.[285] Frankfurter has been called "the most history-minded Justice ever," and his opinions "were often dominated by lengthy historical essays" used as "an instrument of . . . restraint."[286] A history that provided a rationale for judicial deference—and the Government's *CIO* brief was certainly this—would likely have been especially appealing to him. Frankfurter had used history elsewhere to cloak his arguments with a mantle of reasonableness and moderation.[287] An extensive and consistent history of regulation made *Auto*

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[281] *See* WIECEK, *supra* note 265, at 201 ("In the First Amendment area, the Vinson Court was a transitional body. . . ."); *see also* S. Doc. No. 88-39, *supra* note 266, at 871–80 (describing development of "clear and present danger" standard and standards applied to union activities through the 1940s and 1950s); PAUL A. FREUND ET AL., CONSTITUTIONAL LAW: CASES & OTHER PROBLEMS 1253–1421 (1954) (including in First Amendment material cases applying the "clear and present danger" test as well as contemporary material disputing propriety of the test). Scholars and academics likewise debated the merits of judicial restraint—the famous Hand-Wechsler exchange came only a year later. *See* LEARNED HAND, THE BILL OF RIGHTS (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[282] BERNARD SCHWARTZ, AMERICAN CONSTITUTIONAL LAW 240–82 (1955) (discussing civil liberties and the Cold War); *see also* United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 102 (1947) (noting that discretion to regulate political activities of government employees "lies primarily with Congress"); United States v. Rumely, 345 U.S. 41, 46 (1953) (Frankfurter, J.) (refraining from constitutional adjudication because scope of lobbying investigation did not clearly include inquiry into purchasers of defendant's books).

[283] Gilkey, *supra* note 272, at 144.

[284] Papers of Felix Frankfurter, *supra* note 257 (Burton note dated Feb. 12, 1957; Reed note undated).

[285] FELIX FRANKFURTER, *John Marshall and the Judicial Function*, *in* FELIX FRANKFURTER ON THE SUPREME COURT 547–57 (Philip B. Kurland ed., 1970).

[286] Kelly, *supra* note 263, at 129; *see also* HORWITZ, *supra* note 47, at 235–37 (describing Frankfurter's deferential views as an academic and justice).

[287] *See* H. N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 193–98 (1981) (contrasting Frankfurter's use of history in religion and academic freedom cases as justifying intervention with his allegiance to deference in other contexts).

Workers' departure from recent labor precedent seem orthodox and unremarkable.

V. Why This Matters

"The validity of history as a principle of adjudication . . . depends on its accuracy, its relevance to the decisions reached, and how it relates to other principles used in the judicial opinion."[288] Frankfurter completed his long recitation of the history of reform with a final exhortation to the Court to defer to Congress's "calculated" judgments:

> To deny that such activity, either on the part of a corporation or a labor organization, constituted an 'expenditure in connection with any (federal) election' is to deny the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital. More particularly, *this Court would have to ignore the history of the statute* from the time it was first made applicable to labor organizations.[289]

The Court did not ignore history; it just adopted an incomplete and misleading summary of history, one which had been provided by an interested party in other litigation. Courts since *Auto Workers* have relied upon its account of campaign finance legislation, especially in contexts where the Court majority seeks to defer to regulators, without understanding its flaws, gaps, and manipulation of the material.

A misstatement of history that leads to erroneous legal conclusions is worse than "ignoring the history of the statute." It is dressing up a fable as fact. By so doing, this opinion suppressed legitimate questions about the purpose, scope, and permissibility of legislative restrictions on politics. In many other areas of the law, judges question regulations articulated by those who stand to benefit from them. This is commonly interpreted as a conflict of interest, justifying greater scrutiny and less deference. In campaign finance, Congress's compromised position instead becomes the hallmark of expertise when the issue is how legislators dictate the rules of elections.[290] The reform fable, with history, can convince courts to accept uncritically lawmakers' naked preferences for how to regulate politics. Even worse, the history demonstrates that groups of Congressmen, lacking majority support, can on occasion successfully manipulate the process. Yet judges, soothed by a "history" of reasoned decision making, do not ask the hard questions.

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[288] *Id.* at 177.

[289] *Auto Workers*, 352 U.S. 567, 585 (1957) (emphasis added).

[290] Samples, *supra* note 4, at 189–232 (using Watergate-era history to show similar conflict of interest).

Even so, one might reply that this is just so much water under the bridge. Courts use history as a makeweight, not as a rule of decision. The question of whether labor unions may make independent expenditures free from congressional impediment has been asked and answered, and the particulars should not bother people today too much. Perhaps "[i]t is often more important that something be settled than that it be settled just right."[291] Scholars in 2008, then, should not argue that "history" swung the balance against the UAW. The Court, having articulated whatever justification it could for its conclusion, settled the issue.

Were this a stable area of constitutional law, this perspective might be more persuasive. In this world, however, litigants continue to raise difficult questions about the proper role of regulation in preventing certain kinds of groups from saying certain things. Incorporated issue groups have made headway against particular restrictions on their use of corporate treasury funds in candidate-specific "lobbying" advertising.[292] One might expect that the same conclusion would hold for a group using union funding.

Incorporated interest groups today establish press outlets to distribute commentary and political information free from federal campaign finance restrictions.[293] When a labor union does likewise, if litigated that case would revive the legal question presented—but never really settled—in *Auto Workers*.

Instead of repeating a flawed history of reform "progress," advocates of political regulation, and sympathetic Justices, should be expected to argue for their positions on the merits, fully accounting for how similar reforms may have worked or not worked before. Courts should discard the *Auto Workers* history and take a fresh look at the scope, intent, and effects of political regulation, including the Taft-Hartley corporate and labor expenditure ban. It is beyond the scope of this article to predict whether, in abandoning bad history, courts might draw different conclusions about the permissible scope of these campaign finance restrictions, or about related regulations that define the scope of "political committee" and apply these prohibitions to political committee receipts. But they might.

Finally, academics and pundits should abandon the fable of reform. Reform is much more, and much less, than just a process of continuing incremental improvement in our laws. Reform, like war, is politics by other means.

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[291] Richard Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 589 (2000) (distinguishing interest in stability from historical piety).

[292] *See* FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007).

[293] James Dao, *Gun Group's Radio Show Tests Limits on Advocacy*, N.Y. TIMES, June 16, 2004, at A14.