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Voluntary Associations, Corporate Rights, and the State
Legal Constraints on the Development of American Civil Society, 1750–1900

Ruth H. Bloch and Naomi R. Lamoreaux

New Jersey farmer George Hutchins catalyzed a major legal dispute in the late 1880s by bequeathing part of his modest estate to support the propagation of political radicalism. Hutchins's will set up a trust fund dedicated to the free distribution of the writings of Henry George, the popular critic of private property and leader of New York's United Labor Party, naming George and his "heirs, executors and administrators" as the trustees managing the fund.[1] Legally, this bequest fell into the realm of charitable trust law, a contested branch of (originally British) equity law that allowed testators to give property to groups without corporate charters as long as courts deemed their purposes to be sufficiently "charitable."[2] At the urging

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1. *Hutchins' Ex'r v. George*, 44 N.J. Eq. 124 (NJ 1888), quote at 125.

2. In England, charitable trust law had since the sixteenth century allowed specific kinds of unincorporated groups to receive legacies. In the wake of the American Revolution several states, most notably Virginia, passed statutes rejecting British practice, though most other states (including New Jersey) did not. The courts' willingness to enforce charitable trusts varied widely from state to state until the US Supreme Court, in the 1844 case *Vidal v. Girard's Executors*, 43 U.S. 127 (also known as the *Girard's Will Case*), reversed a contrary decision of 1819 by recognizing charitable trusts as an embedded feature of American common law. Soon almost all American states either tacitly or actively came to accept that unincorporated groups pursuing religious, educational, or conventionally charitable purposes could receive bequeathed property. Useful surveys of this history include Jones (1969) and Miller (1961).

of Hutchins's widow and son, the will's executor asked the state's Chancery Court to invalidate the bequest. Since the American Revolution, state courts and statutes had overturned dozens of similar wills leaving legacies to unincorporated associations.[3] The outcome of this case proved no different. New Jersey's Chancery Court rejected Hutchins's bequests on what were in effect political grounds.

The legal question at the heart of the case, according to Vice Chancellor John Taylor Bird, was "What is a charity?"[4] Reviewing the precedents, Bird conceded that some types of voluntary associations, such as evangelical missionary societies, were routinely regarded as charitable even though they aimed to destroy "existing laws, customs, institutions, and religions."[5] He also acknowledged two recent path-breaking decisions by the Massachusetts and Pennsylvania supreme courts that defined charity widely enough to encompass bequests for the dissemination of abolitionist and atheist ideas (albeit only on the condition that the trustees accept their primary goal to be education and not opposition to the law or Christianity).[6] In Bird's view, however, the purposes of the book fund were more fundamentally subversive. George's vilification of private landholding posed too great a threat to the law for the trust to stand. "Whatever might be the rights of the individual author in the discussion of such questions in the abstract, it certainly would not become the court to aid in the distribution of literature which denounces as robbery—as a crime—an immense proportion of the judicial determinations of the higher courts. This would not be legally charitable."[7]

George successfully appealed to New Jersey's high court the following year, but the damage was done. Reversing the Chancery Court's verdict, Chief Justice Mercer Beazley ruled the key issue was not George's radicalism but Hutchins's intentions. The will itself, which benignly described George's works as "spreading the light" of "liberty and justice in these United States of America," disclosed no inclination to violate the law. Rather the book fund, Beazley concluded, was best understood as akin to a library and, therefore, stood squarely within the "charitable" domain of education.[8] Nonetheless, George's hard-won victory brought little satisfaction to him and his followers. According to a biography written later by his son, legal fees devoured a sizable portion of the bequest, and the public fallout from

3. For the key cases, see Miller (1961, 21–50). Well into the twentieth century, appellate decisions about the disposition of charitable trusts for political causes continued to vary according to judges' assessments of the threats posed by the recipient groups. See Note, "Charitable Trusts for Political Purposes," *Virginia Law Review* 37 (1951): esp. 988–94.

4. *Hutchins' Ex'r v. George*, quote at 126.

5. *Hutchins' v. George*, quote at 137.

6. *Jackson v. Phillips*, 96 Mass. 539 (1867); *Manners v. Philadelphia Library Company*, 93 Pa. 165 (1880).

7. *Hutchins' v. George*, quote at 139.

8. *George v. Braddock*, 45 N.J. Eq. 757 (1889).

the case damaged George's pride and reputation.[9] He was not only injured by the vice chancellor's hostile description of his work, but was also plagued by rumors that he personally profited from the legacy.

Without question, George and his fellow trustees would have been better off had they been able to organize as a nonprofit corporation. The wills of benefactors leaving property to incorporated groups stood on firmer legal ground because corporations had a standard right to "take" or "receive" property.[10] Not only would George's organization almost certainly have avoided going to court to get this legacy, but it also would likely have acquired several other valuable rights that came with corporate status: the right to acquire property by means other than bequests, the right to buy and sell property (as well as receive it), the right to sue and be sued as a party in court, the right to offer their members limited liability for debts, and the right to legally enforceable self-governance. This impressive menu of rights remained out of reach to virtually all nineteenth-century voluntary associations that advocated social and political change because they failed to meet the judicial and statutory requirements to incorporate. The only legal recourse available to them if they were bequeathed an endowment was to claim that they qualified as a charitable trust.

Being deprived of corporate rights did not mean that such associations could not exist or, in some cases, even thrive. American citizens were remarkably free as individuals to create or join organizations of most types without having to hide from the government. As Richard Brooks and Timothy Guinnane explain in their chapter for this volume, however, there is an important distinction between the right of individuals to associate and the right of associations to a collective legal identity. To use their terminology, the early United States offered extensive rights to individuals *to associate* in loosely defined groups and even *to aggregate* in ones with mutually understood rules.[11]

9. George (1900, 509–10). This loyal account also claims that the legacy of around $5,000 was too small to be worth the bother, and that George initially chose not to accept the legacy out of compassion for Hutchins's widow until other "collateral kin" who stood to benefit from the defeat of the will stood in his way. A degree of skepticism is in order. First of all, many charitable trust cases involved smaller amounts. Second, Hutchins's widow herself, along with their son, were the parties opposing the bequest; the biography itself depicts George as so offended by the Chancery Court's negative decision that he fought to appeal it. Third, New Jersey gave no rights to "collateral kin" in intestate cases except in the absence of widows or children. Shammas, Salmon, and Dahlin (1987, 240–41).

10. A partial exception was the state of New York, which in 1830 passed a statute denying corporations the automatic right to receive bequests. The state legislature, however, continued routinely to grant the privilege in special charters, and New York's general incorporation act of 1848 included it for "benevolent, charitable, scientific and missionary societies." There were no suits in New York that challenged bequests to corporations in the nineteenth century, whereas there were many such cases involving unincorporated groups (which from 1846 to 1893 were uniformly blocked from receiving them by the New York Constitution and courts). See Katz, Sullivan, and Beach (1985).

11. Brooks and Guinnane (chapter 8, this volume).

At the same time, however, the government significantly restricted associations' access to the benefits that came from being *legal entities* and *legal persons*. These associational rights depended primarily on access to the state-conferred right to incorporate (and, secondarily, in the special case of bequests, on judicial definitions of charity). Nineteenth-century legislators and judges in most parts of the country routinely extended such rights to large numbers of voluntary associations they regarded as politically neutral or benign, including churches and other religious societies, educational institutions like schools and libraries, and traditional charities providing aid to the poor. By contrast, organizations that were viewed by officials as socially or politically disruptive found themselves at a significant legal disadvantage—especially when their members wished to acquire or protect property in order to advance their cause.

Our argument that the government systematically withheld valuable associational rights from politically controversial groups raises fundamental questions about the Tocquevillian portrait of the early United States as an "open access" civil society.[12] Tocqueville famously marveled at the effervescence of American voluntary associations and relished their wide-ranging purposes. In his view, the state had no hand in their success. Unlike governments "established by law," these associations were "formed and maintained by the agency of private individuals" exercising a "natural" "right of association . . . almost as inalienable in its nature as the right of personal liberty."[13] For Tocqueville, this freedom from the state enabled voluntary associations to provide a crucial check on the despotism he regarded as inherent in democratic government.

The basic Tocquevillian perspective continues to dominate scholarship on the role of voluntary societies in democratic polities. Modern theorists of civil society not surprisingly take a more positive view of democracy than Tocqueville—often, for example, highlighting the constructive role played by egalitarian groups that challenge the government—but they, too, locate voluntary associations "outside the state."[14] American historians of social and political movements similarly reinforce Tocqueville's view of an unfettered civil society by focusing on the agency of dissident activists and limiting their descriptions of government intervention to instances of criminalization or forcible repression.[15] Historians of philanthropy and religion

12. Tocqueville (1945, vol. 1, 198–205; vol. 2, 114–28); see also Habermas (1989). On the United States, in addition to Tocqueville, the now classic articulation of this view is Schlesinger (1944).

13. Tocqueville (1945, vol. 1, 198, 203).

14. See Levy (chapter 3, this volume). Levy's useful typology distinguishes between the integrative, competitive, and oppositional roles that democratic theorists commonly attribute to voluntary associations. This chapter concentrates on their oppositional role, but it might be possible to argue that their competitive and integrative roles were similarly compromised by the selective allocation of associational rights.

15. This literature, encompassing much of the subfield of social history, is far too vast to summarize in a footnote. Efforts to "bring the state back in" have simulated legal histories

acknowledge the benefit of early incorporation in the United States, but they rarely depict it as a privilege denied to disfavored groups.[16] A few recent histories of voluntary associations highlight a degree of government intervention, but they, too, either overlook the discriminatory dispensation of charters or maintain that the discrimination had largely ended by the time Tocqueville arrived.[17] Historical sociologists and political scientists vary widely in their value judgments about the social impact of voluntary associations.[18] Whether they view them as beneficial or destructive to American democracy, however, these researchers still join Tocqueville in regarding nineteenth-century voluntary associations as private, civil society organizations separate from the state.

In contrast to this scholarship, we contend that the voluntary associations so admired by Tocqueville never really operated independently of the state.[19] Instead, nineteenth-century lawmakers systematically discriminated against certain groups by constraining their access to valuable entity and personhood rights. The net effect of this process was that the political judgments of government officials skewed the development of American civil society toward conservative and acquiescent groups at the expense of oppositional ones.

Our account of this history draws on the hundreds of legislative acts and court rulings between 1750 and 1900 that shaped this lopsided allocation of rights.[20] We divide the chapter into chronological sections that highlight major changes and continuities over time: (a) the American Revolution's opening of access to corporate rights to churches, evangelical societies, conventional charities, private schools, educational institutions like libraries and museums, and fraternal lodges; (b) the restriction of these rights, none-

documenting the government's treatment of subjugated and oppositional groups, but these almost never focus on voluntary associations as organizations. Our work builds on a few recent exceptions that, however, offer interpretations that differ in important respects from our own, including Novak (2001), Tomlins (1993), and North, Wallis, and Weingast (2009).

16. For example, Wright (1992), Hall (1992), McCarthy (2003), and Gordon (2014).

17. For example, Brooke (2010), Neem (2008), Koschnik (2007), and Butterfield (2015).

18. For example, Putnam (2000), Skocpol, Ganz, and Munson (2000), and Kaufman (2002).

19. In this chapter we use the term "voluntary association" synonymously with "nonprofit group," with both terms referring to any association organized by private citizens for nonbusiness purposes whether incorporated or not. This use seems to us most consistent with today's ordinary speech. In the nineteenth century, however, both terms possessed much narrower legal meanings: "voluntary association," which appeared frequently in case law and treatises, usually referred to an unincorporated group (whether for business or nonbusiness purposes); "nonprofit," "not for profit," and "not-pecuniary" were adjectives coined in late nineteenth-century statutes to distinguish nonbusiness corporations from business corporations. The word "philanthropy" rarely appears in our study because "charity," as a legal term, is more pertinent to our argument, and because its positive valence obscures the distinctions we make between favored and disfavored organizations.

20. One reason scholars have largely missed the importance of the government's role in dispensing these rights is that the national picture was virtually impossible to investigate until the advent of large electronic databases, because the process took place by means of piecemeal statutes and scattered judicial decisions on the state level.

theless, to essentially the same kinds of noncontroversial organizations that had already enjoyed privileges in the colonial period; (c) the manner in which postrevolutionary state legislatures and courts used their powers to grant and interpret charters to curb the rights of potentially dissident organizations composed of artisans and ethnic minority groups; (d) the transition in the mid-nineteenth century from special charters to general incorporation laws that increased access to new categories of politically acceptable organizations like social clubs and recreational groups; (e) the simultaneous mid-century expansion of the range of rights held by associations that received charters, including greater autonomy from judicial supervision; and (f) the state's persistent denial of access to corporate rights to voluntary associations with politically controversial goals, like radical reform societies, trade unions, and political parties. This denial is especially noteworthy in light of the increased opening of access to politically favored ones. It is the goal of this chapter to tell both sides of this history.

7.1 Expanding Access to Traditionally Favored Groups, 1750–1820

The impact of the American Revolution on the legal rights of voluntary associations was much more mixed than scholars generally recognize. On the positive side, American citizens largely won a de facto right to associate despite its absence from the Constitution. Ordinary people could immediately create numerous types of voluntary associations, including oppositional political parties as early as the 1790s. A significant subset of these associations also began to acquire the more explicit rights belonging to corporations—rights to entity and personhood status that went beyond the individual right of their members to associate. On the negative side, access to these corporate rights remained highly restricted for political reasons. The power to issue and enforce charters, previously held by Parliament and the king, shifted to state legislators and judges, who tended to favor the same types of associations as those previously favored under colonial law. This significant degree of continuity with British rule has gone largely unnoticed by celebrants of American voluntarism.

It is well known that political associations that challenged the state during the colonial era were considered illegal, and authorities often used force to repress them. Elites with connections in Parliament or the colonial provincial governments could usually make their criticisms heard, but inasmuch as they coalesced into associations, they were, in the parlance of the day, factions shrouded in secrecy rather than legitimate organizations. On the popular level, traditionally limited protests like bread riots enjoyed a partial legitimacy, but officials treated most public demonstrations of antagonism to government policies as criminal.[21] A few of the most prominent examples

21. On the tradition of extralegal crowd actions, see Maier (1970) and Countryman (1976).

of political repression during the late colonial period include the jailing of Baptists who refused to defer to the Church of England in Virginia, the mobilization of militias against the North Carolina Regulators and the Paxton Boys in Pennsylvania, and, of course, the use of royal troops to suppress the Sons of Liberty in Boston.[22]

What has been less often perceived is the extent to which British law recognized other kinds of privately organized voluntary associations as legitimate. The Elizabethan law of charitable uses endorsed the creation and support of parish churches, schools, workhouses for the poor, and other local organizations serving the indigent or disabled. These types of organizations were founded in the colonies as well as in Great Britain, supported both by the 1601 statute and, in some colonies, by extra laws passed by provincial legislatures.[23] The Glorious Revolution in the late seventeenth century extended legal toleration, if not equal rights, to dissenting Protestant churches. In addition, the king and Parliament granted corporate charters to especially favored organizations, such as the Church of England's missionary wing, the Society for the Propagation of the Gospel, and a similar Presbyterian Scottish evangelical group, both of which operated in America but were seated in Britain.[24]

These types of legally recognized groups had an important characteristic in common: they performed functions regarded by authorities as useful. No clear line divided public and private: some of these state-sanctioned enterprises were founded or funded by donors who freely contributed their own property; some were administered with minimal oversight by the government. Ultimately, however, what justified the privileged legal status of all of them was that they were seen as instruments, or extensions, of the state.[25] The Elizabethan statute and royal charters in effect functioned as official licenses that allowed groups organized by private persons to acquire property and have standing in courts as long as their goals were specifically endorsed by the government. By contrast, other kinds of voluntary associations, like elite social clubs and fraternal groups, possessed no legal status at all.[26]

22. On these instances of repression, see Isaac (1982, 146–77), Whittenburg (1977), Hindle (1946), and Morgan and Morgan (1953).

23. Shurtleff (1854, vol. 4, pt. 2, 488); *Acts and Laws of the State of Connecticut in America* (1796, 252–53, Hartford: Hudson and Goodwin). In the 1820s, the Pennsylvania jurist Henry Baldwin unearthed many examples of the British law of charities being used in colonial America, an argument that helped to persuade the United States Supreme Court in 1844 to change its earlier negative position of 1819. On Baldwin's scholarship and its impact, see Wyllie (1959).

24. Davis (1917, vol. 1, 38).

25. See Jones (1969), Jordan (1959), and Owen (1964). On the spread of private charities and private schools in mid-eighteenth-century America, see Bridenbaugh (1938, 392–98, 448–51).

26. Craft-based fraternities had traditionally been considered corporations with monopoly rights, but guilds had lost virtually all their medieval legal privileges by the late seventeenth century. For examples of early American crafts groups, social clubs, and fraternal societies, see Bridenbaugh's *Cities in the Wilderness* (1938, 36–37, 295, 303, 394–97, 436, 437–40, 457–64), Shields (1997, 175–208), and Bullock (1996, chs. 1–2).

In comparison to England, the legal standing of early American voluntary associations suffered in one important respect: the imperial government was loath to charter organizations created by colonists, largely for fear of their becoming independent of British control. The few exceptions tended either to be related to the Church of England, like William and Mary College, or to receive strong support from royal and proprietary governors whose authority derived from the king. Otherwise, legal protection for property held by colonial groups came from charitable uses law or from charters issued by provincial legislatures without royal approval. The reluctance of the Crown to incorporate organizations based in America produced friction already in the seventeenth century when defiant Puritan legislators issued acts of incorporation for Harvard College, and later Yale, without sending them to England for review.[27] Tensions over the issue of incorporation resurfaced in the late colonial period with several unsuccessful attempts by colonists to gain official approval. The College of New Jersey (later Princeton) and Eleazar Wheelock's missionary school (later Dartmouth) failed to secure charters, forcing their founders to postpone the projects until more sympathetic royal governors agreed to them.[28] In 1763, the imperial Board of Trade rejected the incorporation of a Congregationalist missionary society because the Massachusetts charter required too little government supervision and the group threatened to interfere with British policy toward Native Americans.[29]

The American Revolution gave rise to new rights of association. First and most importantly, the fight against British repression paved the way for the recognition of a de facto right to associate. As Arthur Schlesinger Sr. long ago emphasized, the political organizations formed by the revolutionaries themselves had the practical effect of enhancing the legitimacy of oppositional political groups.[30] Similarly, the upheaval of the Revolution emboldened dissident churches and radical sects that had been previously suppressed by officials supporting the colonial ecclesiastical establishments.[31] This revolutionary context shaped the interpretation of the fundamental rights declared in the First Amendment of the US Constitution: the rights of free worship and a free press, also proclaimed by virtually all state constitutions, and the rights of free speech and assembly, proclaimed by over half of them.[32] Although none of these documents explicitly provided for

27. Davis (1917, vol. 1, 19–22).

28. Davis (1917, vol. 1, 25, 46, 85–86).

29. Davis (1917, vol. 1, 80–81). For the purposes of this chapter we are not including instances of colonial governments chartering public corporations like townships (or the churches of the ecclesiastical establishment). For an emphasis on the importance of such colonial precedents on the prevalence of the corporate form after the Revolution, see Kaufman (2008).

