Legal Constraints on the Development of American Non-Profit Groups, 1750-1900

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In 1888, the Chancery Court of New Jersey invalidated a bequest intended to fund dissemination of the writings of Henry George, a popular critic of private property and leader of New York's United Labor Party. New Jersey, like most American states, allowed testators to leave property to charitable causes, but as Vice Chancellor John Taylor Bird's opinion emphasized, the question at the heart of this case was "What is a charity?"[1] Justice Bird took an exceptionally liberal position in denying that George's advocacy of legal change was an automatic disqualification.[2] After all, he argued, "if this principle should be followed to all its logical consequences, all donations for the spread of the Bible, and to foreign missions," benefiting organizations which similarly strove to obliterate existing "laws, customs, institutions and religions," would need to be invalidated as well.[3] But Henry George's characterization of private landholding as "robbery" posed too big a threat to the law even for Bird. It would "not be legally charitable," he concluded, "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."[4]

Between the American Revolution and this New Jersey decision, dozens of cases involving charitable bequests to nonprofit groups had been tried at the state level. In virtually all of the cases, the bequests at stake had been made to recipients, like Henry George's followers,

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[1] *Hutchins' Ex'r v. George* (NJ 1888). 44 N.J. Eq. 124, quote at 126.
[2] A Massachusetts precedent, *Jackson* v. *Phillips* (MA 1867) 96 Mass. 539, had already stretched the definition of charity to embrace the cause of abolitionism but had disqualified a bequest to women's rights activists because they criticized existing law.
[3] *Hutchins' v. George,* quote at 137.
[4] *Hutchins' v. George*, quotes at 139.

that were not incorporated.[5] The lack of corporate status mattered. Whenever someone died and left property to a chartered nonprofit organization, the will stood on firmer legal ground because corporations had a standard right to "take" or "receive" property.[6] 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 groups that advocated social and political change in the nineteenth century rarely met the qualifications necessary to incorporate. By the 1880s, unincorporated groups in the vast majority of states, including New Jersey, could accept bequeathed property if their purposes were "charitable." But, as this case illustrates, the definition of charity was problematic and depended ultimately upon judicial interpretation.[7]

In the terms used by Richard Brooks and Timothy Guinnane, 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.[8] At the same time, however, the government significantly restricted the rights of associations to be *legal entities* and *legal persons*. Voluntary associations with political or social reform purposes, like the one led by Henry

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[5]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).

[6] 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 "charitable, 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 NY, 1777-1893," *Law and History Review* 3 (Spring 1985): 51-89.

[7] In England, charitable trust law since the sixteenth century had allowed specific kinds of unincorporated groups to receive legacies, but in the wake of the American Revolution several states, most notably Virginia, rejected this tradition. For a time, even the U.S. Supreme Court denied the validity of bequests to unincorporated groups, but in 1844 the Court reversed itself, determining that English charitable trust law was embedded within American common law. *Vidal v. Girard's Executors* 43 U.S. 127 (1844) (also known as the *Girard's Will Case*). As a consequence of this ruling, courts in the majority of states that lacked statutes to the contrary allowed unincorporated groups deemed appropriately religious, educational, and charitable to accept bequeathed property.

[8]Richard Brooks and Timothy W. Guinnane, "The Right to Associate and the Rights of Associations: Civil-Society Organizations in Prussia, 1794-1908," draft of October, 2013, p. 8.

George, ordinarily exercised the rights to associate and aggregate, but their organizations did not have entity or personhood status. These "extra" associational rights depended primarily on whether a group had access to the state-conferred right to incorporate (which automatically brought with it the rights to possess property, to be a party in suits, and, implicitly, to shield the personal property of members). Because they were typically denied corporate status, political and social reform organizations were at a legal disadvantage relative to organizations more inclined to support the status quo -- especially when the members wished to acquire or protect property to advance their cause.

To be sure, corporate status was never for every organization. Small voluntary associations without valuable property or the goal of lasting for generations had little interest in possessing corporate rights or, indeed, in taking advantage of other, less popular forms of legal organization, such as partnerships, joint tenancies, or joint-stock companies.[9] Without assuming any kind of formal legal identity, virtually any law-abiding group could raise money by subscription, dues, or donation and also acquire a physical location by pooling the resources of members to pay rent or occupy a building that belonged to a benefactor. These kinds of informal arrangements posed risks inasmuch as they depended on mutual trust, but the fact that property did not technically belong to the organization did not, at least in the short run, ordinarily present a practical problem. Partly for these reasons, the vast majority of voluntary associations formed the early republic did not become corporations but remained loose aggregations of individuals

[9] These alternative arrangements required a transfer of ownership whenever a stockholder, partner, or joint-tenant died or left the group. The partnership was the default recognized by the courts when an unincorporated group wished to sue, but partners needed to be named as parties and every member needed to agree with the suit. Kenneth Lipartito stresses the utility of the joint-stock arrangement in his "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. However, his examples may be exceptional. Cases involving the property rights of former members of the Harmony Society, for example, contain no discussion of stockholding. See *Schriber v. Rapp,* 5 Watts 351 (PA, 1836)*; Nachtrieb v. The Harmony Settlement,* 3 Wall. Jr. 66 (U.S. Appeals, 1855).

whose collective agreements were not legally binding.[10] In some cases, the possession of corporate rights may have been preferable, but the very process of applying or registering as a corporation, including the hassle of paperwork and an unwelcome fee, deterred members from making the effort. Our research demonstrates, however, that in other cases, especially involving groups that were politically controversial or composed of people outside the middle-class mainstream, associations lacked corporate rights largely because states systematically erected barriers to their acquisition.

This deliberate denial of corporate rights to certain types of voluntary associations raises fundamental questions about the Tocquevillian view of the early United States as an "open access" civil society.[11] Scholars who address the role of voluntary associations in establishing the conditions for liberal democracy typically underscore the importance of their independence from governmental control and their freedom to pursue virtually any goal not blatantly criminal. Their position "outside the state" has, according to this logic, rendered them capable of constructive opposition to state power in much the same manner as a free press. But in the United States during the entire nineteenth century, legal barriers to corporate status prevented the

[10] For example, only four (less than 5%) of the 219 Massachusetts groups founded between 1807 and 1815 that conform to the historian Conrad Edick Wright's broad definition of "charitable" (including evangelical, fraternal, mutual aid, poor relief, medical, and educational organizations) had received charters by 1816. We produced this percentage by cross-checking the acts of incorporation reported in *The Public and General Laws of the Commonwealth of Massachusetts, from Feb 28, 1807 to Feb 16, 1816* , vol IV, (Boston: Wells and Lilly, 1816) and a corresponding Massachusetts subset of the groups listed in Wright's appendix (culled from his laborious search though organizations' reports and other published materials). Conrad Edick Wright, *The Transformation of Charity in Postrevolutionary New England* (Boston: Northeastern University Press, 1992), pp. 244-260.

[11] The canonical theoretical texts are Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve and Francis Bowen (New York: A.A. Knopf, 1945), Vol. II, especially pp. 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 (1944): 1-25. Recent historical literature on the topic includes: 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).

very types of voluntary associations most likely to be critical of the government from organizing on an equal footing with other types.

Our findings revise the Tocquevillian view in another important way as well. During the first half of the nineteenth century, controversial voluntary groups gained only limited protection from government intervention even when they succeeded in becoming corporations. Corporate charters routinely granted self-governance rights to organizations as long as they abided by the terms of their charters, but courts at times took advantage of a member's complaints about unfair treatment by the group's leadership to intervene aggressively in its internal affairs. Because the government at this time lacked the administrative capacity to monitor suspect associations on a routine basis, these kinds of civil suits launched by aggrieved members gave the judicial system an opening to discipline organizations that the authorities perceived as socially or politically disruptive. Another feature of early corporations compounded this vulnerability: prior to the middle of the century states often wrote restrictive terms into corporate charters. In the case of controversial voluntary groups, this common practice disproportionately elevated the threat of potential judicial interference. The legally binding character of corporate status thus strengthened the hand of the state, making groups that became corporations more susceptible to state intervention than those that remained unincorporated.

In addition to documenting the extent to which states advantaged some types of voluntary associations but discriminated against others in the early nineteenth century, we trace the historical process whereby many types of voluntary associations gained increased access to corporate rights over time. Beginning around the middle of the century, judges ceased intervening in matters of corporate governance unless the disputes between members concerned significant losses of individual property at the same time as legislatures started to pass large

numbers of general incorporation laws that made it easier for voluntary associations to become nonprofit corporations. Some states even extended corporate-like rights to certain kinds of unchartered groups. Many types of voluntary associations benefited from this greater access to rights and freedom from governmental control, but states continued to withhold these associational benefits from disfavored groups, including, as we have seen, the disciples of Henry George.

