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REVISITING THE FABLE OF REFORM

Allison R. Hayward, George Mason University
School of Law

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Revisiting the Fable of Reform

Allison R. Hayward*

I. Introduction

There is history, and there is fable. History informs us about what happened, for 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.

The modern campaign finance fable has its root in progressive political arguments. Advocates placed great faith in the management by experts of social problems, and the application of scientific principles to politics. For campaign finance reform, this meant the study of campaigns, the diagnosis of corruption and the prescription of legislative remedies. To sustain this idea over time, as it turns out, required a fable. That fable justified past reform efforts as calculated, measured and reasonable remedies, prescribed by Congress (or legislators, or regulators) after careful examination of political ailments. As new symptoms arise, the fable taught that lawmakers (or regulators) are justified in revisiting the diagnosis, unfettered by judicial interference or constitutional constraint.

Alone, the fable has less power, because the audience could always reason that this story, while appealing in the abstract, just isn't realistic. If one could write the history of reform to fit the fable, those objections are answered. The fable isn't merely an abstract description anymore, it becomes what *really* happened.

In the Supreme Court's 1957 majority opinion in *United States v. UAW-CIO*,¹ known more commonly as *Auto Workers*, Justice Frankfurter added the necessary history to make the reform fable work. While 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* contended that Congress had applied measured and incremental reform step-by-step as the need for regulation arose. That version of events cast the Court's determination against the defendant union in a false light of unassailability.

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 their reaction. One would not want unelected judges to interfere in such a delicate process.

* Assistant Professor of Law, George Mason University School of Law. I am grateful for the cheerful research support of Robert Crow ('08) and the perceptive comments of Bob Bauer, Ross Davies, Renee Lerner, Bob Mutch, Brad Smith, and _____. Any errors or omissions are mine alone.

¹ *United States v. International Union United Automobile, Aircraft, and Agricultural Implement Workers of America (UAW-CIO)*, 352 U.S. 567 (1957) ("*UAW-CIO*" or "*Auto Workers*")

² See *infra* notes _____

This Article corrects and supplements the history in *Auto Workers*. It examines in detail the specific events Frankfurter cited in the opinion.³ It shows how the opinion avoided political context and truncated legislative history. What emerges from a more complete account of the history is a messy, complicated record, dictated by political opportunism.⁴ At each step, reform is a way to capitalize on public sentiment (against the Sugar Trust, or John L. Lewis, as we shall observe) 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, this Article's section III 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 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 evaluating closely *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 adapt history to a fable. The 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 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 optimist's view that lawmaking in this field has proceeded logically and reasonably toward the goal of

³ See *UAW-CIO*, 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).

reducing corruption in political campaigns. Courts, academics, and counsel cite *Auto Workers* quite a bit. A recent KeyCite of the opinion produced 150 citations in cases, as well as 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’Conner 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.” 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*.⁹ It commenced with an invocation of the “sober-minded Elihu Root” straight from Frankfurter’s opinion.¹⁰

The Court included this extensive excerpt from *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.”¹¹ Surely, such care on the part of Congress is entitled to a judge’s respect.

The *McConnell* opinion is not alone. Justice Souter, who joined the Stevens/O’Conner opinion in *McConnell*, pulled *Auto Workers* references into his majority opinions in *FEC v. Beaumont*,¹² *FEC v. Colorado Republican Federal Campaign Committee*,¹³ and *Nixon v. Shrink Missouri PAC*.¹⁴ 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.”¹⁵ “Not only has the original ban on direct corporate contributions endured, but so have the original rationales.”¹⁶ 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...”¹⁷

⁵ Westlaw Keycite run Aug. 13, 2007.

⁶ 540 U.S. 93 (2003)

⁷ 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 Pub. L. 107-155, 116 Stat. 81, enacted March 27, 2002.

⁹ *McConnell v. FEC*, 540 U.S. 93, 115-117 (2003).

¹⁰ *Id.* at 115.

¹¹ *Id.* at 117 (citing *National Right to Work Comm*, 459 U.S. 197, 209 (1982)). As noted below, *National Right to Work* depends heavily on *Auto Workers*, again, for its recitation of reform history.

¹² 539 U.S. 146 (2003).

¹³ 533 U.S. 431, 452 (2001) (*Colorado II*).

¹⁴ 528 U.S. 377 (2000).

¹⁵ *Beaumont*, 529 U.S. at 153.

¹⁶ *Id.* at 154.

¹⁷ *Id.* at 156.

Before *Beaumont*, the Court had held that another “right to life” group possessed the right to make independent expenditures in federal election, 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.¹⁸ Yet when the Court applied this restriction to the Massachusetts group, it found unconstitutional the bar on it 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’s *MCFL* opinion: “Groups such as MCFL, however, do not pose that danger of corruption.”¹⁹

Yet, in Justice Souter’s hands, the *Auto Workers* history led to the *opposite* conclusion in *Beaumont*. Most recently, Souter again deployed *Auto Workers* and the “history of progress” in campaign reform in his dissenting opinion to the court’s recent *Wisconsin Right to Life* decision.²⁰ 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 their view, should permit a statutory bar on this group spending its funds on a lobbying advertisement that criticized an officeholder (who was also running for re-election).²¹

Assuming the *Wisconsin Right to Life* litigants would have appeared to Justice Brennan to be sufficiently “like” its Massachusetts kin to deserve protection, Souter needed some basis in *Wisconsin Right to Life* to argue that times have changed, and that the changes justify a different holding. The reasoning of *Auto Workers*, coupled with recent developments, fits the bill. Thus, “from early in the Twentieth Century through the decision in *McConnell*” Souter wrote, “we have acknowledged that the value of democratic integrity justifies a realistic response when corporations and labor organizations commit the concentrated monies in their treasuries to electioneering.”²² If Congress knows more now, it can regulate more now, in short.

Auto Workers is also a key precedent in Rehnquist’s opinion for the Court in *FEC v. National Right to Work*.²³ 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 “we need only summarize the development here.”²⁴

¹⁸ 479 U.S. 238, 246-47 (1986).

¹⁹ *Id.* at 259.

²⁰ ___ U.S. ___, 127 S. Ct. 2652, 2687 (Souter, J., dissenting) (using *Auto Workers* history, *id.* at 2689-91)

²¹ *Id.* at 2697.

²² *Id.*

²³ 459 U.S. 197, 208-09 (1982).

²⁴ *Id.* at 208.

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.²⁵ 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*, it may be that the meaning of *Auto Workers* has evolved. Justice Brennan used it in a decision that saved a political non-profit 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, appropriate to the time and experience of legislators, for reducing corruption.

But *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. Reexamining *Auto Workers* is important to understand what the true history has been, to observe how and why Congress has enacted certain laws and not others, and to reevaluate what discretion Congress deserves in this highly-charged and conflicted area.

III. The Autoworkers 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 25 pages in the U.S. Reports, of which 19 are devoted to history. Frankfurter began his history of campaign finance reform by justifying 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.²⁶

With this bold introduction, Frankfurter demonstrated that understanding the history of reform was *necessary* to determine the proper scope of particular reforms.²⁷

²⁵ *McConnell*, 540 U.S. at 115-17; *MCFL*, 479 U.S. at 257, *Shrink Missouri*, 528 U.S. at 289, *Beaumont*, 529 U.S. at 153-54.

²⁶ *UAW-CIO*, 352 U.S. at 570.

²⁷ Frankfurter used the "not less than" construction in other works. See FELIX FRANKFURTER, OF LAW AND LIFE & OTHER THINGS THAT MATTER 97 (1965) (Philip Kurland, ed.) ("Since the functions of the Supreme Court are what

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 role of the “individual citizen” in that process. Thoughtful management of this problem, Frankfurter might say, should be left to the people’s representatives.

Yet what Frankfurter meant by “integrity” and the citizen’s “role” remained undefined. At this point in the opinion, it isn’t 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 election process.”

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

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:

‘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.’ 2 Morison and Commager, *The Growth of the American Republic* (4th ed. 1950), 355.

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 fails 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.²⁸ The Sixteenth

they are and demand the intellectual and moral qualities that they do, inevitably touching interests not less than those of the nation . . .)

²⁸ *Pollock v. Farmers’ Loan and Trust*, 157 U.S. 429 (1895) (holding 1894 income tax unconstitutional).

Amendment, which allowed Congress to enact the U.S. income tax, dated to 1913. Frankfurter might have made the point that judicial interference with this Act was unwise, as shown by the eventual amendment of the Constitution. That point would have obvious implications for the case before the Court, but he didn't make it.²⁹ Instead he used these dates to begin his summary at an earlier point, and then turned the opinion toward the roots of the corporate 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 set the stage in Gilded Age America, he moved the discussion into the reformer's 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 soberminded 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:

*'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), 143.³⁰

²⁹ 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 MORISON & COMMAGER, *GROWTH OF THE AMERICAN REPUBLIC* 380-81 (1950 ed.) (listing progressive political reforms of women's suffrage, Australian ballot, direct primaries, direct election of Senators, referenda, home rule, civil service reform, "short ballot," regulation of campaign *expenditures*, executive leadership, and tax reform).

³⁰ *UAW-CIO*, 352 U.S. at 567.

This passage stands as one of the most frequently cited, and thus most influential, in the *Auto Workers* decision.³¹ Yet Frankfurter’s account is misleading in several respects.

i. Publicity v. Prohibition

New York, as it happens, was the first state to enact disclosure laws, in 1890.³² Its law required *only* candidates (not political committees) to report their spending. Laws enacted in Colorado and Michigan in 1891 followed suit, and in 1892 Michigan enacted a stronger law to provide reporting by candidates *and* committees, and centralization of candidates’ expenditures in their committees.³³ That Michigan law also provided for better enforcement.³⁴ Massachusetts, California, Kansas and Missouri soon adopted their own disclosure laws.³⁵ From 1890 to 1895 publicity laws expanded into many states, and contained a variety of specific provisions.³⁶

Auto Workers asserted that the theory behind publicity laws held that such exposure would discourage corporate funding.³⁷ 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.³⁸ Among other reforms, reformers sought a “secret ballot” that would deny the vote-buyer proof that the voter had voted as promised.³⁹ Even so, a variety of corrupt election day activities persisted.⁴⁰

Requiring disclosure of campaign finance activity – especially expenditures – was part of this larger effort to thwart corrupt campaign practices, vote buying, bribery, and

³¹ See *supra* note _____. This influence is not limited to court decisions. Accounts of the history of campaign finance reform quote the *identical* passage. See UROFSKY, *supra* note 4 at 12.

³² EARL SIKES, STATE AND FEDERAL CORRUPT PRACTICES LEGISLATION 122 (1928) (citing Acts of N.Y. 1890 ch. 94). That law required:

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, specific nature of each item, and the purpose for which it was expended or contributed.

³³ PERRY BELMONT, RETURN TO SECRET PARTY FUNDS 128-34 (1927).

³⁴ *Id.* at 129.

³⁵ *Id.* at 129-31.

³⁶ *Id.* at 128-34.

³⁷ UAW-CIO, 352 U.S. at 567.

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

³⁹ *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 p. 4.

⁴⁰ Ernest Ingersoll, *Election Day in New York*, CENTURY ILL. MAG. (Nov. 1896) at 3-15 (describing use of watchers, pasters, ward heelers, and captains on Election Day).

voter intimidation centered in the parties and candidate campaigns.⁴¹ Public exposure of foul uses of campaign money would discourage such activities. By 1895, 13 states had enacted laws requiring expenditure reports.⁴² Whether corporate contributions as a subset of “money” were desirable or undesirable was simply not part of this debate. Reformers wanted to restrain corrupt *use* of money, from *whatever* source.

The legislative “innovation” barring corporations from contributing did not appear until 1897 (in Tennessee, Missouri, Florida and Nebraska).⁴³ 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.”⁴⁴ So any “free speech” or “association” claims would have seemed out of place.

