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

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Abstract: The freedom of citizens to form voluntary associations has long been viewed as an essential ingredient of modern civil society. Our chapter revises the standard Tocquevillian account of associational freedom in the early United States by accentuating the role of state courts and legislatures in the creation and regulation of nineteenth-century American nonprofit corporations. Corporate status gave associations valuable rights that went beyond the basic right of individuals to associate. Government officials selectively used their power to grant and enforce corporate charters to reward politically favored groups while denying equivalent rights to groups they viewed as politically or socially disruptive.

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In 1888, the Chancery Court of New Jersey invalidated a bequest intended to disseminate the ideas of Henry George, a popular critic of private property and leader of New York's United Labor Party. The will requested that a substantial portion of the donor's estate be set aside under the name of the Hutchins' Fund, stipulating that the Fund be given to George and "[George's] heirs, executors and administrators" to support the free distribution of his writings.[1] At the urging of the deceased's resentful widow and next of kin, the estate's executor asked the court for a ruling on the legality of the bequest. Dozens of wills leaving similar bequests to nonprofit associations had been overturned at the state level since the American Revolution. In virtually all of these cases, the bequests had been made to recipients, like Henry George and his supporters, who were not incorporated.[2]

Lack of corporate status mattered. Whenever someone died and left property to a chartered organization, the will stood on much firmer legal ground because corporations had a standard right to "take" or "receive" property.[3] If the individuals planning to distribute George's writings had been organized as a nonprofit corporation, therefore, they almost certainly would have received the funds without incident and avoided going to trial. But, as this chapter will demonstrate, nineteenth-century nonprofit groups advocating social and political change rarely met the requirements necessary to obtain a charter.[4] Their only other legal recourse was to claim

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

[2]For a survey of the key cases, see Howard S. Miller, *The Legal Foundations of American Philanthropy, 1776-1844* (Madison, Wisc.: State Historical Society of Wisconsin, 1961).

[3]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 Stanley N. Katz, Sullivan, Barry Sullivan, and C. Paul Beach, "Legal Change and Legal Autonomy: Charitable Trusts in New York, 1777-1893," *Law and History Review* 3 (Spring 1985): 51-89.

[4] In this paper, "voluntary association" is used synonymously with "nonprofit group," with both terms referring to any association organized by private citizens for non-business 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

that they qualified to receive bequests as charitable trusts. According to a branch of (originally British) equity law, testators in most American states could bequeath property to unincorporated groups as long as courts deemed them sufficiently "charitable."[5] New Jersey Vice Chancellor John Taylor Bird understood that the key question to be decided in the case was "What is a charity?"[6] His written opinion noted 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."[7] But George's vilification of private landowning posed too great a threat to the rule of law. "Whatever might be the rights of the individual author in the discussion of such questions in the abstract," Bird concluded, "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."[8]

Justice Bird might well have added that the court's rejection of the Hutchins Fund did not in any way prohibit George and his associates from distributing the writings for free. Just as George "in the abstract" had the individual right to publish them, individuals who accepted his

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narrower legal meanings: "voluntary association," which appeared frequently in case law and treatises, usually referred to an unincorporated group, whether for business or non-business purposes; "nonprofit" (as well as "not-for-profit" or "not-pecuniary") were adjectives coined in late nineteenth-century statutes to distinguish non-business corporations from business corporations.

[5]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. The legality of charitable trusts in America varied widely from state to state until the U.S. Supreme Court, in the1844 case *Vidal v. Girard's Executors* 43 U.S. 127 (also known as the *Girard's Will Case*) reversed a contrary decision of 1819 and recognized charitable trusts as an embedded feature of American common law. As a consequence of this ruling, unincorporated groups in almost all American states could legally accept bequeathed property if they qualified as "charitable" -- a category that by then, in both Britain and America, had stretched to include most churches, schools, and cultural institutions in addition to charities for the needy. Useful surveys of this history include Gareth Jones, *History of the Law of Charity, 1532-1827* (Cambridge, UK: Cambridge University Press, 1960) and Miller, *Legal Foundations*.

[6] *Hutchins' Ex'r v. George*, quote at 126.

[7] *Hutchins' v. George*, quote at 137. Bird also cited a Massachusetts precedent, *Jackson* v. *Phillips* (MA 1867) 96 Mass. 539, a case that stretched the definition of charity to embrace the cause of abolitionism but disqualified a bequest to women's rights activists.

[8] *Hutchins' v. George*, quotes at 139.

views could, in theory, join together to finance the cost of disseminating his ideas with their personal resources.[9] But the difficulty of securing sufficient contributions on an ongoing basis would, the court knew, prevent the project from being pursued. The denial of the group's right to inherit in effect rendered the association inoperable, even though the decision never questioned the right of its members to associate or declared its purpose illegal.

As Richard Brooks and Timothy Guinnane explain in their chapter for this volume, there is an important historical distinction between the right of individuals to associate and the right of associations to a collective legal identity. In nineteenth-century America, we show in this essay, groups like George's that challenged the state could exist in the sense that their members were free to create them, but they could not own property as entities or exercise other organizational rights. Using Brooks and Guinnane's 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.[10] At the same time, however, the government significantly restricted the rights of associations to the benefits that came from being *legal entities* and *legal persons*. These "extra" 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). Between the American Revolution and the beginning of the twentieth century, legislators and judges in most states routinely granted corporate status to large numbers of voluntary

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[9] Small voluntary associations without property or the goal of lasting for generations might have no particular need for either corporate or charitable status. The main risk of organizing informally without any kind of legal status was the dependence on mutual trust to handle financial matters and resolve internal conflicts. The partnership was the default legal form recognized by the courts when an unincorporated group wished to sue, but this remedy required all the individual members to agree to the suit. Kenneth Lipartito has stressed the utility of the joint-stock arrangement in the special case of utopian communities, but our research shows that even they did not consistently choose this form. See Lipartito, "The Utopian Corporation," *Constructing Corporate America: History, Politics, and Culture*, eds. Kenneth Lipartito and David B. Sicilia (New York: Oxford University Press, 2004), pp. 94-119; *cf. Schriber v. Rapp* (PA, 1836) 5 Watts 351*; Nachtrieb v. The Harmony Settlement*, 3 Wall. Jr. 66 (U.S. Appeals, 1855) (cases involving the property rights of the Harmony Society that contain no discussion of stockholding).

[10] Richard Brooks and Timothy W. Guinnane, "The Right to Associate and the Rights of Associations: Civil-Society Organizations in Prussia, 1794-1908."

associations they regarded as politically neutral or benign. Organizations viewed by officials as socially or politically disruptive were, by contrast, at a significant legal disadvantage – especially when members wished to acquire or protect property to advance their cause.

Our argument that the government systematically withheld valuable associational rights from politically controversial groups raises fundamental questions about the Tocquevillian view of the early United States as an "open access" civil society.[11] 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."[12] 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. Modern theorists of civil society not surprisingly take a more positive view of democracy – often, for example, highlighting the constructive role played by egalitarian associations that challenge the government – but they, too, locate voluntary associations "outside the state."[13] Similarly, American historians of social and political movements tend to reinforce this basic Tocquevillian perspective by focusing on the agency of activists and limiting their descriptions of government intervention to instances of forcible repression or criminalization of dissident

[11] The canonical theoretical texts are Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve and Francis Bowen (New York: A.A. Knopf, 1945), I: 198-205, II: 114-128; and Jürgen Habermas, *The Structural Transformation of the Public Sphere*, trans. Thomas Burger (Cambridge, MA: MIT Press, 1989). On the United States, in addition to Tocqueville, the now classic articulation of this view is Arthur M. Schlesinger, "Biography of a Nation of Joiners" *American Historical Review* 50 (Oct. 1944): 1-25.

[12] Tocqueville, *Democracy*, vol. 1, pp. 198, 203.

[13] See, in this volume, Jacob T. Levy, "*Corps Intermédiares*, Civil Society, and the Art of Association." Levy's useful typology distinguishes between the integrative, competitive, and oppositional roles that democratic theorists commonly attribute to voluntary associations. This paper 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.

activities. What has largely been missed in this scholarship is the way that nineteenth-century lawmakers systematically discriminated against politically disfavored organizations by constraining their access to valuable entity and personhood rights.[14] The evidence presented in this chapter suggests that the voluntary associations admired by Tocqueville never really operated independently of the state, and that the political judgments of government officials skewed the development of American civil society towards conservative and acquiescent groups at the expense of oppositional ones.

Our account of this history is based on hundreds of legislative acts and court rulings between 1750 and 1900 that shaped this lopsided allocation of rights. The chapter proceeds chronologically and is organized around two important periods of legal transition: the Revolution and the mid-nineteenth century. At each of these junctures, we demonstrate, states opened access to corporate rights to many types of organizations that generally accepted the social and political status quo -- including churches, evangelical societies, conventional charities, private schools, elite cultural institutions, fraternal lodges, and, increasingly towards the end of the century, social clubs and recreational groups. On the one hand, the stronger rights acquired by these favored groups over the course of the nineteenth century increased their autonomy and significantly weakened the power of the American state. On the other hand, the statutes and

[14] Recently, historical literature on the period prior to 1840 has given increased attention to incorporation: John L. Brooke, *Columbia Rising: Civil Life on the Upper Hudson from the Revolution to the Age of Jackson* (Chapel Hill: University of North Carolina Press, 2010); Johann N. Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* (Cambridge: Harvard University Press, 2008); Albrecht Koschnik, *"Let a Common Interest Bind Us Together:" Associations, Partisanship, and Culture in Philadelphia, 1775-1840* (Charlottesville: University of Virginia Press, 2007); Kevin Charles Butterfield, "UnBound By Law: Association and Autonomy in the Early American Republic," Ph.D. Diss, Washington University in St. Louis (August 2010). A wide-ranging work of legal history that stresses the role of the state in creating associations (without distinguishing between corporations and unincorporated groups) is William J. Novak, "The American Law of Association: The Legal-Political Construction of Civil Society." *Studies in American Political Development* 15(Fall 2001): 163-188. For a challenging article on the incorporation of churches in the first half of the nineteenth century (interpreting states as privileging lay and individual rights over clerical and organizational ones), see Sarah Barringer Gordon, "The First Disestablishment: Limits on Church Power and Property Before the Civil War," *University of Pennsylvania Law Review* 162 (2013-14): 307-372.

judicial decisions simultaneously erected a series of legal barriers blocking labor unions, associations of religious and ethnic minorities, social reform societies, political parties, and other controversial organizations from access to equivalent rights. The specific kinds of constraints utilized by lawmakers changed significantly around the middle of the century, our analysis shows, but the government's denial of entity and personhood rights to politically disfavored associations persisted. This ongoing pattern of discrimination is especially noteworthy in light of the tremendous opening of access for politically favored associations. It is the goal of this chapter to tell both sides of this history.

Expanding Access to Traditionally Favored Groups, 1750-1820

Our narrative begins in the late eighteenth century with a description of the impact of the American Revolution on the legal rights of voluntary associations. Although the Revolution marked a significant turning point in the history of constitutional rights, our research reveals that its effect on the rights of associations was decidedly mixed. On the positive side, American citizens largely won a *de facto* right to associate despite its absence from the Constitution. It immediately became easier for ordinary people to create numerous types of voluntary associations, including oppositional political parties as early as the 1790s. A significant subset of these associations also newly acquired the more explicit rights belonging to corporations – rights to entity and personhood status that went beyond the individual right of their members to associate. Access to these corporate rights, however, remained highly restricted for highly political reasons. The power to issue and enforce charters, previously held by Parliament and the King, shifted to the hands of 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.

The American Revolution cannot be put into historical perspective without first exploring the legal status of voluntary associations during the colonial period. For good reason, the British government's restrictions on associational freedom are far better known than its bestowal of rights upon certain favored groups. Political associations that challenged the state 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 commanded a certain respect from local authorities, but, more typically, officials treated public demonstrations of antagonism to government policies as criminal.[15] A few of the most prominent examples 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.[16]

But other kinds of privately organized voluntary associations were recognized by British and colonial law 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

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[15] On the tradition of extra-legal crowd actions, see Pauline Maier, "Popular Uprisings and Civil Authority," *William and Mary Quarterly* 27 (Jan.1970): 3-35; Edward F. Countryman, "'Out of the Bounds of the Law:' Northern Land Rioters in the Eighteenth Century," in Alfred F. Young, ed., *The American Revolution: Explorations in the History of American Radicalism* (DeKalb, Ill.: Northern Illinois University Press, 1976), pp. 37-69.

[16] On these instances of repression, see Rhys Issac, *The Transformation of Virginia, 1749-1790* (Chapel Hill: North Carolina University Press, 1982) pp. 146-177; James P. Whittenburg, "Planters, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation," *William and Mary Quarterly* 34 (Apr.1977): 215-38; Brooke Hindle, "The March of the Paxton Boys, " *William and Mary Quarterly* 3 (Oct., 1946): 461-86; Edmund S. Morgan and Helen M. Morgan, *The Stamp Act Crisis: A Prologue to Revolution* (Chapel Hill: North Carolina University Press, 1953).

serving the indigent or disabled, and these types of organizations were founded in the colonies as well as in Great Britain. 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.

What these types of legally recognized groups had in common was that 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 of them 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.[17]

Virtually all the voluntary associations formed in the colonies existed legally in the sense that they were covered by charitable uses law or else existed with the tacit approval of local authorities.[18] When it came to incorporation, however, the imperial government had been loathe to charter organizations created by colonists. The few exceptions tended either to be related to the Church of England, like William and Mary College, or to receive strong support from royally

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[17] Gareth Jones, *History of the Law of Charity, 1532-1827* (Cambridge, UK: Cambridge University Press, 1969); W.K. Jordan, *Philanthropy in England, 1480-1660* (London: George Allen and Unwin, 1959) and David Owen, *English Philanthropy, 1660-1960* (Cambridge, MA: Harvard University Press,1964). On the spread of private charities and private schools in mid-eighteenth-century America, see Carl Bridenbaugh, *Cities in the Wilderness: The First Century of Urban Life in America, 1625-1742*(New York: Oxford University Press, 1938), pp. 392-98, 448-51.