30. Schlesinger (1944).

31. Isaac (1982, 243–95) and Marini (1982).

32. Of the state constitutions ratified before 1820, six lacked the right of speech (Massachusetts, New Jersey, Delaware, Maryland, Virginia, and South Carolina) and five lacked assembly (New York, New Jersey, Maryland, Virginia, and South Carolina). See NBER State Constitutions Project, http://www.stateconstitutions.umd.edu/texts/.

a right of association, they nonetheless provided legal grounding for the idea that Americans were free to form associations whose purposes did not otherwise break the law.

This background did not, however, immediately or completely secure the right of citizens to associate for political purposes. In the 1790s a decisive setback occurred when leaders of the Federalist Party tried to suppress Democratic-Republican clubs and the Jeffersonian oppositional press. Seventy Democratic-Republicans were jailed and fined under the notorious Alien and Sedition Acts of 1798, and after the Jeffersonians gained power, they briefly attempted to retaliate by prosecuting a few prominent Federalists under the common law of seditious libel.[33] Nonetheless, the expiration of the Alien and Sedition Acts in the early 1800s opened up a new era of increasingly accepted partisanship, and by the 1820s, organized political conflict had become widely recognized as an inevitable feature of popular rule.[34] Even so, the extent of the de facto American right to associate in the early republic should not be exaggerated. Laws passed in the South routinely denied free blacks and slaves the right to congregate for virtually any purpose, and Northern courts soon re-introduced the common-law doctrine of criminal conspiracy in order to curtail strikes by labor unions.[35]

Second, the American Revolution gave rise to new associational rights by widening access to incorporation. State legislatures assumed the power to issue charters that previously had been reserved to the king and Parliament, and in many states elected representatives reacted against the former stinginess of the British by passing acts of incorporation in large numbers. Whereas the right to associate was at best a de facto right possessed by individual citizens, the entity and personhood rights of corporations were at once formal and possessed by organizations. They were particularly important for organizations that aspired to last indefinitely, consisted of many members, and experienced high turnover in membership. At a time when the small size of most businesses enabled them to manage their property as partnerships and single proprietorships, voluntary organizations had more need for the form and therefore became corporations more often than businesses.[36] To be sure, not all eligible associations bothered to apply for

33. Only two of the nine known libel prosecutions against Federalists yielded convictions: Lipset (1963, 40–43) and Levy (1960, 296–309).

34. Hofstadter (1969). On the conflicts of the 1790s and the moderate Jeffersonian endorsement of free association, see Neem (2003) and Butterfield (2015, 31–54).

35. As is also noted in this volume by Brooks and Guinnane (chapter 8), "The Right to Associate." Other examples from later in US history include: Southern laws against abolitionists in the 1830s, the Congressional ban on polygamy against Utah Mormons in the 1880s, and the anticonspiracy and antiespionage acts used against Communists in the twentieth century. Laws against nineteenth-century trade unions are discussed later in this chapter; also see Levi et al. (chapter 9, this volume).

36. Maier (1993) and Kaufman (2008, 415, 417). This contrasts sharply with Prussia and France, where businesses received legal entity and personhood rights before nonprofit groups. See Brooks and Guinnane (chapter 8, this volume).

charters; those that were small, ephemeral, or propertyless had little incentive to do so.[37] Once postrevolutionary legislatures increased the availability of charters, however, voluntary associations that had common property to safeguard frequently took advantage of the greater opportunity to use the corporate form.

Another reason that numerous voluntary associations became corporations was that American revolutionary ideology undermined the British law of charitable uses that had previously protected private donations to churches, schools, and local charities. Republican sensibilities were offended by traditional charitable law for two reasons: first, it left jurisdiction over bequests to the juryless, inefficient, and often corrupt chancery courts (think *Bleak House*); and second, it gave perpetual control over donated property to trusts with inflexible mandates that potentially tied up wealth for generations without serving a useful purpose. Although some states continued to recognize British charitable law, others rejected it, which made incorporation by state legislatures the only viable route to legal status.[38]

The sorts of organizations that followed this route were generally the same sorts that the British had previously permitted to hold legal rights either as recipients of royal charters or as beneficiaries of charitable trusts.[39] Although the years between 1780 and 1840 witnessed a veritable explosion of voluntary groups ranging from unorthodox churches to fraternal orders and from political parties to utopian communities, the states mostly limited charters to those whose purposes were religious, educational, or conventionally charitable (either in the sense of aiding or uplifting the poor or, like hospitals, tending to the sick or disabled).[40] Churches and other

37. Historians have tended to overestimate the proportion of voluntary groups that procured charters because the kinds of well-established, propertied groups that became corporations are so heavily represented in printed sources (including charters). We found that only four (less than 5 percent) of 219 Massachusetts groups founded between 1807 and 1815 identified as broadly "charitable" (including evangelical, fraternal, mutual aid, poor relief, medical, and educational organizations) had received charters by 1816. This figure was produced by cross-checking the Massachusetts subset of the groups listed in the exhaustive appendix of Wright (1992, 244–60) with the acts of incorporation reported in *The Public and General Laws of the Commonwealth of Massachusetts, from Feb 28, 1807 to Feb 16, 1816*, vol. 4 (Commonwealth of Massachusetts 1816).

38. Fishman (1985). In Britain, popular hostility to charitable use law culminated with the passage of reform legislation in the 1820s that eliminated the worst abuses and enabled the basic law to persist (Jones 1969, 160–68). On the initial American rejection, see Miller (1961).

39. We thank Jason Kaufman for giving us access to his database of corporate acts collected from the 1780–1800 session laws of Massachusetts, Vermont, Connecticut, Pennsylvania, Ohio, Virginia, North Carolina, Kentucky, and Tennessee for the period (with variations by state). Many of our generalizations about the numbers and types of corporate acts before 1825 are based on searches within recently digitized compilations of state laws contained in Readex, "Archive of Americana": *Early American Imprints, Series I: Evans, 1639–1800*; *Early American Imprints, Series II: Shaw and Shoemaker (1801–1825)*, and in HeinOnline, *Session Laws Library*.

40. This conclusion is derived both from searches in annual sessions and from later lists of corporations published by Pennsylvania, Massachusetts, South Carolina, and Ohio, as follows: Commonwealth of Pennsylvania (1837–39, vol. 3, 213–368); Commonwealth of Massachusetts (1816, 1837, 1860); State of South Carolina (1840, 1–484); and Ohio, Secretary of State (1885, 147–225), containing a list for 1803–1851.

Protestant religious organizations, which often owned property acquired before the Revolution and comprised the majority of first applicants for charters, became the first beneficiaries of the general incorporation laws passed in the 1780s and 1790s.[41] General laws facilitating the incorporation of other traditionally privileged groups were not far behind. Indeed, Pennsylvania and the US Congress, acting for the Northwest Territory, passed general incorporation acts not just for churches but also for charitable and literary societies already in the 1790s.[42] By the 1830s several other states had passed one or more general incorporation acts for specific types of voluntary groups, ranging from fire companies to social libraries to medical societies.[43] Even without general legislation, legislatures in most states incorporated great numbers of such organizations by individual acts. Massachusetts had already issued so many special charters to "charitable" societies that in 1817 the state's weary legislators resorted to a barebones template conferring, in one short phrase, "all the privileges usually given."[44] In addition, when conventionally acceptable voluntary groups applied for charters, most states in most parts of the country took a pluralistic approach to incorporating them. Even elite institutions with colonial charters that established monop-

41. Fishman (1985, 632). The Revolution's support for ecclesiastical disestablishment led states to issue charters to churches as a sign of official religious toleration. Even in Massachusetts, where the Congregationalists continued to receive state support, the government offered to liberally incorporate dissenting churches and bristled when uncooperative Baptists and Universalists refused to take advantage of the opportunity. The state's strategy of attaching corporate rights to ecclesiastical rights (most importantly the rights to tax exemption and licensed marriage ceremonies) ironically backfired as a gesture of religious inclusion. See Cushing (1969).

42. Commonwealth of Pennsylvania 1810), and United States (1798). In Pennsylvania, a judicial opinion of the 1830s insisted on a narrow construction of the 1791 general law, claiming that "literary" never included institutions of higher learning and that "charitable" had always applied only to organizations "affording relief to the indigent and unfortunate." *Case of Medical College of Philadelphia*, 3 Whart. 454 (1838), quote at 18.

43. We found twelve additional general incorporation laws for specific types of voluntary associations passed between 1780 and 1830 (in addition to the many others for religious groups): Virginia Session Laws, October Session, 1787, Ch. 35, p. 25 (fire companies); New York Session Laws, 10th Legislature, 1787, Ch. 82, pp. 524–31 (colleges and academies), 19th Legislature, 1796, Ch. 43, pp. 695–99 (public libraries), and 36th Legislature, 1813, Ch. 40. Vol. 2, pp. 219–24 (medical societies); New Jersey Session Laws, 19th General Assembly, 1794, Ch. 499, pp. 950–52 (societies for the promotion of learning), 24th General Assembly, 1799, Ch. 827, pp. 644–45 (library companies), and 54th General Assembly, 2nd Sitting, 1829, pp. 19–25 (medical societies); Massachusetts Session Laws, January 1798, Ch. 65, pp. 200–201 (social libraries); January 1819, Ch. 114, pp. 181–83 (agricultural societies) and January 1829, pp. 219–20 (lyceums); Kentucky Session Laws, 6th General Assembly, 2nd Session, 1798, Ch. 42, pp. 78–79 (fire companies); Vermont Session Laws, October 1800, pp. 11–15 (social libraries). Here and throughout, the references to "Session Laws" are to HeinOnline's *Session Laws Library*, noted above.

44. For example, "An Act to Incorporate the Master, Wardens and Members of the Grand Lodge of Massachusetts," Massachusetts Session Laws, 1817, p. 408; and "An Act to Incorporate the British Charitable Society," Massachusetts Session Laws, January 1818, pp. 547. These barebones charters were a sharp contrast to the detailed 1786 and 1790 charters reprinted in *The Act of Incorporation, Regulations, and Members of the Massachusetts Congregational Charitable Society* (Boston: John Eliot, 1815, pp. 3–6) and *Rules and Articles of the Massachusetts Charitable Society* (Boston: Adams and Rhoades, 1803, pp. 3–7).

oly privileges, like Harvard College, fought losing battles in state legislatures to prevent rival organizations from becoming incorporated.[45]

Because the power to incorporate resided within state governments, however, local political considerations inevitably affected the distribution of charters in different regions. In general, the South incorporated fewer organizations than the North, both for nonprofit and for business purposes. The rural spread of the population and the slave-based economy discouraged the formation of the kinds of charitable organizations that, in Northern cities, served lower-class groups. Added to this was an especially virulent anticorporatism among Jeffersonians that stemmed from the revolutionary struggle to disestablish the Church of England and later legal battles to invalidate the colonial charters of institutions tied to the former religious establishment.[46] So extreme was Virginia's hostility to ecclesiastical corporations that the state forbade the incorporation of all churches, an example that was later followed by West Virginia, Arkansas, and Missouri.[47] South Carolina, by contrast, issued many charters to local churches but otherwise chartered few voluntary groups that ordinary people joined. Even as the Bible Belt stretched over the South during the Second Great Awakening, the large national evangelical organizations that elsewhere enlisted numerous Protestant ministers and lay activists incorporated few Southern state chapters or auxiliary societies (exceptions were the Virginia and North Carolina Bible Societies and the American Colonization Society chartered in Maryland).[48]

45. On the debates in the early 1820s over the Republican-sponsored charters for Berkshire Medical College and Amherst College, both of which threatened Harvard's monopoly, see Neem (2008, 75–77). Similarly, the University of Virginia corporation was founded by Democratic-Republicans to compete with the older Anglican monopoly, William and Mary College (whose charter the Jeffersonians first tried to destroy).

46. Key cases are *The Rev. John Bracken v. The Visitors of Wm. & Mary College*, 7 Va. 573 (VA 1790) (John Marshall defended the college) and *Terrett v. Taylor*, 13 U.S. 43 (1815) (a precedent for *Dartmouth*). James Madison blasted "the excessive wealth of ecclesiastical Corporations" and used his power as president in 1811 to veto a congressional bill incorporating the Protestant Episcopal Church in Washington, DC. See Campbell (1990, 154).

47. A Virginia law of 1799 declared the incorporation of religious groups to be "inconsistent" with religious freedom (a position written into the state's constitution of 1851). See Buckley (1995, esp. 449–51). Also see Campbell (1990, 154) and Note, "Permissible Purposes for Nonprofit Corporations," *Columbia Law Review* 51 (1951): 889–98. In 2002 a case brought by Jerry Falwell on First and Fourteenth Amendment grounds finally forced Virginia to change its constitution. *Falwell v. Miller*, 203 F. Supp. 2d 624 (US Western District of Virginia 2002). On anticorporatism in Virginia (and among Republicans more generally), see Hall (1992, 22–23), and Hall (1982, 85).

48. For an introduction to the so-called Benevolent Empire, see Griffen (1960). On the Virginia Bible Society, chartered in 1814, and its auxiliary organizations, see Bell (1930, 244–45). North Carolina Session Laws, 1813, p. 26. Three local chapters of the Bible Society were incorporated in Maryland (Baltimore, 1813) and South Carolina (Union, 1825; Charleston, 1826). Maryland incorporated the American Colonization Society, discussed further below, in 1831. Maryland Session Laws, General Assembly, December Session, 1830, pp. 201–2. Our searches for interdenominational bible and missionary societies prior to 1830 produced one result in Maryland (the Female Domestic Missionary and Education Society in Hagerstown, 1831) and no results in the Session Laws of Georgia, West Virginia, Kentucky, Tennessee, Alabama, Mississippi, and Louisiana.

Apart from local churches, the Southern voluntary associations that received the most charters either catered to the elite, like Masonic lodges, literary societies, and private academies, or existed primarily to protect property, like fire companies.[49] This narrow granting of charters, especially when taken together with Virginia's and Maryland's repudiation of British charitable law (which traditionally enabled religious, educational, and charitable groups to receive bequests without needing to be incorporated) may help to explain why so few Southern charitable and religious voluntary associations amassed resources and perpetuated themselves over time.[50] Within the terms of Jeffersonian ideology, political hostility to corporations was justified on high-minded egalitarian principles. But the reluctance of the South to grant extra associational rights to churches and charities probably served the interests of the elite more than those of ordinary citizens. By retaining state control over poor relief and curbing the rights of evangelical groups, the planter class effectively reduced the potential of organized opposition to its social and political dominance.

In the North, the chartering of colleges, academies, and cultural institutions founded by wealthy Federalists bred popular resentment just like the Federalist control of banks.[51] Jeffersonian anticorporate ideology lost much of its force, however, once the Democratic-Republicans gained power and were able to incorporate voluntary associations of their own. In New York, the Democratic-Republican ascendency in the early 1800s shifted the pattern of incorporation more toward fraternal groups of recent immigrants and artisans largely populated by their partisans.[52] These groups satisfied the

49. The cities of Baltimore and Charleston conformed more to a Northern pattern in having several incorporated charitable organizations. On the early general law incorporating Virginia fire companies, also see Davis (1917, vol. 2, 17). On Virginia incorporated academies, see Bell (1930, 168). South Carolina passed almost 450 acts of incorporation for voluntary groups between 1775 and 1835, of which 50 percent were churches and denominational organizations; 14.5 percent academies, seminaries, and colleges; 11 percent library, literary, and other cultural societies; 7 percent Masonic and other fraternal mutual aid associations; 5.5 percent militia and fire companies; 4 percent free schools and charities for the poor; 3 percent professional, agricultural, and commerce societies; and 5 percent other or unknown (State of South Carolina 1840). Our sampling of Georgia's Session Laws between 1789–1810 and 1820–1830 reveals much the same pattern. On Masonic lodges, our surveys found that seven of the thirteen states to incorporate Grand Lodges by 1825 were Southern: South Carolina (1791, 1814, 1818), Georgia (1796, 1822), North Carolina (1797), Louisiana (1816), Mississippi (1819), Maryland (1821), and Alabama (1821). The Northern states were Massachusetts (1817), New York (1818), New Hampshire (1819, 1821), Maine (1820, 1822), Connecticut (1821), and Vermont (1823).

50. Among historians of philanthropy, the term "Virginia Doctrine" refers to the reluctance of several states, especially in the South, to encourage private charities (especially by invalidating charitable bequests). See McCarthy (2003, 87), Miller (1961, xii, 50), and Hirschler (1938, 110).

51. Neem (2008) and Brooke (2010). On the politics of banking, see Qian Lu and John Wallis (chapter 4, this volume), and on New York, Hilt (2017).

52. In addition to the mechanics societies discussed below, the Caledonian Society (Scottish) and the Hibernian Provident Society (Irish), both incorporated in 1807, were particularly known for their history of partisanship (Young 1967, 401–2). Our sample of New York Session Laws indicates that most of the European ethnic societies incorporated prior to 1820 received their charters in 1804–7, during the early years of Democratic-Republican rule.

standard expectation that corporations be socially useful by pledging themselves to the "charitable" assistance of fellow members and their families in need. Even the notoriously partisan Tammany Society of New York received a charter in 1805 shortly after the Democratic-Republicans won control of both houses of the state legislature.[53] Incorporated under terms that granted more freedom of self-governance than usual for the period, the Tammany Society easily withstood an 1809 challenge to its charter by a former member who accused the organization of betraying its official "charitable purpose" by becoming "perverted to the worst purposes of faction."[54] Tammany's leadership in turn indignantly denounced this effort "to cancel its long list of good actions and wrest from it its charter of incorporation, the basis of its stability and existence."[55] Far from consistently opposing corporations, powerful Democratic-Republicans regarded a thin veneer of charity as sufficient to qualify an organization for a charter if enough lawmakers supported it on political grounds. Revolutionary-era hostility toward corporations never entirely disappeared, but as Democratic-Republicans in the North jumped on the corporate bandwagon, the partisan quality of their objections to incorporation started to lose traction. In response to chronic demand, legislators issued more and more charters to nonprofit groups, as well as to businesses, regardless of which party or faction was in power.[56]

Few organizations as blatantly partisan as the Tammany Society managed

53. New York Session Laws, 28th Legislature, 1804, p. 277–79. The distinction between the "fraternal" Tammany Society and the partisan Tammany Hall (the General Democratic Republican Committee of New York, which met in the building owned by the Society) enabled the political machine in its heyday to dispense "charity" and raise private funds without government oversight (see Mushkat 1971, 10, 366). The Tammany charter was unusual in this period in three important ways: in giving carte blanche to the group's own constitution and bylaws to determine the mode of elections, types of officers, and admissions requirements; in containing no term limit; and in allowing the corporation to "take" and "receive" property as well as to purchase and hold it. The only significant restriction was a $5,000 property limit, which was an average amount for fraternal benefit societies of the period. According to a 1807 New York almanac, the society had a two-part constitution, one "public," relating to external matters, the other "private," relating to "all transactions which do not meet the public eye, and on which its code of laws are founded." Quoted from Longworth (1807, 78), as cited by Myers (1901, 24).

54. "Another Denunciation! From the Nuisance of Last Night," *The American Citizen* 10 (Mar. 1, 1809), p. 2. Myers (1901, 31–32) and Mushkat (1971, 37–38). An 1872 petition to the New York legislature to revoke Tammany's charter similarly died in committee (State of New York 1872, 175).