In contrast to the claim made in *Auto Workers*, these reforms were independent of other “corrupt practices” or publicity measures enacted in these states.⁴⁵ Corporate contributions were a separate object of reform with separate justifications.⁴⁶

Corporate contribution prohibitions sought to attack a different problem from that addressed in publicity laws. Typically corporate bans arose once particular corporations provoked the ire of legislators. In the context of the 1897 statutes, railroads were the main target. “It has been charged that the railways exercise a strong influence in politics in these and other western states, and while the propriety 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.⁴⁷ Railroad companies in these states enjoyed local monopolies on transportation, and used this

⁴¹ *Hill Cheerfully Approves*, N.Y. TIMES, Apr. 5, 1890 at 2.

⁴² BELMONT, *supra* note 33 at 134-35; E. Dana Durand, *Political and Municipal Legislation in 1895*, 7 ANNALS AM. ACADEMY OF POL. AND SOC. SCI. 35, 40 (1896).

⁴³ Robert Mutch, *Before and After Bellotti: the Corporate Political Contributions Cases*, 5 ELECTION L. J. 293 n.1 (2006) (citing state statutes).

⁴⁴ SIKES, *supra* note 32 at 127. *See also* *People v. Gansley*, 158 N.W. 195, 200 (Mich. 1916) (“the police power of the state is exercised over [its] corporations with great freedom for the general good.”)

⁴⁵ E. Dana Durand, *Political and Municipal Legislation in 1897*, 11 ANN. AM. ACAD. OF POL. AND SOC. SCI. 38, 43 (Mar. 1898).

⁴⁶ 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*, NORTH AMERICAN REV. (Feb. 1905); *reprinted in* *The Abolition of the Secrecy of Party Funds*, S. Doc. 495, 62nd Cong. 2d Sess. (1912) at 50. 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 ILL. MAG. Sep’t 1894 at 667 (remedy for political extortion of corporate contributions lies in sworn disclosure statements and in “an awakened moral sense of the people who buy the peace.”)

⁴⁷ Durand, *supra* note 45 at 43. No doubt, populist opposition in these states to the 1896 election of William McKinley also bore on the success of these corporate contribution bans, *see* Mutch, *supra* note 4 at xvii; HERBERT D. CROLY, MARCUS ALONZO HANNA 334 (1983 ed.) (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*, CHICAGO DAILY TRIB., May 28, 1897, at 1 (reporting rumors that Hanna agreed to a bill for railroads in return for 1896 contributions, which Hanna denied)

power to exact high rates and state subsidies.⁴⁸ Rail developers had also engaged in sharp dealing with communities to obtain public funding for lines that were, on occasion, never built. Efforts to repudiate these bonds were blocked in the courts.⁴⁹ This situation was, understandably, not popular with the customer base or with politicians eager to capture their support.⁵⁰ 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 1896.⁵¹

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.⁵² 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.⁵³ 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.⁵⁴ Uniform government-supervised voter registration was another reform goal.

When New York’s 1890 “corrupt practices” publicity measure passed its legislature, it was also tied to a ballot reform bill that received the greater fraction of attention of the press.⁵⁵ There were partisan differences in enthusiasm for disclosure; Republicans cheered ballot reform in 1890, but the Democratic Governor only “cheerfully approved” this reform package once sweetened by the inclusion of a

⁴⁸ See H.W. BRANDS, *THE RECKLESS DECADE: AMERICA IN THE 1890S* 180-81 (1995).

⁴⁹ Populist leaders sought to attack abuses both by corporations and the courts that held for them. See Alan F. Westin, *The Supreme Court, The Populist Movement and the Campaign of 1896*, 15 J. POL. 3, 19-20 (1953).

⁵⁰ See *Huntington as a Witness*, WASH. POST, Feb. 14, 1896 at 4.

⁵¹ See APPLETON’S ANNUAL CYCLOPEDIA 1896 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*, THE INDEPENDENT, July 8, 1897 at 4.

⁵² WILLIAMS M. IVINS, *MACHINE POLITICS AND MONEY IN ELECTIONS IN NEW YORK CITY* 82-89 (1887) (U of Mich. Reprint)

⁵³ *The One Cure for Bribery*, N.Y. TIMES, Nov. 20, 1888 at 4.

⁵⁴ *Laws 1890*, Chap. 94. See also *Purifying the Elections*, N.Y. TIMES, Mar. 22, 1887 at 5; *Real and Sham Reform*, N.Y. TIMES, Mar. 16, 1889 at 4. The 1890 disclosure law read:

Every candidate who is voted for at any public election held within the 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, specific nature of each item, and the purpose for which it was expended or contributed.

The Corrupt Practices Act, N.Y. TIMES, Nov. 15, 1890 at 3.

⁵⁵ 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, “The 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 Cheerfully Approves*, N.Y. TIMES, Apr. 5, 1890 at 2.

disclosure requirement.⁵⁶ The subsequent disclosure reports, albeit limited, were of some interest at the time. Reporters dug into the lists to find funds spent in improper treating, such as extraordinary sums for “pasters.”⁵⁷

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...”⁵⁸ 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.⁵⁹

ii. 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, the New York held one of a series of irregularly scheduled constitutional conventions.⁶⁰ 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.⁶¹ Some suggested that the convention take up voting by machine, and disaggregate local and federal elections.⁶² Limits on corporate contributions were not on that list, although it was anticipated that the convention would examine the relations of the State to its private corporations in other areas.⁶³

The corporation contribution ban, touted by Elihu Root during the 1894 New York Constitutional convention, had an independent pedigree. In general, hostility to corporations had already born political fruit with the passage of the Sherman Act in 1890

⁵⁶ *Hill Cheerfully Approves*, *supra* note 55.

⁵⁷ *The Corrupt Practices Act*, N. Y. TIMES, Nov, 15, 1890. “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.” *Id.* Pastors were glued papers with the names of substituted or write-in candidates. Voters would be given the pasters, along for instruction where on the ballot to use them, to encourage votes for candidates whose names (for whatever reasons) did not appear on the printed ballots. See Durand, *Political and Municipal Legislation in 1895*, *supra* note 42 at 38.

⁵⁸ *Election Expenditures*, 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.

⁵⁹ Even so, New Yorkers were well aware of corporate political activity, see the description in JAMES BRYCE, *THE AMERICA COMMONWEALTH* 128-29 (Vol II 1888). Bryce identified tariff industries, railroads and government contractors as sources of corruption.

⁶⁰ “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 . . .” *The Constitutional Convention*, HARPER’S WEEKLY, May 26, 1894 at 483.

⁶¹ *Id.*, see also REVISED RECORD OF CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK Vol. 1 p. 6 (on taking the chair as President of the Convention, Joseph Choate remarking “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 . . .”).

⁶² *New York Constitutional Convention*, 49 ALBANY L. J. 17 (1894) at 291; *First Step Toward Municipal Reform*, CENTURY ILL. MAG. (Feb. 1894) at 630.

⁶³ ALBANY L. J., *supra* note 62 at 291.

as well as the enactment of similar laws in many states.⁶⁴ The popularity of such sentiments, and related political populist economic causes (like free silver) increased in the wake of the financial panic of 1893.⁶⁵

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.⁶⁶

Briefly, in 1894 the U.S. House of Representatives passed a revised tariff bill that included an income tax and lower tariff schedules. In particular, it admitted both raw and refined sugar free of tariff. The American Sugar Refining Company, known also as the "Sugar Trust," preferred that raw sugar be free of tariff, but sought tariffs on refined sugar from other countries.⁶⁷ When the bill came before the Senate, representatives from Louisiana insisted upon 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.⁶⁸

These revelations prompted the Democrat-controlled U.S. Senate to launch an inquiry into the sources for the various stories.⁶⁹ During these hearings, Sugar Trust executive Henry O. Havermeyer 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 that controls the local matters."⁷⁰ Havermeyer's testimony made specific mention of contributions to New York representatives. When asked by the investigation's Chairman, Senator Allen, whether the Sugar Trust

⁶⁴ JONATHAN HUGHES, *AMERICAN ECONOMIC HISTORY* 370 (1983).

⁶⁵ STANLEY L. JONES, *THE PRESIDENTIAL ELECTION OF 1896* 29-46 (1964).

⁶⁶ During the tariff scandal described *infra*, the same corporation was defending itself in a major and highly controversial antitrust suit. See *United States v. E.C. Knight*, 60 F. 306 (C.C. Pa. 1894). The Department of Justice prosecuted the company for violating the Sherman Antitrust Act. The Circuit Court for the Eastern District of Pennsylvania held in January 1894 that the Act did not extend to intrastate combinations of manufacturers. 60 F. 306, 309. On appeal, this decision was affirmed by the Circuit Court, see 60 F. 934 (3d Cir. 1894), and by the Supreme Court, 156 U.S. 1 (1895).

"The *E.C. Knight* decision became a campaign issue in the 1896 election, and subsequently was rendered irrelevant by Sherman Act decisions written by judges appointed after the election." William Eskridge and John Ferejohn, *Super-Statutes*, 50 *DUKE L. J.* 1215 (citing *Swift & Co. v. United States*, 196 U.S. 375, 391-93 (1906)), see also William Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 *YALE L. J.* 464, 491-92 (1959).

⁶⁷ The Sugar Trust scandal is described at length in Harry Peck, *Twenty Years of the Republic (Part IX)*, 22 *THE BOOKMAN* 39, 42-49 (1905).

⁶⁸ Senate Investigation of Attempted Bribery of Certain Senators to Vote Against Tariff Bill, S. Rep. 606/3 (May 24, 1894) ("*Sugar Trust Investigation*"); see *From Washington*, *CONGREGATIONALIST*, June 14, 1894 at 822; Kate Foote, *Our Washington Letter*, *THE INDEPENDENT*, Sept. 6, 1894 at 6; *National Lobby at Washington*, *FRANK LESLIE'S POPULAR MONTHLY*, Vol LVII No. 1 (Nov. 1903) at 7.

⁶⁹ *Sugar Trust Investigation*, *supra* note 68 at 85 (questioning of E.J. Edwards, Philadelphia Press); *id.* at 113 (questioning of John S. Shriver, New York Mail and Express) *id.* at 121 (questioning of Harry Walker, St. Louis Post-Dispatch).

⁷⁰ Senate Report No. 485, 53rd Cong. 2d Sess. 3 (June 1894); see also Mr. Havermeyer Talks, *WASH. POST*, Jun. 13, 1894 at 1. Coincidentally, Root had represented the Havermeyer sugar interests as a private attorney several years before, to reorganize their trustee plan. See RICHARD W. LEOPOLD, *ELIHU ROOT AND THE CONSERVATIVE TRADITION* 16 (1954).

contributed to both parties “with the expectation that whichever party succeeds your interests will be guaranteed” Havermeyer responded “We have a good deal of protection for our contribution.”⁷¹

These comments did not go over well with the Committee or with editorial writers.⁷² By October, a grand jury had indicted Havermeyer 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.”⁷³

New York media prominently covered the Sugar Trust scandal, the hearings from May through July of 1894, and revelations that continued to surface as the state constitutional convention reconvened in September.⁷⁴ Special bitterness was directed toward leaders of the U.S. Senate Democrats, as that party had campaigned successfully in 1892 against the “McKinley tariff,” yet “sold out” to the demands of the Sugar Trust.⁷⁵ Certainly this about-face (or, applying a more modern epithet, “flip-flop”) offered Republicans Convention delegates a tempting issue.

Not surprisingly, the Republican-controlled New York Constitutional Convention wasted no time in presenting the now-useful “trusts in politics” issue to the Convention. The Convention was under the control of its Republican leadership, and key decisions during the proceeding were made in party caucus.⁷⁶ Root was a leader during the process, serving as Chairman of the Judiciary Committee which voted out the various “suffrage” amendments in Article II of the State Constitution, as chairman of the

⁷¹ Sen. Rep. No. 485 at 3; *Mr. Havermeyer Talks*, WASH. POST, Jun. 13, 1894 at 1.