The narrative we present in the following pages is broken into three overlapping chronological periods, roughly 1750-1820, 1800-1850, and 1830-1900. Each of these periods is in turn subdivided thematically in order to highlight, first, the historical expansion of the associational rights attached to the corporate form and, second, the restriction of these rights to a subset of relatively uncontroversial groups. The paper then concludes with a brief discussion of twentieth- and twenty-first century developments in the history of nonprofit corporations that have radically altered the legal and political landscape that was established in the nineteenth century.

Expansion of Access and Traditional Limits, 1750-1820

During the colonial period of American history, the British imperial regime and, for the most part, the colonial provincial governments considered groups that challenged the state to be illegal, and they often forcibly repressed them. To be sure, elites with connections in Parliament or the colonial assemblies could often 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.[12] 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.[13]

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 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 enterprises were founded or funded by donors who freely contributed their own property; some of them were

[12] On the tradition of extra-legal crowd actions, see Pauline Maier, "Popular Uprisings and Civil Authority," *William and Mary Quarterly* 27 (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.: 1976), pp. 37-69

[13] On these instances of repression, see Rhys Issac, The Transformation of Virginia, 174901790 (Chapel Hill: North Carolina University Press, 1982) pp. 146-177; James P. Whittenburg, "Planters, Merchants, and Lawyers: Social Schange and the Origins of the North Carolina Regulation," William and Mary Quarterly, 34 (1977): 215-238; Brooke Hindle, "The March of the Paxton Boys, " The William and Mary Quarterly, Vol. 3, No. 4 (Oct., 1946): 461-486 ; Edmund S. Morgan and Helen M. Morgan, The Stamp Act Crisis: A Prologue to Revolution (Chapel Hill: North Carolina University Press, 1953).

administered with minimal oversight by the government; but ultimately what justified their privileged legal status was that they were seen as instruments, or extensions, of the state.[14]

Virtually all 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.[15] When it came to incorporation, however, the imperial government had been loath 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-appointed governors. This reluctance created friction already in the seventeenth century when defiant Puritan legislators issued acts of incorporation for Harvard College, and later Yale, that the Crown regarded as illegitimate.[16] 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.[17]

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

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[14] 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 All 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, 448-451.

[15] 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 the Massachusetts General Court in 1671 and the Connecticut assembly in1685. 4 Mass. Col. Rec. pt. ii. 488, as found in *Drury v. Natick* (MA 1865); *Acts and Laws of the State of Connecticut in America* (Hartford: Hudson and Goodwin, 1796), pp. 252-253. 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): 203-221.

[16] Arthur M. Schlesinger, "Biography of a Nation of Joiners" *American Historical Review* 50 (1944): 1-25.

[17] Joseph Stancliffe Davis, *Essays in Earlier History of American Corporations* (New York : Russell & Russell, 1965 (orig. 1917), vol. 1, pp.46- 47, 80-81, 85-6. 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 (2008): 402-425.

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.[18] 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.[19]

Secondly, the Revolution produced fundamental constitutional rights that indirectly fostered associational freedom, even though neither the U.S. Constitution nor the state 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 associational activities that 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.[20] But the expiration of the Alien and Sedition Acts left white Americans remarkably free to associate for almost any purpose as long as their activities did not include the violation of existing criminal laws.

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[18] Schlesinger, "Biography of a Nation of Joiners."
[19] 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)
[20] As noted by Brooks and Guinnane, pp. 10-13. Nineteenth-century laws against trade unions are discussed later in this paper. 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.

Finally, the American Revolution promoted rights of association 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 corporate rights given to voluntary associations depended on the existence of the *de facto* right to associate, because members typically did not take the extra step of incorporating until they had already launched their organizations. The very prevalence of the *de facto* right to associate, combined with the greater number of charters, also accentuated the historical significance of the unequal access to incorporation. Virtually any association could exist, but only some types of groups received state-conferred corporate rights.

The years between 1780 and 1820 witnessed a veritable explosion of voluntary groups, ranging from sectarian churches to fraternal orders, from political parties to utopian communities. The subset of organizations that became incorporated, however, were almost all the very same kinds of religious, educational, and conventionally charitable (either in the sense of aiding or uplifting the poor or, like hospitals, tending to the sick or disabled) organizations that had long been encouraged by the British state.[21] Staying remarkably faithful to the legal traditions already established by royal acts of incorporation and the law of charitable uses, American lawmakers deviated little from established precedents when deciding which sorts of

[21] We thank Jason Kaufman for giving us access to his data base 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 Massachusetts for the years 1807-1816, 1830-1837, 1849-1853; an aggregate list published by Pennsylvania to the year 1837; and an Ohio list covering the years 1803-1857 (for complete citations to these lists, see note 48 below).

groups qualified for extra rights of association beyond the *de facto* ones held by their members. The only way that they significantly departed from the past was in their frequent incorporation of 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.[22] The main difference made by the American Revolution was the vast increase in the number and scale of voluntary organizations that received charters -- 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.[23] This historical pattern contrasts sharply with Prussia and France, for example, where businesses received legal entity and personhood rights before nonprofit groups.[24] 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 much more freely than in Europe. In addition, the traditional belief that all corporations should serve the public interest initially favored the chartering of nonprofit groups. It took well into the nineteenth century for American business corporations to become sufficiently open and democratic to overcome republican objections that they used monopolistic privileges to pursue private gain at the expense of the public good.[25] Moreover, the typically small size of most American businesses enabled them to manage their property as partnerships and single proprietorships. Voluntary associations, by contrast, not only consisted of

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[22] 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

[23] Pauline Maier, "The Revolutionary Origins of the American Corporation," *William and Mary Quarterly* 50 (1993): 53-55; Jason Kaufman, "Corporate Law and the Sovereignty of States," *American Sociological Review* 73 (2008): 415, 417.

[24] Brooks and Quinnane, "The Right to Associate and the Rights of Associations."

[25] Maier, "Revolutionary Origins," passim.

more people but 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 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.[26] Although some states continued to recognize the British charitable law, others rejected it, and, with its decline, incorporation rapidly became the favored way to achieve formal legal status for nonprofit groups.[27]

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.[28] This inclination of states to charter church groups was due partly 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

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[26] 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. 160-168. 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)

[27] 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 (1985): 617-683.

[28] We are not including townships. On Massachusetts, see Jason Kaufman, "Corporate Law and the Sovereignty of States," 415, 417. For other states we have relied on the Kaufman data generously shared with us. (see note 21 above).

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).[29] Pennsylvania was unusual in passing a general incorporation act not just for churches but for charitable and literary societies already in 1791, but, even without general legislation, state legislatures in most states incorporated great numbers of such organizations by special charter.[30]

In general, the South charted fewer organizations than the North, both for nonprofit and for business purposes.[31] 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 the former establishment's institutions.[32] 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.[33] When Southern

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[29] John D. Cushing, "Notes on Disestablishment in Massachusetts, 1780-1833," William and Mary Quarterly 26 (1969): 172-185.

[30] [Pennsylvania], *Laws, Statutes, etc, 1700-1800. Laws of the Commonwealth*, 4 vols (Philadelphia: Bioren, 1810), 3:20.

[31] 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; Howard S. Miller, *The Legal Foundations of American Philanthropy, 1776-1844* (Madison, Wisc.: State Historical Society of Wisconsin, 1961), pp. xii, 50; and [Edward S. Hirschler], "Note: A Survey of Charitable Trusts in Virginia," *Virginia Law Review* 25 (Nov. 1938): 110.

[32] 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 (decided in the Marshall Supreme Court; 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. Bruce Campbell, "Social Federalism," p. 154.

[33] Bell, *Church, State, and Education*, p. 365; Campbell, "Social Federalism," p. 154; and Anon., ""Permissible Purposes for Nonprofit Corporations" (1951) p 894. In 2002 a case brought by Jerry Falwell on First and Fourteenth

states issued charters at all, they tended not to go to groups that ordinary people joined. Even as the Bible Belt stretched over the South during the Second Great Awakening, the Southern disinclination to charter religious groups kept remarkably low the number of chartered auxiliaries of the large national evangelical organizations enlisting ministers and lay activists (exceptions were the Virginia Bible Society and the American Colonization Society chartered in Maryland).[34] The most common voluntary associations to be incorporated south of Baltimore either catered to the elite, like Masonic lodges and private academies, or existed simply to protect property, like fire companies.[35] 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 egalitarian grounds, but, seen from another perspective, the reluctance of the South to grant extra associational rights to churches and charities served elite interests by reducing the potential of organized competition with the power of the planter class.

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; Peter Dobkin Hall, *The Organization of American Culture: Private Institution, Elites and the Origins of American Nationality* (New York: New York University Press, 1982), p. 85.

[34] On Virginia Bible Society, chartered in 1814, see 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.

[35] These generalizations based on Ruth Bloch's survey of corporate acts contained in the collection of American imprints edited by Evans (to the year 1800) and Shaw and Shoemaker (1801-1825), published both individually and within compilations of state laws. The city of Baltimore 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 incorporated numerous Masonic lodges.