[18] Before the Glorious Revolution had fully established the supremacy of British law, some colonies passed their own statutes enacting the law of charitable uses, including Massachusetts in 1671 and Connecticut in 1685. See 4 Mass. Col. Rec. pt. ii. p. 488, as found in *Drury v. Natick* (MA 1865) 92 Mass. 169, at 180. *Acts and Laws of the State of Connecticut in America* (Hartford: Hudson and Goodwin, 1796), pp. 252-53. 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 finally to change its earlier negative position of 1819. On Baldwin's scholarship and its impact, see Irwin G. Wyllie, "The Search for an American Law of Charity, 1776-1844," *The Mississippi Valley Historical Review* 46 (Sept 1959): 203-21.

appointed governors. The reluctance of the Crown to create corporations created friction already in the seventeenth century when defiant Puritan legislators issued acts of incorporation for Harvard College, and later Yale, that the British government regarded as illegitimate.[19] Tensions over the issue of incorporation resurfaced in the late colonial period with several more unsuccessful attempts by colonists to gain royal approval for the incorporation of colleges and evangelical societies.[20]

In reaction against the restrictions of British rule, the American Revolution gave rise to new rights of association. First of all, as Arthur Schlesinger Sr. long ago emphasized, the political organizations formed by the revolutionaries themselves during the 1760s and '70s and the unpopularity of the repression they faced had the effect of enhancing the legitimacy of voluntary groups.[21] In the 1790s there was a brief setback to these emerging rights when leaders of the Federalist Party tried to suppress Democratic-Republican clubs and the Jeffersonian oppositional press -- efforts that culminated in the notorious Alien and Sedition Acts of 1798. Although these Acts tested the limits of the increased toleration of political opposition, their quiet expiration after election of Jefferson opened up a new era of increasingly open partisanship. By the 1820s, organized political conflict had become widely recognized as an inevitable feature of popular rule.[22]

Secondly, the American Revolution produced fundamental constitutional rights that indirectly fostered associational freedom, even though neither the U.S. Constitution nor the state

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[19] Schlesinger, "Biography of a Nation of Joiners."
[20] Joseph Stancliffe Davis, *Essays in Earlier History of American Corporations* (New York : Russell & Russell, 1965 (orig. 1917), vol. 1, pp. 46- 47, 80-81, 85-86. For the purposes of this paper 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 Jason Kaufman, "Corporate Law and the Sovereignty of States," *American Sociological Review* 73 (June 2008): 402-25.
[21] Schlesinger, "Biography of a Nation of Joiners."
[22] Richard Hofstadter, *The Idea of a Party System; the Rise of Legitimate Opposition in the United States, 1780-1840* (Berkeley: University of California Press, 1969)

constitutions included a right of association. The rights of free worship, speech, press, and assembly proclaimed by the federal and, at least in part, by most state constitutions provided legal support for associations whose purposes did not otherwise break the law. It is important not to exaggerate the extent of this *de facto* American right to associate in the early republic: 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.[23] But the expiration of the Alien and Sedition Acts left white Americans remarkably free to associate as long as their activities did not violate existing criminal laws.

Finally, the American Revolution increased the entity and personhood rights of associations by opening the gate to incorporation by state legislature. Elected representatives in most states eagerly seized the power to issue charters from the King and Parliament, and, reacting against the former stinginess of the British, granted them in large numbers. Unlike the *de facto* right to associate, moreover, the rights states gave to corporations were explicitly written into charters, legally enforceable, and belonged to the associations themselves. In practice, the extension of corporate rights could not have occurred without the greater number of associations made possible by the *de facto* right to associate. Only a handful of expensive nonprofit institutions, like hospitals and universities, needed to incorporate at the outset in order to raise vital initial resources. Many groups never bothered to apply for incorporation, either because they had no need for property protection or because they wished to avoid the hassle and the cost

[23] As noted by Brooks and Guinnane, "Right to Associate," pp. 10-13 of NBER conference of October 2014. Other examples from later in U.S. history include: Southern laws against abolitionists in the 1830s; the Congressional ban on polygamy against Utah Mormons in the 1880s; and the anti-conspiracy and anti-espionage acts used against Communists in the twentieth century. Laws against nineteenth-century trade unions are discussed later in this chapter; also see, in this volume: Margaret Levi, Tania Melo, Barry Weingast, and Frances Zlotnick, "Opening Access, Ending the Violence Trap."

of fees. Since the initial formation of an association did not depend on being incorporated, requests for charters typically occurred after the organizations had already been launched and expected to accumulate property. Associations taking this extra step were not asking for the state's permission to organize, in other words, but seeking supplemental legal privileges that required the explicit approval of state legislatures.

Although the American Revolution facilitated the incorporation of a greater number of voluntary associations, the types of groups that became incorporated were almost always the same sorts of organizations that had previously held legal rights to own and receive property under British rule. As Tocqueville subsequently observed, the years between 1780 and 1840 witnessed a veritable explosion of voluntary groups, ranging from sectarian churches to fraternal orders, from political parties to utopian communities. But amidst this great variety, only a subset of associations received charters, and these were overwhelmingly ones whose purposes were religious, educational, and conventionally charitable (either in the sense of aiding or uplifting the poor or, like hospitals, tending to the sick or disabled).[24] American lawmakers stayed remarkably faithful to the legal traditions already established by royal acts of incorporation and the Elizabethan law of charitable uses, deviating little from established precedents when considering which sorts of groups to grant extra associational rights. The only way the new

[24] We thank Jason Kaufman for giving us access to his database of corporate acts collected from the session laws of Massachusetts, Vermont, Connecticut, Pennsylvania, Ohio, Virginia, North Carolina, Kentucky, and Tennessee for the period (with variations by state) from approximately 1780-1800. Our generalization is also derived from later lists of corporations published by Pennsylvania, Massachusetts, South Carolina, and Ohio, as follows: [Pennsylvania], *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments of the Constitution, Commenced and held at Harrisburg on the Second Day of May, 1837* (Harrisburg, PA, 1837-1839), vol. 3, pp. 213-368; [Massachusetts] *The Public and General Laws of the Commonwealth of Massachusetts, from Feb 28, 1807 to Feb 16, 1816*, Volume 4 (Boston: Wells and Lilly, 1816); [Massachusetts], *Private and Special Statutes of the Commonwealth of Massachusetts, for the Years 1830-1837*, Volume 7 (Boston: Dutton and Wentworth, 1837); [Massachusetts], *Private and Special Statutes of the Commonwealth of Massachusetts, for the Years* 1849-1853, Volume 9 (Boston: William White, 1860); [South Carolina], *Statutes At Large of South Carolina*, ed. David J. McCord, Vol. 8 (Columbia, S.C.: A.S. Johnston, 1840), pp. 1-484; [Ohio, Secretary of State], *Annual Report of the Secretary of State, to the Governor of the State of Ohio, For the Year 1885* (Columbus: Westbote Co., 1885), pp. 147-225 (containing a list for 1803-1851).

United States significantly broke from the past was by frequently incorporating fraternal associations like the Masons and ethnic benefit societies, which in Britain and the colonies had long been tolerated but typically received no legal recognition.[25] As far as incorporation was concerned, the main difference made by the American Revolution was the vast increase in the number and scale of voluntary organizations that received entity and personhood rights -- not the kinds of state-sanctioned goals they pursued.

For comparative purposes, it is worth underscoring an additional characteristic of corporations in the early United States: for decades after the Revolution, voluntary organizations became corporations more often than businesses.[26] This historical pattern contrasts sharply with Prussia and France, for example, where businesses received legal entity and personhood rights before nonprofit groups.[27] This difference can partly be explained by the existence of the *de facto* right to associate in America, which enabled both businesses and voluntary associations, incorporated or not, to operate quite freely. Meanwhile, the small size of most American businesses until the late nineteenth century enabled them to manage their property as partnerships and single proprietorships. Voluntary associations, by contrast, not only consisted of more people but also typically experienced a high degree of turnover in membership. If they had common property and wished legal protection for it, they tended to turn to the corporate form.

Another reason that voluntary associations incorporated so frequently was that the ideology of the American Revolution undermined the common law of charitable uses, which had traditionally provided legal support in the colonies for private donations to churches, schools, and local charities. Republican sensibilities were offended by the British charitable law for two

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[25]An exception was the royal charter given to the Scottish Corporation of London. See David Owen, *English Philanthropy, 1660-1960* (Cambridge, MA: Harvard University Press, 1964), p. 67

[26] Pauline Maier, "The Revolutionary Origins of the American Corporation," *William and Mary Quarterly* 50 (Jan. 1993): 53-55; Kaufman, “Corporate Law and the Sovereignty of States,” 415, 417.

[27] Brooks and Guinnane, “The Right to Associate and the Rights of Associations.”

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.[28] Although some states continued to recognize British charitable law, others rejected it, and, with its decline, incorporation rapidly became the favored way to achieve formal legal status for nonprofit groups.[29]

Churches led the way. A majority of the early charters and the first general incorporation laws passed in the 1780s and 90s were granted to churches and other Protestant religious organizations.[30] In part, this inclination of states to charter church groups owed to the great number of them that already owned property in the colonial period and now wished legally to secure it. In addition, the Revolution's support for ecclesiastical disestablishment led states to issue charters to churches as a sign of religious freedom. Even in Massachusetts, where the Congregationalists continued to receive state support, the government for decades refused to grant tax exemptions to other denominations or recognize weddings performed by their ministers unless they incorporated (a policy that only angered the dissenters still more).[31] Pennsylvania and the U.S. Congress, acting for the Northwest Territory, were unusual in passing general incorporation acts not just for churches but also for charitable and literary societies already in the 1790s, but by the 1830s several states had passed one or more general incorporation acts for

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[28] 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. Gareth Jones, *History of the Law of Charity, 1532-1827* (Cambridge, UK: Cambridge University Press, 1960), pp. 160-68. On the initial American rejection, see Howard S. Miller, *The Legal Foundations of American Philanthropy, 1776-1844* (Madison, Wisc.: State Historical Society of Wisconsin, 1961)

[29] A good, brief analysis is contained in James J. Fishman, "The Development of Nonprofit Corporation Law and an Agenda for Reform," *Emory Law Journal* 34 (Summer 1985): 617-83.

[30] We are not including townships. On Massachusetts, see Kaufman, "Corporate Law and the Sovereignty of States," 415, 417. For other states we have relied on the Kaufman (see note 24 above).

[31] John D. Cushing, "Notes on Disestablishment in Massachusetts, 1780-1833," *William and Mary Quarterly* 26 (Apr. 1969): 172-85.

specific types of voluntary groups, ranging from fire companies to social libraries to medical societies.[32] Even without general legislation, legislatures in most states incorporated great numbers of such organizations by special charter. 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."[33]

In accord with traditional British practice, business corporations in the early nineteenth century like banks and turnpike companies still commonly received monopoly rights, but voluntary associations almost always did not. Elite institutions with colonial charters, like Harvard College, fought losing battles in state legislatures to prevent rival organizations from becoming incorporated by special charter.[34] Americans rapidly became used to the co-existence of a variety of competing Protestant churches, evangelical societies, academies, charities, and

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[32] [Pennsylvania], *Laws, Statutes, etc, 1700-1800. Laws of the Commonwealth*, 4 vols. (Philadelphia: Bioren, 1810), 3:20; [United States], *Laws of the Territory of the United States North West of the River Ohio* (Cincinnati, OH: Edmund Freeman, 1798), pp. 3-7. 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. Our generalizations about the numbers and types of corporate acts after 1800 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*; and *Early American Imprints, Series II: Shaw and Shoemaker (1801-1825)*. Citations throughout this chapter to Session Laws are from the HeinOnline collection entitled "Session Laws." We found at least eleven 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 leg.,1787, Ch. 82, pp. 524-531 (colleges and academies), 19th leg., 1796, Ch. 43, pp. 695-699 (public libraries), and 36th leg., 1813, Ch. 40. Vol. 2, pp 219-224 (medical societies); New Jersey Session Laws, 19th General Assembly, 1794, Ch. 499, pp. 950-952 (societies for the promotion of learning), 24th General Assembly, 1799, Ch. 827, p. 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) and January 1829, pp. 219-220 (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).

[33] 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 Sessions 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.

[34] On the debates in the early 1820s over the Republican-sponsored charters for Berkshire Medical College and Amherst College which threatened Harvard's monopoly, see Neem, *Creating*, pp. 75-77. A similar example was the founding of the University of Virginia corporation by Democratic Republicans to compete with the older Anglican monopoly, William and Mary College (whose charter the Jeffersonians first tried to destroy).

other conventionally acceptable voluntary groups, and, when they applied for charters, most states in most parts of the country took a pluralistic approach to incorporating them.

Different regions of the country nonetheless encouraged the incorporation of voluntary associations to different degrees and varied in the types of organizations they favored with charters. In general, the South incorporated fewer organizations than the North, both for nonprofit and for business purposes.[35] Partly this disinclination to incorporate was a reflection of the relatively small number of privately organized groups in the region. The rural spread of the population and the slave-based plantation 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 anti-corporatism among Jeffersonians in Virginia that arose 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.[36] So extreme was the hostility to ecclesiastical corporations in Virginia that the state forbade the incorporation of all churches, an example that was later followed by West Virginia, Arkansas, and Missouri.[37] South Carolina, by contrast, issued many charters to local churches but otherwise chartered few

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[35] Historians of philanthropy have coined the term "Virginia Doctrine" to refer to the reluctance of several states, especially in the South, to encourage private charities; however, less scholarly attention has been paid to incorporation than to charitable bequests. See Kathleen D. McCarthy, *American Creed: Philanthropy and the Rise of Civil Society, 1700-1865* (Chicago: University of Chicago Press, 2003), p. 87; Miller, *Legal Foundations of American Philanthropy*, pp. xii, 50; and [Edward S. Hirschler], "Note: A Survey of Charitable Trusts in Virginia," *Virginia Law Review* 25 (Nov. 1938): 110.