⁷² 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 greater enforcement authority for Senate Committee subpoenas. *Id.* The editorialist for the *Outlook* called for “absolute publicity for all campaign contributions” as a remedy for the Sugar Trust scandal. *This Week*, OUTLOOK, June 23, 1894 at 1133.

⁷³ *Sugar Trust Indictments; Some of the Opinions and Findings of the Grand Jury*, N.Y. TIMES, Oct. 3, 1894 at 4.

⁷⁴ See Kate Foote, *Our Washington Letter*, THE INDEPENDENT, Aug. 2, 1894 at 11 (coverage of sugar tariff politics). For criticism of the scandal during the convention, see *The Democratic Failure*, HARPER'S WEEKLY, Aug. 25, 1894 at 794 (“The Democrats permitted a violation of their principles for pecuniary considerations.”) (the cover art of Harper's for this issue also depicts the scandal); *Criticised by Men of Business: The Least Severe Say it was a Deplorable Indiscretion*, N. Y. TIMES, Aug. 26, 1894 at 2 (castigating Sec. 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 WEEKLY, Sept. 1, 1894 at 818; *The True Issue*, HARPER'S WEEKLY, Sept. 8, 1894 (“No more purchase and sale of laws!”)(Cover also depicts sugar trust scandal); *Republican Senators and the Sugar Trust*, N. Y. TIMES, Sept. 10, 1894 at 4; *The Democratic Opportunity*, HARPER'S WEEKLY, Sept. 15, 1894.

⁷⁵ “[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*, THE CHAUTAUQUAN, Oct. 1894 at 91. In general the Republican papers were happy to denounce the Democrats, and the Democratic papers were divided between those who criticize and those who excuse the party for supporting the tariff bill.

⁷⁶ See *Politics and Statesmanship*, HARPER'S WEEKLY, June 2, 1894 at 507.

Convention's Rules Committee, and as a leader of the Republican Caucus (dubbed the House of Lords) that controlled the convention's majority.⁷⁷

On August 21, Root, as Chair of the Judiciary 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.⁷⁸ On September 3, 1894 (which happened to be the first observation of the Labor Day holiday) Root brought the amendment before the Committee of the Whole earlier than scheduled, after a vote consenting to hear it out of order.⁷⁹ The amendment consisted of two sections, with the first providing the Legislature with the power to declare *lawful* certain uses of money by or on behalf of a candidate. Other uses would be prohibited.⁸⁰ 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 or 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 State⁸¹

Immediately, at-large delegate Frederick Holls offered an amendment to exempt corporations organized expressly for political purposes, which Root embraced.⁸² John H. Peck, a Democrat delegate from the 18th District and Morris Tekulsky, a Democrat Tammany Hall associate from the Eighth District,⁸³ both asked whether this exemption would protect Tammany, no doubt to goad Root, whose association with reform and the

⁷⁷ See *Joseph H. Choate To Preside*, N.Y. TIMES, May 8, 1894 at 1, *The Convention Near its End*, N.Y. TIMES, Sept. 22, 1894 at 5 ("House of Lords" reference). Of the 175 delegates election to the convention, 108 were Republican and 67 Democrat. 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.

⁷⁸ REVISED RECORD, VOL. II, at 948. The new amendment was numbered O.I., 391, Printed No. 443. The substituted amendment replaced No. 334, offered by Mr. Foote, which (as described in the *Revised Record*) would require the legislature to regulate primaries and conventions and restrict the use of money in these meetings. See REVISED RECORD, VOL. I at 702 (O.I. 326). "Nathaniel Foote, of Rochester, is a prominent lawyer of excellent reputation. He is a Republican." *The New York State Constitutional Convention*, AM. LAWYER (May 1894) at 212.

⁷⁹ REVISED RECORD, VOL. III at 876; See *Adjourned but Not for Good*, N.Y. TIMES, Sep't 16, 1894 at 5 (noting Labor Day Holiday).

⁸⁰ See amendment to Article 2, Section 6, REVISED RECORD at 876.

⁸¹ REVISED RECORD at 885.

⁸² REVISED RECORD at 886. Frederick Holls was a wealthy lawyer from Yonkers and an active Republican. *The New York State Constitutional Convention*, AM. LAWYER (May 1894) at 212.

⁸³ See, e.g., *Divver and Tekulsky*, N.Y. TIMES, Oct. 20, 1894 (describing fight between two Tammany associates). Tekulsky was a saloon owner and President of the New York State Liquor Dealers Association. See *P. Divvers Nose Battered*, N.Y. TIMES, Oct. 19, 1894.

Union Club was anathema to them.⁸⁴ Other delegates thought all corporate money should be barred, with no exceptions.⁸⁵ 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. It is that and nothing else.”⁸⁶ 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.”⁸⁷

As the debate continued, William P. Goodelle objected that this measure was more properly left to the legislature, rather than amended into the Constitution.⁸⁸ Goodelle also noted that by singling out corporations, the Constitution itself might attract corporate opposition and fail popular approval on the November 1894 ballot.⁸⁹ 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 . . .”⁹⁰ Root adopted this amendment, noted that this would allow the press to continue to express political views.

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 . . .”⁹¹ In context, Root meant to draw a distinction between large corporations (like the Sugar Trust) and political organizations.⁹² Root was not expressing a general sentiment about the scope and worthiness of the proposal as applied to *any* corporation; he is emphasizing its limits to persuade delegates of its reasonable scope. Possible he meant also to emphasize to a larger audience the parallels with the continuing Sugar Trust scandal.⁹³

The convention’s debate then turned toward 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, to which Root (possibly exasperated) replied that “we cannot say that there

⁸⁴ See PHILIP C. JESSUP, ELIHU ROOT, VOL. 1 1845-1909 171-72 (1938).

⁸⁵ REVISED RECORD, VOL. III at 887.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 889-93. Judge Goodelle was a Republican at-large delegate from Syracuse.

⁸⁹ *Id.* at 893.

⁹⁰ McKinstry was a Republican delegate for the 32nd District, from Fredonia.

⁹¹ *Id.* at 894-95.

⁹² 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 cites sums similar to those the Sugar Trust allegedly had given. See Record, Investigation of Attempts at Bribery, Senate Rep. 606/3, at 77-84 (reprinting *Philadelphia Press* coverage from May 14, 1894); *Id.* at 92 (questioning of Elisha J. Edwards, writer of *Philadelphia Press* letter alleging trust gave \$250,000 to \$300,000 to Democrat campaign).

⁹³ *Id.* Root would appreciate these distinctions among corporations. His corporate legal practice represented more modest interests against predation by large combinations See, e.g. PHILIP C. JESSUP, ELIHU ROOT, VOL. 1 1845-1909 97-104 (1938) (describing Root’s private practice).

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.”⁹⁴ Delegate John Bigelow asked Root why the revision was necessary given that laws were on the books prohibiting bribes.⁹⁵ Root’s response was that 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 . . .⁹⁶

The McKinstry amendment and Section 7 passed the Committee of the Whole as amended, despite objections from delegates that no quorum was present.⁹⁷ Debate continued over the substitute Goodelle amendment, and whether the forfeiture of a corporate charter would unjustly punish innocent individual investors.⁹⁸ Eventually the Committee of the Whole reported Root’s amendment, as amended by McKinstry, to the convention by a 72-21 roll call vote.⁹⁹

Yet, the next day, September 4, Delegate Daniel H. McMillan, an at-large (and thus Republican) delegate from Buffalo, moved to reconsider the vote, which was approved, tabling the amendment.¹⁰⁰ 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 delegates understood this would be the effect of the vote. This motion passed over the

⁹⁴ REVISED RECORD VOL. III at 896-97. Hottenroth was a Democrat delegate for the 15th District, from New York City.

⁹⁵ Bigelow, like Tekulsky, *supra*, was a Democrat delegate for the 8th District, from New York City.

⁹⁶ *Id.* at 897.

⁹⁷ *Id.* at 899-900. September 3, 1894 was the first observance of Labor Day, and thus a holiday. The Republican leadership had rejected a request to adjourn for the holiday. See *Adjourned but Not for Good*, N.Y. TIMES, Sep’t 16, 1894 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 cannot hear what business transpired. REVISED RECORD, VOL. III at 903.

⁹⁸ *Id.* at 913-14.

⁹⁹ *Id.* at 918-19. Coverage of this debate is in *To Purify the Ballot Box*, N.Y. TIMES, Sep’t 4, 1894 at 8.

¹⁰⁰ More delegates are present on the 4th, perhaps because it was not a holiday. See roll call vote, REVISED RECORD at 979 (139 delegates voting) with roll call vote on corporate contribution amendment 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 H.R. Rule 18 § 1; Robert’s Rules of Order (10th ed.) §37.

McMillan, like Root, was a Republican corporate lawyer active in state politics. He served as a State Senator in 1886-87, also provided legal representation to the New York Central Railroad Company, and declined to run in 1888 on account of professional conflicts. *Will Not Run for Senator*, N.Y. TIMES, Oct. 25, 1887. Nothing in the *Revised Record*, press, or biographical material indicates that McMillan and Root were rivals or hostile to one another. In fact, both delegates served on the Rules Committee, the Judiciary Committee and the Committee on the Address to the People.

objection of rural Republican Delegate I. Sam Johnson who accused the leaders of wishing to “bury everything else.”¹⁰¹ Johnson and a number of other delegates were angry at what they felt was an effort by the Convention leadership to pass through favored amendments, leaving untouched the remaining.¹⁰² Johnson’s efforts failed and the convention adjourned for six days to September 20.¹⁰³

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.¹⁰⁴ Responding, 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.”¹⁰⁵ The Convention then voted against Johnson’s motion, and the corporate contribution amendment died for good.¹⁰⁶ 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.¹⁰⁷

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

¹⁰¹ REVISED RECORD, VOL. IV at 887-88. Johnson was a Republican delegate for the 32nd 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, Sep’t 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 ALBANY LAWYER, May 1892 *supra* note ___ at 212.

¹⁰² See *Adjourned, But Not for Good*, N.Y. TIMES, Sep’t 16, 1894 at 5.

¹⁰³ Root initially moved that Johnson’s motion not be taken up, but was defeated. Later, Judge Veeder successfully moved to table Johnson’s proposal. *Adjourned, supra* note 102 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, Sep’t 21, 1894 at 5.

¹⁰⁴ REVISED RECORD, VOL. IV at 1010.

¹⁰⁵ *Id.* at 1011.

¹⁰⁶ *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. Johnson eventually voted against the adoption of the amended constitution, along with two other Republican delegates who had opposed the leadership’s efforts to bring the convention to a close without addressing all pending amendments. REVISED RECORD, VOL. IV at 1220; *Revision Has Been Adopted*, N.Y. TIMES, Sep’t 29, 1894 at 1. Immediately after the vote Johnson attempted to change his vote, but was ruled out of order. *Id.* at 1221. All Democrat delegates voted against the constitution, as well. Of more than 400 proposed amendments, the Convention ultimately adopted thirty-three, abandoning 38 special orders passed out of the Committee as a Whole. See listing for “Overtures Left on General Orders” REVISED RECORD, VOL V. at 1049-54.

¹⁰⁷ *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. See REVISED RECORD VOL. V at 732-80 (text of amended constitution) in particular Art. II Sec. 4 (registration); Art III §§ 3 & 4 (districting); Art. XIII § 5 (prohibiting public office from directly or indirectly receiving or requesting any free pass, transportation franking privilege or discrimination “in passenger, telegraph or telephone rates from any person or corporation.”)

because of the unpopular position the Democrat Party had assumed via the Sugar Trust scandal, a scandal making headlines at this same 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. Yet one would also expect Republicans to oppose a reform proposal outlawing corporate sources for funding.

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 but a *day* after the vote to adopt it, from a colleague. What happened? It may be that Root, knew his proposal (even if sincere) was a bit too progressive for his colleagues.¹⁰⁸ Understanding that larger battles remained, he may have consented to dropping the matter on the condition that it receive a hearing (even on Labor Day). It may be that Root offered the amendment merely for partisan advantage without intending its success.¹⁰⁹ 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 the next day 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.¹¹⁰

Thus, the *Auto Worker's* 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 are properly understood as a component of the populist's legislative toolkit. (No one would describe the New York Constitutional Convention as a populist arena.) Each was a weapon against its own foe.