55. As quoted in Myers (1901, 32).

56. A comparison of the numbers of special charters issued by New York and Massachusetts in the two years before and after the state first had both a Democratic-Republican governor and legislative majority shows that that no overall cutback occurred. In New York, where the Federalists lost power in 1802, the number remained constant for businesses and rose by 400 percent for nonprofits (from one to four: the small total number of nonprofit special charters is due to New York's general incorporation acts for churches, libraries, and academies); and in Massachusetts, where the Democratic-Republicans seized control temporarily in 1810–11, chartering rose by 28.5 percent for businesses and 81 percent for nonprofits (from twenty-one to thirty-eight). Averaging the numbers of special charters per year for 1800–1805 and 1834–1835, the overall increase in incorporated voluntary associations between the two periods was 120 percent in Massachusetts (from twelve per year to twenty-six), 800 percent in New York (from two to eighteen), and 100 percent in South Carolina (from four to eight).

to secure charters.[57] Throughout the first half of the nineteenth century, most incorporated voluntary groups fit into the conventionally privileged categories of religious, educational, and charitable groups.[58] To be sure, the stretched definition of "charity" now included fraternal associations whose charitableness mainly consisted of offering financial benefits to their own members, but even they could be regarded as contributing to the wider society by easing pressure on public poor relief. The traditional view that chartered groups benefited the general welfare continued to safeguard the legitimacy of the chartering process despite the political twists and turns of state legislators. Indeed, suspicions that corrupt officials rewarded their partisan allies only reinforced the widespread conviction that socially and politically divisive groups should be ineligible for corporate grants from the government. The Tammany Society, the glaring exception, received its charter early enough in the political battle between Federalists and Democratic-Republicans to slip under the wire, and even it professed a charitable purpose when its charter came under fire. In theory, if not always in practice, corporations were from the outset supposed to stay out of politics.

7.2 Legislative Constraints on the Corporate Rights of Disfavored Groups, 1790–1820

The notion that religious, educational, and charitable associations served the public good also justified a measure of governmental control over them. Even in the case of Protestant churches and other highly favored organizations, acts of incorporation often included limits on the amount of property they could own or the number of years their charters remained valid.[59]

57. Other political groups in the early republic built on Tammany's fraternal model, including the dozens of Washington Benevolent Societies organized by young Federalists starting in 1808, but our searches in the HeinOnline database of state session laws and in published lists of Massachusetts and New York corporations produced no evidence of their incorporation (contrary to Butterfield [2015, 50]). As we show below, partisan organizations became corporations in a few states at the end of the century.

58. Fire companies and mutual aid associations (both loosely considered "charitable") were the only sizable exceptions to these traditional categories. There was minimal change in the percentages of special charters for groups whose purposes were not either religious, educational, traditionally charitable (in the sense of aiding the poor or disabled), mutual aid, or fire protection. In Massachusetts, these exceptional types—the most common of which were agricultural and medical societies—constituted only 3 percent in 1800–1805 (out of a sample totaling seventy-three) and 2 percent in 1834–35 (out of fifty-three); in New York, 11 percent in 1800–1805 (out of eighteen) and none in 1834–1835 (out of thirty-seven); and in South Carolina, 4 percent in 1800–1805 (out of twenty-four) and 6.5 percent in 1830–1835 (out of forty-six).

59. On the limits typically placed on early corporations, see Maier (1993, 76–77). On property limits for church corporations, see Gordon (2014). A few of many other types of examples include: Beaufort Library Society (income limited to $5,000 and a term limit of fourteen years), South Carolina Session Laws, 1807, pp. 244–45; American Antiquarian Society (income limited to $1,500 and personal property to $7,000), Massachusetts Session Laws, 1812, Ch. 69, pp. 142–42; Baltimore Bible Society (income limited to $3,000), Maryland Session Laws, 1813, p. 15; Humane Society in New York (income limited to $3,000), New York Session Laws, 37th Session, 1814, Ch. 9, pp. 12–14; Handel and Hayden Society (personal property and real estate each limited to $50,000), Massachusetts Session Laws, 1816, Ch. 78, pp. 85–86.

New York's 1784 general act of incorporation for churches contained such detailed prescriptions about ecclesiastical governance—including procedures for democratically deciding which church members could vote, how corporate trustees would be elected, and how to determine the salaries of clergymen—that leaders of Episcopal and Dutch Reformed churches mounted a thirty-year campaign for changes that would accommodate their more hierarchical church polities.[60] Charitable and educational corporations serving the general public were typically subject to additional governmental constraints. Massachusetts General Hospital, for example, was required to offer free admission to the indigent, and many private colleges including Harvard and Yale needed to reserve seats on their boards for public officials until the 1860s and 1870s.[61]

Legislatures subjected the charter applications of associations run by socially and politically marginal people to far more discriminatory treatment. Regardless of which party dominated the state government, lawmakers often saw such organizations as raising the specter of social disorder and were reluctant to extend the same entity and personhood rights that they routinely granted to mainstream associations with similar goals. Catholic churches, for example, were routinely compromised by the Protestant bias toward lay ecclesiastical control that prevented high-ranking clergy from organizing as "corporations sole"—a corporate form that in Europe had long made it possible for bishops to rule over their dioceses.[62] Instead, Catholic parishes in the United States that incorporated were forced to entrust church property to local groups of trustees who lacked official religious authority.[63] More direct forms of discrimination undercut the efforts of laborers, blacks, ethnic minorities, and women who formed organizations to pursue otherwise acceptable educational and charitable purposes. For several decades beginning in the 1790s, members of socially subordinate groups submitted a growing number of petitions for charters. The Northeastern state legislatures ruling on these petitions often either rejected them outright or attached special provisions to reduce the corporate rights that charters ordinarily conferred.

60. The initial act is contained in New York Session Laws, 7th Session (1784), Ch. 18, pp. 613–18. Churches that did not conform to the law in the meantime received special charters. For the successive revisions, see New York Session Laws, 16th Session (1793), Ch. 40, p. 433; New York Session Laws, 36th Session, 1813, Ch. 60, Vol. 2, pp. 212–19.

61. Commonwealth of Massachusetts (1814) and Whitehead (1973, 191–240).

62. Maitland (1900).

63. Campbell (1990, 155–56). In one Pennsylvania case of 1822, this situation even gave rebellious lay members of St. Mary's Church an opening to try, albeit unsuccessfully, to revise the corporate charter to altogether exclude priests. *Case of the Corporation of St. Mary's Church (Roman Catholic) in the City of Philadelphia*, 7 Serg. & Rawle 517 (PA 1822). In antebellum Massachusetts, where Irish immigration inflamed Protestant nativism in the 1840s and 1850s, a legislative investigation also led to the rejection of a Jesuit college's bid for incorporation in 1849. For a scathing contemporary attack on the negative report, see *Brownson's Quarterly Review*, n.s., vol. 3, no. 3 (1849) pp. 372–97.

From the time of the Revolution, for example, labor groups experienced exceptional difficulties procuring charters because of longstanding worries by public officials about their potential to control wages. Two organizations of artisans formed in the late eighteenth century, one in Boston to prevent apprentices from quitting before their contracts expired and the other in New York to regulate the members' "affairs and business," were repeatedly denied charters on the grounds that they were "combinations" aiming to set "extravagant prices for labor."[64] A newspaper article written in 1792 by "A Friend to Equal Rights" bemoaned the fact that banks received "every attention" whereas the mechanics' "wish to be incorporated [has] been treated with contempt and neglect."[65] It soon became clear that corporate status for these and other labor organizations, as well as many associations of ethnic minorities, depended on persuading state lawmakers, regardless of the party in power, that they were exclusively "charitable" mutual benefit societies dedicated to providing aid to sick or impoverished members (or, when deceased, their widows and children), and, occasionally, to offering instruction in their trades.[66] In 1816, when the New York Typographical Society attempted to deviate from this formula by adding to its list of objectives the goal of improving conditions of labor, the legislature rejected the bill, passing it only two years later when this provision had been removed.[67]

When labor groups managed to secure charters, the acts of incorporation often contained threats of dire consequences should they stray from their declared purposes of mutual aid and education. In New York, where

64. Street (1859, 261–64; quotes on 261, 263) and Buckingham (1853, esp. 8–9, 50, 57–58, 95–96). The quote is from a later edition, Massachusetts Charitable Mechanic Association (1892, 2). Charters of these two organizations were finally granted in 1792 (New York) and 1806 (Boston). Alfred F. Young (1967, 201–2); New York Session Laws, 15th Legislative Session, 1792, Ch. 26, pp. 300–303; Buckingham (1853, 57, 95–96); Massachusetts Session Laws, February, March Session, 1806, p. 91.

65. Young (1967, 201), quoting from the *New York Journal*, Mar. 30, 1791.

66. For citations to other New York labor charters granted between 1790 and 1820, see below. Our systematic analysis focuses on New York since that state granted labor groups the most charters, but other states also periodically passed restrictive charters for them in this period, for example: The Newburyport Mechanick Association, in Massachusetts Session Laws, January Session, 1810, pp. 139–40 ("for charitable purposes; but . . . for no other purpose whatsoever"); The Stanton Benevolent Mechanic Society, in Virginia Session Laws, 1818, December Session, Ch. 93, pp. 138–39 (forbidden to pass bylaws "for regulating trade, or the wages of labor"). In Pennsylvania, where the Bricklayers' Company was incorporated in 1797 under the general law as a "charitable society," the group's unpublished bylaws deviated from its charter by including "some general rules for measuring, and standard prices for valuation," suggesting a surreptitious purpose concealed from official view. See Wrenn (1971, 73–75).

67. Stevens (1913, 78). Stevens states that the initial bill contained a "provision permitting the association to regulate trade matters." The official records of New York's Assembly, which contain few specifics, report that the problem lay in the "first enacting clause" and that the revised petition contained a "modification" as to the corporation's "intention" (State of New York 1817, 260; State of New York 1818, 195). In the Senate, the 1818 vote to accept the revised bill was still close (12 to 10) (State of New York 1818, 87–88). In 1816, the Senate also rejected another labor group's petition for incorporation, for reasons that are not clear (State of New York 1816, 235).

the largest number of "mechanics" and journeymen groups were incorporated before 1820 (largely owing to the power of Democratic-Republicans), the three earliest acts up to 1805 included the unusual requirement that the groups report to the chancellor to prove that funds were not being diverted to other purposes.[68] A little later this reporting requirement was dropped, but six of the thirteen New York charters issued between 1807 and 1818 contained extra provisions that specifically forbade the enactment of bylaws or rules "respecting the rate of wages, or relative to [their] business."[69] In addition, virtually every corporate grant made by the state to a labor group before 1820 imposed extreme punishments for the pursuit of unapproved objectives. Whereas it was normal for states to reserve the right to dissolve corporations that exceeded their mandates, the charters given to labor groups stipulated that the state could, in addition, confiscate all corporate property.[70]

These unusually restrictive conditions imposed on corporations of artisans reflected the pervasive hostility toward organized labor within early nineteenth-century law. In response to several strikes by journeymen, American courts drew on repressive features of the British common law to indict members of unincorporated labor groups on charges of "criminal conspiracy" to fix wages.[71] Although no state legislature outlawed "combinations" of workmen by statute, as Parliament did in the 1790s, the acceptance of criminal conspiracy law by the judiciary amounted to the denial of the basic right to associate. The inability of labor groups to incorporate unless they denied the intention to raise wages made them more vulnerable to prosecution. When a lawyer for striking Philadelphia cordwainers during the first conspiracy trial of 1806 claimed that workers' organizations had the same collective rights to make rules for their members as a corporation, the argument went nowhere, nipped in the bud by the prosecutor's rejoinder that "this body of journeymen are not an *incorporated society* [italics in original] whatever may have been represented," because corporate status depended upon having "benevolent purposes."[72]

68. Society of Mechanics and Tradesmen of New York City (1792); New York Session Laws, 15th Legislative Session, 1792, Ch. 26, pp. 300–303; Albany Mechanics Society (1801), *General Index of the Laws of the State of New York, 1777–1857*, ed. T. S. Gillett (Albany: Weed, Parsons & Company, 1859), p. 171; Society of Mechanics and Tradesmen of Kings County (1805), New York Session Laws, 1804, 28th Legislative Session, Ch. 86, pp. 208–11.

69. New-York Masons' Society (1807), New York Session Laws, 30th Legislature, 1807, Ch. 9, pp. 8–10; New-York Society of Journeymen Shipwrights (1807), New York Session Laws, 30th Legislature, 1807, Ch. 116, p. 130–32; Mutual Benefit Society of Cordwainers of New York (1808), New York Session Laws, 31st Legislature, 1808, Ch. 20, pp. 10–15; General Society of Mechanics in Poughkeepsie (1808), New York Session Laws, 31st Legislature, 1808, Ch. 235, pp. 254–57; Butchers' Benevolent Society of New-York (1815), New York Session Laws, 38th Legislature, 1815, pp. 59–60; New York Typographical Society (1818), New York Session Laws, 41st Session, 1818, Ch. 17, pp. 13–15.

70. This language was written into the charters of 85 percent (eleven out of a total of thirteen) laborers' fraternal benefit groups incorporated between 1790 and 1819.

71. Tomlins (1993, 107–79).

72. *The Trial of the Boot & Shoemakers of Philadelphia on an Indictment for a Combination and Conspiracy to Raise their Wages* (Philadelphia: B. Graves, 1806, 8).

Charitable and educational associations organized in the Northeast by European ethnic groups, African Americans, and women also encountered resistance when they attempted to incorporate, albeit to a lesser extent, and often received charters specifying similarly restrictive conditions. Most of the New York charters granted to mutual benefit groups formed by recent immigrant groups and free blacks in the first decades of the nineteenth century contained the same threat of property confiscation commonly directed at labor groups. If the group were to pursue any "purposes other than those intended and contemplated by this act," the bills stipulated, the corporation would "cease" and its "estate real and personal" would "vest in the people of this state."[73] The 1808 act that incorporated the New York Society for Promoting the Manumission of Slaves for the purpose of facilitating the funding of its charity school for black children and other "benevolent purposes" contained this provision as well.[74] A report issued by the New York's Council of Revision was unusually explicit in expressing anxiety about chartering immigrant groups. Explaining the veto of an act of incorporation for a German mutual aid society, the councilors proclaimed that "it will be productive of the most fatal evils to the State" to encourage "foreigners differing from the old citizens in language and manners, ignorant of our Constitution and totally unacquainted with the principles of civil liberty" and would "establish a precedent under which the emigrants from every nation in Europe, Asia, and Africa, who incline to seek an asylum in this State . . . [will] claim similar establishments."[75]

An analogous fear of social disorder underlay the initial hesitation to charter charities run by middle-class women. The Boston Female Asylum, founded in 1800, at first met frustration when seeking to incorporate in 1803. In the vitriolic words of a newspaper critic, "the consequences, which will naturally result from it, must be hostile to the peace of society, and to the regularity and harmony of families."[76] When the charter was finally secured, it contained a passage compensating for the fact that married women could not be sued, requiring that wives who handled organizational funds procure

73. Seventy-seven percent (seven out of nine) of European ethnic and all (two out of two) of free black fraternal benefit groups incorporated prior to 1820 contained this language. A comparison to other types of New York "religious and charitable" corporations, 1780–1848, based on a random sample of seventy-one organizations from the *General Index*, pp. 171–74, found this provision in 60 percent of other (nonlabor, nonethnic) fraternal groups; 60 percent of nonfraternal charities; and in none of the religious or educational societies. A word search in HeinOnline session laws found this language in many state franchises like turnpikes, which operated on public land. Otherwise, the provision was virtually nonexistent in charters of business corporations. At least one early charter of an ethnic benefit association, the German Society in New York City, incorporated in 1804, included in addition a reporting requirement like those in the first charters granted to labor benefit groups. New York Session Laws, 27th Legislature, 1804, Ch. 64, p. 609.

74. "Act to incorporate the Society, formed in the State of New-York, for promotion the Manumission of Slaves, and protecting such of them as have been or may be liberated," New York Session Laws, 31st Legislature, 1808, Ch. 19, pp. 256–58.

75. Street (1859, 273).

76. As quoted in Wright (1992, 114).

their husbands' consent and that their husbands take responsibility for any property of the organization they handled. Another section held that the treasurer always be a single woman with enough personal resources to "give bond, with sufficient surety or sureties" to cover "all money and property of said society coming to her hands."[77] Charters of women's charitable groups in Massachusetts contained this language routinely for decades.[78] Pennsylvania charters of the period similarly stipulated that only single women could serve as treasurers, a provision that protected husbands from suits but also prevented wives from assuming positions of fiscal leadership.[79] But the corporate rights of women depended on the specific language of charters, and states did not always so readily defer to the law of *coverture*. In New York, the acts that incorporated women's organizations between 1800 and 1840 typically exempted the husbands of members from financial responsibility, an approach that contrasted with Massachusetts and Pennsylvania and presumably meant to encourage men to allow wives to participate.[80] Either way, lawmakers remained convinced for decades that husbands required an extra layer of protection from the distinctive risks posed by incorporated associations of women.[81]

Despite the legal disadvantages of marriage, middle-class women in most places quickly overcame the initial resistance to their organizing. Aided by emergent cultural assumptions about the superiority of female virtue,

77. Massachusetts Session Laws, January Session, 1803, Ch. 64, pp. 122–24 (relevant sections on p. 123).

78. As stressed by Ginzburg (1990, 51–53) and McCarthy (2003, 41). All five of the Massachusetts charters we identified between 1803 and 1816 contained this provision. See also: Massachusetts Session Laws, May Session, 1804, Ch. 23, pp. 517–18; January Session, 1805, Ch. 62, pp. 619–20; January Session, 1811, Ch. 70, pp. 229–300; November Session, 1816, Ch. 63, pp. 294–97.

79. McCarthy (2003, 41).

80. See, for example, the charters of the following New York organizations issued between 1802 and 1838: The Society for the Relief of Poor Widows with Small Children, New York Session Laws, 25th Session, 1802, Ch. 99, p. 158; The Association for the Relief of Respectable, Aged, Indigent Females in the City of New-York, New York Session Laws, 38th Session, 1814, Ch. 69, pp. 74–76; The Female Assistance Society, New York Session Laws, 40th Session, 1816, Ch. 207, p. 245; and The Association for the Benefit of Colored Orphans in the city of New York, New York Session Laws, 61st Session, 1838, Ch. 232, p. 213).

81. It is puzzling why states included these various provisions at all. The rule of limited liability for members of corporations was gradually becoming an established feature of American law during this period and presumably would have offered husbands automatic protection against suits by corporate creditors. Many charters for business corporations specified the liability of members, thereby overriding the rule, but none of these charters did so. One possible explanation for the provisions is that *coverture* raised extra doubts about the sufficiency of the rule to protect husbands, particularly since American courts did not fully establish it until the mid-1820s. The phrasing of some of the charters also suggests another concern not covered by limited liability: that a wife's possible mishandling of funds risked a suit by the corporation itself (rather than a suit by a creditor against the corporation). Charters addressing a wife's possible "neglect or malfeasance" include the New York charters, cited above, and in a charter for the Savannah Female Asylum, in Georgia Session Laws, 1809, Annual Session, Section 6, p. 60. On the rise of limited liability in the early United States, see Handlin and Handlin (1945) and Perkins (1994, 373–76).

women's groups that stuck to activities like the distribution of Bibles and the care and moral uplift of indigent mothers and children secured charters in large numbers during the first half of the nineteenth century.[82] By the 1830s, the provisions designed to protect husbands from suits had, moreover, largely been dropped.[83] State legislatures concerned about the inadequacy of public poor relief not only welcomed the help of respectable women but also became more likely to give charters to working-class and immigrant mutual aid societies without attaching special restrictions.[84] The socially stabilizing effects of charitable and self-help organizations largely overrode the initial fears of lawmakers that artisans, ethnic minorities, and women would use corporate rights to subvert the social order. This is not to say that government officials had altogether lost their distaste for chartering organizations that professed beneficial purposes and yet stirred public controversies.[85] But the barriers to incorporation that previously stood in the way of otherwise acceptable organizations composed of low-status members largely, if not fully, came down.