[36] Key cases are: *The Rev. John Bracken v. The Visitors of Wm. & Mary College* (VA 1790). 7 Va. 573 (John Marshall defended the College); *Terrett v. Taylor* (1815) 13 U.S. 43 (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, D.C.. See Bruce Campbell, "Social Federalism," p. 154.

[37] Bell, *Church, State, and Education*, p. 365; Campbell, "Social Federalism," p. 154; and Anon., "Permissible Purposes for Nonprofit Corporations," *Columbia Law Review* 51(Nov. 1951), p. 894. In 2002 a case brought by Jerry Falwell on First and Fourteenth Amendment grounds finally forced Virginia to change its constitution. *Falwell v. Miller* (U.S. Western District of Virginia 2002) 203 F. Supp. 2d 624; 2002 U.S. Dist. LEXIS 6481. On anti-corporatism in Virginia (and among Republicans more generally), see Peter Dobkin Hall, *Inventing*, pp. 22-23; and Hall, *The Organization of American Culture: Private Institution, Elites and the Origins of American Nationality* (New York: New York University Press, 1982), p. 85.

voluntary groups that ordinary people joined. Even as the Bible Belt stretched over the South during the Second Great Awakening, the Southern disinclination to issue charters minimized the number of chartered auxiliaries of the large national evangelical organizations that enlisted interdenominational clergy and lay activists (exceptions were the statewide Virginia and North Carolina Bible Societies and the American Colonization Society chartered in Maryland).[38] Apart from local churches, the voluntary associations to be incorporated south of Baltimore commonly catered to the elite, like Masonic lodges, literary societies, and private academies, or existed primarily to protect property, like fire companies.[39] This narrow granting of charters, especially when taken together with Virginia's and Maryland's repudiation of the English law of charitable uses (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. Within the terms of Jeffersonian ideology, opposition to corporations was justified on

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[38] For an introduction to the so-called Benevolent Empire, see Clifford S. Griffen, *Their Brothers' Keepers: Moral Stewardship in the United States, 1800-1865* (New Brunswick: Rutgers University Press, 1960). On the Virginia Bible Society, chartered in 1814, and its auxiliary organizations, see Sadie Bell, *The Church, The State, and Education in Virginia* (orig. pub. Philadelphia: Science Press, 1930; reprint, New York: Arno Press, 1969), pp. 244-5. 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 Sessions Laws, General Assembly, Dec 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.

[39] 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 Joseph Stancliff Davis, *Essays in the Earlier History of the American Corporation*, vol. 2, p.17. On Virginia incorporated academies, see Bell, *Church, State, and Education*, p. 168. South Carolina passed almost 450 acts of incorporation for voluntary groups between 1775 and 1835, of which 50% were churches and denominational organizations; 14.5% academies, seminaries, and colleges; 11% library, literary, and other cultural societies; 7% Masonic and other fraternal mutual aid associations; 5.5 % militia and fire companies; 4% free schools and charities for the poor; 3% professional, agricultural, and commerce societies; and 5% other or unknown. [South Carolina] *Statutes At Large*, Vol. 8 (1840), cited in footnote 24. 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).

egalitarian grounds. Seen from another perspective, however, the reluctance of the South to grant extra associational rights to churches and charities served the elite more than ordinary citizens by reducing the potential of organized opposition to the power of the planter class.

Anti-corporate feeling also arose in the North during the post-revolutionary period but with very different results. Wealthy philanthropists who founded colleges, academies, and cultural organizations (and often lent vital support to societies aiding the poor) tended to belong to the Federalist Party, and during the years when Federalists held power in state legislatures, the granting of charters for nonprofit corporations bred popular resentment just like the Federalist domination of banks.[40] Once the Federalists lost power, however, their Democratic opponents often abandoned their anti-corporate sentiments and sought to procure charters for their own voluntary associations and businesses.

Among Jeffersonians in New York, fraternal groups of recent immigrants and laborers were able to incorporate beginning already in the 1790s and 1800s by pledging themselves to the charitable assistance of fellow members and their families in need.[41] Even the notoriously partisan Tammany Society of New York received a charter as a mutual benefit group in 1805 shortly after the Republicans won control of both houses of the state legislature.[42] Incorporated

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[40] Neem, *Creating a Nation of Joiners*; Brooke, *Columbia Rising*. On the politics of banking, see in this volume, Qian Lu and John Wallis, "Banks, Politics, and Political Parties: From Partisan Banking to Open Access in Early Massachusetts;" and, on New York, Eric Hilt, "Early American Corporations and the State," Working Paper, The Corporation and American Democracy, Tobin Project, February 2014.

[41] In addition to the General Society of Mechanics and Tradesmen, discussed below, the Caledonian Society (Scottish) and the Hibernian Provident Society (Irish), both incorporated in 1807. Their Republican affiliation is discussed in Young, *Democratic Republicans*, pp. 401-402.

[42] Session Laws, New York, 28th leg, 1804, p. 277-279. The Tammany charter was unusual in this period in three important ways: in giving *carte blanche* to the group's own constitution and by-laws 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 $5000 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." *Longworth's American Almanac, New York Register and City Directory for the Thirty-Second Year of American*

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."[43] 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."[44] Whether corporate status was truly this essential to the Tammany Society's rise to power is open to doubt; few organizations as blatantly partisan managed to secure charters.[45] What is clear is that Democratic Republicans did not consistently reject incorporation on principle, and that a thin veneer of charity sufficed to qualify an organization for a charter if enough lawmakers supported it on political grounds. Revolutionary-era hostility towards 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.

Independence (New York: David Longworth, 1807), p. 78. [We owe this reference to Gustavus Myers, *The History of Tammany Hall* (New York: Published by the Author, 1901), p. 24.]

[43] "Another Denunciation! From the Nuisance of last Night," *The American Citizen*, vol. 10 (March 1, 1809), p. 2. Myers, *History of Tammany Hall*, pp. 31-32; Jerome Mushkat, *Tammany: The Evolution of a Political Machine, 1789-1865* (Syracuse: Syracuse University Press,1971), pp. 37-38. The 1805 charter was unusual 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 restriction was a $5000 property limit. An 1872 petition to the New York legislature to revoke Tammany's charter similarly died in committee. *Journal of the Senate of the State of New York at their Ninety-Fifth Session* (Albany: Argus Company, 1872), p. 175.

[44] As quoted in Myers, *History of Tammany Hall*, p. 32.

[45] 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, *Tammany*, pp. 10, 366. Other purposefully 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 data base of state sessions laws and in published lists of Massachusetts and New York corporations produced no evidence of their incorporation. As will be discussed below, during a brief period in the late nineteenth century a few partisan organizations incorporated.

Throughout the first half of the nineteenth century, most of the groups that got charters fit into the conventionally privileged categories of religious, educational, and charitable groups. To be sure, the definition of "charity" applied by legislators increasingly stretched to include fraternal associations like the Masons, whose charitableness mainly consisted of offering financial assistance to their own members, but because fraternal groups claimed to disperse benefits only to members in need, their mutual aid eased pressure on government poor relief in much the same way as conventional charity. Adherence to the traditional view that chartered groups benefited the general welfare safeguarded the legitimacy of the chartering process. Indeed, suspicions that corrupt officials rewarded their partisan allies only reinforced the basic premise that corporate grants ought not to be awarded to socially and politically divisive groups. 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.

Constraints on the Corporate Rights of Disfavored Social Groups, 1790-1820

Even though corporations were not supposed to be political, the belief that corporations should serve the general welfare sanctioned implicitly political judgments about whether particular kinds of voluntary associations were worthy of charters. The voting public in the early republic still consisted of propertied white men, and voters were in sufficient agreement about the socially beneficial character of most religious, educational, and charitable associations that decisions by politicians to incorporate them rarely aroused partisan controversy. Likewise, regardless of which party dominated the state government, lawmakers often saw organizations

representing socially and politically subordinate groups as raising the specter of potential social disorder. Beginning in the 1790s, Northeastern states ruled on a growing number of applications for charters by voluntary associations formed by laborers, blacks, ethnic minorities, and women declaring their purposes to be educational and charitable, and for several decades legislatures resisted extending them the same entity and personhood rights that were routinely granted to other associations professing similar goals. Petitions by such groups either met outright rejection or resulted in charters with special strings attached that qualified their corporate rights. Typically, their corporations needed to adhere to extremely narrow purposes or, in the case of women, to guarantee that they posed no significant risk to potential creditors. Even in the context of mounting pressures on Northern cities to provide poor relief to a burgeoning population out of depleted municipal treasuries, it took until about 1820 for political authorities to overcome the fear of social instability enough to routinely grant corporate rights to charitable and mutual aid associations organized by marginal groups.

From the time of the Revolution, labor groups experienced exceptional difficulties procuring charters because of longstanding worries by public officials about their collective power to control wages. Two organizations of artisans formed in the late eighteenth century, one in Boston formed by master craftsmen seeking to prevent apprentices from quitting before their contracts expired and the other in New York composed of craftsmen and tradesmen aiming to regulate "their affairs and business," were repeatedly denied charters on the grounds that they were "combinations" aiming to set "extravagant prices for labor."[46] A newspaper article written in 1792 by "A Friend to Equal Rights" bemoaned the fact that banks received "every attention"

[46] *The Council of Revision of the State of New York*, ed. Alfred B. Street (Albany: William Gould, 1859), pp. 261-264; quotes on pp. 261, 263; and Joseph T. Buckingham, *Annals of the Massachusetts Charitable Mechanic Association* (Boston: Crocker and Brewster, 1853), esp. pp. 8-9, 50,57-58, 95-96. The quote is from a later edition, *Annals of the Massachusetts Charitable Mechanic Association, 1795-1892* (Boston: Rockwell and Churchill, 1892), p. 2).

whereas the mechanics' "wish to be incorporated [has] been treated with contempt and neglect."[47] 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.[48] 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.[49]

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 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.[50] A little later this reporting

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[47] Young, *Democratic Republicans*, p. 201, quoting from the *New York Journal*, March 30, 1791.

[48] Charters of these two organizations were finally granted in 1792 (New York) and 1806 (Boston). Alfred F. Young, *The Democratic Republicans of New York*, pp. 201-202, 250 [original charter is in New York Session Laws, 15th leg session, 1792, Ch. 26, pp. 300-303]; Buckingham, *Annals*, pp. 57, 95-96 [original charter is in Massachusetts Session Laws, February, March session, 1806, p. 91]. For citations to other New York labor charters granted between 1790 and 1820, see below.

[49] George A. Stevens, *History of New York Typographical Union No. 6* (Albany: J.B. Lyon, 1913), p. 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." *Journal of the Assembly of the State of New York, at their Fortieth Session* (Albany: J. Buel, 1817), p. 260; *Journal of the Assembly of the State of New York, at their Forty-First Session* (Albany: J. Buel, 1818), p. 195. In the Senate, the 1818 vote to accept the revised bill was still close (12 to 10). *Journal of the Senate of the State of New-York, at their Forty-First Session* (Albany: J. Buel, 1818) pp.87-88. In 1816, the Senate also rejected another labor group's petition for incorporation, for reasons that are not clear. *Journal of the Senate of the State of New-York, at their Thirty-Ninth Session* (Albany: J. Buel, 1816) p. 235.

[50] Society of Mechanics and Tradesmen of New York City (1792), New York Session Laws, 15th leg session, 1792, Ch. 26, pp. 300-03; Albany Mechanics Society (1801), *General Index of the Laws of the State of New York, 1777-*

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."[51] 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.[52]

These unusually constricting conditions of incorporation imposed on artisans reflected a more pervasive hostility towards organized labor that pervaded early nineteenth-century American 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.[53] 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 restrictions placed by legislators on the incorporation of labor groups were, by comparison, much less blatantly repressive, but both forms of state intervention clearly aimed to discourage workplace activism. When a lawyer for striking Philadelphia cordwainers during the first conspiracy trial of 1806 claimed that workers' organizations had the same collective rights to

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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.

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

[52] This language was written into the charters of 85% (11 out of a total of 13) laborers' fraternal benefit groups incorporated between1790-1819.

[53] Christopher L.Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993).

make rules for their members as a corporation, the argument went nowhere, nipped in the bud by 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."[54]

To a lesser extent, charitable and educational associations organized in the Northeast by European ethnic groups, African Americans, and women also encountered resistance when they attempted to incorporate. 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."[55] 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.[56] In 1785 the New York Council of Revision vividly expressed its anxieties about extending corporate privileges to associations of immigrant groups when it vetoed an act of incorporation for a German mutual aid society, declaring that "it will be productive of the most fatal evils to the

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

[55] 77% (7 out of 9) of European ethnic and all (2 out of 2) 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 71 organizations from the *General Index*, pp. 171-174, found this provision in 60% of other (non-labor, non-ethnic) fraternal groups; 60% of non-fraternal charities; and in none of the religious or educational societies. A word search in HeinOnline sessions 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 leg., 1804, Ch. 64, p. 609.

[56] "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, Chap. 19, pp. 256-58.