¹⁰⁸*Corporations and Campaign Funds*, WASH. POST, June 17, 1894 at 4 (editorializing against N.Y. 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 seem to be advocating the passage of a corporate contribution ban.

New York reformers preferred to fix the evident deficiencies of the New York Corrupt Practices Act by enacting more effective publicity laws. *Suppressing Political Corruption*, N.Y. TIMES, Mar. 31, 1893 at 4 (advocating secret ballot and "absolute and explicit publicity as to all moneys received or disbursed for political purposes.") *The Week*, OUTLOOK, June 23, 1894 at 1133 (demanding absolute publicity for all campaign contributions)

¹⁰⁹ The Democrats were of this view. See *To Purify the Ballot Box*, N.Y. TIMES Sept 4 1894 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.")

¹¹⁰ See, e.g., *Appleton's Annual Cyclopaedia 1894* 531-34 (1895).

Second, *Auto Workers* placed ahistorical emphasis upon fragments from the 1894 constitutional convention debate, which while eloquent, were misinterpreted. To understand Root's points requires reading more than simply his responses to questions from delegates. *Auto Workers* pulls Root's words out of context, so that the reader cannot understand his oft-quoted reply is directed as reassuring the Convention of the proper scope of the ban – that the law only meant to rein in the large entities (unspoken implication is the Sugar Trust) and not corporations formed for political purposes. Third, the *Auto Worker's* account leaves the reader ignorant of the partisan positioning in the Convention, and how this issue would be particularly appealing to Republicans. It doesn't serve the purposes of the fable to admit that the debate might have been, in 1894, more for political advantage than for reform.

The onslaught of corporate contribution legislation occurred, instead, in 1907, in the wake of the Life Insurance scandal, and results in the passage of several state bans as well as a federal ban in the Tillman Act.¹¹¹ The *Auto Workers* history correctly states that the life insurance investigations scandalized policymakers and provoked legislative responses nationwide.¹¹² 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.¹¹³ When habits of thinking change, they can change quickly. By 1910, Prof. 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.”¹¹⁴

Even here, the *Auto Workers* history is misleading in important ways. As historian Robert Mutch has explained, the bill enacted in 1907 was essentially legislation authored by Republican Senator William Chandler in 1901.¹¹⁵ After the life insurance investigation made headlines, Chandler recruited southern partisan Democrat Ben Tillman to carry the legislation as a populist weapon against corporate power.¹¹⁶ Mutch's thorough research reveals that Roosevelt's national address against corporate contributions was not the catalyst propelling the Tillman act, as *Auto Workers* (and conventional wisdom) would have it.¹¹⁷ Moreover, the cause and effect relationship between the scandal and the proposal is not as tidy as the court's rendition would have it.

B. Reforming Zeal, Poison Pills, and The Hatch Act Limits

¹¹¹ 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 dramatic increase in legislative action against corporate political activity in 1906).

¹¹² See *UAW-CIO*, 352 U.S. at 532. 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.

¹¹³ See RICHARD HOFSTADTER, *THE AGE OF REFORM* 220-23 (1955).

¹¹⁴ ROBERT C. BROOKS, *CORRUPTION IN AMERICAN POLITICS AND LIFE* 245 (1910).

¹¹⁵ MUTCH, *supra* note 4 at 4.

¹¹⁶ *Id.* at 5. Chander and Tillman were close friends. FRANCIS B. SIMKINS, *PITCHFORK BEN TILLMAN: SOUTH CAROLINIAN*, 18-19 (1944) (2002 reprint). Tillman and Roosevelt disliked each other a great deal. *Id.* at 408-13. The relationship grew even colder when Roosevelt broke from Tillman (who, unwilling to deal with TR directly, had been using Chandler to communicate with the President) on the railroad rate bill in 1906. *Id.* at 433-37.

¹¹⁷ MUTCH, *supra* note 4 at 6-8.

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 committee,’ 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 \$5,000, 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 said:

‘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.’ 86 Cong.Rec. 2720.

Reforming zeal? Again the story behind the contribution limit is not nearly as flattering and a bit more complicated than the *Auto Worker’s* 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 (the Lonergan Committee, chaired by Senator Augustine Lonergan (D-CT)) 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 otherwise, whose aims or purposes are the furtherance of group, class or special interests.*”¹¹⁹ Congress, dominated by Democrat members after the 1936 Franklin Roosevelt landslide, showed no enthusiasm to act on this breathtakingly broad proposal.

Similar efforts to restrict political spending by certain disfavored groups (read: unions) did poorly. Senator Arthur Vandenburg, a Michigan Republican, offered an amendment in 1937

¹¹⁸ Sen. Rep. No. 151, 75th Cong. 1st Sess. 127-33 (1937); 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 campaign to file disclosure reports, information from these reports was difficult to use – when the reports were filed. Instead, regular congressional investigations provided post hoc disclosure of campaign financial activity. MUTCH, supra note 4 at 26.

¹¹⁹ Sen. Rep. No. 151 at 135.

to the Wagner Labor Relations Act declaring as an unfair labor practice “any compulsory assessment, or require any contribution, for political purposes.”¹²⁰ That bill died in committee. In 1939, Senator Millard Tydings, a Maryland Democrat, proposed language to 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.¹²¹ Like the Lonergan proposal, this restriction applied to all “pressure groups” not just unions, although unions were, in fact, the group that would be most notably curtailed by this legislation. It too failed.¹²²

The year 1939 saw passage of the Hatch Act, to prevent federal employees from engaging in political activity, leaving attempts at regulating “pressure groups” for another day.¹²³ The Act of 1939, sponsored by Senator Carl Hatch, Democrat from New Mexico, sought to undercut President Franklin Roosevelt’s use of federal workers to labor on behalf of favored candidates (and against those incumbents who had not fully supported the New Deal).¹²⁴

The Hatch Act Amendments of 1940, which are more significant to our discussion, were (at first) intended merely to extend the 1939 Act’s limits on political activity to state governmental workers paid from federal funds.¹²⁵ But placing such restrictions upon state workers limited a source of financial support (and political manpower) for Democrat officeholders who had supported the 1939 Act.¹²⁶

Democrats opposed to the 1940 Hatch extension, and desiring to undermine Republican support, attempted to poison the bill by offering their own amendments attacking Republican financial sources.¹²⁷ One would bar individuals from giving if they owned an interest in a corporation with a government contract. That amendment failed. The second attempt, culminating in Senator John Bankhead’s amendment limiting individual contributions to \$5,000 in aggregate, “in doubt until the last vote was counted”¹²⁸ passed narrowly on March 13, 1940.¹²⁹

¹²⁰ S. 2712, 75th Cong. 1st Sess. (1937); *see also* Kallenbach, *supra* note 118 at 3.

¹²¹ *See* 84 Cong. Rec. 10,436 (1939). Tydings had been a target of President Roosevelt’s 1938 “purge” and (not surprisingly) supported limitations on the political use of government funding and personnel. *See Senate Likely to Sidetrack Hatch Act Extension*, WASH. POST, Mar. 10, 1940 at 1.

¹²² *See* Kallenbach, *supra* note 118 at 3.

¹²³ 53 Stat. 1147 (1939).

¹²⁴ MUTCH, *supra* note 4 at 33.

¹²⁵ *See* S. Rep. 1236, 76th Cong. 3d Sess. (Feb. 26, 1940) (Committee Report on S. 3046)

¹²⁶ MUTCH, *supra* note 4 at 33.

¹²⁷ *Id.* at 34. The legislation containing the amendments was S. 3046, 76th Cong. 3d Sess. (1940). *See* John B. Oakes, *Senate Likely to Sidetrack Hatch Act Extension*, WASH. POST, Mar. 10, 1940 at 1 (describing Democrat amendments and filibustering tactics).

¹²⁸ John B. Oakes, *Senate Adds Curb on Gifts to Hatch Bill*, WASH. POST, Mar. 15, 1940 at 1.

¹²⁹ *Id.* That \$5,000 limit “slipped into the Senate version by an extremely narrow margin” of 40-38. MUTCH, *supra* note 4 at 34; Joseph Tanenhaus, *Organized Labor’s Political Spending: The Law and Its Consequences*, 16 J. OF POL. 441, 442 (1954). A \$1,000 per year limit has been proposed, and failed, the previous day. *Id.* at 442; John B. Oakes, *Can’t Block Hatch Bill, Minton Admits*, WASH. POST (Mar. 14, 1940 at 2 (noting vote taken Mar. 13 on Bankhead \$1,000 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.”); *see also* 86 Cong. Rec. 2790-91 (Mar. 13, 1940).

Democrat 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. Bankhead was an ally of the New Deal, and “an avowed opponent of the Hatch Bill” and offered the amendment to kill the bill by driving away Republican support.¹³⁰ 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 bill, as amended, passed the Senate the next day with the Republicans (against expectations) voting in favor of it.¹³¹ “Many a Senator voted for it, for the simple, political reason that he was confident it would never pass the House.”¹³² Twenty Democratic senators who voted in favor of the poison pill \$5,000 limit voted again passage on the Senate floor.¹³³ Once in the House of Representatives, the House Judiciary Committee held the bill. The Committee added two particular elements: extending the \$5,000 limit beyond individuals to “any individual, partnership, committee, association, corporation and any other organization or group of persons, and adding a \$3 million expenditure ceiling for national political committees¹³⁴

The measure languished in committee. After some months of no activity, the bill was reported out of committee in July, 1940. In the Committee of the Whole, the House added Republican Rep. Albert Vreeland’s amendment excluding from the \$5,000 limit “contributions made to or by a State or local committee, or other State or local organization.”¹³⁵ The House and Senate both approved the final package as amended without debating these additional limits at all.¹³⁶

What provoked this rapid movement? Several weeks before the bill’s final passage, Republican nominee for President Wendell Willkie had announced that his campaign would comply with the \$5,000 per individual limit in the “as yet unpassed Hatch Bill.”¹³⁷ Willkie also

¹³⁰ John B. Oakes, *Senate Adds Curb on Gifts to Hatch Bill*, WASH. POST, Mar. 15, 1940 at 1.

¹³¹ MUTCH, *supra* note 4 at 34.

¹³² *Hatched by Dempsey*, TIME, Jul. 22, 1940.

¹³³ See Putney, B. *Money in Politics*, in EDITORIAL RESEARCH REPORTS 1940 (VOL. I) (CQ Press) Retrieved from CQ Electronic Library, Sept. 19, 2007, from <http://library.cqpress.com/cqresearcher/cqresrre1940041500>.

¹³⁴ Tanenhaus, *supra* note 129 at 442.; *see also* H.R. Rep. 2376, 76th Cong. 3d Sess. (June 4, 1940) (“Judiciary Committee Report”) at 10 (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, a Democrat from Pennsylvania, with Senator Hatch’s consent. Hatch noted the amendment was “in accord with my idea of reducing campaign costs,” and Senator Barkley, Senate Majority Leader and Act supporter, had said that the limit was “fair to both sides.” Putney, *supra* note 133. 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.

¹³⁵ Tanenhaus, *supra* note 129 at 443; 86 Cong. Rec. 9452 (1940). Perhaps Vreeland should be credited as the inventor of “soft money.”

¹³⁶ 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 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* 37 Stat. 25 (1911); OVERACKER, MONEY IN ELECTIONS, *supra* note 4 at 238-40 (describing expenditure limits). A number of state has imposed contribution and expenditures limits of various scope and magnitude, *id.* at 308-12.

¹³⁷ William F. Kerby, *Willkie’s Campaign Promises to Follow Unorthodox Lines*, WALL ST. J. Jul. 3, 1940, at 1. Willkie was nominated at the Republican convention in late June, and the Roosevelt political team took Willkie

urged passage of the bill.¹³⁸ 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.¹³⁹ On July 9 and 10, heated debate reached the floor over the propriety of limited the political activities of public workers, but none of the accounts include any commentary on the contribution or expenditure limits.¹⁴⁰ 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.¹⁴¹ The Senate concurred in the House amendments without debate.¹⁴² President Roosevelt signed the bill July 20, and it became effective immediately.