7.3 Judicial Constraints on the Corporate Right of Self-Governance, 1800–1850

In the early nineteenth century, courts as well as legislatures had power over corporations that constrained the rights of politically suspicious voluntary associations. Virtually all the suits involving incorporated groups that rose to the appellate level originated in internal conflicts over matters of governance. The parties instigating the suits were members (or ex-members) of the organizations, not creditors or outside purveyors, and their complaints were about organizational rules, not debts or damages. States routinely gave corporations the right to enact bylaws that were legally binding on mem-

82. Ginzburg (1990, 48–53) and Cott (1977, 52–53). On the rise in perceptions of female virtue, see Bloch (2003).

83. The Massachusetts provisions, which appeared consistently in at least five charters between 1803 and 1816, were eliminated for seemingly the first time in a charter of 1821 (Massachusetts Session Laws, May Session, 1821, Ch. 11, pp. 577–78). They thereafter appeared intermittently, apparently ceasing altogether in 1838. Massachusetts Session Laws, January Session, 1829, Ch. 115, pp. 188–89; January Session, 1834, Chs. 30 and 163, pp. 30–31 and 228; and January Session, 1836, Ch. 133, p. 814–15.

84. The last highly restrictive charter we found was New York's 1818 charter for the Typographical Society (New York Session Laws, 41st Session, 1818, Ch. 17, pp. 13–15).

85. Our discussion of the late nineteenth century will return to the subject of ethnic discrimination. In the 1830s and 1840s, the best examples of states' political use of their chartering powers are decisions by Vermont, Rhode Island, and Massachusetts to revoke or revise charters previously given to Masonic lodges at the peak of the anti-Masonic crusade, and Massachusetts' shelving of a petition for incorporation by a Jesuit college in the midst of Protestant nativist reactions against the Irish immigration of the 1840s. On the Masonic charters, see Neem (2008, 112–13); Vermont Session Laws, 1830, Ch. 42, p. 54; and Rhode Island Session Laws, January, 1834, pp. 54–56. On the Jesuit college, see *Brownson's Quarterly Review*, n.s., vol. 3, no. 3 (1849), pp. 372–97.

bers, but charters rarely offered explicit guidance on governance apart from mandating the election of officers. Judges therefore had room to interpret whether an organization's right to self-governance permitted the enactment of a particular regulation or procedure. As virtually all of these cases reveal, courts proved particularly inclined to take an aggrieved member seriously when the complaint touched on issues of wider political significance or the organization's activities threatened to disturb the status quo.[86] Whereas voluntary associations without charters were usually free to govern themselves unless they advocated breaking the law, suspect voluntary groups that became incorporated traded the upside of other corporate benefits, like property ownership, for the downside of potential judicial interference.

Despite the constitutional guarantee of freedom of worship, the conviction that corporations were accountable to the government even threatened the autonomy of churches. In New England, where the colonial ecclesiastical establishments hung on for decades, the idea that the state should oversee the governance of church corporations died especially hard. The Massachusetts Supreme Court in 1807 went so far as to overturn the people of Tyringham's decision to fire the minister of their incorporated church because they no longer adhered to his orthodox beliefs. The bench forbade the removal of a minister without proof that he had grossly violated his office, despite the state's 1780 constitutional provision giving "all societies incorporated for religious purposes" the right to elect clergymen.[87] In Connecticut, court decisions in 1793 and 1816 similarly sought to protect the Congregational Standing Order by restricting the corporate right of parish majorities to run their own churches.[88]

Ecclesiastical disestablishment in New England soon eliminated the official privileges of Congregationalists, but corporate status nonetheless continued to offer a justification for judges who favored Congregationalism

86. Of the eight early appellate cases we found in which judges overturned the internal governance procedures of voluntary associations (most of them in the first and second decades of the nineteenth century), seven involved either New England church-state controversies or disputes within politically controversial Pennsylvania and South Carolina religious and fraternal corporations. The only case we found with no evident political significance was *Commonwealth v. Pennsylvania Beneficial Institution*, 2 Serg. & Rawle 141 (1815). A contrasting interpretation of judicial intent is offered in Kevin Butterfield's *Making of Tocqueville's America*, in which *Binns* and several Philadelphia mutual aids cases of the 1810s are described as examples of courts protecting the individual rights of members (see Butterfield 2015, 68–76, 151–62). Apart from *Binns*, however, only two of the cases resulted in actual verdicts, with notably mixed results: *Commonwealth v. Pennsylvania Beneficial Institution*, noted above, favored the individual, but the decision in *The Commonwealth vs. The Philanthropic Society*, 5 Binn. 486 (1813), favored the corporation. This chapter not only underscores the political nature of the early judicial interventions but also argues, contrary to Butterfield, that American courts in later decades increasingly deferred to the governance rights of associations, not individuals.

87. *Avery v. Inhabitants of Tyringham*, 3 Mass. 160 (MA 1807). In a slightly later case the Massachusetts Court similarly held that a town could not fire its established minister without the consent of a customary "council" consisting of ministers from other towns. See *Cochran v. Inhabitants of Camden*, 15 Mass. 296 (MA 1818).

88. *Howard v. Waldo*, 1 Root 538 (CT 1793); *Chapman v. Gillet*, 2 Conn. 40 (CT 1816).

to intervene in religious disputes. The best example is the well-known case *Smith v. Nelson* of 1846, in which Vermont's Supreme Court refused to enforce the Presbyterian synod's dismissal of a minister chosen by a local Presbyterian church.[89] Reversing a contrary lower court ruling, the justices defended the preferences of the church against the decision of the higher ecclesiastical body on the grounds that the church was a "corporate body" in which members were entitled to elect their own leaders. In the eyes of the court, the synod possessed no legal governance power despite the denomination's own rules. The description of the local church as a corporation apparently derived from New England custom rather than from any concrete evidence of registration. Technically, the battles over disestablishment were over, but behind the justices' distaste for the Presbyterian organizational hierarchy, and its reflexive support for local church autonomy, clearly lurked a lingering Congregationalist bias.

Even in Pennsylvania, where religious freedom had prevailed since the colony's founding, the corporate status of churches provided an opening for state intervention. Two church cases decided in 1815 and 1817 stand out as particularly egregious examples of judicial meddling in the internal governance of nonprofit corporations. Whereas the examples from New York and New England reflected longstanding rivalries between denominations over matters of church polity, these Pennsylvania cases reflected conflicts over race and ethnicity that extended well beyond ecclesiastical disputes. The growth of Philadelphia's population of free blacks and the arrival of Irish and German immigrants exacerbated deep-seated social tensions that played out in the religious organizations formed by minority groups. In 1794 the African American members of Philadelphia's Methodist Church formed their own house of worship, the Bethel Church of African Methodists, in response to acts of discrimination such as being forced to sit in the back. White leaders in the original church corporation continued, however, to control the church's property and the selection and pay of its visiting preachers.[90] Under the leadership of its minister, Richard Allen, Bethel tried in 1807 to amend its loosely worded charter of 1796, but when an expelled member, Robert Green, petitioned for a writ of mandamus to restore him to membership (a legal action specific to corporations), the Pennsylvania Supreme Court treated the church as subject to the corporate bylaws of the original Methodist Church "by which the African society is governed."[91] Green had been thrown out of the church by Allen and Bethel's deacons for

89. *Smith v. Nelson*, 18 Vt. 511 (VT 1846). For a similar ruling against a higher unincorporated body of the Methodist Church, see *Methodist Church v. Remington*, 1 Watts 218 (PA 1832).

90. A short first-person account is in *The Doctrines and Discipline of the African Methodist Episcopal Church* (Philadelphia: Richard Allen and Jacob Tapsico, 1817), pp. 4–9. See Nash (1988) and Gordon (2015).

91. *Green v. African Meth. Society*, 1 Serg. & Rawle 254 (PA 1815), at 254. See Newman (2008, 159–60). A year after this negative ruling Bethel Church finally received a special charter, and a later ruling in a similar case endorsed the church's own disciplinary procedures.

breaking a standard Methodist rule against suing another member. Since Pennsylvania gave basic corporate rights to all churches, including the power "to make rules, bylaws, and ordinances and to do everything needful for the good government and affairs of the said corporations," the legality of the rule was not itself in doubt.[92] Rather, Green and his white allies maintained that Bethel's officers lacked the authority to enforce the church's rules. Only if the majority of the parent corporation's membership had explicitly transferred the power of expulsion "by the fundamental articles, or some by-law founded on these articles," the court agreed, would the decision by "a select number" be legal.[93]

In 1817, the Pennsylvania court went to similarly remarkable lengths to sort out the irregularities in a disputed election within Philadelphia's German Lutheran church that caused an eruption of "tumult and violence."[94] Once again, the church was split between bitterly opposed factions and the conflict reflected deep social divisions within the city. German immigrant members who wanted church services conducted in their native language had won the election, and the more assimilated, English-speaking members enlisted a state prosecutor to challenge the legality of the vote. The lower court issued a blatantly anti-immigrant ruling, contending that unnaturalized foreign residents had no more right to vote in church corporations than they did in the wider polity. Upon appeal, the justices in the supreme court rejected that argument by noting the essential difference between "religious and political incorporations," but they, too, ruled against the immigrants. Rather than rely on any specific provision of the church's charter, which called for elections but said nothing about voting procedures, the court ruled that the election had in principle violated the terms of incorporation. The justices, deriving their notion of a fair election from other corporations as well as political life, especially objected to the fact that the immigrant faction had distributed marked ballots to their constituency (a practice that, ironically, American political parties would make standard within two decades). Had the church not been incorporated, it is clear that the case would never have found its way into court. The same bench dismissed a similar case brought by a faction of Methodists because their church had not become a corporation sufficiently in advance of the suit.[95]

The use of corporate status to justify intervention can also be seen in early nineteenth-century cases involving controversial fraternal associations. Like

92. For the general law, see Commonwealth of Pennsylvania (1810, vol. 3, 21).

93. *Green v. African Meth. Society*, quote at 255. In a reference to English corporate law, the concurring opinion stressed failure of the Bethel leadership to "set forth the particular facts precisely upon an amotion out of a corporation" (at 255).

94. *Commonwealth v. Woelper*, 3 Serg. & Rawle 29 (PA 1817).

95. *Commonwealth v. Murray*, 11 Serg. & Rawle 73 (PA 1824). This opinion cites *Woelper* and another Pennsylvania case of 1820, *Commonwealth v. Cain*, 5 Serg. & Rawle 510, in which the court intervened within a church corporation to settle a dispute over pews.

churches, fraternal societies were more fully private than most other types of nonprofit corporations in this period. Not only were their benefits directed primarily to their own members rather than a wider public, but, unlike churches, their selective admissions policies and secret practices meant that their internal affairs were almost entirely removed from outside scrutiny. Both their exclusiveness and their visible displays of high-minded patriotism upon civic occasions conferred social status to those who belonged, and, in most parts of the country, Masonic lodges and numerous smaller fraternities attracted growing numbers of elite and upwardly mobile middle-class men. Their pledges of mutual assistance gave a charitable dimension to their purposes that frequently enabled them, like groups of artisans, to secure charters. But along with corporate status came the ability of disgruntled members who disagreed with the leadership to bring their grievances into courts.[96]

Oaths of secrecy kept such suits to a minimum, but at least two cases about the internal governance rights of fraternal associations rose to the level of state supreme courts, one in Pennsylvania in 1810 and one in South Carolina in 1813. As in the cases involving church corporations, the courts conceived of their role as enforcing corporate charters. The involvement of the legal system was, once again, socially and politically charged because the trials jeopardized the reputations and relationships of prominent citizens.

In *Commonwealth v. St. Patrick's Society*, John Binns, a member of an Irish fraternal group in Philadelphia who had been thrown out in 1807 for "vilifying" another member, went to court to challenge his expulsion.[97] The man whom Binns had insulted was no less than the society's president, William Duane.[98] As the editor of Philadelphia's leading Jeffersonian newspaper, *The Aurora*, Duane had long been a leader of Philadelphia's Irish radicals and frequently spoke out against the Federalist judiciary and the English common law. Binns, a recent Irish immigrant, was allied with rural Republicans and had recently challenged Duane's authority by moving to Philadelphia and founding a rival newspaper supporting the aspiring "country" candidate for governor, Simon Snyder. As tensions mounted, Duane and his allies successfully ousted Binns from several other Irish associations without charters, but since St. Patrick's was a corporation, Binns possessed legal leverage to retaliate. By 1810, when the case finally came before the Pennsylvania Supreme Court, Binns's political fortunes had risen with Sny-

96. On the early American Masons, see Bullock (1996). By 1825, at least thirteen states had incorporated either state or local Masonic lodges. At the height of the anti-Masonic movement in the early 1830s, three New England states temporarily revoked or revised their charters, but had by the 1860s reinstated them.

97. *Commonwealth v. St. Patrick's Society*, 5 Binn. 486 (PA 1810).

98. Phillips (1977), Wilson (1998, 72–76), and Butterfield (2015, 68–76). Butterfield's view of the case as a prime example of courts granting members of associations increased individual rights is at odds with our stress on the politics of legal intervention and the growing rights of uncontroversial associations (often at the expense of individual rights), as we elaborate below.

der's election in 1808, and Duane's campaign against the court system had petered out after the government enacted a few minor reforms.[99] Technically, the justices' decision to adjudicate the dispute stemmed from St. Patrick Society's limited rights as a corporation, not from Duane's hostile stance toward the bench or Binns's increased influence. Even though St. Patrick's members had approved a bylaw forbidding rude behavior long before the expulsion of Binns, the justices adhered to a narrow, literal reading of the corporation's right to self-governance and reinstated Binns's membership.[100] Any expulsion was invalid, the court held, unless the offending member broke the law of the state, violated a rule that explicitly appeared in the charter, or interfered directly with the objects of the society. Rejecting the corporation's argument that cooperation among members was essential to the group's mission, the opinion declared that "vilifying a member, or a private quarrel, is totally unconnected with the affairs of the society, and therefore its punishment cannot be necessary for the good government of the corporation."[101]

For decades, the *Binns* precedent carried considerable weight in court decisions about expulsions from incorporated voluntary associations. The same Pennsylvania court upheld an expulsion for fraud in 1813, distinguishing the facts from the *Binns* precedent in part because the group's charter—rather than merely its bylaws—explicitly forbade "scandalous and improper" behavior.[102] Perhaps in response to *Binns*, New York's General Society of Mechanics and Tradesmen also added such a provision when renewing its 1792 charter in 1811, declaring that "notorious, scandalous, wicked practice" was subject to expulsion.[103] In Connecticut, an expulsion case of 1827 similarly hinged on the precise terms of incorporation. The court reinstated an ousted trustee of a private school corporation because its charter had not authorized expulsion for "disrespectful and contemptuous language towards his associates."[104]

In a South Carolina case, which, like *Binns*, involved a prominent fraternal association whose members were closely tied to the political world, the Chancery Court enforced a charter belonging to the Grand Lodge of South-Carolina Ancient York Masons in a manner that similarly overrode its internally chosen leadership.[105] South Carolina at the time contained two

99. Wilson (1998, 74) and Henderson (1937).

100. Anonymous (1804, 5–6).

101. *Commonwealth v. St. Patrick's Society*, at 450.

102. *The Commonwealth vs. The Philanthropic Society*, 5 Binn. 486 (PA 1813). The last case to directly follow the precedent of Binns seems to have been *Evans v. Philadelphia Club*, 50 Pa. 107 (PA 1865). Many other case reports erroneously described the 1810 decision as chiefly involving financial issues. As noted below, courts increasingly refused to reverse expulsions from fraternal associations unless the former member had lost promised death or sick benefits and the organization had violated its own governance rules.

103. New York Session Laws, 34th Session, 1811, Ch. 113, p. 195.

104. *Fuller v. Trustees School Plainfield*, 6 Conn. 532 (CT 1827), quote at p. 546.

105. *Smith v. Smith* (SC 1813) in DeSaussure (1817, vol. 3, 557–84).

competing Grand Lodges, the consequence of a mid-eighteenth-century split within international Masonry. Both lodges incorporated shortly after the Revolution. At the root of the case was an agreement by the rival Grand Masters to mend the schism by merging the two organizations under the name the Grand Lodge of South Carolina. The leaders polled all the subordinate lodges, which unanimously approved the merger, and then petitioned the state to repeal both the earlier acts of incorporation and issue a new one. In the meantime, however, a group of lodges affiliated with the Ancient York Masons bristled at the top-down enactment of "inauthentic" practices and defected from the consolidated body. The dissidents reorganized themselves into a separate body and appropriated the name of their former Grand Lodge, the South-Carolina Ancient York Masons. With the controversy intensifying, the state legislature voted against dissolving the old corporations and incorporating the new Grand Lodge, but since the continuing existence of the umbrella group did not require a new charter, each of the two groups claimed to be the legitimate successor of one or both of the original corporations.

The conflict came to a head when a debt originally owed to the Ancient York Masons was ordered by a lower court to be paid to the new Grand Lodge of South Carolina. The dissident Ancient Yorks launched a suit contesting this decision, and the Chancery Court saw this occasion as a chance to test the legitimacy of the merger. Going far beyond the matter of the debt, the chancellor evaluated the contested rules and rituals within the terms of Masonry itself, taking care to refer to arcane texts like the *Ahiman Rezons* in his written decision.[106] His attention to such minutia suggests the seriousness with which he took the Masonic split (it is reasonable to suspect that he, like others in the South Carolina elite, had a personal stake in the controversy). The opinion, whose logic is largely incomprehensible to an outsider, landed firmly on the side of the Ancient Yorks, concluding that the referendum organized by the Grand Masters had been based on deception. The original corporation of the Ancient York Masons had never been legally dissolved, and the new Grand Lodge had no right to collect the debt because it was "not a corporate body known to the law."[107]

As these examples indicate, the incorporation of voluntary associations during the early decades of the republic could be both a blessing and a curse. Incorporation gave organizations valuable entity and personhood rights, but it also required them to submit to the state's definition and enforcement of charter rights. Justices adjudicating suits could take issue with the decisions of internally chosen leaders on matters ranging from personal behavior to electoral procedures to institutional tradition. Voluntary associations that

106. Ibid., 566–71.

107. Ibid., 576–82 (quote on 581). The Grand Lodge of South Carolina was incorporated in 1815.

were not incorporated were rarely, if ever, subjected to this kind of judicial scrutiny, unless, like labor groups, their members could be accused of committing crimes. At a time when individual citizens enjoyed an increasing right to associate and officials generally lacked the administrative capacity to monitor groups on a routine basis, the government wielded little power over associations. It was the entity right of corporations to legal standing that brought them into the courts and gave justices an opportunity to discipline them.