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 warning that a charter 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."[57]

A different set of legal issues underlay the hesitation of legislatures to charter women's charities, but in 1803 remarkably similar fears of social disorder animated the opponents of one of the first to seek corporate status, the Boston Female Asylum. In the words of a vitriolic 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."[58] When the charter was secured, it contained a passage compensating for the fact that married women could not be sued, adding the requirement that wives who handled organizational funds procure their husbands' consent and making their husbands liable for corporate debts or malfeasance.[59] Charters of women's groups in Massachusetts regularly contained this language into the 1830s.[60] 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*. Rather than lean on the permission and resources of husbands, other Massachusetts and Pennsylvania charters of the period 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.[61] In New York, by contrast, the

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[57] *The Council of Revision of the State of New York*, ed. Alfred B. Street (Albany: William Gould, 1859), p. 273.
[58] As quoted in Wright, *The Transformation of Charity*, p. 114.
[59] Massachusetts Session Laws, January Session, 1803, Ch. 64, pp.122-24 (relevant sections on p. 123).
[60] As stressed by Lori D. Ginzburg, *Women and the Work of Benevolence* (New Haven: Yale University Press) 1990), pp. 51-53; and McCarthy, *American Creed*, p. 41. In the 1820s, however, this provision began to be dropped. See, for example, the charters of the Society for Employing the Female Poor (Massachusetts Session Laws, May Session, 1821, Ch. 11, pp. 577-578) and the Female Society of Boston for Promoting Christianity among the Jews (Massachusetts Session Laws, January Session, 1834, Ch. 163, p. 228).
[61] McCarthy, *American Creed*, p. 41.

acts that incorporated women's organizations typically took the opposite approach of exempting husbands from liability -- thereby encouraging the full participation of married women even at the potential expense of creditors.[62]

Middle-class women in most places quickly overcame the initial resistance to their organizing despite the complications posed by married women under the law of *coverture*. Aided by emergent cultural assumptions about the superiority of female virtue, 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.[63] Just as state legislatures concerned about the inadequacy of public poor relief approved more generous charters after 1820 to working-class and immigrant mutual-aid societies, so too they increasingly granted them to pious and charitable women seeking to alleviate the burdens of poverty and instill conventional religious morality. The socially stabilizing effects of charitable and self-help organizations composed of social subordinates largely overrode the initial fears that such groups would use corporate rights to subvert the social order. Although government officials continued to worry about the disruptive potential of incorporating labor unions and other activist associations, the special hurdles erected between 1790 and 1820 in the path of groups espousing conventionally acceptable goals partly, if not fully, came down.

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

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[62] 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 sess., 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 sess., 1814, Ch. 69, pp. 74-76; The Female Assistance Society, New York Session Laws, 40th sess., 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 sess., 1838, Ch. 232, p. 213).

[63] Ginzburg, *Women and the Work of Benevolence*, pp. 48-53; Cott, *Bonds of Womanhood,* pp. 52-53. On the rise in perceptions of female virtue, see Ruth H. Bloch, *Gender and Morality in Anglo-American Culture, 1650-1800* (Berkley: University of California Press, 2003).

As these examples of labor, ethnic, and women's groups illustrate, voluntary associations frequently desired the multiple advantages of corporate rights. In the first half of the nineteenth century, however, incorporation also came with a potential disadvantage: the threat of government intervention in an organization's internal affairs. Catholic church corporations, for example, routinely found their freedom compromised by a Protestant bias towards 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 own property and direct their dioceses.[64] As a result, Catholic parishes in the United States were often forced to rely on groups of incorporated trustees who lacked official religious authority.[65] Even in the case of highly favored Protestant churches and philanthropic organizations run by elite white men, the terms of charters in this early period often impinged on the freedom of corporations to run themselves as they wished. Acts of incorporation often included limits on the amount of property they could own and the number of years their charters were valid. [66] Large-scale charitable and educational corporations serving people who were not themselves members were typically subject to additional constraints. Massachusetts General Hospital, for example, was required to

[64]F.W. Maitland, "The Corporation Sole," *The Law Quarterly Review* 16 (October1900): 335-54.

[65] Bruce A. Campbell, "The Constitutional Position of Nonprofit Corporations in Nineteenth-Century America,"*Law and History Review* 8 (Fall 1990), pp. 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* (PA 1822) 7 Serg. & Rawle 517. In antebellum Massachusetts, where Irish immigration inflamed Protestant nativism in the 1840s and 50s, 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*, New Series, vol. 3, no. 3 (1849) pp. 372-97.

[66] Pauline Maier, "Revolutionary Origins," pp. 76-77. A few of many examples involving nonprofit groups include: "An Act to Incorporate … the Massachusetts Charitable Mechanics Association," Massachusetts Session Laws, February, March session, 1806, p. 91 (ten year term; property limit $50,000); *An Act to Incorporate the Society for the Relief of Poor Widows with Small Children* (New York: James Oram, [1802]) (eight year term; property limit $50,000); *Rules and Bye-Laws of the Baltimore Charitable Marine Society … to which is prefixed, an Act of Incorporation* (Baltimore: S. Barnes, 1810) (property limit $20,000).

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.[67]

More surprisingly, states also interfered directly in the decision making of membership corporations like local churches and fraternal associations that were formed, funded, and operated entirely by private citizens. Just as legislators discriminated against socially or politically suspect groups by imposing unusual restrictions in their charters, judges in the early nineteenth century took advantage of their enforcement power by entertaining civil suits by unhappy members challenging a group's leadership. Virtually all charters gave corporations the right to enact bylaws that were legally binding on members, but they rarely offered explicit guidance about matters of internal governance apart from the election of officers. Judges therefore had room to interpret whether an organization's right to self-governance permitted the enactment of a particular rule, and courts proved particularly inclined to take an aggrieved member seriously when the complaint touched on issues of wider political significance or the organization's other activities threatened to disturb the status quo. As the following cases make clear, these kinds of internal disputes over rules gave judges the license they needed to discipline controversial voluntary associations. It was the corporate status of these associations that made them vulnerable judicial intervention. Voluntary associations without charters were free to govern themselves unless the lawfulness of their very existence was in doubt. Politically suspect voluntary groups in effect traded the upside of other corporate benefits, like property ownership, for the downside of potential government control.

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[67] "An Act to Incorporate Certain Persons by the Name of the Massachusetts General Hospital," in *Laws of the Commonwealth, from February 28, 1807 to …1814* (Boston: Thomas and Andrews, 1814); John S. Whitehead, *The Separation of College and State: Columbia, Dartmouth, Harvard and Yale, 1776-1876* (New Haven: Yale UP, 1973, pp. 191-240.

Despite the constitutional guarantee of freedom of worship, the conviction that corporations were accountable to the government even threatened the autonomy of Protestant churches. New York's 1784 general act of incorporation for churches contained prescriptions about ecclesiastical governance that were unusually detailed for charters, dictating procedures for deciding which church members could vote, how corporate trustees would be elected, and how to determine the salaries of clergymen. Only thirty years of concerted pressure by wealthy and powerful denominations induced the state's legislature to allow churches to incorporate under more liberal rules.[68] In New England, where the colonial ecclesiastical establishments hung on for decades, the idea that the state should oversee the internal 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 their own clergymen.[69] 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 govern their own churches.[70]

Ecclesiastical disestablishment soon eliminated the special privileges of Congregationalists, but corporate status nonetheless continued to offer justices a justification for exerting control over religious disputes. The best example is the well-known Vermont case *Smith*

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[68] The initial act is contained in New York Session Laws, 7th Session (1784), Chap. 18, pp. 613-618. For the revisions, see New York Session Laws, 16th Session (1793), Ch. 40, p. 433; New York Session Laws, 36th Session, 1813, Chap. 60, Vol. 2, pp. 212-19.

[69] *Avery v. Inhabitants of Tyringham* (MA 1807) 3 Mass. 160. 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* (MA 1818) 15 Mass. 296.

[70] *Howard v. Waldo* (CT 1793) 1 Root 538; *Chapman v. Gillet* (CT 1816) 2 Conn. 40.

v. Nelson of 1846, in which the Vermont's Supreme Court refused to enforce the dismissal of a minister by the Presbyterian synod.[71] Reversing a contrary lower court ruling, the justices defended the preferences of the local Presbyterian 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 radiated 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 like being forced to sit in the back. White leaders in the original church corporation continued, however, to control the

[71] *Smith v. Nelson* (VT 1846) 18 Vt. 511.

church's property and the selection and pay of its visiting preachers.[72] Under the leadership of minister Richard Allen, Bethel tried and failed to secure its own corporate charter, 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 nonetheless treated the church as subject to the corporate bylaws of the original Methodist Church "by which the African society is governed."[73] Green, an ally of the white opposition, had been thrown out of the church by the minister and deacons for breaking a standard Methodist rule against suing another member. Despite the fact that Pennsylvania gave all churches basic corporate rights, 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 Court denied the authority of the Bethel officers to oust Green. 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" would the decision by "a select number" be legal.[74]

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.[75] Once again, the church was split between bitterly opposed factions, and their conflict alarmed the authorities by erupting into "tumult and violence." Recent German immigrants who wanted church services conducted in their native language won the election, and the more assimilated, English-speaking

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[72] A short first-person account is in *The Doctrines and Discipline of the African Methodist Episcopal Church* (Philadelphia: Richard Allen and and Jacob Tapsico, 1817), pp. 4-9. Gary B. Nash, *Forging Freedom: the Formation of Philadelphia's Black Community, 1720-1840* (Cambridge, Mass.: Harvard University Press, 1988).
[73] *Green v. African Meth. Society* 1 Serg. & Rawle 254 (PA 1815), at 254. Richard S. Newman, *Freedom's Prophet: Bishop Richard Allen, the AME Church, and the Black Founding Fathers* (New York: NYU Press, 2008), pp. 159-160. 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.
[74] *Green v. African Meth. Society*, quote at 255. Referring 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). For the general law, see *Laws of the Commonwealth of Pennsylvania from … [Oct. 14, 1700 to March 20, 1810]*, 4 vols. (Philadelphia: John Bioren, 1810), vol. 3, p. 21.
[75] *Commonwealth v. Woelper* (PA 1817).) Serg. & Rawle 29.

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.[76]

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

[76] *Commonwealth v. Murray* (PA 1824) 11 Serg. & Rawle 73. 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.

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.

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 for "vilifying" another member, went to court to challenge his expulsion.[77] The man whom Binns had insulted was no less than the society's president, William Duane. Duane was also the editor of the leading Jeffersonian newspaper *The Aurora*, an ally of the recently elected Republican state governor, and a vocal opponent of a strong judiciary.[78] Technically, the justices' decision to adjudicate this dispute stemmed from the society's limited rights as a corporation, not from Duane's hostile stance towards the bench or his (and his Irish supporters') other political views. Even though a majority of members had passed a bylaw forbidding rude behavior towards other members, the justices adhered to a

[77] *Commonwealth v. St. Patrick's Society* (PA 1810) 5 Binn. 486.

[78] Kim T. Phillips, "William Duane, Philadelphia's Democratic Republicans, and the Origins of Modern Politics," *Pennsylvania Magazine of History and Biography* 101 (July 1977): 365-387; Kevin Butterfield "A Common Law of Membership: Expulsion, Regulation, and Civil Society in the Early Republic," *Pennsylvania Magazine of History and Biography*, 133 (2009): 255-275. Butterfield notes that Duane and his allies successfully expelled Binns from an unincorporated branch of the Tammany Society, and that Binns success in the St. Patrick's case hinged on its having a charter. Butterfield's larger interpretation, however, which presents *Binns* as an example of Americans increasing use of the common law to gain individual rights within associations, is at odds with our stress on the growing rights of associations (often at the expense of individual rights), as we elaborate below.

narrow, literal reading of the corporation's right to self-governance and reinstated Benn's membership. 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."[79]

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.[80] 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.[81] 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."[82]

In a South Carolina case, which, like *Binns*, involved a prominent fraternal association, the Chancery Court enforced a charter belonging to the Grand Lodge of South-Carolina Ancient

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[79] *Commonwealth v. St. Patrick's Society*, at 450.
[80] *The Commonwealth vs. The Philanthropic Society* (PA 1813) 5 Binn. 486. The last case to directly follow the precedent of *Binns* seems to have been *Evans v. Philadelphia Club* (PA 1865) 50 Pa. 107. Many other case reports erroneously described the decision as having hinged on financial issues.
[81] New York Session Laws, 34th session, 1811, Ch. 113, p. 195.
[82] *Fuller v. Trustees School Plainfield*, (CT 1827) 6 Conn. 532; quote at p. 546.

York Masons in a manner that similarly overrode its internally chosen leadership.[83] South Carolina at the time contained two 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 at first 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. In the midst of this controversy, 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 depend on having 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, even referring to arcane texts like the *Ahiman Rezons* in his written decision.[84] The opinion concluded that the referendum supporting the Grand Masters had been based on deception. The

[83] *Smith v. Smith* (SC 1813) in Henry William DeSaussure, *Reports of Cases argued and determined in the Court of Chancery of the State of South-Carolina* (Columbia, S.C.: Cline & Hones, 1817), vol. 3, pp. 557-84.
[84] *Ibid*., pp. 566-71.

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."[85]

Clearly, 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. As these examples of early appellate court cases suggest, the courts were especially likely to interfere with entities' right to self-government proved when conflicts within organizations aroused public controversy. Then justices might take issue with the decisions of internally chosen leaders on matters ranging from personal behavior to electoral procedures to institutional tradition. Voluntary associations that were not incorporated were rarely, if ever, subjected to this kind of judicial scrutiny, unless, like labor groups, they could be accused of breaking criminal laws. 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 that could not be sued. It was the entity right of corporations that brought them into the courts and gave justices an opportunity to discipline them.