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, 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 limits as a “bombshell” noting that “[p]arty managers in recent times have come to look upon \$3,000,000 as chicken feed.”¹⁴³

seriously as an opponent. THE SECRET DIARIES OF HAROLD L. ICKES VOL. III 221-22 (1954) (June 29, 1940), AMITY SHLAES, *THE FORGOTTEN MAN*, 351, 374-75 (2007). Roosevelt’s staff wanted to have a public financing measure introduced in Congress to “get the money issue into the campaign” and to call attention to Willkie’s expenditures. SECRET DIARIES at 225-24 (June 30, 1940).

¹³⁸ *Gifts for Willkie to Buy No Favors*, N.Y. TIMES, Jul. 3, 1940 at 1; *see also Willkie Bars Corporation Campaign Aid*, WASH. POST, Jul. 3, 1940, at 1. Note that all three major papers featured this story on the front page.

¹³⁹ *Hatch Bill Vote Expected Next Week in House*, WASH. POST, Jul. 6, 1940 at 1; *House Leaders Set Hatch Bill Debate*, N.Y. TIMES, Jul. 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 May 1, but then voted May 29 by 16-7 to send the bill to the floor. *See Hatch Act Bill Approved By House*, WASH. POST, Jul. 11, 1940 at 1. The committee Chairman, Hatton Summers, opposed the bill, and had held a secret ballot that (he claimed) tabled it 14-10. But Democrat Congressman John Dempsey of New Mexico, an ally of Hatch’s, claiming 13 committee members had told him they supported the bill. Dempsey fought for an open vote in Committee, which he finally received May 29. *Hatched by Dempsey*, TIME, July 22, 1940.

On July 8, Roosevelt’s political staff had requested 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. SECRET DIARIES, *supra* note 137 at 236 (July 19, 1940).

¹⁴⁰ *Attacks on Willkie Delay Hatch Bill*, N.Y. TIMES, Jul. 10, 1940 at 11; *Democrats Fight over Hatch Bill*, WASH. POST, Jul 10, 1940 at 4.

¹⁴¹ Henry N. Dorris, *Wider Hatch Bill Adopted by House*, N.Y. TIMES, Jul. 11, 1940 at 1. Approval came after five hours of debate and consideration of ten amendments, most hostile. *Hatch Bill Approved By House*, 243-122, WASH. POST, Jul. 11, 1940 at 1. Thomas R. Ball (R-CT), a one-term member, was the lone Republican voting against the bill.

¹⁴² *Hatch Bill Sent to White House*, N.Y. TIMES, Jul 12, 1940 at 17.

¹⁴³ Luther Huston, *Campaign Outlays Will be Cut Hard*, N.Y. TIMES, July 14, 1940. 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, Jul. 21 1940 at 3 (describing major changes in fundraising). The *Washington Post* editorialized that the new laws would chiefly affect the Democrat party by the removal of patronage workers. While the *Washington Post* editorialized that the new laws would chiefly affect the Democrat party by the removal of patronage workers, the *Wall Street Journal* noted that this party still controlled governmental largess from the Executive branch. *The President Signs (Editorial)* WASH. POST, Jul 21, 1940 at B6; Frank R. Kent, *The Great Game of Politics*, WALL ST. J. Jul 24, 1940 at 4 (“a gentle rain of checks from Mr. Wallace will descend upon the tillers of the soil during the next four months while he campaigns across the country.”).

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.¹⁴⁴ Within days, press reports described other methods for accommodating these limits (these will seem familiar to students of modern campaign finance reform): dividing contributions among donors and recipients, and donating to state and local party committees instead of the national party.¹⁴⁵ 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 months of 1940.¹⁴⁶ Donors used “loans” to bypass the \$5,000 contribution limit.¹⁴⁷

Overall, the Hatch Amendments failed to prevent spending, instead channeling it out of the parties and into independent groups.¹⁴⁸ “The [Hatch] law has accomplished little except to decentralize campaign finance and to make effective publicity of campaign expenditures more difficult.”¹⁴⁹

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.¹⁵⁰ “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 else’s for that matter.”¹⁵¹

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.

Yet the 1940 Act broke new ground in federal regulation of political funding, by attempting to limit (albeit ineffectively) individual contributions to a national committee or the limits such a group could spend.¹⁵² Yet it remains impossible to describe this result as the product of “reforming zeal” -- as *Auto Workers* does, taking Senator Bankhead’s floor

¹⁴⁴ *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, Jul 31, 1940 at 12.

¹⁴⁵ *Jackson Gives GOP Warning on Hatch Law*, WASH. POST, Aug. 5, 1940 at 1; *GOP Obeyes 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.

¹⁴⁶ *Campaign Fund Loophole Reported*, WASH. POST, Oct. 22, 1940 at 6; *Republicans Deny Outlay Exceeded Limit*, WASH. POST, Nov. 13, 1940 at 3.

¹⁴⁷ *Quayle Tells of \$275,000 Election Loan*, WASH. POST, Jan 10, 1941 at 12.

¹⁴⁸ Hedley Donovan, *Hatch Act Held Failure*, WASH. POST, Mar. 8, 1941 at 7. The total, \$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. Where as before the Depression both parties received financial support from finance and industry, in 1940 (and again in 1944) the major interests giving to the Democrat party were officeholders and organized labor. See MERRIAM AND GOSNELL, *THE AMERICAN PARTY SYSTEM* 399 (1969 ed.)

¹⁴⁹ MERRIAM & GOSNELL, *supra* note 148 at 411; Overacker, *Campaign Finance in the Presidential Election of 1940*, 35 AM. POL. SCI. REV. 701, 725-27 (1941).

¹⁵⁰ Tanenhaus, *supra* note 129 at 443.

¹⁵¹ *Id.*

¹⁵² Louise Overacker, *Campaign Finance in the Presidential Election of 1940*, *supra* note 149 at 702.

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 exacted (it was claimed) a countervailing toll upon the wealthy and Republicans, tit for tat.

C. “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, s 313 of the Corrupt Practices Act. 57 Stat. 163, 167. The testimony of Congressman Landis, author of this measure, before a subcommittee of the House Committee on Labor makes plain the dominant concern that evoked it:

‘... public 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.

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.¹⁵³

Only a month before passage, the 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 or order miners to work.¹⁵⁴ The Smith-Connally bill was thus debated as the UMW and the Administration threatened and negotiated with one another over wartime work

¹⁵³ MUTCH, *supra* note 4 at 153.

¹⁵⁴ See SAUL ALINSKY, JOHN L LEWIS, AN UNAUTHORIZED BIOGRAPHY 299-306 (1970 ed.), Ben Gilbert, *Action Taken Without Troops*, WASH. POST, May 2, 1943 at M1; *Text of Order on Seizure*, WASH. POST, May 2, 1943 at M5.

stoppages.¹⁵⁵ “The defiant attitude of Lewis . . . has convinced 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 . . .”¹⁵⁶

Anti-union Republicans and southern Democrats in the House of Representatives, provided a political moment, took advantage of it. Texas Republican Senator Tom Connally’s antistrike and plant seizure bill (the War Labor Disputes Act or S. 796) had passed the Senate 63-16 in early May, 1943.¹⁵⁷ These House members saw the bill as an opportunity to move additional stalled antilabor proposals.¹⁵⁸ So, the House Military Affairs Committee added by unanimous vote several additional clauses to limit strikes, borrowed from Virginia Democrat Rep. Howard W. Smith’s moribund strike bill that lay dead in the Senate.¹⁵⁹ The unions and their allies did little, apparently believing that the more extreme these amendments, the less likely any bill would pass.¹⁶⁰ Meanwhile, as May and June 1943 unfolded, the Administration

¹⁵⁵ See Ben W. Gilbert, *1400 Quit, Roosevelt Hits Mine Strikes*, WASH. POST, May 8, 1943 at 1 (threat of Mid-May strike)

¹⁵⁶ Warren Francis, *President May Face Issue Over Union Curb Soon*, L. A. TIMES, May 9, 1943 at 19.

¹⁵⁷ 89 Cong. Rec. 3993, 78th Cong. 1st Sess. (1943) (vote passing S. 796); Robert G. 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*, CHICAGO 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 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.”). Antilabor bills originating in the House had been killed in Senate Committee. Albright, *supra*; 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 within six months after termination of hostilities. See 86 Cong. Rec. 3808-09 (discussing termination of bill as war’s end); 3812 (Section 6 of S. 796); 3897 (vote on amendment to S. 796); 3993 (vote on passage, text of section 5 of final version).

¹⁵⁸ Robert 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).

¹⁵⁹ *Approve Bill to Ban War Industry Strikes*, CHICAGO DAILY TRIB. May 12, 1943 at 1; *Representatives Push Law to Outlaw Strikes*, LA TIMES, June 2, 1943 at 9; JAMES B. ATLESON, *LABOR AND THE WARTIME STATE* 34-35 (1998) (noting that Smith bill passed House 252-136 on December 3, 1941 “with little serious consideration of its provisions” - the Wednesday before the attack on Pearl Harbor).

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 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* 22-29 (2004) (describing roots of anti-Roosevelt block and Congressional committee system).

¹⁶⁰ *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*, 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. Administration Labor officials wrote Congress to declare their opposition to the bill, predicting it would promote labor unrest and interfere with war production. *US Officials Fight Bill to Curb Strikes*, CHICAGO 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 House).

attempted unsuccessfully to manage the mine workers labor dispute, which remained an unpopular controversy among the press and public.¹⁶¹

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."¹⁶² Sensing the political wind at their backs, anti-labor Republicans pulled concepts from Indiana Republican Congressman Gerald Landis's own languishing proposal, introduced in January banning labor contributions, and amended it into this Senate legislation.¹⁶³ New Landis-inspired language, offered June 3 on the floor during a flood of activity, had been drafted mere hours before.¹⁶⁴ 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, political committees or other persons to accept these prohibited contributions.

Contemporaneous accounts show that the floor fight was between Administration supporters, led by the Majority Whip Robert Ramspeck a Democrat (and New Deal ally) from Georgia, 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, among other tools to combat strikes.¹⁶⁵ The subsequent vote on the bill was marked by "appalling" procedural confusion.¹⁶⁶ One reporter described it as "a parliamentary tangle so involved that members pled ignorance of what they were voting on."¹⁶⁷ 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 . . ." Essentially, a substitute measure sponsored by Indiana Republican Forest

¹⁶¹ Leo Wolman, *Public Now Inclined to Blame US for Difficulty in Mines*, WASH. POST, May 16, 1943 at B4, Ben Gilbert, *Secretary Believes He can Settle Case Speedily of Board will Give Consent*, WASH. POST, May 18, 1943 at 1; Ben 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, 1932 at 13.

¹⁶² William Moore, *Mine Tieup Spurs Bill to Ban Strikes*, CHICAGO DAILY TRIB, June 3, 1943 at 1.

¹⁶³ MUTCH, *supra* note 4 at 153-54, Tananhaus, *supra* note 129, at 444; *see* 89 Cong. Rec. 378 (Jan. 26, 1943) (introduction of Landis's H.R. 1483). Press reports linked the House consideration of the antistrike bill to the coal walk out ordered by John L. Lewis on June 1. Robert C. Albright, *Angry House Votes to Call Up Antistrike Bill*, WASH. POST, June 3, 1943 at 3; *Roosevelt Prepared 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. *Id.*

Note the inaccurate implication in the *Auto Workers* account that the Landis bill was itself enacted.