Anti-corporate feeling also arose in the North during the post-revolutionary period but had very different results. Wealthy philanthropists who founded colleges, academies, and cultural organizations and often supported societies aiding the poor generally belonged 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.[36] Once their Democratic-Republican opponents came to power, however, many of their political allies were quick to abandon anti-corporate sentiments and seek charters for their own voluntary associations as well as for businesses.

In New York, fraternal groups of recent immigrants and laborers supportive of Jefferson 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.[37] 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.[38] Incorporated under terms that granted more freedom of self-governance than usual for the period, the Tammany Society easily withstood an 1809 challenge to its charter by a former member who accused the organization of betraying its official "charitable purpose" by becoming "perverted to

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[36] Neem, *Creating a Nation of Joiners*; Brooke, *Columbia Rising*.

[37] 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.

[38] Session Laws, New York, 28th leg, 1804, p. 277-279. The 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 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.]

the worst purposes of faction."[39] 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."[40] How truly essential corporate status was to the Tammany Society's rise to power is open to doubt; few organizations as blatantly partisan managed to secure charters.[41] 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. Most of these groups remained conventionally religious, educational, and charitable, but the definition of charity increasingly stretched to include a number of fraternal associations like the Masons and societies of laborers and immigrants whose charitableness largely consisted in offering financial assistance to their own members. Still, it is clear that throughout the first half of the nineteenth century the traditional notion that

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[39] "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, 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.

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

[41] 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 Jerome Mushkat, *Tammany: The Evolution of a Political Machine, 1789-1865* (Syracuse: Syracuse University Press, 1971), 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.

corporations should serve the common good underlay legislative decisions about which groups to charter and encouraged public acceptance of the legitimacy of the chartering process. Partisan suspicions of political corruption only reinforced the basic premise that corporate status 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, but even it needed to profess 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 Marginal Social Groups, 1790-1820

Despite the legislatures' increasing willingness to issue charters in the decades after the American Revolution, voluntary associations formed by laborers, blacks, ethnic minorities, and women that sought to incorporate encountered exceptional obstacles because of fears that they would use their extra rights to subvert the social order. Even after a number of such groups succeeded in procuring charters, legislators wrote in special provisions to make sure they adhered to strictly charitable purposes and, in the case of women, that they posed no significant risk to potential creditors. Their ability to secure charters as charities owed much to the mounting pressures on Northern cities to provide poor relief to a burgeoning population of rural and foreign immigrants. Aid to the poor and disabled, whether through the mutual-aid associations of workers, African Americans, and European ethnic minorities or through the donations and volunteer labor provided by middle-class women, assisted the state in meeting obligations that otherwise fell to depleted municipal treasuries.

Applications for charters by labor groups foundered from the outset because lawmakers consistently worried about the collective power of artisans to control wages. In the late eighteen century, two organizations, 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."[42] A newspaper article written in 1792 by "A Friend to Equal Rights" bemoaned the fact that banks received "every attention" whereas the mechanics' "wish to be incorporated [has] been treated with contempt and neglect."[43] 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. [44] 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.[45]

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[42] *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).

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

[44] 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, in HeinOnline, NY session law, 15th leg session, 1792, Ch. 26, pp. 300-302]; Buckingham, *Annals*, pp. 57, 95-96.[original charter: HeinOnline, MA Session Laws, February, March session, 1806, p. 91]. For citations to other New York labor charters granted between 1790 and 1820, see below.

[45] 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

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.[46] A little later this reporting requirement was dropped, but six of the thirteen New York charters issued between 1807 and 1818 contained extra provisions that specifically forbade the enactment of bylaws or rules "respecting the rate of wages, or relative to [their] business."[47] 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.[48]

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

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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].

[46] Society of Mechanics and Tradesmen of New York City (1792); Albany Mechanics Society (1801); Society of Mechanics and Tradesmen of Kings County (1805).

[47] New-York Masons' Society (1807); New-York Society of Journeymen Shipwrights (1807); Mutual Benefit Society of Cordwainers of New York (1808); General Society of Mechanics in Poughkeepsie (1808); Butchers' Benevolent Society of New –York (1815); New York Typographical Society (1818).

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

on charges of "criminal conspiracy" to fix wages.[49] 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 they had the same collective rights to 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."[50]

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."[51] The 1808 act that incorporated the New York Society for Promoting

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

[50] *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.

[51] 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

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.[52] 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 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."[53]

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."[54] 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.[55] Charters of women's

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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.

[52] "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," 31st Legislature, 1808, Chap. 19, pp. 256-58.

[53] *The Council of Revision of the State of New York*, ed. Alfred B. Street (Albany: William Gould, 1859), p. 273.

[54] As quoted in Wright, *The Transformation of Charity*, p. 114.

[55] Massachusetts Session Laws, January Session, 1803, Ch. 64, pp.122-124 (relevant sections on p. 123).

groups in Massachusetts regularly contained this language into the 1830s.[56] 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.[57] In New York, by contrast, the 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.[58]

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.[59] Just as officials ultimately came to recognize the practical value of working-class and immigrant mutual-aid societies to compensate for inadequate public poor relief, so too they soon readily granted corporate powers to pious and charitable women.

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[56] As stressed by Lori D. Ginzburg, *Women and the Work of Benevolence* (New Haven: Yale University Press) 1990), p. 51-53; [56] 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).

[57]McCarthy, *ibid*, p. 41.

[58] 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 (38th sess., 1814, Ch. 69, pp. 74-76); the Female Assistance Society (40th sess., 1816, Ch. 207, p. 245); and the Association for the Benefit of Colored Orphans in the city of New York (61st sess., 1838, Ch. 232, p. 213).

[59] 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).

Early State Interference in Corporate Governance, 1800-1850

As these examples of labor, ethnic, and women's groups illustrate, incorporation could bring multiple advantages to voluntary associations but in the first half of the nineteenth century it also came with a potential disadvantage: the threat of government intervention in their internal affairs. Even for favored groups, charters in this early period often limited corporations' autonomy by specifying expiration dates and setting ceilings on the amount of property and income they could receive.[60] Large-scale charitable and educational corporations dedicated to the service of people who were not themselves members were typically subject to additional constraints: Massachusetts General Hospital, for example, was required to offer free admission to the indigent, and many private colleges including Harvard and Yale needed to reserve seats on their boards for public officials until the 1860s and 1870s.[61] More surprisingly, states also interfered in the operations of membership corporations that were formed, funded, and operated entirely by private citizens, including churches and fraternal associations. Courts adjudicating civil suits brought by disaffected members of such groups proved remarkably willing to exert heavy-handed control over matters of internal governance, particularly in cases where disputes over rules raised judicial concerns about broader social and political conflicts. It was the corporate status of these groups that made them vulnerable to this kind of state intervention. Groups without legally-binding charters were free to govern themselves unless the lawfulness of

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[60] Pauline Maier, "Revolutionary Origins," *William and Mary Quarterly* 50 (1993): 76-77. A few of many examples of 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).

[61] "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.

their very existence was in doubt. For many decades after the Revolution, nonprofit corporations in effect traded the benefits of corporate privileges for the downsides of potential government control.

The guarantees of freedom of worship in American state and federal constitutions typically spared religious corporations from intrusive government oversight, but older notions of corporate accountability to state governments at times even threatened the autonomy of churches. New York's 1784 general act of incorporation for churches contained many prescriptions for internal governance, including procedures for deciding which members could vote, how trustees would be elected, and the manner of determining the salaries of clergymen. It took concerted pressure from wealthy and powerful denominations for thirty years to force the legislature to allow churches to incorporate under more liberal rules.[62] In New England, where the colonial ecclesiastical establishments hung on for decades, the idea that the state bore responsibility for 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.[63] In Connecticut,

[62] The initial act is contained in New York State, *Sessions Laws*, 7th Session (1784), Chap. 18, pp. 613-618 [from HeinOnline (Collection: U.S. State/Territory Session Laws)]. For the revisions, see New York State, *Sessions Laws*, 16th Session (1793), Ch. 40, p. 433; New York State, *Sessions Laws*, 36th Session (1813) Ch 60, Vol 2, pp.212- 219 [1813 from Shaw and Shoemaker 29341].

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

court decisions of 1793 and 1816 similarly sought to protect the Congregational Standing Order by restricting the corporate rights of parish majorities.[64]

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 v. Nelson* of 1846, in which the Vermont's Supreme Court refused to enforce the dismissal of a minister by the Presbyterian synod. [65] 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 the court's distaste for the Presbyterian organizational hierarchy and reflexive support for local church autonomy clearly reflected a lingering Congregationalist bias.

Even in Pennsylvania, where religious freedom had prevailed since its colonial founding, the corporate status of churches provided an opening for state intervention. Whereas the New York and New England examples reflected denominational struggles over church polity, two Pennsylvania church governance cases decided in 1815 and 1817 stand out as particularly egregious examples of judicial meddling in political controversies involving race and ethnicity. The growth of Philadelphia's population of free blacks and the arrival of Irish and German immigrants exacerbated deep-seated social tensions in this period that played out in religious life.