The readiness of early nineteenth-century judges to undermine the corporate governance rights of controversial groups reflected the traditional view of corporations as extensions of the state dedicated to serving the public good. In accord with this understanding, conflicts between members especially risked state intervention when judges regarded the activities of a group as threatening to the general welfare. Even corporations that authorities ordinarily viewed as publically beneficial, like the South Carolina Masonic Lodges or the German Lutheran Church,

[85] *Ibid*., pp. 576-82 (quote on p. 581). The Grand Lodge of South Carolina was incorporated in 1815.

could find themselves in the middle of intense political conflicts. Business corporations, of course, also faced political attacks when they were perceived as violating the public good, but businesses lacked the same vulnerability to judicial scrutiny. Even though economic development was generally perceived as a social benefit, the charters of profit-making corporations were freed from specific expectations of public service earlier than nonprofit ones.[86] When minority stockholders sought redress for damaging decisions made by corporate managers, courts entertained their complaints only if they could prove egregious financial fraud.[87] Not only did conservative judges usually side with business leaders as a matter of course, but the fact that membership in voluntary associations often depended on vaguely defined commitments like sociability or doctrine rather than stockownership also gave judges more room to find fault with the implementation of the rules of nonprofit groups. Whereas the injured interests of stockholders rarely touched on issues of public concern, moreover, disputes within voluntary associations often spilled into wider political controversies. Judges who viewed themselves as the official guardians of corporate responsibility to the public could easily justify ruling against leaders of disruptive groups as necessary to the defense of the common good.

In comparison to either business corporations or noncontroversial nonprofit corporations, then, nonprofit corporations that authorities saw as potential threats to social order were subject to unique legal constraints on their associational rights. Before they could exercise the entity and personhood rights ordinarily given to corporations, controversial voluntary associations needed to overcome two sets of obstacles erected by state officials: first, the legislative barriers to

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[86] On the decline of the public interest justification for banks, see Naomi R. Lamoreaux, *Insider Lending: Banks, Personal Connections, and Economic Development in Industrial New England* (New York: Cambridge University Press, 1995), pp. 27-30.

[87] Ruth Bloch and Naomi Lamoreaux, "Corporations I," unpublished chapter of book in progress. On New York courts' tendency to ignore business violations of charter terms, see Hilt, "Early American Corporations and the State," pp. 20, 32.

corporate status; and second, the restrictive charter provisions and punitive lawsuits that blocked access to particular rights that other corporations received. 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. Associational rights in Tocqueville's America thus reflected the political priorities of the government at least as much as they represented the independence of civil society from the state.

Widening of Access Combined with Persistent Constraints, 1830-1900

Over the course of several decades around the middle of nineteenth century, American lawmakers significantly widened access to the entity and personhood rights of corporations. States responded to both the steadily growing demand for charters and the Jacksonian hostility towards banks and other elite corporations by moving away from their nearly exclusive reliance on special charters that incorporated individual organizations one at a time. An increasing number of legislatures passed general incorporation laws making it easier for designated categories of businesses and voluntary associations to incorporate and giving all individual organizations within a category the same set of rights. At the same time, the gates to incorporation widened still further by encompassing new types of politically favored voluntary groups. By the end of the century, for example, general laws included social clubs and recreational groups alongside the churches, libraries, schools, fraternal lodges, and conventional charities that had long been favored with charters.

As in the case of the manufacturing firms studied by Eric Hilt, the application of general laws to new categories of voluntary associations began in the 1830s, accelerated in the 1840s and

1850s, and had spread to a majority of states in all parts of the union by 1900.[88] The mid-century general incorporation laws 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. By 1860, states across the country had adopted these kinds of multi-purpose incorporation acts for voluntary groups. To be sure, striking regional differences remained. The overwhelming majority of states that took the lead in passing these comprehensive general laws were located in the Northeast, Midwest, and West. The South, which always had incorporated fewer voluntary organizations, for the most part balked at the prospect of abdicating legislative control over the granting of individual charters.[89] Businesses experienced similar differences between the North and the South, but the regional contrast was much more pronounced for nonprofit groups. By the time of the Civil War, general laws for manufacturing firms, for example, had been widely passed in both regions, albeit varying in their details.[90] General laws for voluntary associations, by contrast, proliferated first and foremost in the North.

In 1848, New York enacted 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

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[88] See, in this volume, Eric Hilt, "General Incorporation and the Shift toward Open Access in the Nineteenth-Century United States."

[89] Of the seventeen states we have identified that passed multi-purpose 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 was 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 individual acts, listed in chronological order, are included in the following footnotes.

[90] Eric Hilt study of general laws for manufacturing companies reveals significant North/South differences in the timing and terms of the acts. By 1860, however, many Southern states had enacted general acts for manufacturing companies without having done so for nonprofit groups. Hilt, "General Incorporation."

missionary societies."[91] Before this, only a few specific types of voluntary organizations other than churches had been covered by general incorporation laws -- 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 new general law 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.[92] Despite this loophole, the sheer comprehensiveness of the New York law became an 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 multi-pronged incorporation laws encompassing a vast number of acceptable nonprofit groups.[93]

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[91] New York Session Laws, 1848, 71st Legislature, Chap. 319, pp. 447- 449. For the context see Stanley N. Katz, Barry Sullivan, and C. Paul Beach, "Legal Change and Legal Autonomy: Charitable Trusts in NY, 1777-1893," *Law and History Review* 3 (Spring 1985): 51-89. Other states that also passed general acts in the 1840's 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, Chap. 45, pp. 97-99; "An Act to Authorize the incorporation of Charitable and Benevolent Societies," Maine, 1847, 4th Session, Chap. 1, pp. 27-28.

[92] New York, Constitution of 1846, Article 8, Section 1. On the continuance of special charters, see Katz, Sullivan, and Beach, "Legal Change and Legal Autonomy," pp. 71, 81-82.

[93] "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. 293-294;: "An Act to provide for the formation of Corporations for Moral, Scientific, Literary, Dramatic, Agricultural or Charitable purposes…," Maryland Session Laws, January 1852, chap. 231(no page number); "An Act to Incorporate Literary Institutions and Benevolent and Charitable Societies," North Carolina Session Laws, 1852, Chapter 58, pp. 128-129; "An Act to incorporate benevolent and charitable associations," New Jersey Session Laws, 77th Legislature, 1853, Chapter 84, pp. 355-358. "An Act for the incorporation of voluntary associations [approved 1854]," Kentucky, 1853, vol. 1, Chap. 879, pp. 164-165; "An act relating to the organization of Corporations for Educational,

A handful of these states for the first time even used the generic term "voluntary associations" in the titles of acts to indicate their wide breadth.[94] 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."[95] 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.[96] Only a glimmer of the earlier notion that corporations should contribute to the public good still survived. The judges Pennsylvania designated to review applications merely needed to verify that a corporation's purpose was legal and "not injurious to the community." This trend towards 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.[97]

But it is still crucial to recognize that this wider access to corporate rights never benefitted all types of voluntary associations equally. We have already seen in the case of Henry George's followers how controversial groups without charters as late as 1888 continued to

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Charitable and Religious Purposes," Massachusetts Session Laws, Acts and Resolves, January Session, 1856, Chap. 215, pp. 126-27; "An act for the Incorporation of Benevolent, charitable, scientific or missionary societies," Iowa Session Laws, 7th General Assembly, 1858, Chapter 131, pp. 253-255; "An Act to authorize the formation of Voluntary Associations," Kansas Session Laws, 1858; 4th Session, Chap. 1, pp. 27-28; An Act to Provide for the Incorporation of Benevolent, Charitable, Scientific, and Literary Societies," Wisconsin Session Laws, 1860, 13th session, Chapter 47, pp. 131-133. "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, Chapter 84, pp. 355-358.

[94] Indiana (1846); Kentucky (1853); Kansas (1858).

[95] 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. 303-305.

[96] "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.

[97] 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." [Ohio], The Revised Statutes and Other Acts … of the State of Ohio, in force January 1, 1880 , Vol. I (Columbus: H.W. Derby and Company, 1879), § 3235, p. 837. On the mid-20th-century culmination of these trends, see [Anonymous Note], "Permissible Purposes for Nonprofit Corporations," *Columbia Law Review* 51 (1951): 889-98; James J. Fishman, "The Development of Nonprofit Corporation Law and an Agenda for Reform," *Emory Law Journal* 34 (1885): 617-83.

encounter judicial resistance when they attempted to acquire the right to receive property as charities. The same sorts of constraints were built into the otherwise permissive mid-century general incorporation laws. The seemingly broad terms used to define eligibility, like "charitable," still embraced only a subset of voluntary associations. To be sure, the subset included was now larger than before, and because the laws never stipulated which types were left out, the excluded groups remained hidden from view. Despite the superficial inclusivity of general incorporation laws, states persisted in denying corporate rights to a great number of voluntary associations outside the social and cultural mainstream.

The Protestant bias against "corporations sole," for example, remained a part of American corporate law for more than a century after the Revolution.[98] Not until 1879 did 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 with the guarantee that their successors in ecclesiastical office would automatically replace them.[99] As late as 1899, the Wisconsin Court ruled that the Catholic diocese in Milwaukee was subject to taxes because the archbishop held the land as an individual rather than as a corporation.[100] Similarly, laws like New York's of 1848 that offered easy incorporation to seemingly broad categories of "charitable," "benevolent," and "educational" groups implicitly left out the many contemporary groups of the antebellum period, most significantly antislavery societies, that were agitating for social and political reform.

In addition to being left out of general laws, antislavery groups had difficulty procuring and securing special charters. Several antislavery societies in the North successfully petitioned

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[98] Campbell, "The Constitutional Position of Nonprofit Corporations," pp. 55-6.
[99] *The Public Statutes of the Commonwealth of Massachusetts* (Boston: Rand, Aberg, and Company, 1882) Part I, Title IX, Ch. 38, § 48, p. 287.
[100] *Katzer v. City of Milwaukee* (Wis 1899) 104 Wis. 16

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.[101] 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.[102] 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 U.S. Congress refused to incorporate the group within Washington D.C.; and Virginia similarly denied its bid for incorporation the same year.[103] Although Maryland reaffirmed its support in 1837 by reissuing a charter significantly raising the group's property limit, the standing of its charter in other slave states continued to come 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.[104] Southern appellate courts generally upheld the organization's corporate right to receive the slave property, but the grounds of these decisions became progressively narrow. In the late 1850's, significant rulings shifted the weight of the law away from the corporation to the side of family members contesting the wills.[105]

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[101] 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.

[102] "An Act to Incorporate the American Colonization Society, passed Feb 24, 1831." Maryland Sessions Laws, General Assembly, Dec Session, 1830. Chap. 189, pp. 201-2.

[103] *The African Repository and Colonial Journal* (published by the American Colonization Society) 13 (June 1837), pp. 41-48.

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

[105] *Maund's Adm'r v. M'Phail* (VA 1839) 37 Va. 199 (the ACS allowed to receive the legacy); *Ross v. Vertner* (Miss. 1840) 6 Miss. 305 (same); *Cox v. Williams* (NC 1845) 39 N.C. 15 (same); *Wade v. American Colonization Society* (Miss. 1846) 15 Miss. 663 (same, but on narrow grounds); *Lusk v. Lewis* (Miss 1856) 32 Miss. 297 (the ASC may not receive bequest; this decision was reversed in 1858); *American Colonization Society v. Gartrell* (GA 1857) 23 Ga. 448 (also rules against).

At the same time as the American Colonization Society's corporate rights were being undermined in the South, the more radical Northern abolitionist 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 anti-slavery Baptist Church in Columbus, Ohio chartered in 1851 under the state's general law for the incorporation of churches.[106] How often other abolitionists tried to incorporate and failed is virtually impossible to determine. Radical activists may typically have had no reason to seek the extra associational rights that came with incorporation, since, as a rule, their societies neither amassed sizeable wealth from contributions nor expected to receive legacies.[107] In addition, they rarely, if ever, had occasion to be involved in civil suits, and when members faced criminal charges as individuals, corporate status was irrelevant.[108]

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[106] "Massachusetts Session Laws, 1836, Chap. 9, p.653; Ohio Session Laws, 49th General Assembly, Local Acts, p. 70. In addition to employing word searches in annual sessions laws contained in HeinOnline, we examined these compilations of corporate charters covering the first half of the century:[Pennsylvania], *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments of the Constitution, Commenced and held at Harrisburg on the Second Day of May, 1837* (Harrisburg, PA, 1837-1839), Vol. 3, pp. 213-368; [Massachusetts] *The Public and General Laws of the Commonwealth of Massachusetts, from Feb 28, 1807 to Feb 16, 1816* , vol. IV, (Boston: Wells and Lilly, 1816); [Massachusetts], *Private and Special Statutes of the Commonwealth of Massachusetts, for the Years 1830-1837*, Volume 7 (Boston: Dutton and Wentworth, 1837) [Massachusetts], *Private and Special Statutes of the Commonwealth of Massachusetts, for the Years* 1849-1853, Volume 9 (Boston: William White, 1860); [Ohio, Secretary of State], *Annual Report of the Secretary of State, to the Governor of the State of Ohio, For the Year 1885* (Columbus: Westbote Co., 1885), pp. 147-225 (containing a list for 1803-1851).

[107] Benjamin Quarles, "Sources of Abolitionist Income," *The Mississippi Valley Historical Review*, 32 (June 1945): 63-76. "No abolitionist society had a permanent fund or endowment." (63). The American Anti-Slavery Society, which had over a thousand auxiliaries by the late 1830's, raised more than $150,000 over a six year period, but still struggled to meet operating expenses. It received only one sizeable bequest, 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 politically radical rather than charitable. *Jackson v. Phillips*, 96 Mass. 539 (1867).

[108] For example, Virginia Session Laws, 1835-36, Ch. 66, p. 44.

Yet the few exceptional charters given to antislavery groups between the 1830s and 50s indicate that some abolitionists valued incorporation. More striking, the repeated failure of at least one of their organizations to incorporate demonstrates that lawmakers, even in relatively liberal New England, actively resisted giving them charters. Examples of failed applications rarely surface in documents, but 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 printing establishment that published 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." The organization'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 towards the antislavery cause.[109] Opposition to abolitionism remained strong throughout the United States, however, and the protracted frustration experienced by these antislavery Baptists suggests that the abolitionists' general failure to incorporate their organizations was due to resistance as much as to apathy.