¹⁶⁴ 89 Cong. Rec. 5328 (text of Harness substitute). During that debate, Rep. Sadowski asked Harness, who served on the Judiciary Committee, if he had submitted his substitute to the Committee, Harness replied he had not, but "[w]e discussed every section in this bill, time and time again." 89 Cong. Rec. at 5330. When Sadowski asked why Harness had not submitted this specific bill to the Committee, Harness replied "Because 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.*

¹⁶⁵ Robert C. Albright, *Strictly Mine Strike Bill Threatened in House*, WASH. POST, June 4, 1943 at 4.

¹⁶⁶ 89 Cong. Rec. 5328 (June 3, 1943); Tanenhaus, *supra* note 129 at 444, *see also* Overacker, *Presidential Campaign Funds, 1944*, 39 AM POL. SCI. REV. 899, 919 (1945).

¹⁶⁷ Albright, *Strictly Mine Strike Bill*, *supra* note ____; *see also* 89 Cong. Rec. 5341 (quoting Rep. Bradley: "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 . . ."); *see also Id.* at 5347-48.

Harness, once approved as amended through a complicated series of motions, foreclosed consideration of the Administration's preferred legislation.¹⁶⁸ "Denunciation of John L. Lewis enlivened" the debate.¹⁶⁹

The next day, June 4, the House passed the amended bill by a comfortable margin.¹⁷⁰ On June 5, UMW President John L. Lewis called a "truce" in the miner's strike, ordering miners back to work June 7, and setting a June 20 deadline.¹⁷¹ With the Smith-Connelly 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 9.¹⁷²

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.¹⁷³ 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 219-129 after a perfunctory hour long debate.¹⁷⁴ On June 12, the Senate (in a rare Saturday session) did likewise by 55-22.¹⁷⁵ Debate, once again, hit hard on the UMW crisis. Among the Senators invoking it was

¹⁶⁸ Robert C. Albright, *Quick Approval After Conferences Expected: Measure Aims at Coal Strike*, WASH. POST, June 5, 1943 at 1 (describing compromises and procedural process). Rep. Harness, like Rep. Landis, was a Republican member elected from Indiana in 1939, who (like Landis) served from 1939-49 in the House. 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).

¹⁶⁹ Robert C. Albright, *Quick Approval After Conferences Expected: Measure Aims at Coal Strike*, WASH. POST, June 5, 1943 at 4.

¹⁷⁰ Robert C. Albright, *Quick Approval After Conferences Expected: Measure Aims at Coal Strike*, WASH. POST, June 5, 1943 at 1 (vote of 231-141, Senate Leaders predicting "final enactment of many House measures.")

¹⁷¹ *Lewis Limits Coal Truce: June 20 Set as Deadline*, WASH. POST, June 6, 1943 at M1.

¹⁷² Robert Albright, *Strike Bill Toughened To Provide Lewis Curb*, WASH. POST, June 8, 1943 at 1; Albright, *Conference Version Outlaws Stoppages in US Owned Plants*, WASH. POST, June 10, 1943. The labor contribution ban was retained in the conference version, and was "not seriously contested." *Id.* at 4; 89 Cong. Rec. 5720 (text of conference version); Senator Connally and Rep. Andrew Jackson May led the committee. *Id.*, see also William Moore, *Conferees OK Compromise on Anti-Strike Bill*, CHICAGO DAILY TRIB., June 10, 1943 at 11. Rep. May had been a union target for defeat in 1942 "and since then has 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.

¹⁷³ Tanenhaus, *supra* note 129 at 445. 89 Cong. Rec. 5721 (Sen. Connally stating that the House conferees insisted in 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 "neither the House nor the Senate was wedded to anything." 89 Cong. Rec. 5734 (Rep. Merritt). 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.

¹⁷⁴ Robert Albright, *House Passes Antistrike Bill By 219-129*, 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. *Id.*; see also 89 Cong. Rec. 5736-37.

¹⁷⁵ Robert De Vore, *Senate Votes Approval of No-Strike Bill*, WASH. POST, June 13, 1943 at M1. 30 Democrats and 25 Republicans supported the report, and 16 Democrats, five Republicans and one Progressive (Senator La Follette) opposed it. *Id.* The Senate debate did include criticism (ultimately to no avail) of the labor contribution ban and its effect on Democratic fundraising. *Antistrike Bill's Ban on Political Contributions by Labor Unions Sets off Barbed Controversy in Senate*, WASH. POST, June 13, 1943 at M7.

New Deal “bitter-ender” Democrat Senator Claude Pepper of Florida, who called John L. Lewis, “one of the most dangerous men in America.”¹⁷⁶ The Senate, in contrast with the House, gave the report *eight hours* debate, during which the political contribution ban suffered some criticism. In response to colleagues’ concerns, Senator Carl Hatch promised he would draft legislation to extend the same ban to “employer organizations.”¹⁷⁷

Labor had powerful friends in Congress, yet their resistance in light of the overwhelming hostility to the UMW strike, came to nothing.¹⁷⁸ An American Institute of Public Opinion poll taken June 17 asked “What is your opinion of John L. Lewis” and 87% responded with “unfavorable opinions.”¹⁷⁹ 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 \$5,000.¹⁸⁰ This might be a genuine sentiment, or it could be 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.¹⁸¹

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. Lewis set another deadline of October 31. Observers noted this long period would allow Roosevelt to veto Smith-Connally, and bargain with Congress for an alternative.¹⁸² Roosevelt issued a Statement on June 23 praising the return of the miners, and followed it with his veto of Smith-Connally on June 25.¹⁸³

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 has no relevancy to a bill prohibiting strikes ...”¹⁸⁴ 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

¹⁷⁶ *Senate Approves War Strike Curb*, L.A. TIMES, June 13, 1943 at 1; 89 Cong. Rec. 5786-87 (Sen. Pepper comments on John L. Lewis) 5795 (Senate vote on conference report).

¹⁷⁷ 89 Cong. Rec. at 5721 (1943); *Bill Banning Strikes Passes Senate*, 55-22, CHICAGO DAILY TRIB, June 13, 1943 at 1. Hatch introduced just such a bill, which passed the Senate but died in the House. See Sen. Rep. 412, 78th Cong. 1st Sess. (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.

¹⁷⁸ 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.

¹⁷⁹ *Public Opinion Polls*, 7 PUB. OPINION Q. 478, 485 (1943). Nine percent had “favorable opinions” and a mere 4% had “no opinion.”

¹⁸⁰ Tanenhaus, *supra* note 129 at 445 (quoting Congressman John Sparkman, 89 Cong. Rec. 5401).

¹⁸¹ *Antistrike Bill’s Ban*, *supra* note 175. Union leaders called publicly for a veto. Ben Gilbert, *Green Predicts Labor Revolt if Strike Bill Becomes Law*, WASH. POST, June 15, 1943 at 1; Ben Gilbert, *Labor Held Cut Off WLB In Strike Bill*, WASH. POST, June 18, 1943 at 1.

¹⁸² Ben Gilbert, *Union Insists U.S. Continue Operation of Mines*, WASH. POST, June 23, 1943 at 1.

¹⁸³ Statement On the End of the Coal Strike (June 23, 1943) available at www.presidency.ucsb.edu/ws/?pid+16416; Sen. Doc. 75, 78th Cong. 1st Sess. (June 25, 1943) (Roosevelt’s veto message for S. 796). Even so, a large number of miners refused to return to work. Ben Gilbert, *President Won’t Admit Oct. 31 Limit*, WASH. POST, June 26, 1943 at 1.

¹⁸⁴ Sen. Doc. 75, 78th Cong. 1st Sess. (June 25, 1943) at 3.

consideration should be given to the appropriateness of extending the prohibition to other nonprofit organizations.”¹⁸⁵

Both Houses overrode Roosevelt’s veto that same day, a mere *three hours* later.¹⁸⁶ 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.¹⁸⁷ “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*.¹⁸⁸ “Not since its inception has the Roosevelt administration suffered a more significant defeat” observed the *Los Angeles Times*.¹⁸⁹

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 don’t recognize (or don’t 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.

D. Loopholes, By Accident or By Design

¹⁸⁵ *Id.* at 3. 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. *Attack Fails to Halt Plant Seizure Bill*, WASH. POST, May 5, 1943 at 8.

¹⁸⁶ Tanenhaus, *supra* note 129 at 445, Mutch, *supra* note 4 at 154; George Gallup, *The Gallup Poll: Antistrike Bill*, WASH. POST, June 16, 1943, at 17 (reporting that all provisions of antistrike bill popular with public); *see also* Arthur Sears Henning, *Pass Strike Law Over Veto*, CHICAGO DAILY TRIB., June 26, 1943 at 1 (noting that the President acted at 3:13 pm, the Senate at 3:30 and the House at 5:28, including banner headline on front page); *How Congress Voted to Upset Veto*, CHICAGO DAILY TRIB., June 26, 1943 at 2.

¹⁸⁷ Robert Albright, *Both Houses Overwhelm President’s Objections*, WASH. POST, June 26, 1943 at 1.

¹⁸⁸ Henning, *supra* note 186.

¹⁸⁹ *Antistrike Bill is Now Law (Editorial)*, L.A. TIMES, June 26, 1943 at A4.

Two weeks later, the first political action committee, or PAC, was born.¹⁹⁰ Through the PAC and general education expenditures, unions spent more money in the 1944 election than ever on politics, “voter education” and communications to members.¹⁹¹ The PAC was openly partisan, with an overt preference for Democrats.¹⁹² Union officers and counsel contended that the scope of “contribution” in Smith-Connally did not reach this union spending.¹⁹³ In response to Congressional complaints against unions, the Department of Justice concurred with the unions.¹⁹⁴

A fair reading of the law would affirm that view – no one had interpreted the Corrupt Practices Act to make “contributions” include as a subset 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 \$5,000 limit.¹⁹⁵ A more natural reading would interpret “contribution” “as but one form of ‘expenditure.’”¹⁹⁶

But that reasoning was little comfort to members targeted by union activities in 1944, among them Senator Robert Taft. No surprise, then, that as the *Auto Workers* history recites, congressional pressure to restrict union activity remained. In the aftermath of the 1944 election,

¹⁹⁰ On July 7, 1943 the executive committee of the CIO established the CIO Political Action Committee, and named Sidney Hillman its Chairman. JOSEPH GAER, *THE FIRST ROUND: THE 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* 990-110 (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.” JAMES B. ATLESON, *LABOR AND THE WARTIME STATE, 195-96* (1998).

¹⁹¹ Overacker, 1944, *supra* note 166 at 920, Tanenhaus, *supra* note 129 at 446, Mutch, *supra* note 4 at 154-55; *see also* Louis Waldman, *Will the CIO Capture the Democratic Party?*, *SAT. 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, NC-PAC (the “National Citizens Political Action Committee”), 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) “NCPAC”.

¹⁹² *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).

¹⁹³ Tanenhaus, *supra* note 129 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.” Statement of Les Pressman, General Counsel to the CIO, quoted in Tanenhaus, *supra* note 129 at 447.

¹⁹⁴ *Department of Justice Clears PAC*, 4 *LAW. GUILD REV.* 49 (Sept-Oct. 1944) (quoting Justice Dep’t press release, noting that same activities were done by incorporated newspapers).

¹⁹⁵ 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 \$5,000 boys, for obvious reasons, were not throwing their contributions in the direction of organized labor.” Overacker, (1944) *supra* note ____ at 923.

¹⁹⁶ *Section 304, Taft Hartley Act: Validity of Restrictions on Union Political Activity* 57 *YALE L. J.* 806, 811-12 (1948)

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.¹⁹⁷ Coming out of the 1944 elections, the unions’ PAC and member-related spending lead some to anticipate (or fear) the rise of labor as the vanguard of a new progressive political block in 1946.¹⁹⁸ Yet, for a variety of reasons “[t]he results on November 5 [1946] were disastrous [for labor].