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[64] *Howard v. Waldo* (CT 1793); *Chapman v. Gillet* (CT 1816);
[65] *Smith v. Nelson* (VT 1846).

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 forcing to sit in the back. White leaders in the original church corporation, however, continued to control the church property and the selection and pay of its visiting preachers. [66] Under the leadership of its 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."[67] 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 church officers to oust him. Only if the majority of the 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.[68]

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[66] 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).

[67] *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.

[68] *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) 3:21.

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. [69] 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 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. [70]

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

[69] *Commonwealth v. Woelper* (PA 1817).
[70] *Commonwealth v. Murray* (PA 1824) 11 Serg. & Rawle 73; 1824 Pa. LEXIS 18. This opinion cites *Woelper* and another Pennsylvania case of 1820, *Commonwealth v. Cain*, in which the court intervened within a church corporation to settle a dispute over pews.

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

Oaths of secrecy kept such suits to a minimum, but at least two cases about the governance 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.[71] 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

[71] *Commonwealth v. St. Patrick's Society* (PA 1810).

strong judiciary.[72] Technically, the justices' decision to adjudicate this dispute stemmed from the society's limited rights as a corporation. Even though a majority of members had passed a bylaw forbidding rude behavior towards other members, the court held that this rule exceeded the powers explicitly granted by charter and used its authority to reinstate Binns' membership.

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.[73] 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.[74] 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."[75]

In the South Carolina case, the Chancery Court enforced a charter belonging to the Grand Lodge of South-Carolina Ancient York Masons. [76] South Carolina at the time contained two competing Grand Lodges, the consequence of a mid-eighteenth-century split within international

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[72] 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 Biograph*y, 133 (2009): 255-275. Butterfield notes that Duane and his allies successfully expelled Binns from the unincorporated Tammany Society; however, Butterfield's larger interpretation (somewhat at odds with our own stress on growing associational rights) sees the court's action as part of a larger process whereby American citizens used the common law to gain individual rights within associations. [On p. 265 Butterfield stresses the summary contained in the 1838 case involving the medical college of Phila (I have notes should look it up again);

[73] *The Commonwealth vs. The Philanthropic Society* (PA 1813). The last case to directly follow the precedent of *Binns* seems to have been *Evans v. Philadelphia Club* (PA 1865). Many case reports erroneously described the decision as having hinged on financial issues.

[74] New York Session Laws, 34th session, 1811, Ch. 113, p. 195.

[75] *Fuller v. Trustees School Plainfield*, (CT 1827); quote at p. 546.

[76] *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*, 3 vols (Columbia, S.C.: Cline & Hones, 1817), Vol. 3, pp. 557-584.

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 legislators voted against dissolving the old corporations and incorporating the new Grand Lodge, but the continued existence of the umbrella group did not depend on having a charter and each of the two groups claimed to be the legitimate successor of one or both of the original corporations.

The conflict finally 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 Chancery Court saw a suit launched by the Ancient Yorks as an occasion to test 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.[77] The opinion concluded that the referendum supporting the Grand Masters had been based on deception. The original corporation of the Ancient York Masons had never been legally dissolved, and the new Grand Lodge had no right to collect the debt because it was "not a corporate body known to the law."[78]

[77] *Ibid*., pp. 566-571.
[78] Ibid, pp. 576-582 (quote on p. 581). The Grand Lodge of South Carolina was incorporated in 1815.

Clearly, the incorporation of voluntary associations during the early decades of the republic could be both a blessing and a curse. Incorporation conferred valuable legal privileges, but it also meant succumbing to state control over the definition and enforcement of charter rights. Courts in these early cases openly took issue with the decisions of internally chosen leaders on matters ranging from personal behavior to electoral procedures to institutional tradition. Scarcely any voluntary associations that were not incorporated invited this kind of judicial scrutiny, unless, like labor groups, they could be accused of breaking criminal laws. Similarly, when minority stockholders in business corporations sought redress for damaging decisions made by managers, courts entertained their complaints only if they could prove egregious financial fraud.[79]

The exceptional willingness of early nineteenth-century courts to intervene on behalf of aggrieved members of nonprofit corporations reflected older notions of corporations as extensions of the state. These notions were shed more quickly for businesses than for nonprofit groups in large part because incorporation of nonprofits was still, at least in theory, limited to religious, charitable, and educational organizations deemed vital to the general public good. At the same time, the fact that membership in voluntary associations often depended on vaguely defined traits like sociability or doctrine gave courts more room to meddle with corporate governance when disputes had high social and political stakes. Although the benefits of corporate status outweighed the drawbacks for most groups, the dual risks of rejected applications and hostile legal actions may partly explain why so many voluntary associations formed in the decades after the Revolution did not incorporate.

[79] Ruth Bloch and Naomi Lamoreaux, "Corporations I," unpublished chapter of book in progress.

Further Access to Incorporation Combined with Persistent Constraints, 1830-1900

In the second phase of this history, lawmakers reacted to growing demand for charters and resurgent concerns about corruption in the Jacksonian era (albeit directed mostly against banks) by passing general laws making the process of incorporating less cumbersome and less subject to political manipulation. For nonprofit groups, just like the manufacturing firms studied by Eric Hilt, this mid-century development began in the 1830s and accelerated enormously in the 1840s and 1850s, reaching a majority of states in all parts of the union by 1900.[80] In the case of nonprofits, however, the rise of general incorporation laws built on a greater number of earlier precedents, starting with the late eighteenth-century general laws for churches and Pennsylvania's act covering religious, educational and charitable societies. Already by the 1820s Massachusetts lawmakers had grown weary of constructing detailed charters for charitable corporations and devised a barebones template that conferred, succinctly, "all the privileges usually given."[81] This coincided with the loss of monopolist privileges of traditional Federalist institutions like Harvard College as rival groups became increasingly incorporated.[82] According to the only slightly exaggerated statement of 1832 by the Boston authors of the first American treatise on corporate law, "It has been generally the policy and custom (especially in the United States) to incorporate all associations whose object tends to the public advantage in relation to municipal government, commerce, literature, and religion."[83]

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[80] Eric Hilt, "General Incorporation and the Shift toward Open Access in the Nineteenth-Century United States," preliminary draft.

[81] "An Act to Incorporate the Master, Wardens and Members of the Grand Lodge of Massachusetts," Massachusetts Laws, 1817 Session, p. 408; An Act to incorporate the British Charitable Society," Massachusetts Laws, January Session 1818, pp. 547, as compared 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.

[82] On the debates over the Republic-sponsored charters for Berkshire Medical College and Amherst College, see Neem, *Creating*, @ Kindle loc. 932 ff.

[83] Joseph Kinnicut Angell and Samuel Ames, *A Treatise on the Law of Private Corporations Aggregate* (Boston: Samuel Ames, 1832), p. 7.

At first, general acts of incorporation, like the early ones passed for churches, tended to apply only to highly specific social-service groups like fire companies and social libraries.[84] Gradually these specialized acts gave way to more expansive legislation enabling the easy incorporation of "educational," "benevolent," or "charitable" groups. The major innovation of the 1840s and 50s was the pulling together of such categories into comprehensive single acts covering several types of groups. As Eric Hilt has found in general acts covering manufacturing companies, there were important regional differences between the North and the South, and the contrast is even more striking for nonprofit groups.[85] The states that took the lead were overwhelmingly located in the Northeast and Midwest. As had already been true in the earlier era of special charters, slave-owning states incorporated relatively few voluntary associations and balked at the prospect of abdicating the control of the legislatures over the chartering process.[86]

In New York, where most organizations other than churches had previously required special charters, a mandate contained in the state constitution of 1846 led to the enactment of the most sweeping general act to date, allowing for the incorporation of "benevolent, charitable, scientific and missionary societies."[87] Although this 1848 law still contained significant restrictions on the amount of property that the corporations could own, the New York legislature

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[84] E.g., MA: social libraries (1805) and lyceums (1823); NY: public libraries (1796) and Bible societies (1811); NJ: societies for the promotion of learning (1794) and library companies (1799);

[85] Hilt points to the later passage of general incorporation acts for manufacturing companies in the South compared to the North, as well as other regional differences in the terms of incorporation. In sharp contrast to the near-absence of Southern acts for nonprofit groups prior to 1860, however, many Southern states had by then passed general acts for manufacturing companies. Eric Hilt, "General Incorporation Acts for Manufacturing Firms, 1811-1860," preliminary draft, 2013.

[86] North Carolina was the only state to join the eleven-state Confederacy that had passed such an act before 1860 (the non-Confederate border states of Maryland and Kentucky also did). Of the remaining ten states to pass acts in this period, nine were in the Northeast or Midwest and one in the West (California, one of only two Western states at that time). References to the individual acts, listed in chronological order, are included in the following footnotes.