These cases of judicial intervention also underscore the special vulnerability of voluntary associations regarded as socially or politically controversial.[108] Courts were most inclined to interfere with the self-governance rights of groups posing threats to the status quo because of the traditional view of corporations as creatures of the state. Especially when a dispute between members of an organization reflected broader social divisions, a judicial decision to curb the power of corporate leaders could be justified as a defense of the general welfare. This was true even in the case of corporations that authorities ordinarily viewed as publicly beneficial, like the South Carolina Masonic Lodges or the German Lutheran Church, when complaints against internal procedures bore on larger conflicts that authorities wished to contain.

Controversial voluntary associations thus needed to overcome three sets of state-imposed obstacles before they could exercise the entity and personhood rights ordinarily received by conventionally acceptable voluntary associations that became corporations. First, they needed to surmount the legislative barriers blocking access to incorporation; second, they needed to secure charters without unusually restrictive provisions; and third, they needed to avoid judicial decisions that curbed their right to self-governance. These obstacles prevented the very groups that were the most likely to challenge the government from competing on an equal basis with groups that enjoyed unreserved legislative and judicial approval.

7.4 Widening of Access Combined with Persistent Constraints, 1830–1900

Over the course of several decades around the middle of the nineteenth century, American lawmakers significantly widened access to the entity and personhood rights of corporations. Most states in the Northeast, Midwest, and West ended their nearly exclusive reliance on special charters by enacting more general incorporation laws making it easier for designated categories of businesses and voluntary associations to become incorporated

108. Controversial business corporations like banks were, of course, also widely perceived as violating the public good, but for a variety of reasons too complex to pursue here, business corporations were not as vulnerable to judicial scrutiny as nonprofit ones. On New York courts' tendency to ignore business violations of charter terms, see Hilt (2017, 20, 32). Our own research for a book in progress suggests that courts entertained complaints by minority stockholders against corporate managers only in cases of egregious financial fraud.

and removing the taint of favoritism by giving the same set of rights to organizations within each category.[109] The general laws of this period also moved beyond the earlier focus on narrow types of associations such as churches and libraries to pull together broader categories like "religious," "educational," "benevolent," and "charitable" into single pieces of legislation. Despite this general easing of access, however, the types of groups included within these privileged categories still conformed to the earlier pattern. Oppositional groups pursuing social and political change generally experienced the same difficulties acquiring corporate rights as they had in the era of special charters.

In 1848, New York set the new standards for incorporation by enacting the most sweeping general act to date. Passed in response to a provision in the Jacksonian-inspired Constitution of 1846 that mandated general laws for all corporations, it allowed for the incorporation of "benevolent, charitable, scientific and missionary societies."[110] Before this, the state's general incorporation laws covered only a few specific types of voluntary organizations other than churches—most notably, colleges and academies, libraries, Bible societies, and medical societies. The state had required special charters for all charities, mutual aid societies, and fraternal orders, as well as most kinds of religious associations, educational and cultural groups, and scientific and professional organizations. The loosely defined categories covered by the general law of 1848 therefore made incorporation much easier for an enormous range and number of voluntary associations. Nonetheless, because New York's Constitution still permitted the legislature to issue special charters if "the objects of the corporation cannot be attained under general laws," the state continued to reward politically favored groups by granting them permission to exceed the property limits written into the 1848 law.[111] Despite this loophole, the sheer comprehensiveness of the New York law became an

109. The South, which had always incorporated fewer voluntary associations, for the most part stuck to special charters. Of the seventeen states we have identified that passed multipurpose general acts for nonprofit groups between 1840 and 1860, twelve were in the Northeast or Midwest and one in the West (California, one of only two western states at that time). Alabama and North Carolina were the only states to join the eleven-state Confederacy that had passed such an act before 1860; the non-Confederate border states of Maryland and Kentucky did so as well. References to the acts, listed in chronological order, are included in the following footnotes. There was less regional variation in the case of businesses: for example, general laws for manufacturing firms had been passed throughout the country by 1860. See Eric Hilt's chapter 8 in this volume.

110. New York Session Laws, 1848, 71st Legislature, Ch. 319, pp. 447–449. For the context, see Katz, Sullivan, and Beach (1985). Other states that also passed general acts in the 1840s were Pennsylvania (amending its earlier act), Indiana, and Maine: "An Act Relating to Orphans' Court and Other Purposes," Pennsylvania, 1840, Act No. 258, Sections 13–16, pp. 5–7; "An Act to Authorize the Formation of Voluntary Associations," Indiana, 1846, 31st Session, Ch. 45, pp. 97–99; "An Act to Authorize the Incorporation of Charitable and Benevolent Societies," Maine, 1847, 4th Session, Ch. 1, pp. 27–28.

111. New York, Constitution of 1846, Article 8, Section 1. On the continuance of special charters, see Katz, Sullivan, and Beach (1985, 71, 81–82).

important model for other states to follow. Between 1850 and 1860, California, Ohio, Maryland, North Carolina, New Jersey, Kentucky, Massachusetts, Iowa, Kansas, Illinois, and Wisconsin passed similarly multipronged incorporation laws encompassing a vast number of acceptable nonprofit groups.[112]

A handful of these states for the first time even used the generic term "voluntary associations" in the titles of acts to signal their wide breadth.[113] In 1874, Pennsylvania moved still farther in this direction, dividing its law of corporations into two sections: those "for profit" and those "not for profit."[114] The not-for-profit category consolidated under one heading a uniform set of rules for ten different types of organizations ranging from charities to yacht clubs.[115] Only a glimmer of the earlier notion that corporations should contribute to the public good still survived. Now it was permissible to form corporations for purely private purposes, and judges needed merely to verify that a corporation's purpose was legal and "not injurious to the community." This trend toward greater generality and greater permissiveness continued in most states well into the twentieth century, facilitating the registration of more and more kinds of American voluntary associations as nonprofit corporations.[116]

112. "Act Concerning Corporations," California Session Laws, 1st Session, passed April 22, 1850; "To Provide for the Incorporation of Religious and Other Societies" (including "any religious sect, denomination, or association, fire company, or any literary, scientific, or benevolent association"), Ohio Session Laws, 1852, pp. 293–94; "An Act to Provide for the Formation of Corporations for Moral, Scientific, Literary, Dramatic, Agricultural or Charitable purposes," Maryland Session Laws, January 1852, Ch. 231 (no page number); "An Act to Incorporate Literary Institutions and Benevolent and Charitable Societies," North Carolina Session Laws, 1852, Ch. 58, pp. 128–29; "An Act to Incorporate Benevolent and Charitable Associations," New Jersey Session Laws, 77th Legislature, 1853, Ch. 84, pp. 355–58. "An Act for the incorporation of voluntary associations [approved 1854]," Kentucky, 1853, vol. 1, Ch. 879, pp. 164–65; "An Act to authorize the incorporation of Benevolent and Charitable Associations," Alabama Session Laws, 4th Biennial Session, 1854, pp. 282–83; "An Act Relating to the Organization of Corporations for Educational, Charitable and Religious Purposes," Massachusetts Session Laws, Acts and Resolves, January Session, 1856, Ch. 215, pp. 126–27; "An Act for the Incorporation of Benevolent, Charitable, Scientific or Missionary Societies," Iowa Session Laws, 7th General Assembly, 1858, Ch. 131, pp. 253–55; "An Act to Authorize the Formation of Voluntary Associations," Kansas Session Laws, 1858; 4th Session, Ch. 1, pp. 27–28; "An Act to Provide for the Incorporation of Benevolent, Charitable, Scientific, and Literary Societies," Wisconsin Session Laws, 1860, 13th Session, Ch. 47, pp. 131–33. "An Act for the Incorporation of Benevolent, Educational, Literary, Musical, Scientific and Missionary Societies" Illinois Session Laws, 1859, pp. 20–22; "An Act to Incorporate Benevolent and Charitable Associations," New Jersey Session Laws, 77th Legislature, Ch. 84, pp. 355–58.

113. Indiana (1846), Kentucky (1853), and Kansas (1858).

114. Illinois already in 1872 used the term "not for pecuniary profit" to designate corporations that were neither businesses nor religious organizations. Illinois Session Laws, 27th General Assembly, 1871, pp. 303–5.

115. "An Act to Provide for the Incorporation and Regulation of Certain Corporations" Pennsylvania Session Laws, General Assembly, 1874, pp. 73–74. An amendment in 1876 expanded the list to include both commercial and trade organizations and militia companies. Pennsylvania Session Laws, General Assembly, 1876, p. 30.

116. Another early example was Ohio's revised statutes of 1879 making incorporation possible "for any purpose for which individuals may lawfully associate themselves, except for dealing in real estate, or carrying on professional business" (State of Ohio 1879, § 3235, 837). On the mid-twentieth-century culmination of these trends, see Note, "Permissible Purposes for Nonprofit Corporations," Columbia Law Review 51 (1951): 889–98 and Fishman (1985).

But it is still crucial to recognize that this wider access to corporate rights never benefited all types of voluntary associations equally. The seemingly inclusive terms that the general laws used to define eligibility, like "charitable," still embraced only a subset of voluntary associations, and because the laws never stipulated which types they disqualified, the excluded groups remained largely hidden from view. The anti-Catholic bias against "corporations sole" silently remained a part of American corporate law for decades.[117] States also persisted in denying corporate rights to a great number of activist voluntary associations outside the social and political mainstream, including labor unions and radical reform organizations. Laws like New York's of 1848 that offered easy incorporation to seemingly broad categories of "charitable," "benevolent," and "educational" groups implicitly left out oppositional ones. This tacit exclusion meant that such groups still needed to submit to the political judgments of elected officials by petitioning for special charters when they sought corporate rights.

The exclusion of antislavery groups provides an especially telling example of persistent political discrimination. In addition to being excluded from the categories covered in general incorporation laws, they also had difficulty acquiring and utilizing special charters. Several antislavery societies in the North successfully petitioned for acts of incorporation shortly after the Revolution, but, as we have seen, legislators made sure that their main goals of assisting newly freed blacks fell squarely under the rubrics of education and charity.[118] The first national antislavery organization, the American Colonization Society founded in 1816 and incorporated by Maryland in 1831, never espoused a program of legal change but instead sought to send voluntarily manumitted slaves to Africa.[119] Despite the Society's conservative, evangelical purposes, Southern states in the 1830s began to challenge its corporate status as part of the backlash to the Nat Turner Rebellion. In 1837, following a spirited debate, the US Congress refused to incorporate the group within Washington, DC, and Virginia similarly denied its bid for incorporation the same year.[120] Although Maryland reaffirmed its support in 1837 by reissuing a charter significantly raising the group's property limit, the standing of the Maryland charter in other slave states continued to come

117. Campbell (1990, 55–56). Not until 1879 did the Massachusetts general law for religious organizations finally provide for the indefinite service of high-ranking Catholic clergymen on the incorporated boards of trustees of Catholic churches and guarantee that their successors in ecclesiastical office would automatically replace them (Commonwealth of Massachusetts 1882, Part I, Title IX, Ch. 38, § 48, 287). As late as 1899, a Wisconsin ruling held that the Catholic diocese in Milwaukee was subject to taxes because the archbishop held the land as an individual rather than as a corporation. *Katzer v. City of Milwaukee*, 104 Wis. 16 (WI 1899).

118. For example, the Pennsylvania Society for Promoting the Abolition of Slavery, incorporated in 1789; the Providence Society for the Abolition of Slavery, incorporated in 1790; and the New-York Manumission Society, incorporated in 1808.

119. "An Act to Incorporate the American Colonization Society, passed Feb 24, 1831." Maryland Session Laws, General Assembly, December Session, 1830. Ch. 189, pp. 201–2.

120. *The African Repository and Colonial Journal* (published by the American Colonization Society June 13, 1837, 41–48).

under assault in a series of court cases questioning the validity of wills in which masters bequeathed their slaves to the Society rather than passing them onto their heirs.[121] Until the 1850s, Southern appellate courts generally upheld the organization's corporate right to receive the slave property, but the grounds of these decisions became progressively narrow as the Northern antislavery movement gained ground and Southern states resorted to enacting statutes that specifically outlawed the bequest of slaves for the purposes of emancipating them.[122] In a ruling of 1857, the Georgia court argued definitively that a corporation could not inherit slaves like a natural person and that a state was not obligated to honor the rights of a "foreign" corporation whose aims were "repugnant to its policy [and] prejudicial to its interests."[123] This string of proslavery decisions is particularly notable for occurring after the Supreme Court's 1844 *Girard Will* decision establishing the validity of charitable bequests even if the recipient was not a corporation.

At the same time as slave-holding states were thwarting the corporate rights of the American Colonization Society, the Northern antislavery groups advocating immediate emancipation almost never received charters. The only two abolitionist groups to surface in our searches of session laws in Massachusetts, New York, Pennsylvania, and Ohio fell squarely under the rubric of education and religion: the Infant School Association in Boston "for the education of colored youth," incorporated by Massachusetts in 1836 (an effort planned but never executed by Garrisonian abolitionists); and an avowedly antislavery Baptist Church in Columbus, Ohio, chartered in 1851 under the state's general law for the incorporation of churches.[124] Other churches with abolitionist leanings undoubtedly incorporated as well, of course, without broadcasting their antislavery views in their names. How often other kinds of abolitionist associations tried to incorporate and failed is virtually impossible to determine, since few examples of failed applica-

121. "An Act to Incorporation the American Colonization Society, passed March 14, 1837." Maryland Session Laws, General Assembly, December Session, Ch. 274, pp. cccv–cccvii in HeinOnline (not paginated in original).

122. *Maund's Adm'r v. M'Phail*, 37 Va. 199 (VA 1839) (the ACS allowed to receive the legacy); *Ross v. Vertner*, 6 Miss. 305 (MS 1840) (same); *Cox v. Williams*, 39 N.C. 15 (NC 1845) (same); *Wade v. American Colonization Society*, 15 Miss. 663 (MS 1846) (same, but on narrow grounds, noting that the testator died before the passage of the 1842 statute); *Lusk v. Lewis*, 32 Miss. 297 (1856) (the ASC may not receive bequest because it violated the statute); *Lusk v. Lewis*, 35 Miss. 696 (1858) (reversing the 1856 decision because it was not an explicit condition in the will that the Society emancipate the slaves).

123. *American Colonization Society v. Gartrell*, 23 Ga. 448 (GA 1857), at 449 (citing Justice Taney's opinion in *Bank of Augusta vs. Earle*, 13 Peters 519, which defended the rights of a foreign corporation "unless" they were repugnant to a state's policy and interests).

124. Massachusetts Session Laws, 1836, Ch. 9, p. 653; Ohio Session Laws, 49th General Assembly, Local Acts, p. 70. In addition to employing word searches in annual session laws contained in HeinOnline, we examined these compilations of corporate charters covering the first half of the century: Commonwealth of Pennsylvania (1837–1839, vol. 3, pp. 213–368); Commonwealth of Massachusetts (1816, vol. 4); Commonwealth of Massachusetts (1837, vol. 7); Commonwealth of Massachusetts (1860, vol. 9); Ohio, Secretary of State (1885, 147–225, containing a list for 1803–1851).

tions surface in documents. When they do, however, the extent of legislative opposition becomes apparent. For example, the diary of an agent employed by the Free Will Baptists reveals that in 1833 the New Hampshire legislature denied a petition to incorporate the denominational publishers who produced a highly successful newspaper (subscriptions had rapidly grown to nearly 5,000) because a majority of the state's legislators regarded the paper as "a vehicle of abolitionism." That the group running the press was a religious denomination, whose church and evangelical associations received charters without difficulty, was not enough to convince hostile lawmakers.[125] The Free Will Baptist Printing Establishment's trustees "regularly presented their petition every year" and met "the same repulse, for the same reason" until 1846, when the balance of political power in New Hampshire shifted toward the antislavery cause.[126]

Ordinarily, abolitionists and other radical activists may have had little reason to incorporate their associations. They amassed only small amounts of property from contributors and hardly ever received legacies.[127] Nor did they have much occasion to benefit from the corporate right to legal standing since their organizations rarely, if ever, had occasion to be parties in civil suits, and corporate status was irrelevant in criminal prosecutions since the charges were against individuals.[128] Yet the few exceptional charters granted to antislavery groups between the 1830s and 1850s indicate that incorporation was occasionally valuable. More striking, the protracted failure of the Free Will Baptist publishers to receive a charter demonstrates that lawmakers, even in relatively liberal New England, deliberately refused to incorporate politically controversial groups. That states passed only a small number of acts of incorporation for abolitionists and other radicals needs to be attributed to resistance as much as to apathy.

Instances of failed attempts to incorporate become even harder to trace after state legislatures ceased having control of the process. Under general incorporation laws, the review of applications usually fell to administrative officials at the level of counties rather than states. In New York and Pennsylvania, however, where general incorporation laws required judicial approval, unsuccessful groups at times appealed their rejections in the states' highest

125. For example, New Hampshire Session Laws, 1825, November Session, Ch. 80, p. 335 (Free Will Baptist Church); 1835, June Session, Ch. 15, pp. 230–31 (Free Baptist Meeting House Society); 1838, June Session, Ch. 3, pp. 382–82 (Free Will Baptist Home Missionary Society).

126. Marks (1846, 352–53); for the act itself, see New Hampshire Session Laws, June Session 1846, Ch. 407, p. 409.

127. "No abolitionist society had a permanent fund or endowment" Quarles (1945, 63). The American Anti-Slavery Society, which had over a thousand auxiliaries by the late 1830s, raised more than $150,000 over a six-year period but still struggled to meet operating expenses. Its one sizable bequest was depleted in five years. The only bequest to be legally challenged was litigated after the Civil War, and, as in the Henry George case, the Massachusetts court directed the money away from William Lloyd Garrison's paper and women's rights advocates because their purposes were not deemed to be charitable. *Jackson v. Phillips*, 96 Mass. 539 (1867).

128. For example, Virginia Session Laws, 1835–36, Ch. 66, p. 44.

courts.[129] Scholars have uncovered a significant number of these cases in the late nineteenth and early twentieth centuries, and their outcomes indicate an ongoing pattern of discrimination, particularly against immigrant and religious minority groups. In Pennsylvania, for example, where the general law still contained a long list of eligible categories, courts in 1891 rejected the bid for incorporation of one social club on the grounds that its all-Chinese board of directors might not adhere to its declared purposes and of another because "the law has not provided for corporate capacity" to assist in "the cultivation and improvement of German manners and customs."[130] By 1897, a series of such rulings had established the precedent that all groups incorporated in the state had to conduct their affairs in English.[131] A judge in Pennsylvania also rejected the application of Christian Scientists on the grounds that their church's opposition to medical treatment posed a hazard to public health.[132] In New York, after the 1895 Membership Corporations Law repealed nearly a hundred state laws passed between 1796 and 1894 and generously covered virtually any nonprofit group, judges typically resorted to seemingly technical reasons for denying the applications of disfavored groups.[133] A panel ruling in 1896, for example, refused to incorporate a Jewish organization because it proposed meeting on Sundays, despite the fact that other corporations in the city already did so with impunity.[134]

The denial of applications for incorporation submitted by controversial groups remained a remarkably persistent (if poorly documented) practice in many parts of the country into the mid-twentieth century. As late as 1957, nine states with broadly written laws still made applications subject to the review of judges or administrative officials who could withhold certification at their discretion.[135] According to Norman Silber's history of nonprofit corporations, which concentrates on the twentieth century, rejected applications were rarely appealed except in Pennsylvania and New York, but cases "were reported occasionally in many states, including Alabama, Arkansas, Cali-

129. Close to 200 appellate cases in New York and Pennsylvania between 1890 and 1955 are included in the Note, "Judicial Approval as a Prerequisite to Incorporation of Non-Profit Organizations in New York and Pennsylvania," *Columbia Law Review* 55 (Mar. 1955): esp. 388–89.