The most consistent omissions from the official lists of corporations aside from unions and radical reform organizations were political parties. The longstanding view that corporations ideally stood outside politics was one of the main reasons for the mid-century shift from special charters to general laws. In the 1830s, some Masonic lodges in the North lost charters, for which they had originally qualified, like Tammany society, as "charitable" or "benevolent" groups, because the briefly ascendant Anti-Masonic Party successfully cast them as criminally suspect and unduly politically powerful.[110] As this example suggests, however, what was viewed as

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[109] David Marks, *Memoirs of the Life of David Marks, Minister of the Gospel*, ed. Marilla Marks (Dover, N.H.: William Burr, 1846), pp. 352-53; *New Hampshire Sessions Laws*, June Session 1846, Chap. 407, p. 409.

[110] Vermont revoked the charter of the state's Grand Lodge in 1830 (Vermont Session Laws, 1830, Ch. 42, p. 54); after being re-chartered after the Civil War, the Vermont Masons sued for reinstatement of their corporate property

unduly political was often in the eyes of the beholder. Drawing the line at organized political parties was relatively straightforward, especially after the American party system became fully institutionalized between the 1820s and the 1850s. But groups like Tammany Society, the Masons, and the Free Will Baptist abolitionist press occupied a grey area in which the line between politics, religion, and charity shifted back and forth over time.

Evidence of thwarted applications is especially difficult to gather for the period after legislatures stopped issuing special charters, but scholars have uncovered a significant number of examples in late nineteenth and early twentieth-century New York and Pennsylvania, where otherwise liberal general incorporation laws contained a requirement of judicial approval and unsuccessful groups occasionally appealed their rejections in court.[111] These cases make clear that this extra layer of judicial scrutiny redounded to the particular disadvantage of immigrant and dissident 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."[112] By 1897, a series of such rulings had established the precedent that all groups incorporated in the state had to conduct their affairs in

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(see *Strickland v. Prichard* (VT 1864)). Rhode Island repealed the charters of several lodges in 1834 and subjected the remaining ones to strict scrutiny (see Rhode Island Session Laws, January, 1834, pp. 54-56). The Massachusetts Grand Lodge, chartered in 1817, gave up its charter in 1834 when a movement for its revocation developed (its charter was also officially repealed the same year). On Massachusetts, see Neem, *Creating*, pp. 112-13.

[111] 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(March 1955), especially pp. 388-89.

[112] As discussed in "Judicial Approval," pp. 388-99. For another such case of 1893 involving Russians, see William Wood, "What are Improper Corporate Purposes for Nonprofit Corporations?" *Dickinson Law Review* 44 (Oct. 1939 - May 1940): 266.

English.[113] In New York, after the 1895 Membership Corporations Law repealed nearly a hundred laws passed in the state 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.[114] 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.[115] For decades, judges in both these states continued to turn down organizations whose purposes they deemed threatening to the public good – ranging from Christian Scientists to Lithuanian Socialists.[116]

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 discretionarily withhold certification.[117] According to Norman Silber's history of nonprofit corporations, which concentrates on the twentieth century, rejected applications were rarely appealed outside Pennsylvania and New York, but cases "were reported occasionally in many states, including Alabama, Arkansas, California, Colorado, Delaware, Florida, Indiana, Iowa, Michigan,

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[113] 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).

[114] New York Session Laws, 1895, Vol. 1,Chap. 559, pp. 329-67.

[115] *Matter of Agudath Hakehiloth* (NY 1896) 18 Misc. 717, 42 N.Y. Supp. 985. 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 Norman I. Silber, *A Corporate Form of Freedom: The Emergences of the Modern Nonprofit Sector* (Boulder, Colo.: Westview, 2001), pp. 31-82.

[116] *First Church of Christ Scientist*, 205 Pa. 344, 55 Atl. 184 (1903); *Matter of Lithuanian Workers' Literature Soc'y*, 196 App. Div. 262, 187 N.Y. Supp. 612 (2d Dep't 1921).

[117] 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 (Feb. 1957), p. 551, footnote 41.

Minnesota, Mississippi, Missouri, Nebraska, Louisiana, New Jersey, Tennessee, Texas, Washington, and Wisconsin, and more numerously in Illinois, Ohio, and Pennsylvania."[118]

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.[119] 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 exceptional degree of incorporation fits in with their close ties to Protestant churches and the fact that their chief opponents were powerless Catholics and immigrants. Ethnic divisions over the consumption of alcohol were at play in an 1880 Michigan

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[118] Norman I. Silber, *A Corporate Form of Freedom: The Emergences of the Modern Nonprofit Sector* (Boulder, Colo.: Westview, 2001), p. 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.

[119] 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: Calvin G. Beitel, *A Digest of Titles of Corporations Chartered by the Legislature of Pennsylvania …1700 [to] 1873* (Second Revised and Enlarged Edition, Philadelphia: John Campbell & Son, 1874); [New Jersey] *Sessions Laws*, every five years, 1820-1870; [New Jersey, Secretary of State] *Corporations of New Jersey. List of Certificates filed in the Department of State from 1846 to 1891, inclusive* (Trenton, N.J.: Naar, Day, & Naar, 1892); [New Jersey] Sessions Laws, every five years, 1820-1870; [Ohio], Sessions Laws, every five years, 1820-1870).

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.[120] 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.[121] 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 in the period, go a long way towards explaining its success at achieving corporate rights.

The negligible representation of political and social reform groups on state rosters of corporations does not mean that none received charters. We know that some did from cases in state supreme courts that arose when one state tried to block an organization that had been incorporated in another state from operating in its territory on the grounds that it was a "foreign corporation." Most foreign corporation cases did not reflect controversy over the purpose of the organization so much as territorial competition between it and a rival organization or conflicts over resources between parts of the same organization.[122] At times, however, especially when the conflicts concerned race relations, states tried to expel foreign nonprofit corporations because they feared the disruptive social consequences of the groups' central purposes. The American Colonization Society's legal battles in Southern states in the antebellum period, discussed earlier, revolved partly around disagreements about whether, as a Maryland corporation, the

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[120] *Detroit Schuetzen Bund v. Detroit Agitations Verein* (MI 1880), 44 Mich. 313; 6 N.W. 675; 1880 Mich. LEXIS 554.

[121] For example, Massachusetts Session Laws, 1890, Chap. 439, Sects. 1,2, pp. 481-482.

[122] 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).

organization could wield corporate rights elsewhere. The best known instances of this 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 chartered in Georgia.[123] The Kansas attorney general attempted to prevent the Ku Klux Klan, incorporated in Georgia, 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).[124] Southern states fighting desegregation similarly sought to oust the NAACP and CORE, both chartered in New York.[125] 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 allowed them to incorporate.

It is easy to see these many efforts of states to restrict the entity and personhood rights of controversial voluntary associations as politically motivated. 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 George's ideas, much hinged on the question, "What is a charity?" For him and other authorities at the time, groups viewing private property as robbery 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

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[123] *Ku Klux Klan v. Virginia*, 138 Va. 500, 122 S.E. 122 (1924); *Kansas ex rel. Griffith v. Ku Klux Klan*, 117 Kan 564, 232 Pac. 254 (1925).
[124] Charles William Sloan, Jr., "Kansas Battles the Invisible Empire: The Legal Ouster of the KKK from Kansas, 1922-1927," *Kansas Historical Quarterly* 40 (Fall 1974): 393-409.
[125] See Bloch and Lamoreaux, "Corporations and the Fourteenth Amendment," p. #.

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. The assumption of political neutrality served to bury the political judgments behind the use of these categories.

Stronger Rights for Favored Groups, 1830-1900

The politically uncontroversial and mainstream groups that typically benefited from greater access to incorporation also benefited from another mid-century 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. Access to entity and personhood rights continued to be controlled by the government, but the subset of voluntary associations that managed to acquire these rights enjoyed them more fully and more freely than previously. Whereas in the first half of the century legislatures and courts often disciplined suspect organizations by setting limits on the rights that charters conferred, or narrowly interpreting their provisions, states in the late nineteenth-century relied more exclusively on denying access to incorporation altogether.

Mid-century trends towards broadly written general acts and less intrusive judicial opinions significantly strengthened the rights that corporations received. 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. In this respect, voluntary associations caught up with businesses, which had already gained extensive self-governance rights earlier in the century. But the shift away

from imposing restrictions on nonprofit corporations in the second half of the century can in other respects be seen as going in the opposite direction from the treatment of business. 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, existed in what was virtually a laissez-faire zone.[126] 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.[127] General incorporation acts for businesses also tended to contain provisions prescribing governance rules that were missing from acts for nonprofit groups.[128] The growing freedom of incorporated voluntary associations in the United States presents a striking contrast with Germany, where the government continued to restrict the rights of voluntary associations far more than businesses.[129]

The shift away from government oversight of American voluntary associations can partly be seen in the altered language of legislative acts. Previously, in the era of special charters, states typically mandated that voluntary associations, like businesses, hold annual elections of officers. At times, charters also stipulated the specific titles and responsibilities of the officers and set the procedures and month of elections. These electoral requirements remained standard

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[126] On this late nineteenth-century shift away from regulating businesses by passing restrictive incorporation statutes to regulating them by general laws applying to each industry, see Daniel A. Crane, "The Disassociation of Incorporation and Regulation in the Progressive Era and the New Deal," Working Paper, "The Corporation and American Democracy," Tobin Project, October 2014.

[127] Stanley Katz, et al, "Legal Change and Legal Autonomy: Charitable Trusts in New York, 1777-1893," *Law and History Review* 3 (Spring 1985): 83.

[128] On the issue of prescriptiveness, see Naomi R. Lamoreaux, "Revisiting American Exceptionalism: Democracy and the Regulation of Corporate Governance in Nineteenth-Century Pennsylvania," in *Enterprising America: Businesses, Banks, and Credit Markets in Historical Perspective*, ed. William J. Collins and Robert A. Margo (Chicago: University of Chicago Press, 2015 forthcoming); and Hilt, "General Incorporation," pp. 2, 17-18. Hilt identifies a trend away from prescriptiveness but attributes this to the growing number of Southern states that passed general laws (and which imposed other restrictive mechanisms), a regional pattern that seems absent from the nonprofit laws.

[129] Brooks and Guinnane, "The Right to Associate and the Rights of Associations."

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 of boards and officers that applied to business corporations.[130] Ohio in 1852 similarly exempted religious, fire, literary, and benevolent corporations from requirements to issue public reports.[131] 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."[132] 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.[133]

The stronger governance rights that legislatures granted to incorporated nonprofit groups were steadily reinforced by a series of nineteenth-century judicial decisions. Already in the *Dartmouth* decision, the Supreme Court had prevented states from unilaterally changing the

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[130] "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 (Sect. 11, p. 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 made exceptions to 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).

[131] Ohio Session Laws, 50th Assembly, General Acts, 1852, §72, p. 294.

[132] [Massachusetts] Public Statutes of the Commonwealth … Enacted November 19, 1881 (Boston: Rand, Aberg, and Company, 1882), Ch. 115, § 6, p. 655. The more restrictive requirements for businesses are contained in Ch. 106, pp. 574-76.

[133] For example, with the exception of cemeteries and agricultural societies, New York's 1895 "Act relating to Membership Corporations" contained no property limits. See N.Y. Laws of 1895, Vol. 1, Chap. 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. [Massachusetts], General Statutes of the Commonwealth … 1859 (Boston: William White, 1860), Ch. 32, p. 207; [Massachusetts] Public Statutes of the Commonwealth … Enacted November 19, 1881 (Boston: Rand, Aberg, and Company, 1882), Ch. 115 § 7, p. 656.

governance structure created by a corporate charter unless the charter itself gave them the right to do so. In the words of New York Chancellor James Kent, the court's ruling had thrown "an impregnable barrier" around the rights of "literary, charitable, religious, and commercial institutions" by guaranteeing their charters' "solidity and inviolability."[134] In later cases concerning the self-governance rights of voluntary associations, the inviolability of a group's own rules in essence displaced the inviolability 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.[135] 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.[136] Otherwise, American courts recognized camaraderie as a

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[134] James Kent, *Commentaries on American Law* (New York: O. Halsted, 1826), Vol. 4, p. 392.

[135] *Black and White Smiths' Society v. Vandyke* (PA 1837) 2 Whart. 309.

[136] For a few selected examples from across the country, see the citations here and in the following notes: *Anacosta Tribe v. Murbach* (MD 1859) 13 Md. 91 (refusing the right of a member to sue his incorporated tribe since it had conformed to its own rules); *Gregg v. Massachusetts Medical Society* (MA 1872) 111 Mass. 185 (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* (OH 1877) 1877 Ohio Misc. [no number in original; LEXUS 120] (district court upholding an expulsion based on implicitly understood rules); *Bauer v. Samson* (Ind 1885) 102 Ind. 262 (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* (PA 1890) 135 Pa. 301 (upholding an expulsion, with *Binns* cited only by the losing counsel); *Beesley v. Chicago Journeymen* (Ill 1892) 44 Ill. App. 278 (expulsion upheld on the grounds that, unlike *Binns*, the corporation had incurred injury).

Interesting counter-examples, both in mid-century, still awarded reinstatement to expelled members before the tide of judicial opinion had decisively turned the other way: *Evans v. Philadelphia Club* (PA 1865) 50 Pa. 107 (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* (GA 1869) 38 Ga. 608 (a Reconstruction case overturning the Georgia Medical Society's expulsion of a doctor whose activities on behalf of blacks had been deemed "ungentlemanly.")