[87] New York 1848 Session Laws, 71st Legislature, Chap. 319, pp. 447- 449. In New York prior to 1848 only churches, academies, colleges, and local bible societies were covered by general acts. 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 (1985): 51-89. Indiana and Maine also passed general acts in the 1840s: "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.

kept issuing special charters that circumvented this limit and steadily loosened the property requirements during the second half of the nineteenth century.[88] The states of California, Ohio, Maryland, North Carolina, New Jersey, Kentucky, Massachusetts, Iowa, Kansas, Illinois, and Wisconsin passed similarly wide-ranging laws between 1850 and 1860.[89]

A handful of these states for the first time used the generic term "voluntary associations" in the titles of their acts.[90] Pennsylvania moved still farther in this direction in 1874, dividing its law of corporations into those "for profit" and those "not for profit."[91] 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.[92] Only a glimmer of the earlier notion that corporations should contribute to the public good still survived: judges merely needed to verify that the purpose of a proposed corporation was legal and "not injurious to the community." This trend towards greater generality and greater permissiveness continued in most states well into the

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[88] Stanley N. Katz, Sullivan, 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 (especially pp. 71, 81-82).

[89] "Act Concerning Corporations" California, lst 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, January Session, 1852, chap. 231(no page number); "An Act to Incorporate Literary Institutions and Benevolent and Charitable Societies," North Carolina, 1852, Chapter 58, pp. 128-129; "An Act to incorporate benevolent and charitable associations," New Jersey, 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, Charitable and Religious Purposes," Massachusetts, Acts and Resolves, January Session, 1856, Chap. 215, pp. 126-27; "An act for the Incorporation of Benevolent, charitable, scientific or missionary societies," Iowa, 7th General Assembly, 1858, Chapter 131, pp. 253-255; "An Act to authorize the formation of Voluntary Associations," Kansas, 1858; 4th Session, Chap. 1, pp. 27-28; An Act to Provide for the Incorporation of Benevolent, Charitable, Scientific, and Literary Societies," Wisconsin, 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, 77th Legislature, Chapter 84, pp. 355-358.

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

[91] 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.

[92] "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.

twentieth century, facilitating the registration of more and more kinds of American voluntary associations as nonprofit corporations.[93]

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 encounter judicial resistance when they attempted to acquire corporate-like rights to property as "charitable" groups. The same sorts of constraints were built into the otherwise permissive mid-century legislation that, at least on the surface, granted access to corporate status to a very wide spectrum of groups. General incorporation laws expanded in a piecemeal fashion, and states persisted in making incorporation difficult for a number of groups outside the mainstream.

Despite the rapidity with which post-revolutionary states passed general incorporation that in theory covered all churches, for example, bias against Catholics repeatedly surfaced. States prevented clerics for over a century 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.[94] As a consequence, Catholic parishes in the United States were often forced to rely on groups of incorporated trustees who lacked official religious authority.[95] In one Pennsylvania case of 1822, this situation even gave rebellious lay members of St. Mary's Church an opening to

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[93] 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): 889-898; James J. Fishman, "The Development of Nonprofit Corporation Law and an Agenda for Reform," *Emory Law Journal* 34 (1885): 617-683.

[94] F.W. Maitland, "The Corporation Sole," *The Law Quarterly Review* 16 (1900): 335-54.

[95] Bruce A. Campbell, "The Constitutional Position of Nonprofit Corporations in Nineteenth-Century America," *Law and History Review* 8(1990), pp. 155-56.

try, albeit unsuccessfully, to revise the corporate charter to exclude priests altogether.[96] 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.[97] The state's longstanding general law for religious organizations did not until 1879 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.[98]

A tendency to narrowly interpret even the most liberal general incorporation acts was evident in Pennsylvania already in the 1830s. That state's sweeping law of 1791 ostensibly covered groups formed for "any literary, charitable, or for any religious purpose," but its categorization of eligible groups became more specific in successive decades. Rejecting the bid of a medical school to incorporate under the 1791 act, the Pennsylvania court in 1838 took the position that the term "literary" did not extend to institutions of higher learning and that degree-conferring colleges and universities needed to receive special charters from the legislature.[99] The justices also supported their ruling by pointing to the act passed in 1833 for the incorporation of fraternal societies and fire companies as evidence that the 1791 legislature meant the word "charitable" to encompass only "institutions established for the purpose of affording relief to the

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[96] *Case of the Corporation of St. Mary's Church (Roman Catholic) in the City of Philadelphia* (PA 1822) 7 Serg. & Rawle 517.

[97] Campbell, "Constitutional Position," p. 153. The 1847 application was squashed in 1849 by a standing legislative committee on education. Orestes Brownson, a recent Catholic convert, launched a scathing attack on the negative report by the legislature's standing committee on education in *Brownson's Quarterly Review*, New Series, vol. 3, no. 3 (1849) pp. 372-397.

[98] *The Public Statutes of the Commonwealth of Massachusetts* (Boston: Rand, Aberg, and Company, 1882) Part I, Title IX, Ch. 38, § 48, p. 287. 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. See *Katzer v. City of Milwaukee* (Wis 1899) 104 Wis. 16.

[99] *Case of Medical College of Philadelphia,* 3 Whart. 454. (1838)

indigent and unfortunate."[100] Perhaps in reaction to this limited construction of the 1791 act, the more comprehensive Pennsylvania incorporation law of 1874 carefully itemized the many different types of nonprofit organizations that qualified and added the general proviso that any deemed "injurious to the community" did not. 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 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

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[100] *Case of Medical College of Philadelphia*, 3 Whart. 454. (1838), at 18.
[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. 201-202.
[103] *The African Repository and Colonial Journal, vol. 13* (Washington, DC: James C. Dunn, for the American Colonization Society, 1837) Vol. 13 (June 1837), pp. 41-48.

cases questioning the validity of wills in which masters bequeathed their slaves to the Society rather than passing them on to 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 narrower. 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]

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 impossible to determine with any precision. Radical activists may typically have had no reason to seek the extra associational rights that

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[104] "An Act to Incorporation the American Colonization Society, passed March 14, 1837." 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 is reversed in 1858); *American Colonization Society v. Gartrell* (GA 1857) 23 Ga. 448 (also rules against).

[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: *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).

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]

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 their petition to incorporate the printing establishment that published their highly successful newspaper (subscriptions had rapidly grown to nearly 5000) 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.

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[107] Benjamin Quarles, "Sources of Abolitionist Income," *The Mississippi Valley Historical Review*, Vol. 32, No. 1 (Jun., 1945), pp. 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 over $150,000 over a six year period, but 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.

[109] David Marks, *Memoirs of the Life of David Marks, Minister of the Gospel*, ed. Marilla Marks (Dover, N.H.: William Burr, 1846), pp. 352-353; *New Hampshire Sessions Laws*, June Session 1846, Chap. 407, p. 409.

Political parties, like unions and radical reform organizations, almost never appeared on official lists of corporations. 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 their charters, for which they had originally qualified, like the Tammany Society, as "charitable" or "benevolent" groups, because they were viewed as unduly powerful politically.[110] As this example suggests, however, what was viewed as 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 both the bid for incorporation of one social club

[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 (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). See Neem, *Creating*, @ loc 1385-1399.

[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* (1955), especially pp. 388-89..

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 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 meetings 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

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[112] As discussed in "Judicial Approval," pp. 388-99. For another such case of 1893 involving Russians, see Wood, "What are Improper Corporate Purposes for Nonprofit Corporations," 44 Dick. L. Rev. 264 (October 1939 - May 1940): 266.

[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. 329-367.

[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

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, 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

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over Political Organizations: First Amendment Checks on Powers of Regulation" *Yale Law Journal* 66 (1956-1957), p. 551, footnote 41.

[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 come 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 that listed 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).

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. The importance of ethnic divisions over the consumption of alcohol is driven home in an 1880 Michigan case in which a man who had borrowed money from a German society successfully argued that its action to recover the debt was invalid. The group, he contended, had no right to corporate status because its members opposed the state's temperance law.[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 cases like this 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. 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

[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.

way."[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 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 rights and even altogether exclude controversial voluntary associations as politically motivated. Less obvious, perhaps, are

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[122] *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).
[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. #.

the political assumptions behind the thousands of legislative decisions to charter groups that could unequivocally be 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 ran may have been evident to the losing parties in isolated court cases, but the dominant consensus was that "charity" was politically neutral (as were religion and education) and that corporations should be so as well.