130. As discussed in "Judicial Approval," pp. 388–99. For another such case of 1893 involving Russians, see Wood (1939–1940, 266).

131. A case of 1900, *Societa Italiana di Mutui Socoerso de Benefieinza*, 24 Pa. C.C. 84 (C.P. 1900), cited as precedent on this point the 1897 case *In re Society Principesso Montenegro Savoya*, 6 Pa. Dist. 486 (C.P. 1897).

132. *First Church of Christ Scientist*, 205 Pa. 543 (PA 1903).

133. New York Session Laws, 1895, Vol. 1, Ch. 559, pp. 329–67.

134. *Matter of Agudath Hakehiloth*, 18 Misc. 717, 42 N.Y. Supp. 985 (NY 1896). For a detailed analysis of several of the New York appellate cases stressing the social and political biases of judges into the middle of the twentieth century, see Silber (2001, 31–82).

135. Judges had the power to review applications in six states (New York, Pennsylvania, Virginia, Missouri, Georgia, and Maine) and state administrators in three states (Massachusetts, Iowa, and Mississippi). Note, "State Control over Political Organizations: First Amendment Checks on Powers of Regulation," *Yale Law Journal* 66 (February 1957): 551, fn. 41.

fornia, Colorado, Delaware, Florida, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Louisiana, New Jersey, Tennessee, Texas, Washington, and Wisconsin, and more numerously in Illinois [and] Ohio."[136]

In addition to the evidence provided by sporadic court rulings, documentation of the persistently selective granting of corporate rights in the late nineteenth century can be found in the long lists of nonprofit corporations published by the states of Pennsylvania, New Jersey, New York, and Ohio.[137] Compared to the lists produced in the era of special charters prior to the Civil War, the only significant change was a greater number of incorporated recreational and social clubs. Otherwise, despite the progressive liberalization of general laws and the granting of more and more charters, the overwhelming majority of nonprofit corporations continued to fit into the same limited categories as before: Protestant religious organizations; charities assisting the poor and disabled; educational, cultural, and medical institutions; civic organizations like fire companies; and the major fraternal orders.

Even though it is well known that many social and political reform groups were active in the second half of the century, temperance organizations were the only ones to attain corporate status with any frequency. Their disproportionate success reflects both their close ties to Protestant churches and the weakness of their largely Catholic and immigrant opponents. Ethnic divisions over the consumption of alcohol were at play in an 1880 Michigan case, for example, in which a man who had borrowed money from a German society successfully argued that its suit to recover the debt was invalid because any organization that opposed the state's temperance law had no right to corporate legal standing.[138] In several states, general laws of incorporation added extra regulations to ensure that social clubs would not slip through the cracks of laws restricting the sale of alcohol.[139] The size, respectability, and political clout of the temperance movement, qualities that made it virtually unique among the many activist groups seeking social and political change, go a long way toward explaining its success at achieving corporate rights.

Because states could differ in their assessment of which reform groups were dangerous, organizations seeking incorporation at times succeeded in one state and then attempted to operate in more hostile territory. Despite the

136. Silber (2001, 67; ch. 3, endnote 2). His evidence comes from his investigation of the legal reference book *American Legal Reports*. However, he provides no other details on these cases, many of which may be from the twentieth century. Our own effort to dig into the nineteenth-century records of Missouri, one of the states that mandated review by county court judges, produced documents from St. Louis County with lists of successful applications but not failed ones.

137. These and the following generalizations about types of charters in these four states are based on the following sources, which contain lists of groups incorporated both by special acts and by general laws: Beitel (1874); New Jersey Session Laws, every five years, 1820–1870; New Jersey, Secretary of State (1892); Ohio Session Laws, every five years, 1820–1870.

138. *Detroit Schuetzen Bund v. Detroit Agitations Verein*, 44 Mich. 313 (MI 1880).

139. For example, Massachusetts Session Laws, 1890, Ch. 439, Secs. 1, 2, pp. 481–82.

negligible representation of politically controversial groups on state rosters, we know that some received charters from cases in state supreme courts where the opponents of a "foreign corporation" sought to block its local activities.[140] The American Colonization Society's legal battles in Southern states in the antebellum period, discussed earlier, partly revolved around disagreements about whether, as a Maryland corporation, the organization could wield corporate rights elsewhere. The best-known instances of this kind of repressive use of state corporate law occurred in the next century, in the context of escalating racial conflict in the 1920s and 1950s. State courts in Kansas and Virginia in the mid-1920s denied the right of the Ku Klux Klan to operate in their states because it was a foreign corporation incorporated in Georgia. In Virginia, the court determined that the Klan's sale of its paraphernalia constituted commercial transactions, forcing the corporation to pay a fine and relinquish the nonprofit status it had acquired in Georgia.[141] The Kansas attorney general attempted to prevent the organization from organizing local chapters by refusing to register it as a Kansas corporation, an effort that cost him his reelection (his successor gave it permission).[142] Southern states fighting desegregation in the 1950s similarly sought to oust the NAACP and CORE, both chartered in New York.[143] By then, the Supreme Court had come to view arguments about foreign corporations as antiquated. But for over a century, despite the passage of seemingly liberal general incorporation laws, the strategic refusal by legislatures, courts, and government officials to incorporate voluntary associations supplied a weapon to repress politically polarizing activist groups—even when other states had already incorporated them.

In the case of these kinds of activist reform groups, the political motivations behind state restrictions of their entity and personhood rights seem quite clear. Less obvious, perhaps, are the political assumptions behind the thousands of legislative decisions to charter groups that could be unequivocally viewed as "religious, educational, and charitable." As Justice Bird knew when he defended the 1888 decision to impede the advocacy of Henry

140. Most foreign corporation cases involving voluntary associations did not reflect serious objections to the purpose of the organization as much as territorial competition between it and a rival organization or conflicts over resources between parts of the same organization. When in 1882, for example, a member of a Michigan chapter of a national fraternal organization refused to pay an assessment levied by its "supreme lodge" incorporated in Kentucky, the 1882 Michigan Court overturned his expulsion and warned the Michigan Grand Lodge not to "subject itself, or its members to a foreign authority in this way." See *Lamphere v. Grand Lodge*, 47 Mich. 429 (1882), quote at p. 430. Also see *National Council, Junior Order American Mechanics, and Others v. State Council, Junior Order United American Mechanics*, 104 Va. 197 (1905).

141. *Ku Klux Klan v. Virginia*, 138 Va. 500 (1924).

142. *Kansas ex rel. Griffith v. Ku Klux Klan*, 117 Kan. 564 (KS 1925). Sloan (1974).

143. *NAACP v. Alabama*, 357 U.S. 449 (US Supreme Court, 1958); *NAACP v. Alabama*, 377 U.S. 288 (US Supreme Court, 1964); *CORE v. Douglas*, 318 F.2d 95 (Fifth Circuit Court, 1963). See Bloch and Lamoreaux (2017, 316–19).

George's ideas, much hinged on the question, "What is a charity?" For him and other authorities at the time, groups promoting social equality fell on one side of this dividing line, whereas groups viewing the sale of alcohol as a sin fell on the other. That the line itself was politically drawn must have been evident to the losing parties in isolated court cases. The dominant conservative consensus, however, was that "charity" was politically neutral (as were religion and education) and that corporations should be so as well, an assumption that conveniently buried the political judgments behind the use of these categories.[144]

7.5 Stronger Rights for Favored Groups, 1840–1900

The politically acceptable groups that typically benefited from greater access to incorporation also benefited from another midcentury development: the growth of corporate independence from governmental control. States not only facilitated the formation of nonprofit corporations by passing general laws, but also loosened the strings previously attached to the corporate form. Whereas legislatures and courts in the first decades of the century often disciplined suspect organizations by setting limits on the rights that charters conferred, states in the late nineteenth century relied more exclusively on denying access to incorporation altogether. The growing numbers of voluntary associations that acquired entity and personhood rights under the general laws enjoyed these rights more fully and more freely than before. This change is particularly apparent in relation to the associational right of self-governance, which, as we saw earlier, judges routinely overrode when thwarting the leaders of controversial groups. Starting around the middle of the century, judges almost always left matters of internal governance to the corporations themselves.

The shift away from government oversight of incorporated voluntary associations can partly be seen in the altered language of legislative acts. Previously, in the era of special charters, states mandated a number of governance rules. For example, they often required voluntary associations, like businesses, to hold annual elections of officers. At times, charters also set the month of elections, demanded that members be notified, and stipulated the specific titles and responsibilities of the officers. These electoral requirements remained standard throughout the century for business corporations but gradually faded away for nonprofit groups. Already in the 1820s New Jersey's and New York's general laws specifically exempted religious and library corporations from following the standard rules about the election

144. By contrast, property tax exemptions, which benefited the same kinds of groups and directly cost taxpayers, elicited outspoken criticism at various times in the nineteenth century. The fact that these critics repeatedly failed to sway lawmakers is another example of the political intransigence of these categories. On these efforts, see Diamond (2002).

of boards and officers that applied to business corporations.[145] Ohio in 1852 similarly exempted religious, fire, literary, and benevolent corporations from requirements to issue public reports.[146] By the 1870s, Massachusetts had lifted the requirement that nonprofit corporations, like business corporations, annually elect a board of directors. A long list of nonprofit groups, ranging from temperance associations to sports clubs, were permitted to shift what had earlier been "the power of directors" to "a board of trustees, managers, executive committee, prudential committee, wardens and vestry, or other officers."[147] Even the pioneering regulatory board created in 1867 by New York to oversee the state's charities left the vast majority of private religious and secular charitable enterprises free of supervision, restricting its oversight to groups that received government funding.[148] Ceilings on income and property remained the only common constraints on the rights of incorporated voluntary associations, and by the end of the nineteenth century some states had eliminated even those.[149] Significantly, at a time when states and the federal government were beginning to impose industry-wide regulations on railroads and other types of businesses, the vast majority of nonprofit groups, whether incorporated or not, entered what was virtually a laissez-faire zone.[150]

The stronger governance rights that legislatures granted to incorporated voluntary associations were steadily reinforced by a series of nineteenth-

145. "Act to Prevent Fraudulent Election by Incorporated Companies," New Jersey Session Laws, 50th Session, 1825, p. 83. Subsequent revisions of this New Jersey law retained the proviso excluding literary and religious societies until at least 1877. New York's *Revised Statutes* (1829), Vol. 1, Ch. 18, Title 4, stated that many specific rules about elections and other matters did not apply to incorporated libraries and religious societies (Sec. 11, 605). Of the four Titles within this chapter on the regulation of New York corporations, only the most general one, Title 3, applied to all incorporated voluntary associations. It was notably looser in all its requirements than Title 1 (on turnpikes), Title 2 (on banks and insurance companies), and Title 4 (which focused mostly on stock companies). Religious societies and schools were similarly exempted from another set of New York rules guiding corporations in equity suits and dissolutions (*Revised Statutes* 1829, Vol. 2, Ch. 8, Title 4, Articles 1–3).

146. Ohio Session Laws, 50th Assembly, General Acts, 1852, §72, p. 294.

147. Commonwealth of Massachusetts (1882, Ch. 115, § 6, 655). The more restrictive requirements for businesses are contained in Ch. 106, pp. 574–76.

148. Katz, Sullivan, and Beach (1985, 83).

149. For example, with the exception of cemeteries and agricultural societies, New York's 1895 "Act Relating to Membership Corporations" contained no property limits. See New York Laws of 1895, Vol. 1, Ch. 559, pp. 329–67. Between the 1850s and the 1880s, Massachusetts raised its property limit for virtually all incorporated nonprofit groups from $100,000 to $500,000. Commonwealth of Massachusetts (1860, Ch. 32, 207); Commonwealth of Massachusetts (1882, Ch. 115, § 7, 656).

150. In this respect, the United States presents a striking contrast with Germany, where the rights of voluntary associations continued to be far more restrictive than the rights of businesses. See Brooks and Guinnane (chapter 8, this volume). General incorporation acts for American businesses often contained governance rules and other prescriptions that were missing from acts for nonprofit groups. See Lamoreaux (2015) and chapter 8 in this volume (2, 17–18) by Erik Hilt. On the late nineteenth-century shift toward regulating businesses by passing general laws applying to each industry (in contrast to the earlier reliance on incorporation acts), see Crane (2017).

century judicial decisions. In 1826 the eminent jurist James Kent wrote that the *Dartmouth* decision had already thrown "an impregnable barrier" around the rights of "literary, charitable, religious, and commercial institutions" by guaranteeing their charters' "solidity and inviolability."[151] Despite the frequent insertion of reservation clauses meant to enable legislatures to alter charters (thereby getting around *Dartmouth*), legislatures almost never tried to change the charters of private nonprofit corporations, and courts in the 1830s and 1840s defeated their few attempts to do so.[152] As time went on, moreover, judges came to regard the self-governance rules made by associations as inviolable as the language of their charters. The Pennsylvania Court in 1837 swung decisively away from the 1810 *Binns* decision when it upheld the right of a mutual benefit society to oust a member for violating its bylaw against intoxication on the simple grounds that, as "a private corporation," it was authorized to follow its own rules.[153] The application of the *Binns* precedent contracted to a narrow defense of individual contractual rights. Only when membership came with promised insurance benefits that were lost upon expulsion did judges became concerned about the rights of members whose group had expelled them for offensive conduct, and they ruled on behalf of an expelled member only when they could prove that the disciplinary procedure that took away his benefits deviated from the common practice of the group.[154] Otherwise, American courts recognized camaraderie as a justifiable condition of continued participation and supported decisions to terminate membership for misbehavior even when valuable benefits were lost. In a notable case of 1896, an Illinois court upheld the expulsion of a disagreeable member of the Women's Catholic

151. Kent (1826, vol. 4, 392).

152. Campbell (1990, 158–63).

153. *Black and White Smiths' Society v. Vandyke*, 2 Whart. 309 (PA 1837).

154. Kevin Butterfield identifies a similar shift toward contractualism as early as the 1830s (Butterfield 2015, 81–84, 151, 173–80, 219–20). This process was gradual. As late as the 1860s at least two cases still awarded reinstatement to expelled members: *Evans v. Philadelphia Club*, 50 Pa. 107 (PA 1865) (a late use of the *Binns* precedent, stating that expulsion was not necessitated by the purpose of the corporation); *The State ex rel. of James J. Waring v. The Georgia Medical Society*, 38 Ga. 608 (GA 1869) (a Reconstruction case overturning the Georgia Medical Society's expulsion of a doctor whose activities on behalf of blacks had been deemed "ungentlemanly"). For a few selected cases from across the country that exemplify the shift toward contractualism, see the citations here and in the following notes: *Anacosta Tribe v. Murbach*, 13 Md. 91 (MD 1859) (refusing the right of a member to sue his incorporated tribe since it had conformed to its own rules); *Gregg v. Massachusetts Medical Society*, 111 Mass. 185 (MA 1872) (upholding the expulsion of homeopathic doctors because the internal tribunal of the medical society was itself recognized to be a "court"); *State ex. re. Shaeffer v. Aurora Relief Society*, 1877 Ohio Misc. (no number in original; LEXIS 120) (OH 1877) (district court upholding an expulsion based on implicitly understood rules); *Bauer v. Samson*, 102 Ind. 262 (IN 1885) (defending the contractual right of a member to sue a fraternal organization on a matter of money as opposed to discipline); *Commonwealth ex rel. Burt. v. Union League of Philadelphia*, 135 Pa. 301 (PA 1890) (upholding an expulsion, with *Binns* cited only by the losing counsel); *Beesley v. Chicago Journeymen*, 44 Ill. App. 278 (IL 1892) (expulsion upheld on the grounds that, unlike *Binns*, the corporation had incurred injury).

Order of Foresters despite her potential loss of financial benefits, reasoning that property interests were not sufficient justification for suits by expelled members because many mutual benefit organizations were also "social and fraternal in their nature."[155] In 1897, the US Circuit Court in Washington, DC, declared that social and benevolent clubs had the right to expel members for "conduct unbecoming a gentleman" as long as the provision appeared in their bylaws.[156]

These late nineteenth-century expulsion cases almost always concerned corporations, but corporate status became notably less central to the decisions of American courts once judges backed away from supporting abused members and took the same hands-off approach to the governance of corporations that had always been taken with respect to unincorporated groups. Justices also began to insist that the equity action of mandamus, traditionally available to a member of a corporation wishing to overturn an expulsion, could no longer be used as a way to regain benefits.[157] A former member of the Chicago Board of Trade was denied the right to contest his ouster because the organization was not a business but a "voluntary association." "It is true," the court conceded, that the board was a corporation like "churches, Masonic bodies, and odd fellow and temperance lodges; but we presume no one would imagine that a court could take cognizance of a case arising in either of those organizations, to compel them to restore to membership a person suspended or expelled from the privileges of the organization."[158] Nonprofit corporations could now discipline their members for violating internal rules with little fear of state scrutiny (as had always been the case for unincorporated groups). Contrary to the experience of socially and politically suspect groups in the first half of the century, corporate status no longer meant accepting a potential loss of control over internal governance in return for the advantages of other associational rights, like property ownership, that charters routinely secured.

As a corollary to this growing right of self-governance, incorporated voluntary associations gained several additional rights in the nineteenth century that further enhanced their autonomy. A few of these rights, moreover, including the right of limited liability, extended beyond the ones granted to business corporations. By 1830, the default common law rule that members of corporations enjoyed protection from liability for corporate debts had become well established in American courts, but states could override this

155. *People ex rel. Keefe v. Women's Catholic O. of F.*, 162 Ill. 78 (IL 1896).

156. *United States ex rel. De Yturbide v. Metropolitan Club of Washington*, 11 App. D.C. 180 (DC 1897). The same principle was confirmed in later cases, for example: *Commonwealth ex rel. v. Union League*, 135 Pa. 301 (PA 1890); *Brandenburger v. Jefferson, Club Association*, 88 Mo. App. 148 (MO 1901).

157. Instead, "the property remedy" for a cheated member became an ordinary common law suit. *Lamphere v. Grand Lodge*, 47 Mich. 429, at 431 (MI 1882). Many later cases cited this decision to affirm this point.