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 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."[137] In 1897, the U.S. Circuit Court in D.C. 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.[138]

These late nineteenth-century expulsion cases almost always concerned corporations, but corporate status became notably less central to the decisions of American courts once they backed away from supporting the victims and started to take the same hands-off approach to corporate governance that had always been taken to the governance of 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.[139] 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."[140]

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[137] *People ex rel. Keefe v. Women's Catholic O. of F.* (Ill 1896) 162 Ill. 78..
[138] *United States ex rel. De Yturbide v. Metropolitan Club of Washington* (DC 1897) 11 App. D.C. 180. This principle was later confirmed in similar cases, e.g.: *Commonwealth ex rel. v. Union League* 135 Pa. 301 (PA 1890); *Brandenburger v. Jefferson Club Association* (MO 1901) 88 Mo. App. 148.
[139] Instead, "the property remedy" for a cheated member became an ordinary common law suit. *Lamphere v. Grand Lodge* (MI 1882) 47 Mich. 429, at 431. Many later cases cited this decision to affirm this point.
[140] *People ex. rel. Rice v. Board of Trade* (IL 1875) 80 Ill. 134, quote at 136.

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 common-law rule by passing statutes to the contrary.[141] In the case of business corporations, special charters and general incorporation laws often imposed significantly higher levels of shareholder liability (for example, double or triple the par value of their shares).[142] 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

[141] Shaw Livermore, "Unlimited Liability in Early American Corporations," *Journal of Political Economy* 43 (Oct. 1935): 674-87; Oscar Handlin and Mary F. Handlin, "Origins of the American Business Corporation," *The Journal of Economic History* 5(May, 1945), pp. 1-23 (on liability, especially pp. 8-17).
[142] Morton J. Horwitz, *The Transformation of American Law: 1870-1960* (New York: Oxford University Press, 1992), p. 94; Phillip I. Blumberg, "Limited Liability and Corporate Groups,"*Journal of Corporation Law* 11(Summer 1986): 573-631, (on liability, especially pp. 587-604).

of corporations, shall extend to literary or benevolent institutions."[143] 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.[144]

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."[145] The English precedents for this ruling 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

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[143] Missouri Session Laws, 1845, 12th General Assembly, Revised Statutes, Chapter 34, p. 235; Kansas Session Laws, 1855 (Territory), lst session, Ch.28 Section 21, p. 190.

[144] [New Hampshire] *The General Statutes of the State of New Hampshire* (Manchester: John B. Clarke, State Printer, 1867), Ch. 137, p. 286 (changes a provision of *Revised Statutes of* 1842 to apply only to shareholders); Florida Session Laws, 1868, Ch. 1641, pp. 131-32 (eliminating a provision of 1850 making trustees, if not members, "jointly and severally liable for all debts due." 1850, 5th Session, 1850, Ch. 316, p 36); Ohio Session Laws, 50th Assembly, General Acts, 1852, §79, p. 295; New York, Session Laws, 1848, §7, pp. 448-449. New York's reiterated the 1848 provision as late as 1895 in the New York Membership Corporation Law, § 11 (trustees "jointly and severally liable for all debts" contracted for society while they were trustees, provided debts payable within one year of when they were contracted; in 1853 this was modified so that the trustees must be shown to have acquiesced in the debt.). Since New York is the focus of so many studies, its importance has been magnified. For the 1926 elimination of this law, see James J. Fishman, "The Development of Nonprofit Corporation Law and an Agenda for Reform," *Emory Law Journal* 34 (Summer 1985): 649.

[145] *McDonald* v. *M. G. Hospital* (MA 1876) 120 Mass. 432. Also see *Haas v. Missionary Society of the Most Holy Redeemer*, 6 Misc. 281; 26 N.Y.S. 868 (1893).

and Dean Jaros, "seven state high courts had accepted it by 1900, 25 had by 1920, and 40 had by 1938."[146] Only in 1942 did the tide of legal opinion begin to shift the other way.[147]

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 became significant enough for Joseph Angell and Samuel Ames' classic treatise on corporations to observe for the first time in its fifth edition, "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."[148]

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.[149] Even the states that did not mandate the

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[146] Bradley C. Canon and Dean Jaros, "The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity**,"** *Law and Society* 13 (Summer 1979): 969-86. Quote at 971.
[147] *Ibid*; also see Note, "The Quality of Mercy: 'Charitable Torts' and Their Continuing Immunity," *Harvard Law Review* 100 (Apr. 1987): 1382-99.
[148] Joseph Kinnicut Angell and Samuel Ames, *A Treatise on the Law of Private Corporations Aggregate***,** 5th ed., rev., corr., and enl. (Boston: Little Brown, 1855), § 158, p. 143.
[149]South Carolina Session Laws, 1814, pp. 34-36; Georgia Session Laws, Jan. Session, 1796, p.16 (no pagination in original); Louisiana Session Laws, 2nd leg, 2nd session, 1816, pp. 98 and 100 [confirmed in Louisiana Session Laws, 4th leg., 1st sess., 1819, pp. 16 and 18]; and Alabama Session Laws, 3rd session, 1821, pp. 22-23.

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 Illinois, 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.[150] 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.[151] 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.[152]

Over time, some organizations without charters gained a few of the entity and personhood rights ordinarily held only by corporations. Unincorporated 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 bodies of religious denominations need

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[150] Indiana Session Laws, 31st Session (1846 [Approved 1847]), Chap. 45, pp. 97-99; Illinois Session Laws, 1855, 19th General Assembly, pp. 182-184; Kansas Session Laws, 4th Session (1858), Chap. 1, pp. 27-28; Missouri Session Laws, 1851, 16th General Assembly (1850 [approved 1851]), lst Session, pp. 56-57; Kentucky, Session Laws (1853 [Approved 1854]), vol. 1, Chap. 879, pp. 164-165; Georgia Session Law, "Public Laws" (1855-1856) Title 34 "Charitable Societies", p. 272.

[151] *Chamberlain v. Lincoln* 129 Mass. 70 (MA 1880) 129 Mass. 70.

[152] *Austin v. Searing* (New York 1857) 16 N.Y. 112; *Bauer v. Samson Lodge, Knights of Pythias* (Ind 1885) 102 Ind. 262.

not be incorporated to secure their leadership over lower ones.[153] 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 status. The main catalyst for this development was a 1844 decision by the United States Supreme Court that recognized British charitable trust law as part of American common law, thereby according these kinds of groups in most states the right to receive bequests and build permanent endowments.[154] Several states after 1850 in addition gave all voluntary associations, whether or not they were incorporated, an associational right to stand as parties in suits.[155]

Nonprofit groups that were not corporations, however, continued to suffer important comparative disadvantages under American law despite these developments. Most states still did not give them the right to legal standing, and in the case of labor unions, as we shall see, this right essentially backfired by making them more vulnerable to attacks in the courts. Nor did other controversial groups, like Henry George's followers, benefit from the expansion of charitable trust law. Other important rights that had been more recently acquired by nonprofit corporations, moreover, like charitable immunity and the right to control subsidiary

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[153] 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* (U.S. Supreme Court 1871). 80 U.S. 679; and *Connitt v. Reformed Protestant Dutch Church* (NY 1873) 54 N.Y. 551. Even Virginia, which passed statutes in the post-revolutionary period disallowing charitable bequests, passed laws in the 1840s designating churches and fraternal lodges as property-holding trusts. *The Code of Virginia* (Richmond: Ritchie, 1849), Title 22, Chs. 76-77, pp. 357-369.

[154] *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, *Legal Foundations. al v. Girard's Executors* 43 U.S. 127 (also known as the *Girard's Will Case*). Virginia, which did not allow charitable bequests and incorporated few voluntary groups, passed laws in the 1840s designating churches and fraternal lodges as property-holding trusts. *The Code of Virginia* (Richmond: Ritchie, 1849), Title 22, Chs. 76-77, pp. 357-369.

[155] Connecticut Session Laws of 1867, p. 77; Wyoming Session Laws of 1890-1891, Ch. 76, § 2, p. 328; Maine Session Laws of 1897, Ch. 191, p. 224; Michigan Session Laws of 1897, No. 15, p. 25; Rhode Island Session Laws of 1906, Ch. 1348, pp. 66-67. New York in 1851 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 of 1851, Ch. 455, p. 654).

organizations, never applied to unincorporated voluntary associations. Corporations not only gained new rights in the late nineteenth century, but previous constraints on their rights like low property limits and judicial threats to self-governance were largely removed. 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.

Constraints on the Access 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 behind 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 exception, 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 state treats them differently from nonprofit corporations has been written into campaign laws and tax laws. 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 longstanding prohibition on incorporating political parties and labor unions was, for a few decades, thrown into doubt. Political parties bore far less stigma than they had in the early decades of the century, and states had moved away from criminalizing labor unions for striking to raise wages after the

Massachusetts decision *Commonwealth v. Hunt* in 1842. As the labor movement grew more powerful with the rapid growth of American industry, moreover, leaders of unions gained more political influence. With this increased legitimacy came increased support for both types of groups to incorporate.

For unions, like other voluntary associations, the legal and property rights of corporations became more appealing as labor organizations grew in size and financial resources. As unions began to confront interstate railroads and other major national business corporations after the Civil War, they rapidly expanded beyond specific trades and localities, amassed substantial strike funds, and branched out to run co-operative 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.[156] Longstanding resistance by states finally began to give way in the 1880s once trade unions gained support in Washington. At the instigation of the legislative committee of the Federation of Organized Trades and Labor Unions in 1883, which had just elected Samuel Gompers its president, Congressman Thompson Murch, a pro-union politician from Maine, shepherded an 1886 bill through Congress enabling the incorporation of national trade unions in the District of Columbia.[157] 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."[158] Within a few years, several states enabled the incorporation of unions by enacting similar general laws: Maryland

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[156] John R. Commons, et al., *History of Labor in the United States*, Vols. 1-4 (New York: MacMillan, 1918-1935), Vol. 2, pp. 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 Victoria C. Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States* (Princeton, N.J.: Princeton University Press, 1993), pp. 131-34.

[157] Commons, *History of Labor*, Vol. 2: 329-30.

[158] *"An Act to legalize the incorporation of National Trade Unions."* U.S. Statutes at Large, 49th Congress, 1886, Session 1, Ch. 567, p. 86.

(1884), Michigan (1885), Iowa (1886), Massachusetts (1888), Pennsylvania (1889), and Louisiana (1890).[159] 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 other nonprofit groups (as did New York, the following decade, in its sweeping Membership Corporation Law).[160]

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 shift was the series of anti-union decisions by American courts between 1885 and 1900. Emboldened by the Interstate Commerce Act of 1887 and the Sherman Act of 1890, conservative judges effectively gutted the *Hunt* decision by resuscitating a doctrine of conspiracy 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."[161] Corporate status did not matter in these cases. Using their equity power of injunction, justices ordered the arrest and imprisonment of labor activists, whether their unions were incorporated or not. Moreover, several court decisions of the 1890s showed how corporate status could backfire by making unions more vulnerable to lawsuits

[159] Maryland Session Laws, January 1884 Session, Ch. 267, p. 367 (adding unions to 1868 list of "of educational, moral, scientific, literary, dramatic, musical, social, benevolent [etc.] societies"); Michigan Session Laws, Public Acts, Regular Session, 1885, Act No. 145, pp. 163-165 (supplementing a 1869 law allowing labor unions to incorporate only for "chartable" purposes); *Iowa Session Laws, 21st General Assembly, 1886, Ch. 71, p. 89 (adding unions to 1873 general law of incorporation for non-pecuniary purposes);* Massachusetts Session Laws, 1888, Ch. 134, sects 1-5, pp. 99-100 (a self-contained law with unusual special provisions); Pennsylvania Session Laws, Regular Session, 1889, No. 215, pp. 194-196 (a self-contained law declaring that employees ought to have the same privileges as "associations of capital"); (adding unions, along with Knights and Farmers Alliances, to its 1886 general law for "literary, scientific, religious and charitable" corporations).

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

[161] Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960* (New York: Cambridge University Press, 1985), pp. 46-51; Herbert Hovenkamp, "Labor Conspiracies in American Law, 1880-1930," *Texas Law Review* 66 (April 1988) 949-57. Victoria Hattam stresses the resurgence of conspiracy prosecutions against labor already in the late 1860s, and the use of these indictments in combination with anti-labor injunctions in the 1880s and 1890s. See Hattam, *Labor Visions and State Power*, pp. 112-79.

because corporations had legal standing in courts (whereas unincorporated groups in many states did not).[162]

Unions choosing to remain unincorporated had distinct advantages in states that still stuck to the old common law rule that a group needed corporate status to be a party in court. As long as no legislation had been passed to the contrary, unincorporated unions were better able than incorporated ones to dodge lawsuits against themselves and their members. In Massachusetts, for example, the state Supreme Court in 1906 invalidated a conspiracy suit against unions of bricklayers and masons in 1906 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.[163] The requirement to identify everyone in 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 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 group as a whole. 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

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

[163] *Picket v. Walsh* (MA 1906) 192 Mass. 572. Quotes at 589-590. Also see *Reynolds v. Davis* (MA 1908) 198 Mass. 294. For similar examples elsewhere, see: *Union Pacific Railroad v. Ruef et al*. (U.S. Circuit Court, 1902) 120 F. 120; *St. Paul Typothetae and Another v. St. Paul Bookbinders' Union No. 27 and Others* (MN 1905) 94 Minn. 351; *Indiana Karges Furniture Co v Amalgamated Woodworkers Union* (Ind 1905) 165 Ind. 421.

common law rule that every member must 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 law suits for over a century.[164] 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.[165] Whether or not they incorporated, unions in the late nineteenth century lost more than they gained when they acquired an associational right to legal standing. In this respect, their plight was similar to that of the controversial nonprofit corporations in the first half of the nineteenth century whose rights to self-governance were compromised by conservative courts. Making matters still worse, 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.[166] Not surprisingly, when Louis Brandeis sought to persuade Samuel Gompers that the labor

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[164] Mitchell H. Rubinstein,"Union Immunity from Suit in New York," *New York University Journal of Law & Business* 641 2(Summer 2006): 641-682. The case that initiated this line of interpretation did not involve a union but another type of nonprofit group: *McCabe v. Goodfellow* (NY 1892) 133 N.Y. 89.