Growing Corporate Autonomy and Additional Corporate Rights, 1830-1900

The typically uncontroversial and mainstream groups that 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 loosened the strings previously attached to the corporate form and 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 corporate autonomy 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] While general incorporation acts for manufacturing firms often contained provisions about the treatment of shareholders, the texts of incorporation laws for nonprofit groups that dealt with corporate self-governance were generally permissive and cursory.[128]

In contrast to the early nineteenth-century era of special charters, when acts of incorporation often contained precise guidelines related to internal governance, the later general acts almost always left these matters alone. Gone were the earlier provisions about such matters as the titles and responsibilities of officers, the mode and time of elections, the maximum number of members, and the amounts of dues and punitive fines. Already in the 1820s New Jersey's and New York's general laws specifically exempted religious and library corporations from following standard rules about the election of boards and officers applied to business corporations.[129] Ohio in 1852 similarly exempted religious, fire, literary, and benevolent

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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 Dissassociation of Incorporation and Regulation in the Progressive Era and the New Deal," unpublished paper (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] Eric Hilt, "General Incorporation Acts for Manufacturing Firms, 1811-1860," preliminary draft, 2013, pp. 2, 7-9. Hilt identifies a trend toward great permissiveness 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] "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).

corporations from requirements to issue public reports.[130] By the 1870s Massachusetts had lifted the requirement that corporations be governed by an annually-elected board of directors for several churches and a large class of nonprofit corporations ranging from sports clubs to temperance associations: these groups, in contrast to business corporations, could now shift what had been "the power of directors" to "a board of trustees, managers, executive committee, prudential committee, wardens and vestry, or other officers."[131] Ceilings on income and property remained the only common constraints on incorporated voluntary associations, and by the end of the nineteenth century some states had eliminated even these.[132]

The greater autonomy that legislatures granted to incorporated nonprofit groups was steadily reinforced by nineteenth-century judicial decisions. Already in the *Dartmouth* decision, the Supreme Court had, in the words of New York Chancellor James Kent, thrown "an impregnable barrier" around the rights of "literary, charitable, religious, and commercial institutions" by guaranteeing the "solidity and inviolability" of their original corporate charters.[133] In later cases concerning the self-governance 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

[130] Ohio Session Laws, 50th Assembly, General Acts, 1852, §72, p. 294.
[131] [Massachusetts] Public Statutes of the Commonwealth … Enacted November 19, 1881 (Boston: Rand, Aberg, and Company, 1882), Ch. 115, § 6, p. 655.
[132] 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. 329-367. Between the 1850s and the 1880s, Massachusetts raised its property limit for virtually all incorporated nonprofit groups from $100,000 to $500,0000. [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.
[133] James Kent, *Commentaries on American Law* (New York: O. Halsted, 1826), Vol. 4, p. 392.

rules.[134] 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.[135] Otherwise, American courts recognized camaraderie as a justifiable condition of continued participation and supported decisions to terminate membership for misbehavior even when valuable benefits were lost. In a notable case of 1896, the Illinois Supreme 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."[136] 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.[137]

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[134] *Black and White Smiths' Society v. Vandyke* (PA 1837) 2 Whart. 309; 1837 Pa. LEXIS 177.

[135] For a few selected examples from across the country, see: *Anacosta Tribe v. Murbach* (MD 1859) (refusing the right of a member to sue his incorporated tribe since it had conformed to its own rules); *Gregg v. Massachusetts Medical Society* (MA 1872) (upholding the expulsion of homeopathic doctors because the internal tribunal of the medical society was itself recognized to be a "court"). *State ex. re. Shaeffer v. Aurora Relief Society* (OH 1877) (upholding an expulsion based on implicitly understood rules); *Bauer v. Samson* (Ind 1885) (defending the contractual right of a member to sue a fraternal organization on a matter of money as opposed to discipline); *Commonwealth ex rel. Burt. v. Union League of Philadelphia* (PA 1890) (upholding an expulsion, with *Binns* cited only by the losing counsel); *Beesley v. Chicago Journeymen* (Ill 1892) (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) (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) (a Reconstruction case overturning the Georgia Medical Society's expulsion of a doctor whose activities on behalf of blacks had been deemed "ungentlemanly.")

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

[137] *United States ex rel. De Yturbide v. Metropolitan Club of Washington* (DC 1897). 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.

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. 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.[138] 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."[139] 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).

As a corollary to this growing right of self-governance, incorporated voluntary associations gained other distinctive rights in the nineteenth century that further enhanced their autonomy. Several of these rights, moreover, extended beyond the ones that states granted to business corporations. Nonprofit corporations, for example, enjoyed important advantages when it came to membership liability for corporate debts. By 1830, the default common-law rule that members of corporations had limited liability was well-established in American courts, but statutes could override this common-law rule.[140] Special charters and general incorporation laws

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[138] Instead, "the property remedy" for a cheated member became an ordinary common lawsuit. *Lamphere v. Grand Lodge* (MI 1882), at 431. Many later cases cited this decision to affirm this point.
[139] *People ex. rel. Rice v. Board of Trade* (IL 1875) 80 Ill. 134, quote at 136.
[140] 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*, Vol. 5, No. 1 (May, 1945), pp. 1-23 (on liability, especially pp. 8-17).

often imposed significantly higher levels of shareholder liability on businesses (if not totally unlimited liability as in partnerships).[141] In the case of nonprofit corporations, however, charters generally overlooked the issue of liability entirely, leaving the common-law rule intact, and the pertinent sections of general incorporation laws usually pertained only to stock companies. The early corporation laws of Missouri and Kansas made it clear that "none of the provisions of this article, imposing liabilities on the stockholders and directors of corporations, shall extend to literary or benevolent institutions."[142] Only a small minority of states directly imposed liability on members or directors of nonprofit corporations, and these became less frequent over time. In the 1850s and 1860s, New Hampshire, Ohio, and Florida eliminated such earlier rules.[143] The only notable exception was New York, which until the early twentieth century held to its 1848 provision assigning liability to directors of nonprofit groups.[144] This responsibility did not, however, apply to ordinary members, and it was limited to debts payable within one year of the contract. By contrast, a New York statute passed the same year for manufacturing corporations made shareholders liable for double their investment, a provision later copied by many other states in their general laws for business corporations.[145]

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[141] 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*, Vol. 11, Issue 4 (Summer 1986): 573-631, (on liability, especially pp. 587-604).

[142] 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.

[143] [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); Ohio Session Laws, 50th Assembly, General Acts, 1852, §79, p. 295; Florida, Session Laws, 1868, Ch. 1641, pp. 131-132 (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);

[144] New York, Session Laws, 1848, §7, pp. 448-449; reiterated 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 (1985): 649.

[145] Horwitz, *Transformation of American Law: 1870-1960*, p. 94.

In 1876, this protection from liability was further enhanced 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."[146] 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 and Dean Jaros, "seven state high courts had accepted it by 1900, 25 had by 1920, and 40 had by 1938."[147] Only in 1942 did the tide of legal opinion begin to shift the other way.[148]

Another example of the wide latitude given to nonprofit corporations was their legal right to hold stock of other corporations. This form of investment was denied to business corporations (with the partial exception of 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. As the 1855 edition of Joseph Angell and Samuel Ames' classic treatise on corporations explained, "There are large classes of

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[146] *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).
[147] Bradley C. Canon and Dean Jaros, "The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity**,"** *Law and Society* (Summer 1979): 969-986. Quote at 971.
[148] *Ibid*.; also see Anonymous, "Note: The Quality of Mercy: 'Charitable Torts' and Their Continuing Immunity," *Harvard Law Review*, 100 (Apr., 1987): 1382-1399.

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, they went on, primarily consisted of "religious and charitable corporations, and corporations for literary and scientific purposes."[149] None of the earlier editions of Angell and Ames' work contained an equivalent passage, in all likelihood because few nonprofits in the first half of the century possessed large enough endowments to buy stock.

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. In this respect, fraternal orders operated much like centralized religious institutions, such as the Presbyterian Church or the American Bible Society, with their national, regional, and local layers. Although by the 1870s, the higher bodies of religious denominations no longer needed to be incorporated in order to secure their leadership over lower ones, corporate status still mattered in establishing the hierarchical structure of fraternal orders. [150] Grand Lodges of Masons incorporated quickly at the state level after the Revolution: by 1826 over half of the twenty-four states in the Union, ranging from Maine to Louisiana, had issued special charters to Grand Lodges.[151] The early acts of incorporation passed by South Carolina, Georgia, Louisiana, and Alabama explicitly authorized the Grand

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[149] 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.

[150] 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.

[151] Searches in the HeinOnline Session Laws data base through 1825 produced charters in thirteen of the twenty-four existing states: South Carolina (1791, 1814, 1818); Georgia (1796;1822); North Carolina (1797); Louisiana (1816); Massachusetts (1817); New York (1818); New Hampshire (1819; 1821); Mississippi (1819); Maine (1820;1822); Connecticut (1821); Maryland (1821); Alabama (1821); and Vermont (1823).