158. *People ex. rel. Rice v. Board of Trade*, 80 Ill. 134 (IL 1875), quote at 136.

common law rule by passing statutes to the contrary.[159] In the case of business corporations, special charters and general incorporation laws often imposed significantly higher levels of shareholder liability (e.g., double or triple the par value of their shares).[160] In the case of nonprofit corporations, however, special charters generally overlooked the issue of liability entirely, implicitly defaulting to the common law rule. General incorporation laws that covered both businesses and nonprofit groups similarly left the common law rule intact by stating that their sections on liability applied only to businesses. The laws of Missouri and Kansas made it clear, for example, that "none of the provisions of this article, imposing liabilities on the stockholders and directors of corporations, shall extend to literary or benevolent institutions."[161] In our survey of the general acts passed in the middle of the century for nonprofit corporations, we found only four states (less than a quarter of the total) that imposed liability on members or directors. Two of them (New Hampshire and Florida) had reversed themselves by 1870, and the other two, Ohio and New York, made only trustees or directors, not ordinary members, liable.[162]

In 1876, the right of nonprofit corporations to shield themselves from damaging suits was reinforced by the introduction of the doctrine of "charitable immunity" into American law. In the landmark case *McDonald v. Massachusetts General Hospital*, the Massachusetts Supreme Court invalidated the suit of a patient who had been injured during surgery performed by an unauthorized hospital employee. In the words of the opinion, "A corporation, established for the maintenance of a public charitable hospital, which has exercised due care in the selection of its agents, is not liable for injury to a patient caused by their negligence."[163] The English precedents for this ruling

159. See Livermore (1935), Handlin and Handlin (1945, 8–11) and Perkins (1994, 373–76). An 1844 Connecticut case, involving a bank's attempt to recover a debt owed by a church, clarifies the lack of liability of its members by comparing them to the members of "incorporated academies, colleges, and other literary institutions." *Jewett v. The Thames Bank*, 16 Conn. 511 (1844), at 515.

160. See Horwitz (1992, 94) and Blumberg ([1986]; on liability, especially 587–604).

161. Missouri Session Laws, 1845, 12th General Assembly, Revised Statutes, Ch. 34, p. 235; Kansas Session Laws, 1855 (Territory), 1st Session, Ch. 28, Section 21, p. 190.

162. State of New Hampshire (1867, Ch. 137, 286) (changes a provision of *Revised Statutes* of 1842 to apply only to shareholders); Florida Session Laws, 1868, Ch. 1641, pp. 131–32 (eliminates a provision contained in Florida Session Laws, 1850, 5th Session, Ch. 316, p. 36, making trustees, if not members, "jointly and severally liable for all debts due"); Ohio Session Laws, 50th Assembly, General Acts, 1852, §79, p. 295; New York Session Laws, 71st Legislature, 1848, pp. 448–49. New York's 1848 law was slightly revised in 1853 but otherwise persisted through the state's 1895 Membership Corporation Law. New York Session Laws, 76th Legislature, 1853, Ch. 847, p. 949 (modifies the rule so that trustees were liable only if they personally acquiesced to the loan); New York Session Laws, 1895, 188th Legislature, Vol. 1, Ch. 559, p. 336 (directors are "jointly and severally liable for any debt of the corporation"). Since New York is the focus of so many studies, its importance has been magnified. For the 1926 elimination of this law, see Fishman (1985, 649).

163. *McDonald v. M.G. Hospital*, 120 Mass. 432 (MA 1876). Also see *Haas v. Missionary Society of the Most Holy Redeemer*, 6 Misc. 281 (NY 1893).

dated back to the 1840s, but whereas in England these decisions had already begun to lose traction by the 1870s, the doctrine of charitable immunity began to spread rapidly across the United States. In cases that for the most part concerned hospitals, courts repeatedly ruled that shielding charities from tort suits at once served the public interest and prevented charitable funds from being diverted from their intended use. According to the scholars Bradley C. Canon and Dean Jaros, "seven state high courts had accepted it by 1900, 25 had by 1920, and 40 had by 1938."[164] Only in 1942 did the tide of legal opinion begin to shift the other way.[165]

Another example of the wide latitude given to nonprofit corporations was their exceptional right to hold stock of other corporations. This form of investment was usually denied to business corporations (the major exception being insurance companies) until New Jersey radically broke from precedent and permitted it for all corporations in 1889–90. Nonprofits had, however, routinely bought stock of other corporations since the middle of the century. By 1855, this development had become significant enough for Joseph Angell and Samuel Ames to observe in the fifth edition of their classic treatise, "There are large classes of corporations which may and do rightfully invest their capital or funds in the stock of other corporations, for the purpose of secure and profitable investment." These classes, the passage went on, consisted primarily of "religious and charitable corporations, and corporations for literary and scientific purposes."[166]

Certain nonprofit corporations, unlike business corporations, also gained the right to control subsidiary corporations. Grand lodges of fraternal orders routinely exercised power over their lower affiliate lodges, a practice that dated back to the supremacy of the Masonic Grand Lodge of London in the eighteenth century. The early acts of incorporation for Masons passed by South Carolina, Georgia, Louisiana, and Alabama explicitly authorized Grand Lodges to assume jurisdiction over their affiliated local lodges.[167] Even the states that did not mandate the subordination of local lodges tacitly deferred to the order's top-down governance structure by allowing corporations to establish their own rules. Although the eruption of the anti-Masonic movement in the late 1820s led to the temporary revocation of Masonic charters in Vermont, Massachusetts, and Rhode Island, all three states reincorporated them by 1860, and general incorporation acts passed between 1846 and 1858 by many Midwestern and Southern states—including Illi-

164. Canon and Jaros (1979, quote at 971).

165. Ibid.; also see Note, "The Quality of Mercy: 'Charitable Torts' and Their Continuing Immunity," *Harvard Law Review* 100 (Apr. 1987): 1382–99.

166. Angell and Ames (1855, § 158, 143).

167. South Carolina Session Laws, 1814, pp. 34–36; Georgia Session Laws, January Session, 1796, p. 16 (no pagination in original); Louisiana Session Laws, 2nd Legislature, 2nd Session, 1816, pp. 98 and 100 (confirmed in Louisiana Session Laws, 4th Legislature, 1st Session, 1819, pp. 16 and 18); and Alabama Session Laws, 3rd Session, 1821, pp. 22–23.

nois, Indiana, Kansas, Missouri, Kentucky, and Georgia—contained specific provisions for the incorporation of Masons, Odd Fellows, and Sons of Temperance that implicitly sanctioned the rule of the state-level bodies over local ones.[168] In a Massachusetts case of 1880 involving two rival lodges of the Royal Arch Masons, the state supreme court firmly upheld the right of Grand Lodge corporations to exercise power over their lesser chartered affiliates.[169] Grand Lodges that lacked corporate status, by contrast, could not count on legal recognition of their right to rule subordinate lodges. Important rulings in New York in 1857 and Indiana in 1885 prohibited unincorporated Grand Lodges of the Odd Fellows and the Knights of Pythias from appropriating property owned by local lodges that had split off or been kicked out of the order by their superiors.[170]

Over time, some organizations without charters gained a few of the entity and personhood rights ordinarily held only by corporations. Unincorporated local churches had long exercised the right to receive and hold at least limited amounts of property in perpetuity, and landmark court cases in the 1870s established that higher church bodies did not need to be corporations to secure their governance powers over lower ones.[171] In the middle of the nineteenth century, a growing number of states further extended the property rights not only of churches but also of other conventional religious, educational, and charitable groups even if they lacked corporate charters. The main catalyst for this development was the 1844 decision by the United States Supreme Court in the *Girard's Will Case* that recognized British charitable trust law as part of American common law, thereby according these kinds of groups the right to receive bequests and build permanent endowments in states without statutes to the contrary.[172] Several states after 1850

168. Indiana Session Laws, 31st Session (1846 [approved 1847]), Ch. 45, pp. 97–99; Illinois Session Laws, 1855, 19th General Assembly, pp. 182–84; Kansas Session Laws, 4th Session (1858), Ch. 1, pp. 27–28; Missouri Session Laws, 1851, 16th General Assembly (1850 [approved 1851]), 1st Session, pp. 56–57; Kentucky Session Laws (1853 [approved 1854]), Vol. 1, Ch. 879, pp. 164–65; Georgia Session Law, "Public Laws" (1855–1856), Title 34 "Charitable Societies," p. 272.

169. *Chamberlain v. Lincoln*, 129 Mass. 70 (MA 1880).

170. *Austin v. Searing*, 16 N.Y. 112 (NY 1857); *Bauer v. Samson Lodge, Knights of Pythias*, 102 Ind. 262 (IN 1885).

171. By the 1840s, states often gave churches corporate rights whether they were incorporated or not. See, for example, *Christian Society in Plymouth v. Macomber*, 46 Mass. 155 (1842) (confirming a longstanding statutory rule in Massachusetts); *Cahill v. Bigger*, 47 Ky. 211 (1847) (confirming that in Kentucky an unincorporated church had equity rights to property deeded originally to individual deacons). For church cases affirming the authority of denominational rules (and thereby narrowing or disputing the decision in the 1846 case *Smith v. Nelson* discussed above), see especially: *Watson v. Jones*, 80 U.S. 679 (US Supreme Court 1871); and *Connitt v. Reformed Protestant Dutch Church*, 54 N.Y. 551 (NY 1873). Even Virginia, which passed statutes in the postrevolutionary period disallowing charitable bequests, passed laws in the 1840s designating churches and fraternal lodges as property-holding trusts (Commonwealth of Virginia 1849, Title 22, Chs. 76–77, 357–69).

172. *Vidal v. Girard's Executors*, 43 U.S. 127 (also known as the *Girard's Will Case*). On the history of charitable trust law in nineteenth-century America, see Miller (1961).

in addition gave all voluntary associations, whether or not they were incorporated, an associational right to stand as parties in suits.[173]

Despite these late nineteenth-century developments, voluntary associations without corporate status continued to suffer important comparative disadvantages under American law. Most states at the end of the century still did not give unincorporated groups the right to sue and be sued, and in places that did, legal standing could prove a double-edged sword to controversial groups, such as labor unions, by making them more vulnerable to judicial repression. Nor did the great access to charitable bequests automatically benefit unincorporated associations, as we saw in the case of Henry George's book fund. Other important rights acquired by nonprofit corporations during this period never extended to unincorporated groups, including the right to charitable immunity and the right to control subsidiary organizations. On balance, the legal changes of the late nineteenth century compounded the advantages of corporations while only partly increasing the advantages of other associations. Not only did corporations gain new rights, but they also shed previous constraints on their rights, such as low property limits and judicial threats to self-governance. The extraordinarily wide latitude the government now gave to nonprofit corporations therefore made the inability of disfavored groups to qualify for corporate status all the more discriminatory.

7.6 Constraints on the Associational Rights of Labor Unions and Political Parties, 1860–1900

For the most part, the politics behind the unequal dispensation of associational rights in the late nineteenth century remained hidden from public view. Decisions by officials to deny corporate rights were buried inside of hundreds of obscure state statutes and court rulings, and the groups damaged by them tended to be small and marginal. In the case of two exceptionally visible and contentious groups, however, the politics behind these decisions became glaringly evident around the turn of the century. For a brief period of time, both labor unions and political parties straddled the political fence dividing voluntary associations that received corporate rights from those that did not.

With rare exceptions, political parties and labor unions did not become corporations in the nineteenth century, and they still do not today. Indeed, since 1900 several ways that the government treats them differently from nonprofit corporations have been written into federal laws dealing with tax

173. Connecticut Session Laws, 1867, p. 77; Wyoming Session Laws, 1890–1891, Ch. 76, § 2, p. 328; Maine Session Laws, 1897, Ch. 191, p. 224; Michigan Session Laws, 1897, No. 15, p. 25; Rhode Island Session Laws, 1906, Ch. 1348, pp. 66–67. In 1851, New York passed a similar law extending to any unincorporated "company or association" the right to sue and be sued in the name of its treasurer or president (New York Session Laws, 1851, Ch. 455, p. 654).

exemptions, campaign regulations, and collective bargaining. But what is clear today was not so clear in the late nineteenth century. As states became more permissive in granting corporate status to voluntary groups, the long-standing prohibition on incorporating political parties and labor unions was, for a few decades, thrown into doubt.

For labor organizations, like other voluntary associations, increases in membership and financial resources enhanced the appeal of corporate legal and property rights. When unions began to confront interstate railroads and other national business corporations after the Civil War, they rapidly expanded beyond specific trades and localities, amassed substantial strike funds, and branched out to run cooperative shops and stores. Between the 1860s and 1880s several of the largest labor unions made political demands to incorporate alongside their other (now far better-known) legislative goals like the eight-hour day and the exclusion of Chinese workers.[174] Longstanding resistance finally gave way to pressure from prominent elected officials who threw their weight behind the unions' position. At the instigation of the legislative committee of the Federation of Organized Trades and Labor Unions, which had in 1883 elected Samuel Gompers its president, Congressman Thompson Murch, a prounion politician from Maine, shepherded an 1886 bill through Congress enabling the incorporation of national trade unions in the District of Columbia.[175] Among the allowable corporate purposes listed in the statute was "the regulation of [members'] wages and their hours and conditions of labor" and any "other object or objects for which working people may lawfully combine."[176] Within a few years, several states enabled the incorporation of unions by enacting similar general laws: Maryland (1884), Michigan (1885), Iowa (1886), Massachusetts (1888), Pennsylvania (1889), and Louisiana (1890).[177] Massachusetts still imposed more stringent conditions on unions than on other nonprofit corporations, but most of these states allowed unions to incorporate on the same terms as

174. Commons et al. (1918–1935, Vol. 2, 24, 66–67, 140, 165, 314, 325–26). On the repeated demands for incorporation between 1865 and 1885 by the New York Workingmen's Assembly, the Federation of Organized Trades and Labor Unions, and, in 1884, the Knights of Labor, see Hattam (1993, 131–34).

175. Commons et al. (1918–1935, Vol. 2, 329–30).

176. "An Act to Legalize the Incorporation of National Trade Unions." U.S. Statutes at Large, 49th Congress, 1886, Session 1, Ch. 567, p. 86.

177. Maryland Session Laws, January Session, 1884, Ch. 267, p. 367 (adding unions to the 1868 list "of educational, moral, scientific, literary, dramatic, musical, social, benevolent [etc.] societies"); Michigan Session Laws, Public Acts, Regular Session, 1885, Act No. 145, pp. 163–65 (supplementing an 1869 law allowing labor unions to incorporate only for "charitable" purposes); Iowa Session Laws, 21st General Assembly, 1886, Ch. 71, p. 89 (adding unions to the 1873 general law of incorporation for nonpecuniary purposes); Massachusetts Session Laws, 1888, Ch. 134, secs. 1–5, pp. 99–100 (a self-contained law with unusual special provisions); Pennsylvania Session Laws, Regular Session, 1889, No. 215, pp. 194–96 (a self-contained law declaring that employees ought to have the same privileges as "associations of capital"); Louisiana Session Laws, 1890, p. 42 (adding unions, along with Knights and Farmers Alliances, to its 1886 general law for "literary, scientific, religious and charitable" corporations).

other nonprofit groups (as did New York, the following decade, in its sweeping Membership Corporation Law).[178]

No sooner had they gained permission to incorporate, however, than most unions changed their position and declined to do so. The main reason for this change of heart was the series of antiunion decisions by American courts that occurred between 1885 and 1900. These rulings effectively gutted the influential 1842 decision in *Commonwealth v. Hunt* that had repudiated the British law of conspiracy and regarded labor unions as similar to other kinds of voluntary associations.[179] Emboldened by the Interstate Commerce Act of 1887 and the Sherman Act of 1890, conservative judges devised a new version of conspiracy doctrine that applied, if not to organizing per se, to basic union strategies like picketing, boycotting, and even, most broadly, the calling of strikes leading to "restraint of trade."[180] Corporate status did not help in these cases. Justices used their equity power of injunction to order the arrest and imprisonment of labor activists, whether their unions were incorporated or not. Moreover, several court decisions of the 1890s showed how the legal standing of corporations could backfire by making unions more vulnerable to crippling lawsuits.[181]

It soon became clear that unincorporated unions had distinct advantages in states that stuck to the old common law rule that groups needed corporate status to stand as parties in court. In Massachusetts, for example, the state supreme court in 1906 invalidated a conspiracy suit against unions of bricklayers and masons because "there is no such entity known to the law as an unincorporated association, and consequently it cannot be made a party defendant." For a suit against an unincorporated voluntary association to have standing, the court went on, every member "must be joined as a party defendant" or, following equity rules, several members could be named as the party as long as the plaintiff could show that these individuals were representatives of the entire group.[182] The requirement to identify everyone in

178. Massachusetts Session Laws, 1888, Ch. 134, § 2, p. 99 (requiring the state commissioner of corporations to verify the lawfulness of a union's purposes).

179. Tomlins (1993, 209–16).

180. Tomlins (1985, 46–51) and Hovenkamp (1988). Victoria Hattam stresses the resurgence of conspiracy prosecutions against labor already in the late 1860s, and the use of these indictments in combination with antilabor injunctions in the 1880s and 1890s (see Hattam 1993, 112–79).

181. For example: *Lucke v. Clothing Cutters & T. Assembly*, No. 7507, K. of L., 77 Md. 396 (MD 1893); *Meurer v. Detroit Musicians' Benevolent & Protective Ass'n*, 95 Mich. 451 (MI 1893); *Lysagt v. St. Louis operative Stonemasons' Association*, 55 Mo. App. 538 (MO 1893); *People v. Musical Mutual Union*, 118 N.Y. 101 (NY 1899); *Weiss v. Musical Mutual Protective Union*, 189 Pa. 446 (PA 1899).

182. *Picket v. Walsh*, 192 Mass. 572 (MA 1906), quotes at 589–90. Also see *Reynolds v. Davis*, 198 Mass. 294 (MA 1908). For similar examples elsewhere, see: *Union Pacific Railroad v. Ruef et al.*, 120 F. 120 (US Circuit Court 1902); *St. Paul Typothetae and Another v. St. Paul Bookbinders' Union No. 27 and Others*, 94 Minn. 351 (MN 1905); *Indiana Karges Furniture Co v Amalgamated Woodworkers Union*, 165 Ind. 421 (IN 1905).

a union who supported a strike or else demonstrate that a group of leaders had the consensual support of every member was, from a practical point of view, nearly impossible.

Even though several other states had by then passed laws granting unincorporated voluntary associations the legal personhood rights to sue and be sued, cases involving the illegal actions of only a subset of individual members still foundered if the suit was against the organization. A stream of decisions by the New York Supreme Court beginning in 1892 held that the state's 1880 statute enabling unincorporated associations to be parties in suits did not supersede the requirement that every member be equally liable as an individual—a condition requiring such detailed knowledge about specific actions and identities that large unions in New York were effectively immune from lawsuits for over a century.[183] Other states, however, such as New Jersey, Connecticut, Ohio, and Michigan, decided this question differently, either by court rulings or by passing more explicit laws imposing corporate-like liability on unincorporated groups.[184] Whether or not they incorporated, unions in the late nineteenth century apparently lost more than they gained when they acquired an associational right to legal standing. In this respect, they experienced the same disadvantages as the controversial nonprofit corporations in the first half of the nineteenth century whose rights to self-governance were subverted by conservative courts. Moving further in the same direction, Congress in 1898 added to the judicial damage by mandating that unions incorporating under the federal law of 1886 expel workers who used "violence, threats, or intimidation" to prevent others from working during strikes, boycotts, or lockouts.[185] Not surprisingly, when Louis Brandeis sought to persuade Samuel Gompers that the labor move-

183. Rubinstein (2006). The case that initiated this line of interpretation did not involve a union but another type of nonprofit group: *McCabe v. Goodfellow*, 133 N.Y. 89 (NY 1892).