[165] E.g., 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*. (OH 1904) 14 Ohio Dec. 628]; "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 Another example is 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*. (U.S. District Court, 1898) [citing U.S. 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(Mass. 1982)).

[166] "An Act concerning carriers engaged in interstate commerce and their employees," U.S. Statutes at Large, 55th Congress, Session 2, pp. 424-428, § 8, p. 427.

movement should seize the opportunity of acquiring corporate rights, Gompers responded without hesitation, "No, thank you!"[167]

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.[168] New York, moreover, revised its general incorporation law in 1875 to include "political, economic, patriot" societies and clubs along with athletic, social, musical and other recreational ones, which was followed with a separate 1886 act 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.[169] The New York Membership Corporations Law of 1895 abandoned the long

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[167] "The Incorporation of Trade Unions," 1 Green Bag 2d 306 (Spring, 1998), quote at 306. Gompers' reply originally appeared in *The Boston Globe*, December 5, 1902.

[168] On the 1850s challenge to the charter, see Jerome Mushkat, *Tammany: The Evolution of a Political Machine, 1789-1865* (Syracuse: Syracuse University Press, 1971), pp. 273, 283. In the 1870s, there were two similarly failed challenges, a legislative petition to revoke the charter and a law suit: [New York State], *Journal of the Senate of the State of New York at their Ninety-Fifth Session* (Albany: Argus Company, 1872), p. 175; and *Thompson v. Society of Tammany*, in Marcus Tullius Hun, ed., *Reports of Cases Heard and Determined by the Supreme Court of the of the State of New York*, Marcus T. Hun, Reporter, Vol. 24 (New York: Banks and Brothers, 1879), Vol. 24, pp. 305-16. The 1867 charter revision can be found in New York, Session Laws, Nineteenth Legislature, 1867, Vol. 2, Ch. 593, p. 1615.

[169] "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; "An Act of the Incorporation of Political Clubs," New York Session Laws, 109th leg., 1886, Ch. 236, pp. 409-11.

string of adjectives that previously defined corporate eligibility but its inclusive language left open the possibility that parties or partisan organizations could still incorporate.[170]

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.[171] It is not possible to know simply from the names of these groups whether they were affiliated with political parties or stood for broader "democratic" and "republican" principles, purely as educational or civic groups. 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."[172]

It had always been unusual for states to incorporate political party organizations, but it was only at the end of the century that their non-corporate status began to be a more general principle of law. Some state courts moved categorically to deny the incorporation of political clubs, while other states tightened their regulatory control over nonprofit corporations with partisan purposes. This growing tendency for states to crack down on privately organized political corporations is best understood as part of a more general Progressive reform effort to clip the power of party machines and strengthen the state regulation of elections. During the last decades of the nineteenth century many states took legal steps to accomplish this goal, the two

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[170] "An Act relating to Membership Corporations," New York Session Laws, 1895, Vol. 1, Chap. 559, pp. 329-67.

[171] This evidence is based on searches in the HeinOnline Sessions Law data base, which yielded acts of incorporation for groups with titles that contained "Democrat," "Democratic," and "Republican." For example, in addition to those cited below, *Acts of the Ninety-fourth Legislature of the State of New Jersey* (Newark, N.J.: E. N. Fuller, 1870), pp. 459-60; Maryland Sessions Laws, 1868, pp. 821-23; Tennessee Sessions Laws, 1867-68, p. 385; Connecticut Session Laws, Special Acts and Resolutions, January, 1897, p. 1243.

[172] "An Act to Incorporate the Republican State League of Kentucky," *Kentucky Sessions 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 Sessions Laws*, 1873-74, p. 6.

most notable being the enactment of legislation mandating secret ballots and direct primary elections.[173] No longer could political parties engage in the unregulated practices established in the Jacksonian period whereby they distributed pre-marked ballots and nominated candidates at closed party conventions. By 1900, at least thirty states had enacted laws specifying procedures for the conduct of conventions and primaries.[174] Compared to these major electoral reforms, the turn away from granting corporate rights to party groups in the 1880s and 90s is virtually unknown to scholars. Given the increased autonomy of nonprofit corporations, however, it too was a step towards bringing the political process under greater control and empowering ordinary voters at the expense of political insiders.

Judges began to push back against the incorporation of political party groups beginning in the 1880s. In Pennsylvania, the fact that the 1874 general act had not explicitly included them in its list of qualified organizations provided the legal rationale. 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.[175] 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."[176]

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[173] For a detailed account of both the ballot and primary reforms, see John W. Epperson, *The Changing Status of Political Parties in the United States* (New York: Garland, 1986), pp. 46-151.
[174] Epperson, *Changing Status of Political Parties*, p. 51.
[175] *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 no. 162*, Pa. Dist. & Cnty. Dec. (1948).
[176] *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.

In New York, the state's Supreme Court interpretation of the state's Primary Election Law of 1899 made it clear 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 to allow the Democratic General Committee of Kings County to expel an elected delegate because he was disloyal to the principles of the party.[177] 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.[178] 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."[179] Justice Cullin, who argued that the Kings County Democratic Committee had the same rights as a corporation, stood alone in dissent.[180] In other states where political party groups retained access to incorporation, moreover, corporate status lost its characteristic ability to confer organizational 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.[181]

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[177] *People v. Democratic General Committee of Kings County*. 164 N.Y. 335 (NY 1900). Also see Epperson, *Changing Legal Status of Political Parties*, pp. 75-77.
[178] *McKane v. Democratic General Committee*, 123 N.Y. 609 (NY 1890).
[179] *People v. Democratic General Committee of Kings County*, 164 N.Y. 335 (NY 1900) at p. 342.
[180] *People v. Democratic General Committee of Kings County*, 164 N.Y. 335 (NY 1900), at pp. 347-48.
[181] "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 in significant numbers until 1901 (the state's general

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 corruption (Tammany Society, again, being a case in point). Theoretically, states or the federal government could have regulated parties as corporations, by specific legislation or provisions in general 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 incorporating nonprofit groups 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.[182] The Act was a reaction against corrupt political activities of business corporations, specifically the insurance industry, not nonprofit groups. Understandably, the political influence of profit-making 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

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law of incorporation of 1879 specifically excluded groups with political purposes, but this language was dropped in the 1889 version. [Missouri] Revised Statutes, 1879, § 978, p. 280; and 1889 Revised Statutes, 1889, 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.

[182] See Adam Winkler, "Law and Political Parties: Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915" *Columbia Law Review* 100 (April 2000): 873- 900 (drawing a comparison between parties and business corporations, but not nonprofit ones).

of anti-corporate feeling that underlay the act was entirely directed towards business. Beginning in the 1870s and increasing through the Progressive period, the tax exemptions enjoyed by nonprofit organizations also came under fire as elitist and unfair.[183] 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. On the one hand, the outcome by the turn of the twentieth century was very different for these two types of groups. Unions remained unrecognized as legal entities, instead choosing to negotiate with businesses without the backing of the state. 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. On the other hand, the common failure of both to gain the extensive associational rights ordinarily held by corporations reveals an underlying similarity between them. Both groups 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 support from political officials, 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 expansion of access to corporate status during the second half of the nineteenth century.

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[183] Stephen Diamond, "Efficiency and Benevolence: Philanthropic Tax Exemptions in 19th-Century America," in *Property-Tax Exemption for Charities*, ed. Evelyn Brody (Washington, D.C.: Urban Institute Press, 2002), pp. 120-34. There was a wave of appellate court cases during this period in which these tax exemptions were challenged, often on the grounds that the organizations were not truly "charitable." For example: *Indianapolis v. Grand Master*, 25 Ind. 518 (1865); *State v. Addison* 12 S.C. 499 (1871); *City of Savannah v. Solomon's Lodge*, 53 Ga. 93 (1874); *Gerke v. Purcell*, Ohio St. 229 (1874); *Donohugh v. The Library Company of Philadelphia*, 86 Pa. 306 (1878); *Petersburg v. Petersburg Ben. Ass'n*, 78 Va. 431 (1884); *Young Men's Protestant Temperance and Benevolent Society v. City of Fall River*, 160 Mass. 409 (1893); *Fitterer v. Crawford*, 157 Mo. 51 (1900); *Iowa v. Amana Society*, 132 Iowa 304 (1906).

Conclusion

From the Revolution to the turn of the twentieth century, public officials generally agreed that corporations should stay out of politics while making essentially political decisions about which voluntary associations could incorporate and what rights corporations received. 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, as 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 even when they espoused acceptable purposes. Meanwhile, the overwhelming majority of nonprofit corporations were uncontroversial, mainstream organizations whose access to corporate rights frequently, if not always, depended on supporting the social and political status quo. Virtually all of these rights-bearing associations were Protestant religious organizations, white middle-class fraternal organizations, elite philanthropic, educational, and cultural institutions, or clubs formed for social and recreational purposes. A great number of

them, if not all, espoused social values that were deeply conservative even by the standards of their day and/or excluded women and minorities from membership.

The distinction between politically acceptable and unacceptable categories of voluntary associations persisted despite the widening of access to corporate status after the middle of the century. Many more associations became corporations, but they were still generally the same types of acceptable groups. Some organizations without corporate status also became able to claim entity and personhood rights such as property ownership and legal standing, but they, too, often needed to conform to conservative definitions of "charity" (like the one used against Henry George and his followers). At the same time as this pattern of exclusion persisted, moreover, the rights of acceptable nonprofit corporations grew even stronger, making corporate status all the more valuable. By the end of the century, the multiple benefits of corporate status 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. A reduced risk of judicial intervention in internal disputes in addition bolstered the standard corporate right of self-governance. As courts and legislatures opened the way to this enlarged field of potential advantages, the state's discriminatory role as gatekeeper 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.[184] States in the mid-twentieth century eliminated almost all of

[184] Valuable surveys of twentieth-century developments include: Norman I. Silber, *A Corporate Form of Freedom: The Emergences of the Modern Nonprofit Sector* (Boulder, Colo.: Westview, 2001); Peter Dobkin Hall, *Inventing*

the restrictive categories and the veto powers built into earlier general incorporation laws. Today, nonprofit corporations can be organized by virtually any one for virtually any purpose. The opening of nearly complete access to incorporation has not, however, equalized access to other important associational rights. Important vestiges of the nineteenth-century distinctions between favored and disfavored groups survive, most notably in the federal tax code.[185] The same types of elite and religiously and culturally conservative nonprofit organizations that have always easily incorporated have disproportionately benefited since the early twentieth century from the right of their donors to make tax-deductible contributions – a right that remains out of reach to organizations whose activities attempt primarily to influence legislation or to elect political candidates (as well as to otherwise eligible "charitable" organizations without the resources to comply with IRS requirements).[186] Most nonprofit groups are at least permitted to claim exemptions on all or part of the organization's own income, but the qualifications for this benefit vary substantially among different types of organizations. A labor organization, for example, forsakes this exemption if it lacks authority to officially represent its members in matters of employment, even if it uses income from its members' dues to support them during a lawful strike.[187] In addition to its selective awarding of tax exemptions, the IRS also offers most

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the Nonprofit Sector and Other Essays on Philanthropy, Voluntarism, and Nonprofit Organizations (Baltimore: Johns Hopkins University Press, 1992); Henry B. Hansmann, "The Evolving Law of Nonprofit Organizations: Do Current Trends Make Good Policy?" *Case Western Law Review* 39 (1989): 807-829.

[185] On this shift, see especially Silber, *A Corporate Form of Freedom*. Already in the colonial period many churches and other privileged categories of voluntary associations (and businesses) benefitted from tax-exempt status, but until the inauguration of the federal income tax these exemptions typically pertained only to taxes on the groups' land.

[186] 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/.

[187] IRS Publications, "IRC 501(c)(5) Organizations," p. J-16, at http://www.irs.gov/pub/irs-tege/eotopicj03.pdf. Section 501(c)(5) requires that a "principal purpose" of an exempt labor organization must be the "betterment of the conditions of those engaged in a common pursuit." *Ibid*., p. J-8. The four key points made in the 1976 IRS ruling that originally established this reason for disqualification are: 1) that the organization, while composed of members of various labor unions," was "not a 'labor organization' in the commonly accepted sense of that term" of having

non-profit groups the right to conceal the identities of their donors in their tax filings, including organizations registering in the "social welfare" category that allows legislative lobbying and limited election spending.[188] Political parties and PACs that are, however, classified as "political" (because their activities are "primarily" electoral) must disclose the names of their contributors of their tax forms.[189] 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.

Access to basic corporate rights clearly mattered more to voluntary associations in the century following the American Revolution. While many other factors can also account for the relative success of different types of organizations, our research suggests that the American government's systematic denial of corporate rights to politically dissident and socially marginal groups played a significant role in keeping them smaller, less well endowed, and more short-lived than the types of conventional groups that routinely received charters. Tocqueville himself may be forgiven for celebrating the liberty of United States citizens to associate. His failure to

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"authority to represent or speak for its members as it is used in section 501(c)(5) of the Code;" 2) that it is "controlled by private individuals and not by any labor organization;" 3) that it "does not directly support the efforts of any labor organization;" and 4) that it "does not make these [strike relief] payments with the objective of bettering conditions of employment, but by reason of its contractual agreements with the workers." http://www.irs.gov/pub/irs-tege/rr76-420.pdf.

[188] IRS Publications, 4221-PC, p. 24, at http://www.irs.gov/pub/irs-pdf/p4221pc.pdf

[189] http://www.irs.gov/Charities-&-Non-Profits/Political-Organizations/Political-Organization-Filing-and-Disclosure. Since the U.S. Supreme Courts *Citizen's United* decision in 2011 opened the doors to corporate campaign spending, the category of "social welfare" has gained extra appeal for groups engaged in campaign spending, both because their own donors may remain anonymous and because SuperPACs, with fewer restraints on the amount of their election spending, can report donations from them 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*, February 13, 2014, p. A15; "A Campaign Inquiry in Utah Is the Watchdogs' Worst Case," *New York Times*, March 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.

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.