Lodges to assume jurisdiction over their affiliated local lodges.[152] Most of the states that incorporated Grand Lodges also incorporated local lodges, either in the same charter or in separate ones.[153] Even the states that did not mandate the subordination of local lodges tacitly deferred to the order's governance structure by allowing these various bodies to establish their own rules. Maine's charters of the early 1820s went so far as to require that the bylaws instituted by the Mason's Grand Lodge and several local lodges not be repugnant "to the ancient Masonic usages." [154] The charter granted by New York in 1818 was exceptional in stipulating that the Grand Lodge's corporate powers "shall in no wise affect any other or subordinate chapter in this state."[155]

The eruption of the Anti-Masonic movement in the Northeast only temporarily diminished state support of the order's top-down, multi-corporate structure. Elsewhere in the country, moreover, fraternal orders generally held on to their corporate privileges under similar terms of governance. General acts of incorporation passed between 1846 and 1858 by many Midwestern and Southern states -- including Illinois, Indiana, Kansas, Missouri, Kentucky, and Georgia – contained specific text enabling the easy incorporation of lodges of Masons, Odd

[152]South Carolina Session Laws, 1814, pp. 34-36; Georgia Session Laws, Jan. Session, 1796, p.16 (no pagination in original); Session Laws, Louisiana, 2nd leg, 2nd session, 1816, pp. 98 and100 [confirmed in Louisiana Session Laws, 4th leg., 1st sess., 1819, pp. 16 and 18]; and Alabama Session Laws, 3rd session, 1821, pp. 22-23.

[153] Charters of Grand Lodges in South Carolina, Georgia, and Alabama automatically incorporated local lodges (South Carolina, unique in incorporating both the Ancient York Masons and the Free Accepted Masons in 1791, automatically incorporated the local lodges of the Ancient Yorks only). In 1819, Louisiana issued a blanket act incorporating all subordinate lodges three years after incorporating its Grand Lodge. By 1826 North Carolina, New Hampshire, and Maine had chartered at least twenty local lodges by special acts in addition to chartering Grand Lodges. Searches yielded fewer local charters issued by Massachusetts (1), Connecticut (3), South Carolina (4), and Alabama (2). (Rhode Island, which had not chartered a Grand Lodge prior to 1826, had chartered at least eight local lodges.)

[154] Maine Session Laws, Public Acts, 1820, pp. 4, 21, 30, 37; Maine Session Laws, Private and Special Acts, 1822, pp. 121-123, 125, 145, 180.

[155] "An Act to incorporate the Grand Chapter of the state of New-York," HeinOnline, Session Laws, 41st Session, 1818, Ch. 73, pp. 57-58 (quote p. 58).

Fellows, and Sons of Temperance.[156] After the Civil War, states that had been hostile to the Masons in the 1830s also passed general acts written in broad language that enabled fraternal orders to incorporate without special scrutiny, as well as to govern themselves according to their own rules. In a Massachusetts case of 1880 involving two rival lodges of the Royal Arch Masons, the state Supreme Court firmly upheld the power of Grand Lodge corporations over their lesser chartered affiliates.[157] By contrast, Grand Lodges that lacked corporate status could not count on legal recognition of their power over 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.[158]

The extraordinary latitude given by the government to nonprofit corporations, combined with the greater ease by which voluntary associations could become incorporated, attracted a steadily increasing number of voluntary associations to the corporate form. Only slowly, and unevenly, did organizations without charters gain similar organizational rights to those enjoyed by corporations. For example, legislation in several states after 1850 made voluntary associations eligible to stand as parties in suits whether they were incorporated or not.[159] Unincorporated

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

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

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

[159] 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).

religious, educational, and charitable groups in most places also acquired more extensive rights to receive and hold property in perpetuity.[160]

But nonprofit groups that were not corporations continued to suffer important comparative disadvantages under American law. At the same time as the increasing independence of corporations made corporate status more valuable, states continued to discriminate against certain types of voluntary associations by depriving them of the extra associational rights. This was especially true, as we have seen, if their purposes fell outside the boundaries of what was considered religious or charitable and into the realm of what was considered socially divisive or political. Often these judgments by judges and legislators were themselves political, but for the most part the politics behind the dispensation of associational rights remained hidden from public view. In the case of two exceptionally visible and contentious groups of the late nineteenth century, labor unions and political parties, the politics behind these choices became glaringly evident around the turn of the century. For a brief period of time, both these sets of organization straddled the boundary that ordinarily divided voluntary associations that incorporated and those that did not.

Uncertainties about the Incorporation of Labor Unions and Political Parties, 1860-1900

With rare exception, political parties and labor unions did not become corporations in the nineteenth century and they still do not today. Indeed, the ways in which they are different 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

[160] For example, the right to receive bequests (as discussed at the beginning of this paper), which often lay the basis for permanent endowments. On this development, see Miller, *Legal Foundations*. 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.

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 no longer bore the same stigma as in the early republic, and many states were beginning to incorporate several other types of "civic" organizations dedicated to the erection of public monuments and improvement of public buildings, parks, and other government facilities. Meanwhile, since the Massachusetts decision *Commonwealth v. Hunt* in 1842, labor unions were no longer as widely criminalized for striking to raise wages, and as the labor movement grew more powerful with the rapid growth of American industry, 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 they 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.[161] 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

[161] 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.

Columbia.[162] 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."[163] Within a few years, several states enabled the incorporation of unions by enacting similar general laws: Maryland (1884), Michigan (1885), Iowa (1886), Massachusetts (1888), Pennsylvania (1889), and Louisiana (1890). [164] 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).[165]

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

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[162] Commons, *History of Labor*, 2: 329-330.

[163] *"An Act to legalize the incorporation of National Trade Unions."* U.S. Statutes at Large, 49th Congress, 1886, Session 1, Ch. 567, p. 86. Can cite as: 24 Stat. 567. [found in HeinOnline].

[164] [all in HeinOnline]: 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).

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

leading to "restraint of trade."[166] 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 because corporations had legal standing in courts (whereas unincorporated groups in many states did not).[167] Rather than resist this judicial backlash, Congress in 1898 mandated that unions incorporated under the federal law of 1886 expel workers who used "violence, threats, or intimidation" to prevent others from working during strikes, boycotts, or lockouts.[168]

Unions that choose 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

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[166] Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-196* New York: Cambridge University Press, 1985), pp. 46-51; Herbert Hovenkamp, "Labor Conspiracies in American Law, 1880-1930," *Texas Law Review* 66 (April 1988), pp. 949-957.

[167] 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.

[168] "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..

representatives of the entire group.[169] 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 rights to sue and be sued as collective entities, cases involving the illegal actions of only a subset of individual members also 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 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 lawsuits for over a century.[170] 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.[171] Even though the choice not to incorporate had varying consequences

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

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

[171] 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: *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).

depending on time and place, unions clearly made this decision as a strategic response to their unique legal difficulties.

Although the outcome for political parties was very different, they, too, enjoyed newfound opportunities to incorporate in the late nineteenth century. New York, which had long been the home of the Tammany Society corporation, unsurprisingly went the farthest in this direction. 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.[172] 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.[173] The New York Membership Corporations Law of 1895 abandoned the long string of adjectives that previously defined corporate eligibility but its inclusive language left open the possibility that parties or partisan organizations could still incorporate.[174]

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

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[172] 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 lawsuit: [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. 305-316. The 1867 charter revision can be found in New York, Session Laws, Nineteenth Legislature, 1867, Vol. 2, Ch. 593, p. 1615.

[173] "An Act for the Incorporation of Societies or Clubs for certain Lawful Purposes," Session Laws, New York, 97th and 98th legislatures, 1875, Ch. 267, p. 264-66; "An Act of the Incorporation of Political Clubs," Session Laws, New York, 109th leg., 1886, Ch. 236, pp. 409-411.

[174] "An Act relating to Membership Corporations," New York Session Laws, 1895, Vol. 1, Chap. 559, pp. 329-367.

"Republican" clubs received special acts of incorporation in several states during the late nineteenth century, including New Jersey, Maryland, South Carolina, Tennessee and Kentucky.[175] 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."[176]

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 several legal steps to accomplish this goal, the two most notable being the enactment of legislation mandating secret ballots and direct primary elections.[177] 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

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[175] 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, NJ: E. N. Fuller, 1870), 459-60; *New Jersey Sessions Laws*, 1879, [pp. ##]; *Maryland Sessions Laws*, 1868, p. 821-23; *Tennessee Sessions Laws, 1867-68*, p. 385.

[176] "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.

[177] 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 and London: Garland, 1986), pp. 46-151.

specifying procedures for the conducting of conventions and primaries.[178] Compared to these major electoral reforms, the turn against the incorporation of 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.[179] 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."[180]

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.[181] The opinion differentiated the case from another one

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[178] Epperson, *Changing Status of Political Parties*, p. 51.
[179] *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).
[180] *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.
[181] *People v. Democratic General Committee of Kings County*. 164 N.Y. 335 (NY 1900). Also see Epperson, *Changing Legal Status of Political Parties*, p. 75-77.