184. For example, New Jersey Session Laws, General Public Acts, 1885, pp. 26–27 (applied to labor unions in *Michael Mayer et al. v. The Journeymen Stonecutters' Association et al.* [NJ 1890]; *Barr vs. Essex Trades Council* [NJ 1894]); Ohio Session Laws, 50th General Assembly, 1852, Vol. 51, § 37, p. 62 (applied to labor unions in *Hillenbrand v. Building Trades Council et al.*, 14 Ohio Dec. 628 [OH 1904]); "An Act Relating to Voluntary Associations," Connecticut Session Laws, January Session, 1893, Ch. 32, p. 216; Michigan Session Laws, 1897, No. 15, p. 25 (applied to labor union in *United States Heater Co. v. Iron Molders' Union of North America* [Mich. 1902]). Similar rulings were, in Nevada, *L. C. Branson v. The Industrial Workers of the World* (NV 1908) (citing "Section 14 of the Civil Practice Act of Nevada [Comp. Laws, 3109]"); and, in a federal circuit court, *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union Nos. 1 and 3 et al.* (US District Court 1898 [citing US Rev. St., § 954]). The key case establishing that unions were suable under federal law was *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922). By 1980 only four states—Massachusetts, Illinois, Mississippi, and West Virginia—still followed the common law rule that unincorporated associations could not sue or be sued (as reported in the case in which Massachusetts finally abandoned the rule, *DiLuzio v. United Electrical, Radio and Machine Workers*, 435 N.E. 2d 1027 [MA 1982]).

185. "An Act Concerning Carriers Engaged in Interstate Commerce and Their Employees," US Statutes at Large, 55th Congress, Session 2, pp. 424–28, § 8, p. 427.

ment should seize the opportunity of acquiring corporate rights, Gompers responded without hesitation, "No, thank you!"[186]

For political parties, like unions, the widening access to incorporation during the second half of the nineteenth century briefly opened up an opportunity to expand their associational rights that ended up being decisively closed. During the period of expansion, New York, long the home of the Tammany Society corporation, unsurprisingly went the farthest in granting corporate rights to politically partisan groups. Tammany's leaders, by then at the heart of the Democratic political machine, were able in the 1850s and 1870s to brush off renewed questions about the legitimacy of the Society's 1805 special charter as a charitable group, and in 1867 they even successfully petitioned the legislature to increase the corporation's property limit.[187] Around the same time, New York extended similar rights to other groups. In 1875 it revised its general incorporation law in 1875 to include "political, economic, patriot" societies and clubs along with athletic, social, musical, and other recreational ones.[188] Then it followed with a separate act in 1886 allowing for the incorporation of "political clubs" that omitted an earlier provision for visitorial powers by the Supreme Court that applied to other nonprofit groups.[189] The New York Membership Corporations Law of 1895 revoked these earlier laws and abandoned the long string of adjectives that previously defined corporate eligibility, but its inclusive language still left open the possibility of parties or partisan organizations incorporating.[190] As we will see, the courts soon cut off that possibility.

No state other than New York seems to have explicitly included political groups in a general incorporation law. Nonetheless, scattered evidence suggests that "Democratic" and "Republican" clubs received special acts of incorporation in several states during the late nineteenth century, including New Jersey, Maryland, South Carolina, Tennessee, and Kentucky.[191] It is not possible to know simply from the names of these groups whether they

186. "The Incorporation of Trade Unions," 1 Green Bag 2d 306 (Spring 1998), quote at 306. Gompers's reply originally appeared in the *Boston Globe*, Dec. 5, 1902.

187. On the 1850s challenge to the charter, see Mushkat (1971, 273, 283). In the 1870s, there were two similarly failed challenges, a legislative petition to revoke the charter and a law suit: State of New York (1872, 175) and *Thompson v. Society of Tammany*, in Hun (1879, vol. 24, 305–16). The 1867 charter revision can be found in New York Session Laws, 90th Legislature, 1867, Vol. 2, Ch. 593, p. 1615.

188. "An Act for the Incorporation of Societies or Clubs for Certain Lawful Purposes," New York Session Laws, 97th and 98th Legislatures, 1875, Ch. 267, pp. 264–66.

189. "An Act of the Incorporation of Political Clubs," New York Session Laws, 109th Legislature, 1886, Ch. 236, pp. 409–11.

190. "An Act Relating to Membership Corporations," New York Session Laws, 118th Legislature, 1895, Vol. 1, Ch. 559, pp. 329–67.

191. This evidence is based on searches in the HeinOnline Session Laws database, which yielded acts of incorporation for groups with titles that contained "Democrat," "Democratic," and "Republican." For example, in addition to those cited below, New Jersey Session Laws, 1870, Ch. 196, pp. 459–60; Maryland Session Laws, 1868, pp. 821–23; Tennessee Session Laws, 1867–68, p. 385; Connecticut Session Laws, Special Acts and Resolutions, January 1897, p. 1243.

were affiliated with political parties—they could have been educational or civic groups upholding broader "democratic" and "republican" principles. At least one of them, however, the Republican State League of Kentucky, stated on its petition for incorporation in 1886 that its objects were "to advocate, promote and maintain the principles of the Republican Party."[192]

This fledgling development of political corporations quickly fell victim to an onslaught of electoral reforms that changed the legal status of political parties.[193] Previously, states had left parties essentially free of regulatory control. Partisan electoral practices had since the Jacksonian era regularly included the nomination of candidates at closed party conventions and the distribution of premarked ballots at polling places. At the end of the nineteenth century, Progressive politicians asserted state regulatory authority over elections, passing laws that mandated direct primaries and secret ballots in an effort to clip the power of party machines. At least thirty states had by 1900 specified procedures for the conduct of conventions and primary elections.[194] At the same time, states moved against partisan corporations, either categorically denying the incorporation of political clubs or tightening their control over nonprofit corporations with partisan purposes.

In Pennsylvania, courts seized on the legal rationale that the 1874 general act had not explicitly included political groups in its list of qualified organizations. A precedent-setting lower court opinion of 1889 held that clubs of Democrats and Republicans could incorporate only if they described themselves purely as social organizations and not political ones.[195] The suspicion that a purportedly social and educational club was truly a partisan group similarly thwarted the bid by a Republican club for a charter in 1897, with the judge declaring emphatically that "the law does not authorize the incorporation of political clubs, and in all reported cases the courts have refused charters where the articles of association disclosed a political purpose."[196]

In 1900, New York took much the same step. Despite the legislature's recent passage of incorporation laws suggesting the contrary, the New York Supreme Court's interpretation of the state's Primary Election Law of 1899 held that parties were no longer to be regarded as private associations but as parts of the state. Writing for the majority, Chief Justice Parker refused

192. "An Act to Incorporate the Republican State League of Kentucky," Kentucky Session Laws, 1886, Vol. 3, Ch. 1638, p. 1128. By contrast, the "Planter's Republican Society" of South Carolina was listed in the index as a "benevolent" organization. South Carolina Session Laws, 1873–74, p. 6.

193. Epperson (1986, 46–151).

194. Epperson (1986, 51).

195. *In re. Charters of the Central Democratic Association, and Young Republican Club of the Thirtieth Ward*, 8 Pa. C.C. R. 392 (1889). Pennsylvania justices cited this case well into the twentieth century. For example: *In re Forty-Seventh Ward Republican Club*, 17 Dist. R. 509 (C. P. Phila., 1908); *Fourth Ward Democratic Club* (1911) 20 Dist. R. 841 (Northhampton, 1911); *Republican League Incorporation*, 63 Pa. D. & C. 643 (1948).

196. *In re Monroe Republican Club*, 6 Dist. R. 515 (Allegheny, 1897), quote at 516. This case was also cited in the 1908 and 1911 cases noted above.

to allow the Democratic General Committee of Kings County to expel an elected delegate because he was disloyal to the principles of the party.[197] The opinion differentiated the case from another one tried by the same court in 1890, in which the justices decided that a party committee, as a voluntary association, was free to conduct itself however it wished.[198] The intervening passage of the election reform law, however, had rendered that decision irrelevant. As Parker put it, "the voluntary character of the county general committee has been destroyed."[199] Justice Cullin, who argued that the Kings County Democratic Committee had the same rights as a corporation, stood alone in dissent.[200] In other states where political party groups retained access to incorporation, moreover, corporate status lost its characteristic ability to confer autonomy from the state. In Missouri, political groups still sought corporate status in the early years of the twentieth century, but the legislature passed a statute in 1907 mandating the strict scrutiny of all "leagues, committees, associations, or societies" that published material about candidates for public office. Whether "incorporated or unincorporated," the law made clear, such political groups had to fully disclose all their sources of information, submit detailed reports on the amount of money they raised, and provide the names and addresses of their contributors.[201]

By the turn of the century, political parties no longer could operate with minimal interference from the state. They had moved from being unregulated voluntary associations, typically without corporate status, to being, much like earlier corporations, closely regulated extensions of the state. Of course, political parties had never been privately organized in the same way as most other voluntary groups. Politicians stood at their helms, and partisan positions structured the work of public officials inside the government as well as informing the views of private citizens within the electorate. Because parties were so deeply intertwined with the government, meaningful constraints on their freedom were necessary to lower the high risks of political

197. *People v. Democratic General Committee of Kings County*, 164 N.Y. 335 (NY 1900). Also see Epperson (1986, 75–77).

198. *McKane v. Democratic General Committee*, 123 N.Y. 609 (NY 1890).

199. *People v. Democratic General Committee of Kings County*, 164 N.Y. 335 (NY 1900) at 342.

200. *People v. Democratic General Committee of Kings County*, 164 N.Y. 335 (NY 1900), at 347–48.

201. "An Act to Regulate Civic Leagues and Like Associations," Missouri Session Laws, 44th General Assembly, 1907, pp. 261–62. Special thanks to Michael Everman of the Missouri State Archives, who provided the names of organizations that filed pro forma papers with the St. Louis county court as part of the process of applying for incorporation (Missouri, like New York and Pennsylvania, was unusual for requiring judicial approval under its general act of incorporation for voluntary groups). These applications date back to the mid-nineteenth century, but explicitly partisan organizations did not request incorporation until 1901. Although the state's general law of incorporation of 1879 specifically excluded groups with political purposes, this language was dropped in the 1889 version. Missouri *Revised Statutes*, 1879, § 978, p. 280, and 1889 *Revised Statutes*, Article 10, § 2829, p. 721. The Missouri regulatory law of 1907 coincided with congressional passage of the Tillman Act forbidding corporate involvement in political campaigns.

corruption (Tammany Society, again, being a case in point). Theoretically, states or the federal government could have regulated parties as corporations by adding provisions to incorporation laws, but the state of Missouri proved to be unusual in taking this route. In Pennsylvania and New York, where the general laws for nonprofit corporations were ambiguous about the eligibility of partisan groups, justices chose to invalidate political corporations outright.

It was in this context that Congress passed the Tillman Act of 1907 forbidding corporate involvement in political campaigns.[202] The act was a reaction against corrupt political activities of business corporations, specifically the insurance industry, not voluntary associations. Understandably, the political influence of for-profit corporations was perceived as especially dangerous, both because they commanded greater wealth than nonprofits and because the government more actively regulated them. But it would be a mistake to think that the resurgence of anticorporate feeling that underlay the act was entirely directed toward business. The Tillman Act expressed the same normative logic as the denial of corporate status to political parties: corporations and politics should not mix.

In the case of both political parties and labor unions, access to corporate rights widened at roughly the same time as governments took other legal steps to curb their associational rights. In some ways, the outcome by the turn of the twentieth century was very different for these two types of groups. Unions remained unrecognized as legal entities, preferring to negotiate with businesses without the backing of the state because of the dangers of judicial intervention. Political parties, by contrast, assumed the legal status of entities through the government's enactment of campaign legislation, thereby losing their earlier freedom from state control. At the same time, however, the common failure of both types of groups to gain the extensive associational rights ordinarily held by corporations reveals an underlying similarity between them. Both unions and political parties were socially and politically polarizing. They came closer to incorporating than many other contentious groups of the period, in large part because of their wide public acceptance and official support, but each of them ended the period besieged by politically powerful foes. Their stories illustrate how difficult it was for polarizing groups to acquire strong associational rights even after the great expansion of access to corporate status. In the end, both groups acquired a set of associational rights via government regulation—parties during the Progressive era, and unions during the New Deal—albeit they both still lacked, for better and worse, the extraordinary degree of autonomy that nonprofit corporations had already achieved by the end of the nineteenth century.[203]

202. See Winkler (2000) drawing a comparison between parties and business corporations, but not nonprofit ones.

203. On unions, see Levi et al. (chapter 9, this volume).

7.7 Conclusion

From the Revolution to the turn of the twentieth century, public officials generally agreed that corporations should stay out of politics at the same as they made essentially political decisions about which voluntary associations could incorporate and what rights corporations would receive. During the first decades of the nineteenth century, when politicians routinely rewarded their partisan allies with charters, the nonprofit organizations that succeeded in becoming corporations needed to appear, at least on the surface, to be nonpartisan. Churches, colleges, mutual benefit societies, and other "educational or charitable" groups were ostensibly worthy of charters because they served the common welfare, whereas groups that fostered social and political change served only a dissident faction. Later in the century, the allocation of charters generally ceased to be determined either by partisan loyalty or by the requirement that corporations serve the common welfare. Yet fundamentally political decisions still defined which groups had access to incorporation, and on what terms.

As we have seen, the largest categories of groups chronically deprived of corporate rights consisted of political parties, labor unions, and social reform societies. Organizations formed by (or on behalf of) religious and ethnic minorities also experienced difficulty becoming incorporated, more frequently at the beginning of the century than at the end. Meanwhile, the overwhelming majority of voluntary associations that become corporations throughout the century were uncontroversial, mainstream groups whose access to corporate rights frequently depended on their acquiescence to the social and political status quo. This distinction between politically acceptable and politically unacceptable persisted despite the widening of access to the corporate form. Although some organizations without corporate status became able by the late nineteenth century to claim limited entity and personhood rights, particularly the right to property, they, too, needed to conform to recognized definitions of religion or "charity" (like the ones used for and against the Henry George book fund).

At the same time as this pattern of exclusion persisted, moreover, the rights of acceptable nonprofit corporations grew even stronger, a development that made corporate status all the more valuable. By the end of the century, the multiple benefits of incorporation included not only the legal protections needed to accumulate large amounts of property and avoid membership liability, but the ability to own stocks and control subsidiary corporations. In addition, the reduced risk of judicial intervention in internal disputes bolstered the standard corporate right of self-governance. As courts and legislatures paved the way to this enlarged field of potential advantages, the state's discriminatory role as gatekeeper still functioned much as it did in the earlier era of special charters. Tocqueville to the contrary, the widespread

freedom of individuals to associate in American civil society never meant that the associations they formed were equally free.

This nineteenth-century history might lead one to think that removing the barriers to corporate status would reduce the politicization of associational rights. Developments since then, however, suggest otherwise.[204] States in the mid-twentieth century eliminated almost all of the restrictive categories and veto powers built into earlier general incorporation laws. Today, nonprofit corporations can be organized by virtually anyone for virtually any purpose. The opening of nearly complete access to incorporation has not, however, completely equalized access to associational rights. Important vestiges of the nineteenth-century distinctions between favored and disfavored groups survive, most notably in the federal tax code.[205] The same types of elite and religiously and culturally conservative nonprofit organizations that have always found it easy to incorporate have disproportionately benefited from the right of their donors to make tax-deductible contributions—a right that remains out of reach to "political" organizations as well as to otherwise eligible "charitable" organizations without the resources to comply with IRS requirements.[206] Despite the fact that most nonprofit groups are permitted to claim exemptions on all or part of the organization's own income, the qualifications for this benefit still varies substantially among different types of organizations. A labor union officially recognized by the National Labor Relations Board (NLRB), for example, may take a deduction for its aid to striking workers whereas another labor organization distributing aid to union members for the same authorized strike cannot.[207] More well known is

204. Valuable surveys of twentieth-century developments include Silber (2001), Hall (1992), and Hansmann (1989).

205. On this shift, see especially Silber (2001). Already in the colonial period many churches and other privileged categories of voluntary associations (and businesses) benefited from tax exempt status, benefits that persisted through the nineteenth century. Until the inauguration of the federal income tax at the beginning of the twentieth century, tax exemptions typically pertained only to property taxes on a group's land and did not confer any benefits to donors.

206. The most relevant sections of the Internal Revenue Code are sections 501(c)(3) ("Religious and Charitable"), 501(c)(4) ("Social Welfare"), and 527 ("Political"). For an overview of these rules, see http://www.irs.gov/Charities-&-Non-Profits. For more detailed information, see chapters 2–4 in http://www.irs.gov/publications/p557/.

207. This rule emerged from a 1976 IRS decision to deny a deduction to a group of workers belonging to "various" unions who started a strike fund. The disqualification was based on the fact that it was composed of "private persons" without the "authority" to represent its members in collective bargaining. IRS Publications, "IRC 501(c)(5) Organizations," p. J-16, at http://www.irs.gov/pub/irs-tege/eotopicj03.pdf. Presumably meant to discourage union members from forming nonunion support organizations, this rule seems to contradict the IRS definition of a qualified "labor organization" as not restricted to unions (J-4), as well as other rulings in 1959 and 1974 that enabled nonunion groups to qualify for deductions (J-5–J-6). For a current treatise confirming that, in practice, "labor organization" refers only to unions and union-controlled organizations (without explicitly stating that NLRB certification is necessary), see Hopkins (2016, § 16.1, 445–48). On the history behind the NLRB's official recognition of unions, including its costs to classes of excluded workers, see Levi et al. (chapter 9, this volume).

the right of nonprofit groups with political leanings, including organizations registering in the "social welfare" category that permits legislative lobbying and limited election spending, to conceal the identities of their donors in their tax filings. Political parties and political action committees (PACs) classified as "political" (because their activities are "primarily" electoral), however, must publicly disclose the names of their contributors.[208] With these "extra" associational rights of tax deductibility and donor anonymity hanging in the balance, it is not surprising that IRS employees, much like Judge Bird in 1888, struggle to distinguish between "charitable," "social welfare," and "political" purposes. Henry George and his followers could today easily become a nonprofit corporation with an entity right to receive property, but their association would most likely still lack the full range of associational rights conferred by the law.

In the century following the American Revolution, access to basic corporate rights clearly provided advantages to the typically mainstream voluntary associations that most often acquired them. A corollary of the systematic denial of such rights to politically dissident and socially marginal groups was to keep their associations relatively small and ephemeral. Tocqueville himself may be forgiven for celebrating the liberty of United States citizens to associate. His failure to perceive the unequal rights granted by the state to the voluntary associations they formed, however, need no longer obscure our historical understanding of American civil society.

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208. IRS Publications, 4221-PC, p. 24, at http://www.irs.gov/pub/irs-pdf/p4221pc.pdf. Also see http://www.irs.gov/Charities-&-Non-Profits/Political-Organizations/Political-Organization-Filing-and-Disclosure. Since the US Supreme Court's *Citizen's United* decision in 2011 opened the doors to corporate campaign spending, groups have extra incentives to file as "social welfare" organizations because they can report donations to SuperPACs using the names of the organization rather than the names of the original donors. On these currently controversial issues, see "Left and Right Object to I.R.S. Plan to Restrict Nonprofits' Political Activity," *New York Times*, Feb. 13, 2014, p. A15; "A Campaign Inquiry in Utah Is the Watchdogs' Worst Case," *New York Times*, Mar. 18, 2014, p. A1; "Democrats Lean Heavily on PACs in Coordinated Push to Counter G.O.P.," *New York Times*, Oct. 5, 2014, p. A1.

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