E. Taft-Hartley, and 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 Republican and anti-union Democrats. In 1946, given their power, perhaps they could do something about it. For the first time since 1930 Republicans controlled both houses.”¹⁹⁹ 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.²⁰⁰

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 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 s 313 of the Corrupt Practices Act to proscribe any ‘expenditure’ as well as ‘any contribution,’ to make permanent s 313’s application to labor organizations and to extend its coverage to federal primaries and nominating

¹⁹⁷ 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. 2739, 79th Cong., 2d Sess at 39-40. 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. *Id.*

¹⁹⁸ ZIEGER, *supra* note 190 at 241 (1995). Yet with the passing of President Roosevelt in April 1945, “the liberal cause seemed to drift” *Id.* at 244.

¹⁹⁹ Zieger, *supra* note 190 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.

²⁰⁰ Taft-Hartley mainly addressed management concerns over collective bargaining, and includes a list of unfair labor practices, eased anti-union injunctions, banned secondary boycotts and featherbedding, among other provisions. See Zieger, *supra* note 190 at 246. It also required unions to purge their leadership of Communists.

conventions. The Report of the House Committee and Education and Labor, which considered and approved the Hartley bill, merely summarized s 304 ... and this section gave rise to little debate in the House. [citations]²⁰¹ Because no similar measure was in the labor bill introduced by Senator Taft, the Senate as a whole did not consider the provisions of s 304 until they had been adopted by the Conference Committee.²⁰²

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.²⁰³

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.²⁰⁴ 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 felt moved to question the Taft-Hartley expenditure ban.²⁰⁵ As *Auto Workers* relates that event as follows:

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

‘... 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

²⁰¹ “Little” in *this* context means that over a three day debate, only *one* member, Democrat George P. Miller of California mentioned Section 304, calling it “irrelevant” and “unnecessary.” 93 Cong. Rec. 3522-23, 81st Cong. 1st Sess. (1947), *see also* Tanenhaus, *supra* note 129 at 450-51 (noting also that two House conferees, Ellender and Landis, were ardent union foes).

²⁰² *US v. UAW-CIO*, 352 U.S. at 582-83.

²⁰³ 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 has used in the successful 1946 congressional campaign, and “both are laden with TNT for the elections next year . . .” *Labor, Tax Bills Loaded with TNT For Truman*, WASH. POST, June 2, 1947 at 1.

²⁰⁴ S. Rep. 101, 79th Cong. 1st Sess. (1945) at 80-83; *see also* Overacker (1944) *supra* note 166 at 924-25.

²⁰⁵ Other aspects of the bill had received considerable attention. The 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.

bill subsequently became law despite the President's veto....²⁰⁶

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.²⁰⁷ 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.²⁰⁸

Unions understood the stakes, and mobilized an immense effort to secure Truman's veto, and raise public awareness and opposition to Taft-Hartley.²⁰⁹ In accord with their wishes, and the advice of staff, Truman vetoed the bill June 20.²¹⁰ 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 state purposes of this bill."²¹¹

The House quickly overrode the veto, but the Senate vote was delayed by an anti-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.²¹² Once it was clear the votes wouldn't materialize, on June 23 the Senate overrode Truman's veto 68-25, six votes more than the two-thirds necessary.²¹³

²⁰⁶ *US v. UAW-CIO*, 352 U.S. at 584.

²⁰⁷ 98 Cong. Rec. 6436-37. 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 129 at 452-53.

²⁰⁸ *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; 57 Stat. 163 (1943) (expiring within six months after termination of hostilities); Proc. 2714, 12 Fed. Reg. 1 (Jan. 1947) (declaring hostilities ended December 31, 1946).

²⁰⁹ 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-Hartley. *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).

²¹⁰ Message from the President, H. Doc. 334, 80th Cong. 1st Sess. (1947)

²¹¹ H. Doc. 334 at 9.

²¹² Alfred Friendly, *Taylor, Pepper Lead Democratic Fight to Delay Action on Veto*, WASH. POST, June 21, 1947 at 1; Alfred Friendly, *Labor Bill Foes Admit Fight Futile, Regard Overriding Virtually Certain*, WASH. POST, June 22, 1947 at M1.

²¹³ Alfred Friendly, *Truman's Final Appeal Rejected; Six 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

Truman noted that the Section 304 expenditure ban would extend as well to radio and newspaper corporations (at this time there would have been no statutory exemption for news or commentary).²¹⁴ As the *Yale Law Journal* stated in a 1948 comment evaluating Taft-Hartley, “the 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.”²¹⁵ 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.”²¹⁶

The first “test case” arose quickly out of the endorsement of a candidate in a special election of July 1947, by the *CIO News*.²¹⁷ 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.²¹⁸ (The dissenters would have reached the constitutional issue, and held the law unconstitutional). 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...”²¹⁹

If the Republican 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% of the popular vote, and Democrats took comfortable control of both Houses of Congress.²²⁰ 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

well as of Republican Senator Irving Ives of New York, a close associate of 1948 Republican nominee Thomas Dewey. *Id.* at 2.

²¹⁴ *Id.*

²¹⁵ *Section 304, Taft-Hartley Act: Validity of Restrictions on Union Political Activity*, 57 *Yale L. J.* 806, 811 n. 19. The campaign finance restrictions on incorporated political groups remain controversial. See *Massachusetts Citizens for Life*, 479 U.S. at 259; *Wisconsin Right to Life*, 127 S. Ct. 2652.

²¹⁶ *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). (Frankfurter joined Justice Roberts dissent in this case). 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. Commonwealth*, 69 N.E. 2d 115 (1946)).

²¹⁷ The District Court dismissed the indictment finding that the expenditure ban violated the First Amendment. *US v. CIO*, 77 F. Supp. 355 (D.D.C. 1948)

²¹⁸ *U.S. 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).

²¹⁹ Edwin E. Witte, *An Appraisal of the Taft-Hartley Act*, 38 PAPERS AND PROCEEDINGS OF THE SIXTIETH ANNUAL MEETING OF THE AMERICAN ECONOMIC ASSOCIATION 368, 372 (1948).

²²⁰ ZACHARY KARABELL, *THE LAST CAMPAIGN* 254 (2000). Hostility to Taft-Hartley among workers helped, as did union political action among them, but Truman made his 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).

legislative body and in their capacity to shape a “blunderbuss” regulation into a workable, fair and effective rule for achieving the desired end.”²²¹

By the time the Department of Justice filed its case against the UAW in *Auto Workers*, prosecutors had litigated two other cases against 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.²²² Then in 1949, a federal court of appeals in *United States v. Painters Local No. 481* dismissed an indictment against a union for purchasing advertisements advocating defeat of Senator Taft and several members of Congress who supported Taft-Hartley.²²³ In 1951, in a third case incited by a disgruntled former union officer (rather than brought by the government as a overt “test case”), a federal district judge acquitted a union that had paid salaries for three employees who engaged their time in political organization.²²⁴

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.²²⁵ Unions proceeded to register voters, endorse candidates, raise funds from voluntary contributions for overtly political action, host political speakers, and electioneer to the membership.²²⁶

After these defeats, the Department of Justice declined to prosecute union political expenditures for about 6 years.²²⁷ The Department doubted that the Court would find the

²²¹ Kallenbach, *supra* note 118 at 13.

²²² *US v. CIO*, 335 U.S. 106 (1948). This conclusion came despite the fact that the Union has printed 1,000 additional copies to “remove all doubt” that an “expenditure” of general union funds was involved. *US v. CIO*, 77 F. Supp at 356. 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. *Taft-Hartley Act Held Void in Part on Political Fund*, N. Y. TIMES, Mar. 16, 1948 at 1; *U.S. Court Order Unholding Spending for Union’s Political Views*, N.Y. TIMES, Mar. 16, 1948 at 24.

²²³ *US v. Painters Local 481*, 172 F.2d 854 (2d Cir. 1949) (reversing 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 ___ at 459 (citing *New York Times*, Sep’t 24, 1948). The government did not seek certiorari review of the Second Circuit’s dismissal in favor of defendants.

²²⁴ *U.S. v. Construction and General Lab. U. No. 264*, 101 F. Supp. 869 (W.D. Mo. 1951); Tanenhaus, *supra* note 129 at 460.

²²⁵ Tanenhaus, *supra* note 129 at 463 (citing Labor’s League for Political Education, *Blueprint for Victory*, pamphlet).

²²⁶ See Ruth Alive Hudson & Hjalmar Rosen, *Union Political Action: The Member Speaks*, 7 INDUS. & LAB. REL. REV. 404, 407-08 (1954) (description of 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% answered “seldom or never”. *Id.* at 408. 81% answered that, if active, unions should endorse candidates “who back legislation good for labor.” *Id.* at 409.

²²⁷ See Motion to Affirm, *US V. UAW-CIO*, No. 44 (April 1956) at 12 (in Supreme Court documents available through InfoTrac).

expenditure ban constitutional. After all, no Justice in the *CIO* Court signaled any inclinations that direction.²²⁸

But fear of 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 1955.²²⁹ Unity alarmed a number of prominent Republicans. Senator Barry Goldwater, for one, called it “a ‘conspiracy of national proportions’ to control all elections.”²³⁰ Labor leaders hoped that merger would strengthen union political power.

Perhaps in response to this alarm, in July 1955, the Eisenhower Administration’s Justice Department empanelled a Detroit grand jury, seeking indictment of the United Auto Workers Union. The union had spent about \$5,000 on television broadcasts that supported Democrat candidates for federal office in 1954.²³¹ The grand jury obliged, and indicted the Union on four counts for making expenditures in violation of federal law.²³² 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 that contained “expressions of political advocacy . . . intended by defendant to influence the electorate generally, including electors who were not members of defendant union.”²³³ 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.’”²³⁴

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*, remarking that the government’s efforts to distinguish *CIO* and other decisions were “either futile or picayune.”²³⁵

²²⁸ Hearing on S. 636, 84th Cong. 1st Sess. at 201-10 (1955) (testimony of Assistant Attorney General Warren Olney III).

²²⁹ *Report of the Joint AFL-CIO Unity Committee*, 9 INDUS. & LAB. REL. REV. 461, 462 (1956).

²³⁰ Edwin E. Witte, *The New Federation and Political Action*, 9 INDUS. & LAB. REL. REV. 406, (1956).

²³¹ *Jury Probes Political Spending of Auto Union*, CHICAGO 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 Department about union expenditures in March 1954. *Id.* The Department denied any connection. *Id.* Labor invested heavily in Michigan in 1954, believing that incumbent Senator Homer Ferguson was vulnerable and that Democrats could, with union support, pick up two congressional seats. They succeeded. Foster, *supra* note ___ at 186-87.

²³² *UAW is Indicted for Election TV*, WASH. POST & TIMES HERALD, July 21, 1955 at 34.

²³³ *UAW is Indicted for Election TV*, *supra* note 232; see also Indictment, US v. International Union UAW-CIO, No. 35004 (Pickard, J.) (in archived file of UAW-CIO case, available from the National Archives Great Lakes Region, Chicago, IL, and on file with author); Motion to Affirm US v. UAW-CIO, No. 44 (April 1956) at 2 (in Supreme Court documents available through InfoTrac) (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 190 at 351-52; John Barnard, AMERICAN VANGUARD: THE UNITED AUTO WORKERS DURING THE REUTHER YEARS 267 (2005) (describing UAW media activity including “Meet the UAW-CIO” series, launched in 1951).

²³⁴ *UAW is Indicted for Election TV*, *supra* note 232.

²³⁵ *United States v. International Union UAW-CIO*, 138 F. Supp 53, 58 (E.D. Mich. 1956). Judge Frank Picard, assigned 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 Democrat nominee against Senator Arthur Vandenburg.

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.²³⁶

The Government appealed this judgment under the Criminal Appeals Act to the Supreme Court, and this time prevailed in *Auto Workers*. Before this Court, the government’s legal arguments found a more sympathetic audience than they had in 1948.²³⁷ 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*, declined to reach the issue of whether, so construed, prosecution would violate the union’s constitutional rights.²³⁸ In contemporary doctrinal terms, the Court permitted facial application of the law, but reserved whether “as applied” this prosecution unconstitutionally burdened the UAW to a later date. Justice Douglas wrote for the dissent, which included 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.”²³⁹

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.²⁴⁰

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

²³⁶ *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, *US v. UAW-CIO*, No. 44 (1956) at 28-29. This colloquy suggests that *at least* the Taft-Hartley legislative history was before the court.