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.[182] 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."[183] Justice Cullin, who argued that the Kings County Democratic Committee had the same rights as a corporation, stood alone in dissent.[184] 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 incorporation 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.[185]

By the turn of the century, political parties no longer could operate with minimal interference on the part of the state. They had moved from being unregulated voluntary associations to being, much like corporations in the era of special charters, regulated extensions of the state. Of course, political parties had never been privately organized like most other voluntary groups. Politicians always stood at the helm, and, when in power, they typically

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[182] *McKane v. Democratic General Committee*, 123 N.Y. 609 (NY 1890).
[183] *People v. Democratic General Committee of Kings County*, 164 N.Y. 335 (NY 1900) at p. 342.
[184] *People v. Democratic General Committee of Kings County*, 164 N.Y. 335 (NY 1900), at pp. 347-48.
[185] "An Act to regulate civic leagues and like associations," Missouri Session Laws, 44th General Assembly, 1907, pp. 261-262. Special thanks to Michael Everman of the Missouri State Archives, who provided the names of organizations which 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 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.

passed legislation in accord with their party's policies. Because they were so deeply intertwined with the state, their freedom to operate without meaningful constraints posed exceptionally high risks of corruption (the Tammany Society, again, being a case in point). Theoretically, the federal government, or more states, could have gone the route of Missouri and regulated party corporations by specific legislation, or by enacting provisions in general incorporation laws, but in Pennsylvania and New York, where the general laws for incorporating nonprofit groups were ambiguous about whether political groups qualified, 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.[186] The Act was a reaction against corrupt political activities of business corporations, specifically the insurance industry, not nonprofit groups. Understandably, the undue influence of profit-making corporations on politicians was feared more than that of nonprofit ones, both because of their greater wealth and because a far greater number of laws affected them. But it would be a mistake to think that the resurgence 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.[187] The Tillman Act expressed the same

[186] 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* (2000) (who makes a comparison between parties and business corporations, but not nonprofit ones)

[187] 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. 120-134. A wave of appellate court cases emerged 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).

normative logic as the denial of corporate status to political parties: corporations and politics should not mix.

A central argument of this paper has been that the legal treatment of nonprofit groups since the Revolution reflected this basic conviction that all corporations should stay out of politics. Even in the early nineteenth century, when politicians often rewarded their political allies with charters for businesses, colleges, academies, mutual benefit societies, and other "educational or charitable" groups, organizations agitating for social and political change almost never received them. The largest categories of groups chronically deprived of corporate rights consisted of political parties, labor unions, and social reform societies. In addition, other types of organizations, including ones with conventionally "educational or charitable" purposes formed by (or on behalf of) religious and ethnic minorities, also disproportionately faced obstacles to becoming incorporated. Meanwhile, the overwhelming majority of nonprofit corporations were uncontroversial, mainstream organizations whose strength frequently, if not always, depended on supporting the social and political status quo. Virtually all of them were Protestant churches and other religious societies, 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 opening of access to corporate rights in the middle of the nineteenth century benefited an ever-increasing number of nonprofit voluntary associations but did not significantly alter the acceptable categories. Some groups without corporate status became more able to claim equivalent rights such as property ownership, but they, too, often needed to conform to

conventional definitions of "charity," as the Henry George case illustrates. At the same time as this pattern of exclusion persisted, moreover, the rights of nonprofit corporations grew even stronger. 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. The enhanced rights of self-governance won by corporations as the century progressed reduced the hazards of potential judicial intervention and bolstered the power of organizational leaders at the expense of rank-and-file members who could no longer take their grievances into court. As judges and legislatures opened the way to this expanded field of potential benefits, the state's role as gate keeper arguably mattered as much as it did in the era of special charters. The opening and shutting of the gate to corporate rights at the end of the nineteenth century continued to reinforce pre-existing inequalities in the distribution of political power and wealth in ways that surely worked counter to the democratic promise of American civil society.

Coda: From Open Access to Political 403(c)(4)'s.

Today we live in a very different world. Nonprofit corporations can now be organized for virtually any purpose by virtually anyone. Moreover, those that claim on tax forms to be "social welfare" organizations are also able to operate as offshoots, even drivers, of political parties while concealing the identities of their donors.[188] The historical reasons for this fundamental transformation of the associational landscape since 1900 are too numerous and complex to delve into here, but they certainly include the following:

[188] "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.

- the growth of the non-profit sector in the twentieth century, assisted by the expanded availability and increasing importance of tax exemptions since the institution of the federal income tax in 1916;[189]
- the elimination of most, if not all, of the vestiges of discrimination against the incorporation of ethnic, religious, and advocacy groups in the context of the civil rights movement of the mid-twentieth century (though political parties and labor unions continued to be unincorporated). States for the most part removed provisions from their general incorporation laws allowing judicial discretion and itemizing specific categories of organizations able to incorporate;[190]
- the extension of associational rights under the Constitution, most notably in the 1956 civil rights case, Alabama *ex rel.* Patterson v. NAACP, when the U.S. Supreme Court for the first time recognized a constitutional right to associate and also established the right to conceal the identities of members.[191]
- the politicization of American evangelical churches and the politically galvanizing effects of conservative social issues, especially after 1970s;[192]

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[189] Valuable surveys of this development 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 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 (Hansmann sees this development significantly occurring only after 1950 and concentrates on the emergence of commercial nonprofits).

[190] Silber, *Corporate Form of Freedom*, pp. 83-166; Hansmann, "Evolving Law of Nonprofit Organizations": esp. p. 810 (on 1954 Model Nonprofit Corporation Act) . State officials have, however, occasionally continued to deny corporate status because an organization's purpose is illegal in ways that compromise basic civil rights. For an example of a Native American group being denied a charter in Arizona because of its use of hallucinogenic drugs, see *Native American Church of Navaoland, Inc. et al. V. Arizona Corporation Commission* 405 U.S. 901 (1972).

[191] Alabama *ex rel.* Patterson v. NAACP, 15th Jud. Cir., Ala., June 1, 1956.

[192] On the post-war rise of the Religious Right, see Whitney Strub, *Obscenity Rules : Roth v. United States and the Long Struggle over Sexual Expression* (Lawrence, Kansas: University Press of Kansas, 2013); (2002); Randall Balmer, *The Making of Evangelism: From Revivalism to Politics and Beyond* (Waco, TX: Baylor University Press, 2010), pp. 59-76; Bruce J. Schulman, *The Seventies: The Great Shift in American Culture, Society, and Politics* (New York: Free Press, 2001), pp. 193-217.by Bruce J. Schulman

- also since the 1970s, the concentration of wealth in the highest echelons of the population to a degree not seen since the early twentieth century, enabling a tiny number of citizens to spend vast amounts of money in service of their economic interests as well as their social, cultural, and political views;[193]
- and, most recently, the *Citizens United* and *SpeechNow.org* decisions invalidating the longstanding prohibition on corporations contributing to political campaigns. In the last several years, these decisions have sanctioned unlimited spending on elections, dubious claims of tax exempt status, and concealment of donors' identities. [194] The only barriers to nonprofit corporate political spending are those encoded in the tax code, leaving the IRS with the sole responsibility of distinguishing political nonprofits from other kinds of groups, for which it is ill-equipped and which may even, if the logic of *Citizens United* is extended still more, be unconstitutional.

These recent developments have focused public attention on the ways that American law empowers nonprofit corporations.[195] From the vantage of history, however, the problem is not altogether new. Many of the same types of religiously and culturally conservative nonprofit organizations that have always enjoyed access to corporate rights still disproportionately reap the

[193] The economic data on the distribution of American income and wealth is summarized, from a comparative perspective, in Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge, MA: Harvard University Press, 2014), pp. 22-25, 246-265, 291-303, 314-333, 347-350, 427-429.
[194]For examples of media coverage, see Jeffrey Toobin, "Money Unlimited," *The New Yorker*, May 21, 2012, pp. 36-47; Eduardo Porter, "Unleashing Corporate Contributions," *New York Times*, Aug. 29, 2012; Steven Greenhouse, "Here's a Memo from the Boss: Vote this Way," *New York Times*, Oct. 26, 2012; Nicholas Confessore and Derek Willis, "A Last-Minute Rush of Campaign Spending with Murky Origins," *New York Times*, Nov. 3, 2012.
[195]For examples of media coverage of the impact of *Citizens United*, see Jeffrey Toobin, "Money Unlimited," *The New Yorker*, May 21, 2012, pp. 36-47; Eduardo Porter, "Unleashing Corporate Contributions," *New York Times*, Aug. 29, 2012; Steven Greenhouse, "Here's a Memo from the Boss: Vote this Way," *New York Times*, Oct. 26, 2012; Nicholas Confessore and Derek Willis, "A Last-Minute Rush of Campaign Spending with Murky Origins," *New York Times*, Nov. 3, 2012.

benefits of them today. Their predominance continues despite the removal of the barriers that used to impede the incorporation of controversial and socially marginal groups.

Meanwhile, much like Judge Bird in 1888, the IRS struggles to make distinctions between "charitable," "social welfare," and "political" groups. From the Revolution to the present day, the laws defining the qualifications and rights of nonprofit corporations have never been politically neutral, and the political leanings of judges and legislators have from the outset profoundly shaped the contours of American associational life. Ironically, the recent opening of nearly complete access to corporate rights -- even to the extent of allowing nonprofit corporations composed of secret donors to spend unlimited amounts of money on electoral politics -- has only further skewed what has always been a lopsided competition for influence within the civil society of the United States.[196]

[196]This point may reinforce the argument in the paper by Margaret Levi and Barry Weinglass (?).