²³⁷ The Court (and Justice Frankfurter) was 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 Oral History interview with Joseph L. Rauh, Jr., Harry S Truman Library, at 4-7 (1989), available at <http://www.trumanlibrary.org/oralhist/rauh.htm> (last accessed Nov. 16, 2007) (noting that Frankfurter was major influence on Rauh, obtained first job in Washington for him and also 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.

²³⁸ Frankfurter was joined by Justices Reed, Burton, Clark, J.M. Harlan II and Brennan.

²³⁹ *US v. UAW-CIO*, 352 U.S. at 543.

²⁴⁰ Jury verdict, *US v. UAW-CIO*, No. 35004 (Nov. 6, 1957) on file with author, *see also Find UAW Not Guilty in TV Political Show*, CHICAGO 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).

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 restrict a union's political advertising, and that the indictment against the UAW stated a violation of that statute. A fair reading of the statute could answer those questions "yes" and the reasoning that led the Court to avoid that issue in *CIO* could be left behind. 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.²⁴¹

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.²⁴² Nor does it serve to form the basis for distinguishing between *Auto Workers* and *CIO* and *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.²⁴³ Why is it here?

For a Justice who had been on the Court for *CIO* nine years before, 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 this brief (although deeming him "sober-minded" was Frankfurter's flourish.)²⁴⁴ 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.²⁴⁵

Ironically, the Government's account of the legislative history behind the 1943 Smith-Connally Act is, in fact, *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

²⁴¹ Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536, 545 (1947).

²⁴² YALE LAW JOURNAL, *supra* note ___ at 814.

²⁴³ Frankfurter's file from this case can be found in the Papers of Felix Frankfurter, Harvard Law School Library (microfilm available at other repositories, among them the Georgetown Law Library, where this article's research was done), 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 assert that Frankfurter made heavy use of clerks for opinion writing. See ARTEMUS WARD & DAVID L. WEIDEN, *SORCERER'S APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 205-06 (2006).

²⁴⁴ Brief for the United States, U.S. v. CIO, at 15; Papers of Felix Frankfurter, Draft of Auto Worker's Opinion at 6 (with notation in Frankfurter's hand inserting "sober-minded"). The quoted 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, U.S. v. CIO at 16. The quote from Senator Robinson that follows, *Auto Workers* at 576, is also drawn directly from the government's *CIO* brief. Brief for the United States, U.S. v. CIO at 22.

²⁴⁵ US v. UAW-CIO, 567 U.S. at 577-78; Brief for the United States, U.S. v. CIO at 23.

contribution ban, and was careful to note that Congressman Landis's remarks (pivotal in *Auto Workers*) were about a different (and unsuccessful) measure.²⁴⁶

In general, the Government brief's descriptions and excerpts about the later congressional investigations and debate are fairer, more even-handed, more 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."²⁴⁷ 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 a key problem with using legislative history to justify Congress's "careful" weighing of alternatives – the fact that Congressional deliberation is not much in evidence at key points.²⁴⁸ 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 judges or historians.²⁴⁹ "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.'"²⁵⁰ Moreover, the *Auto Workers* account then exaggerated the Government's account. Had the source of this material been clearer (*cited*, even), one wonders whether subsequent courts would have been more skeptical about adopting it without taking a closer look.

Even once one knows the genesis of this material, the reader may still be left to 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 danger test."²⁵¹ Under

²⁴⁶ Brief for the United States, U.S. v. CIO at 23-24.

²⁴⁷ Brief for the United States, U.S. v. CIO at 40.

²⁴⁸ 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 . . ." Brief for the United States, U.S. v. CIO at 58.

²⁴⁹ 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 (1965).

²⁵⁰ CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 192 (1969).

²⁵¹ WILLIAM M. WIECEK, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* Vol. XII 151 (2006) (noting that until 1942 the "clear and present danger" test was the only doctrine available in political speech cases).

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.²⁵²

One might reasonably predict then that union political expenditures, if found protected by the First Amendment, could not under this test be restricted.²⁵³ Congress's justification for regulating unions (setting aside politics momentarily) is not that the union's expression will cause violence or other "danger," but merely that union members who are in the minority may otherwise be coerced into supporting political objectives with which they disagree.²⁵⁴ 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 would expect to reflect the general wisdom of the time, noted simply that the First Amendment protected non-libelous "political activity and propaganda".²⁵⁵

Yet in reality the Court's decisions preceding *Auto Workers* were far less consistent. The Court sustained a number of laws against First Amendment challenges without reference to the "clear and present danger" test.²⁵⁶ It also protected speech against regulation without expressly applying the test.²⁵⁷ Justice Frankfurter, for his part could argue for broad protections for speech in one case,²⁵⁸ and for a more deferential balancing test that deferred to "reasonable regulations"²⁵⁹ in remarkable 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

²⁵² See *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); *AFL v. Swing*, 312 U.S. 321 (1941) (Frankfurter, J.) (concluding no imminent and aggravated danger" yet reversing injunction of picket, affirming right of non-employee picketers); see generally *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. 39, 88th Cong. 1st Sess. (1963) at 871.

²⁵³ See *United States v. CIO*, 77 F. Supp 355, 356-58 (1948) (applying clear and present danger test to union newspaper expenditure, concluding legislation unconstitutional).

²⁵⁴ Comment, *YALE L. J.* 1, *supra* note ___ at 818. This Comment explores whether the position of dissenting minorities in political matters is different than in other matters, and if they are, whether they could be remedied by measures short of a ban, such as an opt-in or opt-out system. *Id.* at 818-22.

²⁵⁵ SAMUEL P. WEAVER, *CONSTITUTIONAL LAW AND ITS ADMINISTRATION* 433 (1946).

²⁵⁶ Comment, *YALE L. J.*, *supra* note ___ at 818 n. 45 (citing *Public Workers v. Mitchell*, 330 U.S. 75 (1947) (Reed, J. with Frankfurter, J., concurring) (rejecting CIO challenge to Hatch Act political activity limits); *Carpenters and Joiners Union v. Ritter's Café*, 315 U.S. 722 (1942) (Frankfurter, J.) (upholding injunction on picket at restaurant when restaurant not locus of labor dispute); *Drivers' Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941) (Frankfurter, J.) (enjoining picket when labor dispute has involved violence); see also *Jones v. City of Opelika*, 316 U.S. 584 (1942) (Reed, J.) (upholding conviction of Jehovah's Witnesses for failing to pay fees before selling books).

²⁵⁷ *Schneider v. State*, 308 U.S. 147 (1939) (Roberts, J.) (reversing prosecution of pickets for violating various laws)

²⁵⁸ *Swing*, 312 U.S. at 326 (decided Feb. 10, 1941); see generally Royal C. Gilkey, *Mr. Justice Frankfurter's Interpretation of the Constitutional Right of Labor in a Statutory Context With Special Attention to Picketing and Associated Union Activity*, 18 U. KAN. CITY L. REV. 133, 161-64 (1950) (discussing Frankfurter's record in labor and expression decisions).

²⁵⁹ *Ritter's Café*, 315 U.S. at 726 (decided March 30, 1942).

context.”²⁶⁰ 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 absent showing a “clear and present danger.”²⁶¹

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.²⁶² 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?²⁶³ 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.²⁶⁴

The Government in its Supreme Court brief in *CIO*, observing the difficulties for its case from 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.”²⁶⁵ 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.

The *Auto Workers* case came to the Court at a time when the Court’s First Amendment doctrine was in transition.²⁶⁶ The “clear and present danger” test had been giving way to more deferential 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.²⁶⁷ Consequently, any additional support a decision’s

²⁶⁰ Pennekamp v. Florida, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring); see also Dennis v. United States, 341 U.S. 494, 528 (1951)(Frankfurter, j., concurring) (describing clear and present danger test as an “uncritical libertarian generalit[y]”).

²⁶¹ Lane, supra note ___ at 737-38 (citing inter alia Hague v. CIO, 307 U.S. 496 (1939)). The 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. U.S. v. U.S. Brewer’s Assoc. 239 F. 163, 169 (1916).

²⁶² Kallenbach, supra note 118 at 19-20.

²⁶³ *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 . . .”)

²⁶⁴ See supra notes ____.

²⁶⁵ Brief for the United States, US v. CIO, No. 695 (1947) at 9. The government also argued that, were the Court to conclude that this test applied, that the aggregate wealth of entities “is a clear and present danger to free federal elections.” *Id.* at 78.

²⁶⁶ See Wiecek, supra note 251 at 201 (“In the First Amendment area, the Vinson Court was a transitional body . . .”); see also The Constitution, supra note ___ at 871-80 (describing development of clear and present danger standard and standards applied to union activities, through the 1940 and 50s.); FREUND, SUTHERLAND, ET AL., CONSTITUTIONAL LAW: CASES & OTHER PROBLEMS Vol. II 1253-1421(1954) (including in First Amendment material cases applying the clear & present danger test as well as contemporary material disputing propriety of the test).

²⁶⁷ BERNARD SCHWARTZ, AMERICAN CONSTITUTIONAL LAW 240-82 (1955) (discussing civil liberties and the Cold War); see also United Public Workers v. Mitchell, 330 U.S. 75 (noting that discretion to regulation political activities of government employees “lies primarily with Congress.”); United States v. Rumley, 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).

author could find in history, especially a Justice with what had been described as “tenderness for legislative judgment,” adds force and credibility to the conclusion.²⁶⁸ 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.”²⁶⁹

Frankfurter in particular 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.²⁷⁰ 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.”²⁷¹ A history that provided a rationale for judicial deference, and the Government’s *CIO* brief was certainly this, was especially appealing to him. Frankfurter had used history elsewhere to cloak his arguments with a mantle of reasonableness and moderation.²⁷² An extensive and consistent history of regulation made *Auto Workers’s* departure from recent labor precedent seem orthodox and unremarkable. As Charles Miller wrote: “[T]he Court acts as constitutional symbol, as conscience, educator, legitimizer, and guardian of the nation’s political values. In these roles history becomes a value or a means of transmitting values.”²⁷³

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.”²⁷⁴ 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.

Emphasis mine. The Court did not ignore history, it just adopted an incomplete and misleading summary of history, provided by an interested party in other litigation. Courts since *Auto Workers* have relied upon its account of campaign finance legislation, especially in contexts

²⁶⁸ Gilkey, *supra* note 258 at 144.

²⁶⁹ Papers of Felix Frankfurter, *supra* note ____ (Burton note dated Feb. 12, 1957, Reed note undated).

²⁷⁰ Felix Frankfurter, *John Marshall and the Judicial Function*, in FELIX FRANKFURTER ON THE SUPREME COURT 547-55 (1970) (Philip B. Kurland, ed.).

²⁷¹ Kelly, *supra* note 249 at 129.

²⁷² 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).

²⁷³ MILLER, *supra* note 250 AT 193.

²⁷⁴ *Id.* at 177.

where the Court majority seeks to defer to regulators, without understanding its flaws, gaps and manipulation of 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 election.²⁷⁵ The reform fable, with history, can convince courts to accept uncritically lawmaker’s 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 are soothed by a “history” of reasoned decisionmaking not to ask hard questions.

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. Just maybe “[i]t is often more important that something be settled than that it be settled just right.”²⁷⁶ Scholars in 2007, 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, then 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.²⁷⁷ 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.²⁷⁸ When a labor union someday does likewise, if litigated that case would revive the legal question adjudicated – 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.

²⁷⁵ JOHN SAMPLES, *THE FALLACY OF CAMPAIGN FINANCE REFORM* 189-232 (2006) (using Watergate-era history to show similar conflict of interest).

²⁷⁶ 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).

²⁷⁷ Wisconsin Right to Life, 127 S. Ct. 2652 (2007).

²⁷⁸ James Dao, *Gun Group’s Radio Show Tests Limits on Advocacy*, N.Y. TIMES, June 16, 2004.

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.

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.